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# NOTE

## IN SEARCH OF A SMOKING GUN: A COMPARISON OF PUBLIC ENTITY TOBACCO AND GUN LITIGATION

### INTRODUCTION

The late 1960s and early 1970s saw the birth of mass tort litigation in the form of class action lawsuits. These lawsuits allowed courts to consolidate multiple claims into one courtroom for faster and more manageable adjudication. The early cases involved single-accident torts, such as lawsuits brought to recover for deaths and injuries resulting from building fires or collapses.<sup>1</sup> The 1980s and early 1990s saw the emergence of dispersed mass torts, such as lawsuits brought to recover for injuries resulting from exposure to Agent Orange or silicone breast implants.<sup>2</sup> In the late 1990s, a new form of dispersed mass tort arrived: lawsuits brought by cities, counties, states, or the federal government (i.e., public entities) to recover the costs of government expenditures allegedly resulting, directly or indirectly, from the conduct of the tobacco and handgun industries.

Beginning in 1994, forty-eight states filed suit against the tobacco industry. Soon after that litigation was concluded by a national settlement, public entities across the country began filing lawsuits against the gun industry.<sup>3</sup> These public entity lawsuits are comparable in many respects. First, the plaintiffs have mostly been unsuccessful in holding the industries liable

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<sup>1</sup> See *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977); *In re Fed. Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982); see also Alfred W. Cortesi, Jr. & James C. Wilson, *Sentence First, Verdict Afterwards: The Crisis of Mass Torts*, BRIEFLY . . . Feb. 1997, at 21. For an excellent history of mass tort litigation, see generally Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993).

<sup>2</sup> See generally *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983); *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, No. 92-P-10000-S, 1993 U.S. Dist. LEXIS 21236 (N.D. Ala. June 1, 1993).

<sup>3</sup> See *infra* note 136.

for the damages they allegedly caused. Second, the ends sought by the public entities in their litigation against the industries are the same as are many of the claims. Finally, the level of public animosity towards both industries is very high.

The tobacco and gun litigations are similar because the plaintiffs have similar goals. The Attorneys General who sued the tobacco industry acted out of frustration with the lack of political initiative to address the public health crisis allegedly caused by the tobacco industry.<sup>4</sup> The states' goals were to recoup huge Medicaid expenses paid by the states' taxpayers and to force the tobacco industry to reform its marketing and distribution methods.<sup>5</sup> The Attorneys General crafted their claims against the tobacco industry by suing for damages allegedly suffered by the states themselves, thus circumventing the need to prove individual causation.

Similarly, public entities are suing the gun industry because of the failure of individual and class action lawsuits and legislation to accomplish comprehensive gun reform. The public entities' goals are to expose the gun industry's allegedly reckless marketing and distribution practices, to recover at least a portion of the public costs caused by gun violence, and to force the industry to change many of its products' design features.<sup>6</sup> Following the states' example in the tobacco litigation, the public entities that have filed suit against the gun manufacturers are also attempting to sue for damages suffered by the cities directly. In sum, the public entity tobacco litigation has served as a blueprint for the highly coordinated gun litigation.<sup>7</sup>

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<sup>4</sup> See *infra* Part I.B. The Attorneys General were spurred into action in many states by "entrepreneurial trial lawyers who had become frustrated at their lack of success in persuading juries to award damages to people who had developed smoking-related illnesses." Richard Tomkins, *Opening the Floodgates*, FINANCIAL TIMES, Nov. 17, 1998, at 17.

<sup>5</sup> See Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 63 (1997).

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part II.C.1.

Despite the questionable merits of the public entity tobacco lawsuits,<sup>8</sup> the tobacco companies agreed to settle without trying a single case to verdict. The most likely result in the public entity gun litigation is also a settlement, thus achieving the type of industry-wide reform through litigation that has not been achieved through legislation.

This Note concludes that the public entity tobacco and handgun lawsuits, while not technically class action lawsuits, have the same characteristics as those class action lawsuits that have raised questions about the validity of national mass tort class action litigation.<sup>9</sup> Namely, the public entity lawsuits have the potential for huge variations in liability and damages which can force entire industries to settle. The settlement pressure is so great that the lawsuits basically amount to legalized blackmail.<sup>10</sup> Further, this Note argues that the public entity lawsuits constitute an abuse of the judicial process in an attempt to usurp what should be a legislative decision-making process. The public entities' choice of litigation rather than legislation is an inefficient and inappropriate means of regulating gun and tobacco production and distribution, and it implicates concerns about the democratic process.<sup>11</sup> Finally, the public entity litigation defeats two of the central purposes of

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<sup>8</sup> See *infra* Part I.D.

<sup>9</sup> Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States at 36 (Feb. 15, 1999) [hereinafter Report of the Advisory Committee]; see also Symposium, *The Federalist Society: Conference: Civil Justice and the Litigation Process: Do the Merits and the Search for Truth Matter Any more?* 41 N.Y.L. SCH. L. REV. 337, 338 (1997) [hereinafter Symposium]; FED. R. CIV. P. 23(a) (1996 amendment to advisory committee's notes).

<sup>10</sup> Symposium, *supra* note 9, at 350 n.30. The term "legalized blackmail" was used by Sheila Birnbaum to describe class action lawsuits that force settlement and was originally used by Milton Handler in describing antitrust class action lawsuits that force settlement. Symposium, *supra* note 9, at 350 n.30; see also Report of the Advisory Committee, *supra* note 9, at 20 (asserting that aggregation of a massive number of claims through class certification can create an "all or nothing risk" that forces companies to either settle or risk bankruptcy"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (same); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (same).

<sup>11</sup> See Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. ILL. U. L.J. 601 (Spring, 1998). "We are dealing here with moral, political, and legal questions that transcend any single industry. What's at stake is nothing less than our principle of individual responsibility, our choice between legislation and adjudication, and our constitutional right to due process—in short, the rule of law." *Id.* at 602.

tort law—to spread risk through insurance coverage and to compensate specific victims for damages suffered as a result of another's conduct.

Part I summarizes the public entity tobacco litigation and settlement, including the states' specific claims, analyzes the indications for the success or failure of the state lawsuits had they been tried, and discusses the policy implications of the settlement. Part II summarizes the public entity gun litigation, including the specific claims in the city and county lawsuits, analyzes the merits of these claims, and discusses the policy implications of the litigation.

## I. STATE TOBACCO LITIGATION

### A. *Background*

The forty-eight states that filed suit against the tobacco industry were operating on the premise that they would attempt to induce industry-wide reform of the tobacco industry because state and federal governments had failed to do so.<sup>12</sup> In order to induce such reforms, the Attorneys General of the forty-eight states alleged that new information about the tobacco industry supported several novel products liability and other tort claims against the tobacco companies. Ultimately, none of the state tobacco lawsuits were tried to verdict. Instead, they resulted in several agreements that provided for payments to the states and accomplished some of the Attorneys General's regulatory objectives.<sup>13</sup>

The settlement process began in March, 1996, when one of the defendant tobacco companies, the Brooke Group, Ltd., and its tobacco division, Liggett, broke rank from the other tobacco companies and settled with five states and sixty-seven law

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<sup>12</sup> The state lawsuits followed decades of unsuccessful litigation by individual and class action plaintiffs. During the first wave of litigation, 1954 to 1973, the theories of liability were primarily theories of deceit, breach of express and implied warranty, and negligence, and were filed by individual plaintiffs. During the second wave of litigation, 1983 to 1992, individual plaintiffs added theories of failure to warn and strict liability. During the first wave, the tobacco industry's best defense was lack of scientific information and during the second wave it was assumption of risk and contributory negligence. See Kelder & Daynard, *supra* note 5, at 71.

<sup>13</sup> See CARRICK MOLLENKAMP ET AL., *THE PEOPLE V. BIG TOBACCO* 253 (1998).

firms that were suing the industry.<sup>14</sup> It was the first such agreement in forty years of tobacco litigation.<sup>15</sup> The Liggett settlement spurred on negotiations between the remaining defendant tobacco companies and the Attorneys General of the states that had filed suit. One year later, Liggett settled with twenty more states and agreed to release allegedly damaging tobacco industry documents.<sup>16</sup> A few weeks after that settlement was announced, the first meeting between a plaintiff's attorney and tobacco company attorneys took place.<sup>17</sup>

On April 3, 1997, Philip Morris's chief executive, Geoff Bible; R.J. Reynold's chief executive, Steven Goldstone; and their respective attorneys met with several state Attorneys General to discuss an agreement.<sup>18</sup> Two months later in Washington, D.C., the tobacco companies and Attorneys General announced a multi-billion dollar "National Settlement."<sup>19</sup> The National Settlement had to be codified by congressional legislation to bind all of the states to settlement provisions regarding federal jurisdiction over nicotine contained in tobacco products.<sup>20</sup> The Senate debated the language and substance of the Universal Tobacco Settlement Act, and modified the bill repeatedly.<sup>21</sup> In light of the modifications, the tobacco companies withdrew their support for the process of codifying the National Settlement as tobacco legislation.<sup>22</sup>

On November 23, 1998, forty-six states, five commonwealths and territories, and the District of Columbia entered into a twenty-five year, \$206 billion Master Settlement Agreement ("MSA")<sup>23</sup> with Philip Morris, Inc., Brown & Williamson

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<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 254.

<sup>18</sup> See MOLLENKAMP ET AL., *supra* note 13, at 254.

<sup>19</sup> See *id.*

<sup>20</sup> See Graham Kelder et al., *The Proposed Tobacco Settlement*, TOBACCO CONTROL UPDATE, 1997b (1.3-4), at 5.

<sup>21</sup> S. 1415, 105th Cong. (1998). The Act was sponsored by Commerce Chairman John McCain (R-AZ). *Id.*

<sup>22</sup> See Graham Kelder, *Tobacco Pact Moves Forward: President Clinton Enunciates Principles for Comprehensive Legislation on Tobacco as Divergent Coalitions Form and Legislation is Introduced in Congress Codifying the National Settlement*, TOBACCO CONTROL UPDATE, 1997a (2.1), at 4.

<sup>23</sup> For the full text of the MSA, see Tobacco Control Resource Center, Inc. & The Tobacco Products Liability Project, at <http://www.tobacco.neu.edu/Extra/multi->

Tobacco Corp., Lorillard Tobacco Corp., and R.J. Reynolds Tobacco Co.<sup>24</sup> The tobacco companies were required to pay a \$10 billion lump sum cash payment up front, and then to make base annual payments for twenty-five years, subject to inflation protection and volume adjustments (the "Industry Payments").<sup>25</sup> From the Industry Payments, an aggressive federal enforcement program would be created, including a state-administered retail licensing system to stop minors from obtaining tobacco products. Enforcement of federal restrictions on smoking in public places would be funded from the Industry Payments, as would a \$500 million annual, national education-oriented counter-advertising and tobacco control campaign seeking to discourage children from starting to smoke and to encourage current smokers to quit smoking. The agreement also authorized the annual payment to all states of significant, ongoing financial compensation from Industry Payments to fund health benefits program expenditures and to establish and fund a tobacco products liability judgments and settlement fund.<sup>26</sup> In addition, the tobacco companies agreed to go beyond current regulations to ban all outdoor advertising and to eliminate cartoon characters and human figures such as Joe Camel and the Marlboro Man from advertisements.<sup>27</sup>

Prior to the MSA, four states had settled individually with the tobacco companies. In 1997, Mississippi settled for \$3.3 billion over twenty-five years, as did Florida for \$11 billion over twenty-five years. In 1998, Texas settled for \$14.5 billion

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state\_settlement.htm (last modified Nov. 22, 2000).

<sup>24</sup> See MOLLENKAMP ET AL., *supra* note 13, at 291.

<sup>25</sup> See *id.* at 291-92.

<sup>26</sup> See *id.* at 268-69. A legal fight is emerging in several of the states slated to receive part of the settlement. Lawyers in Georgia, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia are preparing to file coordinated class action lawsuits maintaining that under federal Medicaid law, any settlement to the states above the amount they paid through Medicaid for treatment of smoking-related diseases should go to the Medicaid recipients. None of the states that were party to the settlement plan any form of payment directly to afflicted smokers. Many of the states have begun using the money less for smoking-related programs than for initiatives like tax cuts and construction of roads and bridges. In response to these lawsuits, the states are claiming sovereign immunity and maintaining that the settlement was not intended to reimburse them from Medicaid expenses, but instead to resolve claims of antitrust, consumer fraud, and RICO violations. Stephen Labatan, *Medicaid Smokers Seek to Gain a Share of States' Settlement*, N.Y. TIMES, Oct. 26, 2000, at A11.

<sup>27</sup> See MOLLENKAMP ET AL., *supra* note 13, at 268.

over twenty-five years, as did Minnesota for \$6.5 billion over twenty-five years.<sup>28</sup>

The MSA did not end the tobacco industry's litigation troubles. In 1999, the Justice Department filed suit against the tobacco industry.<sup>29</sup> In addition, numerous individual and class action lawsuits have been filed against the tobacco industry before and after the MSA.<sup>30</sup>

### B. *State Claims, Generally*

On May 23, 1994, Mississippi Attorney General Mike Moore filed a lawsuit seeking to recover \$940 million from the

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<sup>28</sup> See Laura Hermer, *Executive Summary*, in THE TOBACCO CONTROL RESOURCE CENTER, INC., THE MULTISTATE MASTER SETTLEMENT AGREEMENT AND THE FUTURE OF STATE AND LOCAL TOBACCO CONTROL: AN ANALYSIS OF SELECTED TOPICS AND PROVISIONS OF THE MULTISTATE MASTER SETTLEMENT AGREEMENT OF NOVEMBER 23, 1998 at 5, available at Tobacco Control Resource Center, Inc. & The Tobacco Products Liability Project, <http://www.tobacco.neu.edu/msa/index.html> (last visited Feb. 28, 2001).

<sup>29</sup> On September 22, 1999, the federal government filed suit against the tobacco industry in federal court. The lawsuit alleges that cigarette companies have conspired since the 1950's to defraud and mislead the American public and to conceal information about the effects of smoking in violation of RICO. According to Assistant Attorney General David Ogden, "[t]he federal government now spends an estimated \$22 billion each year on smoking-related illnesses. More than half of it is paid by Medicare. For too long, these costs have been unfairly borne by U.S. taxpayers. Tobacco companies must be held accountable for the death, disease, and economic burdens caused by their products." Michael J. Sniffen, *Justice Department Sues Tobacco Companies*, ASSOCIATED PRESS, Sept. 22, 1999, available at <http://www.star-telegram.com/news/doc/1047/i:FRONT37/1:FRONT37092299.html> (last visited Feb. 19, 2001).

On June 24, 2000, by a vote of 215 to 183, the House of Representatives approved an amendment that allows the Justice Department to receive \$12 million from the Departments of Defense, Veteran Affairs, and Health and Human Services to support the lawsuit. Attorney General Janet Reno publicly stated that without the money from other agencies, the Justice Department may not have been able to advance the lawsuit. See Steven A. Holmes, *A Vote to Aid Justice Dept. in Tobacco Suit*, N.Y. TIMES, June 24, 2000, at A12.

<sup>30</sup> The most notable lawsuit against the tobacco industry, *Engle v. Philip Morris*, resulted in a huge win for a class action in Miami-Dade County, Florida. In July, 1999, the jury found that the tobacco industry manufactured a deadly product and that it had deceived the public for years. The jury awarded the plaintiffs \$12.7 million in compensatory damages. Following the punitive damages phase of the trial, the same jury awarded \$144.8 billion to the 500,000 Florida smokers in the class. See *Engle v. RJ Reynolds Tobacco*, No. 94-08273 CA-22 at 27-28 (Fla. Cir. Ct. 11th Cir. Nov. 6, 2000), available at Tobacco Control Resource Center, Inc. & The Tobacco Products Liability Project, <http://www.tobacco.neu.edu/Extra/Engle> (last visited Feb. 28, 2001).

tobacco industry that he claimed the state had spent treating sick smokers.<sup>31</sup> Moore was the first Attorney General to file suit, but forty-seven other Attorneys General were soon to follow. Moore's theory was that tobacco products and promotions should be heavily regulated to promote public health. Moore believed that the lack of tobacco regulation<sup>32</sup> stemmed, in large part, from the tobacco industry's use of its financial might to aggressively oppose regulation of cigarette design and manufacture.<sup>33</sup> The failure of state and federal legislatures and administrative agencies to regulate the manufacture of tobacco products led Moore to conclude that products liability litigation was the most promising means of controlling the sale and use of tobacco.<sup>34</sup> The other forty-seven states that filed suit against the tobacco industry shared Moore's purpose and strategy.

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<sup>31</sup> See generally Complaint, *Moore v. The American Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County filed May 23, 1994), available at The State Tobacco Information Center, <http://www.stic.neu.edu/MS/MSTOC.html> (last visited Feb. 28, 2001).

