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Common Law Strict Liability against the Manufacturers and Sellers of Saturday Night Specials: Circumventing California Civil Code Section 1714.4

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COMMON LAW STRICT LIABILITY AGAINST THE MANUFACTURERS AND SELLERS OF SATURDAY NIGHT SPECIALS: CIRCUMVENTING CALIFORNIA CIVIL CODE SECTION 1714.4

I. INTRODUCTION

Saturday Night Specials, a type of small, easily concealed, poorly made handgun, pose an especially serious problem for law enforcement officials in their efforts to reduce the high rate of violent crime in the United States.¹ In 1968, Congress passed the Gun Control Act,² which proscribes the importation of Saturday Night Specials.³ The Act's efficacy, however, continues to be compromised by a loophole which enables foreign national handgun manufacturers to ship disassembled handguns for assembly and sale in the United States.⁴ Not since 1972, when the United States Senate passed legislation to forbid the sale of Saturday Night Specials, has Congress come close to banning this weapon which is primarily used for criminal purposes.⁵

In response to continuing congressional inertia on this issue, recent efforts to stem the widespread availability and criminal use of Saturday Night Specials have focused increasingly upon the courts.⁶

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¹ See infra note 24.
³ Note, Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach, 51 Fordham L. Rev. 771, 790 n.120 (1983) [hereinafter Note] (indicating that 18 U.S.C. § 925(d)(3), which prohibits the importation of firearms not "recognized as particularly suitable for sporting purposes," is interpreted in regulations issued by the Secretary of the Treasury to forbid the importation of Saturday Night Specials).
⁴ Id. at 790-91.
⁵ See Note, supra note 3, at 791 n.122. In 1972, the Senate passed S. 2507, a bill to prohibit the sale of firearms not "readily adaptable to sporting purposes." This legislation died in the House of Representatives because pursuant to congressional rules of parliamentary procedure, it was not approved by the House of Representatives prior to the adjournment of the 92d Congress. Id. See J. Wright, P. Rossi & K. Daly, Under the Gun: Weapons, Crime and Violence in America 17, 178 (1983) [hereinafter Wright]. ("Evidence from several sources makes it clear that the handgun is the preferred firearm in most crimes involving firearms.") Id. The Bureau of Alcohol, Tobacco, and Firearms estimates that during the period 1973-75, 45% of the handguns confiscated pursuant to a criminal investigation were Saturday Night Specials. Id. at 178.
⁶ See generally Note, Handguns and Products Liability, 97 Harv. L. Rev. 1912,
Plaintiffs' suits against the manufacturers of Saturday Night Specials seek to impose liability under various theories of strict liability. Yet not until the decision in *Kelley v. R.G. Industries, Inc.* had any state's high court\(^8\) sided with the plaintiffs' position. The *Kelley* court imposed liability on the manufacturer and seller of a Saturday Night Special using a novel theory of strict products liability.\(^9\) Its holding is grounded in the strong public policy of the State of Maryland against handgun sales for purposes other than law enforcement, sport, and personal protection.\(^10\)

Prior to the ruling in *Kelley*, the State of California enacted an amendment to its Civil Code.\(^11\) Section 1714.4 provides: "In a products liability action, no firearm . . . shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury . . . when discharged."\(^12\) The Ninth Circuit Court of Appeals recently cited section 1714.4 in affirming a summary judgment for the defendant manufacturer of a Saturday Night Special.\(^13\) In refusing to embrace the *Kelley* decision, the court of appeals declared, "There is no indication in California law or public policy that the courts would distinguish 'Saturday [N]ight [S]pecials' from other handguns or find them of so little utility that the risk of injury outweighs their beneficial uses for recreation or protection."\(^14\)

This comment presents a plaintiff's case for a cause of action in strict products liability against the manufacturer of a Saturday Night Special. California law and public policy evince that Saturday Night Specials serve no legitimate purposes.\(^15\) A court would not be in derogation of section 1714.4 by adopting the theory of strict products liability enunciated by *Kelley*. Rather, section 1714.4 is controlling only in those cases where the manufacturer, by reference to the

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1925 (1984) [hereinafter *Handguns*]: "A troubling aspect of the debate over handguns is the impression that those who advocate a products liability theory do so because they are dissatisfied with the results of the democratic process and wish the courts to overturn those results."

*Id.*


9. 304 Md. at 157, 497 A.2d at 1159.

10. *Id.* at 144-46, 497 A.2d at 1152-53.


12. *Id.*


14. *Id.* at 1328.

15. See infra notes 155-68 and accompanying text.
handgun control laws and public policy of California, demonstrates that the particular type of handgun serves some legitimate purposes.

II. THE SATURDAY NIGHT SPECIAL

There is no universally accepted definition of a Saturday Night Special. The Saturday Night Special is a small, inexpensive, cheaply constructed, low caliber handgun. Saturday Night Specials commonly retail for under $50, and frequently may be purchased for between $10 and $20. The easy concealability of the weapon is another commonly noted characteristic, and is a natural consequence of its small size. Proponents of efforts to ban Saturday Night Specials argue that these handguns are the preferred weapon of criminals.

However, not all small handguns are Saturday Night Specials. Many small handguns are well made. They are purchased by individuals for sport, collection, and self-protection. Law enforcement officials and the armed forces also are regular purchasers of small handguns. These are recognized as legitimate purposes for handgun ownership. Thus it should not be surprising that efforts to ban all handguns have been equally eschewed by state and federal legislatures, as well as by the courts.

On the other hand, the cheap construction and short barrel of a Saturday Night Special render it totally inappropriate for target shooting and hunting. The low caliber of this particular type of handgun also diminishes its effectiveness for purposes of self-defense. Law enforcement officials have testified during congressional hearings that the Saturday Night Special is a menace to law enforcement efforts. In spite of evidence that Saturday Night Specials

16. McClain, Prohibiting the 'Saturday Night Special:' A Feasible Policy Option? FIREARMS AND VIOLENCE 201-02 (1984) [hereinafter McClain]. "The term 'Saturday Night Special' . . . has no universal definition. It usually refers to two groups of characteristics of the weapon: (1) short barrel, low caliber, and small size, which maximizes concealability; and (2) cheap construction from low tensile strength materials, which minimizes the price." Id.
17. Wright, supra note 5, at 17.
18. Id.
19. Id. at 178.
20. Handguns, supra note 6, at 1915; see also Kelley, 304 Md. at 158, 497 A.2d at 1160.
23. Id.
24. Kelley, 304 Md. at 145 n.9, 497 A.2d at 1153 n.9 (citing Hearings on S. 2507 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 109-10 (1971) (testimony of Geoffrey Alprin, General Counsel
serve no legitimate purposes, the issue of whether their sale should be prohibited has not received serious attention from state and federal legislatures. As a result, an increasing number of individuals who are victimized by Saturday Night Specials have turned to the courts in an effort to eliminate this type of handgun from the marketplace.

