Defendant Class Actions

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I. INTRODUCTION

Since 1998, over twenty-nine lawsuits have been filed against the firearms industry by cities and counties throughout the nation plagued by gun violence. These lawsuits target the firearms industry for a myriad of transgressions, including its failure to design a safer product, its failure to implement reasonable distribution methods and, in some cases, its irresponsible advertising targeting criminals. These lawsuits seek recovery for the expenditure of hundreds of millions of dollars allegedly wasted on treating the social ills of gun violence.

While these lawsuits raise innumerable legal, social and political questions, this Article will address only one small piece of this litigation puzzle: namely, how can municipalities and other "representative organizations" summon each allegedly culpable firearms industry player to the table? How can these suits be structured to ensure that each participant in the manufacturing, advertising and distribution channels is held accountable for its tortious behavior? How can a plaintiff, who has suffered damages potentially caused by 191 different firearms manufacturers, hundreds of wholesalers and over 80,000 retailers nationwide, join these potential defendants in a manner that ensures that each suffers its proportional share of damages caused?

The answer might lie in an uncommon and, to date, unexplored procedural vehicle called the *defendant class action*. This Article will examine the sparse law governing defendant class action lawsuits and its potential applicability to the recent wave of litigation against the firearms industry. Specifically, this Article will explore Connecticut authority and its Federal counterpart, Rule 23 of the Federal Rules of Civil Procedure.

This Article hopes to serve as a road map for municipalities and other

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representative organizations that have already commenced litigation against the firearms industry, as well as those that are considering joining the fray. The Article will first attempt to paint a broad picture of the firearms industry and, second, briefly overview the claims made against the industry in the pending lawsuits. Finally, the Article will present the law governing defendant class action lawsuits and its potential applicability to these suits.

II. THE FIREARMS INDUSTRY

The firearms industry is a complicated network of manufacturers, wholesalers and retailers. Each year, roughly four and one-half million new firearms, "including approximately two million handguns," are sold in the United States.[1] Many of these firearms are diverted into the criminal market initially from lawful distribution channels. In 1998 alone, the Bureau of Alcohol, Tobacco & Firearms ("ATF") traced and tracked the sales of over 197,000 guns used in crimes.[2] The ATF, through its tracing studies, concluded that "many crime guns were originally sold by Federally licensed firearms dealers in the state in which the city is located."[3] Robert Haas, a retired executive of the Smith & Wesson Co., told jurors in a groundbreaking lawsuit against the firearms industry that the industry casts a blind eye to illegal gun transfers and black market sales.[4] He also stated that "[n]one of the [gun makers] . . . investigate, screen or supervise the wholesale distributors and retail outlets to ensure that their products are distributed responsibly."[5]

According to the Census Bureau, 191 small arms manufacturing companies existed in 1997.[6] The total product shipments from these companies is valued at $1.2 billion.[7] The manufacturers range in status and prestige from the historic Colt Manufacturing, Inc., located in Connecticut's "gun valley," to the manufacturers of cheap and poor quality firearms, a.k.a. "Saturday Night Specials," located mostly in California.

In 1999, there were over 80,570 retailers and pawnbrokers authorized to sell firearms in the United States.[8] The retailers are an interesting and diverse breed of sellers. This level of the distribution chain is populated by

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1. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF THE TREASURY, COMMERCE AND FIREARMS IN THE UNITED STATES 1 (2000) [hereinafter "ATF REPORT"].

2. *See* Letter from James E. Johnson, Under Secretary for Enforcement, Dep't of the Treasury, *Introduction* to CRIME GUN TRACE ANALYSIS REPORTS 1 (Feb. 2000).

3. *Id.*

4. *See* Hamilton vs. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

5. *City Weighs Suit Against Gun Makers*, BALTIMORE SUN, Nov. 13, 1998, at 1A, *available in* LEXIS, News Library, Balsun File.

6. *See* ATF REPORT, *supra* note 1, at 8.

7. *See id.*.

8. *See id.* at 1.

vintage firearms dealers, selling only antique or classic firearms to sellers authorized under federal law to operate out of the trunk of their cars, as well as the traditional storefront dealer. This figure does not include unlicensed private sellers. Surprisingly, a person who makes "occasional sales, exchanges or purchases of firearms" does not need a federal license to sell firearms.[9]

III. THE LAWSUITS

To date, thirty cities and counties have filed lawsuits against the firearms industry.[10] In addition, the National Association for the Advancement of Colored People ("NAACP") and the National Spinal Injury Association filed a class action lawsuit against manufacturers in July, 1999.[11] The NAACP also filed a separate defendant class action lawsuit against a 122-member class of distributors. This is the first and only defendant class action lawsuit targeting at least a portion of the firearms industry to date.

Generally, the lawsuits filed against the firearms industry allege that firearms manufacturers are liable for causing increased gun violence by refusing to implement reasonable safety mechanisms and by irresponsibly distributing their products, fully aware that firearms regularly seep into the criminal market. Under consumer protection statutes, certain complaints target the industry's allegedly false and deceptive advertising.

The City of New Orleans filed the first municipal complaint targeting the industry as a whole. The suit alleged that children are killed or injured with firearms in New Orleans because of gun manufacturers' failure to install feasible internal locking devices into their firearms to prevent unauthorized access and misuse.[12] The City of Chicago filed the second lawsuit against the firearms industry on November 12, 1998.[13] Prior to com-

9. 18 U.S.C. § 921(a)(21)(C) (1999).

