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# LOYOLA LAW REVIEW

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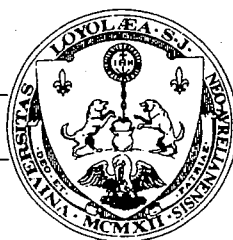
COMMENT

Sued into Submission:  
Judicial Creation of Standards in the Manufacture and  
Distribution of Lawful Products — The New Orleans  
Lawsuit Against Gun Manufacturers

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LOYOLA UNIVERSITY



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SCHOOL OF LAW

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# SUED INTO SUBMISSION: JUDICIAL CREATION OF STANDARDS IN THE MANUFACTURE AND DISTRIBUTION OF LAWFUL PRODUCTS—THE NEW ORLEANS LAWSUIT AGAINST GUN MANUFACTURERS

## I. INTRODUCTION

"We the People, in order to form a more perfect Union . . . ."<sup>1</sup> Putting these words to paper, our founding fathers set out to establish a new form of government, a balanced form by which a system of checks and balances would allow the government to represent the people without any single branch having an inordinate amount of power.<sup>2</sup> In so doing, the Constitution protects certain basic and fundamental rights.<sup>3</sup> Among those rights is the right "to earn [a] livelihood by any lawful calling."<sup>4</sup>

Legal scholars have differing views regarding constitutional interpretation,<sup>5</sup> however, it is clear that our founding fathers did

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1. U.S. CONST. pmbl.

2. See Anthony N.R. Zamora, Note, *The Century Freeway Consent Decree*, 62 S. CAL. L. REV. 1805, 1837 (1989).

Striving to create a balanced form of government, the Framers sought to apportion authority among the three branches of government so as to create an equilibrium of power. The executive was provided with the power of initiative and enforcement; the legislature with the power of the purse; and the judiciary with the power of interpretation.

*Id.* See also Thomas G. Kienbaum, *Preserving Our Independent Judiciary*, 75 MICH. B.J. 488, 488 (1996). "Government in a democracy is grounded historically upon a series of checks and balances between its three major departments." *Id.* See generally U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

3. See *Griswold v. Connecticut*, 381 U.S. 479, 490 (1965).

4. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

5. For a general discussion of constitutional interpretation, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611-54 (1999).

not intend for the courts to be used to further the views of a minority at the expense of the majority.<sup>6</sup> Commentators have suggested that the influx of special interest money is strangling the American political system.<sup>7</sup> In response, these commentators argue that the use of representative litigation<sup>8</sup> is an effective way of acting as citizen legislators, thereby circumventing legislative gridlock.<sup>9</sup>

As is evident by Congress' inability to resolve issues such as campaign finance reform,<sup>10</sup> tobacco legislation,<sup>11</sup> gun control,<sup>12</sup> budget surpluses,<sup>13</sup> health care reform,<sup>14</sup> social security,<sup>15</sup> and tort

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6. See Kienbaum, *supra* note 2, at 491.

Our Constitution, and its insistence upon three co-equal branches of government, must be protected against even the temptation of the quick solution to a perceived problem of the moment. While that 'solution'—be it a particular decision of the Court or a policy direction—may be gratifying for the moment, the damage done to our system of government would be grave and perhaps irreversible.

*Id.*

7. See Wayne Slater, *Trial Lawyers Give Heavily to Democrats: Tobacco Among Biggest Donors*, THE DALLAS MORNING NEWS, May 14, 2000, at 1A (discussing the record breaking amount of "soft" money being raised during the current political season). "Fund raisers on both sides are putting the squeeze on political donors." *Id.* (quoting Larry Makinson of the Center for Responsive Politics). "One of the biggest things money can buy is inaction." *Id.* (quoting Makinson).

8. The term "representative litigation" refers collectively to class actions and *parens patriae* cases and will be discussed later in this article. See *infra* sec. II.

9. See Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 TUL. L. REV. 1655, 1660 (2000) (citing Mary Welek Atwell, *National Association for the Advancement of Colored People Legal Defense and Educational Fund*, in 2 THE ENCYCLOPEDIA OF CIVIL RIGHTS IN AMERICA 631, 631-34 (David Bradley & Shelley Fisher Fishkin eds., 1998)).

10. See generally Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon For Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307 (2000).

11. See generally Adam Cohen, *Are Lawyers Running America?*, TIME MAGAZINE, July 17, 2000, at 24.

12. See generally John D. Wilkerson & David Carrell, *Money, Politics, and Medicine: The American Medical PAC's Strategy of Giving in U.S. House Races*, 24 J. HEALTH POL. POL'Y & L. 335 (1999).

13. See generally Terence Hunt, *Clinton, GOP Leaders Wrangle Over Budget Surplus, Spending*, SEATTLE TIMES, Sept. 13, 2000, at A7; William M. Welch, *Parties Begin Budget Surplus Shopping Spree Study: Spending on Social Programs Near '70s Levels*, USA TODAY, Aug. 22, 2000, at 7A.

14. See generally Cohen, *supra* note 11, at 24.

15. See generally *High Stakes/Social Security Reform Requires Careful Arithmetic*, HOUSTON CHRONICLE, May 10, 2000, at A36.

reform,<sup>16</sup> gridlock seems inevitable when money flows in from every direction, causing the public to lose its voice.<sup>17</sup> This gridlock is readily apparent in the gun control context, in which the gun lobby and the NRA are spending millions of dollars in lobbying and campaign financing,<sup>18</sup> while the Democrats and Republicans remain divided on stronger gun control legislation.<sup>19</sup> Furthermore, in the wake of several recent school shootings, concern over access to handguns and gun related violence is greater than ever.<sup>20</sup> In response to this concern and the increasing cost of keeping the peace, the mayors of a number of cities have filed lawsuits against the largest gun manufacturers in the country.<sup>21</sup> The recent settlement by one defendant of the litigation filed by the City of New Orleans and other cities against the gun industry raises serious questions concerning whether the courts are the appropriate forum for such weighty issues, and what might be the outcome of these tactics.<sup>22</sup>

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16. See generally Perry H. Apfelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?*, 8 CORNELL J.L. & PUB. POL'Y 591 (1999).

17. See Slater, *supra* note 7. See also *A Soft Spot for Cash*, THE TIMES PICAYUNE, Apr. 30, 2000, at A8.

18. Elizabeth Shogren, *NRA Loads Republican War Chest With Cash*, THE TIMES PICAYUNE, Apr. 7, 2000, at A8. The NRA is one of the Republicans' top five contributors of unregulated money. *Id.*

19. See Frank Bruni, *Firearm Issues Have Bush and Gore Dodging Bullets from Campaigns*, THE TIMES PICAYUNE, May 6, 2000, at A10 (discussing the differing views of the presidential candidates on gun control). See also Ceci Connolly & Dan Balz, *Candidates Limit Criticisms on Columbine's Anniversary*, THE TIMES PICAYUNE, Apr. 21, 2000, at A3.

20. See Linda E. Fisher, *Alcohol, Tobacco, and Firearms: Autonomy, the Common Good, and the Courts*, 18 YALE L. & POL'Y REV. 351, 351 (2000) (reviewing AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* (1996) and AMITAI ETZIONI, *THE LIMITS OF PRIVACY* (1999) (citing Albert R. Hunt, *A Discerning Population Isn't Looking to Extremes*, WALL ST. J., June 24, 1999, at A9; Michael Janofsky, *Many G.O.P. Governors Now Pushing for Greater Gun Control*, N.Y. TIMES, Sept. 4, 1999, at A7; Special Report, *Guns in America*, NEWSWEEK, Aug. 23, 1999, at 20)). See also Ira M. Schwartz et al., *School Violence, School Safety, and the Juvenile Justice System, School Bells, Death Knells, and Body Counts: No Apocalypse Now*, 37 HOUS. L. REV. 1, 2 (2000) (noting that numerous plans have been formulated to increase school safety following incidents of school violence).

21. See Beth Wade, *Aiming to Reduce Gun Violence*, AMERICAN CITY & COUNTY, Aug. 30, 2000. It is worth noting that not all makers of handguns have been sued. This issue will be discussed further in this comment. See *infra* sec. II.

22. See *Gun Lawsuit Agreement with Smith & Wesson: Summary Prepared by the U.S. Conference of Mayors* [hereinafter *Gun Lawsuit Agreement*], at [http://www.usmayors.org/USCM/wash\\_update/crime/033100b.htm](http://www.usmayors.org/USCM/wash_update/crime/033100b.htm) (last visited Apr. 25, 2000). The settlement agree-

At first blush, this appears to be a potential break in the legislative impasse regarding gun control, providing an opportunity for citizens' concerns to be appeased. This appearance, however, is deceiving. The purpose of this comment is to discuss the inappropriate use of the judiciary by special interest litigants to regulate the conduct and products of otherwise lawfully conducted businesses in the absence of legislative action.

## II. REPRESENTATIVE LITIGATION

Some of the hot topics of the 1990s and the beginning of the twenty first century are being resolved, not in the legislative branch, but by the judicial branch.<sup>23</sup> Due in large part to the power of the class action lawsuit and the expanded use of *parens patriae* suits, concerns of a litigious minority, with its own social agenda, are being turned into the equivalent of judicial legislation through court action and legally enforceable settlement agreements between special interest litigants and companies who have been sued into submission.<sup>24</sup>

The term "representative litigation" is used to refer to class actions and *parens patriae* suits collectively. Both suits seek "to achieve broad compensation, to deter wrongful conduct by one or

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ment provides for changes in the design, marketing, distribution, and monitoring of Smith & Wesson products. *Gun Lawsuit Agreement*, *supra*.

23. See Mark Johnson, *Who Pays?*, THE NEWS & OBSERVER, May 9, 1999, at A19 (speaking about tobacco, handguns, and Microsoft). "Regulation through lawsuits has become the public policy vehicle of the late '90s." *Id.* "The era of regulation through litigation has just begun." *Id.* (quoting former Labor Secretary Robert Reich). "Abusing the legal system for political, social or selfish ends is fast becoming America's favorite pastime." Lawrence Reed, "Taxation by Litigation" Threatens Every American Business . . . Including Banks!, MICH. BANKER, June 1, 1999, at 84.

24. See Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 56 (2000) (citing *The President's Column*, AM. RIFLEMAN, Apr. 1999, at 12) (suggesting that cities are doing in court what they can not achieve in the legislative branches of government). See also William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1916 (2000) (suggesting that the tobacco settlement is a legally enforceable agreement that puts limitations on advertising, sponsorship of entertainment events, and marketing that would be illegal or unconstitutional if imposed by legislation).

more defendants, and to focus on injuries to a large set of . . . citizens.<sup>25</sup>

Generally speaking, all litigation has the potential to affect the substantive rights of litigants and non-litigants alike, either directly or indirectly.<sup>26</sup> However, class actions and *parens patriae* suits are being used as tools for judicial legislation to affect change in the way corporate America does business.<sup>27</sup> Such actions have the potential to affect persons and businesses far removed from the litigation by hindering access to markets and increasing the cost of consumer goods. In the aftermath of the tobacco settlement,<sup>28</sup> representative litigation<sup>29</sup> has been the focus of much public, media, and legal attention.<sup>30</sup>

25. Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1922 (2000).