III. FAILED THEORIES OF STRICT LIABILITY AGAINST HANDGUN MANUFACTURERS

Plaintiffs’ suits against handgun manufacturers for injuries to innocent third persons, not all of which involve Saturday Night Specials, have relied primarily upon three theories of strict liability: (1) selling handguns is an abnormally dangerous or ultrahazardous activity; (2) the design of the handgun is defective based upon the principles of the Restatement of Torts (Second) section 402A, and (3) the design is defective because the risk of serious injury to others inherent in the design of the handgun outweighs its social benefits. Plaintiffs also have predicated strict liability upon a duty of the manufacturer to control the distribution of handguns to better ensure that they do not fall into the hands of criminals, and, alternatively, upon
a duty to warn the consumer of the likelihood of serious injury if handguns are improperly used.30

A. Abnormally Dangerous Activity

The theory of strict liability for an abnormally dangerous or an ultrahazardous activity is predicated upon sections 519 and 520 of the Restatement (Second) of Torts.31 An abnormally dangerous activity involves risks which cannot be eliminated by the exercise of even the highest standard of care.32 Some of the criteria which the trier of fact, usually a jury, considers in determining whether or not an activity is abnormally dangerous are the existence of a high risk of harm and the probability that the harm will be great; the appropriateness of the activity to the place where it occurs; whether the activity is a common one; and the extent to which the risks of the

failed to take “adequate precautions to prevent the sale of its' [sic] handguns to persons who were reasonably likely to cause harm to the general public.”); Patterson, 608 F. Supp. at 1214 (plaintiff contended that the indiscriminate sale of handguns to the public makes it “too easy for handguns to be obtained by persons who misuse them.”).

30. Riordan, 132 Ill. App. 3d at 647, 477 N.E.2d at 1296 (Plaintiff also claimed that the defendants had a “duty to provide adequate warnings to consumers that possession of a handgun is dangerous. . . .” Id.

31. Restatement (Second) of Torts §§ 519, 520 (1965). Note that California continues to adhere to the Restatement (First) theory of ultrahazardous activity. 4 Witkin, Summary of California Law 3096-104 (8th ed.1974). An ultrahazardous activity is one which: (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage. Restatement of Torts § 520 (1938). See also Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948); Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 345, 214 Cal. Rptr. 194, 201 (1985). In Pierce v. Pacific Gas & Elec. Co., 166 Cal. App. 3d 68, 212 Cal. Rptr. 283 (1985), the court stated that:

The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is injured as a proximate result of that activity, regardless of the amount of care he uses. (citations omitted). The doctrine of ultrahazardous activity focuses not on a product and its defects but upon an activity intentionally undertaken by the defendant, which by its very nature is very dangerous.

Id. at 85, 212 Cal. Rptr. at 293.

The findings of a California court should be similar to the holdings of courts in other states which have ruled on the applicability of the doctrine of strict liability for an abnormally dangerous activity since in all of those cases the courts focused on the activity of selling handguns rather than upon the handgun itself. See supra note 26.

32. Restatement (Second) of Torts § 519, comment d:

The liability stated in this Section is not based . . . upon any negligence. . . . The defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff that has ensued. The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity.

Id.
activity outweigh its social value. However, only one court has held that the sale of handguns might constitute an abnormally dangerous activity.

In Richman v. Charter Arms Corp., the decedent’s mother brought a wrongful death action against the manufacturer of a “snub nose .38” caliber pistol. Plaintiff’s daughter, a medical student at Tulane University, was kidnapped, robbed, raped and then murdered. Her assailant allegedly committed the murder with a handgun manufactured by Charter Arms Corporation. The court embraced the plaintiff’s theory that the sale of handguns might constitute an abnormally dangerous activity and dismissed the defendant’s motion for summary judgment. The court held that handguns are not an item of normal use and ruled that the defendant’s activity presented a question of fact on the issue of whether marketing a handgun is abnormally dangerous. The decision in Richman was pointedly criticized in subsequent decisions before it was overruled.

The majority opinion in Martin v. Harrington and Richardson, Inc. reproved the rationale of Richman on the grounds that it “blurs the distinction between strict liability for selling unreasonably dangerous products and strict liability for engaging in ultrahazardous activities by making the sale of a product an activity.” The court held that marketing handguns is not an ultrahazardous activity. The impact of a contrary holding, according

33. Restatement (Second) of Torts §520 (1965).
36. Id. at 193.
37. Id.
38. Id. at 194.
39. Id. at 209.
40. Id. at 202. The court maintained:

Handguns are not an item of ‘general use’; they are an item of extraordinary or abnormal use. Many people in the community are likely on an average day to operate an automobile, to consume a drink, or to use a knife. Few people, however, are likely to use a handgun except in highly unusual circumstances - when attacked by a criminal assailant, for example, or when acting as a criminal assailant. Thus, the Court cannot conclude that the operation of handguns is ‘a matter of common usage.’

41. Id. at 204. “[T]he Court cannot find as a matter of law that the defendant’s marketing practices are exempt from being classified as ultrahazardous.” Id.
42. 743 F.2d 1200 (7th Cir. 1984).
43. Id. at 1204.
44. Id. at 1203. “If plaintiffs were claiming that the use of a handgun was an
to the court, also might subject the manufacturers and sellers of knives to absolute liability if a knife were used by a criminal to injure or kill someone. This kind of misuse, of either a knife or a handgun, is not a foreseeable consequence of their manufacture or sale.

The notion that the sale of handguns constitutes an abnormally dangerous activity also has been rejected in those jurisdictions where the application of the theory is limited to activities related to the use and ownership of land. Thus, in overturning Richman, the Fifth Circuit Court of Appeals in Perkins v. F.I.E. Corp. held that the district court had misapplied Louisiana law on abnormally dangerous activities. Further, the appellate court took issue with the district court's reasoning in applying this theory to the sale of handguns. The court acknowledged that the use of handguns involves a high degree of risk, but framed the issue as whether the sale, rather than the use or misuse, of handguns is a matter of common usage.

Because the courts which have considered this theory of liability focus on the activity of selling a firearm rather than upon the Saturday Night Special itself, an increasing number of plaintiffs' suits are based on strict products liability in tort.

ultrahazardous activity the argument would clearly fit within the parameters of Illinois law. However, plaintiffs' attempt to impose strict liability for engaging in an ultrahazardous activity upon the sale of a non-defective product is unprecedented in Illinois."

45. Id. at 1204. "A change in this policy . . . would require that manufacturers of guns, knives, drugs, alcohol, tobacco and other dangerous products act as insurers against all damage produced by their products." Id.

46. Id. at 1205.

47. Perkins, 762 F.2d 1250 (5th Cir. 1985); Kelley, 304 Md. 124, 497 A.2d 1143 (1985).

48. 762 F.2d 1250 (5th Cir. 1985).

49. Id. at 1265 n.43. "[A]lthough the use of handguns may involve a high degree of risk and a likelihood of great harm, it is the marketing of handguns that is alleged to be abnormally dangerous. . . . [T]he risks of harm from handguns do not come from their sale and distribution as such." Id. The court held that:

'The direct cause of the plaintiffs' injuries was not the marketing of handguns; the cause was the criminal misuse of those handguns by persons not agents or employees of the defendants. . . . The kinds of injuries for which the plaintiffs seek to hold the defendants absolutely liable, therefore, are injuries that result from the 'substandard' — here, criminal — conduct of unrelated third parties. The doctrine of ultrahazardous activities is therefore unavailable to the plaintiffs under Louisiana law.

Id. at 1268.

