"SATURDAY NIGHT SPECIAL" MANUFACTURERS AND MARKETERS STRICTLY LIABLE FOR MISUSE OF THEIR PRODUCTS

I. INTRODUCTION

The second amendment to the United States Constitution states that "[a] well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."[1] Subsequent to the adoption of the Bill of Rights, scholars, judges, legislators, and the general public have struggled to interpret this phrase and reconcile it with legislative attempts to regulate the availability of various types of firearms.[2] In *Kelley v. R.G. Industries*[3] the Maryland Court of Appeals held manufacturers and marketers of "Saturday Night Specials"[4] strictly liable to innocent persons injured or killed by the criminal use of their product.[5] In creating the common law action, the Maryland court departed from past judicial determinations[6] by devising a method to guarantee compensation for innocent

1. U.S. CONST. amend. II.

2. For articles discussing the second amendment and gun control issues, see Ashman, *Handgun Control By Local Government*, 10 N. KY. L. REV. 97-111 (1982); Beschle, *Reconsidering the Second Amendment: Constitutional Protection For a Right of Security*, 9 HAMLINE L. REV. 69-104 (1986); Gottleib, *Gun Ownership, A Constitutional Right*, 10 N. dKY. L. REV. 113-40 (1982); Teske & Hazlett, *A Scale For the Measurement of Attitudes Toward Handgun Control*, 13 J. CRIM. JUST. 373-79 (1985); Note, *The Right to Bear Arms and Handgun Prohibition: A Fundamental Rights Analysis*, 14 N.C.L. REV. 296-311 (1983); Note, *Do Victims of Unlawful Violence Have a Remedy Against Handgun Manufacturers: An Overview and Analysis*, 1985 U. ILL. L. REV. 967-95.

3. 304 Md. 124, 497 A.2d 1143 (1985).

4. The term "Saturday Night Special" describes a small, cheap, easily concealable, and poorly made handgun. *Id.* at 144-45 n.8, 497 A.2d 1153 (1985) (citing 118 CONG. REC. 21, 27-29 (1972)); United States v. Looney, 501 F.2d 1039 (4th Cir. 1974); York v. State, 56 Md. App. 222, 467 A.2d 552 (1983), *cert. denied*, 299 Md. 137, 472 A.2d 1000 (1984); R.G. Industries, Inc. v. Askew, 276 So. 2d 1 (Fla. 1973).

5. 304 Md. at 157, 497 A.2d at 1159.

6. The *Kelley* court chronicles a litany of attempts by plaintiffs to impose strict liability on handgun manufacturers and marketers, and the subsequent rejection by the

victims[7] and implement the state's public policy regarding "Saturday Night Specials."[8]

Prior to *Kelley* the courts refused to hold the manufacturer or marketer of a handgun strictly liable for the injuries or deaths caused by criminal use of the weapon.[9] Plaintiffs usually argued two theories of liability: the "abnormally dangerous activity" theory[10] and the "abnormally dangerous product" theory.[11] Courts, however, consistently refused to hold handgun manufacturers and marketers liable under either theory for injuries to innocent persons caused by the criminal use of their product.[12]

II. ABNORMALLY DANGEROUS ACTIVITY

Under the "abnormally dangerous activity" theory, a person or cor-

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courts of the theories advanced by plaintiffs in these actions. *Id.* at 132-40, 497 A.2d at 1147-50. While most courts rejected strict manufacturer and marketer liability *in toto*, one federal district court recognized the possible validity of a strict liability claim. *See* Richman v. Charter Arms Corp., 571 F. Supp. 192 (E.D. La. 1983). The Fifth Circuit Court of Appeals, however, overturned that determination in Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985), by rejecting the district court's language suggesting the possible application of the "abnormally dangerous activity doctrine."

7. See *infra* notes 80-81 and accompanying text for a discussion of compensation.

8. See *infra* notes 82, 84 and accompanying text for a discussion of public policy.

9. Discussion of the applicability of strict liability to manufacturers and marketers of handguns dominates many scholarly writings. For examples of articles supporting the application of strict liability, see Siegel, *Liability of Manufacturers for Negligent Design and Distribution of Handguns*, 6 HAMLINE L. REV. 321 (1983); and Turely, *Manufacturer and Suppliers Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1982). For examples of articles opposing the imposition of strict liability, see Bridgewater, *Legal Limits of a Handgun Manufacturer's Liability for the Criminal Acts of Third Persons*, 49 MO. L. REV. 830 (1984); and Mackarevich, *Manufacturers' Strict Liability for Injuries from a Well-Made Handgun*, 24 WM. & MARY L. REV. 467 (1983).

10. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977).

11. *Id.* § 402A.

12. For examples of cases rejecting the "abnormally dangerous activity" theory, see Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984); Riordan v. International Armament Corp., 132 Ill. App. 3d 642, 477 N.E.2d 1293 (1985); and Burkett v. Freedom Arms, 299 Or. 551, 704 P.2d 118 (1985).

For examples of cases rejecting the "abnormally dangerous product" theory, see Martin v. Harrington & Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984); Riordan v. International Armament Corp., 132 Ill. App. 3d 642, 477 N.E.2d 1293 (1985); Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206 (N.D. Tex. 1985); and Richman v. Charter Arms Co., 571 F. Supp. 192 (E.D. La. 1985), *rev'd on other grounds*, Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985)

poration engaged in an abnormally dangerous or ultrahazardous activity may be held liable for a person's injuries caused by the dangerous activity.[13] The "abnormally dangerous activity" doctrine recognizes the liability of a participant in that activity even if the participant exercised reasonable care to prevent the occurrence of injury.[14] To impose liability on the participant, the plaintiff bears the burden of showing the abnormally dangerous nature of the activity.

When determining what constitutes an abnormally dangerous activity, courts apply a six part standard to evaluate the nature of the activity conducted by the plaintiff. A court will consider the following factors: (1) the probability that someone will be harmed; (2) the possibility that the resulting harm will be great; (3) the existence of the risk even if the defendant exercises reasonable care; (4) the uniqueness of the activity; (5) the appropriateness of the activity with respect to where it occurred; and (6) the value of the activity to the community compared to its dangerousness.[15] If a plaintiff proves the aberrant and unacceptable nature of an activity through the application of these factors, the court will hold the defendant liable for the plaintiff's injuries due to the defendant's participation in this "abnormal" activity.[16]

Courts have refused to extend the concept of an "abnormally dangerous activity" to include the manufacturing or marketing of handguns. The courts have taken various approaches in handgun cases. Some courts have examined whether the activity was appropriate for the location where the activity took place. The courts interpreting this factor have refused to apply the doctrine unless the alleged ultrahazardous activity occurred on or was somehow related to land owned or occupied by the alleged tortfeasor.[17]

These courts held that no such connection exists in handgun manu-

13. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

14. *Id.*

15. *Id.* § 520.

16. *Id.* § 519.

17. Maryland adopted this limitation in Toy v. Atlantic Gulf & Pacific Co., 176 Md. 197, 4 A.2d 757 (1939), which held the defendant not liable when earth fell into the plaintiff's pond. The *Kelley* court reaffirmed this requirement, citing as an example of a possibly abnormally dangerous activity the fact situation in Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (1969). In *Yommer* the defendant gas station owner used faculty underground storage tanks to hold his gasoline. *Id.* at 221, 257 A.2d at 139. Those defective tanks leaked petroleum into the water supply of a populated area. The *Yommer* court held the defendant liable because the hazard had some relationship to the defendant's use of his land.

facturer liability cases.[18] In *Mavilla v. Stoeger Industries*[19] a federal district court employed a different approach and ruled that the state legislature's decision not to ban handguns precludes classifying the manufacturing and marketing of handguns as an abnormally dangerous activity.[20] Finally, in *Martin v. Harrington and Richardson, Inc.*[21] the Seventh Circuit indicated another basis for excluding the manufacturing and marketing of handguns as an abnormally dangerous activity. The court interpreted Illinois law to limit the application of the "abnormally dangerous activity" theory to instances in which the alleged tortfeasor's ultrahazardous activity related to the use of an instrumentality, rather than to its production or sale.[22]

III. ABNORMALLY DANGEROUS PRODUCT

The second predominant theory advanced by injured victim plaintiffs in actions against handgun manufacturers finds its source in section 402A of the Restatement (Second) of Torts.[23] According to section 402A, a manufacturer is liable for injuries caused by his product if the plaintiff can prove the following: (1) the product was defective when the manufacturer sold it; (2) the defect was unreasonably dangerous; (3) the defect was the cause of the injury; and (4) the product was expected to and did reach the consumer without a substantial change in its condition.[24] The courts apply this standard to defects in both product design and production.[25] The courts are split, however, as to what standard should apply in determining the existence of a de-

18. *See* Richman v. Charter Arms Co., 571 F. Supp. 192 (E.D. La. 1983), *rev'd on other grounds*, Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985) (example of the application of land-relation requirement in a handgun manufacturer's liability case); Riordan v. International Armament Corp., 132 Ill. App. 3d 642, 477 N.E.2d 1293 (1985) (explicit rejection of the existence of any property connection in handgun manufacturer's liability case).