<sup>32</sup> The tobacco industry is not entirely unregulated. In 1964, the Surgeon General's Advisory Committee issued a report linking smoking to a number of diseases. See U.S. DEPARTMENT OF HEALTH & WELFARE, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE* 31 (1964). That report led Congress to pass the Federal Cigarette Labeling Act, by which Congress sought to inform the public as to the various health hazards associated with smoking cigarettes. 15 U.S.C. §1331 (2000). This Act was amended by the 1969 Public Health Cigarette Smoking Act, which required the use of the word "dangerous" in cigarette labels and banned advertising of cigarettes on any electronic medium. Pub. L. 91-222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331-1340.

<sup>33</sup> The tobacco industry does contribute heavily to political campaigns. Total "soft money" contributions, which are not subject to federal limits, reached close to \$2.3 million in 1995. Kelder & Daynard, *supra* note 5, at 68. However, plaintiffs lawyers are not exactly political lightweights. In fact, Vice President Gore and the Democratic party collect "big contributions" from trial lawyers. Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000, at 23. Following the disbursement of legal fees from the tobacco settlement, approximately 100 of the plaintiffs law firms involved will get about \$10 billion. See *id.* Who knows what portion of those billions will be dedicated to lobbying efforts opposing tort reform.

<sup>34</sup> See Kelder & Daynard, *supra* note 5, at 63. Some legislation has had the effect of helping the tobacco industry defend itself against individual plaintiffs' claims. The government-mandated inclusion of warning labels on each pack of cigarettes (15 U.S.C. §§ 1331-1340) foreclosed any claim that the tobacco industry had failed to warn consumers about the dangers of tobacco products. See *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992).

During the "third wave" of lawsuits against the tobacco industry, the Attorneys General introduced several new claims. The two main claims underlying the liability theories in the state lawsuits were: (1) The tobacco companies knew, but long hid, their knowledge that nicotine is pharmacologically active and highly addictive; and (2) The tobacco companies manipulated nicotine levels in their products to hook unsuspecting smokers.<sup>35</sup>

More specifically, the states alleged that the tobacco companies had engaged in a long history of misrepresentations about the health hazards of tobacco beginning in the 1930s. The states claimed that the tobacco companies had known for nearly sixty years that smoking caused cancer, coronary heart disease, emphysema, and stroke, and that the defendants had conspired to suppress that scientific information so that it would not reach the public.<sup>36</sup> The states asserted that, following the initial "Big Scare" in 1953 about tobacco causing cancer, the defendants created the Tobacco Industry Research Committee to manipulate information about tobacco-related research.<sup>37</sup> The states further alleged that the defendants had promised to conduct valid research and honestly report the results in 1954, but had breached those promises and have continued to do so for nearly fifty years.<sup>38</sup>

One of the more ingenious aspects of the states' lawsuits against the tobacco industry was that they effectively forestalled the use of the tobacco industry's most successful defenses. The defenses of assumption of risk and contributory negligence might not have been available to tobacco companies in medical cost reimbursement lawsuits because the states were not suing on behalf of injured smokers; rather, they were suing on behalf of the states themselves to recover medical costs that they were forced to pay to care for indigent smokers on Medicaid. The theory was that the tobacco industry could not plausibly argue that the states chose to smoke or that the states contributed to the financial harm caused to them.<sup>39</sup> In addition, the Attorneys General's strategy was to decouple the

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<sup>35</sup> See Kelder & Daynard, *supra* note 5, at 72.

<sup>36</sup> See *Iowa ex rel. Miller v. Philip Morris*, 577 N.W.2d 401, 404 (Iowa 1998).

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See Kelder & Daynard, *supra* note 5, at 82-83.

states' rights to recover from the expensive, time-consuming requirement of proving causation and damages for each smoker, relying instead on statistical information.<sup>40</sup>

### C. *State Claims, Specifically*

The following sample of cases cover the range of novel claims lodged against the tobacco industry by states across the country.

#### 1. Unjust Enrichment and Restitution<sup>41</sup>

On May 23, 1994, Mississippi filed a lawsuit claiming that the tobacco industry should be forced to reimburse the state's taxpayers for the state's share of Medicaid costs created by treatment of tobacco-related diseases. Rather than proceeding on a theory of subrogation, Mississippi's Attorney General chose to proceed in equity. His equitable theories of unjust enrichment and restitution were grounded in the notion that the state had been injured directly by the tobacco industry's behavior because the state had been forced to confer a benefit on the tobacco industry by paying Medicaid costs associated with tobacco-related illnesses.<sup>42</sup> The unjust enrichment and restitution theory of liability had three elements: (1) the tobacco industry knowingly created a massive public health crisis, (2) the State, as guardian of the public health, acted to meet

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<sup>40</sup> See Bob Van Voris, *AG's Claims Mere Smoke?*, NAT'L L.J., Apr. 28, 1997, at A1.

<sup>41</sup> The doctrine that the commission of a tort results in the unjust enrichment of the defendant at the plaintiff's expense has developed out of the common law procedure of assumpsit. "The plaintiff may disregard, or 'waive,' the tort action, and sue instead on a theoretical and fictitious contract for restitution of the benefits which the defendant has so received." WILLIAM L. PROSSER & W. PAGE KEETON, *LAW ON TORTS* 672 (5th ed. 1984). Restitution "looks to what the defendant has received which in good conscience should belong to the plaintiff; and this may be either more or less than the amount of the plaintiff's actual loss." *Id.* at 672-73. Restitution is restricted to those cases in which "the wrongdoer has been unjustly enriched by his commission of a tort and is 'under an obligation from the ties of natural justice' to repay it." *Id.* at 673 (citations omitted).

<sup>42</sup> See Complaint at ¶¶ 2, 40, *Mississippi v. The Am. Tobacco Co.*, No. 94:1429 (Miss. Ch. Ct. Jackson County filed May 23, 1994), available at The State Tobacco Information Center, <http://www.stic.neu.edu/MS/MSTOC.htm> (last visited Feb. 28, 2001).

that crisis through the provision of necessary medical treatment, and (3) in fulfilling that duty, the State assumed a crushing financial burden which, in all equity and fairness, should be borne by the tobacco companies.<sup>43</sup>

## 2. Public Nuisance<sup>44</sup>

Section 821B of the Restatement (Second) of Torts reflects the broad power of the state to protect the public from activities that are an unreasonable interference with a right common to the general public.<sup>45</sup> Several states argued that, inasmuch as health is a right common to the general public, the state should have a right to prevent the tobacco companies from further interfering with that right by negligently marketing and distributing tobacco products. These states argued that they had been damaged by abating, through the Medicaid program, a health hazard created by the tobacco companies.<sup>46</sup>

## 3. Antitrust Violation, Conspiracy, and Consumer Fraud

Minnesota filed suit on August 17, 1994, and Blue Cross-Blue Shield joined as a co-plaintiff seeking reimbursement for its alleged share of tobacco-related health care costs.<sup>47</sup> Minnesota's Attorney General sued under theories of antitrust violations, conspiracy, and consumer fraud, claiming that the

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<sup>43</sup> See Jonathan S. Massey, *Commentary of Florida's 1994 Medicaid Third-Party Liability Act: The Florida Tobacco Liability Law: Fairy Tale Objections to a Reasonable Solution to Florida's Medicaid Crisis*, 46 FLA. L. REV. 591, 596 (1995).

<sup>44</sup> To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or even several. It is not necessary, however, that the entire community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of public rights. See PROSSER & KEETON, *supra* note 41, at 605-7.

<sup>45</sup> A public nuisance is defined by the Restatement (Second) of Torts as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1). A public right is one common to all members of the public. See *id.* § 821B(g).

<sup>46</sup> See Massey, *supra* note 43, at 601.

<sup>47</sup> On appeal, the Supreme Court of Minnesota determined that Blue Cross-Blue Shield had the necessary interest in this matter to pursue its statutory and common law antitrust and consumer claims as well as its equitable claims, but not on its tort theory. "While we believe that Blue Cross has been injured, we conclude that the injury . . . is simply too remote." *Minnesota v. Philip Morris*, 551 N.W.2d 490, 495 (Minn. 1996).

tobacco industry undertook a special duty to inform consumers of the dangers inherent in tobacco products.<sup>48</sup> At the heart of Minnesota's claims was the theory that the tobacco companies illegally conspired both to suppress research on the deleterious effects of smoking and to manipulate nicotine levels in cigarettes in order to induce addiction. The State also alleged that the tobacco industry undertook a duty to protect the public health by asserting that it would cooperate with public health authorities and by accepting the preservation of public health as a basic industry responsibility.<sup>49</sup>

#### 4. Products Liability—Abnormally Dangerous Activity<sup>50</sup>

West Virginia filed suit on September 20, 1994, claiming that tobacco companies intentionally manufactured and sold numerous brands of defective, unreasonably dangerous, and hazardous products.<sup>51</sup>

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<sup>48</sup> See generally Plaintiffs' Second Amended Complaint, *Minnesota v. Philip Morris*, Cl-94-8565 (2d Dist. Minn. Ramsey County filed Jan. 6, 1998), available at The State Tobacco Information Center, <http://www.stic.neu.edu/MN/MNTOC.htm> (last visited Feb. 28, 2001).

<sup>49</sup> See *Minnesota v. Philip Morris*, 551 N.W.2d at 493-94.

<sup>50</sup> The doctrine of strict liability for abnormally dangerous activities grew out of an English case, *Rylands v. Fletcher*. 1865, 3 H. & C. 774. The rule that emerged from English decisions is that "the 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." This rule has been rejected by a few American jurisdictions, but accepted by the majority. The American decisions, like the English ones, have applied the principle only to the thing out of place, the abnormally dangerous condition or activity which is not a "natural" one where it is. The Restatement of Torts has accepted the principle of *Rylands v. Fletcher*, but has limited it to an "ultrahazardous activity" of the defendant, defined as one which "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and is not a matter of common usage." PROSSER & KEETON, *supra* note 41, at 519-27.

<sup>51</sup> See generally Complaint, *West Virginia v. The Am. Tobacco Co.*, No. 94-1707 (Cir. Ct. Kanawha County filed Sept. 20, 1994), available at The State Tobacco Information Center, <http://www.stic.neu.edu/WV/WVTOC.htm> (last visited Feb. 28, 2001).

## 5. Florida's Medicaid Third-Party Liability Act

Only one state codified its novel attack against the tobacco industry.<sup>52</sup> Until 1994, in lawsuits to recover Medicaid expenses, Florida was statutorily limited to traditional notions of subrogation, assignment, and lien. Under any of those theories, Florida would have been subject to the same legal obstacles that a Medicaid recipient would face in pursuing a claim. In 1994, however, with the amended Medicaid Third-Party Liability Act (the "Florida Act"),<sup>53</sup> Florida created an independent cause of action for itself to which traditional affirmative defenses would not apply.<sup>54</sup> The effects of the 1994 modifications to the Florida Act were to (1) restate and expand its language indicating that all affirmative defenses be abrogated to the extent necessary to ensure the State's recovery; (2) relieve the State of any duty to identify individual recipients of Medicaid payments; (3) abrogate the statute of repose defense; (4) authorize the State to pursue all of its claims in one proceeding; (5) authorize the State to utilize theories of market share liability in conjunction with a theory of joint and several liability; and (6) authorize the State to use statistical analysis in proving causation and damages.<sup>55</sup>

In a 5-4 decision, the Florida Supreme Court upheld the Florida Act, but with two significant caveats. First, the facial constitutionality ruling does not preclude a later action challenging the manner in which the Florida Act is applied.<sup>56</sup> Second, the essential components of the Florida Act are constitutional, but a few provisions must be modified or the Florida Act would be stricken as violative of Due Process.<sup>57</sup>

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<sup>52</sup> See Levy, *supra* note 11, at 605.

<sup>53</sup> FLA. STAT. ANN. § 409.910 (West 1994).

<sup>54</sup> Agency for Health Care Admin. v. Assoc. Indus. of Fla., 678 So. 2d 1239, 1249, 1258 (Fla., 1996).

<sup>55</sup> *Id.* at 1249-50.

<sup>56</sup> See *id.* at 1253.

<sup>57</sup> See *id.* at 1248. The court held that the provision granting the State authority to pursue an action without identifying individual Medicaid recipients must be stricken because it encroaches on Due Process rights. Specifically, it would preclude a defendant from challenging improper payments made to individual recipients and from proving that his product was not used by the recipient. See *id.* at 1253-54. The court held that the portion of the Act that abolished the statute of repose defense was unconstitutional because once an action is barred, a property right to be free from a claim has accrued. See *Agency for Health Care Admin.*, 678

## D. *Indications for Success or Failure at Trial*

There are several reasons to think that the state lawsuits would not have been as successful as the settlement in reforming the tobacco industry. Conversely, there are several arguments supporting the conclusion that the state lawsuits would have been at least as successful as the settlement that was reached. Ultimately, regardless of whether one concludes that the state lawsuits would have resulted in verdicts against the tobacco industry, it is apparent that the states successfully forced the tobacco companies into a massive settlement. The merit of the state lawsuits remains a debatable point.<sup>58</sup> The policy implications of the settlement, however, are more clear.<sup>59</sup>

### 1. Indications for Failure of State Lawsuits

#### a. *Dismissed State Claims*

There is a pattern among the dismissed claims in the state lawsuits.<sup>60</sup> In case after case, the state and federal court judg-

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So. 2d at 1254. And, the State must use either a theory of market share liability or joint and several liability, but not both. *See id.* at 1255-56.

On the other hand, the court upheld the abrogation of affirmative defenses, commenting that any Due Process problems will arise in the application of the Act. *See id.* at 1250. It also upheld the joinder of claims in order to promote judicial efficiency, and the use of statistical evidence to prove causation, but the court noted that the State retains the burden of proving its case within the bounds of the rules of procedure and evidence. *See id.* at 1255.

<sup>58</sup> *See infra* Part I.D.1 and Part I.D.2.

<sup>59</sup> *See infra* Part I.E.

<sup>60</sup> In *Illinois v. Philip Morris*, the court dismissed the special duty, nuisance, and unjust enrichment claims. No. 96L 13146 (Ill. Cir. Ct. Nov. 13, 1997). In *Indiana v. Philip Morris*, the court dismissed the conspiracy, antitrust, unjust enrichment, indemnity, assumed duty, criminal mischief, and nuisance claims. No. 96L 13146 (Ill. Cir. Ct. Nov. 13, 1997). In *Iowa ex rel. Miller v. Philip Morris*, the state's highest court affirmed the trial court's dismissal of the deception, special duty, and indemnity claims. 577 N.W.2d 401 (Iowa, 1998). In *Maryland v. Philip Morris*, the unjust enrichment, special duty, fraud, breach of warranty, negligence, strict liability, and conspiracy claims were all dismissed. No. 96122017 (Md. Cir. Ct. May 21, 1997). In *Washington v. American Tobacco Co.*, the state's highest court dismissed the state's special duty and unjust enrichment claims. No. 96-2-15056-8 SEA (Wash. Super. Ct. Nov. 19, 1996). In *Idaho v. Philip Morris*, the District Court dismissed the antitrust, nuisance, and conspiracy claims. No. CV-OC-97-03239 (Idaho Dist. Ct. Sept. 2, 1998). And, in *Texas v. American Tobacco*

es who were considering the states' claims rejected the Attorneys General's most pivotal claims—that the tobacco companies knew, but long hid, their knowledge that nicotine is pharmacologically active and highly addictive and that the tobacco companies manipulated nicotine levels in their products to hook unsuspecting smokers, causing the state to suffer economic damages. These courts made it clear that the states had not adequately stated a claim upon which relief could be granted and that the tobacco industry did not have a special duty to the states. Further, the states had not successfully pleaded that the tobacco industry had been unjustly enriched or that it had created a public nuisance in the marketing and distribution of tobacco. By and large, the courts found that the states had failed to state a claim upon which relief could be granted. In sum, the Attorneys General did not successfully plead that the tobacco companies conspired to mislead the public as to the ill effects of smoking.<sup>61</sup>

Two cases, *Texas v. American Tobacco Co.*<sup>62</sup> in combination with *Iowa ex rel. Miller v. Philip Morris*,<sup>63</sup> provide more specific examples of why judges dismissed many of the state claims. The tobacco company defendants in the Texas lawsuit argued that the lawsuit could not proceed in a direct action because the State's exclusive remedy is through assignment or subrogation pursuant to Section 32.033 of the Texas Human Resources Code.<sup>64</sup> The Eastern District of Texas rejected the

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*Co.*, the Eastern District of Texas dismissed the state's antitrust, unjust enrichment, and nuisance claims. 14 F. Supp. 2d 956, 974 (E.D. Tex. 1997).

<sup>61</sup> Several of the courts declined to dismiss the RICO, consumer protection, and antitrust claims. (*Idaho v. Philip Morris*, No. CV-OC-97-03239 (Idaho Dist. Ct. Sept. 2, 1998); *Illinois v. Philip Morris*, No. 96L 13146 (Ill. Cir. Ct. Nov. 13, 1997); *Maryland v. Philip Morris*, No. 96122017 (Md. Cir. Ct. May 21, 1997); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956, 974 (E.D. Tex. 1997); *Washington v. American Tobacco Co.*, No. 96-2-15056-8 SEA (Wash. Super. Ct. Nov. 19, 1996). Not surprisingly, the federal government's lawsuit focuses on these claims rather than on those that were dismissed by the state and federal court judges.

