

**THE ILLINOIS ATTORNEY GENERAL'S AUTHORITY TO PROMULGATE
HANDGUN SAFETY REGULATIONS UNDER THE CONSUMER FRAUD AND
DECEPTIVE BUSINESS PRACTICES ACT**

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I. INTRODUCTION: THE SCOPE AND ORIGIN OF THE PROBLEM OF UNINTENTIONAL FIREARM DEATH AND INJURY.

This paper addresses the authority possessed by the Illinois Attorney General to promulgate regulations under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1-12 (2000), to require that handguns manufactured or sold within the State of Illinois meet minimum standards designed to reduce the risk of unauthorized access and unintentional discharge, particularly at the hands of children. The paper concludes that there is a pressing need for such regulation and that the Attorney General may – and should – exercise her authority to promulgate regulations in this area.

Frequently overlooked in the debate about gun control and gun violence is the reality that firearms cause thousands of unintentional deaths and injuries. According to the Centers for Disease Control and Prevention, 15,000 persons in the United States are treated each year in hospital emergency rooms for unintentional gunshot wounds.¹ Children and young adults are the most frequent victims of such accidents; most of those injured and killed are aged 15-24.² But young children – those 14 and under – are also conspicuously affected. Children in this category suffered an average of 770 fatal and 3,519 nonfatal firearm-related injuries annually from 1993 to 1998.³ And those aged 15-19 suffered, on average, 4,152 fatal and 18,481 nonfatal firearm-related injuries in each of those years.⁴

Illinois contributes to the national epidemic of unintended firearms injuries. Between 1994 and 1996, a total of 715 young people under the age of 20 were treated in Illinois hospitals for unintended firearms injuries, and of these, 247 were under the age of ten.⁵ In the same period, 34 young people under the age of 20 died of unintentional firearm-inflicted injuries.⁶ Between 1998 and 2000, 25 young people under the age of 20 died as a result of such injuries.⁷

Voices of Illinois Children President Jerry Stermer succinctly describes the cause of many of these accidental deaths and injuries: “[y]oung children die or are seriously injured because their parents or other gun owners don’t store their firearms properly. As a result, children often find loaded guns and use them unintentionally on themselves or other children.”⁸ An ABC News survey found that “[m]ore than half of U.S. gun owners living with children keep unlocked weapons in the home. . . . Of the homes with children and firearms, 55 percent of those surveyed reported having one or more guns in an unlocked place and 43 percent reported keeping guns without a trigger lock in an unlocked place. . . .”⁹ A 1990 estimate published in the *Journal of the American Medical Association* indicated that elementary school aged “latchkey children” have access to guns in more than 1.2 million homes.¹⁰ According to one federal study, 8% of accidental shooting deaths resulted from shots fired by children under the age of six.¹¹

The presence of unlocked guns in the home increases the risk not only of accidental gun injuries but of intentional shootings as well. A recent study found that more than 75% of the guns used in youth suicide attempts and unintentional injuries were stored in the residence of the victim, a relative, or a friend.¹² At least two studies have found that the risk of suicide increases in homes where guns are kept loaded and/or unlocked.¹³ In 2000, 23 Illinois young people aged 0 to 19 committed suicide with a firearm.¹⁴ Of these, 14 were aged 17 and under.¹⁵ In 1999, there were 37 suicides committed by Illinois children and teenagers aged 0 to 19 using a firearm.¹⁶ Twenty-one Illinois children aged 17 and under committed suicide using a firearm in 1999.¹⁷

It is apparent, therefore, that it would save lives if there were regulations to make firearms inoperable by young children and to reduce the risk of unauthorized access and accidental discharge of these weapons. The Illinois legislature has recognized the importance of

keeping guns out of the hands of children. For example, Illinois makes it unlawful for a person to keep an unsecured gun on his premises if he knows or has reason to believe a child under the age of fourteen is likely to gain access to the gun, and the child causes death or great bodily harm.¹⁸