10. The cites and counties who have filed suit are: New Orleans, LA (October 30, 1998); Chicago and Cook County, IL (Nov. 12, 1998); Miami-Dade County, FL (Jan. 27, 1999), Bridgeport, CT (Jan. 27, 1999), Atlanta, GA (Feb. 5, 1999), Cleveland, OH (Apr. 8, 1999), Wayne County, MI (Apr. 26, 1999), Detroit, MI (Apr. 26, 1999), Cincinnati, OH (Apr. 28, 1999), St. Louis, MO (Apr. 30, 1999), San Francisco, Alameda County, Berkeley, Sacramento, and San Mateo County, CA (May 25, 1999) (East Palo Alto, and Oakland, CA joined July 16, 1999), Los Angeles, Compton, and West Hollywood, CA (May 25, 1999) (Englewood, CA joined July 16, 1999), Camden County, NJ (June 2, 1999), Boston, MA (June 3, 1999), Newark, NJ (June 9, 1999), Camden, NJ (June 21, 1999), Los Angeles County, CA (Aug. 6, 1999), Gary, IN (Aug. 27, 1999), Wilmington, DE (Sept. 29, 1999); Washington, D.C. (January 20, 2000); and Philadelphia, PA (April 2000). *See* Firearms Litigation, *Firearms Litigation—The Document Index* (visited April 15, 2000) <http://www.firearmslitgation.org/decisions.html>.

11. The National Spinal Cord Injury Association was added as a plaintiff in October 1999. *See* Amended Complaint, NAACP v. A.A. Arms, Inc., No. 99 CV3999 (E.D.N.Y. filed Oct. 5, 1999).

12. *See* Complaint, Morial v. Smith & Wesson Corp., No. 98-18578 (La. Civ. Dist. Ct. Orleans Parish filed Oct. 30, 1998).

13. *See* Amended Complaint, City of Chicago v. Beretta U.S.A. Corp., No. 98 CH 015596 (Ill. Cir. Ct. Cook County, Apr. 7, 1999).

mencing its suit, Chicago launched an undercover investigation called "Operation Gunsmoke," that targeted the distribution methods of local dealers.

During "Operation Gunsmoke," investigators posed as "straw purchasers," criminals and gang members seeking to "take care of business."[14] In just over a three-month period, the investigation resulted in the "illegal" undercover purchase of 171 firearms from Chicago area dealers.[15] Accordingly, Chicago's lawsuit targeted firearms trafficking from the manufacturer to the user, which allegedly caused the ultimate damage inflicted upon the City.[16]

The City of Bridgeport brought the fourth municipal lawsuit against the firearms industry. Armed with raw firearms trace data obtained from the ATF, Bridgeport's suit was the first to bring an action accusing the industry of unfair trade practices[17] and civil conspiracy.[18] These and the other twenty-seven municipal lawsuits are still in their infancy, and like any other cutting edge litigation, they face an uphill battle; however, the defendant class action, as will be demonstrated below, may be an efficient and economically sound method for municipalities to use in their fight against the firearms industry.

IV. CERTIFICATION OF THE DEFENDANT CLASS ACTION UNDER CONNECTICUT AND FEDERAL LAW

A. *Background of the Defendant Class Action*

Defendant class actions are appropriate under Connecticut and federal law.[19] The use of a representative action to conclusively litigate the inter-

14. City of Chicago, Office of the Mayor, *They Needed Handguns to "Take Care of Business" in Chicago; Suburban Gun Shops Provided Plenty-No Questions Asked* (visited on April 21, 2000) <http://www.ci.chi.il.us/mayor/notices/GunLawSuit.98.11.12d.html>.

15. *See id.*

16. *See* City of Chicago, Office of the Mayor, *Gun Industry Floods Chicago with Illegal Weapons, City and County Charge in Landmark $433 Million Lawsuit* (visited on April 15, 2000) <http://www.ci.chi.il.us/Mayor/SpecialNotices?GunLawSuit.98.11.12b.html>.

17. *See* Connecticut Unfair Trade Practices Act, CONN. GEN. STAT. § 42-110(a)—(q) (1999).

18. Bridgeport is presently appealing the court's decision granting defendant's motion to dismiss based upon standing grounds, inter alia. Appeal, Ganim v. Smith & Wesson, No. CV 99 0153198-S (Conn. App. Ct. filed Dec. 30, 1999).

19. *See* CONN. PRAC. BOOK §§ 9-7 to 9-8 (formerly §§ 87-88); FED. R. CIV. P. 23. Additionally, statutory authority exists for class actions under Connecticut General Statutes §§ 42-110g(b) and 42-110h that allow Connecticut Unfair Trade Practices Act plaintiffs to bring class actions on behalf of themselves and others similarly situated pursuant to rules established by the judges of the Superior Court. *See* Walsh v. Nat'l Safety Assocs., 44 Conn. Supp. 569, 695 A.2d 1095, 1103 (1996). Although an additional statutory source exists for class actions, the *Practice Book* rules are controlling when ruling on a motion for class certification. *Id.*

ests of a defendant class has long been accepted in the United States.[20] Consistent with this traditional position, Practice Book § 9-7 of the Connecticut Rules of Practice, which is identical to Rule 23(a) of the Federal Rules of Civil Procedure, authorizes defendant class actions, stating, "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all . . . ."[21] Defendant class actions, however, are a rare breed and there is no written decision that one has ever been certified in a Connecticut state court.[22] Nevertheless, the defendant class action has been recognized in many jurisdictions and in various types of cases, including, but not limited to, patent infringement cases, suits against local officials challenging the validity of state laws, securities litigation, and actions against employers.[23]

Because the requirements for class certification in Connecticut are substantially similar to the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure, Connecticut courts routinely rely on federal case law to aid them in their analysis.[24] This is especially true in an analysis of the defendant class action because Connecticut case law on defendant class actions is silent.