50. Id. at 1255-56. "All of the activities . . . for which liability has been imposed [in Louisiana] originated in a landowner or custodian's use or abuse of land or immovable property in such a way as to cause injury to another person." Id.
B. Restatement of Torts Section 402A

Strict liability against the manufacturer or seller of a product is imposed under section 402A of the Restatement (Second) of Torts if a defect renders the product unreasonably dangerous to the user or consumer.\(^1\) Many of the suits against handgun manufacturers ask the courts to impose strict liability on the grounds that handguns are defective because their small size makes them peculiarly attractive for criminal uses and, consequently, unreasonably dangerous.\(^2\)

In *Riordan v. International Armament Corp.*,\(^3\) the plaintiffs' decedent was shot and killed while attempting to restrain someone in a restaurant.\(^4\) The gun used to shoot him was manufactured by Walther Waffenfabrik, GmbH, a West German corporation, and distributed in this country by International Armament Corporation.\(^5\) The decedent's survivors filed a wrongful death action against Waffenfabrik and International Armament Corporation under a theory of strict liability for the sale of a defective product.\(^6\) Plaintiffs contended that because the gun was small, easy to conceal, and relatively inexpensive, it served no useful social purpose and thus was defective in design.\(^7\)

Although Illinois has adopted section 402A of the Restatement (Second) of Torts,\(^8\) the court ruled that a product is defective under section 402A only when, "in light of its nature and intended function," it does not perform in a manner which the ordinary consumer would expect.\(^9\) The court was unable to find that the handgun's inherent characteristics, including its small size, easy concealability,

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51. *Restatement (Second) of Torts* § 402A comment (i) (1965).
54. *Id.* at 645, 477 N.E.2d at 1294.
55. *Id.*
56. *Id.* at 645, 477 N.E.2d at 1295.
57. *Id.* at 650, 477 N.E.2d at 1297-98. Note that the *Kelley* court accepted precisely this position, but not based upon section 402A of the Restatement (Second) of Torts. The *Kelley* court rejected section 402A because that section predicates liability upon whether the product performs as intended by an ordinary consumer or user. Section 402A does not afford room for the consideration of a product's utility or lack thereof. *See Kelley*, 304 Md. at 136, 497 A.2d at 1148.
59. *Id.* at 650, 477 N.E.2d at 1298. "The alleged design defects of size and concealability of the defendants' handguns were not conditions which caused the handgun to fail to perform in the manner reasonably to be expected in light of its nature and intended function." *Id.*
and low price, rendered the product unreasonably dangerous in the sense that it did not perform as an ordinary consumer would expect. Rather, the handgun fired when the trigger was pulled; it did precisely what it was intended to do. There was nothing "wrong with the product or the way it performed."*

C. Risk/Utility

California and a handful of other states apply a risk/utility analysis in order to determine whether a product that causes injury is defective in design. The leading California case is *Barker v. Lull Engineering Co.*, where the Supreme Court articulated a two-prong test for design defects:

[A] product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

No California court has ruled on the applicability of the risk/utility prong of *Barker* in a suit against the manufacturer or seller of a Saturday Night Special. Civil Code section 1714.4 was enacted when two such suits were pending. However, a United States District Court sitting in Texas has issued a ruling based upon the risk/utility test in a products liability suit against a handgun manufacturer.

In *Patterson v. Rohm Gesellschaft*, the plaintiff's son, a clerk at a convenience store, was killed during an attempted robbery. The gun used to shoot the plaintiff's decedent was a Rohm .38 cali-

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60. *Id.*

61. *Id.* "[T]he plaintiffs have cited no Illinois decision in which it has been [held] that an entire product line may be held to be defectively designed where the plaintiff's injury was caused by that product's operation precisely as it was designed to operate." *Id.*


63. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

64. *Id.* at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234.

65. California Senate Comm. on the Judiciary, 1983-84 Regular Session, Analysis of Assembly Bill 75 at 2. [Hereinafter Senate Analysis].


67. *Id.* at 1208.
ber revolver. Plaintiff brought a wrongful death action against Rohm Gesellschaft and R.G. Industries alleging that the handgun was defective in design because the risk of injury posed by this type of handgun outweighed its social benefits. Plaintiff conceded that there was nothing mechanically wrong with the way the handgun performed. Instead, the plaintiff argued that a handgun used for illegal purposes should be subject to a risk/utility test in order to determine if it is defective in design.

In rejecting the plaintiff's theory of liability, the court explained that, "[u]nder Texas law, there can be no products liability recovery unless the product does have a defect. Without this essential predicate, that something is wrong with the product, the risk/utility balancing test does not apply." The court reasoned that holding a handgun manufacturer strictly liable when one of its products is improperly used would be akin to applying strict liability to the manufacturer of a knife or a match if either of those products were improperly used. Handguns, knives, and matches all have socially redeeming uses. The court cautioned: "Handguns are collected as a hobby and are used for target shooting and hunting, as well as for self-defense." Unlike the Patterson court, the ruling in Kelley directly addresses the issue of whether Saturday Night Specials serve any useful purposes.

68. Id. The court identified the weapon as a Saturday Night Special. Id. at 1207.
69. Id. at 1208.
70. Id. at 1210.
71. Id. "[T]he plaintiff's attorneys argue that (i) Texas law no longer requires a showing that the product is defective; (ii) that the word 'defective' in § 402A is merely synonymous with the phrase 'unreasonably dangerous'; and (iii) that the jury may simply apply the 'risk/utility test' to any product (whether or not it has a defect)." Id. Also note that one of the plaintiff's attorneys was Windle Turley, the author of Manufacturers' and Suppliers' Liability to Handgun Victims, 10 N. Ky. L. Rev. 41 (1982). Mr. Turley is regarded as the principal proponent of imposing strict liability upon the manufacturers and sellers of handguns, although not exclusively Saturday Night Specials, based upon a risk/utility test for defective design.
72. Patterson, 608 F. Supp. at 1211.
73. Id. at 1212, (citing Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 828 (1973)).
74. Patterson, 608 F. Supp. at 1210-11 n.11. The Patterson court at least implicitly suggests that Saturday Night Specials serve some legitimate purposes. Assuming arguendo that the laws and policies of the State of Texas are dissimilar to those of Maryland and California, the only probable legitimate purpose of a Saturday Night Special is self-protection. See supra text accompanying notes 20-24. However, the Kelley court declared that, as a matter of law, because of their short barrels, light weight, easy concealability, poor manufacture, inaccuracy and unreliability, Saturday Night Specials are "virtually useless for the legitimate purposes of . . . protection of persons, property and business." 304 Md. at 144-46, 497 A.2d at 1153-54. Admittedly, the court's statements are at times equivocal.
In holding that the manufacturer or seller of a Saturday Night Special can be found strictly liable for the injuries inflicted upon the victim of a shooting that occurs during the commission of a crime, the Maryland Court of Appeals in *Kelley* applied a novel common law theory of strict liability. The court rejected the plaintiff's arguments for the imposition of liability pursuant to sections 402A, 519 and 520 of the Restatement (Second) of Torts, as well as an application of the risk/utility test of *Barker*. Instead, the court held that "the common law adapts to fit the needs of society. Consequently, we shall recognize a separate, limited area of strict liability for the manufacturers, as well as all in the marketing chain of Saturday Night Specials."

Three reasons were given in support of the holding: (1) Saturday Night Specials serve "no legitimate social purpose in today's society;" (2) the manufacturer knows or should know that the primary use of a Saturday Night Special is criminal activity; and (3) the manufacturer is more blameworthy than the innocent victim.

