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Personal Injury Report

Keeping The Lid On Pandora's Box:

Using Traditional Limits On Liability To Defend Corporate Defendants Against Civil Liability Based On Criminal Misuse Of Legal Products

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A commentary article reprinted from the October 24, 2011 issue of Mealey's Personal Injury Report

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Commentary

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The American common law has long recognized the general rule that a party has no duty to protect another person from the deliberate criminal attack of a third party.[4] Affirming the basic propriety of such a rule, Justice Oliver Wendell Holmes observed that "everyone has the right to rely upon his fellow-men acting lawfully."[5] Courts have identified several reasons for adhering to this fundamental precept: the notion that the deliberate criminal act of a third person is the intervening, superseding, or sole legal cause of harm to another;[6] the difficulty of determining the foreseeability of criminal acts;[7] the economic consequences of imposing such a duty would be severe;[8] the reluctance of judges to tamper with a traditional, common law concept;[9] and the public policy that protecting citizens is the government's duty rather than the duty of the private sector.[10] The common notion that legal liability should remain linked to culpability undergirds each of these reasons.

While exceptions to the general rule have been recognized, those exceptions have primarily been confined to two instances: premises liability and limited "special relationships," including innkeeper-guest, common carrier-passenger, school-student, and, sometimes, employer-employee.[11] Until relatively recently, lawsuits seeking to recover from a defendant based on the criminal activity of a third party have sought to rely on either of these exceptions. A new trend, however, is developing that seeks to challenge and undermine both the general rule and the basic principles of negligence law itself.

Driven by increasingly creative attorneys, this trend consists of filing civil lawsuits against solvent corporations ("deep-pocket defendants") for the criminal acts of a third party.[12] In such suits, the deep-pocket defendant is often the manufacturer of a product misused by a criminal to commit a crime — a use obviously not intended by the manufacturer. The ultimate claim, generally accompanied by inflammatory rhetoric, states that the deep-pocket defendant should have foreseen the criminal's activity and is, therefore, negligent for failing to undertake some measures to prevent the crime and protect the victim(s). Consistent with this trend, manufacturers of ammonium nitrate,[13] insecticides,[14] ammunitions,[15] chemotherapy agents,[16] over-the-counter cold medications,[17] and prescription drugs[18] have been sued because their products were misused and, in some cases, altered, in furtherance of some criminal scheme or activity. Likewise, manufacturers and owners of sulfuric acid,[19] chemical carcinogens,[20] firearms,[21] and automobiles[22] have also been sued for a third party's criminal assaults.

This trend seeks compensation from product manufacturers based on a criminal's decision to misuse the manufacturer's product to commit a criminal act. In arguing for such recovery, plaintiffs downplay and/or overlook many of the following critical facts: the third party's acts were intentional and were prohibited by existing criminal law; the injuries were not created by the manufacturer; the injuries occurred as a result of the criminal's decision to violate the law and misuse a product; the manufacturer had no ownership or control of the product at the time the third party used it to commit the crime; the manufacturer did not control, and may have had no relationship with, the criminal. In crafting their complaints, plaintiffs also overlook and ignore well-established legal limits on liability.

In defending against such claims, counsel must be prepared to highlight and explain the significance of the factual and legal deficiencies that undercut plaintiffs' claims. This article discusses these limits and argues that holding product manufacturers liable for the criminal misuse of their legal products would involve a dangerous expansion of the law and would contravene sound public policy.

I. Overarching Legal Defenses Establish That Manufacturers Should Not Be Liable For The Criminal Misuse Of Their Products

Historically, civil claims against product manufacturers arising out of third-party criminal conduct have been rare primarily due to the availability of strong defenses that can be applied without regard to the individual claims alleged in the specific complaint. These include the proximate cause requirement and the remoteness doctrine. Defense counsel should familiarize themselves with these principles and defenses, and any dispositive motion[23] should lead with them in seeking dismissal of such claims.[24]

1. Claims Against Product Manufacturers Arising Out Of Criminal Misuse Of A Product Fail For Lack Of Proximate Cause

Few principles have caused so much uncertainty in the law as proximate cause. At its most basic, proximate cause is the limit the law imposes upon the right to recover for the consequences of an allegedly negligent act.[25] As a limitation on liability, it absolves those parties whom it would be unfair to punish because of the attenuated relationship their conduct bears to the plaintiff's injuries.[26] Absent this limitation, potential liability for any party's acts could be absolute and infinite if dependent only on "but-for" causation.

As Dean Prosser observed: "In a philosophical sense, the causes of an accident go back to the birth of the parties and the discovery of America; but any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation."[27] Proximate cause is determined by looking back, after the occurrence, and examining whether the injury appears to be a reasonable and probable consequence of the conduct.[28] That determination cannot be based on speculation and conjecture.[29] Additionally, a proximate cause must produce a particular result without the necessity of an intervening or a superseding cause.[30] Plaintiffs can be expected to argue that proximate cause is a question of fact that may only be decided by the jury; nevertheless, it becomes an issue of law for the court when there is no evidence from which a jury could reasonably find the required proximate causal nexus between the defendant's alleged acts and plaintiff's alleged injury.[31]

While the definition of proximate cause itself may seem to lack precision, the principles related to it do not suffer from such uncertainty. These principles should lead to the dismissal of deep-pocket defendants from cases seeking recovery for the criminal activity of a third party, primarily because the criminal acts of the third party should operate as intervening and superseding causes that are sufficient to constitute the sole legal cause of the plaintiff's alleged injury.[32]

American courts have repeatedly recognized that crimes generally constitute intervening and superseding causes that are sufficient to break the chain of causation between the defendant's alleged breach of duty and the plaintiffs' alleged injury.[33] If a criminal act by a third party intervenes and produces plaintiff's injury, the causal chain between the defendant's alleged negligence and the plaintiff's injury is broken.[34] Though a defendant is not invariably excused from liability when the chain of causation includes a criminal act, "there remains a consensus that liability should not be lightly assessed when the injury would not have happened but for the criminal conduct."[35] In addition, a duty to

protect against the intentional criminal acts of third parties generally is not recognized.[36]

The Tenth Circuit's analysis of this issue in *Gaines-Tabb v. ICI Explosives, USA, Inc.*[37] is instructive. That case concerned the bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995.[38] The bombing caused the deaths of 168 people and injuries to hundreds of others.[39] Twenty days later, plaintiffs brought suit for personal injuries or wrongful death against the manufacturer of the ammonium nitrate allegedly used to create the bomb.[40] Plaintiffs' claims were primarily negligence-based, and alleged that the manufacturer was negligent in making explosive-grade ammonium nitrate available to consumers.[41]

On a motion to dismiss, the district court held that ICI did not have a duty to protect plaintiffs, and that ICI's alleged actions or inactions were not the proximate cause of plaintiffs' injuries.[42] On appeal, the Tenth Circuit affirmed the dismissal based on the lack of proximate cause without reaching the question of duty.[43] Addressing the proximate cause requirement, the court noted that "the causal nexus between an act of negligence and the resulting injury will be deemed broken with the intervention of a new, independent and efficient cause which was neither anticipated nor reasonably foreseeable."[44] The court stated that to be considered a supervening cause, an intervening cause must be: (1) independent of the original act; (2) adequate by itself to bring about the injury; and (3) not reasonably foreseeable.[45] The court further observed that when the intervening act is intentionally tortious or criminal, it is more likely to be considered independent.[46]

After analyzing the factual allegations, the court ultimately held that "[b]ecause the conduct of the bomber or bombers was unforeseeable, independent of the acts of defendants, and adequate by itself to bring about plaintiffs' injuries, the criminal activities of the bomber or bombers acted as the supervening cause of plaintiffs' injuries."[47] The court accordingly ruled that plaintiffs failed to state a claim for negligence.[48]

The Supreme Court of Nebraska reached a similar result in *Shelton v. Board of Regents of the Univ. of Nebraska*.[49] That suit was brought by, or on behalf of, victims of a poisoning by a former employee of the defendant.[50] The former employee had stolen the chemical carcinogens from defendant's premises and then poisoned two families.[51] He was convicted of murder as a result of the deaths caused by the poisonings.[52] Agreeing with the trial court that defendant's negligence was not the proximate cause of plaintiffs' injuries, the *Shelton* court affirmed dismissal without reaching the issue of duty.[53] The court explained that a proximate cause of an alleged injury is "that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred."[54] The court also stated that an efficient intervening cause is a new and independent force, which breaks the causal connection between the alleged original wrong and the injury.[55]

Applying these principles, the court held that even if defendant had been negligent as alleged, two subsequent illegal criminal acts (breaking and entering, and poisoning the victims) intervened between the alleged negligence of defendant and the injuries suffered by the plaintiffs.[56] The court then held that those two intervening criminal acts were of such a nature as to constitute an efficient intervening cause, which destroyed any claim that the alleged negligence of defendant was the proximate cause of plaintiffs' injuries.[57] Notably, the court highlighted its commitment to the canons of legal responsibility when it stated:

The events involved in this case are indeed sad and tragic. Hindsight might disclose some inkling of the tragedy caused by a disturbed but nevertheless criminal mind. That hindsight is not, however, sufficient in this case to permit this court to say that Eppley Institute could have reasonably realized the likelihood of Harper's criminal acts merely because it hired him to care for experimental rats. No doubt the appellants have suffered. Undoubtedly Harper is liable to them for his actions. Those facts, however, are not sufficient to hold the appellees liable.[58]

Despite the sympathetic nature of crime-victim plaintiffs, other courts have also been unwilling to impose liability on a deep-pocket defendant for a third party's criminal activity.[59] In each of these cases, the court found the criminal activity of the third parties to constitute a superceding cause of the plaintiffs' injuries, and therefore dismissed the claims as a matter of law. Applying these principles, courts have rejected claims against a variety of defendants for want of proximate cause.