<sup>62</sup> 14 F. Supp. 2d 956 (E.D. Tex. 1997).

<sup>63</sup> 577 N.W.2d 401 (Iowa 1998).

<sup>64</sup> In order to participate in the Medicaid program, a state must submit for approval a plan outlining how the state will provide medical assistance under the program. The plan must include certain provisions mandated by the federal government, including one that requires a state to take all reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the plan and to seek reimbursement to the extent of such legal liability. See 42 U.S.C. § 1396 (2000).

defendants' arguments regarding the State's ability to proceed in a direct action, but it nonetheless dismissed the State's claims for violation of the federal and state antitrust laws, the Texas Deceptive Trade Practices-Consumer Protection Act, restitution and unjust enrichment, public nuisance, and negligent performance of a voluntary undertaking.<sup>65</sup> The court dismissed the State's antitrust claims because the State had not suffered an antitrust injury, nor was it suing as a consumer, competitor, or other participant in the Texas cigarette market. The court dismissed the Deceptive Trade Practices claim because the State was not a "consumer" within the Act's meaning, and thus had no standing to assert a claim pursuant to the Act.<sup>66</sup>

The Eastern District of Texas was equally unimpressed with the State's common law pleadings. The court dismissed the State's claims of unjust enrichment and restitution because the State failed to plead that it had conferred any benefit upon the defendants.<sup>67</sup> Although the Texas Attorney General is authorized to bring suit to enjoin or abate a public nuisance, none of the proscribed activities defined under the statutory scheme were implicated in the State's claim, and the broad definition of the elements of public nuisance urged by the State were simply not found in Texas case law.<sup>68</sup> The court, therefore, dismissed the State's public nuisance claim. The court also dismissed the State's negligent performance of a voluntary undertaking claim because the Texas courts had not extended Section 323 of the Restatement (Second) of Torts to create a duty based upon corporate statements or advertisements.<sup>69</sup>

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In accordance with these provisions, Texas enacted a provision entitled "Subrogation," which created a separate and distinct cause of action in favor of the State, so that the State may, without written consent, take direct civil action in any court of competent jurisdiction. *See* TEX. HUM. RES. CODE ANN. § 32.033(d) (Vernon Supp. 2000).

<sup>65</sup> *See Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d at 970.

<sup>66</sup> *See id.* at 970-71.

<sup>67</sup> *See id.* at 972 (holding that the alleged benefit enjoyed by the defendants was too attenuated and indirect to find support under the theory of unjust enrichment and that it was dubious to assert that under Texas law defendants were subject to a manifest duty to provide medical care to individual smokers because the State conceded that it was under a legal duty to do so).

<sup>68</sup> *See id.* at 972-73.

<sup>69</sup> *See id.* at 973. Restatement (Second) of Torts Section 323 instructs:

In Iowa, the State's highest court was swayed by the defendants' remoteness argument. Iowa's petition identified nine separate counts, and the trial court dismissed four of the counts: civil liability for deception, voluntary assumption of a special duty, unjust enrichment and restitution, and indemnity.<sup>70</sup> The State appealed the dismissal of all but the unjust enrichment and restitution claims. The defendants' argument for dismissal was two-fold: (1) the State's exclusive remedy to recoup Medicaid costs was under Section 249A.6 of the Iowa Code; and (2) the State's claim to recover damages was based on remote and derivative injuries that were unrecoverable.<sup>71</sup> The court found that "[a] statutory cause of action under Section 249A.6 was not pled in the petition. The State made no subrogation claim against the defendants and [had] no common law right to indemnity. The State's exclusive remedy for recovery of these costs [was] under section 249A.6."<sup>72</sup> The trial court had dismissed the State claims of civil liability for deception, voluntary assumption of duty, and unjust enrichment, and restitution on the grounds of remoteness of damages.<sup>73</sup> The appellate court affirmed the decision, stating:

[A] failure to apply the remoteness doctrine would permit unlimited suits to be filed. Any employer or insurer who paid medical expenses of an employee or insured injured by smoking would have a claim

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One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: a) his failure to exercise such care increases the risk of such harm; or b) the harm is suffered because of the other's reliance upon the undertaking.

The State had claimed that the defendants had voluntarily assumed a duty to report honestly and completely on all research regarding cigarette smoking and health because of their public pronouncements to do so, mainly through advertising.

<sup>70</sup> See *Iowa v. Philip Morris, Inc.*, 577 N.W.2d at 403.

<sup>71</sup> See *id.* at 404.

<sup>72</sup> *Id.* at 406.

<sup>73</sup> See *id.* In making its decision on remoteness, the court considered the fact that a state court in Minnesota had applied the remoteness doctrine to prevent Blue Cross and Blue Shield of Minnesota from bringing a direct tort action against tobacco companies to recover for injuries to its consumers—the smokers. That court found that while it believed that Blue Cross had been injured, the tort was too remote for Blue Cross to recover upon it. See *Minnesota v. Philip Morris, Inc.*, 551 N.W.2d 490, 495 (Minn. 1996).

against the tobacco industry. We are not inclined to open the proverbial flood gates of litigation to such an extent.<sup>74</sup>

In sum, the federal court in Texas found that Texas had no antitrust or common law claims, and the highest court in Iowa dismissed the State's common law claims. Taken together, the treatment of the claims filed by the Attorneys General in these two states provides some indication that the state lawsuits might not have resulted in the kind of reform achieved by the MSA.

### b. *Dismissal of Union Fund Lawsuits*

The dismissal of a large number of the union fund lawsuits<sup>75</sup> provides another indication that the state lawsuits might have been unsuccessful. To begin, the union fund lawsuits and the state lawsuits against the tobacco industry are comparable because they asserted similar theories of liability and damages. For example, in *Laborer's Local 17 Health and Benefit Fund v. Philip Morris*, the union claimed that the defendant tobacco companies had engaged in a conspiracy to deceive the general public, and the plaintiff specifically, with respect to the health risks associated with smoking.<sup>76</sup> The Union alleged that the defendants had employed an advertising campaign designed to mislead the public and had actively concealed information that would have demonstrated the actual health risks and addictiveness of nicotine, the effectiveness of various smoking treatments for addiction, and the defendants' own ability to manufacture less addictive products.<sup>77</sup>

Furthermore, like the states' claims against the tobacco industry, the union fund allegations included unjust enrichment, public nuisance, restitution, fraud, and misleading consumers. The lawsuits were not only similar in terms of the theories of liability, but also in the damages claimed. Like the

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<sup>74</sup> *Iowa v. Philip Morris, Inc.*, 577 N.W.2d at 495.

<sup>75</sup> The "union fund lawsuits" number at least twenty. They are characterized as such here because the plaintiffs in these lawsuits are all union health and welfare funds that are suing to recover money spent by unions under health plans to treat union members suffering from smoking-related illnesses.

<sup>76</sup> 7 F. Supp. 2d 277, 282 (S.D.N.Y. 1998), *rev'd*, 172 F.3d 223 (2d Cir. 1999).

<sup>77</sup> *See id.*

states, the union funds were suing for damages directly, not under a theory of subrogation. Specifically, the union fund plaintiffs sought past and future damages for money expended to provide medical treatment to plan participants and beneficiaries who had suffered and were suffering from tobacco-related illnesses, and for damages allegedly inflicted on the fund's infrastructure independent of the harm suffered by the participants, including losses suffered due to the fund's inability to control costs and to establish programs to educate the fund's participants not to use tobacco.<sup>78</sup>

The union funds thought that they would have success attacking the tobacco industry by circumventing the need to prove injury to individual smokers, thus avoiding the assumption of risk and contributory negligence defenses frequently and successfully used by the tobacco industry. That was the same strategy employed by the Attorneys General. But, multiple federal district courts and courts of appeal heard this strategy in the union fund lawsuits and concluded that the claims should be dismissed on the grounds of proximate cause and/or lack of standing.<sup>79</sup>

However, the Second Circuit, in *Laborer's Local 17*, held that the union fund suit was distinguishable from the state tobacco lawsuits in some important respects.<sup>80</sup> First, some of

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<sup>78</sup> See, e.g., *Laborer's Local 17*, 7 F. Supp. 2d at 282.

<sup>79</sup> See generally *United Food and Comm. Workers Unions, Employers Health and Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir. 2000); *Tex. Carpenters Health Ben. Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.3d 92 (3d Cir. 1999); *Int'l Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris*, 34 F. Supp. 2d 656 (N.D. Ill. 1998), *aff'd*, 196 F.3d 818 (7th Cir. 1999); *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999); *R.I. Laborer's Health & Welfare Fund v. Philip Morris*, 99 F. Supp. 2d 174 (D.C. R.I. 1999); *Haw. Health & Welfare Trust Fund for Operating Eng'rs v. Philip Morris*, 52 F. Supp. 2d 1196 (D.C. HI. 1999); *Ark. Carpenters' Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp. 2d 936 (E.D. Ark. 1999); *Northwest Laborers-Employers Health & Sec. Trust Fund v. Philip Morris, Inc.*, 58 F. Supp. 2d 1211 (W.D. Wash. 1999).

On March 3, 2000, the Supreme Court of the State of New York, County of New York, dismissed ten cases brought by union funds. *Eastern States Health and Welfare Fund v. Philip Morris, Inc.*, No. 60386/97 (Sup. Ct. N.Y. County Mar. 3, 2000), available at Brown & Williamson Tobacco, Medical Cost Reimbursement, [http://www.brownandwilliamson.com/Index\\_sub2.cfm?ID=15](http://www.brownandwilliamson.com/Index_sub2.cfm?ID=15) (last visited Feb. 28, 2001).

<sup>80</sup> 191 F.3d 229, 243-44 (2d Cir. 1999).

the state lawsuits involved statutory provisions that the state courts had construed to authorize the states to sue directly. In addition, in some cases, the unique quasi-sovereign rights of a state to sue to protect the health and welfare of its citizens could be found to sustain standing.<sup>81</sup> And, generally speaking, state cases are distinguishable on the issue of proximate causation because of the state's unique role in the protection of its citizens.<sup>82</sup>

The dismissal of nearly all of the union fund lawsuits further indicates that the state lawsuits, had they gone to trial, would have been dismissed.<sup>83</sup> *Ironworkers Local Union No. 17 Insurance Fund v. Brown & Williamson* was the first union fund suit to be tried.<sup>84</sup> In that case, a jury in federal court in Ohio returned a verdict in favor of the defendant tobacco companies after hearing the union fund's case.<sup>85</sup>

There are, however, differences between the union fund and state lawsuits. First, the state lawsuits were filed predominantly in state courts, whereas the union fund lawsuits were all filed in federal courts. State court judges, and particularly juries, might have been more receptive to novel state claims against the tobacco industry than federal court judges and juries. Moreover, in the union fund lawsuits, there was no

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Not all of the Union Fund lawsuits were dismissed. Judge Weinstein, in the Eastern District of New York, held that the plaintiffs' complaints were sufficient to state a subrogated claim under federal RICO. The plaintiffs in this case, National Asbestos Workers Medical Fund and Blue Cross-Blue Shield of New Jersey, qualified as subrogees who have been injured economically as a result of the misconduct of the defendants. The plaintiffs allegedly expended billions of dollars in the treatment of smoking-related illnesses, and they were obligated to do so as part of their legal obligation to the subrogers. See *The Nat'l Asbestos Workers Med. Fund v. Philip Morris, and Blue Cross and Blue Shield of N.J. v. Philip Morris*, 74 F. Supp. 2d 221 (E.D.N.Y. 1999).

Judge Weinstein also distinguished the claims in this case from those in *Laborer's Local 17*. He emphasized the active role of the Blues in providing medical care to the nation and analogized its relationship to its plan participants to a parental relationship. And, organizations with the incentives and resources of the Blues are uniquely suited to vindicate the economic injuries sustained by the nation's health care infrastructure. See *id.* at 226-27; see also *infra* note 241.

<sup>84</sup> See *Brown & Williamson Tobacco, Medical Cost Reimbursement*, at [http://www.brownandwilliamson.com/Index\\_sub2.cfm?ID=15](http://www.brownandwilliamson.com/Index_sub2.cfm?ID=15) (last visited Feb. 28, 2001).

<sup>85</sup> *Id.*

equivalent to the states' quasi-sovereign interest in the well-being of the populace.<sup>86</sup> These differences might have led to different judicial determinations or jury verdicts in the state lawsuits.

### c. *Lack of Damages*

There is another, more common sense reason to think that the state lawsuits would not have been successful—the states may not have sustained any economic damages as a result of tobacco-related illness. Indeed, one commentator noted, “[T]he states so fervent in their rush to punish the industry may [have found] that the huge payoff they [were] awaiting [was] illusory.”<sup>87</sup> Even if the tobacco companies had been held liable for all smoking-related public health costs, including publicly-funded medical care, pensions, and lost tax receipts, the courts might have been unlikely to condone large damage awards if cigarette excise taxes already generated net revenues in excess of Medicaid costs.<sup>88</sup> In sum, the states were suing the tobacco industry to recover external costs that (1) were imposed by smokers on nonsmokers, (2) could not have been imposed without the complicity of the state itself, which did not ban cigarettes or tax cigarettes at a higher rate,<sup>89</sup> (3) were unaffected by the industry's conduct, and (4) were more than offset by the excise taxes flowing into state treasuries.<sup>90</sup>

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<sup>86</sup> See generally *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982).

<sup>87</sup> Levy, *supra* note 11, at 633-34.

<sup>88</sup> See *id.* at 634.

<sup>89</sup> “[E]ven a relatively small price increase, such as \$.25/pack, will have significant consumption decreases of 4%, with 14% decreases among 12 to 17 year-old males . . . the hypothesized 25 cent per pack could produce long-term reductions of at least 10,000 cigarette-caused cancer deaths annually, and possibly much more.” Kelder & Daynard, *supra* note 5, at 71. The high price elasticity of demand for cigarettes suggests that the state, given its unique power to levy taxes, has been in complicity in not discouraging smoking.

<sup>90</sup> See Levy, *supra* note 11, at 634. The results of a recent Rand Corporation study support these conclusions. The study focused on two important factors. First, if a smoker does not die from a smoking-related illness, he will die from something else. Accordingly, the relevant social cost is not the entire amount spent on his illness, but the difference between the amount that was spent and that which would have been spent on average for a non-smoker. Second, premature death from smoking can produce long-term external benefits in the form of lower retirement costs and reduced nursing home care, not to mention reduced pension pay-

Recent studies show that the external costs of smoking total approximately fifty-one cents per pack, which does not include offsets for retirement and nursing home savings. With all expenditures and savings factored in, the total external cost per pack is 25.3 cents, less than half of the prevailing fifty-three cent tax rate.<sup>91</sup> Therefore, even if the Attorneys General had managed to convince a judge or jury that the tobacco industry should have borne the blame for smoking-related Medicaid costs, they would have "won the battle and lost the war. Quite simply, the states have suffered no monetary damage."<sup>92</sup>

## 2. Indications for Success of State Lawsuits

### a. *Powerful Plaintiffs*

One factor that should not be underestimated in evaluating the potential success of the state lawsuits was the identity of the plaintiffs. Rather than litigating *in* forty-eight states against individual or class action plaintiffs, the tobacco companies were litigating *against* forty-eight separate states. The absence of individual smokers whom jurors could condemn for causing their own illness might well have contributed to verdicts for the states. In addition, politics and public opinion played a much larger role in the state tobacco lawsuits than in individual lawsuits. The fact that forty-eight states were suing the tobacco industry and condemning them in the press for lying to the public and for misleading the nation as to the true effects of nicotine could hardly have escaped jurors' attention. In short, had the cases been tried, the states' campaign against the tobacco industry might well have tipped the scales in the states' favor.

The states also had vast resources at their disposal. The Attorneys General who filed suit against the tobacco industry seemed to have learned a litigation lesson from the tobacco

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ments. Those benefits are an offset to the near-term outlays for medical care, sick leave, and group life insurance. *See id.*

<sup>91</sup> *See id.* at 636-37.

<sup>92</sup> MOLLENKAMP ET AL., *supra* note 13, at 639. In at least three of the state lawsuits, however, state court judges ruled that the defendant tobacco companies would not be able to plead the "pass-through defense." *See infra* Part I.D.2.d.

industry. During the first and second waves of tobacco litigation, the tobacco industry successfully pursued a "king of the mountain" strategy by taking countless depositions and filing and arguing countless motions in an effort to bankrupt any and all plaintiffs' attorneys.<sup>93</sup> The Attorneys General's strategy appears to have been to file lawsuits in as many states as possible<sup>94</sup> and to employ novel theories of liability so that it would eventually become fiscally inefficient for the industry to continue defending itself. The Attorneys General who filed suit had at their disposal the financial resources of their respective states, and in several states, outside counsel advanced the costs of attorney time and expenses on a contingency fee basis.<sup>95</sup>

#### b. *State Court Judges Versus Federal Court Judges*

Another factor that might have contributed to verdicts for the states was that all but one of the state lawsuits were filed in state court.<sup>96</sup> Although some state court judges did dismiss state lawsuits,<sup>97</sup> many of the state court judges did not and may not have done so had the settlement not been reached. Because state court judges might have been more responsive to political pressure and public opinion than federal court judges, many state court judges might have allowed the lawsuits to have been tried.

