IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 03-CV-24
03-CV-38

DISTRICT OF COLUMBIA, *et al.*,

Appellants,

v.

BERETTA U.S.A., *et al.*,

Appellees.

On Appeal from a Decision of the
Superior Court of the District of Columbia

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS
AS AMICUS CURIAE SUPPORTING APPELLEES

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Certificate required by Rule 28(a)(1) of the Rules of the District of Columbia Court of Appeals:

The undersigned counsel of record for Amicus Curiae The National Association of Manufacturers certifies that the following listed parties and amici appeared below:

<u>Plaintiffs</u>:

District of Columbia
Bryant Lawson
James Foster-El
Michelle Foster-El
Patrick Mahoney
Laura Wallace
Madilia Marsh-Williams
Gregory Ferguson
Ahmad Vaughan
Avery Blue

<u>Defendants</u>:

B.L. Jennings, Inc.
Beretta U.S.A. Corp.
Browning Arms Co.
Bryco Arms
Century International Arms, Inc.
Colt's Manufacturing Company, Inc.
Davis Industries, Inc.
Fabbrica d'Armi Pietro Beretta S.p.A.
Forjas Taurus, S.A.
Glock GmbH
Glock, Inc.
H&R 1871, Inc.
Heckler & Koch, GmbH
Heckler & Koch, Inc.
Hi-Point Firearms
International Armament Co. D/b/a Interarms Industries, Inc.
K.B.I., Inc.
Navegar, Inc.
Norinco Sports, U.S.A., Inc.
Phoenix Arms, Inc.
Sigarms, Inc.
Smith & Wesson Corp.

Sturm, Ruger & Company, Inc.
Taurus International Manufacturing, Inc.

Amicus:

The American Jewish Congress

These representations are made in order that the judges of this Court, among other things, may evaluate possible disqualification or recusal.

Attorneys of record for Amicus Curiae The National Association of Manufacturers

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INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers (NAM) is the Nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 States. The NAM has been an advocate for order, stability, and predictability in the area of liability for all manufacturers. The arguments of plaintiffs in this case – urging, contrary to *Delahanty* v. *Hinckley*, 564 A.2d 758 (D.C. 1989), that negligence claims can proceed against gun manufacturers on the basis of "foreseeability" of harm alone (without any duty founded on a traditional relationship), and further urging an unprecedented expansion of the doctrine of "public nuisance" so that it threatens to engulf the entire law of torts and to abandon identifiable criteria for liability – cut directly against the order, stability, and predictability that the NAM favors and that are essential to a well-functioning manufacturing community. Order, stability, and predictability in tort law are not only necessary for proper business planning, but also essential to the international competitiveness of U.S. manufacturers. The unpredictable imposition of liability on U.S. manufacturers through the use of novel legal theories makes the investment of capital in the United States less attractive, and tends to push investment overseas, along with the job opportunities that investment in manufacturing industries creates.

The NAM agrees with *all* of the arguments that appellees are making in support of affirmance of Judge Long's comprehensive opinion dismissing these lawsuits in their entirety, but will focus in this brief on only two issues: negligent marketing and distribution, and public nuisance. The NAM is concerned that plaintiffs' negligence theory urges this Court to depart from settled law in this jurisdiction (including the *Delahanty* case) and from widely recognized principles of tort law. Were this Court to recognize a novel claim for negligent marketing and

distribution of non-defective products, the new law this Court would create could potentially affect manufacturers of many mass-produced products other than handguns – such as knives, matches, rope, and automobiles – that can cause harm if "foreseeably" misused by enough purchasers. The NAM is likewise concerned about the application of a public nuisance cause of action, as an alternative to the product design cause of action that this Court properly rejected in *Delahanty*, to create liability for the manufacturer of a lawful product. Like plaintiffs' negligence theory, their public nuisance theory has implications going well beyond the firearms industry. It threatens seriously to undermine the ability of any manufacturer to produce and sell products that are lawful and non-defective if those products are capable of being criminally misused by some remote possessor of the product.

