

Slowly but Surely:
The U.S. Congress' Attempt to
Shield Gun Manufacturers from
Liability

Mireia Artigot i Golobardes

J.S.D. Candidate, Cornell Law School
Myron Taylor Hall, Ithaca, NY

316

Summary

1. Introduction
2. Grounds of Lawsuits Against Gun Manufacturers
3. Congress' position: No claims allowed against any member of the firearm industry
4. Conclusion
5. Appendix - The Protection of Lawful Commerce in Arms Act
6. References

1. Introduction

During the last ten years, there has been an exponential raise in suits brought against gun manufacturers and distributors.

Until now, most of these claims have been dismissed in favor of defendants by courts that have understood that these claims did not state a cause of action either under product liability theories, negligence and negligent entrustment, public nuisance or market share liability.

In October 1998, however, the tendency changed and private citizens were joined by municipalities such as New Orleans, that became the first municipality to file a suit against the gun industry.¹ Since then many cities in the U.S. have sued manufacturers, distributors or other participants of the gun industry.² One of the latest cases has taken place in New York, where in 2004 New York city sued the gun manufacturers and sellers for creating a public nuisance by marketing and distributing firearms in ways that make them accessible to criminals.

These suits represented a first step adopted by victims together with municipalities in trying to claim damages against gun manufacturers for the harm caused by firearms. However, even though some Congressmen had manifested their position towards these lawsuits, up to now the legislative power had not made explicit its standpoint regarding the scope of liability to which gun manufacturers should be exposed to.

The difficulty to success in these lawsuits and in receiving compensation for the harm suffered implied that victims and their attorneys used legal theories that were not meant to be applied in this context. For this reason, despite the victims' energy and imagination, they were generally unsuccessful in their claims. There was still hope, though.

However, on October 26 2005, Congress passed the *Protection of Lawful Commerce in Arms Act*, which seeks to protect firearms manufacturers from being sued for the criminal misuse of their lawful products by third parties. This legislation seeks to prevent abuses to the American legal system from frivolous lawsuits.

This brief note will present an overview of the origin and the evolution of the suits filed against gun manufacturers and continue with a concise presentation of the content of this new act. In an earlier paper presented by this electronic journal³ I claimed that given that, despite the lack of specific regulation applicable to these lawsuits against gun

¹ See *Morial v. Smith & Wesson Corp.*, No. 98-18578, 2000 WL 248364 (La. Civ. D. Ct. Feb. 28, 2000) (filed Oct. 30, 1998).

² See *Firearms Litigation Clearinghouse*, *Firearms Litigation: Current Cases*, at <http://www.firearmslitigation.org/>

³ Mireia ARTIGOT I GOLOBARDES (2003), *City of Cincinnati v. Beretta, U.S.A. Corp. et al.: An analysis of U.S. Lawsuits against the Firearms Industry*, www.indret.com, 04-2003.

manufacturers, the existing legal theories should not be stretched in such cases because this was not the role of courts and judges but of the legislature.

However, the situation now is quite different given that it seems that Congress has decided to protect the firearms industry from these lawsuits based on the understanding that a significant amount of them are frivolous, by making it very difficult for victims to bring a claim against gun manufacturers for the harm suffered by guns.

Even though this Act has just been passed and it is difficult to assess its impact and its interaction with state regulation in light of its current lack of application, it is still worth presenting this new regulation recently passed by the U.S. Congress.

2. *Grounds of Lawsuits Against Gun Manufacturers*

I will now briefly present an overview of the different legal theories upon which lawsuits against gun manufacturers were brought.⁴ I believe that this will allow us to better assess and understand the potential impact of the *Protection of Lawful Commerce in Arms Act* that was recently passed.