19. 574 F. Supp. 107 (D. Mass. 1983).

20. *Id.* at 110. The court held that a state decision to allow possession of handguns precluded imposing strict liability on handgun manufacturers under product liability for the death of third party. *Id.*

21. 743 F.2d 1200 (7th Cir. 1984).

22. *Id.* at 1203-04. Under Illinois law, a handgun is not an unreasonably dangerous product and liability is not imposed on the manufacturer of a product that is not defective. *Id.* at 1204.

23. See *supra* note 12 for cases in which § 402A has been argued by plaintiffs in handgun manufacturer liability cases.

24. RESTATEMENT (SECOND) OF TORTS § 402A (1977).

25. *Id.*

fect and whether the defect was unreasonably dangerous.[26] The courts apply either the "consumer expectation"[27] test or the "risk/utility" test.[28]

A. *Consumer Expectation Test*

Under the "consumer expectation" test, the trier of fact must determine whether the ordinary, ultimate consumer would consider the product unreasonably and dangerously defective.[29] A defect exists if the product left the seller's control in a condition unexpected by and unreasonably dangerous to the ultimate consumer.[30] Courts determine the unreasonableness and dangerousness of the defect in light of the expectations of the reasonable consumer and his expected use of the product.[31]

B. *Risk Utility Test*

The risk/utility test originated in the California Supreme Court's decision in *Barker v. Lull Engineering Co.*[32] Under the "risk/utility" theory, the court applies a two-step evaluation.[33] The court must first

26. *Kelley*, 304 Md. at 136-37, 497 A.2d at 1148-49. States accepting the existence of alternative theories include California (Barker v. Lull Engineering Co., Inc., 20 Cal. 3d 414, 573 P.2d 443, 143 Cal. Rptr. 225 (1978)); Illinois (Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 396 N.E.2d 534 (1979)); and Massachusetts (Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964 (1978)).

27. *See infra* notes 29-31 and accompanying text.

28. *See infra* notes 32-35 and accompanying text.

29. 304 Md. at 135, 497 A.2d at 1148. The Maryland court first articulated this test when it adopted § 402A in Phipps v. General Motor Corp., 278 Md. 337, 363 A.2d 955 (1976). The *Phipps* court stated, "both these conditions [defective and unreasonably dangerous] are explained in the official comments [to section 402A] in terms of consumer expectations." *Id.* at 344, 363 A.2d at 959.

30. 304 Md. at 135, 497 A.2d at 1148.

31. *Id.*

32. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). In *Barker* the plaintiff was a heavy machine operator who sued a machine manufacturer for injuries he suffered when the manufacturer's machine malfunctioned. *Id.* at 418-20, 573 P.2d at 446-48, 143 Cal. Rptr. at 228-30.

33. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237. The court noted that "[a] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests." *Id.* The court can choose to apply the "consumer expectation" test, in which "a product may be found defective . . . if [the] plaintiff established that the product failed to perform as safely as an ordinary consumer would expect." *Id.* The alternative test provided by the court is actually the "risk/utility" test. *See infra* notes 34-35 and accompanying text.

decide if the product proximately caused the injury.[34] The court then determines if the value of the product's current design outweighs its potential to cause harm.[35]

Attempts to hold manufacturers and marketers of handguns liable through the application of the "abnormally dangerous product" theory have consistently failed.[36] The courts have completely rejected the theory's application to handgun manufacturers and marketers, though often failing to distinguish which standard they applied to the case. *Patterson v. Rohm Gesellschaft* exemplifies a court's rejection of the "abnormally dangerous product" theory.[37] In *Patterson* a federal district court completely rejected the plaintiff's section 402A design defect claim.[38] The court found that no design defect existed because the gun performed according to its intended design by discharging a bullet with deadly force.[39] Other courts have expressed the same opinion in similar cases.[40]

In *Kelley v. R.G. Industries* the Maryland Court of Appeals categorically rejected the use of both the "abnormally dangerous activity"[41] and "abnormally dangerous product"[42] doctrines. In *Kelley*, Olin Kel-