26. Andrea Catania & Charles A. Sullivan, *Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of Martin v. Wilks*, 57 BROOK. L. REV. 995, 995-96 (1992). "[T]he interests of nonparties are often affected by prior judgments . . ." *Id.* at 1010. See also Howard M. Eriehson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 948-1017 (1998) (discussing the preclusive effect of judgments and settlements on litigants and non-litigants).

27. See cases cited *infra* note 39.

28. The "Tobacco Master Settlement Agreement" was a response to class action and *parens patriae* suits brought by the States Attorneys General against the "Big Five" tobacco companies. See Tobacco Master Settlement Agreement 1998, available at <http://cnie.org/nle/ag-ss.html>. The settlement provides for changes in marketing and distribution of tobacco products as well as payments to the states for the costs paid for medical treatments of tobacco related illness and death. *Id.* See also Daniel Givelber, *Cigarette Law*, 73 IND. L.J. 867 (1998) (discussing tobacco settlement agreements).

29. The term "representative litigation" is used to describe class actions and *parens patriae* suits. *Parens patriae* suits are lawsuits brought by the government in its representative capacity and have been described as being analogous to class actions that are typically brought by private citizens. See Brunet, *supra* note 25, at 1922. Both suits seek "to achieve broad compensation, to deter wrongful conduct by one or more defendants, and to focus on injuries to a large set of . . . citizens." *Id.* For further discussion of *parens patriae*, see Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1847-58 (2000).

30. See generally Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859 (2000); McGovern, *supra* note 9, at 1659-60; Pryor, *supra* note 24, at 1885; Cohen, *supra* note 11, at 22 (discussing the use of class actions to form social policy and fill lawyers' bank accounts); Pamela Coyle, *Ieyoub Quick to Defend Class-Action Tactic*, THE TIMES PICAYUNE, Apr. 2, 2000, at B3; *Give Me a Break!*, 20/20 (ABC television broadcast, June 30, 2000) (discussing the recent use of class action to sue the makers of Pokemon and other abuses); *Morning Edition* (National Public Radio radio broadcast, Hour 1, July 20, 2000) (discussing class actions and attorneys' attempts to make social policy).

### A. Class Actions Suits

The class action is a "nontraditional litigation procedure that permits a representative with typical claims to sue on behalf of and stand in judgment for a class, provided that the representative can establish the prerequisites to class certification."<sup>31</sup> Federal Rule of Civil Procedure 23 provides the requirements for class action litigation.<sup>32</sup> These requirements are commonly referred to as "numerosity, commonality, typicality, and adequacy of representation."<sup>33</sup> The determination of whether a class action should be maintained is left to the discretion of the trial judge through the certification process.<sup>34</sup>

Other portions of Rule 23 provide for notification of class members and what is commonly referred to as an "opt-out" provision by which a member of the class may request to be excluded from the class.<sup>35</sup> Additionally, the rule provides for notification of judgment to class members who have not opted out, and to have certain issues or subclasses separated from the class action.<sup>36</sup> Additionally, the rule provides that the trial court has discretion to structure the proceeding according to the parties' needs and the complexity of the litigation.<sup>37</sup> The final part of Rule 23 provides that no settlement or dismissal of the class action shall be allowed without the approval of the court and notification of the class.<sup>38</sup>

Class actions have been used for years to seek redress from large corporations and to provide relief for products liability

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31. Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2128 (2000).

32. FED. R. CIV. P. 23. Rule 23 was added to the Federal Rules in 1938 and was amended in 1966 to its present form. See Pryor, *supra* note 24, at 1888. Louisiana has its own class action rule which closely parallels the federal rule. See LA. CODE CIV. PROC. ANN. arts. 591-597 (West 1998).

33. STEPHEN C. YEAZELL, CIVIL PROCEDURE 967 (4th ed. 1996). See also FED. R. CIV. P. 23(a).

34. FED. R. CIV. P. 23(c). The certification process has been the subject of vigorous debate among courts and legal scholars.

35. FED. R. CIV. P. 23(c)(2).

36. FED. R. CIV. P. 23(c)(3-4).

37. FED. R. CIV. P. 23(d).

38. FED. R. CIV. P. 23(e).

claims, toxic torts, and consumer fraud cases.<sup>39</sup> However, prior to the 1966 amendment of Rule 23, a class representative had to represent an identifiable group of injured plaintiffs.<sup>40</sup> Since the amendment, attorneys are permitted to "sue whenever they believe that a group of individuals has been harmed, merely by suing on one individual's behalf" rather than pooling separate but similar identifiable claims.<sup>41</sup> This change has resulted in an explosion of class action filings, claims which may represent limitless numbers of plaintiffs and subject companies to unpredictable and potentially devastating judgments.<sup>42</sup>

### B. *Parens Patriae* Suits

Unlike class actions, *parens patriae* suits do not have to meet statutory requirements and can be brought unilaterally by a state's attorney general or in some cases by a city's mayor in his or her representative capacity.<sup>43</sup> *Parens patriae* suits, which have their historical roots in English common law, are suits brought by the executive branch under its "quasi-sovereign" authority in or-

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39. A number of memorable class action and *parens patriae* suits have been litigated in the last thirty-four years. These include the case against Ford for design defects of the Pinto, *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 359-60 (Cal. Ct. App. 1981), and the case against the makers of silicone breast implants for alleged illness caused by the implants, *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. 1469, 1470 (N.D. Ala. 1995). Additionally, a number of cases have been brought against the manufacturers of asbestos and asbestos products. See, e.g., *In re Asbestos Litig.*, 90 F.3d 963, 968 (5th Cir. 1996), *vacated sub nom.* Flanagan v. Ahearn, 521 U.S. 1114 (1997) (mem.); *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986); *Georgine v. Amchem Prods., Inc.*, 878 F. Supp. 716 (E.D. Pa. 1994), *vacated*, 83 F.2d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). There have been a number of toxic tort cases in Louisiana. See, e.g., *McCastle v. Rollins Envtl. Servs. Inc.*, 456 So. 2d 612 (La. 1984); *Atkins v. Harcross Chem., Inc.*, 638 So. 2d 302 (La. App. 4th Cir. 1994). Most recently there have been class actions against "Big Tobacco." See *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 963 (5th Cir. 1996); *Broin v. Philip Morris Cos.*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994); *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

40. Lawrence W. Schonbrun, *The Class Action Con Game*, REGULATION, available at <http://www.cato.org/pubs/regulation/reg20n4j.html>.

41. *Id.* See also Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 910 (1998) (discussing *Castano*, 160 F.R.D. at 544, which sought damages for "all present and past smokers in the country—a class numbering as many as 100 million people"). *Id.*

42. Schonbrun, *supra* note 40.

43. See Ratliff, *supra* note 29, at 1848.



der to protect the health, safety, and welfare of the citizens of the political subdivision.<sup>44</sup> "*Parens patriae* literally means 'parent of the country.'<sup>45</sup> According to the United States Supreme Court, to bring a *parens patriae* suit, "the state must assert an interest related to its sovereignty."<sup>46</sup> Sovereign interests consist of "the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves *the power to . . . enforce a legal code*, both civil and criminal."<sup>47</sup>

"When the attorney general files a *parens patriae* suit, the relief sought by the attorney general on behalf of his citizens may be similar to the 'aggregate remedies [of] . . . a class action; however, unlike a class action, a presumption exists that the citizen cannot bring an action on his own.'<sup>48</sup> Such was the case in the tobacco litigation, in which states' attorneys general throughout the nation sued the makers of tobacco products, seeking to recover the cost of increased medical expenses expended by the state in treating smoking related illnesses.<sup>49</sup>

### C. Social Issue Torts

The litigation against the big tobacco and gun manufacturers, as well as other such lawsuits, have been referred to by one commentator as "social issue torts."<sup>50</sup> Social issue torts have "the explicit intent to address social issues globally through tort litigation."

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44. Ratliff, *supra* note 29, at 1850-53.

45. Ieyoub & Eisenberg, *supra* note 30, at 1865 (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601 (1982)).

46. Ieyoub & Eisenberg, *supra* note 30, at 1865.

47. *Id.* at 1865 (quoting Alfred, 458 U.S. at 601).

48. See Pryor, *supra* note 24, at 1899 (quoting Beth S. Schipper, Note, *Civil RICO and Parens Patriae: Lowering Litigation Barriers Through State Intervention*, 24 WM. & MARY L. REV. 429, 449 (1983)).

49. See Mather, *supra* note 41, at 910. Forty-six states and Puerto Rico filed suit against tobacco companies to recover the cost of medical care of indigent smokers. *Id.* at 911. The lawsuits resulted in "a collective settlement of \$246 billion" and restrictions on advertising and marketing. Fisher, *supra* note 20, at 351. "The municipalities' lawsuits [against gun manufacturers] have been modeled in part upon the prior lawsuits brought by the states against cigarette companies." *Id.*

50. McGovern, *supra* note 9, at 1656. "'Social issue torts' refer generically to the use of tort law by plaintiffs' counsel to achieve social goals in areas such as handguns, tobacco, health maintenance organizations, the Holocaust, genetically modified organisms, and others . . ." *Id.* at 1656 n.1.

tion rather [than] through piecemeal lawsuits or statutory reform."<sup>51</sup> Social issue torts have also been held out as an engine for major revisions in the social fabric,<sup>52</sup> through the use of "[j]urors as Populist Protectors."<sup>53</sup> More often than not the use of representative litigation in the area of social issue torts is aimed at threatening a company with financial ruin under the cost of insurmountable legal expenses.<sup>54</sup> The persistent cost of litigation, the risk of failure, the drop in public confidence and stock prices, and the potential to avoid future litigation and losses are all factors which are thought to force settlement by defendants, regardless of the merits of the case.<sup>55</sup>

Plaintiffs' attorneys who take on social issue torts often see litigation as a way to achieve financial redistribution while reinvesting their bounty to litigation that "implicates social control."<sup>56</sup> Some plaintiffs' attorneys unabashedly admit that they are seeking to promote their own social agenda, due in part to the inability of the legislative branch to effect any real change.<sup>57</sup>

In several recently broadcast and print media reports, plaintiffs' counsel have held themselves out as the saviors of the

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51. McGovern, *supra* note 9, at 1656 n.1.

52. *See id.* at 1659. There have also been opposing views that suggest that such a lawsuit is inappropriate as an "end run" around legislation. *See* Brent W. Landau, *State Bans on City Gun Lawsuits*, 37 HARV. J. ON LEGIS. 623, 625 (2000) (citing John R. Lott, Jr., *Will Suing Gunmakers Endanger Lives?*, CHI. TRIB., Nov. 17, 1998, at 19)).