The first suits against gun manufacturers were brought as **products liability** claims.⁵ However, product liability does not impose liability for dangerous products as such but only for the harm caused by products that are deemed to be defective – either because of a manufacturing defect, a defect on the product design or a defect based on the failure to warn or to instruct.⁶ Guns are not defective products, just dangerous, and this resulted in product claims against gun manufacturers being dismissed unless the gun was proved to be defective.⁷

In light of the failure of product liability theories, plaintiffs sought alternative theories in order to hold gun manufacturers liable, including the traditional **negligence** concept of tort law. Concretely, plaintiffs focused on the conduct of defendants and alleged gun manufacturers' negligent marketing.⁸

⁴ For a more detailed discussion in this issue see Mireia ARTIGOT I GOLOBARDES, *supra* note 3.

⁵ In several states there was common products liability law that later was collected in a text and passed as a products liability statute. An important problem presented by the coexistence between products liability statutes and court-made products liability law is to determine whether the statute preempts the courts' opinions. However, this question is beyond the scope of this paper.

⁶ See Gary T. SCHWARTZ (2000), *Tort issues in light of the Cigarette Litigation: Cigarette Litigation's Offspring: Assessing Tort Issues Related to Guns, Alcohol & Other Controversial Products in light of the Tobacco Wars*, 27 Pepp. L.Rev. 751, 752.

⁷ See David KAIRYS (1998), *Legal Claims Of Cities Against The Manufacturers Of Handguns*, 71 Temple L.Rev. 1, 12. Despite the gun's nature and its use, they are not considered defective products unless they fit into one of the defective categories –manufacturing defects, design defects or defects for the failure to warn or instruct - established by the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, (1998).

⁸ See Richard J. FIATO (2001), *Note: Gun Manufacturers And Gun Violence: Should Gun Manufacturers Be Liable? In Some Cases Perhaps They Should Be Or On The Other Hand, Maybe Not*, 78 U. Det. Mercy L. Rev. 675, 678. It has been suggested that gun manufacturers could be held liable under Negligent Entrustment because gun manufacturers market their products in a way that made possible and foreseeable that the product would

In order to sustain a negligence claim, plaintiffs must show the *prima facie* elements of negligent conduct.⁹ These elements are the existence of a legal duty of care, a breach of the duty, the existence of damages resulting from this breach and that the manufacturer's breach of the duty was the proximate cause of the plaintiff's harm. However, legal policy requires that "courts must be mindful of the precedential, and consequential, future effects of their rulings, and 'limit the legal consequences of wrongs to a controllable degree.'¹⁰" In other words, courts must determine the scope of this duty as well.

Generally, plaintiffs' suits against gun manufacturers under the negligent marketing theory did not prevail¹¹ because of major causation¹² and duty problems.¹³

Imposing a general duty of care upon the makers of firearms under these circumstances based on their supposed ability to control the marketing and the distribution process of their products would conflict with the principle that any judicial recognition of a duty of care must be based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens.¹⁴

The major problem in imposing a duty on gun manufacturers is that it is very difficult, if not impossible, to define its scope given that a duty may not be predicated just because it is foreseeable that persons may be killed or injured by defendants' lethal products.¹⁵ Victims of illegal handguns could not show that a change in the marketing techniques would likely have prevented their injuries.¹⁶

Therefore, imposing such duty could create an indeterminate class of plaintiffs as well as an indeterminate class of defendants whose liability might have little relationship to the benefits of controlling illegal guns.

reach an illegal market like the criminals market. This theory holds manufacturers liable if victims can establish that they knew or had reason to know that the dealers to which it sold had a history of have a history of sales to ineligible buyers. However, this theory did not succeed because it is generally considered applicable only to the entrustment of products to children.

⁹ *Id.* at 676.

¹⁰ *Lauer v City of New York*, 95 N.Y.2d 95, 100 [quoting *Tobin v Grossman*, 24 N.Y.2d 609, 619].

¹¹ *See City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *Philadelphia v. Beretta U.S.A. Corp.*, 277 F. 3d 415 (3d Cir. 2002); *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001); *Carrel v. Allied Prods. Corp.*, 677 N.E.2d 795 (Ohio 1997).