These courts recognize that the criminal activity involved is an intervening or superseding cause that breaks the chain of causation.[60]

Proximate cause is a particularly important principle in cases involving third-party criminal acts because it applies to a wide variety of claims. As plaintiffs have had trouble prevailing on traditional products-liability claims, they have attempted to bring claims under a variety of different theories.[61] A recent example of the strength and breadth of the proximate cause requirement as a bar to such claims is the Eighth Circuit's decision in *Ashley County, Ark. v. Pfizer*.[62] In *Ashley County*, a number of Arkansas counties asserted claims against the manufacturers of pseudoephedrine-containing cold medications because criminals used those medications to make methamphetamine.[63] The counties sought to recover all the costs associated with Arkansas's "methamphetamine epidemic," including policing methamphetamine production and use, cleaning up contaminated methamphetamine labs, treating methamphetamine addiction, and caring for children of methamphetamine users.[64]

Rather than plead traditional negligence claims, which would have required the counties to establish the existence of a duty, or strict-products-liability claims, which would have required a showing that the cold medications at issue were defective, the counties asserted claims for Unjust Enrichment, Deceptive Trade Practices, Public Nuisance, and a claim pursuant to Arkansas' Civil Action by a Crime Victim Statute.[65] The Eighth Circuit affirmed a grant of judgment on the pleadings to the defendants, in large part because plaintiffs could not demonstrate that the conduct of the pseudoephedrine manufacturers was a proximate cause of the damages caused by methamphetamine use in Arkansas.[66] In so holding, the Eighth Circuit cautioned against the dangers of expanding existing legal theories to impose liability on manufacturers of legal products for the criminal misuse of their products.

> [W]e are very reluctant to open Pandora's box to the avalanche of actions that would follow if we found this case to state a cause of action under Arkansas law. We could easily predict that the next lawsuit would be against farmers cooperatives for not telling their farmer customers to sufficiently safeguard their anhydrous ammonia (another ingredient in illicit methamphetamine manufacture) tanks from theft by methamphetamine cooks. And what of the liability of manufacturers in other industries that, if stretched far enough, can be linked to other societal problems? Proximate cause seems an appropriate avenue for limiting liability in this context, as in the gun manufacturer context, particularly "where an effect may be a proliferation of lawsuits not merely against these defendants but against other types of commercial enterprises-manufacturers, say, of liquor, anti-depressants, SUVs, or violent video games-in order to address a myriad of societal problems regardless of the distance between the causes of the problems and their alleged consequences."[67]

The proximate cause analysis provides corporate defendants with strong legal arguments to present in defense of claims based on a third party's criminal misuse of a product. The criminal action will almost always constitute an intervening or superseding cause that will break the chain of causation. This is both understandable and consistent with public policy which recognizes that the party that bears responsibility for the consequences of a crime is the party that committed the crime.

2. The Remoteness Doctrine Bars Claims Against Product Manufacturers Based On The Criminal Misuse Of Their Products

Closely associated with the notion of proximate cause, the remoteness doctrine bars recovery as a matter of law when the claimed injury can be connected to the defendant's alleged conduct — if at all — only by an attenuated chain of causation, with intervening steps or actors between the defendant's conduct and the plaintiff's alleged harm.[68] An injury that is too remote from its causal agent fails to satisfy tort law's proximate cause requirement.[69] Even if a causal connection may be present, there comes a point beyond which "the connection between the defendant's negligence and the claimant's damages is too tenuous and remote to permit recovery."[70] Factors that bear on the applicability of the remoteness doctrine include: (1) "a number of intervening acts between defendants conduct and the plaintiffs' injury"; (2) "the possibility for duplicate recovery for the same harm"; (3) "prevention of an avalanche of claims"; and (4) "recovery for indirect economic harm, when there is a direct, non-economic harm to another."[71]

For these reasons, one court rejected an action based on the misuse of firearms on remoteness grounds. In

Finocchio v. Mahler,[72] plaintiff sued a homeowner who stored a firearm in an unlocked dresser drawer.[73] A friend of the homeowner's teenage daughter stole the firearm and ammunition and then accidentally shot the plaintiff's daughter the next day.[74] The court found the series of events to be too attenuated, as a matter of law, to support proximate causation:

Here the chain of causation included three acts over which the owner had no control, two of which involved serious crimes. All took place after [the homeowner] had stored the weapon in the dresser drawer. First, [the thief], on July 5, intruded into the night stand and found ammunition, from which he suspected the presence of a gun on the premises. Second, the next day, he stole the gun and a clip of ammunition from the dresser drawer and carried those articles away. Third, he appeared at another house on July 7 and, with culpable negligence, caused the weapon to fire a fatal shot. Our attention has not been called to any case in which recovery was allowed for so attenuated a chain of causation.[75]

The court therefore sustained summary judgment in favor of the defendant.[76]

Likewise, other courts have recognized that the legal limitations incorporated into the concept of proximate causation serve to create necessary boundaries on the scope of liability proposed by creative pleading and legal theories:

We suppose that, given sufficient information, imagination, and stratospheric reasoning, by omitting attention to the boundaries which the courts and treatises attempt to set by using the words "proximate," "natural and probable consequence," "unbroken chain of circumstances," "efficient intervening cause," and "remote," the wrong which any of us may do can be traced in the ultimate causal connection with injury to a great many others, even those yet unborn; but the law, although a great moral force in itself, does not permit the recovery of damages except for those injuries which have an immediate affinity with actions which produce the wrong.[77]

Cases against manufacturers where their products were misused by a criminal are also typically very attenuated in both time and place. Initially, the product was manufactured without defect in one place. It was then likely distributed to at least one other location before the criminal took possession (and sometimes ownership) of the product. The location of the assault may have been several hundred, if not thousands, of miles away from where the product was manufactured. In addition, there may also have been a significant lapse of time between when the product was manufactured and when the criminal misused it to commit a crime. The existence of such attenuating facts may be used to support dismissal under the remoteness doctrine.

The remoteness doctrine is a particularly relevant defense when the plaintiff is a municipality,[78] an insurance company, or another entity seeking to recover costs incurred in remedying the consequences of criminal activity.[79] In these cases, the plaintiffs have not suffered a direct injury as a result of the crime in question; rather, their alleged injuries stem from the general costs to society resulting from criminal acts.[80] The fact that these parties are seeking "recovery for indirect economic harm, when there is a direct, non-economic harm to another" triggers the application of the remoteness doctrine.[81] The presence of more directly injured parties raises the specter of double recovery and further implicates the remoteness doctrine.[82]

The remoteness doctrine provides additional legal support for the position that deep-pocket defendants should not be liable for the criminal misuse of their products by third parties. The attenuated nature of these claims, as illustrated by the many actions that stand between the defendant manufacturer and the injured crime victim, demonstrates why courts should not allow them to proceed.

II. Legal Gaps In Plaintiffs' Commonly Asserted Claims Establish That Manufacturer Defendants Are Not Liable For The Criminal Misuse Of Their Products

In addition to the overarching principles and defenses discussed above, defense counsel should be prepared to assert specific defenses and arguments directed toward each individual claim pleaded in a complaint. These arguments should highlight for the court how traditional theories of liability do not apply in cases in which the only connection between the alleged injury and the actions of the defendant is a third party's decision to use the product in the commission of a crime.

Such claims typically include negligence claims, strict-products-liability claims, and, more recently, public-nuisance claims.[83]

1. Negligence Claims Should Fail As There Is No Duty To Protect Plaintiffs From The Intentional Criminal Acts Of A Third Party

The initial cases involving claims brought against deep-pocket defendants seeking to recover for the criminal conduct of third parties tended to assert traditional negligence claims. Plaintiffs in these cases argued that the deep-pocket defendant could have foreseen the manner in which criminals might have misused their products and that, accordingly, the defendant had a duty to prevent third parties from using their products to commit a crime. The majority of these cases have failed because plaintiffs have been unable to establish that the defendant owed or breached any legal duty to the plaintiff.

Generally, to establish negligence, a plaintiff must prove the following elements: (1) the existence of a duty; (2) the breach of that duty by defendant; (3) an injury to plaintiff; and, (4) that the defendant's breach was the proximate cause of plaintiff's injury.[84] The failure to plead and establish any of these elements should result in the dismissal of the plaintiff's claim. The existence of a legal duty is a question of law to be decided by the court.[85] Therefore, courts certainly possess the authority to dismiss plaintiffs' claims as a matter of law for failing to establish the duty element.[86]

Recognizing the novelty of their claims and the difficulty in establishing the duty and the proximate cause elements in these cases, plaintiffs have sought to discard these traditional requirements of negligence. They typically propose that questions of duty and proximate causation be supplanted by, and subsumed in, an inquiry about foreseeability. In these efforts to find the deep-pocket defendant liable for a third party's criminal acts, plaintiffs would have foreseeability alone determine both the duty and proximate cause elements. Not surprisingly, the argument is then made that the determination of foreseeability cannot be made as a matter of law but should instead be made only by the trier of fact. If such arguments were accepted, recourse to motions to dismiss, for judgment on the pleadings, and for summary judgment would be rendered meaningless in negligence suits.