The plaintiff in *Kelley* was injured during an armed robbery of the grocery store where he was employed. The perpetrator of that crime shot him with an R.G. 38S. Plaintiff filed suit in state court against the manufacturer, Rohm Gesellschaft (Rohm), a West German corporation, and R.G. Industries, its United States subsidiary and distributor. Rohm removed the case to the Federal District Court of Maryland. R.G. Industries subsequently was dismissed from the action by stipulation of both parties.

The district court certified three questions to the Maryland Court of Appeals. The Maryland court examined both federal and

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75. 304 Md. 124, 497 A.2d 1143 (1985).
76. It should be noted that the section 402A of the Restatement test and the risk/utility test of design defects also are common law theories of strict liability.
77. *Kelley*, 304 Md. at 138, 497 A.2d at 1149.
78. *Id.* at 157, 497 A.2d at 1159.
79. *Id.* at 154-57, 497 A.2d at 1158-59.
80. *Id.* at 128, 497 A.2d at 1144.
81. *Id.* at 128, 497 A.2d at 1144-45.
82. *Id.* at 129, 497 A.2d at 1145.
83. *Id.*
84. *Id.* Consider the irony of dismissing R.G. Industries in view of the court's holding that liability could be imposed upon both the manufacturer and seller of a Saturday Night Special. See infra note 97.
85. The court considered whether (1) a handgun manufacturer generally may be held liable for injuries to third-party victims of handgun crimes; (2) Saturday Night Specials are regularly used to perpetrate handgun crimes; and (3) the particular handgun constitutes a
state policies on handgun sales, ownership, and use and concluded that imposing strict liability upon the manufacturer and seller of a Saturday Night Special would further those policies. The court cited the federal Gun Control Act of 1968, which prohibits the importation of Saturday Night Specials, and two Maryland statutes as the impetus for the ruling.

Because of the legitimate uses of handguns recognized by the Maryland gun control law, including hunting, law enforcement, and protection of one's self, residence and business, the court determined that federal and state policies would not countenance the imposition of strict liability upon the manufacturers of all handguns. The Maryland court recognized certain inherent differences in Saturday Night Specials and other handguns:

There is, however, a limited category of handguns which clearly is not sanctioned as a matter of public policy. This type of handgun, commonly known as a 'Saturday Night Special', presents particular problems for law enforcement officials. Sat-

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Saturday Night Special. Kelley, 304 Md. at 131, 497 A.2d at 1146.
86. Id. at 155-57, 497 A.2d at 1158-59.
88. Section 922 of the Gun-Control Act enunciates certain unlawful acts with respect to the importation of firearms, and section 925 delegates authority to the Secretary of the Treasury to issue appropriate regulations, including prohibitions on the importation of Saturday Night Specials. Note, supra note 3, at 790-91.
89. Kelley, 304 Md. at 142-44 nn.5-7, 497 A.2d at 1151-53 nn.5-7. The Maryland statutes make it unlawful to carry a handgun without a permit. Id. at 143-44 n.7, 497 A.2d at 1152-53 n.7, (citing Art. 27, § 36B(b), of the Maryland Code). Section 36B(b) prohibits the wearing, carrying, or transporting of a handgun; section 36B(c)(2) provides, "Nothing in this section shall prevent the wearing, carrying, or transporting of a handgun by any person to whom a permit to wear, carry or transport any such weapon has been issued under section 36E of this article." Id. Exemptions to the permit requirement are provided for law enforcement personnel and members of the armed forces. Kelley, 304 Md. at 142-43 n.6, 497 A.2d at 1151-52 n.6. Additional exemptions are provided for persons who are transporting a handgun between the place of purchase and their residence; their place of residence and their place of business; and to and from a hunting trip or other sporting event. Id. A person also is authorized to carry or wear a handgun at his residence or business without a permit. Id.

The Maryland statutes are premised upon an awareness that many violent crimes are committed by persons using handguns and a corresponding intent to reduce the number of violent crimes that are perpetrated by such persons. Id. at 141, 497 A.2d at 1151. The preamble to article 27 provides, in part:

(i) There has, in recent years, been an alarming increase in the number of violent crimes perpetrated in Maryland, and a high percentage of those crimes involve the use of handguns; (ii) The result has been a substantial increase in the number of persons killed or injured which is traceable, in large part, to the carrying of handguns on the streets and public ways by persons inclined to use them in criminal activity.

Id.
90. 304 Md. at 142-44, 497 A.2d at 1152-53.
Saturday Night Specials are generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability. These characteristics render the Saturday Night Special particularly attractive for criminal use and virtually useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and business.\(^91\)

The court's holding is further narrowed by its refusal to precisely define a Saturday Night Special.\(^92\) It left that determination to the jury, with one caveat: high quality, small handguns which can be legitimately used by law enforcement personnel are not Saturday Night Specials.\(^93\) A handgun which might constitute a Saturday Night Special will be characterized by small size and short barrel length, poor workmanship, low cost, and questionable reliability.\(^94\) The plaintiff bears the burden of demonstrating to the court that the handgun in question "possesses sufficient characteristics of a Saturday Night Special."\(^95\) If the proper showing is made, the issue then goes to the jury.\(^96\) If the jury determines that the handgun is a Saturday Night Special, liability may be imposed upon both the manufacturer and the seller,\(^97\) provided certain other conditions are

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91. Id. at 144-46, 497 A.2d at 1153-54. The court also stated:
Saturday Night Specials are largely unfit for any of the recognized legitimate uses sanctioned by the Maryland gun control legislation. They are too inaccurate, unreliable, and poorly made for use by law enforcement personnel, sportsmen, homeowners or businessmen. . . . The chief 'value' a Saturday Night Special has is in criminal activity, because of its easy concealability and low price.

Id. at 154, 497 A.2d at 1158.

92. Id. at 158, 497 A.2d at 1159. "[A] handgun should rarely, if ever, be deemed a Saturday Night Special as a matter of law. Instead, it is a finding to be made by the trier of facts." Id.

93. Id. The Maryland court's guidance for the jury is rather amorphous:
[The General Assembly of Maryland has recognized the need for certain persons to carry guns, for example, law enforcement personnel and persons with special permits. Non-uniformed law enforcement personnel and certain permit holders will of necessity be required to carry small, short barreled handguns. A high quality, small, short barreled handgun, designed for such legitimate use, is not a Saturday Night Special, and the trier of facts should not be permitted to speculate otherwise.

Id. Based on the foregoing, it is not entirely clear whether the focus is upon the materials and workmanship of the weapon or whether it is a type typically possessed by law enforcement personnel or persons with permits to carry concealed weapons.

94. Id.
95. Id.
96. Id.
97. Id. "[O]nce the trier of facts determines that a handgun is a Saturday Night Special, then liability may be imposed against a manufacturer or anyone else in the marketing chain,
The scope of the court's holding applies only to injuries sustained by third persons who are shot with a Saturday Night Special sold after the date of the decision. Except for the plaintiff in *Kelley*, no cause of action would be recognized for the victim of a shooting involving a Saturday Night Special sold prior to the court's ruling. However, the manufacturer and seller of the Saturday Night Special bear the burden of proof that the gun was sold prior to the date of the decision.