Defendant class actions must meet all the prerequisites of Rule 23(a) or its state counterpart, Practice Book § 9-7, before a court can determine whether to certify a class of defendants.[25] There is no distinction in the rule between plaintiff and defendant classes.[26] Defendant class actions, however, pose unique due process concerns that do not exist when certifying plaintiff classes.[27]

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20. *See* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1854) ("[T]he rule is well established, that a . . . bill may . . . be maintained against a portion of a numerous body of defendants, representing a common interest").

21. CONN. PRAC. BOOK § 9-7 (emphasis added).

22. A Westlaw search of the Connecticut database does not reveal any Connecticut state cases that involve the certification of a defendant class action. *See* Search of WESTLAW CT-CS Database (Apr. 13, 2000).

23. *See* First Fed. Mich. v. Barrow, 878 F.2d 912 (6th Cir. 1989); Sebo v. Rubenstein, 188 F.R.D. 310 (N.D. Ill 1999); Monaco v. Stone, 187 F.R.D. 50 (E.D.N.Y. 1999); Williams v. State Bd. of Elections, 696 F. Supp. 1574 (N.D. Ill. 1988); *In re* Itel Sec. Litig., 89 F.R.D. 104 (N.D. Cal. 1981); *see also* Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 632 (1978).

24. *See* Arduini v. Automobile Ins. Co. of Hartford, 23 Conn. App. 585, 583 A.2d 152, 154 (1990); Rivera v. Rowland, No. CV 95545629, 1996 WL 677452, at *2, (Conn. Super. Ct. Nov. 8, 1996); Campbell v. New Milford Bd. of Educ., 36 Conn. Supp. 357, 423 A.2d 900, 903 (Conn. Super. Ct. 1980).

25. *See* 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.45 (3rd. ed. 1992); *see also Arduini*, 583 A.2d at 154.

26. *See Sebo*, 188 F.R.D. at 318.

27. *See id.; see also* NEWBERG & CONTE, *supra* note 24, § 4.45.

B. *Steps to Successful Certification of the Firearms Industry Defendants as a Defendant Class*

1. *Standard for Defendant Class Certification*

In proceeding with defendant class actions against the gun industry, the plaintiff bears the burden of demonstrating that all the requirements of Rule 23 or its state counterpart are satisfied.[28] The complaint filed by the plaintiff must sufficiently allege the prerequisites for a class action under Practice Book §§ 9-7 and 9-8 for Connecticut state cases, or Rule 23 for federal cases.[29] In states whose rules are modeled after Rule 23, the pleadings must satisfy the rule's class prerequisites.[30] "Courts must accept the complaint's allegations as true and should avoid preliminary inquiry into the merits of the case . . . . [A]t times, [however], it is necessary to probe behind the pleadings before coming to rest on the certification question."[31] The court, "after a rigorous analysis," should certify a class if it is satisfied that the requirements of Rule 23 or its state counterpart are met.[32] Interpretation of the requirements for class certification should be liberally construed.[33]

2. *Meeting the Prerequisites for a Defendant Class Action Pursuant to Practice Book § 9-7 or Rule 23(a)*

The prerequisites of a class action under Practice Book § 9-7 and Rule 23(a) are identical:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[34]

These four requirements are generally known as numerosity, commonality, typicality and adequate representation. In any of the pending or future lawsuits filed by cities, counties, the NAACP or other representative organizations against the gun industry, the plaintiffs should satisfy each

28. *See Monaco*, 187 F.R.D. at 59; *Campbell*, 423 A.2d at 903.

29. *See* Maltagliati v. Wilson, No. CV 970575612-S, 1998 WL 774137, at *3 (Conn. Super., Ct. Oct. 22, 1998) (granting defendant's motion to strike because plaintiff's counts labeled "Class Action" failed to allege any of the requirements for a class action set forth in the Practice Book §§ 9-7 and 9-8).

30. *See* NEWBERG & CONTE, *supra* note 24, § 13.11.

31. *Monaco*, 187 F.R.D. at 59 (internal quotations omitted).

32. *Id.*

33. *See* Campbell v. New Milford Bd. of Educ., 423 A.2d 900, 903 (Conn. Super. Ct. 1980).

34. CONN. PRAC. BOOK § 9-7; FED. R. CIV. P. 23(a).

prong of this four-part analysis.

a. Numerosity

Plaintiffs suing the gun industry should easily meet their burden of showing that the class is "so numerous that joinder of all members is impracticable."[35] There is no magic number that automatically satisfies the numerosity requirement of this rule.[36]

> The specific requirement that the class be so numerous that joinder of all members is impractical does not mean that joinder must be impossible, but rather means only that the court must find that the difficulty or inconvenience of joining all members of the class makes class litigation desirable.[37]

Numerosity is rarely an issue in defendant class actions. Courts have certified defendant classes ranging from thirteen to over 13,000.[38] Moreover, courts have stated that they will apply a less stringent numerosity requirement when certifying a defendant class.[39] Plaintiffs are only required to show some evidence or a reasonable estimate of the number of class members.