When confronted with this inversion of basic principles of negligence, defense counsel should provide the court with as many legal and public policy reasons as possible to dismiss the claims as a matter of law. We offer several of these reasons concerning the question of duty and highlight cases where courts have refused to deviate from the ordinary canons of legal responsibility.

A. Duty Is A Required Element Of Negligence

A defendant who owes no discernable duty to a plaintiff will not be subject to liability based in negligence for that plaintiff's alleged injury.[87] The duty question essentially asks whether the defendant is under any legal obligation to act for the benefit of the particular plaintiff: "[n]egligence in the air, so to speak, will not do."[88] In the absence of a legal duty, a negligence claim must fail;[89] unless the defendant has assumed a duty to act, or stands in a special relationship to the plaintiff, a defendant is not liable in tort for a pure failure to act for the plaintiff's benefit.[90] Courts have recognized that, in fixing the orbit of duty, it is their responsibility to limit the legal consequences of wrongs to a controllable degree and to protect against crushing exposure to liability.[91]

Accordingly, a plaintiff attempting to establish the liability of a deep-pocket defendant for the criminal acts of a third party must first prove the existence of a duty owed by that defendant to the plaintiff. Existing law and public policy, however, reject the imposition of such a duty on manufacturers whose products are misused in criminal activity.

B. There Is No Duty To Protect Individuals Against The Criminal Actions Of Third Parties

As a general rule, a party has no duty to protect another from a deliberate criminal attack by a third person.[92] In the absence of a special relationship giving the defendant authority and ability to control the criminal, or a special relationship between the plaintiff and the defendant that requires the defendant to take actions to protect the plaintiff from harm, courts do not, and should not, impose a duty to control the actions of third parties.[93] This position is reflected in the Restatement (Second) of Torts § 315 which explains that:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless.

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.[94]

Accordingly, courts should — and in fact do-decline to impose liability for the criminal acts of a third party because the defendant has no control over subsequent criminal conduct.[95]

While two common-law exceptions to the general rule of non-liability do exist, those exceptions involve premises liability or limited "special relationships" such as innkeeper-guest, common carrier-passenger, school-student, and sometimes employer-employee.[96] Neither of those exceptions, however, applies to the manufacturer of a product that is used by a third party in a criminal assault. Therefore, the general rule should be dispositive and should result in the dismissal of plaintiff's negligence-based claims in such cases.

Applying this rule, the court in *McCarthy v. Sturm, Ruger & Co.*[97] granted defendant's motion to dismiss because defendant owed plaintiffs no legal duty.[98] That case concerned a murderous shooting spree on a railroad-passenger train.[99] Plaintiffs sued the defendant, the manufacturer of the ammunition used by the third-party criminal, asserting claims based on negligence and strict liability.[100] Plaintiffs argued that the defendant owed a duty to them because it was foreseeable that criminals would use defendant's product to injure innocent people.[101] In rejecting plaintiffs' claims, the court first explained that the existence of a legal duty is a question of law for the court to determine.[102] The court then observed that no "special relationship" existed between defendant and the third party that would give defendant the authority and ability to control the third party's actions.[103] In the absence of such a relationship, courts do not impose a duty to control the actions of third parties.[104]

Likewise, the court in *Henry v. Merck and Co.*,[105] reversed a jury verdict in plaintiff's favor on negligence claims against a chemical manufacturer and remanded with instructions to enter judgment in favor of the manufacturer.[106] In that case, an employee of the defendant stole sulfuric acid from the defendant's premises and assaulted the plaintiff with the acid.[107] The former employee was convicted of the crime of maiming.[108] Plaintiff argued that the defendant was negligent in allowing the third party to remove the acid from the defendant's premises.[109] Initially, the court remarked that a negligence claim fails in the absence of a duty.[110] The court also reiterated the general rule that, absent special circumstances, no duty is imposed on a party to anticipate and prevent the intentional or criminal acts of a third party.[111] Noting that the defendant had no relationship with the plaintiff that gave rise to a duty to protect the plaintiff from the criminal acts of a third party, the court instructed the trial court to direct a verdict in favor of the defendant.[112]

Other courts have also routinely applied this rule to bar similar negligence claims against deep-pocket defendants.[113] This general rule demonstrates that negligence claims against product manufacturers arising out of the criminal actions of a third party should fail as a matter of law.

C. No General Duty To Render Aid Exists

In addition to the general rule that a party has no duty to protect another from a deliberate criminal attack by a third person, there is also generally no obligation to go to the aid of a person in danger.[114] Absent a statute or special relationship, a private party is under no legal duty to render assistance to a person in peril, even if such assistance can be offered without cost or effort.[115] Section 314 of the Restatement (Second) of Torts codifies this well known principle:

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.[116]

Nor is the general rule changed because the defendant possibly could have foreseen harm to a particular individual from his failure to act.[117]

The Missouri Court of Appeals recognized this principle in *Chiney v. Am. Drug Stores, Inc.*[118] In *Chiney*, plaintiff, who was suffering from an acute asthma attack, went to a drug store and asked the pharmacist to provide an inhaler or call her doctor to refill her asthma prescription.[119] The pharmacist refused.[120] Plaintiff sued the pharmacist, claiming that she suffered injury to her lungs as a result of his failure to help.[121] The court noted that "[w]hile recognizing a moral and

humane duty to aid a person in distress or danger, in the absence of some special relationship between the parties, the law generally imposes no legal duty to do so."[122] After examining the "statutes, rules, principles and precedents" governing the relationship between a pharmacist and a potential customer, the court held that the defendant was under no legal duty to render assistance to the plaintiff.[123]

The cases against manufacturers whose products have been misused by a criminal should reach the same determination of no liability. It is unlikely that a statute would impose a duty on a manufacturer to render aid to victims of criminal assaults. Moreover, the mere fact that the deep-pocket defendant manufactured the misused product does not create a "special relationship" between the defendant and the victim.[124] Indeed, in such cases it is likely that there is no relationship of any sort between the defendant and the victim.

D. Foreseeability Alone Does Not Define Duty

As indicated above, plaintiffs bringing suit against manufacturers based on the criminal assault of a third party argue that the legal duty is defined by foreseeability alone, or that duty and foreseeability constitute the same element. Such an understanding would eviscerate the legal limitations of negligence and would strip the law of its capacity to guide the conduct of citizens. If foreseeability were the only standard, people could not act with any assurance that their conduct was lawful and not negligent: the law's virtue of affording predictability would be lost. Fortunately, the common law is clear that foreseeability alone does not define duty or liability.[125] The mere fact that a consequence might foreseeably result from an action or condition does not serve to establish a duty owing from a defendant to a plaintiff.[126] Rather, foreseeability is applicable to determine the scope of duty *only after it has been determined that there is a duty*.[127]

The Missouri Supreme Court has specifically recognized the danger of expanding tort law to the limits of foreseeability. In *Asaro v. Cardinal Glennon Mem. Hosp.*,[128] the court declined plaintiff's invitation to expand recovery for emotional distress based on foreseeability of harm alone.[129] The reason is that foreseeability alone is an impossible and impractical standard:

> Yet as Dean Prosser suggested, foreseeability goes "forward to eternity, and back to the beginning of the world." . . . For this reason, no court has defined duty as being coextensive with foreseeability.[130]

Moreover, when considering foreseeability, the analysis should be rigorous and practical. As one court has observed, "foreseeability requires more than someone viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury."[131] Therefore, even if it were a factor in the determination of duty, an analysis of foreseeability should remain moored to tort law's primary concern with reasonably and fairly allocating losses that arise out of socially unreasonable conduct.[132]

The New York Supreme Court has also explained that "foreseeability, alone does not define duty."[133] Rather, that court explained that foreseeability is only relevant to the question of duty because it "determines the scope of the duty" once the duty is determined to exist.[134] The court explained that before the foreseeability of a criminal act even becomes relevant, the plaintiff must first show "that a defendant owed not merely a general duty to society but a specific duty to him or her, for without a duty running directly to the injured person there can be no liability and damages, however careless the conduct or foreseeable the harm."[135]

Recognizing the danger inherent in a foreseeability-only standard, other courts have also refused to impose duties of care, even when potential harm appears highly foreseeable in hindsight.[136] Indeed, courts have recognized that imposing a duty upon a product manufacturer based solely upon the alleged foreseeability of the criminal misuse of a product would effectively "make a manufacturer or distributor an insurer of its product."[137] The limitations on duty set forth above demonstrate why traditional negligence claims cannot justify imposing civil liability on deep-pocket defendants based on a third party's criminal misuse of their products. Courts facing such claims should recognize and respect these traditional limits on duty and dismiss such claims.

2. Strict Product Liability Claims Should Fail Because Product Manufacturers Are Not Liable For Post-Sale Alterations Or Misuse Of Their Products

Plaintiffs have also asserted strict-liability claims against manufacturers alleging that the manufacturer's

product was defective because it could be converted for a criminal use.[138] As with plaintiffs' negligence claims, strict-products-liability claims that arise out of a third party's use of a legal product in the commission of a crime suffer from significant legal failings.