¹² For an analysis of the causation problems presented in handgun cases see Aaron TWERSKI/ Anthony J. SEBOK (2000), *Liability Without Cause? Further Ruminations On Cause-In-Fact As Applied To Handgun Liability*, 32 Conn. L. Rev. 1379, 1387. *See also Philadelphia v. Beretta U.S.A. Corp.*, 277 F. 3d 415 (3d Cir. 2002). Plaintiff alleged that the gun industry's methods for distributing guns were negligent and a public nuisance. The court granted defendant's a motion to dismiss, because the plaintiffs did not establish the necessary causal nexus between the defendants' conduct and their alleged injuries and therefore could not recover under any legal theory asserted.

¹³ *See Trujillo v. City of Albuquerque*, 603 P.2d 303 (Ct. App. N.M. 1979), *Boston v. Smith & Wesson*, 2000 Mass. Super. LEXIS 352 (Mass. 2000). In these cases the plaintiffs' negligence claim was dismissed because did not establish defendant's duty that needed to take into consideration factors such as the foreseeability of the harm to the plaintiff, the degree of the certainty that the plaintiff suffered the injury, and the closeness of the connection between the defendant's conduct and the injury suffered.

¹⁴ *Waters v New York City Hous. Auth.*, 69 N.Y.2d 225, 230

¹⁵ *Hamilton v. Beretta*, 96 N.Y.2d 222, 235 (2001)

¹⁶ *Ibid.*

Consequently, given the difficulty to define the scope of this duty and how difficult it is for courts to distinguish between cases where a gun has been properly distributed from cases where a gun has been distributed improperly and ended in the hands of future criminals,¹⁷ courts generally considered that gun manufacturers owed no duty to insure against third parties for the criminal use of their non-defective products.¹⁸

An alternative basis for imposing a duty of care was the **negligent entrustment** doctrine, based on the supposed authority of firearms manufacturers over “downstream distributors and retailers” to whom they deliver their products.¹⁹

The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have regarding the trustee's propensity to use the chattel in an improper or dangerous manner. In this sense, the owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others.²⁰ This tort interacts with Federal law that has already implemented a statutory and regulatory scheme to ensure the seller's "responsibility" through licensing requirements and buyer's "responsibility" through required background checks.

Courts have considered that the negligent entrustment doctrine might well support the extension of a duty to manufacturers through successive, reasonably anticipated trustees. This extension seeks to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis. Thus, gun suppliers have been subjected to liability under this theory²¹ as long as they knew or should have known the individual's ability to use the gun safely.²²

However, general statements or claiming that manufacturers about an industry are not enough to establish that the gun supplier's duty. Therefore, stating that gun manufacturers should not engage in certain categories of sales is not enough given that defendants do not have an affirmative duty to investigate and identify corrupt dealers, which would not be feasible anyway. Courts have required showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market, otherwise the defendant's duty would become far wider than the danger it seeks to prevent.

Plaintiffs have also tried to use the **market share liability** theory, which provides an exception to the general rule that in common-law negligence. Under this theory, a plaintiff

¹⁷ Emily KROMKE (2003), *California's legislative response to Merrill v. Navegar: An Analysis*, 24 Whittier L. Review 833, 849.

¹⁸ See FIATO, *supra* note 8 at 677.

¹⁹ Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 821 (E.D.N.Y. 1999);

²⁰ See, Rios v Smith, 95 NY2d 647; Splawnik v Di Caprio, 146 AD2d 333, 335; Restatement [Second] of Torts § 390

²¹ Splawnik, *supra*; see also, Cullum & Boren-McCain Mall v Peacock, 267 Ark 479, 592 SW2d 442 [1980];

²² Earsing v Nelson, 212 AD2d 66

must prove that the defendant's conduct was a cause-in-fact of the injury.²³ However, in order to apply the market share liability theory, Courts have required that products are fungible and that it is not possible to identify the manufacturer of the product that caused the injury to a particular plaintiff.²⁴

