
New York Court of Appeals Decides Negligent Marketing Case

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The New York State Court of Appeals recently decided a key issue of state law relating to the potential liability of handgun manufacturers. The decision was the first in the country to comprehensively address the applicability of a theory of negligent marketing to the gun industry. As negligent marketing and negligent distribution theories are becoming more popular ways of attacking manufacturers of “dangerous” products, the court’s decision, in *Hamilton v. Beretta U.S.A. Corp.*, USCOA, 2 No. 36 (April 26, 2001) (“*Hamilton*”), could have significant nation-wide impact in regard to the liability not only of firearms corporations, but also for makers of many products, especially those that are frequently considered nuisances, such as cigarettes, alcohol, automobiles, even high-fat food products, and many others. Those involved in these industries would be well advised to be aware of the *Hamilton* decision, and of the potential importance in modern mass tort law of the negligent marketing cause of action.

Though the plaintiffs in *Hamilton* ultimately lost their case, they may have helped pave the way for similarly situated plaintiffs to successfully sue makers of dangerous products under a negligent distribution theory. The *Hamilton* plaintiffs brought their case in federal court in the Eastern District of New York, where they sued on multiple theories, of which the only to survive dismissal was the negligent marketing claim. The seven plaintiffs were relatives of people killed by handguns; twenty-five handgun manufacturers were defendants in the case. Plaintiffs alleged that defendants negligently distributed and marketed their products, resulting in a high volume of guns on the black market. The jury returned a special verdict, finding that 15 of the 25 defendants failed to use reasonable care in distributing their guns, and that under a market share theory of liability, twelve of those 15 proximately caused the deaths of the decedents of some of the plaintiffs. The court then denied defendants’ motion for judgment as a matter of law. See *Hamilton v. Accu-Tek*, 935 F.Supp. 1307; *Hamilton v. Accu-Tek*, 62 F.Supp.2d 802.

The case was appealed to the Second Circuit Court of Appeals, which certified two questions of state law to the New York State Court of Appeals. *Hamilton v. Accu-Tek*, 222 F.3d 36:

1. Whether the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture?

2. Whether liability in this case may be apportioned on a market share basis, and if so, how?

The New York Court of Appeals answered both questions in the negative. The court rejected outright the applicability of a market share liability theory to gun manufacturers, and its discussion of this issue was brief. The decision was based primarily on the fact that guns are not identical fungible products, and that it is often possible to discern which manufacturer’s gun caused injury to a particular plaintiff. *Id.* at 19-23.

More interesting was the court’s analysis of the negligent marketing and distribution theory. The court first stated its general reluctance to extend liability to defendants for failing to control the actions of others. Under tort law, a duty of care is generally not owed to those harmed by the actions of third parties. Exceptions exist where a defendant has control of the tortfeasor’s actions or where a defendant has a special obligation to protect the plaintiff. Examples of these relationships include master/servant, parent/child, and common carrier/passenger. An important point to the court was that the duties created by these special relationships do not extend to the community at large. The court did not want to create a duty that would run to every potential victim of gun violence. *Id.* at 6-9.

Another reason proffered by the court for not establishing a duty was the remoteness of the connection between gun manufacturers and gun violence victims, often extending through several intermediate parties, such as a distributor, a retailer, subsequent purchasers, and possibly thieves. The court did not want to impose liability without a tangible showing that the defendants were in position to prevent the harm. *Id.* at 9-10.

The court also rejected plaintiffs’ argument that gun manufacturers have a special duty to protect because of the foreseeability of harm caused by their particularly hazardous products. For one, plaintiffs failed to show how the risk of injury was exacerbated by negligent marketing and distribution. And second, the analogies offered by plaintiffs dealt with defective products or failure to warn or failure to include a safety feature, whereas defendants’ products here were admittedly not defective, and plaintiffs had not demonstrated that defendants could have taken reasonable steps to prevent plaintiffs’ injuries. *Id.* at 10-12. This last point is important, because it suggests the possibility that gun makers could be

liable if they fail to utilize reasonable warnings or injury prevention measures. However, the court also recognized that courts should in general be cautious about imposing liability in an area so heavily regulated by federal statutory requirements. *Id.* at 18.