Of additional interest is the *Kelley* court's treatment of the risk/utility test of *Barker*. Although the Maryland Court of Appeals has yet to adopt a risk/utility standard for determining whether a product contains a design defect, the court did address the plaintiff's exhortation that such a test ought to be adopted under the facts. The court disposed of the plaintiff's contentions on the basis that, before the risk/utility test can be applied, the product must malfunction. When a Saturday Night Special fires in the direction in which it is aimed and is intentionally discharged, there is no malfunction in the design of the product. This is the identical burden of proof requirement that has been erected by California Civil Code section 1714.4, when a third person who has been shot by a Saturday Night Special or any other firearm brings an action against the manufacturer or seller under a risk/utility theory of strict products liability. However, the provisions of that section do not proscribe an extension of the *Kelley* decision in California.

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88. *Id.* at 158-59, 497 A.2d at 1160. The plaintiff or plaintiff's decedent must have suffered injury or death as a result of having been shot by someone with a Saturday Night Special. Also, the shooting must result from a criminal act, and the plaintiff or plaintiff's decedent must not have been a party to the crime. *Id.*

99. *Id.* at 162, 497 A.2d at 1162.

100. *Id.*

101. *Id.* at 162 n.31, 497 A.2d at 1162 n.31. The "facts concerning the date of sale to a member of the public can be ascertained much more easily by the defendants than the plaintiff." *Id.* The court's finding on this issue could be explained based upon the manufacturer's superior ability to identify the date of manufacture through, e.g., cross-referencing the serial number of a particular handgun to the manufacturer's own records identifying the date of manufacture.

102. *Id.* at 138, 497 A.2d at 1149.

103. *Id.* "We believe . . . that . . . [t]his standard is only applied when something goes wrong with a product." *Id.*

104. *Id.*
Any strict products liability suit filed in California against the manufacturer or seller of a Saturday Night Special is subject to Civil Code section 1714.4. The plaintiff should urge the court to narrowly interpret that section. Specifically, the plaintiff’s attorney must convince the court that section 1714.4 is intended only to prohibit a finding of liability based on the risk/utility test for determining whether a product is defective in design. In order to determine the proper scope of section 1714.4, it is necessary to analyze the statute.

105. The full text of section 1714.4 reads:

(a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) For purposes of this section:

(1) The potential of a firearm or ammunition to cause serious injury, damage or death when discharged does not make the product defective in design.

(2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.

(c) This section shall not affect a products liability cause of action based upon the improper selection of design alternatives.

(d) This section is declaratory of existing law.

CAL. CIV. CODE § 1714.4 (West 1985).

106. Statutory interpretation of the acts of the California Legislature frequently proves arduous for attorneys and the courts. See generally Comment, The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria, 12 PAC. L.J. 189 (1980); Smith, Legislative Intent: In Search of the Holy Grail, 53 CAL. ST. B.J. 294 (1978). In stark contrast to the U.S. Congress, the California Legislature does not publish daily records of legislative proceedings which include verbatim transcripts of debates. Commodore Home Systems, Inc. v. Superior Court, 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982) (Mosk, J., concurring). “It is unfortunate that in California we do not have the equivalent of the Congressional Record. Thus, we lack the ability to glean from verbatim floor debates a common denominator or consensus reflecting views on a measure under consideration.” Id. at 221, 649 P.2d at 918, 185 Cal. Rptr. at 276. Nor does the Legislature habitually publish committee reports, which are another extrinsic aid for statutory interpretation. Id.; see also Southern California Gas Co. v. Public Utilities Comm’n, 24 Cal. 3d 653, 596 P.2d 1149, 156 Cal. Rptr. 733 (1979).

Analysis of the statutory language itself thus frequently may be the sole source for determining the meaning of a statute; it is certainly the primary source. California Teachers’ Ass’n v. San Diego Community College Dist., 28 Cal. 3d 692, 621 P.2d 856, 170 Cal. Rptr. 817 (1981). But if the statutory language is ambiguous, California courts will refer to those extrinsic sources which are available and which may bear on legislative intent. Id.; see also Southern California Gas Co. v. Public Utilities Comm’n, 24 Cal. 3d 653, 596 P.2d 1149, 156 Cal. Rptr. 733 (1979).

The most frequently cited extrinsic aid is testimony, written or oral, by individual legislators about the arguments that were made in support of or against a particular bill. See generally California Teachers’ Ass’n, 28 Cal. 3d 692, 621 P.2d 856, 170 Cal. Rptr. 817 (1981); Larcher v. Wanless, 18 Cal. 3d 646, 654 n.10, 557 P.2d 507, 511 n.10, 135 Cal. Rptr. 75, 79 n.10 (1976); In re Marriage of Bouquet, 16 Cal. 3d 583, 589, 546 P.2d 1371, 1374, 128 Cal.
The language of section 1714.4 is the logical starting point for ascertaining the intent of the Legislature. Subsection (a) provides that "no firearm . . . shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury. . . ." The operative language of subsection (a) squarely confronts the risk/utility test of Barker v. Lull Engineering. It suggests an intent only to prevent recovery in strict products liability based upon the theory that a product causing injury is deemed defective if its design is the}

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107. California Teachers' Ass'n, 28 Cal. 3d 692, 621 P.2d 856, 170 Cal. Rptr. 817 (1981). "Although a court may properly rely on extrinsic aids, it should first turn to the words of a statute to determine the intent of the Legislature." Id. at 698, 621 P.2d at 858-59, 170 Cal. Rptr. at 820.


proximate cause of injury and the defendant fails to prove that the inherent risk of injury which results from the product's design is outweighed by its usefulness.110

The defendant would argue against such a narrow application of section 1714.4 by contending that, in enacting AB 75, the Legislature has established a general public policy prohibiting strict products liability actions against the manufacturers and sellers of firearms, including Saturday Night Specials. The proponent of this position might point to subsection (b)(1), which provides: "The potential of a firearm . . . to cause serious injury . . . when discharged does not make the product defective in design."111 Also, under subsection (b)(2), "[i]njuries . . . resulting from the discharge of a firearm . . . are not proximately caused by its potential to cause injury . . . but . . . by the actual discharge of the product."112 Arguably the import of these provisions is that a Saturday Night Special alone, without something more, is not defective. The gist of this argument is that the plaintiff must prove that the handgun malfunctioned when used as it was intended to be used.

Against this, the plaintiff might counter that subsection (b) merely amplifies subsection (a). Both speak to the "potential" of a firearm to cause injury. Under this view, subsection (b) merely makes plain that the ability of a firearm to injure a person is not to be considered an inherent risk of the product under the risk/utility design defect test of Barker, and is consistent with a narrow construction of section 1714.4.

The plaintiff also might employ subsection (c) to buttress this position. That subsection permits a products liability action "based upon the improper selection of design alternatives" by the manufacturer.113 The significance of this subsection is that it suggests an unwillingness on the part of the Legislature to insulate the manufacturers and sellers of firearms from all strict products liability suits. On the other hand, the defendant's rejoinder points out, subsection (c) authorizes a single type of strict products liability action against the manufacturers and sellers of firearms: the plaintiff must prove that the gun malfunctioned when used as it is intended to be used and that the failure in performance is the result of the manufacturer's conscious design choice. Another point which defense counsel might assert is that the statute itself represents a pronouncement by

110. Id. at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234.
111. CAL. CIV. CODE § 1714.4 (West 1985).
112. Id.
113. Id.
the Legislature that all firearms, including Saturday Night Specials, are useful.