In prosecution of firearm manufacturers, distributors and retailers, the numerosity requirement will likely be satisfied. In Bridgeport, for example, over 102 manufacturers' guns were used to commit crimes in the city during the years 1995 through 1998. Over 427 dealers sold these weapons.[40] Facts also suggest that over 300 handgun wholesalers operate in the United States and may have contributed to the negligent distribution of handguns nationwide, including Bridgeport. Under the less stringent numerosity standard for certifying a defendant class, it appears this requirement will be satisfied by the over 500 potential firearms defendants.

Similarly, the NAACP has brought suit against 110 gun manufacturers. The NAACP also brought a defendant class action against firearm distributors, naming three distributors as representative of the 122-member class of similar situated companies. The 122-member class, and far smaller prospective classes, should satisfy the numerosity test.

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35. *Id.*

36. *See* Arduini v. Automobile Ins. Co. of Hartford, 583 A.2d 152, 154 (Conn. Super. Ct. 1990).

37. *In re* Itel Sec. Litig., 89 F.R.D. 104, 112 (N.D. Cal. 1981).

38. *See* Dale Elecs., Inc. v. R.C.L. Elecs., Inc., 53 F.R.D. 531, 534-36 (D.N.H. 1971) (certifying defendant class of 13); *see also* Osborne v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 94 F.R.D. 23, 25 (D. Del. 1981) (certifying defendant class of 3700).

39. *See, e.g.*, Marcera v. Chinlund, 595 F.2d 1231, 1237 (2d Cir. 1979) (certifying defendant class of 42), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Alvarado Partners v. Metha, 130 F.R.D. 673, 675 (D. Colo. 1990). *But see* Danis v. USN Comm., Inc., 189 F.R.D. 391, 400 (N.D. Ill. 1999) (group of 15 failed to meet the numerosity requirement).

40. *See* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, DEP'T OF THE TREASURY, ATF TRACE ANALYSIS REPORT 1995-1998 (Bridgeport).

b. Commonality

Plaintiffs must also demonstrate that there are "questions of law or fact common to the class."[41] This requirement does *not* mandate "a *complete* identity of legal and factual issues among all class members."[42] It only requires that some common questions exist, not that they predominate.[43] In fact, the rules require that only a single issue common to all members of the class exist.[44] "Thus, the mere fact that there may be factual differences is not fatal to class certification."[45] A case is appropriate for certification "where the question of basic liability can be readily established by common issues."[46]

In concluding that the commonality requirement has been met, courts examine both the plaintiff's claims and the anticipated defenses of the class.[47] "In short, commonality is satisfied where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated."[48]

As such, commonality will likely not be an issue in the present context. Lawsuits that have been filed or will be filed in the future by cities, counties, the NAACP and other representative organizations against the gun industry are generally based on two theories of liability. The plaintiffs have collectively alleged that the firearms industry is liable because it has failed to: (1) incorporate reasonable safety devices into their lethal products; and (2) adequately regulate their distribution channels, thereby knowingly permitting firearms to seep into the criminal market.[49] These theories have formed the basis for various claims including violations of state products liability acts, public nuisance, negligent distribution, negli-

41. CONN. PRAC. BOOK § 9-7(2) (2000); FED. R. CIV. P. 23(a)(2).

42. Campbell v. New Milford Bd. of Ed., 423 A.2d 900, 904 (Conn. Super. Ct. 1980).

43. A separate and second finding that common issues predominate over individual issues is required by *Practice Book* § 9-8, once they are found to exist under *Practice Book* § 9-7. Further, if the defendant class may be certified under Rule 23(b)(3), then the predominance of common questions test for such class actions is normally considered in tandem with the Rule 23(a)(2) test. *See* Thillens v. Community Currency Exch. Ass'n, 97 F.R.D. 668, 681-83 (N.D. Ill. 1983) (citing NEWBERG & CONTE, *supra* note 24, §§ 1146, 1148C, the court found conspiracy to be a predominating common issue for all defendant class members even though class members have individual defenses).

44. *See* Sebo v. Rubenstein, 188 F.R.D. 310, 319 (1999).

45. *Cambell*, 423 A.2d at 904.

46. *Id.*; *see In re* Itel Sec. Litig., 89 F.R.D. 104, 112 (1981).

47. *See Campbell*, 423 A.2d at 904-05.

48. *Id.* (quoting Gordon v. Forsyth County Hosp. Auth., 409 F. Supp. 708, 717-18 (M.D.N.C. 1976)).

49. *See* Amended Complaint at ¶¶ 1-5, Ganim v. Smith & Wesson, No. CV 99 0361279-S (Conn. Super. Ct. Fairfield County filed Apr. 21, 1999) (the "Bridgeport action"); Complaint at ¶¶ 1-11, Morial v. Smith & Wesson Corp., No. 98-18578 (La. Civ. Dist. Ct. Orleans Parish filed Oct. 30, 1998) (the "New Orleans action"); Complaint at ¶¶ 1-7, NAACP v. Acusport Corp., No. 99 CV07037 (E.D.N.Y. filed Oct. 29, 1999) (the "NAACP defendant class action").

gent marketing, unfair trade practices, and civil conspiracy.[50] Common questions of law or fact regarding these theories present a classic model of common issues.