Plaintiffs also argued that gun manufacturers have the ability to control the marketing and distribution of their products, and have a general duty to exercise that control in order to reduce the risk of illegal gun trafficking. The court rejected that argument because an imposition of such a duty would also create overly broad liability, as plaintiffs had not presented evidence showing any statistically significant relationship between particular dealers and guns used in crimes. *Id.* at 12-13. This suggests that a gun maker could be found liable if specific evidence existed that the gun maker had failed to reasonably market and distribute its product, and that such failure proximately caused harm to a plaintiff. Even here, though, the court noted that the imposition of a duty of care must be based upon an assessment of the costs and benefits of its imposition. *Id.* at 12-13.

Finally, plaintiffs argued that defendants had a duty of care because of their authority over downstream distributors and retailers, asserting that the possessor of a dangerous instrument has a duty not to entrust it to another if doing so would create an unreasonable risk of harm to others. Though the court rejected this argument under the facts of the case, it seemed to find the most validity in this theory. According to the court, the tort of negligent entrustment might lie, but only where the gun manufacturer has reason to know that the particular distributor to whom it sells its guns is engaging in consistent substantial sales of guns into the gun trafficking market. *Id.* at 13-15.

Thus, a plaintiff would have to prove both that specific dealers play a disproportionate role in supplying the illegal gun market (compared with the proportion of the legal market supplied by those dealers), and that the defendant gun manufacturer knew or should have known that it supplied one of those dealers. *Id.* at 14-15. The court noted that 1.2 percent of firearm dealers provided 57 percent of the crime guns traced to dealers in 1998, though current data does not reveal whether this is attributable to irresponsible conduct, high sales volume, or other reasons. *Id.* at 15 n.5. The court stated that the duty equation might change if a core group of corrupt dealers is identified in the future. *Id.* at 15 n.5. However, the court specifically held that gun manufacturers have no affirmative duty to investigate and identify corrupt firearm dealers because that is a job for law enforcement agencies. *Id.* at 16-18.

In sum, the negligent marketing and distribution theory was rejected, but the court suggested that such a claim might be allowed to go forward in the future if a plaintiff were able to show that the manufacturer failed to use reasonable warnings or injury prevention measures, or knowingly sold its products to a corrupt dealer. Because the court's decision (1) is clear and well reasoned; (2) does not rely on any peculiar points of state law; (3) was issued by a highly respected court;

and (4) is the first to address the sustainability of a negligent marketing claim, *Hamilton* will likely prove to be a roadmap for future litigants.

Lawsuits filed against firearm manufacturers continue to spring up around the country. There currently are approximately 25 pending cases in which municipalities have sued handgun manufacturers, and several others have been brought by individual plaintiffs. *Hamilton* was widely seen as a test case. Although the gun industry won this battle, its foes may have found an important strategy in the court's suggestion that the negligent marketing theory might stand under a different set of facts.

Moreover, the gun industry has already been put on notice that its standard product liability insurance policies will not cover liability for negligent marketing. In two cases decided in 2000, two different courts held that fairly standard language in insurance policies held by handgun manufacturers exempted the respective insurance companies from having to defend or indemnify the policy-holding gun makers against claims brought under a negligent marketing and distribution theory. Both the First Circuit Court of Appeals and the United States District Court for the District of Maryland construed negligent marketing claims as asserting liability for injuries "arising out of" the gun manufacturer's product (as opposed to its conduct), and therefore held that a "products hazard exclusion" exempted the insurers from having to provide coverage. See *Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Ins. Co.*, 220 F.3d 1 (1st Cir. 2000); *Beretta, U.S.A., Corp. v. Federal Insurance Co.*, 117 F.Supp.2d 489 (D.Md. 2000).

But claims against gun manufacturers may be only the tip of the negligent marketing iceberg. The current flurry of litigation against the gun industry follows in the footsteps of the success, to the tune of hundreds of billions of dollars, local governments found in filing suits against tobacco companies. It seems inevitable that we will see an increasing number of lawsuits brought against companies seen as responsible for other types of social ills. Liquor producers are one obvious potential future target, but other less obvious industries that should be aware of the negligent marketing theory's potential applicability to their businesses include chemical manufacturers, pharmaceutical companies, automakers, and food manufacturers. Even the movie and video game industries could be targets of similar claims.

Unlike the traditional product liability suit, a negligent marketing claim does not depend on proving that the product at issue was improperly designed or manufactured. *Hamilton* recognizes that even a perfectly designed and manufactured product could create an unreasonable risk of harm to others. Though the *Hamilton* court limited potential liability to the manufacturer that knowingly distributes its product to corrupt dealers, it is no stretch to imagine a different court applying a looser definition of "negligence" in marketing. Manufacturers of any products that could be considered "dangerous" would be well served to keep abreast of further developments in this area. They may soon find that they are the ones exposed to the greatest danger.