Faced with such legal parries between counsel for the plaintiff and defendant over the appropriate scope of section 1714.4, the court may turn to extrinsic aids in an effort to clarify the ambiguity which results by resort to the statutory language alone.114 The court may accept into evidence a statement by Assemblyman McAlister or another legislator, provided such a statement reveals the nature of arguments made in support of, or in opposition to, passage of AB 75.115 Assemblyman McAlister's statement in support of AB 75116 is somewhat contradictory, and the legislative intent in enacting the bill is unclear. In alluding to two pending lawsuits in which the risk/utility design defect test of Barker served as the theory of liability,117 the assemblyman declared, "these suits in my opinion are without merit and stretch the law of torts to the breaking point."118

Since the foregoing remark refers to suits against the manufacturer or seller of firearms which are brought on the basis of the risk/utility design defect test of Barker, arguably the Legislature, in approving AB 75, intended only to bar this type of strict products liability suit. Later in his statement, however, Assemblyman McAlister states, "AB 75 is intended to preclude courts from using products liability theories to hold firearm manufacturers and dealers civilly liable to anyone who has been shot by a firearm."119 The latter remark suggests an intent to bar all strict products liability actions, not only by victims of handgun shootings but also by handgun users, against the manufacturers and sellers of firearms, including Saturday Night Specials. Yet subsection (c) of the statute at the very least makes it clear that section 1714.4 does not prohibit every type of strict products liability suit against the manufacturers and sellers of firearms.120

114. See supra note 106.
115. Id.
117. See Assembly Committee on the Judiciary Analysis of AB 75. The analysis states: "Currently, there are at least two such lawsuits pending in California. . . . [T]he plaintiffs argue that firearms, usually the 'Saturday [N]ight [S]pecial' handgun variety, are 'inherently defective' products because the danger posed by such items far outweighs any social benefits." Id. at 1.
119. Id.
120. Subsection (c) provides: "This section shall not affect a products liability cause of action based upon the improper selection of design alternatives." CAL. CIV. CODE § 1714.4
At still another juncture in his statement, the assemblyman iterates that AB 75 "has been amended to affect only those lawsuits which seek to impose liability on gun manufacturers and sellers on this (sic) theory that a firearm . . . is defective in design merely because it causes injury when used."121 It is apparent that limiting the extent of the inquiry on the intended scope of section 1714.4 to the statutory language and Assemblyman McAlister's statement does not resolve the ambiguity.122

In some recent decisions involving statutory interpretation, California courts examined committee analyses prepared by the appropriate Assembly or Senate committee with jurisdiction over the enabling legislation.123 The Senate Committee on the Judiciary prepared such an analysis of AB 75 in anticipation of Senate consideration of the bill.124 The Assembly Committee on the Judiciary also prepared an analysis of AB 75; but because the Senate substantially amended the legislation, comparatively little significance should be placed on the Assembly committee's analysis in ascertaining the legislative intent of AB 75.

The Senate committee's analysis criticizes the all-inclusive compass of the version of AB 75 approved by the Assembly.125 Specifically, the Senate committee wished to preserve the rights of the
user or consumer of a firearm in the event that it misfires, or malfunctions in some other way, inflicting injury upon the user or consumer.\textsuperscript{126} The committee believed that the language of the Assembly version of AB 75, which required the plaintiff to prove that the product malfunctioned, placed an unfair proof burden on this group of potential plaintiffs.\textsuperscript{127} In order to accommodate this concern, the committee desired to retain the first prong of the design defect test delineated by Barker.\textsuperscript{128} Under the first prong of that test, the existence of a design defect may be proved upon a showing that “the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. . . .”\textsuperscript{129} This first prong of the design defect test of Barker essentially creates a consumer expectation test, under which the user of a firearm can sue the manufacturer or seller if a gun inflicts injury on the user when it is used as a firearm is normally used.

An additional concern of the Senate committee was ensuring that the language of AB 75 would only preclude so-called “Turley suits.”\textsuperscript{130} These suits against the manufacturers and sellers of handguns, not all of which involve Saturday Night Specials, ask for the imposition of strict liability on the basis of the risk/utility design defect test of Barker.\textsuperscript{131} Because the Senate determined that the language of AB 75 as approved by the Assembly was too broad,\textsuperscript{132} the committee recommended an amendment to limit the scope of the bill to strict products liability actions predicated upon the risk/utility design defect test.\textsuperscript{133} The committee’s analysis states that “it may only be necessary to require proof of a malfunction in cases based on the risk/utility test to prevent ‘Turley suits.’ ”\textsuperscript{134} The preceding language of the committee analysis evinces a concern only for the risk/
utility test of what constitutes a design defect and is consistent with a narrow interpretation of Civil Code Section 1714.4. On the other hand, the manufacturer or seller of a Saturday Night Special might argue that the Senate committee’s analysis provides further evidence that the Legislature sought only to protect the user of a firearm against injuries rather than to protect third-party victims of a shooting.

However, amendments to AB 75 suggest that the Legislature intended to leave room for alternative theories of liability, or at least that the Legislature’s concern is with but one type of strict products liability action. The Assembly amended the bill three times before passing it and referring it to the Senate. The Senate then proceeded to amend AB 75 twice before finally approving it. The Senate amendments are substantial and also provide what ostensibly became the operative language of section 1714.4. Whereas the Assembly version of AB 75 specifically enumerated the types of actions which could be brought against the manufacturer or seller of a firearm, the Senate version only prohibits one type of action.

135. Senate Analysis, supra note 65, at 7.
136. Assembly Final History at 126.
137. Id.
138. Conference Comm. Rep. No. 018895. The Conference Report on AB 75 reproduces the language of the bill as passed by each house of the Legislature. As passed by the Assembly, the bill:

1) Amended existing provisions of the Civil Code to specify that no person, organization, or public or business entity may be held legally accountable for damages suffered as the result of furnishing (with or without consideration) a firearm or ammunition, except where:
   a) There is a manufacturing or design defect which causes a firearm to malfunction;
   b) There is a breach of a duty to warn related to a malfunction of the firearm or ammunition due to a manufacturing or design defect; or
   c) The furnishing of a firearm or ammunition is prohibited by law.

The Senate amendments delete the Assembly language and, instead, specify that:
1) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that its benefits do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.
2) Ammunition or firearms are not defective in design simply because they have the potential to cause serious injury, damage, or death when discharged.
3) Injuries or damages are proximately caused by the actual discharge of ammunition or firearms, not by the potential of those products to cause serious injury, damage or death.
4) The above provisions shall not affect a products liability cause of action based on the improper selection of design alternatives.

Id.
139. Id.
Since the Senate language prevailed over the Assembly language in the version of the legislation that emerged from the conference committee, the Senate Committee on the Judiciary's analysis should be accorded greater weight in any effort to determine legislative intent than either the statement by Assemblyman McAlister or the analysis prepared by the Assembly Committee on the Judiciary. The particular concern of the Senate committee's analysis, and one which is embodied in the actual language of section 1714.4, is that the plaintiff should be prohibited from bringing an action against the manufacturer or seller of a Saturday Night Special based upon the risk/utility design defect test of Barker.140 A credible argument can be made that the imposition of strict liability on the manufacturer or seller of a Saturday Night Special is not precluded by Civil Code section 1714.4.