For example, with respect to the negligent marketing and distribution practices of the various members of the gun industry, common legal and factual questions exist regarding: (1) whether the conduct of the members of the class in distributing and/or selling firearms posed harm to plaintiffs; (2) whether all of the defendant class members knew, or should have known, of the movement of handguns from the legitimate handgun market into the "black market" for handguns; and (3) whether all defendant class members marketed, distributed and/or sold handguns negligently.[51] Based on these common questions of law or fact under the liberally construed commonality standard, the litigation against the gun industry under a theory of negligent distribution or negligent marketing, or other common theory, meets the commonality requirement.

c. Typicality

Plaintiffs must also meet the third prerequisite for defendant class certification, which provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[52] The principles governing the "typicality" analysis are "quite similar to those discussed in connection with the *requirement* of commonality."[53] This prong focuses on typical defenses of the representative parties rather than the typical claims.[54] The defenses of the class representative need not be identical to those of the class members so long as they are "substantially similar."[55]

It appears that the defendant class members will have substantially similar defenses to allegations of negligent handgun distribution and failure to implement reasonable safety features into weapons. In the groundbreaking lawsuit *Hamilton v. Accu-Tek*,[56] the defendant manufacturers each argued that:

> (1) they owed the plaintiffs no legal duty; (2) the evidence is insufficient to support the jury's findings of negligence and proximate cause; (3) market share liability does not apply; and (4) plaintiffs' proof with respect to market share was inadequate to support the

50. *See* Amended Complaint at ¶¶ 57, 65, 88, *Ganim* (No. CV 99 0361279-S); Complaint at ¶¶ 14-18, *Morial* (No. 98-18578); Complaint at ¶ 31, *NAACP* (No. 99 CV07037).

51. *See* Amended Complaint at ¶¶ 1-7, *Ganim* (No. CV 99 0361279-S); Complaint at ¶¶ 1-11, *Morial* (No. 98-18578); Complaint at ¶¶ 1-6, *NAACP* (No. 99 CV07037).

52. CONN. PRAC. BOOK § 9-7(2) (2000); FED. R. CIV. P. 23(a)(3).

53. *Campbell*, 423 A.2d at 905 (emphasis added).

54. *See* NEWBERG & CONTE, *supra* note 24, § 4.45.

55. *See* Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668, 678 (N.D. Ill. 1983).

56. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 817-18 (E.D.N.Y. 1999).

jury charge and verdict.[57]

Based on the defenses raised in *Hamilton* and the unified defenses to the claims brought by Bridgeport and others, the firearm manufacturers, distributors and retailers have essentially conceded that their defenses are typical of those of a defendant class thus far.

Even if unique or substitute defenses arise, the court can resolve this problem by ordering that the atypical issue be tried after trial of the class issues.[58] Further, the court can create sub-classes under Rule 23(c)(4) to limit defendant class treatment to perfectly common issues.[59]

d. Adequate Representation

In order to satisfy the last prerequisite for defendant class certification, the plaintiff must show that the defendant class representatives will "fairly and adequately protect the interests of the class."[60] This prerequisite is

> satisfied where the court is assured of vigorous prosecution (or defense), and where there is no conflict between the representative of the class and the other class members. . . . Thus, if the court believes that the representative class members are represented by qualified counsel, and that the named class members have common interests with, and no antagonistic interests against, fellow class members, the adequacy of representation requirement is met.[61]

In determining the adequacy of representation, "'the court should consider whether counsel is competent and diligent, whether the action is a collusive suit, and whether there are any antagonistic or conflicting claims between the representative . . . and members of the proposed class.'"[62] Generally, defendants' efforts to defeat certification of a defendant class based on conflicts between the class representative and other members of the class have been unsuccessful.[63]

Strong due process considerations surround the selection of adequate class representatives since adequate representation is the key to the consti-

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57. *Id.* at 817-18.

58. *See In re* Itel Sec. Litig., 89 F.R.D. 104, 112-13 (N.D. Cal. 1981).

59. *See* 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.61, at 406 (2d ed. 1985).

60. CONN. PRAC. BOOK § 9-7(4); FED. R. CIV. P. 23(a)(4).

61. *Itel Sec. Litig.*, 89 F.R.D. at 113 (citation omitted); *see also* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977); Campbell v. New Milford Bd. of Educ., 423 A.2d 900, 906 (Conn. Super. Ct. 1980).

62. *Id.* (quoting Governor's Grove Condo. Ass'n, v. Hill Dev. Corp., 35 Conn. Supp. 199, 202, 404 A.2d 131, 133 (1979)); *see also East Tex. Motor Freight Sys., Inc.*, 431 U.S. at 405 (holding that the failure to promptly move for class certification bears strongly on the adequacy of representation that class members expect to receive).

63. *See* Northwestern Nat'l Bank v. Fox & Co., 102 F.R.D. 507, 513 (S.D.N.Y. 1984) (holding that defendant class certification is appropriate over a defendant's objection that the interests of the six named representatives will differ materially from the interests of the class members).

tutionality of defendant class actions.[64] Defendant classes present an unusual situation in that the plaintiffs choose the representative.[65] To avoid due process conflicts and ensure defendant class certification, a municipality or other similarly situated plaintiff should choose defendant class representatives that have a sufficient financial interest in defending the present action.[66]

In the actions against the gun industry, finding an adequate representative is a simple task. For instance, if we assume that all firearms manufacturers make up the defendant class, selecting Smith & Wesson as a defendant class representative should suffice. As one of the country's largest handgun manufacturers, Smith & Wesson has a serious financial interest in this litigation.[67] In fact, Smith & Wesson, although not presently part of a defendant class, has taken the lead on behalf of the manufacturers and retailers in the lawsuit filed by the City of Bridgeport.[68] Thus, choosing Smith & Wesson or any other major firearm industry defendant as a class representative will insure a vigorous defense. Accordingly, the adequate representation prerequisite should be satisfied.