Courts have considered that this liability theory is not adequate in the firearms context given that it is often possible to identify the type of firearms and its manufacturer and the marketing techniques of the different gun manufacturers are not uniform – gun manufacturers have different marketing activities that allegedly contribute to the illegal handgun market in different ways and to different extents. Therefore, simple apportionment would not lead to a fair result. Courts in New York and other jurisdictions have refused to extend the market share theory where products were not fungible and differing degrees of risk were created²⁵ because the manufacturer's share of the national handgun market does not necessarily correspond to the amount of risk created by its alleged tortious conduct.

Furthermore, there is a significant difficulty in proving precisely which manufacturer caused any particular plaintiff's injuries since guns used in crimes are often not recovered.²⁶ The inability to locate evidence, however, does not alone justify the extraordinary step of applying market share liability.²⁷ Rather, a more compelling policy reason is required for the imposition of market share liability.

In light of the failure of the traditional tort categories to hold gun manufacturers liable, plaintiffs' lawyers thought that **nuisance** was a broadly defined tort whose flexible crime-fighting content could allow them to state causes of action against gun manufacturers.²⁸

In the Restatement (Second) of Torts, nuisance is used to refer to the harm to another or to the invasion of an interest and specifically states that “nuisance” does not signify any particular kind of conduct on the part of the defendant. Instead, the concept of nuisance refers to two particular kinds of harm – the invasion of two kinds of interests – by conduct that is tortious only if it falls into the usual categories of tort liability.²⁹

²³ The first time that the market share liability was adopted by the Second Circuit was in *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487, *cert.denied*, 493 US 944 (1989) where the Court held that plaintiffs injured by the drug DES were not required to prove which defendant manufactured the drug that injured them but instead, every manufacturer would be held responsible for every plaintiff's injury based on its share of the DES market.

²⁴ Hamilton, *supra* note 15, at 240.

²⁵ See, e.g., *Brenner v American Cyanamid Co.*, 263 AD2d 165 (lead pigment used in paint); *DaSilva v American Tobacco Co.*, 175 Misc 2d 424 (dealing with cigarettes).

²⁶ Hamilton *supra* note 15, at 241.

²⁷ See *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601.

²⁸ See *Developments in the Law (2000), The Paths of Civil Litigation II: The use of the Public Nuisance Tort Against the Handgun Industry*, 113 Harv. L. Rev. 1759, 1760.

²⁹ See *id.* § 824:

Type of Conduct Essential to Liability (1965):

The conduct necessary to make the actor liable for either a public or a private nuisance may consist of

(a) an act; or

Public nuisance focuses on the rights of the general public rather than the rights of particular people harmed.³⁰ This doctrine has been used in the environmental, the asbestos and the tobacco litigation context.³¹ However, the new litigation focus is the gun cases. Recent judicial decisions have rejected nuisance as a basis for liability in these cases because courts have considered that if defective products are not a nuisance as a matter of law, it would not make any sense to consider a non-defective, lawful product as a nuisance.³²

Municipalities believed that manufacturers of guns facilitated, sustained and sometimes even encouraged the demand for their products for their use in criminal acts. By doing that, municipalities believed that gun manufacturers promoted guns to everybody else as necessary for their protection against guns used by criminals³³ and that this conduct constituted public nuisance.³⁴ The basis of those claims was the direct, foreseeable and known harm done to the cities by marketing, distributing and promoting policies and practices of gun manufacturers³⁵ and therefore making them available for the purposes of committing a crime.³⁶ In the few cases brought by individuals³⁷ against gun manufacturers based on public nuisance, the defendants' motions to dismiss were granted.

Regardless of whether these public nuisance claims are brought defending the population against risks posed by firearms or as a direct plaintiff who suffers losses, whether the actions of the gun industry constitute public nuisance is crucial to the outcome of these suits because if successful, the government tools for crime control would be significantly increased.