This argument is further supported by the fact that no federal court has certified a class action against the tobacco industry,<sup>98</sup> as compared to the fact that two class actions

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<sup>93</sup> See Kelder & Daynard, *supra* note 5, at 71.

<sup>94</sup> By the time the settlements were reached, forty-eight states had filed suit against the tobacco industry. See Levy, *supra* note 11, at 601.

<sup>95</sup> See Kelder & Daynard, *supra* note 5, at 86. In Minnesota, for example, Blue Cross-Blue Shield joined the state as a co-plaintiff and covered the out-of-pocket expenses plus a contribution to attorney time spent on the case. *Id.* In Mississippi, twelve law firms assisted the Attorney General with the lawsuit against the tobacco industry. In Florida, thirteen firms assisted. See The State Tobacco Information Center, State Suit Summary Chart, at <http://stic.neu.edu/summary.htm> (last visited Feb. 28, 2001).

<sup>96</sup> Only Texas sued in federal court. See generally Complaint, Texas v. The American Tobacco Co., No. 5:96 CV91 (E.D. Tex. filed Mar. 28, 1996), available at The State Tobacco Information Center, <http://www.stic.neu.edu/TX/TXCOMP.htm> (last visited Feb. 21, 2001).

<sup>97</sup> See *supra* Part I.D.1.a.

<sup>98</sup> See Clay v. Am. Tobacco Co., 188 F.R.D. 483, 503 (S.D. Ill. 1999) (denying

against the tobacco industry have been certified in Florida state courts. In *Broin v. Phillip Morris, Inc.*,<sup>99</sup> the Court of Appeal of Florida, Third District, certified a class of flight attendants who were exposed to "second-hand" smoke while aboard aircrafts. *Broin* was later settled during the trial.<sup>100</sup> In *Engle v. R.J. Reynolds*,<sup>101</sup> the same court certified a class of smokers seeking damages for certain diseases and medical conditions allegedly contracted by the plaintiffs' asserted addiction to smoking. The case proceeded to trial and the jury agreed with the class action plaintiffs that the tobacco industry had manufactured a deadly product and had deceived the public for years.<sup>102</sup> The claims in *Engle* were the same or very similar to the claims in the class action lawsuits that were denied certification in federal courts across the country.<sup>103</sup>

### c. Role of the Jury

The Florida jury that decided *Engle* made it clear to the world that one jury has the power to cripple an industry. Their

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motion for class certification); *Brown v. Philip Morris, Inc.*, No. 98-5518, 1999 U.S. Dist. LEXIS 14495, at \*45 (E.D. Pa. 1999) (same); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 557 (D. Minn. 1999) (same); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 100 (W.D. Mo. 1997) (same).

<sup>99</sup> 641 So. 2d 888 (Fla. Dist. Ct. App. 3d Dist. 1994).

<sup>100</sup> See *Brown & Williamson Tobacco*, at [http://www.brownandwilliamson.com/Index\\_sub2.cfm?ID=15](http://www.brownandwilliamson.com/Index_sub2.cfm?ID=15) (last visited Feb. 28, 2001).

<sup>101</sup> 672 So. 2d 39 (Fla. Dist. Ct. App. 3d Dist. 1996).

<sup>102</sup> See *Engle v. RJ Reynolds Tobacco*, No. 94-08273 CA-22 at 27-28 (Fla. Cir. Ct. 11th Cir. Nov. 6, 2000), available at Tobacco Control Resource Center, Inc. & The Tobacco Products Liability Project, <http://www.tobacco.neu.edu/Extra/Engle> (last visited Feb. 28, 2001) [hereinafter *Engle I*].

<sup>103</sup> The defendant tobacco companies suffered a \$12.7 million compensatory damages verdict and a staggering \$144.8 billion punitive damages verdict in the *Engle* class action. See *id.* at 62-65. Shortly after the punitive damage award was decided upon by the jury, the tobacco companies attempted to remove the case to federal District Court in Florida after a union fund filed a petition with the state court claiming entitlement to a portion of the money awarded in the case. See *Engle v. RJ Reynolds Tobacco*, 122 F. Supp. 2d 1355 (S.D. Fla. 2000). The fact that the tobacco companies were anxious to move to federal court for post-trial litigation provides further support for the argument that state court judges are more sympathetic to claims against the tobacco industry than federal court judges (at least in Florida). Federal District Court Judge Ursula Ungaro-Benages, however, sent the judgment back to state court. See *id.* at 1364. On Monday, November 6, 2000, Miami-Dade County Circuit Judge Robert Kaye upheld the jury's punitive damage award of \$145 billion. See *Engle I*, No. 94-08273 CA-22 at 62-65.

\$144.8 billion punitive damage award against the tobacco industry is the largest punitive damage award in U.S. history.<sup>104</sup> After a two year trial, the jury dropped its punitive damages bombshell on the tobacco industry. The six jurors' comments after the trial revealed that they felt a "sense of mission" in this case; and that they "did not want to ignore the tremendous devastation that [cigarettes have] caused. The number had to match that. It had to be significant."<sup>105</sup> The Florida jury's emotional response to the tobacco industry's alleged deception of the public could have belonged to any one of the juries in the state lawsuits. It is apparent that any one jury had the potential to award a state nearly as much in punitive damages as the tobacco companies agreed to pay in the settlement.<sup>106</sup> Tobacco company executives have asserted that they will declare bankruptcy if they are forced to pay the punitive damage award in the *Engle* case.<sup>107</sup>

#### d. *Reduced Requirement in Proving Damages*

Although analysis of a full statistical model may prove that the states have not suffered economic losses as a result of smoking-related illnesses,<sup>108</sup> that analysis might not have

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<sup>104</sup> See Rick Bragg, *Tobacco Lawsuit in Florida Yields Record Damages*, N.Y. TIMES, July 15, 2000, at A1.

<sup>105</sup> Rick Bragg & Sarah Kershaw, *Juror Says a "Sense of Mission" Led to Huge Tobacco Damages*, N.Y. TIMES, July 16, 2000, at A1.

<sup>106</sup> The situation is comparable to that described by Judge Posner in *Matter of Rhone-Poulenc Rorer Inc.* In *Rhone-Poulenc Rorer*, Judge Posner decertified a class comprised of hemophiliacs infected by the AIDS virus as a consequence of using defendant's drug manufacturers' products. See 51 F.3d 1293, 1300 (7th Cir. 1995). Judge Posner explained that one jury composed of six people "will hold the fate of an industry in the palm of its hand." *Id.* That jury will have the power to "hurl the industry into bankruptcy." *Id.*

<sup>107</sup> *Id.* The legislatures in five states have passed or are considering bills that limit to \$25 million the requirement that a defendant in a civil lawsuit must post cash or a bond in the full amount of the jury award plus interest while the defendant appeals. Barry Meier & Emily Yellin, *Big Tobacco is Lobbying States for Help*, N.Y. TIMES, Mar. 20, 2000, at A20. The five states that have passed or are considering passing such legislation are Florida, Georgia, Kentucky, North Carolina, and Virginia. *Id.* The reason these states have taken such action is that "[i]f allowed to stand, the \$145 billion verdict would endanger the industry's ability to continue paying the state, providing money that helps subsidize legislators' favorite projects." Jacob Sullum, *Tobacco's New Best Friend*, N.Y. TIMES, July 20, 2000, at A25.

<sup>108</sup> See *supra* Part I.D.1.c.

been conducted had the state lawsuits been tried. At least in Minnesota and Texas, the presiding judges decided that the states could determine which statistical model to use. In addition, the tobacco companies would not be able to use the defense that the states had not suffered economic losses by passing on any expenses that they incurred to the federal government or to taxpayers.

In *Minnesota v. Philip Morris, Inc.*,<sup>109</sup> the Supreme Court of Minnesota decided that Blue Cross and Blue Shield of Minnesota could join the State as a plaintiff for two reasons.<sup>110</sup> First, Blue Cross and Blue Shield had standing by "plain statutory grants" with respect to its antitrust and consumer fraud claims.<sup>111</sup> Second, the tobacco companies would not have been able to use the "pass through defense"—the argument that "any increased costs associated with increased medical care needed by its nicotine-addicted consumers will simply be passed on to employer subscribers."<sup>112</sup> As a result, the State argued that, if its lawsuit had gone to trial, the tobacco companies would not have been able to assert that the State was ultimately reimbursed a portion of its Medicare costs by the federal government; instead, the State would have been permitted to seek recovery of the full extent of its damages.<sup>113</sup>

In *Texas v. American Tobacco Co.*,<sup>114</sup> the Eastern District of Texas declined to dismiss the State's claims for remoteness.<sup>115</sup> Because the State brought its action based on its quasi-sovereign interests in protecting the health, welfare, and well-being of the populace, the court found that there was "no better party to prosecute this matter."<sup>116</sup> Moreover, the court found that quasi-sovereign interest lawsuits "will always involve a harm to individuals, but it is this harm and a state's

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<sup>109</sup> 551 N.W.2d 490 (Minn. 1996).

<sup>110</sup> *Id.* at 496.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See Plaintiff's Memorandum in Opposition to Defendants' Consolidated Motion for Partial Summary Judgment on Certain Damages Issues: Recovery of Federal Share of Medicaid at ¶ III.B, *Minnesota v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996) (No. C1-94-8565), available at The State Tobacco Information Center, <http://www.stic.neu.edu/MN/MNTOC.htm> (last visited Feb. 28, 2001).

<sup>114</sup> 14 F. Supp. 2d 956 (E.D. Tex. 1997).

<sup>115</sup> See *id.* at 968.

<sup>116</sup> See *id.*

interest in protecting against it that provides the basis" for such an action.<sup>117</sup> The court approved the State's proposed proof of damages by use of a statistical model, the details of which were not available to the court when it made its decision.<sup>118</sup> This opinion demonstrated that at least this court was willing to let a case proceed to trial without undue concern as to whether, or how, the State would ultimately be able to prove that it had suffered damages.

### 3. Summary of Indicators

In sum, it is not clear whether the tobacco industry would have been defeated in state courts by the forty-eight states that set out to regulate the industry. Nonetheless, many of the reforms sought by the Attorneys General have been achieved without a single lawsuit having been tried to verdict. Moreover, the fact that industry-wide reform was achieved without a single jury reaching a verdict has serious policy implications. The fact that industry-wide reform was *sought* by means of litigation has critical policy implications. These policy concerns will be discussed in Section E.

### E. *Policy Implications*

In the process of addressing a union fund lawsuit, a federal district court judge opined that "[w]hether an industry should be penalized for successfully marketing a legal product is certainly an interesting question, but it is beyond the scope of any single lawsuit. Policymaking on such a scale is ordinarily best left to the legislature."<sup>119</sup> State and federal legislatures are better equipped than the nation's courts to manage the regulation of tobacco products.<sup>120</sup> Unlike courts, legisla-

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<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> *Laborer's Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 7 F. Supp. 2d 277, 283 (S.D.N.Y. 1998) (Scheindlin, J.).

<sup>120</sup> Interestingly, the manufacture, marketing, and advertising of tobacco products are regulated. For example, the Department of Agriculture sets production quotas and price levels for tobacco. Congress has authorized the Bureau of Alcohol, Tobacco, and Firearms to qualify and regulate cigarette manufacturers. Of course, in 1965, Congress passed the Federal Cigarette Labeling and Advertising Act, which established a federal program to address the relationship between smoking

tures are designed to address the issue. Furthermore, "the remedies that regulatory bodies could impose are infinitely more subtle than the off-on toggle switch between dramatically high tort liability and practically no liability at all."<sup>121</sup> Taxation, for example, provides a more efficient means of regulating tobacco than large scale damage awards. Because individuals choose to smoke, raising the price of each pack would create a deterrence, which would in turn reduce health care costs. The tax revenue could then be used to offset health care costs of those who choose to persist in smoking.<sup>122</sup>

Some commentators argue that it is precisely because of the failure of legislatures and administrative agencies to regulate tobacco that litigation provides a better means of controlling the sale and use of tobacco.<sup>123</sup> They argue that smoking generates externalities in the economy (i.e., market failure), particularly because it generates addictive behavior. But it is difficult to see where the market has failed; Americans smoke too much, but that is probably because they prefer to smoke despite their knowledge of the relevant risks.<sup>124</sup> Even if there is market failure, the market itself can adjust in subtle, incremental ways to affect the relevant risks of injury. For example, a "growing number of life and health insurance companies ex-

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and health. Under that program, cigarette manufacturers are required to place Surgeon General warnings on each and every pack of cigarettes, as well as on all cigarette advertisements. All other cigarette advertising is subject to the scrutiny of the Federal Trade Commission. Cigarette manufacturers are required to report the tar and nicotine yields of their products to the Federal Trade Commission annually. Similarly, manufacturers must report all ingredients contained in cigarettes to the Department of Health and Human Services annually. States also regulate tobacco production and distribution. They tax cigarettes sales and certain individual states have enacted laws requiring manufacturers to provide tar and nicotine tests and ingredient reports different from those required by the federal government. See Brown & Williamson Tobacco, at <http://www.brownandwilliamson.com> (last visited Sept. 6, 2000).

<sup>121</sup> James A. Henderson Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1330 (1991).

<sup>122</sup> The argument for increased taxation as an efficient means of regulation is buttressed by the fact that studies have shown that the price elasticity of demand for cigarettes is relatively high. Even a relatively small price increase will lead to significant consumption decreases, especially among teenagers. See Kelder & Daynard, *supra* note 5, at 71.

<sup>123</sup> See *id.* at 63.

<sup>124</sup> See Henderson & Twerski, *supra* note 121, at 1330.

tend more favorable rates to nonsmokers.”<sup>125</sup> This kind of non-judicial regulation is even more capable of flexibility than legislation.

Legislative or market regulations of tobacco products are not only more effective and efficient than court-imposed solutions, they are also more appropriate. “By using litigation to achieve goals that properly belong to legislation, the [tobacco lawsuits] would short-circuit democratic debate on public issues.”<sup>126</sup> Regulation of tobacco products has been a hotly debated subject for many years. Such a publicly controversial subject is one best left for democratically-elected legislators to mull over. If any rules are to be established to control this activity, which millions of Americans enjoy and which generates billions of dollars of revenue for the economy, it should be within the control of legislatures rather than the courts.

The Fifth Circuit denied class certification in *Castano v. American Tobacco Co.*<sup>127</sup> because “[c]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even where the probability of an adverse judgment is low.”<sup>128</sup> Although the court was explaining why class certification was not appropriate in *Castano*, the same logic applies to the state lawsuits against the tobacco industry. In fact, the state lawsuits imposed much more settlement pressure on the tobacco industry than would a class action. Indeed, simultaneously litigating against forty-eight states obviously put insurmountable pressure on the tobacco companies to settle. The dubious merits of the state lawsuits make it apparent that the states’ goal was to force the tobacco companies to settle the claims. This goal represents a gross abuse of the judicial system.

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<sup>125</sup> *Id.* at 1331.

<sup>126</sup> *Uncle Sam v. Big Tobacco*, THE ECONOMIST, Oct. 22, 1999, at 22.

<sup>127</sup> 84 F.3d 734, 476 (5th Cir. 1996).

<sup>128</sup> 84 F.3d at 746. Similarly, in *Matter of Rhone-Poulenc Rorer Inc.*, Judge Posner decertified a class of hemophiliacs infected with the AIDS virus because the defendants successfully argued that they were at risk of suffering irreparable harm from immense settlement pressure. See 51 F.3d at 1297-99. The court quoted Judge Henry J. Friendly, who called settlements induced by a small probability of a massive judgment “blackmail settlements.” See *id.* at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

Even if one were to agree that the public entity litigation used to reform the tobacco industry was not an abuse of the judicial system or a usurpation of the role of representative government, the fact remains that it was an inefficient means of reform. The problem was that a large portion of the proceeds were absorbed by legal costs and trial lawyers' contingency fees.<sup>129</sup> In fact, over \$10 billion in legal fees from the tobacco settlements will be shared by more than 100 firms.<sup>130</sup> Additionally, the public entity lawsuits defeat two of the central purposes of tort law.

One of the purposes of tort law is to serve a loss-spreading function; defendants (often large companies) can, by means of rates, prices, taxes or insurance, distribute to the public at large the risks and losses which are inevitable in a complex civilization. But there are obvious limitations upon the power of a defendant to shift the loss to the public, and the courts frequently have been reluctant to saddle an industry with the entire burden of the harm it may cause, for fear that it may prove ruinously heavy. This is particularly true where the liability may extend to an unlimited number of unknown persons, and is incapable of being estimated or insured against in advance.<sup>131</sup>

The tobacco industry cannot possibly insure against the losses claimed by the public entities, nor can it pass on to consumers, in addition to the billions of dollars it has already agreed to pay the states in the settlements, the cost of billions of dollars in punitive damages.

Another central purpose of tort law is to compensate specific victims for damages suffered as a result of the conduct of another.<sup>132</sup> If the public entities have not been damaged directly, the tobacco companies, and potentially the gun companies, will be paying billions of dollars in damages without actually compensating specific victims.