As an initial matter, courts have defined the duty a product manufacturer owes and have consistently held that a manufacturer's liability is predicated upon the dangerous nature of the product at the time it leaves the control of the manufacturer.[139] Plaintiffs typically must demonstrate that the product was defective by showing that the product was unreasonably dangerous through the application of either a risk/utility or a consumer expectations test. Additionally, plaintiffs must demonstrate that the product was defective in this manner at the time it left the control of the manufacturer. Any subsequent modification to the product, even if foreseeable, which renders the product unsafe does not subject the manufacturer to liability.[140]

These requirements undercut any potential product liability claim involving the criminal misuse of a product. For example, in a jurisdiction that applies a consumer expectation test, a plaintiff would have to show that the product was unreasonably dangerous because it could cause harm "beyond that which would be contemplated by the ordinary user or consumer who purchases it, with ordinary knowledge common to the foreseeable class of users as to its characteristics."[141] As courts have recognized, the ordinary consumer of a legal product is one who purchases it for legal uses; accordingly, the mere fact that a criminal may misuse that product does not make it unreasonably dangerous for ordinary consumers.[142] As the Florida Court of Appeals explained, "the essence of the doctrine of strict liability for a defective condition is that the product reaches the consumer with something 'wrong' with it."[143] Where the alleged "defect" is a product of a third party's use of the product, and not any flaw with the design, manufacturing, or warnings associated with the product, strict-liability theories simply do not apply.[144]

Similarly, a manufacturer does not have a duty to warn in anticipation that a user will alter its product so as to make it dangerous.[145] Indeed, as set forth above, the duties outlined by courts have not included the duty to protect particular plaintiffs from the criminal misuse of a defendant's product by a third party. The Third Circuit has explained that "manufacturers have no duty to prevent criminal misuse of their products which is entirely foreign to the purpose for which the product was intended."[146] As with negligence claims, traditional strict product liability claims do not warrant or justify the imposition of liability upon a deep-pocket defendant for the criminal misuse of their products by third parties.

3. Public Nuisance Claims Should Be Rejected As An Improper Attempt To Avoid The Limitations Of Traditional Legal Theories And To Expand The Law

Faced with the limitations of duty and product defect that are inherent in traditional negligence and strict product liability theories, creative lawyers have turned to different legal theories in an attempt to hold manufacturers of legal products liable for the criminal misuse of those products. Claims for public nuisance have become one of the more popular of the non-traditional theories of liability. Plaintiffs have asserted public nuisance claims against firearm and cold medication manufacturers with limited success.[147] Public nuisance is an attractive claim for plaintiffs because plaintiffs do not have to demonstrate that the defendant owed and breached a duty to the plaintiffs, nor do plaintiffs necessarily have to demonstrate that the defendant's product was used in a foreseeable manner. In this way, public nuisance claims avoid some of the hurdles to liability discussed above.[148] Indeed, in some states, plaintiffs need only show that defendants' conduct caused an unreasonable interference with a public right.[149]

However, courts should be, and many have been, reluctant to allow plaintiffs to use public nuisance claims to effectuate an end-run around traditional tort limits to liability. Most courts have rejected efforts to expand the law of nuisance to create claims based on the sale of legal products that might be used in a crime.[150] One of the strongest rebukes came from the New York Appellate Division in *Spitzer v. Strum, Ruger & Co., Inc.*[151] In *Spitzer*, the Attorney General of New York sought to abate legal sale of guns in New York which he claimed had created a public nuisance.[152] The Appellate Division recognized that plaintiffs' argument would transform the tort of public nuisance into a catch-all claim that could be asserted against any legal activity:

We see on the horizon, were we to expand the reach of the common-law public nuisance tort in the way

plaintiff urges, the outpouring of an unlimited number of theories of public nuisance claims for courts to resolve and perhaps impose and enforce — some of which will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motivated and exploitative. Such lawsuits could be leveled . . . to address a myriad of societal problems — real, perceived or imagined — regardless of the distance between the "causes" of the "problems" and their alleged consequences, and without any deference to proximate cause.[153]

As the *Spitzer* court explained, public-nuisance claims simply do not support the imposition of liability upon a deep-pocket defendant for injuries allegedly caused by a third party's criminal misuse of their product.[154] Traditional elements of nuisance law, including the requirement that the defendant have ownership or control over the instrumentality giving rise to the nuisance, simply are not present. Furthermore, to the extent that the "nuisance" at issue is the crime that allegedly injured the plaintiff, such nuisance is caused by the actions of the third-party criminal. Accordingly, courts should recognize, as the *Spitzer* court did, that using public-nuisance theories to impose liability upon manufacturers for the criminal misuse of their products would represent an unprecedented and unwarranted expansion of the law.

III. Public Policy Opposes Requiring A Party To Underwrite A Third Party's Criminal Activity

Opposition to the imposition of liability in these cases is not limited to legal arguments and precedent. Established public policy also opposes the trend. Multiple courts have discussed public policy reasons for why manufacturers should not be held liable for injuries caused by the criminal misuse of their products. For example, in *McCarthy v. Sturm, Ruger and Co., Inc.*,[155] the Court dismissed plaintiff's negligence and strict-liability claims against the manufacturer of the ammunition, holding that defendant owed no duty to prevent a criminal act. Addressing public policy considerations, the court stated: "[t]o impose a duty on [the defendant] to prevent the criminal misuse of its products would make it an insurer against such occurrences. Such liability exposure would be limitless and thus to impose a duty here would be inappropriate."[156]

So too, in *Elsroth v. Johnson and Johnson*,[157] an analogous case involving criminal tampering with Tylenol?, the court dismissed all claims against the manufacturer.[158] The court noted that "the notion that manufacturers should be forced to write off the consequences of determined criminal tampering by third parties as a cost of doing business" was an unprecedented and unacceptable cost for manufacturers.[159] The court further observed that:

[a]utomobile manufacturers are not liable to those burglarized when automobiles are used to effectuate burglaries; telephone companies are not liable to those defrauded when the telephone lines are used to perpetuate fraudulent schemes; and handgun manufacturers are not liable to those injured when handguns are used to inflict criminal harm.[160]

Suits against manufacturers for the criminal assaults of third parties seek to impose unprecedented and unacceptable costs on manufacturers simply because a criminal made the unfortunate and independent decision to use those manufacturers' products to violate existing law. Imposing liability would require manufacturers to monitor or supervise the marketplace to ensure that those in possession of their products - which could amount to thousands, if not millions, of consumers - do not violate the law. Manufacturers, however, have neither the necessary powers (*e.g.*, to execute search warrants, to compel testimony, etc.) nor the protections (*e.g.*, immunity) of law enforcement agencies to fulfill such a duty.

Moreover, the costs to train employees to police the marketplace would be staggering, especially when considered in conjunction with the knowledge that even pervasive monitoring would not prevent criminal activity. Importantly, public policy, as expressed in statutes and regulations, does not require such activity by manufacturers.[161] Indeed, those statutes and regulations typically have already assigned these responsibilities to various governmental authorities rather than to private citizens. A court addressing these types of suits should consider whether a system where private citizens monitor and police the activity of other private citizens is desirable. It should also weigh the possibility that imposing such a duty may force manufacturers, in light of the monitoring costs, to stop making certain products — a result which ultimately punishes the American public.

In some instances, the imposition of a new duty through litigation may conflict with a current regulatory

framework. For example, the firearms and pharmaceutical industries are both heavily regulated. Creating new obligations through these lawsuits against manufacturers may be contrary to the public policy as expressed in those existing regulations. As many courts have recognized, such pervasive changes should be made only through legislation, rather than through litigation.[162]

Indeed, these exact public policy concerns are reflected in the Congressional findings underlying the Protection of Lawful Commerce in Arms Act.[163] In its findings, Congress explained that:

The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.[164]

Furthermore, as Congress recognized:

Such actions are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and did not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several states. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.[165]

Moreover, Congress recognized that these lawsuits actually constitute attempts by plaintiffs (regardless of whether plaintiffs were individuals, public interest groups, or branches of federal, state, or local governments) "to circumvent the legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States."[166]

While the Congressional findings set forth above were included in an Act that preempted claims brought against gun and ammunition manufacturers based on the criminal misuse of their products,[167] the policy judgments expressed therein should apply with equal force to claims brought against the manufacturers of any legal product that face similar claims. The fundamental point is that persons who commit criminal acts are the ones responsible for their actions and that manufacturers of legal products are not responsible for a criminal's decision to use their products in the commission of a crime.

IV. Conclusion

Despite the strong legal defenses available to manufacturers and the public policy reasons that counsel against the imposition of liability, the danger this trend poses to corporate entities should not be underestimated, especially if a jury is permitted to make determinations of liability. Such cases typically involve emotional facts.[168] As victims of criminal behavior, the plaintiffs are very sympathetic parties, often the innocent targets of very brutal and disturbing assaults.[169] The assaults cause significant physical injury and may even result in death. Most likely, the extent of the injuries caused by the criminal vastly exceeds the capacity of the criminal to provide compensation to even one victim, much less to multiple victims. A corporate defendant, however, is less likely to have such financial limitations. Under such circumstances, the temptation may be strong for a trier of fact to find the criminal activity foreseeable in hindsight, to find that the deep-pocket defendant could have somehow prevented the harm, and to find it "fair" to compensate the victim. That type of approach, however, would overlook actual culpability and thereby shift liability to a party based not on its wrongful activity, but on its financial condition. That approach would also establish a scheme of absolute liability in which manufacturers would become insurers of their products. The long history of the common law, however, would find such a result abhorrent.