53. McGovern, *supra* note 9, at 1660 (citing Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183-85 (1991)).

54. *See id.* at 1664. "[P]iling on' . . . almost inevitably leads to settlement." *Id.* at 1658; accord Landau, *supra* note 52, at 625-26 (noting that critics claim that the gun suits are an attempt to bankrupt the companies through crushing litigation expenses). *See also* David Kopel, *Strong Arm Suits*, LIBERTY MAGAZINE, Feb. 2000, at 35-36, available at <http://i2i.org/SuptDocs/Crime/Magazines/StrongarmSuits.htm> (noting that the Mayor of Philadelphia had stated that the cost of litigation could be fatal to some companies).

55. *See* McGovern, *supra* note 9, at 1658. This "piling on' strategy . . . almost inevitably leads to settlement." *Id.* It should be noted that this is a common argument against class actions. *See generally* Kopel, *supra* note 54, at 35-36.

56. McGovern, *supra* note 9, at 1661.

57. *See, e.g.,* Cohen, *supra* note 11, at 24. "We're the last bastion . . . . We're the last fighters available for the little guy." *Id.* (quoting attorney Fred Levin speaking about the role of plaintiff's lawyers in public life). Asked "if trial lawyers are trying to run America," attorney Dickie Scruggs laughingly responded, "[s]omebody's got to do it." *Id.* Mr. Scruggs is also credited with stating that he is aiming to reform industries such as asbestos manufacturing, health care, guns, and tobacco because the country's elected leaders have failed in the task. *Id.* at 22.

American consumer.<sup>58</sup> On a recent episode of the news program *20/20*, a class action lawyer described his lawsuit against the makers of Pokemon as an attempt to protect the nation's children from the addictive quality of the game.<sup>59</sup> Likewise, National Public Radio aired a program discussing the recent class actions against health maintenance organizations, in which Mr. Dick Scruggs, a seasoned class action lawyer, described himself as a "veteran" of the tobacco war, fighting for, among other things, public health.<sup>60</sup>

Most recently, *Time Magazine* published an article entitled *Are Lawyers Running America?* that focused on the recent class action suits against corporate America.<sup>61</sup> In that article, trial lawyers portrayed themselves as "the last fighters available for the little guy."<sup>62</sup> When asked if attorneys were trying to run America, one trial lawyer stated that "[s]omebody's got to do it."<sup>63</sup>

In line with this sentiment is the purported aim of the lawsuits against the handgun manufacturers—"greater regulation of the firearms industry."<sup>64</sup> This type of regulation through litigation, however, is not the way our founding fathers envisioned our government operating.<sup>65</sup> Consequently, in response to the endless lawsuits, a representative of a group of gun owners has opined

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58. See *supra* notes 11, 30 and accompanying text.

59. See *Give Me a Break!*, *20/20*, *supra* note 30.

60. See *Morning Edition*, *supra* note 30.

61. Cohen, *supra* note 11.

62. *Id.* at 24 (quoting trial attorney Fred Levin) (discussing the use of class actions to form social policy and fill lawyers' bank accounts).

63. *Id.* (quoting attorney Dickie Scruggs).

64. Lytton, *supra* note 24, at 54 (citing Paul M. Barrett, *Attacks on Firearms Echo Earlier Assault on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1; Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1999, at A1; Fox Butterfield, *California Cities Sue Gun Makers Over Sales Methods*, N.Y. TIMES, May 25, 1999, at A20; Fox Butterfield, *Bill Would Subject Guns to Federal Safety Controls*, N.Y. TIMES, Mar. 3, 1999, at A10).

65. The separation of powers embodies the idea that the legislative body should enact laws and the judiciary should interpret laws. See *Zamora*, *supra* note 2, at 1837. See also U.S. CONST. art. I, § 8, cl. 18 (providing that the legislative branch has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"); U.S. CONST. art. III, § 1 (providing, in part, that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

that "[t]he founding fathers would be very sad that laws are now being made by litigation rather than legislation . . . ."<sup>66</sup>

### III. THE NEW ORLEANS HANDGUN LITIGATION

Concededly, in certain circumstances, representative litigation can be beneficial to a class of claimants. However, the lawsuits filed by the Mayor of the City of New Orleans and other mayors against the makers of handguns are extremely troubling because of their implications for our system of government, as well as the potential detrimental impact on manufacturers and distributors of other lawful products throughout the country. Regardless of an individual's belief regarding gun control, the current use of representative litigation should be of concern to every person and business in this country.<sup>67</sup> This comment suggests that the legal system is being improperly used to create new standards for the manufacture and distribution of legal products. The judiciary is being used by special interest litigants as a tool for judicial legislation in the absence of actual legislative enactments. This is not only a violation of the constitutional separation of powers, it is also shortsighted and offers few, if any, real benefits to the consumer or to society.

As many states did in asserting their *parens patriae* right in the tobacco case, the City of New Orleans, as a "home rule" charter city,<sup>68</sup> is asserting its right under *parens patriae*, seeking to

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66. See Raju Chebium, *Litigation Moving Gun Control Issue Into Courts: Gun Makers Charge Local Officials with Meddling*, available at <http://www.cnn.com/LAW/trials.and.cases/case.files/0004/guns/overview.html> (quoting Rod Collins, secretary of the Michigan Coalition for Responsible Gun Owners).

67. See Reed, *supra* note 23.

Whether the subject is breast implants, guns, tobacco or any other product, abusing the legal system is not a harmless lark. It is an exercise in intellectual corruption, an evasion of responsibility, an attack on the democratic process, and a manifestation of greed run amok that every consumer and businessman in America ignore at their [sic] peril.

*Id.*

68. See Thomas F. Segalla, *Governmental and Individual Claims in Gun Litigation and Coverage: Where Do We Go From Here?*, SE64 ALI-ABA 363, 400 (Jan. 13, 2000). "Many major cities are 'home ruled' under their state constitutions. Essentially, this 'home rule' clause guarantees the cities the right to sue and be sued unfettered by the state." *Id.* at 400. For a discussion of the powers granted home rule charter cities under the California constitu-

recover monies expended due to increased city costs due to gun violence.<sup>69</sup> On October 30, 1998, the Mayor of New Orleans, Marc H. Morial, and the City of New Orleans, represented by the Center to Prevent Handgun Violence,<sup>70</sup> the private law firm of Gauthier, Downing, LaBarre, Besler, & Dean,<sup>71</sup> and other attorneys,<sup>72</sup> filed a lawsuit against fifteen gun manufacturers, several pawn shops, and trade associations, seeking damages for expenses incurred due to allegedly defective products and unlawful actions.<sup>73</sup> Because of budgetary concerns, the city signed a contingency fee contract and is purportedly not expending any taxpayer money in pursuit of the case.<sup>74</sup>

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tion, see Eric Gorovitz, *California Dreamin': The Myth of State Preemption of Local Firearm Regulation*, 30 U.S.F.L. REV. 395, 398-400 (1996).

69. *Morial v. Smith & Wesson Corp.*, No. 98-18578, 2000 WL 248364, at \*1 (La. Civ. D. Ct. Feb. 28, 2000).

70. The Center to Prevent Handgun Violence is an organization headed by Sarah Brady, the wife of former Press Secretary Bill Brady, who was seriously injured by a gunshot wound during the attempted assassination of President Reagan. The group is responsible for the passage of the "Brady Bill" into law. See *New Orleans Files Handgun Suit*, ASSOCIATED PRESS, Oct. 31, 1998, available at 1998 WL 21781871. See also David Kopel, *Should Gun Makers Pay Damages to Local Governments for Gun Related Violence and Injuries?*, THE INDEPENDENCE INSTITUTE, Feb. 11, 2000, available at <http://i2i.org/SuptDocs/Crime/CQsuits.htm>. The "Brady Bill" regulates the sale and marketing of firearms and includes a waiting period and background check of potential purchasers. 18 U.S.C. § 922 (1994).

71. Wendell Gauthier is a well-known New Orleans based lawyer who filed a landmark class action suit against the nation's tobacco companies. See *New Orleans Files Handgun Suit*, ASSOCIATED PRESS, Oct. 31, 1998, available at 1998 WL 21781871. Mr. Gauthier filed the lawsuit "Personally and for all Participating Castano Tobacco Attorneys." *Morial*, 2000 WL 248364, at \*1. The "Castano Tobacco Attorneys" are a team of sixty private law firms from around the country that were brought together and organized by Mr. Gauthier in the early 1990s. See Mather, *supra* note 41, at 910. The Gauthier-led team filed *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996), seeking recovery for the cost of smoking-related addiction by all present and past smokers nationwide. *Castano*, 160 F.R.D. at 548. The class represented a potential 100 million plaintiffs. *Id.* at 550. The case was dismissed after appellate review, but served as a model for the individual state actions filed by the states' attorneys general against "Big Tobacco." See *Castano*, 84 F.3d at 746.

72. The amended complaint lists fifteen separate law firms, including three participating "Castano Tobacco Attorneys" representing the plaintiffs. Amended Petition at 1, *Morial* (No. 98-18578).

73. Petition, *Morial* (No. 98-18578) (Filed Oct. 30, 1998); see also *Morial*, 2000 WL 248364, at \*1; see also *New Orleans Handgun Suit*, ASSOCIATED PRESS, Oct. 31, 1998 (discussing the lawsuit).

74. See George Will, Editorial, *As Cities Sue Gun-makers, They May Soon be Class-action Defendants*, NAPLES DAILY NEWS, Jan. 25, 1999, available at <http://www.naplesnews.com/today/editorial/d308280a.htm>. The City of Chicago has filed a similar lawsuit using city

The captioned lawsuit, *Morial v. Smith & Wesson Corp.*,<sup>75</sup> seeks to recover millions of dollars in damages expended by the City of New Orleans in "additional police protection, emergency services, pensions benefits, health care and other necessary facilities and services due to the threat of the use of [handguns] . . . ."<sup>76</sup> Additionally, the city seeks to recover the loss "of substantial tax revenue due to lost productivity . . . ."<sup>77</sup> The plaintiff claims that guns are "unreasonably dangerous" as defined by the Louisiana Products Liability Act<sup>78</sup> and that the defendants have engaged in "unlawful action."<sup>79</sup> The suit was amended on September 7, 1999 to include allegations of nuisance,<sup>80</sup> fraudulent concealment,<sup>81</sup> unjust enrichment,<sup>82</sup> negligent marketing,<sup>83</sup> and civil conspiracy.<sup>84</sup> Subsequently, the case was removed to the United States District Court for the Eastern District of Louisiana on November 23, 1998 and was remanded back to Civil District Court in New Orleans on August 18, 1999.<sup>85</sup>

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attorneys, and the cost to the taxpayers is expected to approach one million dollars. See John R. Lott, Jr., *Will Suing Gun Manufacturers Save Lives?*, INVESTOR'S BUSINESS DAILY, May 27, 1998, available at <http://www.junkscience.com/news2/lot3.htm>. See also discussion *infra* subsection III(C) (noting the costs associated with the New Orleans lawsuit against the makers of handguns).