Finally, it is beyond doubt that the use of public entity litigation to force industry reform will not be limited to tobacco. According to Larry Kraus, President of the U.S. Chamber of

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<sup>129</sup> See Richard Tomkins, *Opening the Floodgates*, FINANCIAL TIMES Nov. 17, 1998, at 17 (quoting George Priest, Professor of Law and Economics at Yale Law School).

<sup>130</sup> See Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000, at 24.

<sup>131</sup> PROSSER & KEETON, *supra* note 41, at 22.

<sup>132</sup> See *id.* at 6.

Commerce Institute for Legal Reform, the alcohol and fast foods industries should be getting very nervous.<sup>133</sup> Indeed, he stated, "Anyone who doesn't think this is going to happen is badly mistaken . . . because it has already started with the gun industry."<sup>134</sup>

## II. THE GUN MANUFACTURER LITIGATION

### A. Background

Gun manufacturers, like the tobacco companies, have increasingly become targets of public entity litigation. Beginning in the fall of 1998 with New Orleans and Chicago, thirty-two cities and counties and one state have filed lawsuits against the gun industry<sup>135</sup> seeking to recover the costs they have allegedly incurred as a result of gun-related violence.<sup>136</sup>

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<sup>133</sup> Tompkins, *supra* note 129, at 17 (interviewing Larry Kraus). The next target for the trial lawyers are the HMO's. See Cohen, *supra* note 130, at 23; John Neylar, *They're Ba-a-ck!*, FORTUNE, June 26, 2000, at 16.

<sup>134</sup> Tompkins, *supra* note 129, at 17 (interviewing Larry Kraus).

<sup>135</sup> Although advocates of the gun litigation have at various times claimed that the litigation was directed solely towards recovering damages caused by handguns and imposing restrictions on the sale of handguns alone, any such distinction can no longer be made. The local governments' complaints and briefs occasionally mention handguns in particular, but generally refer to the "gun industry," "firearms," or "illegal firearms" and cite statistics of firearms sales and firearms-related damages that make no distinction between different types of firearms. See generally First Amended Complaint, *Chicago v. Beretta U.S.A. Corp.*, No. 98-CH-015596 (Cook County Cir. Ct. filed Nov. 12, 1998); Complaint, *Morial v. Smith & Wesson Corp.* (New Orleans), No. 98-18578 (Parish of Orleans Civ. Dist. Ct. filed Oct. 30, 1998); Brief and Separately Bound Appendix of Plaintiffs-Appellants, *Ganim v. Smith & Wesson Corp.* (Bridgeport), No. A.C. 20382 (Conn. App. Ct. filed Jan. 27, 1999), all available at Firearms Litigation Clearinghouse, <http://www.firearms-litigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>136</sup> The city, county, and state lawsuits include, in chronological order by filing date: New Orleans, LA (*Morial v. Smith & Wesson Corp.*, No. 98-18578 Div. M (Parish of Orleans Civ. Dist. Ct. filed Oct. 30, 1998)); Chicago/Cook County, IL (*Chi. v. Beretta U.S.A. Corp.*, No. 98-CH-015596 (Cook County Cir. Ct. filed Nov. 12, 1998)); Bridgeport, CT (*Ganim v. Smith & Wesson Corp.*, No. 06-CV-99-01531988 (Conn. Super. Ct. filed Jan. 27, 1999)); Miami/Dade County, FL (*Penelas v. Arms Tech., Inc.*, No. 99-01941-CA-06 (11th Cir. Ct. Miami-Dade County filed Jan. 27, 1999)); Atlanta, GA (*Atlanta v. Smith & Wesson Corp.*, No. 99-VS-0149217J (Fulton County Ct. filed Feb. 5, 1999)); Cleveland, OH (*White v. Hi-Point Firearms*, No. CV-99-381897 (Cuyahoga County C.P. filed Apr. 8, 1999)); Detroit, MI (*Archer v. Arms Tech., Inc.*, No. 99-912-658-NZ (Wayne County Cir. Ct. filed Apr. 26, 1999)); Wayne County, MI (*McNamara v. Arms Tech., Inc.*, No. 99-912-662-NZ (Wayne County Cir. Ct. filed Apr. 26, 1999)); Cincinnati, OH (Cincin-

The success of the tobacco litigation has played an important role in the local governments' decisions to file lawsuits against the gun industry.<sup>137</sup> Judge Robert F. McWeeny, deciding Bridgeport's suit against the gun manufacturers, wrote, "In advance of their unusual theories supporting this litigation, the plaintiffs draw inspiration if not precedent from the 'tobacco' cases."<sup>138</sup>

Just as the public entity lawsuits in the tobacco litigation were followed by a federal suit, the municipal, county, and state lawsuits of the gun manufacturers have led to a potential federal suit. On December 7, 1999, the Clinton Administration threatened to file a massive lawsuit against the gun industry.<sup>139</sup> The plaintiff in the suit would be the Department of Housing and Urban Development ("HUD"), which would file a class action suit on behalf of 3,200 public housing authorities nationwide.<sup>140</sup> HUD would seek to recover money spent on

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nati v. Beretta U.S.A. Corp., No. A-99023169, (Ohio Ct. C.P. filed Apr. 28, 1999)); St. Louis, MO (St. Louis v. Cernicek, No. CV-992-01209 (St. Louis Cir. Ct. filed Apr. 30, 1999)); Alameda County, Berkeley, East Palo Alto, Oakland, Sacramento, San Francisco and San Mateo County, CA (People v. Arcadia Mach. & Tool, Inc., No. 303753 (S.F. Super. Ct. filed May 25, 1999)); Compton, Englewood, Los Angeles and West Hollywood, CA (People v. Arcadia Mach. & Tool, Inc., No. BC-210894 (L.A. Super. Ct. filed May 25, 1999)); Camden County, NJ (Camden County Bd. Of Chosen Freeholders v. Beretta U.S.A. Corp., No. 99-CV-2518 (D.N.J. filed June 1, 1999)); Boston, MA (Boston v. Smith & Wesson Corp., No. 99-VS-0149217J (Suffolk County Super. Ct. filed June 3, 1999)); Newark, NJ (James v. Arcadia Mach. & Tool, Inc., No. ESX-L-6059-99 (Essex County Super. Ct. filed June 9, 1999)); Camden, NJ (Camden v. Beretta U.S.A. Corp., No. 451099 (Camden County Super. Ct. filed June 21, 1999)); Los Angeles County, CA (People v. Arcadia Mach. & Tool, Inc., No. BC-214794 (L.A. Super. Ct. filed Aug. 6, 1999)); Gary, IN (Gary v. Smith & Wesson Corp., No. 45D029908-CT-355 (Lake Super. Ct. Filed Aug. 27, 1999)); Wilmington, DE (Sills v. Smith & Wesson Corp., No. 99-C-09283 (New Castle County Super. Ct. filed Sept. 29, 1999)); Washington, D.C. (D.C. v. Beretta U.S.A. Corp., No. 00-0000428 (D.C. Super. Ct. filed Jan. 20, 2000)); New York City (New York City v. Arms Tech., Inc., No. 00 CV (E.D.N.Y. filed June 20, 2000)); New York State v. Sturm, Ruger & Co., No. 402586 (Sup. Ct. N.Y. County filed June 26, 2000). Almost all of the complaints are available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions> (last visited Feb. 28, 2001).

<sup>137</sup> The tobacco litigation served as a model for the gun litigation. See *infra* Part II.C.1.

<sup>138</sup> Ganim v. Smith & Wesson Corp. (Bridgeport), No. 06-CV-99-01531988 at 11, 1999 Conn. Super. LEXIS 3330, at \*12 (Conn. Super. Ct. Dist. Waterbury Dec. 10, 1999).

<sup>139</sup> See Paul M. Barrett & Bob Davis, *Administration Threatens Massive Suit Against Gun Industry to Force Changes*, WALL ST. J., Dec. 8, 1999, at A3.

<sup>140</sup> See *id.*

security for the prevention of gun violence within the housing authorities.<sup>141</sup>

The pressure on the gun manufacturers to settle the public entity claims is mounting, just as it did during the tobacco litigation. Yet, the gun manufacturers are far more vulnerable than were the cigarette companies. The cigarette companies have extremely deep pockets—in 1995, Americans spent \$48.7 billion on tobacco products, mostly on nearly 490 billion cigarettes<sup>142</sup>—but the gun industry's combined sales total only \$1.4 billion per year.<sup>143</sup> The tobacco industry seems to have survived the public entity litigation, but declining sales in the wake of the Brady Bill mean that perhaps only the largest gun manufacturers, like Colt's Manufacturing Co. or Beretta U.S.A., will survive the litigation.<sup>144</sup> Faced with the prospect of litigating against multiple local governments, gun manufacturers have met privately with negotiators for large American cities.<sup>145</sup> Indeed, Smith & Wesson, in a move similar to Liggett's early break with the tobacco industry,<sup>146</sup> has already agreed to a number of manufacturing, sales, and distribution "restrictions" in exchange for immunity from lawsuits by cities, states, and the federal government.<sup>147</sup> In addition, Colt's Manufacturing Co. recently reported that it will stop making commercial handguns in an attempt to avoid a potentially devastating jury verdict.<sup>148</sup>

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<sup>141</sup> See *id.* There has been no indication that the Bush Administration will advocate such a lawsuit, but the Bush Administration has no control over the local lawsuits.

<sup>142</sup> See Frank J. Chaloupka & Kenneth E. Warner, *The Economics of Smoking*, NATIONAL BUREAU OF ECONOMIC RESEARCH, NO. 7047, March, 1999, at 39.

<sup>143</sup> See Angie Cannon, *Now Gun Makers Are in the Crosshairs*, U.S. NEWS ONLINE, at <http://www.usnews.com/usnews/issue/990208/8guns.htm> (last modified Feb. 2, 1998). One might think \$1.4 billion dollars should be considered "deep pockets," but it is a modest figure relative to the litigation costs and potential awards arising out of lawsuits filed by thirty-three public entities.

<sup>144</sup> See *id.*

<sup>145</sup> See Myron Levin, *Gun Makers, Plaintiffs Discuss Settlement*, L.A. TIMES, Sept. 28, 1999, at C-3.

<sup>146</sup> See *supra* text accompanying notes 14-17.

<sup>147</sup> See Smith & Wesson Clarification of the March 17, 2000 Settlement Document Agreement, available at <http://www.smith-wesson.com/misc/agreement1.html>. Ironically, as the settlement repeatedly points out, Smith & Wesson already meets most of the standards required by the settlement. See generally *id.*

<sup>148</sup> Denise Lavoie, *Colt's to Stop Taking New Orders for Guns*, ASSOCIATED PRESS, available at [abcnews.com](http://abcnews.com), <http://www.abcnews.go.com/sections/us/dailynews/>

## B. Public Entity Claims

The local governments' lawsuits against the gun manufacturers allege a number of varying causes of action, but the most prevalent are products liability for design defect, failure to warn,<sup>149</sup> and negligent marketing and distribution.<sup>150</sup> Some of the public entity lawsuits have already been dismissed, while others have survived.<sup>151</sup> To date, the greatest success for gun litigation plaintiffs has actually been in a suit brought by private plaintiffs. In *Hamilton v. Accu-Tek*,<sup>152</sup> a Brooklyn jury held fifteen gun manufacturers liable under the negligent marketing and distribution theory.<sup>153</sup> The decision marked the first time that a court applying New York law had held a manufacturer liable for non-negligent manufacturing of a lawful, but dangerous, product and the first time that a gun manufacturer had ever been held liable for damages caused by criminal shootings.<sup>154</sup> The verdict and accompanying decision no doubt encouraged the local governments in their efforts to use litigation to regulate gun manufacturers' business practices.<sup>155</sup> Yet, the precedential value of *Hamilton* is unclear

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colt991011.html (last visited Feb. 28, 2001).

<sup>149</sup> New Orleans was the first city to use these theories. See Complaint at 14-16, *Morial v. Smith & Wesson Corp.* (New Orleans), No. 98-18578 (Parish of Orleans Civ. Dist. Ct. filed Oct. 30, 1998), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>150</sup> See Brief and Separately Bound Appendix of Plaintiffs-Appellants at 1, *Ganim v. Smith & Wesson Corp.* (Bridgeport), No. A.C. 20382 (Conn. App. Ct. May 1, 2000), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>151</sup> See discussion *infra* Parts II.B.1, II.B.2.

<sup>152</sup> 62 F. Supp. 802 (E.D.N.Y. 1999); see also discussion *infra* Part II.B.2.

<sup>153</sup> See 62 F. Supp. at 808.

<sup>154</sup> New York courts had previously rejected strict liability claims against manufacturers of guns and ammunition. See *McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (holding that a manufacturer of hollow point bullets was not liable on design defect claim because such bullets function as designed); *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762, 769 (E.D.N.Y. 1981) (holding that a shotgun working as designed was not unreasonably dangerous for its foreseeable use); see also *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 824 (E.D.N.Y. 1996) (holding that manufacturing and selling non-defective handguns was not grounds for strict liability under New York law). *Hamilton* is discussed in greater detail in Section 2, which analyzes the negligent marketing/distribution theory.

<sup>155</sup> Bridgeport has already cited the *Hamilton* decision in its appeal of the trial court's decision to grant the defendants' motion to dismiss. See Brief and Separately Bound Appendix of Plaintiffs-Appellants Mayor Joseph P. Ganim at 1 (Bridge-

because the Second Circuit recently certified to the New York Court of Appeals the main issues involved—whether gun manufacturers could be held liable for the non-defective manufacture and distribution of a lawful product and whether damages could be apportioned according to a market-share theory of liability (and if so, how).<sup>156</sup>

In general, there have been a sufficient amount of filings and decisions to warrant an examination of the individual claims filed by local governments against gun manufacturers and the merits of those claims.

1. Products Liability for Design Defect and Failure to Warn

- a. *Design Defect*

Most of the local governments suing the gun manufacturers included claims of products liability for defective design.<sup>157</sup> For example, New Orleans alleged that the guns sold were defective because the gun manufacturers failed to “employ alternative designs which would have reduced, if not prevented, many of plaintiffs’ damages.”<sup>158</sup> Yet, several private plaintiffs have tried to use this claim in lawsuits against gun or ammunition manufacturers, but such claims have repeatedly been dismissed.<sup>159</sup> These claims were dismissed either because the risk versus utility balancing typically sought by the plaintiffs does not even apply absent a defect in the product (in the sense that the product malfunctions),<sup>160</sup> or because the

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port), No. A.C. 20382 (Conn. App. Ct. May 1, 2000), *available at* Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>156</sup> See *Hamilton v. Accu-Tek*, 222 F.3d 36, 46 (2d Cir. 2000).

<sup>157</sup> See, e.g., Complaint at 14, *Morial v. Smith & Wesson Corp.* (New Orleans), No. 98-18578 (Parish of Orleans Civ. Dist. Ct. filed Oct. 30, 1998); Complaint at 12, *Atlanta v. Smith & Wesson Corp.*, No. 99-VS-0149217J (Fulton County Ct. filed Feb. 5, 1999); Plaintiffs’ First Amended Complaint at 35, *Boston v. Smith & Wesson Corp.*, No. 99-02590 (Suffolk County Super. Ct. filed June 3, 1999), *all available at* Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>158</sup> See Complaint at 14, *Morial*, No. 98-18578.

<sup>159</sup> See, e.g., *McCarthy*, 119 F.3d at 157; *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1997); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1272 (5th Cir. 1985).

<sup>160</sup> See *McCarthy*, 119 F.3d at 155. The *McCarthy* court explained that “[t]he

plaintiffs generally failed to identify any specific defect in the product that caused it to malfunction.<sup>161</sup> In other words, a gun that functions properly is not defectively designed simply because it is misused.

The design defect claims against gun manufacturers have appropriately been dismissed because they are not the kind of defect claims for which the Restatement (Second) of Torts provides a remedy. Section 402 of the Restatement states that a seller of a product may be held strictly liable for physical harm to a user or consumer if the product sold is "in a *defective* condition unreasonably dangerous to the user or consumer."<sup>162</sup> The comments to Section 402 state that a "defective condition" exists:

[W]here the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful . . . .<sup>163</sup>

Thus, although a gun is certainly dangerous, a consumer seeking to hold a gun manufacturer liable for design defect has the unenviable task of establishing that guns leave the sellers' hands in a "condition not contemplated by the ultimate consumer."<sup>164</sup> A consumer would have a difficult time proving that when he received a gun, he did not think that firing it at himself or another would cause damage.

Despite the lack of precedent in either case law or the Restatement, the local governments' design defect actions against the gun manufacturers have achieved a modest degree of success. For example, Boston's defective design claim survived a motion to dismiss, but the decision did not give much indication as to the merits of the claim.<sup>165</sup> Similarly, the

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purpose of the risk/utility analysis is to determine whether the risk of injury might have been reduced or avoided if the manufacturer had used a feasible alternative design. *Id.* (citing *Urena v. Biro Mfg. Co.*, 114 F.3d 259, 364 (2d. Cir. 1997)).

<sup>161</sup> See *Perkins*, 762 F.2d at 1272.

<sup>162</sup> RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) (emphasis added).

<sup>163</sup> *Id.* § 402A cmt. g.