The NAM believes that accepting plaintiffs' theories, in spite of the myriad cases that have rejected identical and similar causes of action, needlessly and unwisely places at risk the ability of manufacturers to assess their potential liability for harm caused by their products. The negligence issue, already settled by this Court and supported by decisions of several other courts, should be decided in accordance with time-tested, not novel, principles of tort law. Likewise, in addressing the public nuisance issue, this Court should follow the decisions of the majority of jurisdictions that have addressed the issue, and hold that the manufacturers' lack of control over subsequent use of their products mandates rejection of plaintiffs' novel theories. The alternative is to substitute after-the-fact expansion of tort liability by the courts for the proper role of the legislature in setting forth prospective, knowable standards for manufacturers' conduct of their businesses.

SUMMARY OF ARGUMENT

Commentators and courts have overwhelmingly rejected the novel theories under which municipalities and individuals have sued gun manufacturers for downstream violence during the last two decades. The few contrary decisions are out of step with the general body of jurisprudence and particularly with this Court's decision in *Delahanty* v. *Hinckley*, 564 A.2d 758 (D.C. 1989).

Plaintiffs cannot succeed on a negligent distribution and marketing theory because they cannot show the first element of negligence, a duty of care owed by the defendant manufacturers to either the plaintiff gun victims or the District of Columbia. This Court held in *Delahanty* that no liability exists in tort for the criminal acts of third parties unless there is a "special relationship" between the parties. The New York Court of Appeals recently reached the same conclusion, unanimously, in *Hamilton* v. *Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 750 N.E.2d 1055, 727 N.Y.S.2d 7 (2001), and rejected the argument that "foreseeability" alone gives rise to a duty of care. Plaintiffs argue, directly contrary to *Delahanty*, that no "special relationship" is necessary and that "foreseeability" suffices. But their sole authority for that argument is Section 448 of the Restatement, as applied in *District of Columbia* v. *Carlson*, 793 A.2d 1285, 1290 (D.C. 2002). But Section 448 and *Carlson* address *causation*, not *duty*. They thus say absolutely nothing to undermine the sound holdings of *Delahanty* and *Hamilton* that a special relationship is required. And plaintiffs do not even pretend to be able to show a special relationship. Their negligence claims thus fail.

The District's "public nuisance" claim also fails because, among other things, defendants lack the ability to control subsequent uses of their products. This Court effectively rejected the

public nuisance theory when it rejected a "defective product" theory in *Delahanty* with the observation that "any high degree of risk of harm, or any likelihood that such harm will be great, would result from the use, not the marketing as such, of handguns." 564 A.2d at 761. Allowing evasion of that principle through incantation of the words "public nuisance" would open the door to manufacturer liability for third-party misuse of all sorts of nondefective products. Recognizing that fact, courts have consistently rejected "public nuisance" liability when the defendant does not control the instrumentality alleged to constitute a nuisance. *E.g.*, *Tioga Public School District #15* v. *United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993). Just two months ago, a New York court soundly applied the principles of *Tioga* and other cases to reject the theory in a case involving handgun manufacturers. *People ex rel. Spitzer* v. *Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. 2003). This Court should do likewise.

ARGUMENT

This is one of a number of actions brought in the last two decades by municipalities and individual victims of violence, advancing a variety of creative legal theories in an effort to hold manufacturers liable for gun violence perpetrated by individual criminals who (in almost all cases) obtained their guns through one or more illegal transactions after someone else lawfully purchased the guns from dealers who obtained the guns in lawful transactions with the

manufacturers. Overwhelmingly, both commentators[1] and courts[2] have found the novel legal theories wanting.