But this is merely a *reactive* measure that punishes the gun owner *after* a child or other person has already been injured or killed because the gun was not properly stored or secured. In addition to after-the-fact punishment, we need to require gun manufacturers to incorporate simple childproofing devices in their products as a *preventative* measure against handgun injuries to children. The U.S. General Accounting Office (GAO) has estimated that 31 percent of accidental deaths caused by firearms might be prevented by the addition of two devices: a child-proof safety lock (8 percent) and a loading indicator (23 percent).¹⁹

Unfortunately, federal statutory law and state common law have not succeeded in imposing such common sense preventative requirements on the manufacturers and sellers of handguns. The federal Consumer Product Safety Act, which was enacted to impose standards of product safety, *exempts* handguns from its requirements.²⁰ No other federal statute or agency regulates the product safety of handguns. State common law has also failed to protect consumers from accidental injury from handguns for various reasons, including problems of standing, causation and the emotion-laden public debate over handguns and their utility.²¹

The Illinois Attorney General has the ability to fill the regulatory void. Using her authority under the Illinois Consumer Fraud and Deceptive Business Practices Act she could enact regulations to require that all handguns manufactured or sold within Illinois meet the following four safety criteria:

- have a locking device to prevent unauthorized access to the weapon;

- have a load indicator or other device on weapons that use a magazine to show when the weapon is loaded;
- be of childproof design, such as having a large grip size or requiring multiple motions for operation, so that small children cannot operate the gun;
- have passed a “drop test” so that the weapon will not accidentally discharge when dropped.

If these requirements were imposed on weapons manufactured or sold in Illinois, the risk of firearm injury to Illinois children and other citizens could be significantly reduced.

II. THE MASSACHUSETTS MODEL.

In 1997, the Massachusetts Attorney General, acting under the authority of the Massachusetts Unfair Business Practices Act, Mass. Gen. Laws ch. 93A, § 2 (the “Massachusetts Act”), a statute closely paralleling the Illinois Consumer Fraud and Deceptive Business Practices Act, promulgated and implemented consumer protection regulations like the ones we propose above. The Massachusetts experience provides important guidance for Illinois.

The Massachusetts Attorney General’s regulations declared the following to be “unfair or deceptive practices” under the Massachusetts Act : (1) the sale of a handgun by a commercial seller that is not equipped with some form of trigger lock; (2) the sale of a handgun by a commercial seller that is not equipped with a mechanism to prevent an average 5-year old from firing the gun, such as increasing trigger resistance, altering the firing mechanism so that the child’s hand is too small to operate the gun, or requiring a series of motions to operate the gun; and (3) the sale of a semi-automatic handgun by a commercial seller that is not equipped with a load indicator or magazine disconnect.²² The regulations also declared that the sale of a handgun

prone to accidental discharge, either by repeated firings based on a single pull of the trigger or firing upon being dropped, is an unfair or deceptive practice.²³

The gun industry challenged the regulations, claiming that they were beyond the Attorney General's regulatory authority under the Massachusetts Act. The Massachusetts Supreme Judicial Court rejected the industry's arguments and upheld the regulations in *American Shooting Sports Council, Inc., v. Attorney General*.²⁴ The gun makers contended that the Massachusetts Act was limited to regulation of marketing practices and did not cover the safety issues addressed in the regulations. The Massachusetts Court rejected this argument, holding that unsafe products with either inherent risk of danger or latent performance inadequacies amounted to unfair or deceptive acts that the Attorney General could regulate under the Act.²⁵ The court reasoned that this was especially the case where the risk of harm could not be avoided by adequate disclosures or warnings.²⁶

The court also found that the sale of dangerous products could be an unfair or deceptive practice because such sales could breach the implied warranty of merchantability.²⁷ The court reasoned that if a product is dangerous in an unforeseeable way due to a defect, then it would not "be fit for the ordinary purposes for which such goods are used" and, thus, would be subject to regulation under the Massachusetts Act for breach of the implied warranty.²⁸ In this respect, the court analogized an unsafe gun to a lawnmower that, in addition to possessing certain dangers known to the user, also performed in an unexpected way, such as blowing up or catching fire.²⁹

Finally, the court noted that the Massachusetts Act must be interpreted with reference to the Federal Trade Commission Act. The court reasoned that, under the FTC Act, "unwarranted health and safety risks may support a finding of unfairness."³⁰ The Attorney General could reasonably conclude that there are unwarranted health and safety risks from handguns designed

without available safety mechanisms to reduce the risk of injury from accidental discharge.