However, this situation may start changing in New York and from there, in other cities throughout the U.S.

In 2004 New York City sued the gun manufacturers and sellers for creating public nuisance by marketing and distributing firearms in ways that make the accessibility of handguns

(b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the private interest.

³⁰ See David KAIRYS (2000), *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1173.

³¹ See Lauren E. HANDLER/ Charles E. ERWAY (2002), *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 Def. Couns. J. 484, 487.

³² See Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001).

³³ See KAIRYS, *supra* note 19 at 12.

³⁴ Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001). The plaintiff in this case, Camden County, considered that the gun manufacturers' marketing and distribution of handguns created and contributed to the widespread criminal use of handguns in the county and that this was a public nuisance for the county because this conduct endangered public safety, health, and peace, and imposed inordinate financial burdens on the county. However, the Court of Appeals affirmed the District Court judgment and dismissed the claim. See also Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882 (Dis. Ct. E.D. Pa. 2000).

³⁵ See David KAIRYS (1998), *Legal Claims Of Cities Against The Manufacturers Of Handguns*, 71 Temple L.Rev. 1, 13.

³⁶ KAIRYS, *supra* note 30 at 1173.

prevalent to criminals. Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York found that New York law permits the City to bring lawsuits against gun manufacturers and sellers for creating public nuisance. The City's current complaint seeks no damages but instead requests an injunction requiring the defendants to adopt responsible business practices. However, this lawsuit is still pending at this time.

Admitting that this claim already states a cause of action of public nuisance is already very important but the outcome of this lawsuit is of crucial importance for the future evolution of the lawsuits against gun manufacturers and more generally the firearms industry as a whole, because it may open the possibility to prevail against gun manufacturers for the harm caused by their non-defective products.

It is too early, though, to foresee how this lawsuit will turn up. However, anticipating this possibility, Congress has stepped in and significantly protected and helped the firearm industry by recently enacting the *Protection of Lawful Commerce in Arms Act*.³⁸

3. Congress' position: No claims allowed against any member of the firearm industry

Based on the separation of powers established in the U.S. Constitution, judges and courts are not designed and qualified for determining whether certain activities that are completely legal impose too much risk to citizens through the application of legal theories not meant for this purposes.

I believe that it is the legislative power the one with the authority to establish the mechanisms to determine that a product is inherently dangerous and therefore should be kept out of the market or whether should be legally marketed but by participants of the industry internalizing the costs of the harm caused. It is the responsibility of the legislature to determine the policy regarding commerce and therefore to set gun laws³⁹, and the job of the judiciary to interpret that policy and ensure that the constitutional integrity is maintained.⁴⁰

When an older article involving this issue was published in this electronic journal, U.S. Congress had not made an explicit statement regarding the liability of the firearms

³⁷ See *NAACP v. A.A.Arms, Inc.*, 2003 U.S. Dist. LEXIS 8238 (E.D.N.Y. 2003), *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Bubalo and Dofflyn v. Navegar*, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. 1998).

³⁸ PROTECTION OF LAWFUL COMMERCE IN ARMS ACT, PL 109-92, 2005 S 397 (2005)

³⁹ KROMKE, *supra* note 17 at 853.

⁴⁰ *Id.* at 851. Even though this idea is beyond the scope of this paper, it is worth mentioning that besides this horizontal distribution of powers problem between courts, legislatures and the executive branch, another tension arises with the vertical distribution of powers between municipal, state and federal decision making. The distribution of the social costs caused by the gun industry is asymmetric because rural areas are less affected by firearms violence than urban areas. Cities disproportionately bear the costs of illegal use of guns and senators from rural states routinely block gun control legislation because they do not face the horror that urban mayors do. This could be a reason why mayors from cities where firearms violence is a problem turn to the courts as a democratic safety valve.

industry and the tendency of the lawsuits filed against some gun manufacturers. However, the context and the general framework of this situation is completely different for two major reasons.