There are a few outlier decisions of state courts – the Superior Court rightly called them "aberration[al]"(*District of Columbia* v. *Beretta U.S.A. Corp.*, No. Civ.A. 0428-00, 2002 WL 31811717, *22 (D.C. Super. Ct. Dec. 16, 2002)) – approving particular theories under the law of

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[1] *E.g.*, Richard C. Ausness, *Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 32 S.C. L. REV. 907 (2002); Comment, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273 (2002); Note, *Is Hamilton v. Accu-Tek a Good Predictor of What the Future Holds for Gun Manufacturers?*, 34 IND. L. REV. 419 (2001); Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379 (2000); Comment, *There's No Smoking Gun: Cities Should Not Sue the Firearm Industry*, 25 U. DAYTON L. REV. 215 (2000); Michael J. Folio, *The Politics of Strict Liability: Holding Manufacturers of Nondefective Saturday Night Special Handguns Strictly Liable After Kelley v. R.G. Industries, Inc.*, 16 HAMLINE L. REV. 147 (1992); David T. Hardy, *Product Liability and Weapons Manufacture*, 20 WAKE FOREST L. REV. 541 (1984); Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984); Philip D. Oliver, *Rejecting the "Whipping Boy" Approach to Tort Law: Well-Made Handguns Are Not Defective Products*, 14 U. ARK. LITTLE ROCK L.J. 1 (1991); Donald E. Santarelli & Nicholas E. Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471 (1983); see also Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 10 (1894).

[2] *E.g.*, *People ex rel. Spitzer* v. *Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (App. Div. 2003);*City of Atlanta* v. *Sturm Ruger & Co.*, 560 S.E.2d 525 (Ga. Ct. App. 2002); *Hamilton* v. *Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 750 N.E.2d 1055, 727 N.Y.S.2d 7 (2001); *Merrill* v. *Navegar, Inc.*, 26 Cal. 4th 465, 28 P.3d 116, 110 Cal. Rptr. 2d 370 (2001); *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (2001); *Morial* v. *Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001); *City of Philadelphia* v. *Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), aff'd, 277 F.3d 415 (3d Cir. 2002); *Camden Cty. Bd. of Chosen Freeholders* v. *Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000), aff'd, 273 F.3d 536 (3d Cir. 2001); *Penelas* v. *Arms Tech., Inc.*, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999), aff'd, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001); *King* v. *R.G. Industries*, 451 N.W.2d 874 (Mich. App. 1990); *Knott* v. *Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. App. 1988); *Richardson* v. *Holland*, 741 S.W.2d 751 (Mo. App. 1987).

individual States. Only one of those decisions, however, comes from the highest court of a State.[3]

Most important for present purposes, *this Court* has already rejected two theories of liability against gun manufacturers in *Delahanty* v. *Hinckley*, 564 A.2d 758 (D.C. 1989). The individual plaintiffs and the District of Columbia offer only transparently incorrect arguments in an effort to urge this Court to depart from *Delahanty* and approve the negligence cause of action specifically rejected in that case. And the "public nuisance" theory – advanced by the District but not the individual plaintiffs – should similarly be rejected as an effort to repackage under a different (and inapplicable) rubric the very "defective product" theory this Court rejected in *Delahanty*.[4]

I. THE SUPERIOR COURT PROPERLY FOLLOWED THE HOLDING OF *DELAHANTY* V. *HINCKLEY* THAT THERE CAN BE NO NEGLIGENCE CLAIM BECAUSE DEFENDANTS OWE PLAINTIFFS NO DUTY OF CARE

As the individual plaintiffs correctly observe (Br. 10), the elements of a claim of negligence under District of Columbia law – like the elements of a claim of negligence under the law of most U.S. jurisdictions – are "*a duty of care owed by the defendant to the plaintiff*, a

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[3] See *Cincinnati* v. *Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *James* v. *Arms Technology, Inc.*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003); *City of Chicago* v. *Beretta U.S.A. Corp.*, 337 Ill. App. 3d 1, 785 N.E.2d 16 (1st Dist.. 2003), appeals pending, Nos. 95253 *et al.* (Ill.); *Young* v. *Bryco Arms*, 327 Ill. App. 3d 948, 765 N.E.2d 1 (1st Dist. 2001), appeals pending, Nos. 03678 *et al.* (Ill.). As defendants will explain in their own brief or briefs, the cases are wrongly decided. The NAM will focus, however, not on explaining the error of out-of-jurisdiction decisions but on showing why District of Columbia law requires rejection of plaintiffs' theories.