75. No. 98-18578, 2000 WL 248364, at \*1 (La. Civ. D. Ct. Feb. 28, 2000).

76. Amended Petition, § 10, *Morial* (No. 98-18578).

77. *Id.*

78. LA. REV. STAT. ANN. § 9:2800.51-60 (West 1997 & Supp. 2000). See also John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 LA. L. REV. 565, 565-627 (1989) (discussing the Louisiana Products Liability Act).

79. *Morial*, 2000 WL 248364, at \*1.

80. See Amended Petition § 18, at 17, *Morial* (No. 98-18578). The amended petition alleges that the illegal trafficking of guns combined with the illegal possession and use of guns infringes on the public health safety and welfare, thereby creating a nuisance. *Id.*

81. *Id.* at 19. The amended complaint alleges that the defendants knowingly, jointly, and fraudulently concealed the safety of handguns and the risks associated with the "design and manufacture of . . . handguns and the ownership of such handguns." *Id.*

82. *Id.* The plaintiff alleged that the "[d]efendants have reaped enormous profits and gains from the sale of handguns in and around the City of New Orleans." *Id.*

83. *Id.* at 21. The defendants are alleged to have "failed to exercise reasonable care by distributing, promoting, and over-promoting handguns without adequate supervision and/or control, in such a manner that made it reasonably foreseeable that persons would be injured by the criminal or irresponsible use of handguns." *Id.* at 22.

84. *Id.* at 22. This part of the complaint alleges that the defendants conspired to keep safety features off the market that would prevent unauthorized use of a handgun and to conceal the dangers of handguns. *Id.* at 22-23.

85. *Morial v. Smith & Wesson Corp.*, No. 98-18578, 2000 WL 248364, at \*1 (La. Civ. D. Ct. Feb. 28, 2000). The case was remanded based on diversity of citizenship pursuant to

In response to the lawsuit, the Louisiana Legislature enacted Louisiana Revised Statute sections 40:1799<sup>86</sup> and 9:2800.60.<sup>87</sup> Section 9:2800.60 was intended to clarify the intent of the Louisiana Products Liability Act and to prohibit the filing of lawsuits against the makers of non-defective products in general and guns in particular.<sup>88</sup> Section 40:1799 was passed to ban all lawsuits by

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28 U.S.C. § 1332. Notice of Filing of Notice of Removal, *Morial* (No. 98-18578) (filed Nov. 23, 1998). The case was remanded to state court because the case involved several questions of state law that were more properly settled in state court. See Pamela Coyle, *N.O. to Keep Gun Lawsuit in State Court*, THE TIMES PICAYUNE, Aug. 19, 1999, at A1, available at 1999 WL 19760597. See also, *Federal Judge Sends Guns Lawsuit to State Courts*, AP NEWSWIRE, Aug. 19, 1999. The issues involving state law were the ability of the City of New Orleans to bring the lawsuit under its home rule charter and whether gun makers have a duty to warn purchasers of the potential dangers inherent in the product. *Id.* The fact that the case was remanded back to state court, a venue believed to be "plaintiff friendly," is thought to be adding pressure on the defendants to settle. See Coyle, *supra*, at A1.

86. The Louisiana Legislature enacted Louisiana Revised Statutes section 40:1797.1, which was later designated as Louisiana Revised Statutes section 40:1799 (West 2000).

87. LA. REV. STAT. ANN. § 9:2800.60 (West 2000). See generally Leslie Zganjar, *Lawmakers Try to Halt Suit vs. Gun Makers*, BATON ROUGE ADVOCATE, Apr. 19, 1999, at B9; Randy McClain, *Foster-Backed Gun Bills Sailing Through*, BATON ROUGE ADVOCATE, June 7, 1999, at A1. At least fifteen states have passed similar laws prohibiting cities from suing gun makers, including Alaska, Arizona, Arkansas, Georgia, Louisiana, Maine, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, and Wyoming. See Matthew Barakat, *Bills Banning Lawsuits Against Gun Makers Quietly Progress*, AP NEWSWIRE, Mar. 6, 2000.

88. See LA. REV. STAT. ANN. § 9:2800.60. This section provides:

A. The legislature finds and declares that the Louisiana Products Liability Act was not designed to impose liability on a manufacturer or seller for the improper use of a properly designed and manufactured product. The legislature further finds and declares that the manufacture and sale of firearms and ammunition by manufacturers and dealers, duly licensed by the appropriate federal and state authorities, is lawful activity and is not unreasonably dangerous.

B. No firearm manufacturer or seller shall be liable for any injury, damage, or death resulting from any shooting injury by any other person unless the claimant proves and shows that such injury, damage, or death was proximately caused by the unreasonably dangerous construction or composition of the product as provided in R.S. 9:2800.55.

C. Notwithstanding any other provision of law to the contrary, no manufacturer or seller of a firearm who has transferred that firearm in compliance with federal and state law shall incur any liability for any action of any person who uses a firearm in a manner which is unlawful, negligent, or otherwise inconsistent with the purposes for which it was intended.

D. The failure of a manufacturer or seller to insure that a firearm has a device which would: make the firearm useable only by the lawful owner or authorized user of the firearm; indicate to users that a cartridge is in the chamber of the firearm; or prevent the firearm from firing if the ammunition magazine is removed, shall not make the firearm unreasonably dangerous, unless such device is required by federal or state statute or regulation.

municipalities against gun makers except those directly related to purchases by the municipality.<sup>89</sup> Both laws were to be "appl[ie]d to all actions or claims pending on or filed after the effective date of th[e] Act."<sup>90</sup>

On January 3, 1999, the National Shooting Sports Foundation and Shooting Arms and Ammunition Manufacturers' Institute were dismissed from the suit for lack of personal jurisdiction.<sup>91</sup> On December 7, 1999, the remaining defendants moved to

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E. (1) For the purposes of this Chapter, the potential of a firearm to cause serious injury, damage, or death as a result of normal function does not constitute a firearm malfunction due to defect in design or manufacture.

(2) A firearm may not be deemed defective in design or manufacture on the basis of its potential to cause serious bodily injury, property damage, or death when discharged legally or illegally.

F. Notwithstanding any provision of law to the contrary, no manufacturer or seller of a firearm shall incur any liability for failing to warn users of the risk that:

(1) A firearm has the potential to cause serious bodily injury, property damage, or death when discharged legally or illegally.

(2) An unauthorized person could gain access to the firearm.

(3) A cartridge may be in the chamber of the firearm.

(4) The firearm is capable of being fired even with the ammunition magazine removed.

G. The provisions of this Section shall not apply to assault weapons manufactured in violation of 18 U.S.C. § 922(v).

LA. REV. STAT. ANN. § 9:2800.60 (West 2001).

89. See LA. REV. STAT. ANN. § 40:1799, which provides:

A. The governing authority of any political subdivision or local or other governmental authority of the state is precluded and preempted from bringing suit to recover against any firearms or ammunition manufacturer, trade association, or dealer for damages for injury, death, or loss or to seek other injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition. The authority to bring such actions as may be authorized by law shall be reserved exclusively to the state.

B. This Section shall not prohibit the governing authority of a political subdivision or local or other governing authority of the state from bringing an action against a firearms or ammunition manufacturer, trade association, or dealer for breach of contract as to firearms or ammunition purchased by the political subdivision or local authority of the state.

LA. REV. STAT. ANN. § 40:1799 (West 2000).

90. LA. REV. STAT. ANN. §§ 40:1799 & 9:2800.60 (West 2000). At least thirteen other states have enacted similar legislation to protect handgun makers from lawsuits. See Landau, *supra* note 52, at 623. The states are Alaska, Arizona, Arkansas, Georgia, Maine, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, and Utah. *Id.* at 638 n.2 (listing states and specific laws).

91. Exception of Lack of Personal Jurisdiction, Reason for Judgment, Morial v. Smith & Wesson Corp., No. 98-18578, 2000 WL 248364, at \*1 (La. Civ. D. Ct. Feb. 28, 2000). The trial judge found that the defendant trade organizations lacked sufficient contact with Louisi-



have the case dismissed by filing a Peremptory Exception of No Right and No Cause of Action alleging that the legislative enactment of Revised Statutes sections 40:1799 and 9:2800.60 had made the case moot because of their retroactive applicability.<sup>92</sup> The defendants further claimed that Louisiana law did not support the allegations.<sup>93</sup>

The motion was argued on January 28, 2000 and denied on February 28, 2000.<sup>94</sup> In denying the motion, the court held that the actions of the legislature were unconstitutional under both the Louisiana and United States Constitutions as special<sup>95</sup> and retroactive substantive laws that affected vested rights in pending litigation.<sup>96</sup> The court further held that the plaintiff did not have a cause of action under the Louisiana Products Liability Act for the claims of nuisance, fraudulent concealment, unjust enrichment, negligent marketing and distribution, and civil conspiracy.<sup>97</sup>

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ana to subject them to the jurisdiction of the state. Exception of Lack of Personal Jurisdiction, Reason for Judgment, *Morial*, 2000 WL 248364, *supra*, at \*1

92. See *supra* note 90 and accompanying text.

93. *Morial*, 2000 WL 248364, at \*1-2. The defendants alleged that the Louisiana Products Liability Act did not recognize claims against manufacturers of non-defective products and that the allegations added in the amended petition were not recognized by Louisiana law. *Id.* at \*10-\*12.

94. *Id.* at \*1-2. The legislative enactments were intended to have a preclusive effect to "all claims existing or actions pending . . ." LA. REV. STAT. ANN. § 40:1799.

95. The court held that the legislative enactments were "special laws" because they were directed specifically at derailing the New Orleans lawsuit. *Morial*, 2000 WL 248364, at \*6-\*8. The court relied on Article III of the Louisiana Constitution, which prohibits laws affecting existing civil actions. *Id.* at \*7 (citing LA. CONST. art. III, § 12(a)(3)).

96. *Id.* at \*2-\*15. The court held that an interest in a pending lawsuit is a vested property right that can not be eliminated by retroactive laws even if supported by legislative intent to do so. *Id.* at \*8. It is worth noting that the United States Supreme Court generally disfavors the retroactive application of legislation. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). As stated by Justice Scalia in *Landgraf*, "there exists a judicial presumption of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent a clear statement to the contrary." *Id.* at 286 (Scalia, J., concurring).

97. *Morial*, 2000 WL 248364, at \*12. These allegations were not viable because under Louisiana law strict liability and negligence are not applicable to manufacturers. *Id.* "Louisiana law has clearly established that the Louisiana Product Liability Act is the exclusive theory of recovery in Louisiana against a manufacturer." *Id.* (citing *Peterson v. G.H. Bass & Co.*, 713 So. 2d 806, 808-09 (La. App. 4th Cir. 1998) (affirming the trial court's summary judgment applying the Act); *Moore v. Safeway, Inc.*, 700 So. 2d 831, 848 (La. App. 1st Cir. 1996) (affirming application of the Act); *Bernard v. Ferrellgas, Inc.*, 689 So. 2d 554, 558 (La. App. 3d Cir. 1997) (applying the Act in a products liability action involving the explosion of a propane delivery system); *Ashley v. Gen. Motors Corp.*, 666 So. 2d 1320, 1321 (La. App.