Aware of these temptations, the law recognizes specific legal limitations on liability such as duty and proximate cause. Absent the use of duty and proximate cause as legal limitations, liability for any party's acts would be absolute and infinite if limited only on "but-for"

causation and vague notions of "foreseeability."[170] Indeed, so critical and fundamental are these limitations that they are required elements of a plaintiff's cause of action for negligence. The trend identified above, however, represents a frontal assault on these basic limitations on liability because it seeks to replace these required elements with a single standard of foreseeability. This trend constitutes more than a paradigm shift in the law of negligence: it represents an attempt to purge negligence law of the requirement of actual wrongdoing or culpability. At the very least, it seeks to treat required elements, such as duty and proximate cause, as merely academic obstacles to recovery. According to this trend, foreseeability — determined long after the incident with the benefit of hindsight — is all that needs to be shown. Foreseeability and damage would then become the only elements of a cause of action for negligence.

An additional byproduct of the desire to compensate an innocent victim in the particular case may be the unappreciated imposition of wholly new legal obligations on the corporate entity and an equally unappreciated conflict with existing regulatory or statutory law. For example, to impose liability in these situations would be to require manufacturers to police the marketplace and detect a criminal's misuse of their products. Apart from the fact that manufacturers have neither the training nor expertise to engage in such monitoring, the costs would be overwhelming. Likewise, to the extent manufacturers are already regulated, the imposition of new obligations may conflict with existing statutory or regulatory schemes. If such sweeping changes are to be made, they should come not through litigation, but through appropriate legislation.

Given this environment, defense counsel involved in such litigation must direct the court to legal arguments focusing on the required elements of duty and proximate cause. Established public policy and basic notions of fairness also oppose the imposition of liability on one party for the criminal acts of a third party. Such arguments and limitations should allow for resolution of these cases by the court as a matter of law before trial. The statement of the Missouri Court of Appeals highlights the proper judicial posture and response when deciding such cases: "[plaintiff] was an innocent victim of a savage crime. Every human instinct cries out for a way to prevent such tragedies. Yet we dare not violate the ordinary canons of legal responsibility in an effort to obtain compensation for her."[171]

In the vast majority of cases seeking recovery from a deep-pocket defendant for the criminal activity of a third party, courts apply these ordinary canons of legal responsibility to dismiss such claims as a matter of law. In so doing, these courts assure that legal liability remains linked to culpability, that the required elements of a negligence cause of action remain intact, and that liability continues to be based on wrongful activity rather than on the sympathetic state of the plaintiff or the financial capacity of the defendant. To the extent these canons are not applied, the case must be recognized as an aberration of American law. That recognition is necessary if the law is to be more than a determination of perceived fairness, and more than a vehicle for redistributing wealth.

Endnotes

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4. *See Vittengl v. Fox*, 967 S.W.2d 269 (Mo.App. 1998). The cases applying this rule are too numerous to cite, but the following is only a small sampling of these

cases: *Sanders v. Acclaim Entertainment, Inc.*, 188 F. Supp. 2d. 1264 (D. Colo. 2002); *Bloxham v. Glock, Inc.*, 53 P.3d 196 (Ariz. Ct. App. 2002); *Jackson v. A.M.F. Bowling Centers, Inc.*, 128 F. Supp. 2d 307 (D. Md. 2001); *Kim v. Budget Rent A Car Sys., Inc.*, 15 P.3d 1283 (Wash. 2001); *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305 (3d Cir. 1999); *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613 (10th Cir. 1998); *Washington v. U.S. Dept. of HUD*, 953 F. Supp. 762 (N.D. Tex. 1998); *Wise v. United States*, 8 F. Supp. 2d 535 (E.D. Va. 1998); *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996).

5. Oliver Wendell Holmes, Collected Papers 131-132 (1952).

6. *Ashley County, Ark. v. Pfizer*, 552 F.3d 659, 673 (8th Cir. 2009); *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 319 (3d Cir. 1999); *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 621 (10th Cir. 1998); *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693, 704 (E.D. Ky. 2003); *Bikowicz v. Sterling Drug, Inc.*, 161 A.D.2d 982, 983-84 (N.Y. App. Div. 1990).

7. *L.A.C. v. Ward Parkway Shopping Ctr.*, 75 S.W.3d 247, 257 (Mo. banc 2002).

8. *See McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997); *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 312 (3d Cir. 1999) ("The courts must consider not only the interests of the litigants but also the interests of society in general, including the social and economic costs of any expansion of the outer boundaries of tort liability.").

9. This reason is particularly powerful when the case is before a federal court applying state common law pursuant to diversity jurisdiction. *Ashley County, Ark. v. Pfizer*, 552 F.3d 659, 673 (8th Cir. 2009) ("It is not the role of a federal court to expand state law in ways not foreshadowed by state precedent."), quoting *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002).

10. *See Wright v. St. Louis Produce Market Inc.*, 43 S.W.3d 404, 409 n.3 (Mo.App. 2001).

11. *See, e.g.*, *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 272 (Mo.App. 1987).

12. For example, the December 2002 issue of TRIAL magazine contains several articles that advocate suing deep-pocket defendants for the criminal acts of a third party. One article actually provides a checklist of possible defendants that should not be "overlooked" when filing suit. The abstract for that article, titled "When Negligence Leads to Crime," states: "There may be more to a crime than you think. Investigate all the factors that may have led to the incident, no matter how innocuous they seem — you may turn up liable parties that you wouldn't have found otherwise. You won't want to overlook these legal theories when preparing your next case."

13. *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305 (3d Cir. 1999); *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613 (10th Cir. 1998).

14. *Stephenson v. S.C. Johnson & Son, Inc.*, 638 N.Y.S.2d 889 (N.Y. Sup. Ct. 1996).

15. *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366 (S.D.N.Y. 1996); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, (Conn. 2001); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 321 Ark. 210; 900 S.W.2d 202 (Ark. 1995); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Camdem County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192 (N.Y. App. Div. 2003); *In re Firearm Cases*, 24 Cal. Rptr. 3d 659 (Cal. Ct. App. 2005); *Penelas v. Arms Technology, Inc.*, 778 So. 2d 1042 Fla. Dist. Ct. App. 2001); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989). *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004)*; District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005).

16. This refers to the mass civil litigation stemming from the criminal dilution of chemotherapy agents by a Kansas City pharmacist. Plaintiffs in that litigation alleged that pharmaceutical companies knew or should have known of the pharmacist's criminal activity.

17. *Ashley County, Ark. v. Pfizer*, 552 F.3d 659 (8th Cir. 2009); *Prince v. B.F. Ascher Co., Inc.*, 90 P.3d 1020, 1028 (Okla. Civ. App. 2004).

18. *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 486 (Miss. 2006); *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693, 704 (E.D. Ky. 2003); *Orzel v. Scott Drug Co.*, 537 N.W.2d 208, 221 (Mich. 1995); *Pappas v. Clark*, 494 N.W.2d 245, 247-48 (Iowa 1992).

19. *Henry v. Merck & Co.*, 877 F.2d 1489 (10th Cir. 1989).

20. *Shelton v. Board of Regents of the Univ. of Nebraska*, 320 N.W.2d 748 (Neb. 1982).

21. *Valentine v. On Target, Inc.*, 353 Md. 544 (Md. Ct. App. 1999).

22. *Kim v. Budget Rent A Car Sys., Inc.*, 15 P.3d 1283 (Wash. 2001). *Hersh v. Miller*, 99 N.W.2d 878 (Neb. 1959). Automobile manufacturers have also been sued. *Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244 (Neb. 2003).

23. Given the costs and burdens of civil discovery, the Authors encourage defense counsel to present their legal arguments at the earliest possible stage. While inquiries such as proximate cause and remoteness may seem factually driven, they often can be the appropriate subject of motions to dismiss, motions for judgment on the pleadings, or similar motions.

24. The Authors encourage defense counsel to assert both of these arguments because it is impossible to predict which such defenses a particular judge will find persuasive. This is illustrated by the Arkansas Pseudoephedrine litigation where both the district court judge and the Eighth Circuit's panel agreed that the plaintiffs' claims failed as a matter of law, but they reached their respective conclusions for different reasons. *Compare Independence County v. Pfizer*, 534 F. Supp. 2d 882 (E.D. Ark. 2008) with *Ashley County, Ark. v. Pfizer*, 552 F.3d 659 (8th Cir. 2009).

25. *Heffernan v. Reinhold*, 73 S.W.3d 659, 664 (Mo.App. 2002); *Ashley County, Ark. v. Pfizer*, 552 F.3d 659, 671 (8th Cir. 2009) ("Proximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant's actions.").

26. *Heffernan*, 73 S.W.3d at 664.

27. William L. Prosser, *The Minnesota Court on Proximate Cause*, 21 Minn. L. Rev. 19, 22 (1936).

28. *Heffernan*, 73 S.W.3d at 665.

29. *See Stanley v. City of Independence*, 995 S.W.2d 485, 488 (Mo. 1999).

30. *See Guffey v. Integrated Health Services of Kansas City*, 1 S.W.3d 509, 518 (Mo.App. 1999).

31. *See, e.g., id.* at 518; *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 620 (10th Cir. 1998); *Henry v. Merck & Co., Inc.*, 877 F.2d 1489, 1495 (10th Cir. 1989).