Thus, the regulations were a proper means to prevent “unfair or deceptive practices” pursuant to the Attorney General’s authority under the Massachusetts Act.

III. THE ILLINOIS ATTORNEY GENERAL MAY PROMULGATE GUN SAFETY REGULATIONS PURSUANT TO THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT.

A. The Consumer Fraud Act Authorizes the Attorney General to Promulgate Consumer Protection Regulations.

Like the Massachusetts Act, the Illinois Consumer Fraud and Deceptive Business Practices Act (the “Illinois Act”) provides the Illinois Attorney General with authority to promulgate regulations concerning handgun safety. The Illinois Act, like the Massachusetts Act, proscribes “[u]nfair methods of competition and unfair or deceptive acts or practices . . . in the conduct of any trade or commerce”³¹ This broad grant of regulatory authority encompasses the power to impose requirements preventing the sale of *unsafe* products – including unreasonably dangerous handguns – within the State of Illinois.

Like the Massachusetts Act, the Illinois Act is a broad, flexible and remedial statute. The General Assembly intended the Illinois Act to provide the broadest possible consumer protection. During Senate debates over whether to adopt HB 1548, a proposed amendment to the original 1961 Act, Senator Sours, a proponent of the bill stated: “In my judgment this bill is sufficiently broad to take just about anything into its cornucopia of ideas and prohibitions.”³²

Thus, the Act itself provides that it “shall be liberally construed to effect the purposes thereof.”³³

The Illinois courts have often emphasized the extremely broad scope of this legislation:

“Effective regulation [of unfair practices] requires that the concept be flexible, defined on a case-by-case basis”³⁴

The Illinois Act also grants the Attorney General wide authority to regulate. First, the Attorney General has broad discretion to determine which unfair practices it is in the public interest to remedy. “The Act is clearly within the class of remedial statutes which are designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils.”³⁵ Then, once the Attorney General makes a finding of unfairness, she is empowered to promulgate substantive regulations in order to remedy the practice. “The Attorney General, in addition to other powers conferred upon him by this Act, may . . . promulgate such rules and regulations as may be necessary, which rules and regulations shall have the force of law.”³⁶

Rejecting the argument that the Attorney General’s power to promulgate rules was limited to procedural matters, the Illinois Appellate Court held in *United Consumers Club, Inc. v. Attorney General* that “[i]n light of this explicit statutory language, it is clear that rules and regulations promulgated by the Attorney General under section 4 are legislative and thus are binding on the courts.”³⁷ “[T]he Consumer Fraud Act should be construed liberally in favor of protecting consumers as well as construed to confer upon the Attorney General the broadest kind of power to act in the interest of the consumer public.”³⁸

Finally, and significantly, interpretation of the Illinois Act, like the Massachusetts Act, must give consideration to the parallel provisions of the FTC Act. The Illinois Act specifically provides that “consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the FTC Act.”³⁹ The decisions of the Federal Trade Commission and the United States Supreme Court regarding the meaning of the term “unfair” under the FTC Act make it absolutely clear that it is “unfair” under the FTC

Act – and, therefore, “unfair” as well under the Illinois Act – to manufacture and sell products that unreasonably risk injury to children.

B. Selling Products Injurious to Children and Other Consumers is “Unfair” under Supreme Court and FTC Precedent.

The Supreme Court and the Federal Trade Commission (FTC) have found that selling products that unreasonably risk injury to children and other consumers is an “unfair” practice under the FTC Act.