However, the court did hold that the plaintiffs had stated a cause of action under the Louisiana Products Liability Act for design defects and inadequate warnings.<sup>98</sup>

### A. The Smith & Wesson Agreement

Although guns are currently the most highly regulated consumer product in the nation,<sup>99</sup> one of the defendant gun manufacturers, Smith & Wesson, agreed to change the way it does business in the hopes of being dismissed from the lawsuits.<sup>100</sup> The changes include a two-week waiting period for purchases,<sup>101</sup> additional safety devices, owner recognition technology, and the creation of a private "Compliance Oversight Commission."<sup>102</sup> The Commission will be made up of "two representatives of the cities, one of the states, one from the ATF, and one from the gun industry."<sup>103</sup> In response to the agreement, seventeen cities dismissed their suits against Smith & Wesson; however, New Orleans and twelve other cities have gone forward with the lawsuits against Smith & Wesson and the other handgun makers.<sup>104</sup>

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2d Cir. 1996)) (applying the Act in a product liability action involving an automobile manufacturer).

98. See *Morial*, 2000 WL 248364, at \*11-\*13.

99. See Kopel, *supra* note 70. Current federal law requires state and federal licensure of distributors, federal testing of all guns, an FBI background check of the purchaser, and a seventy-two-hour waiting period prior to purchase. *Id.*

100. See Bruce Alpert, *Major Gun Firm Bites the Bullet*, THE TIMES PICAYUNE, Mar. 18, 2000, at A1, available at 2000 WL 6547759. For a copy of the agreement, see *Gun Lawsuit Agreement with Smith & Wesson: Summary Prepared by The U.S. Conference of Mayors*, available at [http://www.usmayors.org/USCM/wash\\_update/crime/033100b.htm](http://www.usmayors.org/USCM/wash_update/crime/033100b.htm)

101. See Alpert, *supra* note 100.

102. See *Gun Lawsuit Agreement*, *supra* note 22.

103. *Id.*

104. See Ed Somers, *Mayors, Counties, State AG's Form "Communities for Safer Guns Coalition"*, UNITED STATES CONFERENCE OF MAYORS, Mar. 31, 2000, available at [http://www.usmayors.org/USCM/wash\\_update/crime/033100a.htm](http://www.usmayors.org/USCM/wash_update/crime/033100a.htm). See also Chebium, *supra* note 66. Interestingly, in the wake of the Smith & Wesson agreement, New Orleans attorney Kenneth Carter, who is part of the city's legal team, suggested that the city would sign the agreement and drop the lawsuit because the agreement tracked the city's complaint. See Alpert, *supra* note 100. That prediction has failed to materialize. In fact, twelve cities and counties have not dropped their suits against Smith & Wesson. See Somers, *supra*. They are Alameda County, Camden County, Chicago, Cincinnati, Cleveland, Compton, Cook County, East Palo Alto, San Mateo County, Wayne County, Wilmington Los Angeles County, and New Orleans. *Id.*

Shortly after the agreement with Smith & Wesson was signed, local, state, and federal agencies began giving preference to Smith & Wesson in the award of weapons contracts.<sup>105</sup> Placing further pressure on companies that refused to settle, at least six states' attorneys general began antitrust investigations against the handgun manufacturers that refused to sign the agreement and certain trade associations and consumer groups that had boycotted Smith & Wesson products in protest to the agreement.<sup>106</sup>

### B. The Response

Interestingly, since the New Orleans lawsuit against the gun industry was announced, the press, which traditionally advocates stricter handgun laws, and the Second Amendment Foundation,<sup>107</sup> which opposes stricter handgun laws, have been consistent in their criticism and opposition to these suits. In fact, on November 30, 1999, the Second Amendment Foundation,<sup>108</sup> with the assistance of constitutional law professors from around the country,<sup>109</sup> filed a lawsuit in Washington D.C. against Mayor Marc Morial, the United States Conference of Mayors, and the mayors of the other cities engaged in these lawsuits against the handgun industry.<sup>110</sup> The lawsuit alleges that the defendants have conspired "to

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105. See Chebium, *supra* note 66.

106. *Id.*

107. "The Second Amendment Foundation is a tax-exempt education, legal action and publishing group founded in 1974 and now has over 600,000 individual citizen supporters nationwide. The Foundation is "a gun owner advocacy and education organization . . . ." *Mayors Face Lawsuit by Gun Owner Group*, Second Amendment Foundation, Dec. 9, 1998 [hereinafter *Mayors Face Lawsuit*], available at <http://saf.org/pub/rkba/press-releases/mayors1.htm>.

108. See generally *Mayors Face Lawsuit*, *supra* note 107; Chebium, *supra* note 66; Will, *supra* note 74; Lott, *supra* note 74; *Courting Disaster: The Anti-gun Lawsuits that Boston has Signed on to are Anti-democratic—and Could Provoke a Dangerous Backlash*, BOSTON PHOENIX, June 24–July 1, 1999, available at <http://www.bostonphoenix.com/archive/features/99/06/24/EDITORIAL.html>; D.F. Olivera, *A Cynical Grab for Undeserved Money*, THE SPOKESMAN-REVIEW, Jan. 8, 1999, available at <http://www.spokane.net/marketplace/partners/spokesmanreview.asp>; J.D. Tuccille, *High Noon in the Courtroom*, CIVIL LIBERTIES, Jan. 24, 1999, available at <http://civilliberty.mingco.com/newsissues/civilliberty/library/weekly/aa012499.htm>.

109. Professor George Strickler of Tulane University School of Law in New Orleans is a member of the Foundation's steering committee for the lawsuit. See *Mayors Face Lawsuit*, *supra* note 107. For a list of law professors and their respective schools, see *supra* note 108.

110. See *Second Amendment Found. v. United States Conference of Mayors*, No. 1:99CV03181 (D.D.C. Nov. 30, 1999), available at <http://www.saf.org/lawsuit.html>.

violate civil and constitutional rights, including the First, Second and Ninth Amendments, as well as the creation of undue burden on lawful interstate commerce."<sup>111</sup> The lawsuit further seeks monetary damages, attorney's fees and costs, and other unspecified relief.<sup>112</sup>

#### IV. DISCUSSION

The fact that groups with traditionally opposing views on handgun control are in agreement in their opposition to the New Orleans handgun litigation points to a serious problem in the use of representative litigation to solve social issues. The aforementioned case against the handgun makers and the responses to it expose the dark side inherent in the use of representative litigation by special interest litigants. These suits result in lawful companies being forced to adopt new standards or business practices.<sup>113</sup>

While in the tobacco context arguments can be made that tobacco harms the user when used properly<sup>114</sup> and that tobacco companies concealed their knowledge about the addictive qualities of tobacco,<sup>115</sup> similar arguments cannot be made about handguns or other consumer products.<sup>116</sup> While both products are legally made and distributed in this country, handguns, unlike tobacco prod-

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111. *Second Amendment Found.*, *supra* note 110.

112. *Id.*

113. Although there are tremendously disturbing issues relating to legal fees that have come out of the settlement of these types of suits, this is not the focus of this comment. For discussions regarding attorney's fees in class actions, see generally, Patricia M. Hynes, *Plaintiffs' Class Action Attorneys Earn What They Get*, 2 JOURNAL OF THE INSTITUTE FOR THE STUDY OF LEGAL ETHICS 243 (1999); Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809 (2000); Kenneth Lasson, *Lawyering Askew: Excesses in The Pursuit of Fees and Justice*, 74 B.U. L. REV. 723 (1994).

114. See Segalla, *supra* note 68, at 369. "Cigarettes offer no beneficial uses and can only be harmful and even deadly to a person." *Id.*

115. See Cynthia R. Mabry, *Warning! The Manufacturer of this Product May Have Engaged in Cover-ups, Lies, and Concealment: Making the Case for Limitless Punitive Awards in Product Liability Lawsuits*, 73 IND. L.J. 187, 224 (1997).

116. See *Suing Gun Makers: Hazardous to Our Health*, NCPA POLICY REPORT NO. 223, National Center for Policy Analysis, Mar. 1999, available at <http://www.ncpa.org/studies/s223.html>.

ucts, are not "designed" to harm the purchaser and have repeatedly been proven as effective and not defective.<sup>117</sup>

### A. Previous Attempts at Judicial Legislation

Ultimately, what the lawsuits against the tobacco companies, and now the lawsuits against the handgun industry, are attempting to do is create standards for the manufacture and distribution of any given product through the force of overwhelming litigation costs.<sup>118</sup> The net effect is to accomplish in court what cannot be achieved in the state and federal legislative branches.<sup>119</sup>

Historically, the judiciary has shared the view that courts should not create handgun legislation and has routinely rejected the role of the courts as legislative bodies by dismissing previous actions against handgun makers.<sup>120</sup> In a 1983 decision by the United States District Court for the District of Massachusetts, the court, citing Louisiana law, refused to impose liability because of a lack of legislation describing the marketing of handguns as an

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117. See, e.g., Mark Johnson, *supra* note 23 (noting that guns have redeeming purposes, unlike tobacco which has no healthy alternative). See also Timothy Burn & Donna De Marco, *Gun Shops Battle the Odds Dealers Scramble for Niche as Sales Drop, Laws Multiply*, THE WASHINGTON TIMES, Dec. 19, 1999 (stating that "there's no amount of safe smoking but guns are safe if used properly") (quoting Sanford Abrams, vice president of the Maryland Licensed Firearms Dealers Association); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1216 (N.D. Tex. 1985) (noting that handguns function as intended and are not defective); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1298 (Ill. App. Ct. 1985) (finding that guns are non-defective products); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533-34 (11th Cir. 1986) (finding that guns perform as intended and are non-defective); Pryor, *supra* note 24, at 1908-09 (noting that guns are used by both citizens and law enforcement as a deterrent to crime).

118. See McGovern, *supra* note 9, at 1664. "[P]iling on' . . . almost inevitably leads to settlement." *Id.* at 1658; Landau, *supra* note 52, at 625. Critics claim that the gun suits are an attempt to bankrupt the companies by "the sheer cost of litigation." Kopel, *supra* note 54, at 35-36, available at <http://i2i.org/SuptDocs/Crime/Magazines/StrongarmSuits.htm>. The Mayor of Philadelphia has noted, with pleasure, that the cost of litigation could be fatal to some companies. *Id.*

119. See generally *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107, 111 (D. Mass. 1983); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1216 (N.D. Tex. 1985). See also Reed, *supra* note 23; Dahleen Glanton, *NRA, Firearms Industry Work to Fight Cities' Suits*, CHI. TRIB., Feb. 4, 1999, available at 1999 WL 2841099.