34. 20 Cal. 3d at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238. Under this alternative standard, a plaintiff can prove a product's defectiveness if "[he] demonstrates that the product's design proximately caused his injury." *Id.*

35. *Id.* According to *Barker*, the second step requires the defendant "to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risks of danger inherent in such design." *Id.*

36. *See* Kelley v. R.G. Industries, 304 Md. 124, 138, 497 A.2d 1143, 1149 (1985). The court stated, "this [rejection of the application of the abnormally dangerous product theory] has been the consistent conclusion in other jurisdictions which have confronted the issue." *Id.*

37. 608 F. Supp. 1206 (N.D. Tex. 1985). In *Patterson* the survivor of a man killed during a holdup sued the manufacturer of the handgun used during the commission of the crime. *Id.*

38. *Id.* at 1212.

39. *Id.* The court stated "a gun, by its very nature must be dangerous." *Id.*

40. *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984); Riordan v. International Armament Corp., 132 Ill. App. 3d 642, 477 N.E.2d 1293 (1985); Richman v. Charter Arms Corp., 571 F. Supp. 192 (E.D. La. 1983), *rev'd on other grounds*, Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985).

41. 304 Md. 124, 133, 497 A.2d 1143, 1147 (1985).

42. *Id.* at 138-39, 497 A.2d at 1149-50. For a discussion of the previous failures of the "abnormally dangerous activity" and "abnormally dangerous product" theories, see *supra* notes 6, 12, 20, 40 and accompanying texts.

ley sustained gunshot wounds during an armed robbery.[43] Kelley and his wife brought an action against the marketer[44] and manufacturer[45] of the gun that caused his injuries.[46]

The federal district court[47] found no applicable Maryland precedents and, therefore, certified a series of questions[48] for the Maryland Court of Appeals.[49] The Maryland court reduced the issues to three basic questions: the liability of handgun manufacturers in general,[50] the liability of manufacturers of "Saturday Night Specials" in particular,[51] and the determination of whether the handgun used against Kelley was a "Saturday Night Special."[52]

43. 304 Md. at 128, 497 A.2d at 1144.

44. The West German Rohm Gesellschaft Corporation designed and marketed the handgun used in the robbery. *Id.* at 128, 497 A.2d at 1145.

45. R.G. Industries, Inc., a wholly owned subsidiary of Rohm Gesellschaft, manufactured the handgun in its Miami, Florida plant. *Id.*

46. *Id.* at 129, 497 A.2d at 1145.

47. *Id.* R.G. Industries requested removal of the case from the Maryland state courts to the United States District Court for the District of Maryland pursuant to 28 U.S.C. §§ 1441 and 1446. *Id.*

48. Maryland law provides for such a certification in the Uniform Certification of Question of Law Act. MD. CTS. & JUD. PROC. CODE ANN. § 12-601 (1984).

49. 304 Md. at 129, 497 A.2d at 1145. The court heard oral arguments and decided that some issues raised in arguments did not fall within the scope of the certification order. The court ordered the plaintiff to return to the district court to obtain a new certification order, which expanded the scope of the order and allowed the court to address other issues it deemed appropriate. *Id.* at 130, 497 A.2d at 1146.

50. *Id.* at 131, 497 A.2d at 1146. Specifically, the court asked, "Is the manufacturer or marketer of a handgun, in general, liable under any strict liability theory to a person injured as a result of the criminal use of its product?" *Id.*

51. *Id.* The second question was: "Is the manufacturer or marketer of a particular category of small, cheap handguns, sometimes referred to as 'Saturday Night Specials,' and regularly used in criminal activity, strictly liable to a person injured by such handguns during the course of a crime?" *Id.*

52. *Id.* at 131, 497 A.2d at 1146. The court stated that the trier of fact should resolve whether the Rohm Revolver Handgun Model RG385, serial number 0152662, falls within the category referred to in the second question by looking at factors such as the gun's accuracy, barrel length, concealability, quality of workmanship, cost, and marketing techniques used by the manufacturer, and whether the gun fell within the Bureau of Alcohol, Tobacco, and Firearms regulations of handguns banned from importation into the U.S. *Id.* at 157, 497 A.2d at 1159-60. Once the trier of fact establishes that the gun was indeed a "Saturday Night Special," then liability may be imposed against anyone in the marketing chain up to the manufacturer. *Id.* at 158, 497 A.2d at 1160.