<sup>164</sup> *Id.*

<sup>165</sup> The court acknowledged that the plaintiffs were using the design defect theory in a novel way, and that the court would reserve judgment until all the facts had been entered into the record. See *Boston v. Smith & Wesson Corp.*, No.

Cleveland design defect claim also survived a motion to dismiss.<sup>166</sup> Yet, the decision hinged on a federal court's interpretation of the Ohio Product Liability Act (the "Ohio Act"),<sup>167</sup> and that interpretation directly contradicted that of the state trial court hearing Cincinnati's suit.<sup>168</sup> The different interpretations of the Ohio Act in the Cleveland and Cincinnati cases are worth examining because they are illustrative of the fundamental problem in the gun manufacturer litigation—the claims are so broad and diffuse in nature that courts cannot adequately address them.

In an unusual move, the federal district court hearing Cleveland's suit held that the defendant gun manufacturers' argument that a manufacturer could only be held liable in strict products liability or negligent design for defects in a product at the time it left a manufacturer's plant failed because the plaintiffs alleged that *every* firearm of each defendant was defective.<sup>169</sup> The court's decision regarding the defendants' argument that a products liability action could not be based on the injuries resulting from the deliberate misuse of a product was also unusual. The court cited the case of *Perkins v. Wilkinson Sword*,<sup>170</sup> in which an Ohio state court held that the risk versus utility test of the Ohio Act could be used to show that the design of a properly functioning lighter was defective, as precedent for holding that a manufacturer's failure to incorporate safety features could provide a basis for liability.<sup>171</sup> That analogy was inappropriate as there is a fundamental difference between the two products—one is designed to light tobacco products or controlled fires, while the other is

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99-02590 at 36 n.74 (Conn. Super. Ct. Dist. Waterbury Dec. 10, 1999), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>166</sup> See *White v. Smith and Wesson Corp.* (Cleveland), No. 1:99 CV 1134 at 15 (N.D. Ohio 2000), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>167</sup> OHIO REV. CODE § 2307.71 et seq. (1988).

<sup>168</sup> See *White*, No. 1:99 CV 1134 at 15; *Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369 at 2, 1999 Ohio Misc. LEXIS 27, at \*5-6 (Oh. Ct. C.P. Oct. 7, 1999) [hereinafter *Cincinnati I*].

<sup>169</sup> See *White*, No. 1:99 CV 1134 at 15. The plaintiffs alleged that every gun sold was defective because they did not contain feasible safety mechanisms such as trigger locks. See *id.*

<sup>170</sup> 700 N.E.2d 1247 (Ohio 1998).

<sup>171</sup> See *White*, No. 1:99 CV 1134 at 15 (citing *Perkins*, 700 N.E.2d at 1250).

designed for target shooting, hunting, or self-defense.

The district court's decision in the Cleveland case was truly ironic in that three of the defendants, Glock, Inc.; H&R 1871, Inc.; and Hi-Point Firearms, removed the case from state court with the other defendants' consent.<sup>172</sup> Apparently, they would have fared better had they remained in state court. In *Cincinnati's* suit against the gun manufacturers, an Ohio state court reached a very different conclusion as to the validity of such design defect claims under Ohio state law:

Rather than identifying a specific product, specific defect, an identified manufacturer, and a specific injury with a causal connection, as the City acknowledges is *required* under the 1988 Ohio Product Liability Act, the complaint instead aggregates anonymous claims with no specificity whatsoever. To the extent the City pursues a theory of collective liability, no recognized theory of collective liability under Ohio law applies in these circumstances. Further, neither the law of Ohio nor any jurisdiction of which this Court is aware permits recovery in strict liability for the intentional use of a product to accomplish an intended result such as homicide or suicide.<sup>173</sup>

So, which court had it right, the federal or state court? It recently became clear that the federal court should have reserved judgment on such a novel theory of recovery until it had been resolved by the state courts. On August 11, 2000, Ohio's intermediate appellate court, the Ohio Court of Appeals, affirmed the state trial court's dismissal of *Cincinnati's* claims.<sup>174</sup> The court noted that the Ohio Act defines the "harm" for which a plaintiff can recover as including "death, physical injury to person, serious emotional distress, or physical damage to property."<sup>175</sup> *Cincinnati* was seeking to recover only for economic loss (money spent on services arising out of gun violence) and had alleged no damage to city property, and therefore it could not recover in strict liability under the Ohio

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<sup>172</sup> See *id.* at 2.

<sup>173</sup> *Cincinnati I*, No. A9902369 at 2, 1999 Ohio Misc. LEXIS 27, at \*5-6 (citations omitted) (emphasis added).

<sup>174</sup> See *Cincinnati V. Beretta U.S.A. Corp.*, No. A9902369 at 2 (Ohio Ct. App. Aug. 11, 2000), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001) [hereinafter *Cincinnati II*].

<sup>175</sup> See *id.* at 5.

Act.<sup>176</sup> The appellate court also echoed the trial court's language when it held that Cincinnati had failed to identify any *specific* product, defect, or defendant.<sup>177</sup>

The trial court's decision and the affirmation on appeal would suggest that Cincinnati's prospects for success are grim. Yet, Ohio, like many states, is currently in the midst of a decade-long battle over tort reform.<sup>178</sup> The highest court—the Ohio Supreme Court—is dominated by a four-judge majority that one commentator has described as a “super legislature.”<sup>179</sup> The majority has repeatedly declared tort reform legislation enacted by the Ohio General Assembly to be unconstitutional. In the most recent round, the Ohio Academy of Trial Lawyers and the Ohio AFL-CIO challenged the validity of 1998 Ohio Laws 350, a massive tort reform bill that amended, enacted, or repealed over 100 sections of the Ohio Revised Code.<sup>180</sup> This case should not even have been heard by the supreme court because the plaintiffs alleged no personal injury to establish standing in court—they merely claimed to be acting to prevent potential economic loss and for the general public good.<sup>181</sup> Nevertheless, the court took the opportunity to exercise judicial review, and held that the law “intrudes upon judicial power by declaring itself constitutional, by reenacting legislation struck down as unconstitutional, and by interfering with this court's power to regulate court procedure.”<sup>182</sup>

As the decision illustrated, the Ohio tort reform battle encompasses debates ranging from constitutional to products liability law, and it could easily be the subject of a hundred law review articles. The Ohio debate is relevant to this Note only insofar as it demonstrates that the scope of potential

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<sup>176</sup> See *id.*

<sup>177</sup> See *id.* at 6-7.

<sup>178</sup> See generally Stephen J. Werber, *Ohio Tort Reform in 1998: The War Continues*, 45 CLEV. ST. L. REV. 539 (1997) [hereinafter Werber, *The War Continues*]; Stephen J. Werber, *Ohio Tort Reform Versus the Ohio Constitution*, 68 TEMPLE L. REV. 1155 (1996).

<sup>179</sup> See Werber, *The War Continues*, *supra* note 178, at 539.

<sup>180</sup> See generally *State ex. rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

<sup>181</sup> See *id.* at 1079-80. Typically, the constitutionality of a law is challenged as various private civil actions act as vehicles to challenge different parts of a law, and the Court acknowledged that over twenty private challenges to various sections of the law were pending in Ohio courts. See *id.* at 1080 n.9.

<sup>182</sup> *Id.* at 1076.

liability under tort law and, in particular, products liability for design defect, such as that alleged in the local governments' lawsuits against the gun manufacturers, has expanded to the point where it touches on public policy. For example, whereas few people would argue against holding a gun manufacturer liable for damages resulting from the sale of a defective batch of guns that repeatedly discharged without the triggers being pulled, the question of whether a gun manufacturer can be held strictly liable for the non-negligent manufacturer and sale of a lawful product is too controversial to be decided by an entrenched, four-judge "super legislature." Judge Robert P. Ruehlman, in dismissing Cincinnati's suit against the gun manufacturers, wrote that the city's claims were "an improper attempt to have this court substitute its judgment for that of the legislature."<sup>183</sup> Yet, that is likely to happen when Cincinnati appeals.

The design defect debate is by no means confined to Ohio. Indeed, while the Boston design defect claim survived a motion to dismiss, the court in the Miami-Dade suit dismissed the plaintiffs' design defect claim for the exact same reasons as the state court in Cincinnati.<sup>184</sup> The conflicting opinions in the different jurisdictions indicate that the issue, while cloaked in the language of design defect, is really a question of the boundaries of products liability law. This Note will identify similar problems in the other claims used by the local governments, but this basic conflict indicates that the differences in the treatment of the local governments' claims actually reflect fundamental differences of opinion on public policy.

### b. *Failure to Warn*

Another theory upon which the public entity plaintiffs are seeking to hold the gun manufacturers liable is failure to

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<sup>183</sup> *Cincinnati I*, No. A99-02369 at 2, 1999 Ohio Misc. LEXIS 27, at \*4 (Oh. Ct. C.P. Oct. 7, 1999).

<sup>184</sup> The court held that "[t]he County's products liability counts fail because they fail to state claims for a particular plaintiff injured as a result of a specific alleged defect in a particular product." *Penelas v. Arms Tech., Inc.* (Miami-Dade), No. 99-01941 CA-06 at 5 (11th Cir. Ct. Miami-Dade County Dec. 13, 1999) (citations omitted), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

warn.<sup>185</sup> The plaintiffs are arguing that the gun manufacturers have failed to adequately warn consumers of the dangers of gun use.<sup>186</sup> This theory, like the design defect theory, has consistently failed when advanced by private plaintiffs against gun manufacturers because there is no obligation to warn when the dangers inherent in the use of a product are open and obvious.<sup>187</sup>

Similarly, the public entities' claim of failure to warn does not seem to be the kind of action envisioned by the drafters of the Restatement (Second) of Torts. The Restatement states that "a seller is not required to warn with respect to products . . . when the danger, or potentiality of danger, is generally known and recognized."<sup>188</sup> Thus, guns are not "unreasonably dangerous" under Section 402 of the Restatement because everyone is well aware that a properly functioning gun can cause serious injury or death and that guns are, in fact, designed to injure or kill.<sup>189</sup>

Nevertheless, each court that has rendered a decision in the local governments' lawsuits has treated the failure to warn claims in the same manner as it treated the design defect claims. The federal court hearing Cleveland's suit held that the court could not say, as a matter of law, that the dangers of gun use were well known; rather, the court held that the issue was one of fact for a jury to decide.<sup>190</sup> That holding was, of course, contradicted by both the state trial and appellate courts hearing Cincinnati's suit.<sup>191</sup> In likening the failure to warn claim to that of design defect, the Ohio Court of Appeals held, "The city's failure to warn claims . . . miss the mark, too, not only

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<sup>185</sup> See, e.g., Complaint at 15-16, *Morial v. Smith & Wesson Corp.* (New Orleans), No. 98-18578 (Parish of Orleans Civ. Dist. Ct. filed Oct. 30, 1998), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>186</sup> See *id.*

<sup>187</sup> See *Treadway v. Smith & Wesson Corp.*, 950 F. Supp. 1326, 1332 (E.D. Mich. 1996); *Delahanty v. Hinckley*, 564 A.2d 758, 760 (D.C. 1989).

<sup>188</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. j. (1965).

<sup>189</sup> See *Treadway*, 950 F. Supp. at 1336.

<sup>190</sup> See *White v. Smith & Wesson Corp.* (Cleveland), No. 1:99 CV 1134 at 17 (N.D. Ohio 2000), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>191</sup> See *Cincinnati I*, No. A9902369 at 3, 1999 Ohio Misc. LEXIS 27, at \*10-11 (Oh. Ct. C.P. Oct. 7, 1999), *aff'd*, *Cincinnati II*, No. A9902369 (Ohio Ct. App. Aug. 11, 2000).

due to the city's failure to identify injuries caused by specific manufacturers or products, but also because the manufacturers have no duty to give warnings about the obvious dangers of handguns."<sup>192</sup> Similarly, in the Boston case, the court treated the failure to warn claim as it did the design defect claim. The court held that it could not declare, as a matter of law, that the dangers posed by firearms were open and obvious.<sup>193</sup>

Thus, each court treated the products liability claims in the same manner. Most likely, this was because the courts that allowed one products liability claim to proceed had more expansive views of the limits of products liability law, and thus also allowed other products liability claims to proceed. Likewise, the courts with the more narrow, traditional view of products liability law dismissed all products liability claims. This trend, sure to continue as courts in other jurisdictions render decisions, also reveals a fundamental problem in the gun manufacturer litigation, namely, that the theories advanced reach the limits of the law and enter into the realm of public policy.

## 2. Negligent Marketing and Distribution

The greatest success in the litigation against the gun manufacturers has been *Hamilton v. Accu-Tek*,<sup>194</sup> in which relatives of six people killed by handguns and one handgun violence survivor and his mother sued twenty-five handgun manufacturers.<sup>195</sup> Federal District Court Judge Jack B. Weinstein

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<sup>192</sup> *White*, No. 1:99 CV 1134 at 8.

<sup>193</sup> See *Boston v. Smith & Wesson Corp.*, No. 99-02590 at 38 (Suffolk County Super. Ct. July 13, 2000), available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>194</sup> 62 F. Supp. 2d 802 (E.D.N.Y. 1999). Developments during the *Hamilton* case prompted Temple law professor David Kairys, who in 1996 joined a mayoral commission on youth violence in Philadelphia, to propose to Philadelphia Mayor Edward Rendell that Philadelphia file a nuisance suit against the gun industry. See Paul M. Barrett, *Evolution of a Cause: Why the Gun Debate has Finally Taken Off*, WALL ST. J., Oct. 21, 1999, at A19 [hereinafter Barrett, *Evolution of a Cause*]. In 1997, Mayor Rendell retained Kairys to draft such a suit, but it was never filed. See *id.* In January, 1998, Kairys stopped representing Philadelphia and faxed or mailed over 100 copies of "litigation blueprints" to municipal lawyers throughout the country. See *id.* Kairys became a legal advisor to most of the public entities suing the gun industry. See *id.*

<sup>195</sup> See *Hamilton*, 62 F. Supp. at 808.

of the Eastern District of New York entered a decision after a Brooklyn jury had found fifteen of the gun manufacturers liable for negligent marketing and distribution of handguns.<sup>196</sup> The court apportioned damages according to each handgun manufacturer's share of the total handgun market.<sup>197</sup> *Hamilton* marked the first time that a court applying New York law had held a manufacturer liable for non-negligent manufacturing of a dangerous product, and the first time that gun manufacturers had ever been held liable for damages caused by criminal shootings.<sup>198</sup> In fact, in the *Hamilton* decision, Judge Weinstein noted that in New York, manufacturers of guns and ammunition could only be held strictly liable if the product were defective or unreasonably dangerous for its foreseeable use.<sup>199</sup> Judge Weinstein wrote:

Recovery in strict liability is predicated on the existence of a defect, either in the design of the product, the manufacture of the product or the warnings provided by the manufacturer. On the ground that the proof failed to fit the case into one of these categories, courts have rejected strict liability claims against manufacturers of guns and ammunition.<sup>200</sup>

Having rejected the plaintiffs' design defect claim, Judge Weinstein turned to the theory that the gun manufacturers were liable for negligent marketing and distribution of their products.<sup>201</sup> Judge Weinstein wrote, "The precise duty alleged in this case is that of handgun manufacturers to exercise reasonable care in marketing and distributing their products so as to guard against the risk of criminal misuse."<sup>202</sup> This theory was subtly different from those that had previously failed to hold gun manufacturers liable for criminal shootings because it alleged that while "the sale of the weapon is not itself tortious, the method of sale and distribution by producers may be."<sup>203</sup>

The causation requirement necessary to sustain a negligent marketing claim is very similar to that of a lawsuit in

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<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 845.

<sup>198</sup> See *supra* note 154.

<sup>199</sup> See *Hamilton*, 62 F. Supp. 2d at 825.

<sup>200</sup> *Id.* at 824.

<sup>201</sup> See *id.* at 823-24.

<sup>202</sup> *Id.* at 824.

<sup>203</sup> *Id.* at 825.

mass tort.<sup>204</sup> In either type of lawsuit, liability turns only on a statistical probability of causation and a causal link between the plaintiff and defendant.<sup>205</sup> Judge Weinstein explained this similarity in *Hamilton* by describing the causation requirements of a mass tort suit:

[P]laintiffs prove causation by establishing by a preponderance of the evidence that exposure to a particular substance causes the disease in question, and that exposure to this product—regardless of who may have manufactured the unit involved—caused the plaintiffs to develop the disease. The burden then shifts to the defendant to disprove causation. Liability is then apportioned according to the degree of risk posed by individual defendants, as measured by each one's share of the relevant market.<sup>206</sup>

Similarly, the plaintiffs in *Hamilton* sought to prove that the gun manufacturers' allegedly indiscriminate marketing and distribution practices generated an underground market in handguns, which provided youths and criminals with easy access to dangerous firearms,<sup>207</sup> and thus facilitated criminal misuse.<sup>208</sup>

It is ironic that Judge Weinstein drew a comparison between negligent marketing and mass tort lawsuits in this novel case because mass tort litigation has a dubious history.<sup>209</sup> Indeed, mass tort lawsuits have been criticized for several reasons. First, they frequently involve great variations in damages and "uncertain evidence of liability and causation."<sup>210</sup> Defendants who are pressured into settling in the face of uncertain claims are left believing that the process is unfair.<sup>211</sup> Furthermore, aggregation of a massive number of claims through class certification can create an "all or nothing risk" that forces companies to either settle or risk bankruptcy.<sup>212</sup>

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<sup>204</sup> Judge Weinstein specifically made this comparison in *Hamilton*. See *Hamilton*, 62 F. Supp. at 834.