Nor is the possibility of bringing a successful action against the manufacturer of a Saturday Night Special foreclosed by the Ninth Circuit Court of Appeals' recent ruling in Moore v. R.G. Industries, Inc.141 There the plaintiff sued Rohm Gesellschaft and R.G. Industries alleging that the handgun with which she was shot and rendered a quadriplegic was, because of its small size and easy concealability, defective in design.142 The decision, although it acknowledged the Kelley court's determination that Saturday Night Specials serve no legitimate purposes, nevertheless sustained the lower court's entry of summary judgment for the defendants.143

The Moore court considered only the Barker test of a design defect.144 As the court conceded, "we apply the existing California law, and do not predict possible changes in that law."145 The risk/utility test of a design defect, it held, could not be applied in view of section 1714.4.146 Because of constraints on its ability to consider possible changes in California strict products liability law,147 the Ninth Circuit Court of Appeals did not actually consider that other

140. Senate Analysis, supra note 65. "Proponents of handgun liability suits assert that the availability of 'Saturday Night Special' handguns to the general public causes widespread and severe harm without conferring any substantial social benefit." Id. at 9.
141. 789 F.2d 1326 (9th Cir. 1986).
142. Id. at 1327.
143. Id. at 1328.
144. Id. at 1327.
145. Id. (citing Klingebiel v. Lockheed Aircraft Corp., 494 F.2d 345, 346 (9th Cir. 1974)).
146. Moore, 789 F.2d at 1327.
147. There is now no procedure by which the 9th Circuit Court of Appeals can certify questions of law to the California Supreme Court as was done in Kelley. See supra note 85 and accompanying text.
laws and policies of California might permit an extension of the *Kelley* decision.\textsuperscript{148} Thus in spite of the court's averment that "there is no indication in California law or public policy that the courts would distinguish 'Saturday [N]ight [S]pecials' from other handguns,"\textsuperscript{149} there is authority to support an extension of the *Kelley* decision.

\section*{VI. Applying the Kelley Ruling in California}

The appropriate case for an attorney to argue for adoption of the *Kelley* decision will involve the following scenario. The plaintiff is the victim, or the victim's survivor, of a criminal shooting. The gun used by the criminal assailant to injure or kill the victim is a Saturday Night Special. The victim is not someone who participated in the criminal act.

The initial task of the attorney is to isolate the scope of Civil Code section 1714.4. Plaintiff's attorney should focus first on the statutory language of that section,\textsuperscript{150} asserting that the language is sufficiently definite in ruling out only an action based upon the risk/utility prong of the *Barker* test for a design defect.\textsuperscript{151} Section 1714.4 does not bar all types of strict products liability actions against the manufacturers of firearms, but rather only one. The bill analysis prepared by the Senate Committee on the Judiciary is an extrinsic source to which the plaintiff's attorney may wish to direct the court's attention. The attorney should argue for an interpretation of section 1714.4 that is consistent with the Senate Committee on the Judiciary's concern that the section be read only to prevent so-called "Turley suits," which proceed upon the risk/benefit prong of the *Barker* test of a design defect.\textsuperscript{152}

Concomitantly, a distinction must be made between the risk/utility test of *Barker* and the theory of strict liability embraced by the *Kelley* decision. By allowing the trier of fact to weigh differences in the inherent risk of a product against its usefulness, a court at least implicitly makes a prior determination that the product serves some legitimate purposes. The ruling in *Kelley*, on the other hand, is premised upon the notion that Saturday Night Specials serve "no

\textsuperscript{148} The attorney will encounter some difficulties in attempting to keep the case in the state courts. If plaintiff sues a foreign national corporation in a state court, that party is likely to exercise the right of removal to a federal district court pursuant to 28 U.S.C. § 1441 (1948).
\textsuperscript{149} *Moore*, 789 F.2d at 1327.
\textsuperscript{150} See supra note 106 and accompanying text.
\textsuperscript{151} See supra notes 125-26 and accompanying text.
\textsuperscript{152} See supra note 130-35 and accompanying text.
legitimate purpose in today's society.” The court's finding is grounded in the law and policies of the federal government and the State of Maryland.

Next, the attorney must demonstrate that imposing strict liability upon the manufacturer or seller of a Saturday Night Special under the Kelley theory will further California public policy. California public policy on handguns is found in the Dangerous Weapons Control Law. "The Dangerous Weapons Control Law is designed to minimize the danger to public safety arising from the free access to firearms that can be used for crimes of violence.” The provisions of California’s Dangerous Weapons Control Law are in many respects similar to the gun control laws of the State of Maryland.

A concealed weapon is defined under the Dangerous Weapons Control Law as a firearm with a barrel shorter than twelve inches. A person who carries a concealed weapon must have a license. However, an individual who carries a concealed weapon on the premises of his or her own residence or place of business is not required to have a license. Other people whom the state does not require to have a license in order to carry a concealed weapon include law enforcement personnel, members of the armed forces, and people who use handguns for target shooting, provided they belong to a recognized club or organization. Furthermore, carrying a firearm during the commission or attempted commission of a felony is punishable by an additional prison sentence of one year. Actual use of a firearm to commit or attempt to commit a felony is punishable by an additional term of imprisonment for two years. These provisions of the Dangerous Weapons Control Law suggest some of

153. Kelley, 304 Md. at 155, 497 A.2d at 1158.
154. Id. at 147, 497 A.2d at 1154.
156. People v. Scott, 24 Cal. 2d 774, 151 P.2d 517 (1944); see also People v. Washington, 237 Cal. App. 2d 59, 46 Cal. Rptr. 545 (1965). “The clear intent of the Legislature in adopting the weapons control act was to limit as far as possible the use of instruments commonly associated with criminal activity.” Id. at 66, 46 Cal. Rptr. at 566.
158. Id. at § 12025 (Note that a license differs from a permit, the latter of which is required under the Maryland gun control statutes. A permit is required for each firearm purchased, while a license authorizes the ownership of firearms for a particular period, which, in California, is three years.).
159. Id. at § 12026.
160. Id. at § 12027.
161. Id. at § 12022.
162. Id. at § 12022.5.
the purposes for which handgun ownership is recognized as legitimate: protection of one’s home or business, law enforcement, and sport.

The defendant manufacturer of Saturday Night Specials also will postulate that many homeowners and business persons may purchase Saturday Night Specials expressly for such purposes. The natural conclusion to this syllogism is that Saturday Night Specials serve some legitimate purposes. This would bring the plaintiff’s cause of action within the purview of section 1714.4.

The Kelley ruling eschews this syllogism. Saturday Night Specials are characterized in the court’s opinion as “too inaccurate, unreliable, and poorly made for use by . . . homeowners and businessmen.” Merely because handgun ownership is legitimate to protect one’s home or business, it does not follow that all types of handguns are appropriate for these purposes. The plaintiff must emphasize state gun control policies to justify a ruling that Saturday Night Specials are not appropriate for protecting one’s home or business and, therefore, serve no legitimate purposes.