[4] The NAM does not address in this brief any of the issues in this case pertaining to the Strict Liability Act, D.C. Code §§ 7-2551.01 *et seq*. The NAM's silence on those issues reflects the interests of its national, broad-based membership and should not be construed as implicit disagreement with any of defendants' arguments.

breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." *District of Columbia* v. *Harris*, 770 A.2d 82, 87 (D.C. 2001) (internal quotation marks omitted and emphasis added).[5] It is crystal clear that plaintiffs cannot show the first element, a duty of care owed by the defendant manufacturers to either the plaintiff gun victims or the District of Columbia. There is no need to go beyond that element to affirm the Superior Court's judgment dismissing the negligence count.[6]

This Court dispositively addressed the "duty" element in *Delahanty*:

> "In general no liability exists in tort for harm resulting frm the criminal acts of third parties, although liability for such harm sometimes may be imposed on the basis of some special relationship between the parties." * * * We are not inclined to extend the rationale of those decisions to the present case.

564 A.2d at 762 (quoting *Hall* v. *Ford Enterprises, Ltd.*, 445 A.2d 610, 611 (D.C. 1982)). In the present case, as in *Delahanty*, plaintiffs allege no "special relationship." Rather, their argument is that District of Columbia tort law imposes on manufacturers a duty of care toward the general public *without* any need for a special relationship. Lawson Br. 10-17; D.C. Br. 28-33. "[C]ourts have held," they say – and they imply that this Court should join them – "that there can be

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[5] The elements of the tort under New York law are the same. *Stagl* v. *Delta Airlines, Inc.*, 52 F.3d 463, 467 (2d Cir. 1995) ("In order to establish a prima facie case of negligence under New York law, a claimant must show that: (1) the defendant owed the plaintiff a cognizable duty of care; (2) the defendant breached that duty; and (3) the plaintiff suffered damage as a proximate result of that breach.") (citing *Solomon* v. *City of New York*, 66 N.Y.2d 1026, 1027, 499 N.Y.S.2d 392, 392, 489 N.E.2d 1294, 1294 (1985)). The identity of standards under New York and D.C. law is significant because plaintiffs claim that the law of negligence differs in the two jurisdictions and that this Court should not follow a key decision of the New York Court of Appeals on which the Superior Court relied. See pp. 8-10, *infra*.

[6] The NAM strongly agrees with – but will not separately address – the Superior Court's further holding that plaintiffs are too remote from defendants for the third element, proximate causation, to be established.

negligence-based liability *without* a special relationship when the defendant is in a position to 'know or have reason to know, from past experience, that there [was] a likelihood of conduct on the part of third persons in general which was likely to endanger the safety' of another." Lawson Br. 12 (emphasis added) (quoting *James*, 820 A.2d at 47). In other words, foreseeability alone, according to plaintiffs, gives rise the duty and no particular relationship – "special" or otherwise – is necessary.

That view of tort law flies in the face of *Delahanty* and is revolutionary. As Judge Wesley wrote for a unanimous New York Court of Appeals in *Hamilton*, "Foreseeability, alone, does not define duty – it merely determines the scope of the duty once it is determined to exist." 96 N.Y.2d at 232, 750 N.E.2d at 1060, 727 N.Y.S.2d at 12 (citations omitted). "As we noted earlier, a duty and the corresponding liability it imposes do <u>not</u> rise from mere foreseeability of the harm." 96 N.Y.2d at 235, 750 N.E.2d at 1062, 727 N.Y.S.2d at 14 (emphasis in original; citation omitted). One need only compare *Delahanty* and *Hamilton* to see that the law of New York and the law of the District of Columbia are identical in this regard.