<sup>205</sup> See *id.*

<sup>206</sup> *Id.* at 834-35.

<sup>207</sup> See *id.* at 844.

<sup>208</sup> *Id.*

<sup>209</sup> See *supra* Introduction.

<sup>210</sup> Report of the Advisory Committee, *supra* note 9, at 36.

<sup>211</sup> Report of the Advisory Committee, *supra* note 9, at 36; see also Symposium, *supra* note 9, at 338; FED. R. CIV. P. 23(a) (1966 amendment to advisory committee's notes).

<sup>212</sup> On May 15, 1995, before the tobacco and gun manufacturer litigation had even begun, the Dow Corning Corp., holder of the largest share of the breast

Such a risk can force defendants to settle even meritless claims and to accept unjustifiable settlement terms.<sup>213</sup> However, a number of circuit courts have decertified classes in national mass tort class action lawsuits because of the insurmountable pressure on defendants to settle and the overly broad variations in liability and damages.<sup>214</sup>

The irony that Judge Weinstein would make a comparison to mass tort litigation stems from the fact that the same criticisms of the validity of mass tort lawsuits apply to the negligent marketing theory that succeeded in *Hamilton*. The decision in *Hamilton* was an unprecedented expansion of existing tort law. As mentioned, Judge Weinstein stated outright that strict products liability theories were insufficient to hold handgun manufacturers liable for third party misuse of handguns.<sup>215</sup> Yet, Weinstein also stated that "[u]nder New York negligence law, duties of manufacturers parallel in many respects those imposed by strict products liability."<sup>216</sup> Given this interrelationship between the strict products liability and negligence law standards, and the plaintiffs' failure to meet the requirements for strict products liability, it would seem that a negligence claim should also fail. Instead, Weinstein stated that the limits of strict products liability warranted application of "classic negligence law."<sup>217</sup> Even though the New York Court of Appeals has not recognized a duty of care

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implant market, filed for reorganization under Chapter 11 of the Bankruptcy Code due to burdens imposed by breast implant litigation, despite the fact that Dow had joined a global settlement and despite the fact that to this day there has yet to be published a single peer-reviewed study that supports the central allegation behind the lawsuit—that silicone breast implants cause disease. See *In re Dow Corning Corp.*, 86 F.3d 482, 486 (6th Cir. 1996); *In re Dow Corning Corp.*, 187 B.R. 919, 919-23 (E.D. Mich. 1995); see also *supra* note 10 and accompanying text.

<sup>213</sup> Report of the Advisory Committee, *supra* note 9, at 20; see also Symposium, *supra* note 9, at 338.

<sup>214</sup> See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1076 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).

<sup>215</sup> See *supra* notes 199-200 and accompanying text.

<sup>216</sup> *Hamilton v. Accu-Tek*, 62 F. Supp. 802, 823 (E.D.N.Y. 1999) (citing *Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 387, 570 N.E.2d 198, 203, 568 N.Y.S.2d 550, 555 (1991) (holding that a failure to warn claim is identical to a negligence claim) and *Lancaster Silo & Block Co. v. N. Propane Gas Co.*, 75 A.D.2d 55, 62, 427 N.Y.S.2d 1009, 1014 (4th Dep't 1980) (holding that in a design defect case there is little difference between a claim in negligence and strict liability)).

<sup>217</sup> See *Hamilton*, 62 F. Supp. 2d at 823.

regarding marketing and distribution of non-defective but dangerous products,<sup>218</sup> Weinstein nevertheless held the handgun manufacturers liable.

The negligent marketing theory is particularly disturbing in the context of public entity lawsuits against gun manufacturers because the use of the theory amounts to a broad, concerted effort to implement what has been called "product-category liability."<sup>219</sup> While courts have generally rejected manufacturer liability absent a design defect in the product,<sup>220</sup> the goal in the gun litigation seems to be the imposition of liability without defect on manufacturers of socially disfavored products.<sup>221</sup> The plaintiffs seek to hold gun manufacturers liable for the costs associated with gun violence without ever identifying individual victims who have been harmed by guns, individual criminals who have used guns to harm others, or individual gun manufacturers that sold the specific guns used to cause damage.<sup>222</sup>

This approach represents a step towards judicial acceptance of the theory that some products should never have been distributed to begin with. Such a theory would have a number of undesirable results. First, it would undermine any accurate determination of variation among different manufacturers' culpability.<sup>223</sup> For example, in *Hamilton*, the defendant gun

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<sup>218</sup> See *id.* at 824. The New York Court of Appeals has explained the standard: Where a product presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to detailed plans and specifications, it is said to be defectively designed. This rule, however, is tempered by the realization that some products, for example knives, must by their very nature be dangerous in order to be functional.

Robinson v. Reed-Prentice Div. of Package Machinery Co., 49 N.Y.2d 471, 479, 403 N.E.2d 440, 443, 426 N.Y.S. 717, 720 (1980).

<sup>219</sup> See generally Henderson & Twerski, *supra* note 121.

<sup>220</sup> See *id.* at 1296-97.

<sup>221</sup> See *id.* at 1323.

<sup>222</sup> Accurate determination of causation seems particularly unlikely because a large portion of guns used in crimes are never recovered. See *Hamilton*, 62 F. Supp. 2d at 843. There frequently is no "smoking gun" and thus no truly accurate identification of which gun manufacturer sold the gun in question.

<sup>223</sup> See Henderson & Twerski, *supra* note 121, at 1303. Henderson and Twerski used the example of the difficulty in establishing which cigarette manufacturer should be held liable for illness suffered by a plaintiff who had used multiple tobacco products. See *id.* (citing Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631, 662 n.207 (1987); Note, *The Great American Smokeout: Holding Cigarette Manufacturers Liable for Failing to Provide Adequate Warnings*

manufacturers argued that the negligent marketing theory and apportionment of liability based on each gun manufacturer's share of the gun market failed to take into account variations between each gun manufacturer's ratio of negligent to non-negligent sales.<sup>224</sup> On its face, this argument seems eminently reasonable—finding fifteen gun manufacturers liable for negligent marketing would seem to warrant a determination of the ratio of negligent to non-negligent sales for each gun manufacturer. Yet, Weinstein stated:

The precise breach alleged and proved against the [gun manufacturers] was their overall policy and practice of indiscriminate marketing and distribution of handguns. Given the nature of the breach, as found by the jury, any variations in the ratio of tortious to non-tortious sales among the negligent defendants must be regarded as accidental and irrelevant rather than a reflection of differing degrees of culpability.<sup>225</sup>

In addition to eliminating any apportionment of liability among gun manufacturers, acceptance of a product-category liability theory for gun manufacturers would create the insurmountable problem of determining which products fit into the category.<sup>226</sup> For example, the debate over "Saturday Night Specials" resulted in one court holding manufacturers of a certain classification of gun liable for resulting damages.<sup>227</sup> "Saturday Night Specials" are generally defined as small, inexpensive, poorly manufactured, inaccurate, and unreliable lightweight handguns with short barrels that are easily concealed, and thus ideal for criminal misuse.<sup>228</sup> Yet, such a determination fails to take into account any benefit produced by such guns—most notably the availability of an affordable means of protection.<sup>229</sup> Regardless of whether the social burden caused by the availability of such guns outweighs the social utility, it is virtually impossible for a court to effectively make such a calculation.<sup>230</sup> Similarly, it is impossible for a court to tackle

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of the *Hazards of Smoking*, 27 B.C. L. REV. 1033, 1047-49 & n.118 (1986)).

<sup>224</sup> *Hamilton*, 62 F. Supp. 2d at 845.

<sup>225</sup> *Id.* at 845 (citations omitted).

<sup>226</sup> See Henderson & Twerski, *supra* note 121, at 1305.

<sup>227</sup> See *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1160 (Md. 1985).

<sup>228</sup> See *id.* at 1153-54.

<sup>229</sup> See Henderson & Twerski, *supra* note 121, at 1306.

<sup>230</sup> See *id.*

the problem of determining which handguns, out of the thousands of different types available today, fit the "Saturday Night Special" classification.<sup>231</sup> As two commentators have noted, "To be answered rationally, the question whether handguns of a particular size and monetary price are 'good for society' would require extended legislative or administrative hearings and investigations."<sup>232</sup>

This problem grows to an unimaginable scale in public entity lawsuits against gun manufacturers. No court can adequately address the issues of which type of firearm has a net social utility, which manufacturer negligently markets its guns, or what percentage of each "negligent" gun manufacturer's sales were legitimate or negligent. Such issues can only be properly addressed, if at all, by legislatures. Put simply, the negligent marketing theory is a step towards product-category liability, which would be an expansion of tort law into the province of legislatures.

### C. Policy

The public entity lawsuits of the gun manufacturers are following the same pattern as the public entity lawsuits against the tobacco companies. For example, the proliferation of gun violence involving youths, and, in particular, events such as the Columbine High School shooting, have created a general anti-gun sentiment among the public,<sup>233</sup> even though gun violence as a whole has fallen off dramatically in recent years.<sup>234</sup> In addition, future settlements in the gun manufacturer litigation will likely include advertising and sales restrictions, and will likely cause increases in gun prices resulting from increased costs to manufacturers (for compliance with safety restrictions).<sup>235</sup> Similarly, the tobacco settlement in-

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<sup>231</sup> See *id.*

<sup>232</sup> See *id.*

<sup>233</sup> After the Columbine High School shooting, President Clinton proposed a large gun control bill. See Barrett, *Evolution of a Cause*, *supra* note 194, at A19.

<sup>234</sup> There were 16,914 homicides nationwide in 1998, of which 10,975 involved guns. This was down from 18,210 homicides in 1997, of which 12,346 involved guns. Robberies involving guns fell to 38% of robberies nationwide in 1998, down from 40% in 1997. Fox Butterfield, *F.B.I. Study Finds Gun Use In Violent Crimes Declining*, N.Y. TIMES, October 18, 1999, at A19.

<sup>235</sup> President Clinton has indicated that the goal of the current local gun manu-

volved restrictions on advertising and sales<sup>236</sup> and caused cigarette price increases.<sup>237</sup>

### 1. Coordination and Settlement Pressure

The regulations sought by the plaintiffs indicate that the gun manufacturer litigation, like the tobacco litigation, is based more on the use of settlement pressure to impose regulations than on legal causation and liability. The policy orientation of the lawsuits against the gun manufacturers was clear in the events leading up to the *Hamilton* decision. Freddie Hamilton, the lead plaintiff in *Hamilton*, was referred to her lawyer by Barbara Holt, an anti-gun activist and member of the all-volunteer New Yorkers Against Gun Violence organization.<sup>238</sup> The plaintiffs' lawyer in *Hamilton*, Elisa Barnes, cited the tobacco litigation as a guide in her suit against the gun manufacturers.<sup>239</sup> Ms. Barnes, speaking on the subject of gun litigation, said, "You don't need a legislative majority to file a lawsuit," and "[u]ltimately it was the litigation, and the danger of punitive damages, that brought the cigarette companies to the table."<sup>240</sup> Ms. Barnes found a willing participant in Judge Weinstein, who parted with prior New York case law and held that gun manufacturers could be found liable for negligent marketing and distribution of guns.<sup>241</sup>

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facturer lawsuits and threatened federal suit is to force gun manufacturers to stop "irresponsible marketing practices" and to accept "safety design changes." Press Conference with President Bill Clinton, Subject: Middle East and His Agenda for Next Year, Dean Acheson Auditorium, Department of State 5 (Dec. 9, 1999), (transcript available from FEDERAL NEWS SERVICE, INC.). [hereinafter Press Conference].

<sup>236</sup> See *supra* Part I.A.

<sup>237</sup> On November 24, 1998, Philip Morris and R.J. Reynolds announced a price increase of forty-five cents per pack to help them pay for the settlement with the states. Skipp Wollenberg, *Record Price Hike for Cigarettes*, ABCNEWS.COM, Nov. 25, 1998, at <http://abcnews.go.com/sections/us/DailyNews/cigarettes981124.html> (last visited Feb. 16, 2001).

<sup>238</sup> See Barrett, *Evolution of a Cause*, *supra* note 194, at A1.

<sup>239</sup> *Id.* at A19.

<sup>240</sup> *Id.*

<sup>241</sup> See *Hamilton v. Accu-Tek*, 62 F. Supp. 802, 839 (E.D.N.Y. 1999). Judge Weinstein is an outspoken supporter of judicial activism. In his book, Judge Weinstein wrote, "By their very nature, these [mass tort] cases involve unanticipated problems with wide-ranging social and political ramifications. A judge does not 'legislate from the bench' because he or she considers the broadest implications of his or her decision in such a case. Judges not only may take such a view, they

Although many of the municipalities and counties that have sued the gun manufacturers based their complaints on the negligent marketing theory that succeeded in the *Hamilton* case,<sup>242</sup> the main blueprint for the gun litigation was the highly coordinated tobacco litigation. In the tobacco litigation, a group of plaintiffs' lawyers, the Castano Group, initiated numerous private lawsuits against the tobacco industry and coordinated and consulted with state and federal officials on many of the governments' tobacco lawsuits.<sup>243</sup> In May, 1998, Wendell Gaultier, a founding member of the Castano Group, called Dennis Henigan, a former corporate litigator with Washington's Foley & Lardner who changed sides and was hired to start the Center to Prevent Handgun Violence's litigation unit.<sup>244</sup> This began a pattern of collaboration identical to that in the tobacco litigation—Henigan and the Castano Group offered to pay the costs of the cities' lawsuits against gun manufacturers in return for twenty percent of all settlements or thirty percent of all jury awards.<sup>245</sup> Henigan and the Castano Group helped convince New Orleans Mayor Marc Morial to file the first suit on behalf of a city against the gun industry.<sup>246</sup>

The plaintiffs and anti-gun groups have improved upon the coordination that played such a large role in the tobacco litigation. In particular, web sites such as the Firearms Litigation Clearinghouse<sup>247</sup> not only put plaintiff's lawyers and activists nationwide in contact with one another, but also provide a medium through which hundreds of complaints, briefs, decisions, and information on shootings or individual gun manufacturers can be exchanged.<sup>248</sup> The site also encourages visitors

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must." JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 92-3 (1995).

<sup>242</sup> See, e.g., First Amended Complaint at 7, *Chicago v. Beretta U.S.A. Corp.*, No. 98-CH15596 (Cook County Cir. Ct. filed Nov. 12, 1998); Brief and Separately Bound Appendix of Plaintiffs-Appellants at 1, *Ganim v. Smith & Wesson Corp.* (Bridgeport), No. CV-99-0361279 (Conn. App. Ct. filed Jan. 27, 1999), all available at Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>243</sup> See MOLLENKAMP ET AL., *supra* note 13, at 74.

<sup>244</sup> See Peter J. Boyle, *Big Guns*, THE NEW YORKER, May 17, 1999, at 54.

<sup>245</sup> See *id.* at 61.

<sup>246</sup> See *id.*

<sup>247</sup> <http://www.firearmslitigation.org> (last visited Feb. 28, 2001).

<sup>248</sup> See *id.*

to explore whether they might be entitled to compensation through civil litigation as a result of gun violence<sup>249</sup> and provides a phone number to call for referrals to attorneys.<sup>250</sup> This level of coordination among plaintiffs far exceeds that of the plaintiffs in the tobacco litigation. Given that less sophisticated coordination in the tobacco litigation forced a \$48.7 billion (sales) industry to agree to a nation-wide settlement, the pressure on the gun manufacturers to settle, as Smith & Wesson already has, must be overwhelming.

The pressure now imposed upon the gun manufacturers raises all the concerns that came to light in several national class action mass tort lawsuits.<sup>251</sup> The process of using national class action lawsuits to force settlement, regardless of the merits of the claims involved, has been referred to as "legalized blackmail"<sup>252</sup> because entire industries must settle not only to minimize bad publicity,<sup>253</sup> but also to avoid bankruptcy at the hands of a jury or as a result of litigation costs.<sup>254</sup> Litigating on a national scale can bankrupt companies or force them to alter their manufacturing and marketing practices even though the manufacturers are selling non-defective, lawful products. The decision to impose regulations on manufacturers of non-defective, lawful products is not one that should be made by plaintiff's lawyers, activists, or "super legislature" judiciaries. Such decisions should be made by legislatures through the process of representative government.

## 2. Negligent Plaintiffs

Apart from the questionable tort theories and policy justifications, the public entity gun lawsuits are particularly hypocritical because many of the cities suing under theories of neg-

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<sup>249</sup> See <http://www.firearmslitigation.org/rtk.html> (last visited Feb. 28, 2001).

<sup>250</sup> See <http://www.firearmslitigation.org/intro.html#services> (last visited Feb. 28, 2001).