Additional support for the proposition that Saturday Night Specials serve no legitimate purposes can be found in sections 12028 and 12030 of the California Penal Code. Those sections, which also are part of the Dangerous Weapons Control Law, permit law enforcement authorities to do one of three things with firearms that are confiscated pursuant to a criminal investigation. If found useful for “sporting, recreational, or collection purposes,” the weapons may be sold to the public. Alternatively, they may be retained by the confiscating authority or donated to federal or state branches of the military, provided the weapons would serve some “useful” purpose. Otherwise, the firearms must be destroyed. It must be em-

163. Kelley, 304 Md. at 54, 497 A.2d at 1158.
164. The defendant would seem to have the upper hand with respect to federal law and policy toward Saturday Night Specials, since a handgun which is not suitable for sporting purposes nevertheless may be appropriate for self-protection. Whether a particular type of handgun can be imported depends upon its suitability for sporting purposes. See supra note 3. Regulations promulgated pursuant to the federal Gun Control Act prohibit the importation of Saturday Night Specials. See supra notes 3-4 and accompanying text.
165. CAL. PENAL CODE § 12028 (West 1982). Subsection (b) provides: "A firearm of any nature used in the commission of any misdemeanor as provided in this code or any felony, or an attempt to commit any misdemeanor as provided in this code or any felony, is, upon a conviction of the defendant, a nuisance." In addition subsection (c) authorizes the law enforcement agencies to "offer the weapons, which the officers in charge of them consider to have value with respect to sporting, recreational, or collective purposes, for sale at public auction to persons licensed under federal law to engage in business involving any weapon purchased." Id.
166. Id. at § 12030.
167. Id. at § 12028.
phasized that no law enforcement authority would donate a Saturday Night Special to the military, retain it for law enforcement purposes, or make it available for public sale.168

The attorney also must impress upon the court that reliance upon the common law to create a special category of strict products liability for the manufacturers and sellers of Saturday Night Specials would not be inconsistent with prior extensions of the common law. As the California Supreme Court stated in *Rodriguez v. Bethlehem Steel Corp.*:169

The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to . . . the needs of the country.170

The California Supreme Court applied this notion of the common law most notably in *Li v. Yellow Cab*171 and again in *American Motorcycle Assn v. Superior Court*.172 In those cases, the Supreme Court embraced common law theories of comparative fault and comparative partial indemnity, respectively. "Nothing in the legislative history," the court wrote in *American Motorcycle*, "suggests that the Legislature intended by the enactment to preempt the field. . . ."173 The rulings in both cases reflect the court’s reliance on the common law to foster contemporary notions of justice.174

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168. The San Jose Police Department destroys all confiscated Saturday Night Specials which have been used in the commission of a crime. Twice each year these weapons are destroyed pursuant to court order. Telephone Conversation with Dwight Messimer, administrative assistant to San Jose Police Chief Joseph D. McNamara, July 14, 1987.


170. *Id.* at 393, 525 P.2d at 676, 115 Cal. Rptr. at 772 (citing 15 AM. JUR. 2D Common Law §§ 1, 2 at 794-96).


172. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

173. *Id.* at 601, 578 P.2d at 914, 146 Cal. Rptr. at 197. In both cases the court accepted the premise that the statutes were merely codifications of the common law. See *Li*, 13 Cal. 3d at 814, 532 P.2d at 1233, 119 Cal. Rptr. at 865; *American Motorcycle*, 20 Cal. 3d at 601, 578 P.2d at 914, 146 Cal. Rptr. at 197.

174. See *Li*, 13 Cal. 3d at 814, 532 P.2d at 1233, 119 Cal. Rptr. at 865 and *American Motorcycle*, 20 Cal. 3d at 602, 603, 578 P.2d at 915, 146 Cal. Rptr. at 198. Assuming arguendo that section 1714.4 codifies the existing common law, a probable counter argument to the courts looking beyond the statute for purposes of developing a special category of strict products liability is timing or ripeness. Section 1714.4 was enacted in 1983. In both *Li* and *American Motorcycle*, considerable time elapsed before the Supreme Court was willing to look be-
Subpart (d) of section 1714.4 states: "This section is declaratory of existing law." Because section 1714.4 concerns the application of the risk/utility test, and since the Barker decision established that test for determining defects in design, it is arguable that subpart (d) renders section 1714.4 the law as of the date of the Barker decision. Barker created a common law rule. Implicitly, then, the Legislature must intend that section 1714.4 be regarded as part of the Barker decision. There is no indication in the legislative history of an intent to preempt the courts from further development of the law of strict products liability, even as it concerns the manufacturers of firearms. What the Legislature proscribes is only the application of the risk/utility test of what constitutes a defective design to manufacturers and sellers of firearms.

Finally, the attorney must demonstrate that creating a special category of common law strict products liability applicable to Saturday Night Specials would not place any unfair burden on either citizens who wish to lawfully purchase handguns for legitimate purposes or the manufacturers and sellers of handguns. This theory of strict products liability would remove from the marketplace only those handguns which serve none of the legitimate purposes of handgun ownership recognized by California law and public policy. Such a ruling against the manufacturers and sellers of Saturday Night Specials should have no measurable effect upon the ability of citizens to lawfully purchase handguns for legitimate uses.

Arguing for recovery pursuant to the criteria delineated by the Maryland Court of Appeals in Kelley v. R.G. Industries, Inc. should convince the court that the defendants in such a suit would

175. CAL. CIV. CODE § 1714.4 (West 1985).
177. See supra notes 125-40 and accompanying text.
178. See supra notes 155-62 and accompanying text.
not be unfairly subject to liability. Liability should not be imposed unless the plaintiff or the plaintiff's decedent suffers injury or death as the innocent victim of a criminal act. After the initial decision imposing liability, no recovery should be granted to future plaintiffs unless the handgun is shown to have been sold by the original seller after the date of the court's initial ruling. The burden of proof on this latter issue should fall upon the defendants, as they possess a superior ability to present evidence of the date on which the particular Saturday Night Special was first sold.

VII. CONCLUSION

At first glance, section 1714.4 of the Civil Code appears to preempt any legal recourse by the victim of a deliberate shooting against the manufacturer or seller of a Saturday Night Special. A close examination of that section reveals that, to the contrary, section 1714.4 concerns only so-called "Turley suits," that is, actions based upon the risk/utility design defect test of Barker v. Lull Engineering Co. That section does not preclude a suit against the manufacturer or seller of a Saturday Night Special under a theory of common law strict liability that Saturday Night Specials serve no legitimate purposes.

An action should be brought in California against the manufacturer or seller of a Saturday Night Special. The plaintiff should advocate adoption of the ruling of the Maryland Court of Appeal in Kelly v. R.G. Industries, Inc. That court held that Saturday Night Specials serve no legitimate purposes and that the imposition of strict liability upon the manufacturer and seller for the injuries suffered by the plaintiff would further federal and state gun control policies. In making a successful argument for the adoption of the Kelley decision, plaintiff's counsel must argue: (1) for a narrow interpretation of Civil Code Section 1714.4; and (2) that the gun control policies of California would support such an extension of the common law.

California gun control policies are substantially similar to those of the State of Maryland. Therefore, a California court may be willing to embrace the rationale of Kelly v. R.G. Industries and apply such a novel common law theory of strict products liability against

179. See Kelley, 304 Md. at 159-62, 497 A.2d at 1160-62.
180. Id. at 162 n.31, 497 A.2d at 1162 n.31.
181. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
the manufacturer or seller of a Saturday Night Special. Such a ruling would contribute to a reduction in the rate of violent crime committed in this state by persons using firearms and the elimination from the marketplace of a handgun which serves none of the legitimate purposes for handgun ownership recognized by the laws and public policy of California.

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