3. *Additional Requirements for Defendant Class Certification*

After a plaintiff establishes the four prerequisites for defendant class certification under Connecticut Practice Book § 9-7 or Rule 23(a), it must fulfill additional requirements set forth in § 9-8, or alternatively, Federal Rules of Civil Procedure 23(b)(1), 23(b)(2) or 23(b)(3).[69] Unlike the Federal Rules, which set forth three options for maintaining a defendant class action, § 9-8 is the only provision in the Connecticut Rules of Practice that allows a class to be maintained. Practice Book § 9-8, which is identical to Rule 23(b)(3), requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available meth-

64. *See* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853); Hansberry v. Lee, 311 U.S. 32, 44-45 (1990).

65. *See* Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 640 (1978).

66. *See Itel Sec. Litig.*, 89 F.R.D. at 113.

67. *See* Hamilton vs. Accu-Tek, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999).

68. In *Ganim v. Smith & Wesson*, several defendants joined Smith & Wesson's Motion to Dismiss dated May 21, 1999. *See* Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Ganim v. Smith & Wesson Corp (Conn. Super. Ct. Fairfield County filed May 24, 1999) (No. CV 99 0361279-S) (original motion filed by Smith & Wesson on May 24, 1999); Defendant Colt's Manufacturing Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction (filed May 24, 1999); Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (filed May 24, 1999 by Glock Ges.m.b.H, Glock Inc. and Browning Arms Co.); Motion of Defendants Bryco Arms and B.L. Jennings to Dismiss for Lack of Subject Matter Jurisdiction (filed May 24, 1999). It should be noted that the case was transferred to the Complex Litigation Docket in the Judicial District of Waterbury in New Haven County on March 12, 1999 under the following docket number: CV 99-0153198.

69. *See* CONN. PRAC. BOOK § 9-8 (2000); FED. R. CIV. P. 23(b).

ods for the fair and efficient adjudication of the controversy."[70]

Rule 23(b)(1) states that a defendant class action may be maintained if the prerequisites of Rule 23(a) are met and:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.[71]

Similarly, Rule 23(b)(2) allows a class to be maintained after the Rule 23(a) requirements are met and "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[72]

a. Certification under Practice Book § 9-8 and Rule 23(b)(3)

In order to complete the analysis under Connecticut law, this section will address § 9-8 and its federal counterpart Rule 23(b)(3) before discussing certification under Rule 23(b)(1) or (2).

1. *Predominance of Common Issues*

A plaintiff under Connecticut law must show that "questions of law and fact common to the members of the class predominate over any questions affecting only individual members."[73] Under federal law, this requirement is not mandatory unless class certification is sought under Rule 23(b)(3).[74] This provision under federal or state law is similar to the requirement of commonality, but imposes a further condition that the common issues "predominate over" the individual issues.[75]

In determining whether common questions predominate, courts consider both the plaintiff's claim and the anticipated defenses of the class.[76] Should individual questions arise during the course of litigation, they may

70. CONN. PRAC. BOOK § 9-8.
71. FED. R. CIV. P. 23(b)(1).
72. FED. R. CIV. P. 23(b)(2).
73. *Id.*
74. *See* FED. R. CIV. P. 23(b)(3).
75. *See* Sebo v. Rubenstein, 188 F.R.D. 310, 319 (N.D. Ill. 1999); Rivera v. Rowland, No. CV 95545629, 1996 WL 677452, at *4 (Conn. Super. Ct. Nov. 8, 1996).
76. *See Sebo*, 188 F.R.D. at 319.

be tried separately.[77] The court may also create subclasses or decertify the class.[78]

A thorough review of the lawsuits filed by the cities, counties, the NAACP and other representative organizations will show that common questions predominate over individual issues. These lawsuits, as previously mentioned, involve conduct of the gun manufacturers that is interrelated. For example, the conspiracy claim filed by the City of Bridgeport alleges that manufacturers, retailers and trade associations acted in concert to commit unlawful acts—creating a public nuisance and tacitly or explicitly aiding and abetting the illegal sale of handguns by:

> [F]ailing to develop and implement means and mechanisms they knew, and/or reasonably should have known would prevent their handguns from being fired by unauthorized and/or unintended users; . . . [and] failing to implement means, mechanisms and procedures they know or should have known would prevent their handguns from flowing into the illegal market.[79]

Further, as stated in the commonality section of this Article,[80] there are claims that firearm manufacturers, distributors and retailers were negligent in the marketing and distribution of handguns.[81] Because the focus of these national lawsuits is on claims common to the entire gun industry, they predominate over any questions affecting individual members.

2. *A Superior Method of Adjudication*

The last component of class certification under Practice Book § 9-8 and Rule 23(b)(3) requires a plaintiff to demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The United States Supreme Court has stated "that the class action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of individual parties only.'"[82] The Court further held that a class action "is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn

77. *See In re* Gap Stores Sec. Litig., 79 F.R.D. 283, 305 n.22 (N.D. Cal. 1978).

78. *See In re* Itel Sec. Litig., 89 F.R.D. 104, 114 (N.D. Cal. 1981).

79. First Amended Complaint at ¶ 157(a), (d), Ganim v. Smith & Wesson Corp., No. CV 99 0361279-S (Conn. Super. Ct. filed Apr. 22, 1999); *see also* Complaint at ¶¶ 47-53, NAACP v. Acusport Corp., No. CV 9907037 (E.D.N.Y. filed Oct. 29, 1999) (claiming that defendants failed to prevent the illegal distribution of weapons); Complaint at ¶¶ 5-11, 17, 18, Morial v. Smith & Wesson Corp., No. 98-18578 Div. M (La. Civ. Dist. Ct. Orleans Parish filed Oct. 30, 1998) (same); First Amended Complaint at ¶¶ 23-28, City of Chicago v. Beretta U.S.A., No. 98 CH 015596 (Ill. Cir. Ct. Cook County filed Apr. 7, 1999) (alleging that defendants failed to take available measures to prevent the use of firearms by unauthorized users).