First, courts have started to allow bringing legal claims against gun manufacturers that attempted to hold them liable. In this sense, Courts have begun to be sensitive to seller's responsibility regarding harm caused by guns sold for example, illegally or to criminals and have started to take steps prevent such bad commerce and bad use of guns.

At the same time and despite the National Rifle Association efforts to silence this issue, courts have started to point out the legal gap regarding gun safety given that guns are one of the few products –if not the only one – not subject to any specific safety regulation.

In light of this situation, it can be considered a great success for the industry the *Protection of Lawful Commerce in Arms Act*,⁴¹ which is a bill that was just passed by the U.S. Congress given that from a practical perspective, it is possible to fear that it closes the door of U.S. courthouses to firearms victims.

Some say, and there are ground supporting such conclusion, that this bill provides immunity to the firearm industry in the U.S. However such conclusion might be too premature.

A similar measure had previously been rejected by the U.S. Senate on March 2, 2004 but on October 26 2005 this bill was passed. This Act aims to address the increasing number of pending lawsuits brought both by individuals and by municipalities against gun manufacturers whose products are used to commit a violent crime.

This bill, though, is very protective of the firearms industry given that it prevents victims of gun-related crimes from suing gun makers and dealers and therefore makes significantly harder holding gun manufacturers liable when their products are used to commit a crime given that it prohibits bringing any liability claim against gun makers and dealers in any state or federal court while requires dismissing any pending actions against them.

Citing the specific words of the bill, firearm victims cannot file a lawsuit against manufacturers or sellers of firearms, ammunition, or components of a firearm for the damages they suffered as a consequence of the “criminal or unlawful misuse of a firearm.” So for example, a gun manufacturer would not be liable if a criminal uses one of the weapons he manufactures and kills a number of people or, for example, if a gun dealer does not keep track of his inventory and some guns disappear and without reporting this to the authorities; these guns are used to commit crimes resulting in deaths.

This bill, though, includes some expectations that would hold gun manufacturers liable: in cases where the person or persons who sell or transfer the firearm do so knowingly that it

⁴¹ PROTECTION OF LAWFUL COMMERCE IN ARMS ACT (2005), *supra* note 38.

will be used in the commission of a crime of violence or in a drug trafficking crime; where federal or state laws are violated in the transfer of the firearms and the violation is the proximate cause of the harm for which relief is sought; where there is a breach of contract or warranty in connection with the purchase of the firearm and in cases of death, physical injuries, or property damage resulting directly from a defect in design or manufacture of the firearm when this is used as intended or in a reasonably foreseeable manner.

Given how popular firearms fairs are in little U.S. towns, the interpretation and application of this provision that opens a slight opportunity to hold gun manufacturers liable, will be crucial for these lawsuits.

However, the fact that no other industry gets this special legal protection regarding the liability derived from the harm caused by their products is already too alarming for not commenting this Act.

It is far too early to foresee how the interpretation and implementation of this provision and of the whole act will be and whether it will be considered constitutional or not. Even though the opinions where this exception has been challenged have not been released at this time while I am writing this note, it has been key already in certain lawsuits and this seems to be just the beginning.

Even though this act raises many issues regarding the Congress' standpoint concerning the degree and the circumstances under which gun manufacturers should be held liable, it will not be until later in time when we will be able to assess the impact of this act that has just been passed.

4. Conclusion

As mentioned in a previous article,⁴² the legislature - and not the courts - should be deciding which activities will be considered legal and socially necessary activities and therefore whether the costs derived from them will be borne by the society as a whole; and which costs derived from them should be borne by the different agents participating in that industry, instead of holding liable the participants of a certain legal and heavily regulated industry of the costs derived from their legally marketed product. Therefore, I believe that the explicit step adopted by Congress is very valuable in order to prevent filing frivolous lawsuits against gun manufacturers. Even if I disagree with the current wording and the content of the *Protection of Lawful Commerce in Arms Act*, I believe that it is not good judicial policy stretching and using existing tort categories inadequately in order to be able to hold gun manufacturers liable, even in cases where the defendant's conduct does not fit

⁴² Mireia ARTIGOT I GOLOBARDES, *supra* note 3.

in any tortious conduct subject to liability.⁴³ Doing so would represent an inadequate and discretionary application of the existing legal instruments.