Yet plaintiffs claim that the law of New York and the law of the District of Columbia diverge on this precise point. According to the individual plaintiffs (Br. 17), "the court in *Hamilton* relied on New York law that, in contrast to the Restatement and District law, requires a special relationship for a duty to arise." The Restatement provision that plaintiffs claim is followed in the District but disregarded in New York is RESTATEMENT (SECOND) OF TORTS § 448 (1965). The case that plaintiffs claim shows that no "special relationship" is required for a duty to arise in this jurisdiction – and, thus, that *Delahanty* was wrong to insist that one *is* required – is *District of Columbia* v. *Carlson*, 793 A.2d 1285, 1290 (D.C. 2002).

Plaintiffs seriously misread the Restatement and *Carlson*. Section 448 of the Restatement discusses *causation* – the third element of a negligence claim, not the first. Chapters 12-15 (Sections 281 to 429) of the Restatement cover the first two elements of negligence – duty and breach – and plaintiffs do not claim that any portion of the Restatement supports the existence of a duty toward the general public not to engage in "negligent marketing and distribution." Cf. Note, *supra*, 97 HARV. L. REV. at 1921 ("A defect-in-distribution theory * * * could not be justified as a mere application of existing products liability law to handguns; there is no currently accepted legal doctrine of 'defect in distribution.'"). Section 448 is found within Chapter 16 of the Restatement, "The Causal Relation Necessary to Responsibility for Negligence." The discussion in Section 448, and throughout Chapter 16 generally, *presupposes* that duty and its breach have been established according to the principles stated in earlier Chapters. Thus, although Chapter 16 certainly discusses foreseeability, it does nothing at all to undermine *Delahanty* or the sound statement of law by the unanimous New York court that "a duty and the corresponding liability it imposes do <u>not</u> rise from mere foreseeability of the harm." 96 N.Y.2d at 235, 750 N.E.2d at 1062, 727 N.Y.S.2d at 14 (emphasis in original).

When Section 448 is applicable – when the question before the court really is one of causation – neither New York courts nor courts in this jurisdiction hesitate to apply it. The New York Court of Appeals followed Section 448 in *Kush ex rel. Marszalek* v. *City of Buffalo*, 59 N.Y.2d 26, 33, 462 N.Y.S.2d 831, 835, 449 N.E.2d 725, 729 (1983), a case that was in turn cited in *Hamilton*, 96 N.Y.2d at 235, 750 N.Y.2d at 1063, 727 N.Y.S.2d at 15, but both cases properly recognized that Section 448 pertains to causation, not duty. Plaintiffs' effort to show that the

District of Columbia differs from New York, because the former but not the latter follows the Restatement, therefore fails.

Unsurprisingly, *District of Columbia* v. *Carlson* is inapposite for the exact same reason: the case pertains exclusively to causation and says absolutely nothing about the scope of anyone's (let alone a manufacturer's) duty. *Carlson* was a suit by an injured pedestrian who contended that the District's failure to maintain a traffic signal or provide alternative traffic-control devices at the intersection of Sixth Street and Independence Avenue, S.W., rendered the District liable for the injuries he sustained when a motorist failed to stop at that intersection and hit him. The District did *not* argue on appeal that it lacked a duty toward the pedestrian or that it had not breached its duty. Rather, the District's *only* arguments on appeal were "that the non-functioning traffic signal was not a cause-in-fact of the accident, and that, even if it was, the actions of Mr. Poe [the motorist] were an unforeseeable superseding cause that relieves the District of any liability." 793 A.2d at 1286. In addressing a causation question, this Court naturally enough looked to causation precedents and to the causation provisions of the Restatement, Section 448 in particular. See 793 A.2d at 1290. But the Court said nothing at all to suggest that its discussion of "foreseeability" (*id.* at 1290-1292) bore in any way, shape, or form on the question of "duty" that was not before the Court. *Delahanty*, not *Carlson*, is the relevant precedent on the "duty" question, and it requires dismissal of both the District's and the individual plaintiffs' negligence claims. The Superior Court's other reasons for dismissing those claims were correct as well, but this Court need not reach them in order to affirm.