32. *See* infra note 33.

33. *See, e.g., Dix v. Motor Market Inc.*, 540 S.W.2d 927, 932 (Mo.App. 1976); *Sanders v. Acclaim Entertainment, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002); *Kim v. Budget Rent A Car Sys. Inc.*, 15 P.3d 1283, 1288-89 (Wash. 2001); *Bikowicz v. Sterling Drug, Inc.*, 161 A.D.2d 982, 983-84 (N.Y. App. Div. 1990) (Selling Sudafed is not a proximate cause of plaintiff's addiction to methamphetamine); *see also Port Auth. of N.Y and N.J.*, 189 F.3d at 319 (owners of the World Trade Center had no claim against the manufacturers of ammonium nitrate fertilizer used in the first World Trade Center bombing, in part, because the "bombing was not a natural or probable cause of any design defect in defendant's products" and because "the terrorists' actions were superseding and intervening events breaking the chain of causation"); *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 621 (10th Cir. 1998) (manufacturers of ammonium nitrate fertilizer used in Oklahoma City bombing were not liable because "the criminal activities of the bomber or bombers acted as the supervening cause of plaintiffs' injuries."); *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693, 704 (E.D. Ky. 2003) ("[P]laintiffs have not demonstrated that OxyContin is the proximate cause of addiction and withdrawal symptoms for people using the drug illegally. The proximate cause of any alleged injury in such circumstances is the alteration and/or abuse of the drug, not the drug itself."); *McCarthy*, 916 F. Supp. at 372 (criminal action of New York City subway shooter was an intervening cause that broke the chain of causation).

34. *Ford v. Monroe*, 559 S.W.2d 759, 762 (Mo.App. 1977).

35. *Finocchio v. Mahler*, 37 S.W.3d 300, 303 (Mo.App. 2001).

36. *L.A.C. v. Ward Parkway Shopping Ctr.*, 75 S.W.3d 247, 257 (Mo. banc 2002).

37. 160 F.3d 613 (10th Cir. 1998).

38. *Id.* at 619.

39. *Id.*

40. *Id.*

41. *Id.* at 619-20.

42. *Id.* at 619.

43. *Id.* at 621.

44. *Id.* at 620.

45. *Id.*

46. *Id.*

47. *Id.* at 621.

48. *Id.* at 621. *See also Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 319 (3d Cir. 1999) ("[T]he terrorists' actions were superseding and intervening events breaking the chain of causation.").

49. 320 N.W.2d 748 (Neb. 1982).

50. *Id.* at 750.

51. *Id.* at 751.

52. *Id.* at 750.

53. *Id.* at 752.

54. *Id.*

55. *Id.*

56. *Id.* at 753-54.

57. *Id.* at 754.

58. *Id.* at 754. *See also Cebula v. Bush*, 778 F. Supp. 567, 570 (D.C.D.C. 1991) ("The Court is truly sympathetic with the plaintiff, and deeply regrets that she was the victim of this crime. But she has demonstrated no cognizable legal claim against any of these defendants, and no connection between them and her attack or her attackers, aside from the fortuitous fact that she had come from an ALI program at the Kennedy Center and (presumably) passed through the Watergate complex and Union Station on her way home. This does not make the defendants liable for the crime she suffered.").

59. *See, e.g., Kim v. Budget Rent A Car Sys., Inc.*, 15 P.3d 1283 (Wash. *banc* 2001) (no proximate cause where third party stole defendant's automobile and used it to commit vehicular assault against plaintiff); *Stephenson v. S.C. Johnson & Son, Inc.*, 638 N.Y.S.2d 889 (N.Y. Sup. Ct. 1996) (no proximate cause where third party used insecticide spray can manufactured by defendant as a blow torch to assault plaintiff); *Henry v. Merck & Co., Inc.*, 877 F.2d 1489 (10th Cir. 1989) (no proximate cause where third party stole sulfuric acid from defendant's premises and used it to assault and maim plaintiff).

60. *See Port Auth. of N.Y and N.J.*, 189 F.3d at 319 (dismissing claims against the seller of Ammonium Nitrate fertilizer used in the first World Trade Center bombing because "the terrorists' actions were superseding and intervening events breaking the chain of causation."); *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693, (E.D. Ky. 2003) (rejecting claims arising out of criminal misuse of a prescription narcotic because "[t]he proximate cause of any alleged injury in such circumstances is the alteration and/or abuse of the drug, not the drug itself."); *Prince v. B. D. Ascher Co., Inc.*, 90 P.3d 1020, 1029 (Okla. Civ. App. 2004).

61. *See, e.g., Ashley County, Ark. v. Pfizer*, 552 F.3d 659 (8th Cir. 2009).

62. *Id.*

63. *Id.* at 663.

64. *Id.*

65. *Id.* at 664.

66. *Id.* at 670-71 ("The criminal actions of the methamphetamine cooks and those further down the illegal line of manufacturing and distributing methamphetamine are 'sufficient to stand as the cause of the injury' to the Counties in the form of increased government services, and they are 'totally independent' of the Defendants actions of selling cold medicine to retail stores, even if the manufacturers knew that cooks purchased their products to use in manufacturing methamphetamine. Arkansas law will not support a conclusion that the 'natural and probable consequences,' of manufacturers selling cold medicine to independent retailers through highly regulated legal channels is that the cold medicine will create a methamphetamine epidemic resulting in increased government services.") (internal citations omitted).

67. *Id.* at 671-72 (quoting *District of Columbia v. Beretta, U.S.A. Corp*, 872 A.2d 633, 651).

68. Victor Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. AND PUB. POL'Y 421 (1999).

69. *See City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 423 (3d Cir. 2002).

70. *Petition of Kinsman Transit Co.*, 388 F.2d 821, 825 (2d Cir. 1968).

71. *See Schwartz*, *supra* note 68.

72. 37 S.W.3d 300 (Mo.App. 2001).

73. *Id.* at 301.

74. *Id.* at 302.

75. *Id.* at 303-04. *See also Stephenson v. S.C. Johnson & Son, Inc.*, 638 N.Y.S.2d 889, 894 (N.Y. Sup. Ct. 1996) ("Cardozo noted, 'a series of new and unexpected causes intervened and had to intervene' before the injury occurred. This is precisely the case here where the young assailant obtained a can of Raid Max, which had to have been cut out from a sealed plastic container, obtained a cigarette lighter, applied the flame of the lighter to the spray of the aerosol, and sought out and intentionally burned plaintiff. This series of acts, all necessary to result in plaintiff's injury, demonstrates "[t]he remoteness of the relation" between defendants' negligence and plaintiff's injury .... Here, the acts of the intervening third party – the eleven year old boy – and the injury he caused the plaintiff are both extraordinary and attenuated from any negligence of the defendants.") (internal citations omitted).

76. *Id.* at 304.

77. *Greenwobod v. Vanarsdall*, 356 S.W.2d 109, 114 (Mo.App. 1962).

78. As civil claims against product manufacturers arising out of the criminal misuse of their products have become more common, a number of cases have been filed by local governments. In these cases, the governments argue that they have been forced to bear the burden of policing crimes allegedly facilitated by the product at issue. The Free Public Services Doctrine recognizes that a governmental entity, such as a county, cannot recover from an alleged tortfeasor the costs of taxpayer-supported governmental services, such as police and fire services, expended in response to a tortfeasor's actions. Applying this doctrine, a number of courts have held that public policy does not allow a governmental entity to recover damages from a party merely because that party has allegedly created the need for public services. *United States v. Standard Oil of California*, 332 U.S. 301 (1947) (invoking the Free Public Services Doctrine to bar the federal government's attempt to recover hospital and salary costs for an injured soldier); *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (N.J. Super. 1976) (dismissing a city's suit to recover firefighting costs); *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983) (applying the Free Public Services Doctrine to bar city's action for expenses arising from a train derailment); *Walker County v. Tri-State Crematory*, 643 S.E.2d 324, 328 (Ga. Ct. App. 2007) (applying the Free Public Services Doctrine to bar claims for negligence and nuisance brought by county against a crematory that improperly disposed of human remains).

79. Claims by entities that pay costs incurred as a result of injuries to third parties are commonly dismissed as too

remote, even when the injury suffered arose from a traditional tort. *See Arkansas Carpenters' Health & Welfare Fund v. Philip Morris Inc.*, 75 F. Supp. 2d 936, 941 (E.D. Ark. 1999); *Newton v. Tyson Foods, Inc.*, 207 F.3d 444 (8th Cir. 2000) (affirming dismissal of remote RICO and tort claims against poultry processor); *Lyons v. Philip Morris Inc.*, 225 F.3d 909 (8th Cir. 2000) (dismissing remote federal antitrust and RICO claims); *United Food & Commercial Workers Unions & Employers Health & Welfare Fund v. Philip Morris Inc.*, 223 F.3d 1271 (11th Cir. 2000) (dismissing remote fraud, conspiracy, and breach of assumed duty claims); *Tex. Carpenters Health Benefit Fund v. Philip Morris Inc.*, 199 F.3d 788 (5th Cir. 2000) (dismissing remote antitrust, RICO, and state law claims); *Ark. Blue Cross & Blue Shield v. Philip Morris Inc.*, 196 F.3d 818 (7th Cir. 1999) (dismissing remote antitrust, RICO, and state law claims); *Cent. States Joint Bd. Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818 (7th Cir. 1999) (dismissing remote antitrust, RICO, and state law claims); *Int'l Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818 (7th Cir. 1999) (dismissing remote antitrust, RICO, and state law claims); *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999) (dismissing remote claims under various theories); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris Inc.*, 171 F.3d 912 (3d Cir. 1999) (dismissing remote claims for recovery of costs incurred treating smoking-related illnesses).