80. *See supra* Part IV.B.2.b.

81. *See supra* notes 48-50 and accompanying text.

82. General Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

on questions of law applicable in the same manner to each member of the class.'"[83] An obvious advantage of a class action is that, if used in appropriate cases, it "'saves the resources of both the courts and the parties.'"[84]

Further, the Connecticut Supreme Court has stated that the "class action procedures set forth in the Practice Book [§ 9-7 et seq.], like Federal Rule 23, are designed to increase efficiencies in civil litigation by encouraging multiple plaintiffs to join in one lawsuit."[85] The court noted that "[m]any jurisdictions have recognized that in certain situations, class action suits are superior to individual lawsuits."[86] Class action suits are advantageous because they: (1) promote judicial economy and efficiency; (2) protect defendants from inconsistent obligations; (3) protect the interests of absentee parties; and (4) provide access to judicial relief for small claimants.[87]

In examining the superiority requirement with respect to defendant class actions, "courts most often address the right of class members to opt out of the class."[88] Under Connecticut common law rules, a class member may opt out of the class: "In a federal class action claim each putative class member would be required to affirmatively join the suit. . . . In [Connecticut], all the putative class members are part of the class and their rights are conclusively determined unless they affirmatively opt out of the class."[89]

Certification of a defendant class would be futile if all class members exercised their right to be excluded from the class.[90] Certification decisions, therefore, appear to turn on the court's assessment of the likelihood that members of the defendant class will opt out.[91] This problem is alleviated by the threat of individual lawsuits that discourage the defendants' desire to opt out of the defendant class.[92]

In the lawsuits brought by cities, counties, the NAACP and other representative organizations against the gun industry, the defendant class ac-

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83. *Id.* (quoting *Califano*, 442 U.S. at 701).

84. *Id.*

85. Grimes v. Housing Auth., 242 Conn. 236, 698 A.2d 302, 306 (1997).

86. *Id.*

87. *See id.*

88. Solovy et al., *Class Action Controversies*, 499 PLI/LIT. 7, 583 (1994). Significantly, the *Connecticut Practice Book* does not contain an express provision similar to Federal Rules of Civil Procedure 23(c)(2)(A) whereby a party can request exclusion from the class.

89. Canzolino v. United Tech. Corp., No. CV 9400486965, 1998 WL 165073, at *15 (Conn. Super. Ct. 1998); *cf.* Fetterman v. University of Conn., 41 Conn. Supp. 141, 559 A.2d 246, 247 (Conn. Super. Ct. 1988) (denying motion for class certification based on the absence of fair and adequate representation necessary to protect the due process rights of absentee class members).

90. *See* Solovy et. al., *supra* note 86, at 583.

91. *See In re* LILCO Sec. Litig., 111 F.R.D. 663, 673 (E.D.N.Y. 1986) (certifying defendant class because it perceived no leverage gained by defendants even if they did opt out because plaintiffs had intended to join all defendants if certification were not granted).

92. *See id.* at 674.

tion should be considered a superior method to adjudicate the interests of the parties based on the common issue of negligent handgun distribution and unsafe design, among other things. Further, because most of the wholesalers, retailers and manufacturers are identifiable, opting out would not help members of the defendant class because a plaintiff can join them or pursue individual actions. Accordingly, a defendant class action is maintainable under Practice Book § 9-8 and Rule 23(b) as a superior method for the efficient adjudication of the present controversy.

b. Certification Under Rule 23(b)(1) or (b)(2)

Once the court determines that the prerequisites of Rule 23(a)[93] have been met, it must decide whether the class is certifiable under one of the provisions of Rule 23(b). The provision chosen under this rule is critical because 23(b) provides various options for certifying the defendant class that raise notice and due process concerns for the defendant class members.[94]

c. Rule 23 (b)(1)

Cities, individuals and non-profit organizations seeking to create a defendant class of defendant members of the firearms industry should seek certification pursuant to Rule 23(b)(1).[95] This rule provides obvious benefits to plaintiffs because it does not require that the defendants be notified individually, or be given an opportunity to opt out."[96] By contrast, Rule 23(b)(3), discussed above, requires that reasonable notice of the lawsuit be given to all class members and that they be advised of their right to opt out.[97]

In the gun lawsuits, prosecution of a defendant class action should be certified under Rule 23(b)(1).[98] Failure of a court to certify a defendant class under this rule may result in the prosecution of separate actions against manufacturers, distributors and retailers and create a risk of: (1)

93. As previously stated, the analysis under Rule 23(a) is identical to that of Connecticut Practice Book § 9-7. *See supra* Part IV.A.

94. Rule 23(b)(3) was previously discussed in conjunction with Connecticut Practice Book § 9-8. *See supra* Part IV.B.3.

95. Federal Rule of Civil Procedure 23(b)(1) provides:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

FED. R. CIV. P. 23(b)(1).

96. Williams v. State Bd. of Elections, 696 F. Supp. 1574, 1576-77 (N.D. Ill. 1988).

97. *See id.* at 1577.

98. *See id.* (certifying defendant class action under Rule 23(b)(1)).

inconsistent or varying judgments with respect to the individual defendants which would establish incompatible standards of conduct for the plaintiffs; or (2) judgments with respect to the individual defendants which would as a practical matter be dispositive of the interests of other defendants not parties to the action.[99] It would also substantially impede the ability of these unnamed parties to protect their interests.