120. See sources cited *infra* notes 121-30 and accompanying text.

unreasonably dangerous activity.<sup>121</sup> Similarly, the Seventh Circuit Court of Appeals, also citing Louisiana law, rejected imposing liability on gun makers because to impose such liability would "drive manufacturers out of business . . . produc[ing] a handgun ban by judicial fiat. . . ."<sup>122</sup>

In the Texas case of *Patterson v. Rohm Gesellschaft*,<sup>123</sup> the court dismissed an action against handgun makers that alleged defects in the product as well as defects in the distribution that caused guns to be available to criminals.<sup>124</sup> The judge stated that:

[A]s an individual, I believe, very strongly, that handguns should be banned and that there should be stringent, effective control of other firearms. However, as a judge, I know . . . that the question of whether handguns can be sold is a political one . . . and that this is a matter for the legislatures not the courts.<sup>125</sup>

The *Patterson* court further opined that should the plaintiffs' allegations be found viable, such theories would "be applicable to other products besides handguns."<sup>126</sup>

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121. See *Mavilia*, 574 F. Supp. at 111. The case was brought as a wrongful death action against a gun manufacturer by the surviving spouse and children of an innocent bystander killed by a gunshot. *Id.* at 108. The plaintiff alleged that the design and distribution of guns should create liability for the manufacturer. *Id.* The court applied Massachusetts law, but reviewed and cited Louisiana law in support of its holding that the legislatures did not intend to create liability on the makers of handguns. *Id.* at 110-11 (citing *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 208-09 (E.D. La. 1983)).

122. *Martin*, 743 F.2d at 1204. In this case, the plaintiffs sought recovery from a gun manufacturer for the damages associated with an intentional shooting, rather than seeking damages from the shooter. *Id.* at 1201. The plaintiff alleged that the gun used was an unreasonably dangerous product and that the manufacturer should be strictly liable. *Id.* In rejecting the plaintiff's claim, the court cited *Richman* as persuasive authority that products liability law was not intended to apply to non-defective products. *Id.* at 1203-05 (citing *Richman*, 571 F. Supp. at 208-09).

123. 608 F. Supp. 1206 (N.D. Tex. 1985).

124. *Id.* at 1216.

125. *Id.* Political questions have been declared non-justiciable because they involve the constitutional separation of powers. *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). The United States Supreme Court has defined a political question as "essentially a function of the separation of powers." *Id.* at 217. In *Baker*, the Court listed several factors that may indicate whether an issue is a political question. *Id.*

126. *Patterson*, 608 F. Supp. at 1216. Numerous jurisdictions have rejected attempts at legislation by the judiciary. See generally *Riordan v. Int'l Armament Corp.*, 477 N.E.2d

In *Delahanty v. Hinckley*,<sup>127</sup> a case in which the plaintiff sought recovery for damages from handgun manufacturers that resulted from the attempted assassination of President Reagan, the district court dismissed the claims.<sup>128</sup> In its decision, the court stated that:

What is really being suggested by plaintiffs, and by indeed many citizens, is for this Court . . . to indirectly engage in legislating some form of gun control. . . . [S]uch legislation should be left to the federal and state legislatures which are in the position to . . . address all of the issues and concerns as well as reflect the will of the citizens.<sup>129</sup>

One of the most recent dismissals occurred in *City of Cincinnati v. Beretta U.S.A. Corp.*,<sup>130</sup> a case that mirrors the claims by the City of New Orleans. In that case, the City of Cincinnati sought recovery from handgun manufacturers, distributors, and trade associations for "costs incurred in providing police, emergency, court, prison and other related services" due to the intentional or accidental use of handguns.<sup>131</sup> The city further sought recovery for "diminution in property value and loss of taxpayer revenue, punitive damages and . . . injunctive relief which would require defendants to change the methods by which they design, distribute and advertise their products nationally."<sup>132</sup>

In dismissing the case, the trial court refused to create judicial legislation for a lawful product, deferring instead to the state

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1293, 1299 (Ill. App. Ct. 1985); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327-28 (9th Cir. 1986); *Rhodes v. R.G. Indus., Inc.*, 325 S.E.2d 465, 467 (Ga. Ct. App. 1985); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1534 (11th Cir. 1986); *Richardson v. Holland*, 741 S.W.2d 751, 756 (Mo. Ct. App. 1987); *Forni v. Ferguson*, 232 A.D.2d 176, 176 (N.Y. 1996); *Wasylow v. Glock, Inc.*, 975 F. Supp. 370, 380-81 (D. Mass. 1996); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53, 54 (Mich. Ct. App. 1997); *Ganim v. Smith & Wesson Corp.*, No. CV-990153198S, 1999 WL 1241909, at \*1 (Conn. Super. Ct. Dec. 10, 1999).

127. 686 F. Supp. 920 (D.D.C. 1986).

128. *Id.* at 926. The plaintiffs sought recovery based on defective design, defective distribution, failure to warn of criminal misuse of the product, and that sale and distribution of handguns was an ultrahazardous activity. *Id.* at 927.

129. *Id.* at 930.

130. No. A-9902369, 1999 WL 809838, at \*1 (Ohio Ct. Com. Pl. Oct. 7, 1999).

131. *Id.* at \*1.

132. *Id.*

legislature.<sup>133</sup> The court further held that injunctive relief, which would enjoin the sale and marketing of lawful products outside of Cincinnati, would violate the Commerce Clause of the United States Constitution.<sup>134</sup> The court added that no law nor jurisdiction recognizes strict liability for the intentional use of a product to achieve an intended result such as homicide or suicide.<sup>135</sup> Additionally, absent a special relationship between the manufacturer and a negligent or criminal party, a manufacturer is not liable to the plaintiff.<sup>136</sup>

In dismissing the allegations of public nuisance, the court stated that "public nuisance simply does not apply to the design, manufacture and distribution of a lawful product."<sup>137</sup> Moreover, the court found that the city could not recover damages sought for city services because "as a matter of law, the city's payments arose out of its duties to its citizens and were not a benefit conferred on the defendants."<sup>138</sup>

While these cases and opinions, combined with the actions of the Louisiana Legislature, are insightful and may provide the makers of lawful products some solace, the failure of courts to dismiss suits,<sup>139</sup> the persistence with which such suits are brought, the multiplicity of the forums, and mounting legal bills have forced some gun manufacturers to declare bankruptcy, settle, or limit the sale of their products to certain markets.<sup>140</sup> For instance, Colt's Manufacturing Company has now stopped all sales to the public and is focusing on the military and law enforcement markets,<sup>141</sup> presumably because these markets would be exempt from the agreement urged by the City of New Orleans and signed by

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133. *Beretta*, 1999 WL 809838, at \*1.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Beretta*, 1999 WL 809838, at \*2.

138. *Id.* at \*3.

139. According to the Federal Judicial Center, ninety percent of all motions to dismiss are denied. See Lawrence W. Schonbrun, *The Class Action Con Game*, 20 REGULATION 4, ¶ 26, available at <http://www.cato.org/pubs/regulation/reg2on4j.html>.

140. See Landau, *supra* note 52, at 626 (describing instances in which dealers settled lawsuits, stopped selling handguns, or changed their guidelines).

141. See Cohen, *supra* note 11, at 25.



Smith & Wesson.<sup>142</sup> The New Orleans handgun suit, as well as other similar suits, have not been dismissed and appear to have found sympathetic venues,<sup>143</sup> thereby increasing pressure on the industry to settle.

### B. The Fallacy of Such Suits

While it is true that handguns are an issue on which most people have strong opinions, the current use of representative litigation to "solve" social problems by changing both corporate behavior and product standards is not only improper in a representative form of government, but the benefits to society, the consumer, and the taxpayer are suspect at best. For instance, the recent tobacco settlement does not remove tobacco from the market,<sup>144</sup> thereby avoiding the continuing death and increased health costs allegedly associated with tobacco products and their use.<sup>145</sup> In fact, because the states have agreed to a structured settlement, requiring payment over years, the states are in the interesting position of having to ensure that tobacco products continue to be sold nationwide to ensure future settlement payments.<sup>146</sup> Additionally, the cost of the settlement is being passed on to the consumer by way of higher tobacco costs,<sup>147</sup> while the settlement is

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142. See Gun Lawsuit Agreement, *supra* note 22.

143. See Somers, *supra* note 104. The municipal and county suits which are proceeding have been filed by Alameda County, Camden County, Chicago, Cincinnati, Cleveland, Compton, Cook County, East Palo Alto, San Mateo County, Wayne County, Wilmington Los Angeles County, and New Orleans. *Id.*

144. See Tobacco Master Settlement Agreement Summary, available at <http://caag.state.ca.us/tobacco/msasumm.htm>.

145. See *id.* The settlement agreement provides monies for anti-smoking education and makes tobacco products more difficult to obtain by minors, but it does not take the product off the market or require non-damaging tobacco products. See *id.*

146. See Milo Geyelin & Gordon Fairclough, *Even \$145 Billion Isn't Enough to Kill Tobacco—Cigarette Makers Can Just Raise Prices*, THE WALL ST. J. EUROPE, July 17, 2000, available at 2000 WL 21066408. Realizing that the *Engle* judgment and the bond requirements for appeal had the potential to bankrupt the tobacco companies, the State of Florida changed the bond requirements due for appeal to the lesser of ten percent of the defendants' net worth or \$100 million. *Id.* This was done "to secure the state's multibillion-dollar slice of the settlement pie." *Id.*

147. See *id.* "Since November 1998, the average retail price of a pack has risen thirty-seven percent, to \$2.71, allowing the big five to take the state settlement liability in stride." *Id.*

purportedly paid to the states and the taxpayers.<sup>148</sup> The end result appears to be no net gain for the consumer or the taxpayer. The handgun suit brought by the City of New Orleans likewise has dubious benefits.

Although plaintiffs' attorneys allege that representative litigation and social issue torts are engines for major revisions in the social fabric,<sup>149</sup> the espoused role of jurors as policy makers is a fallacy; ninety-eight percent of all lawsuits settle.<sup>150</sup> Additionally, because settlement negotiations are held in private between plaintiff and defense counsel and away from public scrutiny,<sup>151</sup> a small group of attorneys is often in the position of dictating how a large portion of the population will be affected. Such private agreements create judicially sanctioned standards for the manufacture, distribution, and sale of products to the consumer.

Moreover, the view of litigation as a means of changing the social fabric, or as a tool for global change on social issues, is shortsighted and denies the limited applicability of judgments and settlements.<sup>152</sup> Judgments and settlements that arise from litigation are only binding upon parties and are not as broad as legislative enactments that affect entire segments of the population or the business community.<sup>153</sup> Because the tobacco settlement was entered into by the "big five" tobacco companies and the New Orleans lawsuit was filed against the "major manufacturers" of handguns, there is nothing to stop new manufacturers that are not "regulated" by the litigation from entering the market.<sup>154</sup> Al-

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148. See Raymond A. Pacia, *Hold Lead—Paint Makers Accountable*, THE PROVIDENCE J., Oct. 14, 1999 (defending the fees paid to attorneys under the tobacco settlement). "Every penny of the tobacco settlement money goes to the state and its taxpayers." *Id.*

149. See Geyelin & Fairclough, *supra* note 146.

150. See *The Liability System*, INSURANCE INFORMATION INSTITUTE, available at <http://www.iii.org/media/issues/liability.html> (updated June 2000).