IV. APPLYING STRICT LIABILITY TO HANDGUN MANUFACTURERS IN GENERAL

In answering the question of the liability of handgun manufacturers in general, the Maryland Court of Appeals closely tracked the discussions and rationales of the courts that had previously addressed the question.[53] The *Kelley* court rejected the "abnormally dangerous activity" theory because Maryland had not extended the theory's application to include tortious activities not related to land owned or operated by the alleged tortfeasor.[54] According to the court, a Maryland court must evaluate the abnormality and dangerousness of an activity in relation to the occupation and location of the land where the activity takes place.[55] The court found that no such relationship existed between the dangers inherent in the criminal use of handgun and any occupation or ownership of land.[56] Thus, the court refused to apply the "abnormally dangerous activity" theory.[57]

The court further rejected the application of the "abnormally dangerous product" doctrine[58] by repudiating the applicability of both the "consumer expectation"[59] and the "risk/utility"[60] tests to Kelley's claim. The court rejected the "consumer expectation" test, stating that a consumer should reasonably expect a handgun to discharge a bullet with deadly force.[61] In the court's opinion, the "risk/utility" test also

53. *Id.* at 132-34, 497 A.2d at 1146-50.

54. *Id.* at 133, 497 A.2d at 1147. For a discussion of this land relation requirement, see *supra* note 17 and accompanying text.

55. 304 Md. at 133, 497 A.2d at 1147. *See supra* note 17 and accompanying text.

56. 304 Md. at 133, 497 A.2d at 1147.

57. *Id.* at 133, 497 A.2d at 1147. See *supra* note 12 and accompanying text for a discussion of other jurisdictions that have rejected the "abnormally dangerous activity" doctrine.

58. 304 Md. at 138, 497 A.2d at 1149.

59. *Id.* at 136, 497 A.2d at 1148. For a discussion of the "consumer expectation" test, see *supra* notes 29-30 and accompanying text.

60. 304 Md. at 136, 497 A.2d at 1149. For a discussion of the "risk utility" test, see *supra* notes 32-34 and accompanying text.

61. 304 Md. at 136, 497 A.2d at 1148. The Maryland courts have accepted the "consumer expectation" theory, first articulated in Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976), as the state standard. The *Kelley* court felt the "consumer expectation" test failed because the plaintiffs missed the distinction between the handgun's normal function, which can be dangerous, and a handgun defectively designed or manufactured that causes injuries through its malfunction. 304 Md. at 136, 497 A.2d at 1148. In this instance, a consumer should reasonably expect a handgun to fire a bullet with enough force to harm someone, as that is the handgun's normal func-

failed because the gun worked exactly as designed and assembled by its manufacturer.[62] The court, therfore, found no liability based on the "abnormally dangerous" theory.[63]

V. APPLYING STRICT LIABILITY TO MANUFACTURERS OF SATURDAY NIGHT SPECIALS

The *Kelley* court, though rejecting strict liability for handgun manufacturers in general,[64] did not reject the Kelleys' damage claim against the specific handgun manufacturer and marketer. While the Maryland court interpreted existing Maryland law as failing to provide the Kelleys with a remedy, the court recognized the flexibility of the common law as a basis for fashioning some relief for Kelley and others injured by handguns.[65] The court, however, noted that any relief must correspond to the public policy of the state regarding handgun ownership, possession, and use.[66]

The court of appeals interpreted Maryland's handgun laws as effectuating a general prohibition against the wearing, carrying, or transporting of handguns.[67] The same law, however, provides various

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tion. *Id.* An action would exist only for injuries caused by design or manufacturing defect that causes an unexpected discharge or other malfunction. *Id.*

62. 304 Md. at 138, 497 A.2d at 1149. The Maryland court addressed the "risk/utility" test even though no decision of the court has ever relied on its application. *Id.* at 137-38, 497 A.2d at 1149. The court interpreted language in *Phipps* as giving it the option of considering the "risk/utility" standard. The *Phipps* court stated: "[I]n some circumstances, the question of whether a particular design is defective may depend upon a balancing of the utility of the design and other factors against the magnitude of that risk." 278 Md. at 348, 363 A.2d at 961. In *Kelley* the court stated that the "risk/utility" test applies only when the product fails to work in a manner intended by its design. 304 Md. at 138, 497 A.2d at 1149. Because the gun worked properly, the court found the "risk/utility" test inapplicable and thus the manufacturer was not liable under § 402A. *Id.*

63. 304 Md. at 138, 497 A.2d at 1149.