<sup>251</sup> See *supra* notes 209-213 and accompanying text.

<sup>252</sup> See *supra* note 10 and accompanying text.

<sup>253</sup> Publicly owned companies have the added burden of having to worry about share price. On the day that the Justice Department filed its suit against the tobacco industry, shares of Philip Morris fell \$1.125 to \$34.50, while shares of R.J. Reynolds fell \$1.1875 to \$27.3125. See David S. Cloud & Gordon Fairclough, *U.S. Sues Tobacco Makers in Massive Case*, WALL ST. J., Sept. 23, 1999, at A3.

<sup>254</sup> See *supra* notes 103 & 212.

ligent marketing and distribution have actually sold the same guns in the same manner as the manufacturers.<sup>255</sup> During the 1980s, police departments in numerous cities began the practice of recycling their used guns into the consumer market through trade-ins or resales.<sup>256</sup> This practice saves police departments money because gun manufacturers offer the departments large discounts for trade-ins, which the manufacturers then sell to wholesalers.<sup>257</sup> Federal Bureau of Alcohol, Tobacco, and Firearms statistics show that in 1998, at least 1,100 former police guns were among the 193,203 crime guns traced.<sup>258</sup> In October 1998, the International Association of Chiefs of Police enacted a resolution which stated that "recirculation of these firearms back into the general population increases the availability of firearms which could be used again to kill or injure additional police officers and civilians."<sup>259</sup>

Gun manufacturers have also accepted guns seized from crime scenes in trade-ins with municipalities.<sup>260</sup> New Orleans, the first city to sue the gun manufacturers, recently recycled 7,300 guns by selling them to an Indiana broker, even though many of the guns, including TEC-9s and other semiautomatics that have been banned from importation and manufacture since 1994, were confiscated from criminals.<sup>261</sup> New Orleans' suit against the gun manufacturers demands, as part of the remedy, that manufacturers be required to equip guns sold with safety locks, yet no such condition was attached to the sale of guns by New Orleans.<sup>262</sup> Similarly, Boston recently sold roughly 2,350 9mm pistols to gun wholesaler Interstate

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<sup>255</sup> Vanessa O'Connell & Paul M. Barrett, *Unloading Old Police Guns: More Cities Ban Trade-Ins and Resales*, WALL ST. J., Nov. 10, 1999, at B1 [hereinafter O'Connell & Barrett, *Unloading*].

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Vanessa O'Connell & Paul M. Barrett, *Ricochet: Cities Suing Gun Firms Have a Weak Spot: They're Suppliers, Too*, WALL ST. J., Aug. 16, 1999, at A1 [hereinafter O'Connell & Barrett, *Ricochet*].

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*; see also Walter Olson, *Big Guns: Plaintiffs' Lawyers Declare Themselves the "Fourth Branch of Government" and Go After Firearms, Lawyers Guns and Money*, at [http://www.lawyersgunsandmoney.com/forth\\_branch\\_of\\_government.htm](http://www.lawyersgunsandmoney.com/forth_branch_of_government.htm) (last visited Feb. 28, 2001).

<sup>262</sup> Olson, *supra* note 261.

Arms Corp. ("Interstate") for \$324.87 each.<sup>263</sup> Interstate then charged Boston \$324.87 for each new .40 caliber Glock that the city purchased.<sup>264</sup> Nevertheless, Boston, in its suit against the gun manufacturers, has alleged "willful blindness" in the gun manufacturers' marketing and distribution practices.<sup>265</sup>

The most disturbing behavior of certain municipalities comes in the wake of the Violent Crime Control and Law Enforcement Act of 1994,<sup>266</sup> which prohibited the manufacture of gun magazines that can hold more than ten rounds.<sup>267</sup> Beginning in 1994, that restriction caused an increase in demand for larger magazines,<sup>268</sup> but did not apply to law-enforcement agencies. Thus, wholesalers, seeing an opportunity to earn money, made offers to police departments to trade in their used guns, which had the larger magazines.<sup>269</sup> The wholesalers then re-sold the larger magazines for two to three times their "pre-ban" value.<sup>270</sup> Municipal police departments have thus participated in the recirculation of prohibited magazines into the civilian market.

The hypocritical nature of New Orleans' and other cities' lawsuits is not merely a public relations matter. These municipalities are essentially gun suppliers and the gun manufacturers could defend themselves by accusing the municipalities of negligence in distributing used police guns or seized guns.<sup>271</sup> In anticipation of the problems arising from their own hypocrisy, New Orleans, Miami, St. Louis, and Bridgeport have indicated that they are considering ending the practice of recycling police guns into the civilian market.<sup>272</sup>

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<sup>263</sup> O'Connell & Barrett, *Ricochet*, *supra* note 258, at A1.

<sup>264</sup> *Id.*

<sup>265</sup> Complaint at 2, *Boston v. Smith & Wesson Corp.*, No. 99-2590C (Mass. Sup. Ct. filed June 3, 1999), available at Firearms Litigation Clearinghouse, <http://firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>266</sup> H.R. 3355, 103rd Cong., 2d. Sess. (1994).

<sup>267</sup> See 18 U.S.C.S. § 921(a)(31)(A) (2000).

<sup>268</sup> O'Connell & Barrett, *Ricochet*, *supra* note 258, at A1.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> O'Connell & Barrett, *Unloading*, *supra* note 255, at B1.

<sup>272</sup> *Id.*

### 3. Politics

It seems that the local governments' lawsuits against the gun manufacturers are motivated more by the prospect of regulating the manufacturers and generating revenue through settlements than by a desire to redress past wrongs. In fact, St. Louis Mayor Clarence Harmon, in a letter written in support of U.S. Senator Dick Durbin's proposed Gun Industry Accountability Act,<sup>273</sup> which would allow cities, counties, and states to recover federal money spent on firearms-related medical costs, stated outright that because urban tax bases are shrinking, cities must find new ways to recover costs for problems that could be prevented by increased industry regulation.<sup>274</sup>

The federal government, once again, has been a late entry into the conflict between the public entities and industries and it has displayed great enthusiasm for using litigation to impose regulations. Rather than just participating in settlement talks, President Clinton has threatened a massive suit by HUD to force gun manufacturers to accept regulating settlement terms.<sup>275</sup> Recent statements give some indication as to the Clinton Administration's motives. On December 9, 1999, President Clinton, during his press conference on the Middle East and his agenda for the year 2000, was asked:

Sir, on another legal matter, your threat of a class action suit against gun manufacturers, is this an attempt, sir, through either coercion or ultimately the judicial branch to get accomplished what you couldn't get accomplished through legislation? And with the difficulties that you've had recently getting some of your initiatives passed in Congress as you head into this last year of your presidency, is this the hint of a new tactic to get those initiatives passed when you can't get them through Congress?<sup>276</sup>

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<sup>273</sup> S. 560, 106th Cong. (1999).

<sup>274</sup> Knighttridder News Service, *Legal Battle Brewing Over Gun Violence*, THE SALT LAKE TRIBUNE, Mar. 11, 1999, available at [http://www.sltrib.com/1999/mar/03111999/nation\\_w/89702.htm](http://www.sltrib.com/1999/mar/03111999/nation_w/89702.htm) (last visited Feb. 16, 2001).

<sup>275</sup> See *supra* notes 139-141.

<sup>276</sup> Press Conference, *supra* note 235, at 4-5.

### President Clinton answered:

The litigation which is being initiated by public housing authorities has a good grounding in fact. There are 10,000 gun crimes committed every year in the largest public housing authorities.

Now they spend a billion dollars on security. And I think it's important that the American people know they are not asking for money from the gun manufacturers; they are seeking a remedy to try to help solve the problem. They want, first of all, more care in manufacturers and the dealers with whom they deal. The second thing they want to do is to stop irresponsible marketing practices. And the third thing they want is some safety design changes . . . so I'm continuing to work with Congress, and I will do so vigorously. But I think the—this was an appropriate thing to do on the merits.<sup>277</sup>

Presidential spokesman Joe Lockhart, speaking to reporters before President Clinton's press conference, was more blunt when he said, "The legislative branch certainly has enough authority [to pass laws]. Should they choose not to exercise that, we have other ways of doing it."<sup>278</sup> Since the goal of tort law is to provide plaintiffs with a means of recovering for damages suffered,<sup>279</sup> President Clinton's statement reveals that the law suits against the gun manufacturers have less to do with recovery in tort than they do with using the judicial system to impose regulations that are legislative in nature.

The recent dismissals of the public entity lawsuits in Cincinnati, Bridgeport, and Miami-Dade<sup>280</sup> suggest that the gun manufacturers should not yield to settlement pressure too quickly. In addition, numerous state legislatures have attempted to prevent city and county lawsuits against the gun manufacturers by enacting legislation specifically drafted to prohibit counties or municipalities from filing such lawsuits.<sup>281</sup> The

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<sup>277</sup> *Id.* at 5.

<sup>278</sup> Paul M. Barrett, *Gun Industry Leader Backs Clinton Bid for Pact*, WALL ST. J., Dec. 9, 1999, at B16 (alteration in original).

<sup>279</sup> See PROSSER & KEETON, *supra* note 41, at 5-6.

<sup>280</sup> *Cincinnati I*, No. A99-02369 (Ohio Ct. C.P. Oct. 7, 1999); *Ganim v. Smith & Wesson Corp.* (Bridgeport), No. CV-99-0361279 (Conn. Super. Ct. Dec. 10, 1999); *Penelas v. Arms Tech., Inc.* (Miami-Dade), No. 99-01941-CA-06 (Fla. Cir. Ct. Miami-Dade County Dec. 13, 1999), *all available at* Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org/decisions.html> (last visited Feb. 28, 2001).

<sup>281</sup> See ALASKA STAT. § 09.65.155 (Michie 1999); ARIZ. REV. STAT. § 12-714 (1999); ARK. CODE ANN. § 14-54-1411 (Michie 1999); GA. CODE ANN. § 16-11-184 (1999); 1999 La. Acts 291; 1999 Me. Laws 430; MONT. CODE ANN. § 7-1-115

Tennessee statute prohibiting such lawsuits, which is typical of the statutes enacted by other states, reads as follows:

The authority to bring suit and right to recover against any firearms or ammunition manufacturer, trade association or dealer by or on behalf of any state entity, county, municipality or metropolitan government for damages, abatement or injunctive relief resulting from or relating to the lawful design, manufacture, marketing or sale of firearms or ammunition to the public shall be reserved exclusively to the state.<sup>282</sup>

Tennessee State Representative H.E. Bittle said, regarding the lawsuits against the gun manufacturers, "Some of the mayors and attorneys have figured they have another tobacco to get a load of money out of. They'll bankrupt the legal gun manufacturers because some criminal is violating the law. That's totally ridiculous to me."<sup>283</sup> Of course, New York State Attorney General Eliot Spitzer's suit against gun manufacturers indicates that some state governments are willing to use the judiciary to implement political policy.<sup>284</sup>

The efforts of some state legislatures to block the local government lawsuits and the recent Cincinnati and Miami-Dade dismissals may strengthen the gun industry's resistance to any kind of industry-wide settlement. Indeed, the gun manufacturers withdrew from a round of negotiations that included the Clinton Administration and some of the municipalities that have filed suit.<sup>285</sup> Many gun manufacturers and wholesalers did not want the Clinton administration to reap political gain from involvement in settlement talks.<sup>286</sup> Even some state and local officials feared that the Clinton Administration would settle for a quick deal so that President Clinton could claim a political victory in his final year of office.<sup>287</sup> Thus, it has become quite clear that the lawsuits against the gun manufac-

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(1999); NEV. REV. STAT. ANN. § 12.107 (Michie 1999); OKLA. STAT. tit. 21 § 1289.24a (1999); 1999 Pa. Laws 59; S.D. CODIFIED LAWS § 21-58-2 (Michie 1999); TENN. CODE ANN. § 39-17-1314 (1999); 1999 Tex. Gen. Laws 597.

<sup>282</sup> TENN. CODE ANN. § 39-17-1314(c)(1) (Vernon Supp. 2000).

<sup>283</sup> Bonna M. de la Cruz, *Bills to Block Suits Making Way Through Legislature*, THE TENNESSEAN, Mar. 3, 1999, at 1.

<sup>284</sup> See *supra* note 136.

<sup>285</sup> Paul M. Barrett, *Gun Industry Cancels Talks, Blocking Administration Role in Settlement*, WALL ST. J., Jan. 20, 2000, at B2.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

turers have little to do with any notions of substantive law, and are nothing more than a collective attempt to use the courts to implement regulatory policies that representatives have failed to implement through legislation, and additionally to generate revenues. Judge Robert F. McWeeny, in his decision dismissing Bridgeport's suit based on the city's lack of standing, seemed to share this point of view:

When conceiving the complaint in this name, the plaintiffs must have envisioned such settlements as the dawning of a new age of litigation during which the gun industry, liquor industry and purveyors of "junk food" would follow the tobacco industry in reimbursing governments' expenditures and submitting to judicial regulation.<sup>288</sup>

## CONCLUSION

The tobacco industry's settlements with the state attorneys general prevented any of the states' lawsuits from being tried, so it is unclear what precedential value, if any, can be taken from the tobacco litigation. Most courts did not allow the plaintiffs' main arguments—that the tobacco companies had deceived the public about the dangers of smoking and manipulated nicotine levels to induce addiction—to proceed. Courts in Texas and Iowa were also not receptive to the public entity plaintiffs' antitrust, unjust enrichment, public nuisance, or negligence claims. In addition, the dismissal of the majority of the union fund lawsuits indicates that there is still a line of remoteness that almost no court will cross. The union fund lawsuits have largely been dismissed by federal courts, perhaps because they seemed to have been filed only after the state lawsuits forced the tobacco industry to agree to massive payments under the MSA.<sup>289</sup>

Although the MSA included tremendous concessions on the part of the tobacco industry, it is also clear that it was in no

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<sup>288</sup> *Ganim v. Smith & Wesson Corp.* (Bridgeport), No. 06-CV-99-01531988 at 12-13, 1999 Conn. Super. LEXIS 3330, at \*14 (Conn. Super. Ct. Dist. Waterbury Dec. 10, 1999).

<sup>289</sup> The judge hearing the Bridgeport suit of the gun manufacturers referred to the tobacco union fund lawsuits as "me too" lawsuits—lawsuits that were only filed by the unions to get a share of the tobacco industry's massive payments. *See id.* at 13, \*14.

way an admission of guilt. In fact, the only real trial success for plaintiffs seeking to recover from the tobacco industry has been the *Engle* class action suit in Florida. In addition, although the Justice Department's suit against the tobacco industry remains unresolved, a suit of that magnitude will likely either be dismissed, settled, or even dropped under the new presidential administration.

Similarly, the merits of the plaintiffs' claims against the gun manufacturers are unclear. In the context of the gun litigation, the federal courts in the *White* (Cleveland) and *Hamilton* cases have been most receptive to the plaintiffs' theories. Those theories have had mixed receptions in the state courts. The federal courts were more receptive to the public entities' claims against the gun manufacturers, whereas the state courts were more receptive to the plaintiffs' claims against the tobacco industry.

The gun litigation differs from the tobacco litigation in two important respects—the gun litigation has a far shorter history, and the *Hamilton* verdict, holding gun manufacturers liable for negligent marketing and distribution, has preceded final adjudication of the public entity lawsuits. *Hamilton* has been used by the public entity plaintiffs as both a blueprint and legal precedent. Yet, if the New York Court of Appeals does not recognize the validity of the negligent marketing and distribution claim or the application of the market-share theory of liability, then one of the public entity plaintiffs' main theories will have been undercut.

The tobacco and gun lawsuits are very similar in an important respect—the public entity plaintiffs are highly coordinated and are thus able to bring intense settlement pressure to bear on the defendants. In the past, mass tort litigation costs alone have forced entire corporations to file for bankruptcy protection.<sup>290</sup> In the tobacco litigation, the states successfully forced settlement, in part because jury verdicts could very well have destroyed the entire industry. The same result may be achieved by the local governments in the gun litigation. In addition, the burden of defending against the public entity lawsuits, combined with the resulting public relations backlash, has made the tobacco and gun companies more vulnera-

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<sup>290</sup> See *supra* note 212.

ble to private lawsuits. In the past, private lawsuits against tobacco or gun manufacturers always failed, yet private plaintiffs have recently won jury verdicts against tobacco and gun companies.

The massive awards, such as those agreed to in the MSA, are essentially a retroactive tax imposed to recover government expenditures, and the restrictions on marketing and distribution imposed by the MSA or the Smith & Wesson settlement will have the same effect as would regulatory legislation. Yet, these legislative ends effectively circumvented the traditional process of representative government. After all, state and federal public entities have permitted the sales of cigarettes and guns and have even taxed such sales to generate revenue. But the public entities now seek to have courts declare that such sales were negligent or violated strict products liability laws. And even if the defendants, or the public, disagree with that characterization, the defendants are forced to comply under threat of bankruptcy. In sum, the plaintiffs' ability to use settlement pressure to recover on questionable legal grounds illustrates the fundamental problem with public entity mass tort lawsuits: litigation is used to achieve legislative effects.

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