However, in light of the remarkable amount of victims of firearms in the U.S. and the important problem of violence existing in the U.S., it is kind of disappointing to witness the Act passed by Congress and therefore the position adopted, which is possible to interpret as an important victory of U.S. conservative groups and of the gun industry as a whole.

⁴³ For an opposite opinion and a defense of the use of strict liability for handgun manufacturers see Paul R. BONNEY (1998), *Strict Liability for Handgun Manufacturers*, 1985, in *ECONOMIC ANALYSIS OF TORT AND PRODUCTS LIABILITY LAW*, 221-247 (Jenny B. Wahl ed. Garland Publishing, Inc.).

5. *Appendix – The Protection of Lawful Commerce in Arms Act*

UNITED STATES PUBLIC LAWS
109th Congress - First Session
Convening January 7, 2005

PL 109-92 (S 397)
October 26, 2005

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

An Act To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

15 USCA § 7901 NOTE

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protection of Lawful Commerce in Arms Act".

15 USCA § 7901

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.--Congress finds the following:

- (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
- (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.
- (3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
- (4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.
- (5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.
- (6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our

Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) PURPOSES.--The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.--A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.--A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.

15 USCA § 7903

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS.--The term "engaged in the business" has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.--The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.--The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.--The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION. —

(A) IN GENERAL.--The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include —

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including —

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26, United States Code.

(B) NEGLIGENT ENTRUSTMENT.--As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) RULE OF CONSTRUCTION.--The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this Act shall be construed to create a public or private cause of action or remedy.

(D) MINOR CHILD EXCEPTION.--Nothing in this Act shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) SELLER.--The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level.

(7) STATE.--The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.--The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) UNLAWFUL MISUSE.--The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

SEC. 5. CHILD SAFETY LOCKS.

18 USCA § 921 NOTE

(a) SHORT TITLE.--This section may be cited as the "Child Safety Lock Act of 2005".

18 USCA § 922 NOTE

(b) PURPOSES.--The purposes of this section are—

(1) to promote the safe storage and use of handguns by consumers;

(2) to prevent unauthorized persons from gaining access to or use of a handgun, including children who may not be in possession of a handgun; and

(3) to avoid hindering industry from supplying firearms to law abiding citizens for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(c) FIREARMS SAFETY.--

18 USCA § 922

(1) MANDATORY TRANSFER OF SECURE GUN STORAGE OR SAFETY DEVICE.--Section 922 of title 18, United States Code, is amended by inserting at the end the following:

"(z) SECURE GUN STORAGE OR SAFETY DEVICE. —

"(1) IN GENERAL.--Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this

chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

"(2) EXCEPTIONS.--Paragraph (1) shall not apply to—

"(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United States, a State, or a department, agency, or political subdivision of a State, of a handgun; or

"(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or

"(B) the transfer to, or possession by, a rail police officer employed by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);

"(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or

"(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.

"(3) LIABILITY FOR USE. —

"(A) IN GENERAL.--Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.

"(B) PROSPECTIVE ACTIONS.--A qualified civil liability action may not be brought in any Federal or State court.

"(C) DEFINED TERM.--As used in this paragraph, the term 'qualified civil liability action'—

"(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if—

"(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and

"(II) at the time access was gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device; and

"(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se."

(2) CIVIL PENALTIES.--Section 924 of title 18, United States Code, is amended--

(A) in subsection (a)(1), by striking "or (f)" and inserting "(f), or (p)"; and

18 USCA § 924

(B) by adding at the end the following:

"(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE. –

"(1) IN GENERAL. –

"(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.-- With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing –

"(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

"(ii) subject the licensee to a civil penalty in an amount equal to not more than \$2,500.