Abrogating the "duty" element of negligence, and replacing it with a mere "foreseeability" inquiry, would threaten practically limitless litigation against the manufacturers of lawful,

non-defective products. It is arguably "foreseeable" that some fraction of all sharp knives will be misused for criminal purposes. It is arguably "foreseeable" that some fraction of all automobiles will be driven illegally by impaired drivers who will then cause great bodily harm. And it is arguably "foreseeable" that some fraction of matches sold will be used in arson or other crimes. Yet tort law has never made manufacturers of those products the insurers against all possible misuse of those products, nor should this Court suddenly impose an insurer-like duty on all manufacturers of products capable of being criminally misused. Rather, this Court should follow its own *Delahanty* decision, as well as the majority of decisions by other courts, and affirm dismissal of the negligence count.

II. THERE CAN BE NO PUBLIC NUISANCE CLAIM BASED ON PROPERTY THE DEFENDANTS DO NOT CONTROL AT THE TIME OF INJURY

All agree that the District's "public nuisance" claims should be evaluated under RESTATEMENT (SECOND) OF TORTS § 821B (1979). The Superior Court dismissed the claims on the grounds, among others, that in a case not involving the use or enjoyment of land District of Columbia law does not recognize such a tort in the absence of an applicable District of Columbia regulatory scheme, and that the conduct the District attacks in this count occurs outside the District and cannot be "abated" within the District. Those grounds were correct, but the NAM anticipates that they will be adequately briefed by the parties, and the NAM will not add to the briefing on those issues. Instead, the NAM will explain why a straightforward application of the criteria developed in case law from multiple jurisdictions precludes the recognition of a "public nuisance" claim because defendants lack the ability to control subsequent uses of their products. As

the Superior Court correctly explained, "The key point * * * is that the defendants do not have control over the criminals who used or misused their products." 2002 WL 31811717, at *30.

Preliminarily, the NAM notes that the "public nuisance" theory, which depends on the idea that defendants' products *inherently* are so dangerous that defendants should be responsible for *any* harm they cause within the District (no matter how many other actors had to commit misdeeds before the products caused harm), is nothing more than a repackaged version of the "defective product" and "abnormally dangerous activity" theories definitively rejected by this Court in *Delahanty*, 564 A.2d at 760-762. The short, commonsense answer to the District's repackaged argument is the same as the short, commonsense answer this Court gave in *Delahanty*, 564 A.2d at 761 (citing *Perkins* v. *F.I.E. Corp.*, 762 F.2d 1250, 1265 n.43 (5th Cir. 1985)): "[A]ny high degree of risk of harm, or any likelihood that such harm will be great, would result from the use, not the marketing as such, of handguns." The scourge of gun violence is no more attributable, in law, to the makers of handguns than the scourge of drunk driving is attributable to the makers of automobiles.

Upholding the District's public nuisance theory of recovery would affect every manufacturer of a product that may later be criminally misused to cause injury. At its core, the theory imposes potential liability for the sale of lawful, non-defective products to distributors – in this case, licensed by the federal government. It imposes that liability despite subsequent sale of those products to other distributors and dealers – in this case, also federally licensed. It makes the manufacturer the "insurer" for lawful, lawfully sold, non-defective products.

To be liable on a public nuisance claim, a defendant must control the property at the time of the injury to the plaintiff. A lawful sale of the property – even a sale to the plaintiff –

relinquishes the defendant's control of it and precludes a public nuisance claim. In the case of firearms – which cause harm not to the purchaser but to someone shot by the purchaser or (far more often) someone who obtains the gun through several additional transactions, often illegally – the manufacturer has even less control of the property and is even less subject to liability on a nuisance theory.