64. *Id.* at 132-39, 497 A.2d at 1146-50. The court rejected the two primary theories to hold manufacturers and marketers liable. *Id.* For other theories rejecting liability of handgun manufacturers, see Linton v. Smith & Wessen, 127 Ill. App. 3d 676, 469 N.E.2d 339 (1984) (complaint dismissed because no common law duty existed for manufacturer to control distribution of weapon); Bennett v. Cincinnati Checker Cab Co., Inc., 353 F. Supp. 1206 (E.D. Ky. 1973) (handgun manufacturers not liable for criminal acts of third parties when specific defect not alleged).

65. 304 Md. at 140-41, 497 A.2d at 1150-51.

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

67. *Id.* Under the Maryland Code, "any person who shall wear, carry or transport any handgun ... shall be guilty of a misdemeanor." MD. ANN. CODE art. 27, § 36B(b) (Supp. 1984).

exceptions to the flat prohibition of handguns.[68] The court interpreted the existence of these exceptions to indicate a legislative intent not to ban all handgun possession or use.[69] According to the court, holding all handgun manufacturers and marketers strictly liable for injuries caused by the criminal use of their product would, contrary to Maryland's public policy, limit the availability of all handguns.[70]

While rejecting strict liability for all handgun manufacturers and marketers in general, the *Kelley* court determined that an exception to the general public policy of controlled possession exists for the "Saturday Night Special."[71] The Maryland court found that both the United States Congress and the Maryland General Assembly treat the "Saturday Night Special" as a unique species of handgun.[72] The court recog-

68. MD. ANN. CODE art. 27 § 36B(c)(1), (3)-(5) (1982). These exceptions allow possession by law enforcement personnel, military personnel, hunters, and sportsmen, and for home and business protection. *Id.* Another part of the code permitted handgun possession by those who meet certain age and character requirements and prove to the Maryland State Police the existence of a good and substantial reason to carry a handgun. *Id.* § 36B(c)(2) (1982).

69. 304 Md. at 144, 497 A.2d at 1152-53.

70. *Id.* at 144, 497 A.2d at 1153. Implicit in this statement lies a concern for the chilling effect of strict liability imposition on the availability of handguns. In Martin v. Harrington & Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984), Judge Pell stated that "[i]mposing liability for the sale of handguns, which would in practice drive manufacturers out of business, could produce a handgun ban by judicial fiat in the face of the decision of the legislature [to allow handgun possessoin]." *Id.* at 1204.

71. 304 Md. at 144-47, 497 A.2d at 1153-54. The court determined that Maryland's public policy did not encompass the possession and use of handguns that clearly had no legal use. *Id.* at 154, 497 A.2d at 1158. The *Kelley* court then decided that "Saturday Night Specials" fit into this category due to their characteristics of easy concealability, cheap materials, and poor workmanship. *Id.* The federal district court in Mavilla v. Stoeger Indus., 574 F. Supp. 107 (D. Mass. 1983), suggested that "Saturday Night Specials" may exist as a separate class from the class of handguns in general. *Id.* at 110 n.2. The idea of carving out a special niche for a particular dangerous product within a class generally accepted by society also occurred in Moning v. Alfano, 400 Mich. 425, 254 N.W.2d 759 (1977), which held the manufacturer of a slingshot liable for injuries caused to a third person by the user.

72. 304 Md. at 155, 497 A.2d at 1158. At the federal level, the Gun Control Act of 1968 prohibits the importation of any firearm not approved by the Department of Treasury. 18 U.S.C. §§ 922, 925(a) (1984). The Secretary of the Treasury promulgated regulations barring the importation of a certain category of firearms that includes the "Saturday Night Special." *See* 27 C.F.R. § 178.112(c) (1987). Section 178.112(c) states in pertinent part:

> No firearm shall be placed on the Importation List unless it is found that (1) the caliber or gauge of the firearm is suitable for use in a recognized shooting sport, (2) the type of firearm is generally recognized as particularly suitable for or readily adaptable to such use, and (3) the use of the firearm in a recognized shooting sport

nized that the criteria of Congress and the Maryland legislature defining what constitutes an acceptable handgun does not include handguns that possess the primary characteristics of the "Saturday Night Special."[73] In light of this exclusion, the *Kelley* court concluded that neither Congress nor the Maryland General Assembly intended to afford "Saturday Night Specials" the same status granted to other handguns and firearms under their respective laws.[74]

After finding that "Saturday Night Specials" do not fall within the class of handguns whose possession the Maryland legislature permits,[75] the court decided it could then fashion a common law remedy, consistent with Maryland's public policy, for innocent victims injured by "Saturday Night Specials."[76] The court decided that because "Saturday Night Specials" fall outside the statutory scheme regulating the use of handguns, holding the weapon's manufacturer and marketer strictly liable for injuries to innocent persons is consistent with Maryland's public policy.[77]

The *Kelley* court found the strict liability remedy reasonable in light

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will not endanger the person using it due to deterioration through such use or because of inferior workmanship, materials or design.