80. *See* notes 78 and 79, *supra*.

81. *See Schwartz*, *supra* note 68.

82. *Id.* While the Authors argue that even the more "directly injured" crime victims should not be able to recover damages from a deep-pocket defendant for harm allegedly caused by a third party's criminal misuse of that defendant's product, this does not change the fact that, for remoteness doctrine purposes, the alleged injuries of "third-party payor" type plaintiffs and municipal plaintiffs (whose alleged injuries arise out of paying law enforcement costs) are even more remote and attenuated than those of the direct victim of the criminal act.

83. This is by no means an exhaustive list of claims that plaintiffs have attempted to assert in these types of cases. For example, the plaintiffs in *Ashley County, Ark. v. Pfizer* asserted public nuisance claims but also asserted claims for unjust enrichment, violations of the Arkansas Deceptive Trade Practices Act and claims under Arkansas's Civil Action by A Crime Victim Statute. When facing such claims, defense counsel should closely review the elements of the claim and, to the extent the claim is based on a statute, the text and the legislative history of the statute. Such a review will likely demonstrate that the claim simply does not apply to the situation. For example, the Eighth Circuit recognized that the plaintiffs' unjust enrichment claims failed because the alleged facts supporting the supposed unjust enrichment simply were not sufficient to establish an unjust enrichment claim under Arkansas law. *See* 552 F.3d at 666 ("Unjust enrichment is based on an implied contract theory of recovery, however, and Arkansas courts 'will only imply a promise to pay for services where they were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of their payment by the party beneficiary.' The Counties did not provide the services for which they now seek compensation, *i.e.*, law enforcement, inmate housing, social services, and treatment, with the expectation that the Defendants-manufacturers and wholesalers of products containing pseudoephedrine-would pay for those services. In other words, the cold medicine manufacturers cannot be said to be the beneficiaries of the services provided by the Counties.").

84. *See Stitt v. Raytown Sports Ass'n.*, 961 S.W.2d 927, 930 (Mo.App. 1998).

85. *See Knop v. Bi-State Development Agency*, 988 S.W.2d 586, 589 (Mo.App. 1999); *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 313 (3d Cir. 1999).

86. As discussed above, a court also has the ability to dismiss a negligence claim as a matter of law if the plaintiff is unable to demonstrate proximate cause. The ability to obtain a dismissal as a matter of law is significant in these cases because an early dismissal, or a judgment on the pleadings, will allow a defendant to avoid the costs and burdens associated with full-blown discovery.

87. Pollock, LAW OF TORTS 468 (13th ed. 1920). *See also Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1053

(C.D. Cal. 2002) ("The injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her.").

88. *Id.*

89. *See Knop v. Bi-State Development Agency*, 988 S.W.2d 586, 592 (Mo. Ct. App. 1999).

90. W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 853 (5th ed. 1984). *See also Valentine v. On Target, Inc.* 353 Md. 544, 553 (Md. Ct. App. 1999) ("One cannot be expected to owe a duty to the world at large to protect it against the action of the third parties, which is why the common law distinguishes different types of relationships when determining if a duty exists.").

91. *See McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997); *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 312 (3d Cir. 1999) ("The courts must consider not only the interests of the litigants but also the interests of society in general, including the social and economic costs of any expansion of the outer boundaries of tort liability.").

92. *See Faheen v. City Parking Corp.*, 734 S.W.2d 270, 272 (Mo.App. 1987).

93. *See McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996). *See also, City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 425-26 (3d Cir. 2002) (gun manufacturers owe no legal duty to protect citizens from the deliberate and unlawful use of their products); *Jackson v. A.M.F. Bowling Centers, Inc.*, 128 F. Supp. 2d 307, 311 (D. Md. 2001) ("[A]bsent a statute or special relationship, a private party is under no legal duty . . . to control a person's criminal acts so as to prevent harm to another . . ."); *Wise v. United States*, 8 F. Supp. 2d 535, 546 (E.D. Va. 1998) (no duty to control conduct of third person especially when third person commits acts of assaultive criminal behavior); *McCarthy v. Olin Corp.*, 119 F.3d 148, 156-57 (2d Cir. 1997) (no duty to control conduct of third persons to prevent them from causing injury to others even where, as a practical matter, defendant could have exercised such control).

94. Restatement (Second) of Torts § 315 (1965).

95. *See, e.g., Finocchio v. Mahler*, 37 S.W.3d 300, 303 (Mo.App. 2001); *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 314 (3d Cir. 1999) ("In addition, defendants had no control over the fertilizer once it was sold and no control over the final assembly of the bomb.").

96. *See Faheen*, 734 S.W.2 at 272.

97. 916 F. Supp. 366 (S.D.N.Y. 1996).

98. *Id.* at 372.

99. *Id.* at 368.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 368-69.

105. 877 F.2d 1489 (10th Cir. 1989).

106. *Id.* at 1497.

107. *Id.* at 1491.

108. *Id.*

109. *Id.* at 1490-91.

110. *Id.*

111. *Id.* at 1492.

112. *Id.* at 1497.

113. *See, e.g., City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 425-26 (3d Cir. 2002) (holding that gun manufacturers are under no legal duty to protect citizens from the deliberate and unlawful use of their products); *Kim v. Budget Rent A Car Systems, Inc.*, 15 P.3d 1283, 1285-86 (Wash. banc 2001) (defendant owed no duty to victim of vehicular assault injured by criminal who stole car from defendant); *Valentine v. On Target, Inc.*, 727 A.2d 947, 951 (Md. Ct. App.

1999) ("One cannot be expected to owe a duty to the world at large to protect it against the actions of third parties ...."); *Morehouse v. Goodnight Bros. Constr.*, 892 P.2d 1112, 1114-16 (Wash. Ct. App. 1995) (defendant company whose ladder was stolen and used by rapist to gain access to plaintiff's home owed no duty to protect plaintiff from rapist).

114. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts 375 (5th ed. 1984).

115. *See Jackson v. A.M.F. Bowling Centers, Inc.*, 128 F. Supp. 2d 307, 311 (D. Md. 2001).

116. Restatement (Second) of Torts § 314.

117. Dan B. Dobbs, 2 The Law of Torts 853 (2001).

118. 21 S.W.3d 14 (Mo.App. 2000).

119. *See* 21 S.W.2d at 15-16.

120. *Id.* at 16.

121. *Id.*

122. *Id.*

123. *See id.* at 18.

124. *Grunow v. Valor Corp. of Florida*, 904 So. 2d 551, 556 (Fla. Ct. App. 2005).

125. *See Stitt v. Raytown Sports Ass'n, Inc.*, 961 S.W.2d 927, 930 (Mo.App. 1998) ("[F]oreseeability alone is not enough to establish a duty[,] . . . there must also be some right or obligation to control the activity which presents the danger of injury."); *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 720 (Mo.App. 1983) (duty to protect against intentional criminal conduct is "not determined by the foreseeability of a criminal act" and includes "a weighing of the relationship involved").

126. *Id. See also Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 235 (N.Y. 2001) ("a duty and the corresponding liability it imposes do *not* rise from mere foreseeability of the harm") (emphasis in original); *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 312 (3d Cir. 1999) ("Foreseeability of injury to another is important, but not dispositive. Fairness, not foreseeability alone, is the test."); *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) ("The New York Court of Appeals has held that foreseeability must be distinguished from duty.").

127. *McCarthy v. Olin Corp.*, 119 F.3d 148, 156 (2d Cir. 1997); *see also Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 235 (N.Y. 2001).

128. 799 S.W.2d 595 (Mo. 1990).

129. 799 S.W.2d at 598.

130. *Id.* (citations omitted).

131. *Washington v. United States Dept. of HUD*, 953 F. Supp. 762, 775 (N.D. Tex. 1996).

132. *See Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 312 (3d Cir. 1999).

133. *Hamilton v. Beretta U.S.A. Corp.*, 727 N.Y.S.2d 7, 12 (N.Y. 2001).

134. *Id.*

135. *Id.* at 12-13.

136. *See, e.g., Thing v. LaChusa*, 771 P.2d 814 (Cal. 1989) (negligent tortfeasors not liable for mental distress suffered by parents or next of kin who come upon the scene after an accident and see a loved one seriously injured); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959) (defendant not liable for failing to make rescue effort to save plaintiff); *State of Louisiana Ex. Rel. Guste v. Testbank*, 752 F.2d 1019 (5th Cir. 1986) (defendant not liable for negligent infliction of economic harm).