Typical of the cases rejecting nuisance liability because the defendant – a manufacturer – did not control the property is *Tioga Public School District #15* v. *United States Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993). The court rejected an effort to use the tort of nuisance to recover damages from the manufacturer of an asbestos-containing product for asbestos contamination of a building following the installation of that product in the building. Applying North Dakota law, but noting that the decision was supported unanimously by decisions applying Rhode Island, New Hampshire, Tennessee, and Michigan law, Judge Bowman wrote for the court:

> One issue on which the courts appear to agree * * * is that nuisance law does not afford a remedy against the manufacturer of an asbestos-containing product to an owner whose building has been contaminated by asbestos following the installation of the product in the building. * * * *These courts have noted that liability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the nuisance.*

984 F.2d at 920 (emphasis added).[7] The Third Circuit followed *Tioga* in the *Camden* case, rejecting a nuisance claim against handgun manufacturers and adding the observation, "If defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case [handguns] cannot be a nuisance without straining the law to absurdity." 273 F.3d at 540. More recently, just two months ago, the First Department of the

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[7] Accord *City of Bloomington* v. *Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989); *City of Manchester* v. *National Gypsum Co.*, 627 F. Supp. 646, 656 (D.R.I. 1986).

Appellate Division of the New York Supreme Court cited both *Tioga* and *Camden* with approval in rejecting a public nuisance claim under New York law against handgun manufacturers. *Spitzer*, 761 N.Y.S.2d at 197.

Not only did the New York court recognize that *Tioga* and *Camden* were soundly reasoned and precluded recognition of a "public nuisance" cause of action based merely on the manufacture of lawful, non-defective products, but also that court recognized – as should this Court – that the plaintiffs were simply trying to repackage under a new (and even less applicable) theory the same types of claims that the highest court in the jurisdiction had already rejected. In New York, the relevant precedent was the *Hamilton* decision of the Court of Appeals, and the Appellate Division wrote: "Notwithstanding the arguments advanced by plaintiff, our reading of *Hamilton* suggests the Court's resolve to maintain its present and longstanding posture of denying liability where the causal connection between the alleged business conduct and harm is too tenuous and remote." 761 N.Y.S.2d at 195-196. Here, the relevant precedent is this Court's decision in *Delahanty* v. *Hinckley*, and the District's effort to evade the force of that precedent should be rejected just as strongly.

Policy concerns that animated the *Spitzer* decision are just as applicable here in the District as they are in New York. As the Appellate Division observed, "giving a green light to a common-law public nuisance cause of action [would] likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and

activities." 761 N.Y.S.2d at 196.[8] In fact, that is the very reason why amicus's members are concerned about this litigation. As that court further observed, "In asking this Court to allow the pursuit of a common-law public nuisance cause of action, plaintiff would have us summarily ignore * * * the plain fact that courts are the least suited, least equipped, and thus the least appropriate branch of government to regulate and micro-manage the manufacturing, marketing, distribution and sale of handguns." *Id.* at 198-199.

As one commentator has noted, "redefining the common law tort of public nuisance to hold gun manufacturers liable may be an attractive option for a court wanting to address this societal problem," but "such judicial activism may be costly in its own right to the stability of the entire legal system." Comment, *supra*, 31 U. BALT. L. REV. at 302. Some 14 years ago in *Delahanty*, this jurisdiction soundly rejected the "best" theories on which a gunmaker might conceivably have been held liable for third parties' violent use of its products. Plaintiffs in the present case seek to avoid *Delahanty* by presenting even weaker theories. The weaker theories should not be accepted; instead, the District's current effort to stretch the common law even further should be rejected.

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[8] See also 761 N.Y.S.2d at 196-197:

> A variety of such lawsuits would leave the starting gate to be welcomed into the legal arena to run their cumbersome course, their vast cost and tenuous reasoning notwithstanding. Indeed, such lawsuits employed to address a host of societal problems would be invited into the courthouse whether the problems they target are real or perceived; whether the problems are in some way caused by, or perhaps merely preceded by, the defendants' completely lawful business practices; regardless of the remoteness of their actual cause or of their foreseeability; and regardless of the existence, remoteness, nature and extent of any intervening causes between defendants' lawful commercial conduct and the alleged harm.

CONCLUSION

The judgment of the Superior Court should be affirmed.

Respectfully submitted,

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