151. See Cohen, *supra* note 11.

152. For discussions related to the limits of litigation, settlements, and judgments see generally, sources cited *supra* note 26. See also 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.9 (2d ed. 1984) (discussing standing to raise the rights of others).

153. See Lytton, *supra* note 24, at 51.

154. See Erichson, *supra* note 26, at 956–60. Settlements bind the parties and do not bind others in the absence of privity. *Id.* at 956. "Nonparties cannot be bound by a judgment." *Id.* at 959. See also *Stone v. Williams*, 970 F.2d 1043, 1053–54 (2d Cir. 1992), for a discussion of claim and issue preclusion.

though such an action would be "politically incorrect," it is certainly possible. If new and independent companies enter the handgun market, they obviously would also not be subject to liability for costs incurred from the past misuse of their products within that market.

As a *parens patriae* suit brought by the Mayor of New Orleans in his representative capacity, the gun lawsuit asserts a claim on behalf of the city for expenses paid due to handgun violence.<sup>155</sup> Presumably, those monies were expended, not out of the pocket of the city, but out of the pocket of the taxpayers.<sup>156</sup> If the New Orleans lawsuit against handgun manufacturers is successful, the taxpaying citizens should logically receive a tax refund for the overcharges.<sup>157</sup>

Further, the increased legal expenses, insurance costs, settlement costs, and compliance monitoring paid by the handgun manufacturers will certainly be passed on to the consumer by way of increased sales prices.<sup>158</sup> This is currently demonstrated by the tobacco settlement. The tobacco companies have not suffered a loss in profits; they have simply raised the price of tobacco products following the settlement, and more price increases are likely on the way.<sup>159</sup> The taxpaying public, the supposed "protected" party, is having to pay even higher prices for the same products against which the lawsuits were brought in the first place.<sup>160</sup> If

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155. *Morial v. Smith & Wesson Corp.*, No. 98-18578, 2000 WL 248364, at \*1 (La. Civ. D. Ct. Feb. 28, 2000).

156. Political subdivisions are, generally speaking, not independently wealthy and raise revenue for public health, safety, and welfare through taxation. The United States Constitution establishes the power to raise revenue and collect taxes in the legislative branch. See U.S. CONST. art. I, §§ 7-8.

157. However, any settlement will likely be diverted to other uses.

158. See generally Landau, *supra* note 52, at 637. If the suits are successful, the gun manufacturers will internalize the costs and pass them on to the consumer. See *id.*; Timothy Burn & Donna De Marco, *Gun Shops Battle the Odds Dealers Scramble for Niche as Sales Drop, Laws Multiply*, THE WASHINGTON TIMES, Dec. 19, 1999, at C1, available at 1999 WL 3101453 (asserting that costs of litigation will be passed on to the consumer).

159. See Geyelin & Fairclough, *supra* notes 146-47 and accompanying text.

160. See Mabry, *supra* note 115, at 205. "Punitive awards force manufacturers to increase the price of their products." *Id.*; see also Fisher, *supra* note 20, at 369. "[I]mposition of liability on manufacturers, distributors, or dealers can discourage production and drive up the cost of consumer goods, arguably further diminishing individual economic freedom." *Id.*

tobacco is any guide, handgun manufacturers will, likewise, pass their costs on to the consumer.

Perhaps most troubling is that, according to the Centers for Disease Control and Prevention statistics, nationwide only 1,356 of the 38,500 deaths reported in 1994 were attributable to the accidental use of handguns.<sup>161</sup> The lawsuit filed by the City of New Orleans cites only seven injuries or deaths since 1993 caused by either the negligent or unintentional use of handguns in New Orleans.<sup>162</sup> The New Orleans lawsuit seeks to recover the cost of increased police protection, emergency services, police pensions, medical care, and lost tax revenue due to the threat of handgun violence.<sup>163</sup> The city properly asserts that it was legally bound to provide these services and has expended millions of dollars in doing so.<sup>164</sup> However, it can hardly be imagined that the city has expended the dollars and provided these services based on seven unintentional or negligent acts in seven years. In fact, the city states that it is attempting to recover for the use and "threat of use."<sup>165</sup> The clear implication is that damages sought by the city are due to the intentional misuse of legal products and are not attributable to a defective product.<sup>166</sup>

Questions also surround whether the safety improvements sought by the city would end the willful, intentional, and criminal misuse of a legal product. The Cincinnati suit was dismissed precisely because cities cannot recover monies expended due to criminal misuse of legal products or for the cost of providing public safety because cities have a duty to expend those monies.<sup>167</sup>

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161. See Wade, *supra* note 21.

162. See Amended Petition § 9, at 6, Morial v. Smith & Wesson Corp. (filed September 7, 1999) [hereinafter Amended Petition].

163. See *id.* § 25, at 23. See also *New Orleans Files Lawsuit Against Handgun Industry*, ASSOCIATED PRESS, Oct. 31, 1998.

164. See Amended Petition, *supra* note 162, § 25, at 23.

165. *Id.*

166. In fact, according to New Orleans Police Chief Richard Pennington the recent increase in the New Orleans murder rate is attributable to a "drug crisis" and an unsuccessful witness protection program. See *N.O. Police Chief Seeks Bigger Force, Top Cop Warns of Drug Scene*, THE TIMES PICAYUNE, Oct. 6, 2000, at B1.

167. See Lytton, *supra* note 24, at 56. "A trial court recently dismissed Cincinnati's lawsuit against the gun industry holding that 'absent statutory authorization, the city may not recover for expenditures for ordinary public services which it has a duty to provide.'" *Id.* at

One commentator has suggested that the lawsuit by the City of New Orleans is hypocritical because the city is suing the same manufacturers from which its own police department purchases its handguns.<sup>168</sup> Additionally, the city has been an active participant in the handgun market and has been either directly or indirectly responsible for putting more guns onto the streets and potentially into criminal hands through a handgun swap to secure greater fire power for the city police department.<sup>169</sup> When questioned about the potential consequences of the trade, Mayor Morial appeared unconcerned over what happened with the handguns and whether they would end up in criminal hands once they left the city's control.<sup>170</sup> Yet the New Orleans lawsuit now seeks recovery from manufacturers and distributors for the same type of conduct.

Interestingly, the New Orleans lawsuit and others seek to recover the costs caused by handgun violence.<sup>171</sup> While it is true that the intentional and/or negligent use of firearms creates an economic burden on the city, city employees such as police officers do not always use their firearms in a responsible manner.<sup>172</sup> Apparently the city is not seeking to recover the costs incurred by taxpayers due to the intentional or negligent use of firearms by city employees.<sup>173</sup> Such costs surely include emergency medical

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56 n.274 (quoting *City of Cincinnati v. Beretta U.S.A.*, No. A9902369, 1999 WL 809838, at \*10 (Ohio Ct. C.P. Oct. 7, 1999)).

168. See Lytton, *supra* note 24, at 56.

169. See *id.*

170. See *id.* at 55 n.273 (citing Mayor Marc Morial, *Comments at ABA Conference on Gun Violence Liability: Taking Aim at the Gun Industry—Are Guns the Next Tobacco?* (June 5, 1999)).

171. See Chebium, *supra* note 66 (discussing gun manufacturers lawsuits against state officials).

172. See Bruce Alpert, *U.S. Keeps Up Probe of NOPD Morial: Reforms Address Problems*, THE TIMES PICAYUNE, Apr. 2, 1999, at A1, available at 1999 WL 4406206. In 1994, New Orleans police officer Len Davis shot and killed a woman because she had filed a brutality complaint against him. *Id.* The City of New Orleans and at least thirteen other U.S. cities are under investigation by the Justice Department for persistent police brutality. *Id.* See also Gary Fields, *New Orleans' Crime Fight Started With Police*, USA TODAY, Feb. 1, 2000, at A6. New Orleans police officer Antoinette Frank was convicted for the murder of three people while on duty. *Id.*

173. The City of Los Angeles is considering using most of a \$300 million dollar tobacco settlement payment to cover the cost of claims against the police department from police brutality including shooting of unarmed persons. See Rene Sanchez, *L.A. Struggles to Clean*

services, increased police details,<sup>174</sup> internal affairs investigations, district attorney investigations, legal prosecution and defense, legal judgments against the city,<sup>175</sup> and loss of public confidence.<sup>176</sup> The total cost of one improper police shooting may potentially far exceed a similar action by a citizen.

The City of New Orleans is also seeking to force handgun manufacturers to adopt unproven and perhaps even non-existent technology.<sup>177</sup> Quite possibly unproven technology forced into the marketplace may result in "true" products liability on the part of the gun manufacturers if someone is unable to use a handgun to defend himself when needed. Arguments can be made that such liability may be extended to the city for having forced the technology into the market in the first place. Moreover, the cost of the "improved" handguns may put them out of reach for the people who benefit from them the most—poor families living in crime-ridden areas.<sup>178</sup> Such a result may cause higher crime and an increased need for police services,<sup>179</sup> which are exactly the damages the City of New Orleans now seeks to recover.

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*Up Cops' 'Huge Mess' Tobacco Settlement May Be Diverted to Pay For Lawsuits*, THE TIMES PICAYUNE, Feb. 18, 2000, at A6, available at 2000 WL 6540289.

174. Frequently, after an incident of police brutality there are citizen protests and rallies as was the case after the Rodney King beating in Los Angeles. See Joe Domanick, *Can LAPD Reform Itself? The City Council has Agreed to a Consent Decree, and Parks Says He'll Implement Reforms. But The Department's Parliamentary Culture Stands in the Way*, LOS ANGELES TIMES, Sept. 24, 2000, at M1, available at 2000 WL 25899788.

175. The family of Amadou Diallo, an unarmed man shot and killed by forty-one bullets fired by New York Police, filed suit against the city seeking \$81 million dollars in damages. *Diallo Family Sues City for \$81 Million*, THE TIMES PICAYUNE, Apr. 19, 2000, at A7, available at 2000 WL 6556662.

176. Following the shooting of an unarmed man by Chicago police officers, Mayor Richard Daley opined that police shootings of innocent persons chip away at the "cornerstone of community policing." Fran Spielman, *Cops to Face Charges Five May Have Violated Policy*, CHI. SUN TIMES, June 16, 1999, available at 1999 WL 6544063.