For example, if a municipality successfully prosecuted a products liability claim against certain manufacturing defendants, the court could rule that a firearm must possess certain safety features. Such a finding would have a dramatic impact beyond the local litigation for each manufacturer doing business in the State of Connecticut. Similarly, if a judicial ruling established a duty to distribute firearms in a particular manner, such a ruling could have nationwide implications for manufacturers, distributors and retailers alike. A defendant class consisting of each manufacturer will eliminate the possibility of inconsistent judgments and ensure that the interests of non-parties are adequately protected.

A court certifying a defendant class pursuant to Rule 23(b)(1) also has the option to certify a class generally or limit certification to particular common issues. The court could certify a class or sub-class for common issues that could be "dispositive of the entire litigation."[100] Class treatment should be structured to encompass common issues, permitting individual defendants to raise unique defenses. Such a procedure would eliminate due process concerns and permit class certification.[101]

If a choice exists between certifying a class under subsections (b)(1) or (b)(3), courts should proceed under "(b)(1) exclusively in order to avoid inconsistent adjudication or a compromise of class interests." [102] The court should not hesitate to opt for (b)(1) over (b)(2).[103] Moreover,

> the rationale for this preference is that ordinarily no one wants to be a defendant, so that defendant class members who have an opportunity to opt out can be expected to do so . . . . Massive opt-out undermines the breadth and finality of judgments, increases the possibility of duplicative litigation, and lessens the probability of giving plaintiffs full relief.[104]

Thus, in light of the fact that defendant classes involving the gun industry can be certified under either Rule 23(b)(1) or Rule 23(b)(2), courts should certify the manufacturers, distributors and wholesalers as a defendant class

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99. *See* Grimes v. Housing Auth., 698 A.2d 302, 306-07 (Conn. 1997).

100. NEWBERG & CONTE, *supra* note 24, § 4-62, at 4-236.

101. *See id.*

102. First Fed. v. Barrow, 878 F.2d 912, 919 (6th Cir. 1989) (quoting Reynolds v. NFL, 584 F.2d 280, 284 (8th Cir. 1978)).

103. *See* Williams v. State Bd. of Elections, 696 F. Supp. 1574, 1577 (N.D. Ill. 1988).

104. *Id.* (citation omitted).

or classes under Rule 23(b)(1).

Accordingly, class certification under Rule 23(b)(1) in this context is necessary not only to conserve judicial resources, but also to provide "an efficient vehicle for achieving unitary adjudication."[105]

d. Certification Under Rule 23(b)(2)

Like Rule 23(b)(1), this rule has no counterpart under Connecticut law. Classes under this rule should be certified where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole."[106] Although the issue of whether a defendant class can be certified is unsettled, the better-reasoned view is that a defendant class can be certified under this provision under this rule.[107] There is no dispute, however, that district courts have certified defendant classes under Rule 23(b)(2), as demonstrated in over forty-five cases.[108]

In all of the lawsuits filed by cities, counties and the NAACP against the gun industry there is an injunctive relief component.[109] In the Bridgeport action, for example, the City of Bridgeport sought preliminary and injunctive relief enjoining the defendant members of the firearm industry from: (1) continuing to distribute handguns without appropriate safety devices; (2) using any unfair or deceptive sales practices; and (3) using any unfair or deceptive advertising practices in the future.[110] Further, the City of Bridgeport sought injunctive relief requiring the defendant manufacturers and retailers: (1) to create and implement standards regarding their distribution of handguns as well as the conduct of the gun dealers to whom distributors supply handguns; and (2) to fund studies, programs, advertising campaigns and other events focused upon handgun safety and owner responsibility.[111]

In actions against the gun industry where injunctive relief is sought, it is appropriate to certify a defendant class under Rule 23(b)(2). For this reason, it was proper for the NAACP to seek class certification under Rule 23(b)(2) in its recently filed defendant class action against distributors.[112]

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105. *First Fed.*, 878 F.2d at 919.

106. FED. R. CIV. P. 23(b)(2).

107. *See* Marcera v. Chinlund, 595 F.2d 1231, 1239 (2d Cir. 1979), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979); Monaco v. Stone, 187 F.R.D. 50, 66 (E.D.N.Y. 1999) (finding certification of a defendant class under Rule 23(b)(2) is appropriate). *But see* Henson v. East Lincoln Township, 814 F.2d 410, 413, 417 (7th Cir. 1987); Thompson v. Board of Educ., 709 F.2d 1200, 1203-04 (6th Cir. 1983); Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980).

108. *See Henson*, 814 F.2d at 413.

109. *See e.g.*, First Amended Complaint at ¶ 5, Prayer for Relief, Ganim v. Smith & Wesson Corp., No. CV 99 0361279-S (Conn. Super. Ct. Fairfield County. filed Apr. 22, 1999).

110. *See id.*

111. *See id.*

112. *See* Complaint at ¶ 28, NAACP v. Acusport Corp., No. 9907037 (E.D.N.Y. filed Oct. 29, 1999).

V. CONCLUSION

Although untested, the defendant class action should permit a municipality to efficiently ensnare each culpable and irresponsible member of the firearms community into the throes of litigation. This procedural vehicle ensures consistent adjudication for all parties and promotes judicial economy. Municipalities, individuals or other entities should be strongly encouraged to examine closely the viability of bringing defendant class actions to curb senseless and preventable firearms violence and to end the seepage of firearms into the illegal market.