Id. For a discussion of the relevant Congressional reports and Treasury investigations placing the "Saturday Night Special" in a category of illegitimate weapons, see *Kelley*, 304 Md. at 147-53, 497 A.2d at 1154-57.

The court interpreted the policy of the state of Maryland to contain prohibition of "Saturday Night Specials." *Id.* at 154, 497 A.2d at 1158. The court first noted that Maryland's public policy on handguns closely coincides with federal policy. *Id.* at 153, 497 A.2d at 1157. The court then cited instances in which handgun possession and use are allowed under the Maryland Code. *Id.* The court noted, however, that a handgun used in the commission of a crime did not fall within the scope of protected handgun use. *Id.* at 154, 497 A.2d at 1158. Thus, the *Kelley* court determined that handguns primarily suited for criminal use had no legitimate purpose and were therefore contrary to Maryland's public policy. *Id.*

73. 304 Md. at 144-46, 497 at 1153. The court found that the primary characteristics of the "Saturday Night Special" were its short barrel, light weight, easy concealability, low cost, poor quality, and unreliability. *Id.* at 145-46, 497 A.2d at 1153.

74. *Id.* at 155, 497 A.2d at 1158.

75. *Id.* at 153-54, 497 A.2d at 1158. The primary use of "Saturday Night Specials" is criminal and the possession of a handgun for use in criminal activity does not fit within Maryland's list of exceptions. MD. ANN. CODE art. 27, § 36B(c)(1982). Therefore, the "Saturday Night Special" falls within Maryland's general handgun prohibition. MD. ANN. CODE art. 27, § 36B(b) (Supp. 1986). See *supra* notes 67-68 and accompanying text for a discussion of Maryland handgun law.

76. 304 Md. at 157, 497 A.2d at 1159. *See also supra* notes 67-70 and accompanying text.

77. 304 Md. at 157, 497 A.2d at 1159.

of its determination that the manufacturers and marketers of "Saturday Night Specials" know or should know of the primary, criminal nature of their product's use.[78] The court concluded that the imposition of strict liability on the manufacturers and marketers of this unique type of handgun did not violate Maryland or federal policy concerning handgun possession because their primary use was for criminal or unprotected activity.[79]

The court in *Kelley v. R.G. Industries* achieved two laudable accomplishments. First, the *Kelley* court provided compensation for innocent victims of criminal acts by allowing the victim to sue the manufacturer or marketer of the instrumentality that caused the plaintiff's injury. In many instances, the victims in these cases have no means of recovery because the assailant is either unidentified or judgment-proof.[80] The court recognized, however, that the assailant is not the sole defendant in actions involving gunshot injuries, and held that the company which exacerbated the victim's injury by producing an inexpensive weapon with no legitimate purpose should compensate those victims for injuries caused by their product.[81]

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78. *Id.* at 155-56, 497 A.2d at 1158. The court cited examples of the manufacturer's sales personnel classifying a "Saturday Night Special" as a "ghetto gun" or stating that "[the gun] sells real well, but between you and me, it's such a piece of crap I'd be afraid to shoot it." *Id.* (citing Brill, *The Traffic (Legal and Illegal) in Guns*, HARPER'S, Sept. 1977, at 40). The court also noted a Michigan case that held a toy manufacturer strictly liable for injuries caused by a slingshot produced by the manufacturer. *See* Moning v. Alfano, 400 Mich. 425, 254 N.W.2d 754 (1977). The court in *Moning* found that the manufacturer of a dangerous product could be held liable for injuries when the primary purchasers were likely to misuse the product. *Id.* at 446-49, 254 N.W.2d at 759. *See* Ivenson, *Manufacturer's Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 776 (1983) (argues for expansion of the application of liability to handgun manufacturers).

79. 304 Md. at 154, 497 A.2d at 1158. *See supra* notes 67-70, 75 and accompanying texts.