In the 1934 case of *FTC v. R.F. Keppel & Bro., Inc.*,⁴⁰ the Court reviewed an FTC cease and desist order against a company that sold penny candies in “break and take” packs, a form of merchandising that induced children to buy lesser amounts of inferior candies in the hope of winning bonus packs containing extra candy and prizes. The FTC had found that the practice was unfair because “use of the break and take package in the retail trade involves the sale or distribution of the candy by lot or chance,” and therefore violated public policy by tempting and encouraging children to gamble.⁴¹

The Supreme Court agreed with the FTC that the practice was “unfair” in light of the injury it posed to children. “[H]ere the competitive method is shown to exploit consumers, children, *who are unable to protect themselves* Without inquiring whether ... the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy.”⁴²

In *FTC v. Sperry & Hutchinson Co.*, the Supreme Court extended its decision in *Keppel* and further clarified the expansive scope of FTC authority under the unfairness doctrine.⁴³ In that case, Sperry and Hutchinson (“S&H”), the largest and oldest company in the trading stamp

business, challenged a cease and desist order issued by the FTC relating to S&H's improper suppression of trading stamp exchanges.⁴⁴

On appeal, S&H argued that the FTC overstepped its authority in finding this practice "unfair" because the FTC Act empowered the commission to "restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals."⁴⁵ The Supreme Court rejected such a limited construction of "unfairness," instead finding that the unfairness doctrine encompassed practices beyond those that were merely anti-competitive or deceptive.⁴⁶ In doing so, the Court first looked at the legislative history behind the term "unfair," noting that Congress purposefully left the term undefined when enacting the original statute in 1914. This was in order to delegate authority to the commission to define unfair practices as they arose.⁴⁷ The Court quoted the original House Conference Report:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.⁴⁸

Although "the sweep and flexibility of this approach were thus made crystal clear,"⁴⁹ the Court had on two prior occasions attempted to fence in the concept of unfairness to cover only deceptive or anti-competitive practices.⁵⁰ The Court, however, noted that *Keppel* had rejected this narrow interpretation, reasoning that "[n]either the language nor the history of the [FTC] Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories."⁵¹

After finding that the unfairness doctrine was not limited to deceptive or anti-competitive conduct, the Court outlined the factors, promulgated by the FTC, for determining whether a practice is unfair:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).⁵²

Thus, *Sperry & Hutchinson* specifically approved an interpretation of “unfairness” under the FTC Act “not moored in the traditional rationales of anti-competitiveness or deception.”⁵³

Following *Sperry & Hutchinson*, the FTC has had occasion specifically to find “unfair” unsafe sales practices capable of causing injury to children.⁵⁴ In *In the Matter of Philip Morris, Inc.*, the FTC entered a consent order requiring Philip Morris to cease distribution of sample razor blades via home-delivered newspapers to the general public without “special packaging” clearly indicating the contents.⁵⁵ The FTC found that “[t]he distribution of the razor blades as aforesaid constitutes a hazard to the health and safety of persons engaged in the distribution of newspapers and persons receiving such newspapers in their houses, *particularly young children*, and also to family pets.”⁵⁶ Under the consent order, the FTC defined “special packaging” as “packaging that is designed or constructed to be significantly difficult for children under six years of age to open within a reasonable time although not difficult for adults to open, but does not mean packaging which all such children cannot open within a reasonable time.”⁵⁷

Seven years after *Phillip Morris*, in a 1980 letter written in response to a request by Congress to define the scope of “unfairness” as applied to consumer transactions “not involving the content of advertising,” the FTC restated its test for unfairness, as approved by the Supreme Court in *Sperry*. This letter, subscribed to by all five Commissioners, has come to be known as the “1980 Policy Statement.”⁵⁸ The 1980 Policy Statement reaffirmed the *Sperry & Hutchinson* three factor test for determining whether a practice is “unfair:” (1) whether the practice injures

consumers; (2) whether it violates established public policy; and (3) whether it is unethical or unscrupulous.⁵⁹

C. When the Illinois Act is Interpreted In Accordance with FTC and Supreme Court Precedent under the FTC Act, it is Clear that the Illinois Attorney General Has Authority to Promulgate Regulations Proscribing Unsafe Handguns.

As noted above, the Illinois Act itself requires that the Act be interpreted with consideration to the foregoing FTC and Supreme Court precedent. 815 ILCS 505/2. Under the three-pronged test set out in the Supreme Court's *Sperry & Hutchinson* decision and the FTC's 1980 Policy Statement, it is fully apparent that the Illinois Attorney General has authority under the Illinois Act to implement regulations requiring that handguns sold in this State have locks and devices to prevent children from operating them and to ensure that such handguns will not accidentally discharge upon being dropped.