137. *Grunow v. Valor Corp. of Florida*, 904 So. 2d 551, 556 (Fla. Ct. App. 2005). In *Grunow*, the plaintiff, a widow of a school teacher who had been killed by a student with a "Saturday Night Special" handgun, sued the distributor of the handgun. *Id.* at 553. The case went to trial and the jury entered a verdict in favor of the plaintiff finding that the defendant was liable for negligently supplying the handgun without "feasible

safety measures." *Id.* at 554. The trial court then entered judgment notwithstanding the verdict in favor of defendants and the plaintiff appealed. *Id.* In affirming the trial court's judgment, the Florida Court of Appeals explained that a duty does not arise in the absence of a special relationship between the parties and that mere foreseeability of harm is not sufficient to create a special relationship between the parties or give rise to a duty. *Id.* at 556, citing *K.M. v. Publix Super Mkts., Inc.*, 895 So. 2d 1114, 1117-18 (Fla. 4th DCA 2005) (holding a special relationship arises from an actual relationship between the party upon whom a duty is imposed and either the criminal actor who should be controlled or the victim who is entitled to protection). *See also Trespalacios v. Valor Corp. of Florida*, 486 So. 2d 649 (Fla. Ct. App. 1986); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986).

138. *See, e.g. Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. 4th DCA 1986); *Gaines-Tabb*, 160 F.3d at 624.

139. *See Boyer v. Bandag, Inc.*, 943 S.W.2d 760, 763 (Mo.App. 1997) (emphasis added).

140. *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429, 432 (Mo. Ct. App. 1987) ("If a modification is foreseeable, but the modification makes a safe product unsafe, the manufacturer is not liable.").

141. *Freeman v. Hoffman-LaRoche, Inc.*, 618 N.W.2d 827, 835 (Neb. 2000) (setting forth Nebraska's consumer expectations test.).

142. *Gaines-Tabb*, 160 F.3d at 624 ("[T]he ordinary consumer of AN [ammonium nitrate] branded as fertilizer is a farmer. There is no indication that ICI's AN was less safe than would be expected by a farmer.").

143. *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. 4th DCA 1986).

144. *Id.*

145. *Hill v. General Motors Corp.*, 637 S.W.2d 382, 386 (Mo.App. 1986). Indeed, some courts have explained that a third party's decision to alter the product cuts off any product liability because, for product liability theories to apply the product causing the injury must be the product that the defendant sold and any alteration changes the product so that this requirement is not met. *See Prince v. B.F. Ascher Co., Inc.*, 90 P.3d 1020, 1026 (Okla. Civ. App. 2004) ("An extracted ingredient is not the legal equivalent of the parent product. As Prince's expert acknowledged, the substance Ballard injected was not Benzedrex, but a solution Ballard created from the extracted active ingredient in Benzedrex: propylhexedrine.").

146. *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 312 (3d Cir. 1999).

147. Compare *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (allowing a public nuisance claim against a firearm manufacturer to proceed) with *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 650-51 (D.C.) (refusing to judicially adopt "a right of action for public nuisance applied to the manufacture and sale of guns generally"); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d. Cir. 2001); *Spitzer v. Sturm Ruger & Co., Inc.*, 761 N.Y.S.2d 192 (N.Y. App. Div. 2003); *Ashley County*, 552 F.3d at 671-72.

148. While these public nuisance claims can avoid some of the pitfalls of more traditional product liability and negligence claims, they do not relieve plaintiffs of the burden of establishing causation and demonstrating that their claims are not too remote. *See*, *e.g.*, *Ashley County*, 552 F.3d at 666 ("the nuisance must . . .be the natural and proximate cause of the injury.") (quoting *Taylor Bay Protective Ass'n v. Adm'r, U.S. E.P.A.*, 884 F.2d 1073, 1077 (8th Cir. 1989)).

149. *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1229 (Ind. 2003). However, not all states define public nuisance so broadly. Nuisance claims arose out of the manner in which property owners used their property and some states still limit public nuisance claims in this fashion. *See Independence County v. Pfizer*, 534 F. Supp. 2d 882 (E.D. Ark. 2008) (rejecting public nuisance claim against manufacturers of cold medications that were sold through independent retailers because "The Arkansas Supreme Court defines a nuisance as "conduct by one landowner which unreasonably interferes with the use and enjoyment of the lands of another . . ." and "Defendants do not own the land on which the alleged nuisance occurred. Because Defendants are not

landowners, Plaintiffs cannot succeed on their public nuisance claim.").

150. *See*, *e.g.*, *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d. Cir. 2001); *Spitzer v. Sturm Ruger & Co., Inc.*, 761 N.Y.S.2d 192 (N.Y. App. Div. 2003).

151. 761 N.Y.S. 2d 192 (N.Y. 2003).

152. A number of cases asserting public nuisance damages have been brought by governmental entities seeking to recover costs that they have expended policing illegal activity allegedly caused by the public nuisance. *See Spitzer*, 761 N.Y.S. 2d at 194; *see also City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir., 2002); *Ashley County, Ark. v. Pfizer*, 552 F.3d 659 (8th Cir. 2009); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136 (Ill. 2004); *see also District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 650-51 (D.C. 2005) (affirming grant of judgment on the pleadings on plaintiff's negligence and public nuisance claims but allowing plaintiffs to proceed on a claim pursuant to Washington D.C.'s Assault Weapon Manufacturing Strict Liability Act of 1990, D.C. Code 7-2551.01 et seq. (2001)).

153. *Spitzer*, 761 N.Y.S.2d at 202-03; *see also City of Chicago*, 821 N.E.2d 1099, 1138 (2004) ("In the present case, the consequences of imposing a duty upon the dealer defendants to prevent the creation of a public nuisance in the city of Chicago by those intent on illegally possessing and using guns in the city are equally far-reaching. The same concerns underlie our conclusion that it is inadvisable as a matter of public policy to deem the dealer defendants' actions a legal cause of the alleged nuisance.").

154. *Id.*

155. 916 F. Supp. 366 (S.D.N.Y. 1996), *aff'd*, 119 F.3d 148 (2d Cir. 1997).

156. *Washington v. United States Dept. of HUD*, 953 F. Supp. 762, 775 (N.D. Tex. 1996) (citations omitted). *See also Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 233 (N.Y. 2001) ("This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another."); *Port Auth. of N.Y and N.J. v. Arcadian Corp.*, 189 F.3d 305, 312 (3d Cir. 1999) ("the legal bounds of duty and proximate cause are aspects of tort law in which issues of fairness and public policy are particularly relevant.").

157. 700 F. Supp. 151 (S.D.N.Y. 1988).

158. *Id.* at 154.

159. *Id.* at 164.

160. 700 F. Supp. at 164.

161. Courts have recognized that statutes and regulations are the very highest evidence of public policy and are binding on the courts. *See, e.g.*, *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. banc 1959), *overruled on other grounds by Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986); *see also Schulte v. Missionaries of La Salette Corp.*, 352 S.W.2d 636, 638 (Mo. 1961) ("the expression of public policy should be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts"), *overruled on other grounds by Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599 (1969).

162. *See, e.g., Bloxham v. Glock, Inc.*, 53 P.3d 196, 200 (Ariz. Ct. App. 2002) ("Imposing potential tort liability in a case such as this, which involves no regulatory violations, could ultimately conflict with firearms regulations."); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Ct. App. 2001) ("The County's frustration cannot be alleviated through litigation as the judiciary is not empowered to "enact" regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government, but to the legislative branch."); *Valentine v. On Target, Inc.*, 353 Md. 544, 556 (Md. Ct. App. 1999) ("If we would hold today that gun merchants owe an indefinite duty to the general public effectively we would be regulating the merchants. This type of regulation is the realm of the legislation and is not appropriate as a judicial enactment.").

163. 15 U.S.C. §§ 7901-03.

164. 15 U.S.C. § 7901 (a)(6).

165. 15 U.S.C. § 7901 (a)(7).

166. 15 U.S.C. § 7901 (a)(8).

167. 15 U.S.C. § 7902.

168. *See, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1105 (Ill. 2004) ("The tragic personal consequences of gun violence are inestimable. The burdens imposed upon society as a whole in the costs of law enforcement and medical services are immense.").

169. There are some notable exceptions where the plaintiffs are not traditional crime victims. As claims brought by crime victims have faced legal difficulties, creative plaintiffs counsel have signed up municipalities and other government entities to bring claims under the theories that the "deep-pocket" corporate defendant's conduct has caused the governmental entity to incur costs associated with policing criminal activity and treating victims of those crimes. *See City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Ashley County, Ark. v. Pfizer*, 552 F.3d 659 (8th Cir. 2009); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136 (Ill. 2004); *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 650-51 (D.C. 2005). Other cases have even involved claims brought by persons who allegedly suffered injury while illegally misusing a "deep-pocket" defendants' product. *Prince v. B.F. Ascher Co., Inc.*, 90 P.3d 1020, 1028 (Okla. Civ. App. 2004); *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 486 (Miss. 2006); *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693, 704 (E.D. Ky. 2003); *Orzel v. Scott Drug Co.*, 537 N.W.2d 208, 221 (Mich. 1995); *Pappas v. Clark*, 494 N.W.2d 245, 247-48 (Iowa 1992).

170. *See* William L. Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19, 22 (1936).

171. *Vittengl v. Fox*, 967 S.W.2d 269, 282 (Mo.App. 1998). Approving such judicial obligations and restraint, Justice Cardoza famously remarked that "[w]e must not sacrifice the general to the particular. We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103 (1921). ■

MEALEY'S PERSONAL INJURY REPORT
edited by Chris Bauer
The Report is produced twice monthly by

1600 John F. Kennedy Blvd., Suite 1655 Philadelphia, PA 19103
1-215-564-1788
Email: mealeyinfo@lexisnexis.com Web site: http://www.lexisnexis.com/mealeys
ISSN 1553-2364