80. *See, e.g.*, Martin v. Harrington & Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984) (if the victim has been injured or attempts to recover damages from the user of the handgun, the user is frequently unreachable or judgment-proof); Kelley v. R.G. Industries, Inc., 304 Md. 124, 497 A.2d 1143 (1985); Patterson v. R.G. Industries, Inc., 608 F. Supp. 1206 (N.D. Tex. 1985) (instance of unidentified assailant).

81. 304 Md. at 157, 497 A.2d at 1159. The court found such a requirement appropriate because the manufacturer and marketer of a "Saturday Night Special," who produces the instrumentality that caused the plaintiff's injuries, is "more at fault" than an innocent victim. *Id.* The court also noted the potential criminal use of the product and that the manufacturer knew or should have known of the potential criminal application of his product. *Id.* at 156, 497 A.2d at 1159. The *Kelley* court found this knowledge sufficient to hold manufacturers and marketers of "Saturday Night Specials" strictly liable for injuries caused by their product. *Id.* at 157, 497 A.2d at 1159.

The second accomplishment of the *Kelley* decision lies in its limitation of the existence of a type of handgun repugnant to public policy.[82] The *Kelley* decision effectively bans the production and marketing of "Saturday Night Specials" in the state of Maryland through the use of economic pressure.[83] By making "Saturday Night Specials" expensive to produce, their price will increase, thereby decreasing their availability or making them too expensive to produce.[84]

The major criticism of the imposition of strict liability on the manufacturers of "Saturday Night Specials" comes from the impression that the court overstepped its traditional role by creating legislation through judicial fiat.[85] This charge, however, fails to take into account two important factors. First, both Congress and the Maryland legislature decided that "Saturday Night Specials" did not deserve the same status as other handguns.[86] Congress found that "Saturday Night Specials" do not have a legitimate purpose and that their availability should be curtailed.[87] Likewise, Maryland limited the acceptable uses for handguns.[88] The *Kelley* court, therefore, followed the intent of both legislatures by distinguishing "Saturday Night Specials" from other handguns through the imposition of strict liability for marketers and manufacturers. Instead of legislating by judicial fiat, *Kelley* merely articulates an actual ban implicit in legislative policy.

Second, the *Kelley* decision is narrow, therefore minimizing the amount of any "legislating" attempted by the court. The court's opinion explicitly avoids applying strict liability to handgun manufacturers

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82. *See supra* notes 71-74, 78-79 and accompanying texts.

83. *See* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984). In *Martin* the court stated that the imposition of strict liability on handgun manufacturers would effectively ban their production by making the manufacturer act as an insurer against damages produced through use of the weapon. *Id.*

84. Judge Cudahy, in his *Martin* concurrence, interpreted this economic argument not as an attempt to create a judicial ban on handgun sales through economic pressure, but as an attempt to internalize the cost of handgun use by including the cost of handgun fatalities and injuries. *Id.* at 1206. He stated, "the imposition of strict liability on the manufacturer and seller should not be viewed as an attempt to drive handguns from the market—for the courts, an improper goal. Rather, it is an effort to place the costs inherent in handguns on the users rather than on the victims." *Id.*

85. *See id.* at 1204. In *Martin* the court stated that "imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat, in the face of the decision of the legislature." *Id.*

86. *See supra* notes 72-74 and accompanying text.

87. *See supra* note 72 and accompanying text.

88. *See supra* notes 72-75 and accompanying text.

in general, and focuses solely on "Saturday Night Specials." Because these weapons exist as an outcast in the handgun regulations, the narrowness of the holding will discourage any attempt by courts to expand the decision's specific findings through judicial activism.

Congress and state legislatures have explicitly found the existence of "Saturday Night Specials" contrary to public policy. By applying strict liability to the manufacturers and marketers of "Saturday Night Specials" for injuries caused by their product during the commission of a criminal act, the Maryland Court of Appeals took a reasonable and important step to enforce its state policy regarding "Saturday Night Specials." The court provided a common law remedy to compensate innocent victims injured by criminal acts when no such relief was available. The *Kelley* decision will help eliminate a weapon repugnant to our society, thereby effectuating the intent of both the United States Congress and the Maryland General Assembly. Finally, and most importantly, the Maryland court successfully reconciles constitutional guarantees established over 200 years ago with changes in our society, protecting the "right to bear arms" while providing relief for those injured from the abuse of that right.

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