1. Unsafe handguns are “unfair” because they injure consumers.

The FTC has stated that “[u]njustified consumer injury is the primary focus of the FTC Act, and the most important of the three S&H criteria. By itself it can be sufficient to warrant a finding of unfairness.”⁶⁰ The FTC has identified three sub-factors to consider in determining whether a practice causes consumer injury. First, the injury must be substantial—“[u]nwarranted health and safety risks may ... support a finding of unfairness.”⁶¹ A practice that merely causes trivial or speculative harm such as emotional impact is not unfair.⁶² There is no question that the type of harm at issue here—death or injury of children—is substantial injury.

Second, “the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces.”⁶³ In this case, the cost of childproofing a weapon or ensuring that it does not discharge when dropped is *de minimis* compared to the cost of a child's life.

“Finally, the injury must be one which consumers could not reasonably have avoided.”⁶⁴

This factor is concerned with the inability of consumers to make informed decisions to purchase based on inadequacy of information in the marketplace. In this instance, it is clear that the market has failed to inform consumers of the risk of injury because children *are* dying or causing other injury by gaining access to weapons without child safety devices. One need only read the newspaper to find another story of a child being hurt or killed as the result of an accident with a gun.⁶⁵

2. Unsafe handguns are “unfair” because they violate public policy.

Second, selling handguns without child safety devices or that fire upon being dropped is also an unfair practice because it violates public policy. First, as discussed above, both the Supreme Court and the FTC have long recognized that selling unsafe products that cause injury to children is an unfair practice. This point requires no amplification; the long line of Supreme Court and FTC decisions discussed above duly reflect this principle.

In addition, as read against a background of common law principles—as the 1980 Policy Statement instructs—selling unreasonably dangerous products violates public policy. Like the federal courts, Illinois common law also has a long tradition of treating the sale of products that unreasonably risk harm to consumers as a violation of public policy.

For example, in the landmark case of *Suvada v. White Motor Co.*, the Illinois Supreme Court, adopting section 402A of Second Restatement of Torts,⁶⁶ extended strict tort liability from unwholesome food products to other unreasonably dangerous products, rendering both privity and reliance on contract warranty theory unnecessary to a cause of action.⁶⁷ In surveying the common law, the court noted that Illinois’ recognition of strict liability for the sale of unwholesome food since 1847 was based on the public policy of protecting the consumer.

Recognizing that privity of contract was not necessary in an action for the sale of unwholesome food, and further acknowledging the public policy arguments in support of protecting the public against defective, dangerous products, the court extended strict tort liability to dangerous products other than food. “Without extended discussion, it seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases.”⁶⁸

Therefore, there is no question that the sale of unsafe handguns that unreasonably risk injury to children and other consumers is a violation of the public policy of Illinois.

3. Unsafe handguns are “unfair” because their sale constitutes unethical or unscrupulous conduct.

The third factor, which looks to whether the conduct is “immoral, unethical, oppressive, or unscrupulous,” is not considered as an independent basis for a finding of unfairness, but instead acts to inform the other two factors.⁶⁹ “This test was presumably included in order to be sure of reaching all the purposes of the underlying statute, which forbids ‘unfair’ acts or practices. It would therefore allow the Commission to reach conduct that violates generally recognized standards of business ethics.”⁷⁰ Where some responsible gun manufacturers already include safety devices on their handguns, and the cost of such devices is negligible as compared to the life of a child, it can be described as immoral or unethical for a manufacturer to sell handguns not fitted with such devices.

IV. THE ILLINOIS ATTORNEY GENERAL SHOULD PROMULGATE REGULATIONS TO PREVENT THE SALE OF UNSAFE HANDGUNS IN THIS STATE.

The foregoing discussion makes clear that the Illinois Attorney General's authority to regulate unfair practices under the Illinois Act encompasses the power to prevent the sale in this State of handguns that unreasonably risk injury to children and other consumers. There are few instances in life where the action of a public official has the direct potential to prevent a senseless tragedy. This is one such instance. The Illinois Attorney General should implement regulations to prevent accidental death and injury from handguns.