177. See Leslie Wayne, *'Smart Gun' May Not be a Quick Fix After All Workable Model Still Not in Sight, Despite all the Talk*, THE TIMES PICAYUNE, June 15, 1999, at D12. "[N]o workable smart gun is in sight . . ." *Id.*

178. See John R. Lott, Jr., *Will Suing Gun Manufacturers Save Lives?*, INVESTOR'S BUSINESS DAILY, May 27, 1998, available at <http://www.junkscience.com/news2/lott3.htm>.

179. See *id.* Guns are used defensively 2.5 million times a year. *Id.* See also Jim McLean, *Gunmakers Could Have Lawsuit Protection*, THE TOPEKA CAPITAL-JOURNAL, Feb. 16, 1999, available at 1999 WL 12091609. "[G]uns are used three to five times more often for protection than they are misused by criminals." *Id.* (quoting an NRA informational packet).

### C. The Hidden Costs of the New Orleans Lawsuit

Although the New Orleans lawsuit purportedly is not being paid for with taxpayer dollars, there is a serious question about the indirect costs of such a lawsuit. For instance, who will pay the defense costs incurred by the City of New Orleans in defending the lawsuit by the Second Amendment Foundation?<sup>180</sup> Because there is no contingency fee to be earned, the current plaintiffs' firms may not be eager to take on this issue. If the current legal team refuses to assist in the city's defense, the city will have to expend precious city resources to defend the suit itself by diverting attorneys in the city attorney's office from other more pressing matters or hiring outside counsel versed in the defense of constitutional matters.<sup>181</sup> If such is the case, the consumer and taxpayer in New Orleans will pay the bill, either directly or indirectly.

Lawsuits against lawful industries also deter businesses from coming to New Orleans or selling their products in New Orleans<sup>182</sup> because to do so would expose them to the state's jurisdiction and potential liability.<sup>183</sup> A convention of the National Shooting Sports Foundation, which would have brought 30,000 people and an estimated \$145 million dollars to the New Orleans economy in 1999, was canceled and rescheduled in Las Vegas in protest of the New Orleans lawsuit.<sup>184</sup> Certainly, it is within the realm of possibility that many other people and businesses have changed their opinion of New Orleans. The number of choices available to the public consumer has already been reduced with the withdrawal of Colt's Manufacturing Company from the public

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180. See *Second Amendment Found. v. United States Conference of Mayors*, No. 1:99CV03181 (D.D.C. Nov. 30, 1999), available at <http://www.saf.org/lawsuit.html>.

181. See *id.* The lawsuit filed against the cities alleges certain constitutional violations. *Id.*

182. See Bruce Egger, *Gun Trade Show Agrees to Return to Convention Center*, THE TIMES PICAYUNE, Dec. 10, 1999, at A1, available at 1999 WL 29016382. The National Shooting Sports Foundation canceled a convention in New Orleans in protest to the city's lawsuit against the makers of handguns. *Id.*

183. Under the Louisiana law, a defendant must have continuous, substantial, and systematic contacts with the state in order to be subject to its jurisdiction. *Fricke v. Owens-Corning Fiberglass Corp.*, 647 So. 2d 1260, 1264 (La. App. 4th Cir. 1994).

184. See J.D. Tuccille, *High Noon in the Courtroom*, CIVIL LIBERTIES, Jan. 24, 1999, available at <http://civilliberty.about.com/library/weekly/aa012499.htm?terms=highnooninthecourtroom>.

market.<sup>185</sup> Other companies have been forced into bankruptcy.<sup>186</sup> Perhaps more handgun companies will close their doors or limit their sales to certain markets. A shrinking source of handguns may please some people; however, such pleasure should be tempered. As long as gun ownership itself is legal, there will be a market for guns that may be satisfied by an unregulated black market,<sup>187</sup> or by new and aggressive companies not "regulated" by past "judicial legislation."

The settlement with Smith & Wesson also provides compliance issues for the city. Unlike legislation, which affects an entire industry, litigation and settlements are only binding on the parties.<sup>188</sup> Other manufacturers that were not sued are obviously not subject to any of the settlement terms and would likely be able to sell their products at lower cost. Further, other communities may elect not to adopt the settlement terms and may seek to attract businesses (and their tax dollars) that are unwelcome in New Orleans.

Moreover, if other manufacturers settle under different terms or terms inconsistent with those to which Smith & Wesson has agreed, or if other manufacturers enter the market, special compliance agents versed in all the subtleties of each agreement and product will be required to monitor each different manufacturer, model, distribution system, and dealer.<sup>189</sup> The system could become unwieldy and costly to the taxpayer and consumer. This process, if extended to other products that come into public disfavor may indeed lead to absurd results. The cost of doing business

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185. See Landau, *supra* note 52, at 626. See also *Colt Pulls Back From Firing Line*, THE ORANGE COUNTY REGISTER, Oct. 21, 1999, at B8, available at 1999 WL 30109662 (discussing Colt's decision to "pull back from the consumer handgun business").

186. See Segalla, *supra* note 68, at 369. The companies that have filed for bankruptcy protection are: Sundance Industries, Inc., Lorcin Engineering Co., and Davis Industries, Inc. *Id.*

187. See Cohen, *supra* note 11, at 25 (suggesting that an unregulated black market for tobacco products may be the result of the litigation against tobacco companies).

188. See Lytton, *supra* note 24, at 51. While this article states the truism that legislatures and regulatory agencies legislate and the judiciary is limited to enforcing rules after injury in a particular case, the author expresses the view that the judiciary should be proactive in regulating industries such as the gun industry. *Id.*

189. The Smith & Wesson Agreement creates a "Compliance Oversight Committee" made up of representatives from the gun industry as well as city, state, and federal employees. See Somers, *supra* note 104.



could eventually result in manufacturers seeking the least common denominator and providing the consumer with gradually decreasing choices based not on what the market will bear but rather on what design will generate the least amount of frivolous litigation.<sup>190</sup>

In an essay by Paul Morton, entitled *How Lawsuits Brought the World's Greatest Nation to Ruin*,<sup>191</sup> the author describes a fictional nation named "Litagia," where endless liability destroyed the economy. The essay reads in part:

Throughout the economy, new ventures disappeared. New factories were not built, since no locations could be found where it was legally possible to build them. In 1998, the U.S. Supreme Court promulgated the 'omnia culpa' doctrine . . . which in plain language meant that whenever a person suffered injury through use of a product, all persons or corporations who had any contact with the product, from raw material to delivery van, were equally liable to damage claims. It soon became very difficult to get anyone to make or sell anything, and most people went back to the ancient art of making things for themselves.<sup>192</sup>

Although tragic, postal shootings, school shootings, shootings in attorney's offices, workplace shootings, domestic shootings, and drug related and gang shootings are intentional rather than accidental acts. The willful and intentional illegal use of legal products should not subject entire industries or classes of products to liability and forced standards based on the beliefs of a litigious minority. To do so puts the judiciary in the position of legislating standards and conduct and is a violation of the constitutional separation of powers.

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190. See Paul Morton, *How Lawsuits Brought the World's Greatest Nation to Ruin*, MEDICAL ECONOMICS, Feb. 21, 1977, at 142.

191. See *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1205 (7th Cir. 1984) (quoting Morton, *supra* note 190, at 142).

192. *Id.* (citations omitted).

#### IV. CONCLUSION

If New Orleans prevails against the handgun industry, manufacturers of other lawfully manufactured and distributed products, which are also intentionally misused or abused, could be next. Commentators have offered suggestions about which industries may become the next target of representative litigation. Some of the suggestions are: suing car makers for vehicular homicides due to drunken driving or road rage;<sup>193</sup> suing automobile manufacturers for vehicular homicides caused by intentional acts;<sup>194</sup> suing automobile manufacturers for car thefts or people driving without a license;<sup>195</sup> suing bakeries, fast food companies, or Ben & Jerry's Ice Cream for the health risks associated with the ingestion of high fat foods;<sup>196</sup> suing the makers of fertilizer for the health care costs of the Oklahoma City bombing;<sup>197</sup> or suing the makers of knives for injuries resulting from their use.<sup>198</sup> However, suing these industries will do little to re-weave our social fabric or even to improve our society. Likewise, the case against the handgun manufacturers will do little, if anything, to stop intentional misuse of a legal product.

The fundamental problem with judicial legislation is that it permits the courts to solve complex social issues, a function properly reserved to the legislature. In a representative form of government, the legislative branch is empowered to make the laws as reflected by the votes of the majority. The judiciary is given the task of interpreting those laws, not creating its own. However, if certain segments of society feel they must use the judicial branch in an attempt to solve issues that have a negative effect on society, there are far more pressing issues than the illegal use of legal products. This commentator would suggest that if mayors and trial lawyers are looking to solve social problems through litigation, a better list of targets or issues might include the public edu-

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193. See Segalla, *supra* note 68, at 403.

194. See Lytton, *supra* note 24, at 63.

195. *Id.* The author suggests that this would be a negligent marketing claim filed for failure to supervise retail sales and ensure that the driver was adequately licensed. *Id.*

196. See Reed, *supra* note 23, at 84.

197. *Id.*

198. See *Colt Pulls Back From Firing Line*, *supra* note 185. Apparently knife makers are being sued in England for the intentional misuse of their products. *Id.*

cation system, public housing, blighted housing, the sewerage and water board, uninsured motorists, the transportation department, coastal erosion, and the dead zone in the Gulf of Mexico. Unfortunately, because there is no potential for a large fee, these issues will likely have to wait.

The attempted use of the judicial branch to solve perceived social ills appears to be continuing, and businesses, consumers, and taxpayers are losing out. A number of commentators have offered solutions to the continuous attacks on lawfully conducted businesses and the recurrent attempts to use the courts to legislate. These include class action reform,<sup>199</sup> extending the Sullivan Principles<sup>200</sup> to the Second Amendment, tort reform,<sup>201</sup> and treating such ruinous lawsuits as California treats SLAPP suits.<sup>202</sup> If the proposed solutions are successful, special interest litigants will no longer have the ability to sue lawful companies into submission, and the courts will once again be limited to interpreting the laws as envisioned by our founding fathers and as expressed in the Constitution.

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199. Class action reform is on the top of the Republican agenda. Some have suggested that providing class action removal to federal court would be an adequate remedy to class action abuse. See *The Liability System*, *supra* note 150.

200. The Sullivan principles grew out of the first amendment case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and require a showing of actual malice in the publication of a falsehood. *Id.* at 279-80. Likewise, lawsuits against product manufacturers would have to show knowledge of criminal activity or reckless disregard. See David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 738-73 (1995) (discussing lawsuits and their effects upon gun manufacturers).

201. Tort reform proponents generally advocate capping noneconomic losses, restrictions on punitive damages, and attorney's fees. See Cohen, *supra* note 11, at 27.

202. SLAPP stands for Strategic Lawsuits Against Public Participation, and such suits are brought as intimidation by persons or companies against members of the public for exercising their First Amendment rights by speaking out against development plans. See Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 968 (1999). California has passed a law that requires a good faith showing prior to entertaining the suits and allows for sanctions and legal fees for violation of a person's First Amendment rights. *Id.* at 968.