¹ Karen D. Gotsch, et al., CDC SURVEILLANCE SUMMARY NO. SS-2, SURVEILLANCE FOR FATAL AND NONFATAL FIREARM-RELATED INJURIES – UNITED STATES 1993-1998, at 2 (April 13, 2001), *available at* <http://www.cdc.gov/mmwr/pdf/ss/ss5002.pdf>.

² *Id.* at 4.

³ *Id.* at 23-24.

⁴ *Id.*

⁵ Jenifer Cartland, et al., Center for Childhood Safety, Child Health Data Lab, Children's Memorial Hospital, STATE & COMMUNITY REPORTS ON INJURY PREVALENCE & TARGETED SOLUTIONS (SCRIPTS), CHILD AND ADOLESCENT INJURY IN ILLINOIS, at Table 1.1 (1998), *available at* <http://www.chdl.org/Research/SCRIPTS.HTM>.

⁶ *Id.*

⁷ CENTERS FOR DISEASE CONTROL AND PREVENTION, 1998-2000, ILLINOIS UNINTENTIONAL FIREARM DEATHS AND RATES PER 100,000.

⁸ VOICES FOR ILLINOIS CHILDREN ACTION ALERT (SEPT. 27, 2000), *available at* <http://www.voices4kids.org/alert092700.html>.

⁹ *Survey: Most Gun Owners with Children Leave Weapons Unlocked*, *available at* <http://abcnews.go.com/sections/us/DailyNews/gunlocks000330.html> (2000).

¹⁰ Letter by Robert K. Lee and Jeffrey J. Sacks, Centers for Disease Control, to the Journal of the American Medical Association, 264 JAMA 17, 2210 (Nov. 17, 1990).

¹¹ U.S. GEN. ACCOUNTING OFFICE, ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED, at 17 (1991), *available at* <http://161.203.16.4/d20t9/143619.pdf>.

¹² David C. Grossman, Donald T. Reay and Stephanie A. Baker, "Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm," ARCH. PEDIATR. ADOLESC. MED. 153: 875-878 (1999).

¹³ M. Miller and D. Hemenway, "The Relationship Between Firearms and Suicide: A Review of the Literature," 4 Aggression and Violent Behavior 59-75 (Spring 1999).

¹⁴ CENTERS FOR DISEASE CONTROL AND PREVENTION, 2000, ILLINOIS SUICIDE FIREARM DEATHS AND RATES PER 100,000.

¹⁵ *Id.*

¹⁶ CENTERS FOR DISEASE CONTROL AND PREVENTION, 1999, ILLINOIS SUICIDE FIREARM DEATHS AND RATES PER 100,000.

¹⁷ *Id.*

¹⁸ 720 ILCS § 5/24-9 (2000).

¹⁹ *Id.*

²⁰ 15 U.S.C. § 2052(a)(1)(E).

²¹ Glenn Kaplan & Chris B. Smith, *Patching Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to make Handguns and other Consumer Goods Safer*, 17 YALE J. ON REG. 253, 263-71 (2000).

²² 711 N.E.2d 899, 901-02 nn. 2-6 (Mass. 1999); *see also* Mass Regs. Code tit.940, §16.01 *et seq.* (2003).

²³ *Id.*

²⁴ *Id.*

²⁵ *American Shooting Sports Council*, 711 N.E.2d at 904-05.

²⁶ *Id.* at 904.

²⁷ *Id.* at 904-05.

²⁸ *Id.* at 904 n.9 (*citation omitted*).

²⁹ *Id.* at 904.

³⁰ *American Shooting Sports Council*, 711 N.E.2d at 907 (*citation omitted*).

³¹ 815 ILCS 505/2.

³² H.B. No. 1548, 78th Ill. G.A. Debates 268 (1973).

³³ 815 ILCS 505/2 § 11a.

³⁴ *Scott v. Association for Childbirth at Home, International*, 430 N.E.2d 1012, 1018 (Ill. 1981); *see also* *People v. Datacom Systems Corp.*, 585 N.E.2d 51, 64 (Ill. 1991).

³⁵ *Scott*, 430 N.E.2d at 1017.

³⁶ 815 ILCS § 505/4,

³⁷ *United Consumers Club v. Illinois*, 456 N.E.2d 856, 859 (Ill. App. 3d Dist. 1983).

³⁸ *Id.* at 860 (*quoting* *Levin v. Lewis*, 431 A.2d 157, 161 (N.J. 1981).

³⁹ 815 ILCS § 505/2.

⁴⁰ 291 U.S. 304 (1934).

⁴¹ *Id.* at 307-08.

⁴² *Id.* at 313 (*emphasis added*).

⁴³ 405 U.S. 233 (1972).

⁴⁴ *Id.* at 234-35.

⁴⁵ *Id.* at 235.

⁴⁶ *Id.* at 244-45.

⁴⁷ *Id.* at 240.

⁴⁸ *Id.* (*citation omitted*).

⁴⁹ *Id.* at 241.

⁵⁰ The first was *FTC v. Gratz*, 253 U.S. 421 (1920), where the Court, over the strong dissent of Justice Brandeis, narrowly interpreted unfairness to include those practices that were “heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.” *Id.* at 427. The second was *FTC v. Raladam Co.*, 283 U.S. 643 (1931), in which the Court held that “[t]he paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree” *Id.* at 647-48.

⁵¹ *Sperry & Hutchinson*, 405 U.S. at 243 (*citation omitted*).

⁵² *Id.* at 244 n.5 (*quoting* Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964)).

⁵³ *See, e.g.*, *Spiegel, Inc. v. FTC*, 540 F.2d 287, 292-93 and n.8 (7th Cir. 1976); *Heater v. FTC*, 503 F.2d 321, 323 (9th Cir. 1974); *American Financial Services Ass’n v. FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985).

⁵⁴ In the Matter of Philip Morris, 82 F.T.C. 16 (1973); *see also* In the Matter of Chemway Corp., 78 F.T.C. 1250 (1971) (unfair practice to sell “Germ Fighter” toothbrushes treated with a chemical with little or no recognized therapeutic benefit that may constitute a danger to the consumer by adding to the body’s burden of mercury).

⁵⁵ Philip Morris, 82 F.T.C. 16.

⁵⁶ *Id.* (*emphasis added*).

⁵⁷ *Id.*

⁵⁸ Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* H.R. REP. NO. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983) [*hereinafter* 1980 Policy Statement]; *see also* *American Financial Services*, 767 F.2d at 970.

⁵⁹ 1980 Policy Statement at 35.

⁶⁰ *Id.* at 36.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 37.

⁶⁵ See, e.g., *Charges unlikely in boy's shooting*, CHICAGO TRIBUNE, 4/19/03 ("Chicago police said ... they are not likely to file charges against relatives of a 6-year-old boy who fatally shot himself while playing with a 9 mm handgun in his grandparents' home."); Leslie Williams, *Gunshot kills boy, 14*, LINCOLN COURIER, 2/5/03 ("A popular Chester-East Lincoln eight-grader who had a passion for skateboarding died Saturday from a single gunshot wound after a gun apparently was accidentally fired at his home.")

⁶⁶ That section provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to reach the user or consumer in the condition in which it is sold. (2) The rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁶⁷ *Suvada v. White Motor Co.*, 210 N.E.2d 182, 186-88 (Ill. 1965), *over'd on other grounds*, *Dixon v. Chicago & North Western Transp. Co.*, 601 N.E.2d 704 (Ill. 1992).

⁶⁸ *Suvada*, 210 N.E.2d at 186. While a gun sold without some form of childproofing device is not defective in the sense that the gun operates as intended, the argument here is that the gun is unreasonably dangerous because it operates all-too-well in the hands of a child. "Unreasonably dangerous conditions include manufacturing defects, design defects, and failures to warn of a product's dangerous propensities." *Hansen v. Baxter Healthcare Corp.*, 723 N.E.2d 302, 311 (Ill. App. 1st Dist. 1999) (*citing Lamkin v. Towner*, 563 N.E.2d 449, 457 (Ill.2d 1990)). Here, the product is unreasonably dangerous because of a design defect: the handgun is designed to be operable by a small child. Of course, a gun that fires upon being dropped is defective whether it was designed to do so, or due to a manufacturing defect. In either case, the risk of harm posed by these handguns is unreasonably dangerous.

⁶⁹ 1980 Policy Statement, *supra* note 53, at 40.

⁷⁰ *Id.*