"(B) REVIEW.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

"(2) ADMINISTRATIVE REMEDIES.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary."

18 USCA § 922 NOTE

(3) LIABILITY; EVIDENCE. –

(A) LIABILITY.--Nothing in this section shall be construed to –

(i) create a cause of action against any Federal firearms licensee or any other person for any civil liability; or

(ii) establish any standard of care.

(B) EVIDENCE.--Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with the amendments made by this section shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action relating to section 922(z) of title 18, United States Code, as added by this subsection.

(C) RULE OF CONSTRUCTION.--Nothing in this paragraph shall be construed to bar a governmental action to impose a penalty under section 924(p) of title 18, United States Code, for a failure to comply with section 922(z) of that title.

18 USCA § 922 NOTE

(d) EFFECTIVE DATE.--This section and the amendments made by this section shall take effect 180 days after the date of enactment of this Act.

SEC. 6. ARMOR PIERCING AMMUNITION.

18 USCA § 922

(a) UNLAWFUL ACTS.--Section 922(a) of title 18, United States Code, is amended by striking paragraphs (7) and (8) and inserting the following:

"(7) for any person to manufacture or import armor piercing ammunition, unless –

"(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

"(B) the manufacture of such ammunition is for the purpose of exportation; or

"(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

"(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery –

"(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

"(B) is for the purpose of exportation; or

"(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;".

18 USCA § 924

(b) PENALTIES.--Section 924(c) of title 18, United States Code, is amended by adding at the end the following:

"(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section –

"(A) be sentenced to a term of imprisonment of not less than 15 years; and

"(B) if death results from the use of such ammunition –

"(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

"(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112."

(c) STUDY AND REPORT. –

(1) STUDY.--The Attorney General shall conduct a study to determine whether a uniform standard for the testing of projectiles against Body Armor is feasible.

(2) ISSUES TO BE STUDIED.--The study conducted under paragraph (1) shall include—

(A) variations in performance that are related to the length of the barrel of the handgun or center-fire rifle from which the projectile is fired; and

(B) the amount of powder used to propel the projectile.

(3) REPORT.--Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit a report containing the results of the study conducted under this subsection to—

(A) the chairman and ranking member of the Committee on the Judiciary of the Senate; and

(B) the chairman and ranking member of the Committee on the Judiciary of the House of Representatives.

6. References

Mireia ARTIGOT I GOLOBARDES (2003), *City of Cincinnati v. Beretta, U.S.A. Corp. et al.: An analysis of U.S. Lawsuits against the Firearms Industry*, www.indret.com, 04-2003

Paul R. BONNEY (1998), *Strict Liability for Handgun Manufacturers*, 1985, in *ECONOMIC ANALYSIS OF TORT AND PRODUCTS LIABILITY LAW*, 221-247 (Jenny B. Wahl ed. Garland Publishing, Inc.)

Richard J. FIATO (2001), *Note: Gun Manufacturers And Gun Violence: Should Gun Manufacturers Be Liable? In Some Cases Perhaps They Should Be Or On The Other Hand, Maybe Not*, 78 U. Det. Mercy L. Rev. 675, 678

Lauren E. HANDLER/ Charles E. ERWAY (2002), *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 Def. Couns. J. 484, 487

David KAIRYS (1998), *Legal Claims Of Cities Against The Manufacturers Of Handguns*, 71 Temple L.Rev. 1, 12

-- (2000), *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163, 1173

Emily KROMKE (2003), *California's legislative response to Merrill v. Navegar: An Analysis*, 24 Whittier L. Review 833, 849

Gary T. SCHWARTZ (2000), *Tort issues in light of the Cigarette Litigation: Cigarette Litigation's Offspring: Assessing Tort Issues Related to Guns, Alcohol & Other Controversial Products in light of the Tobacco Wars*, 27 Pepp. L.Rev. 751, 752

Aaron TWERSKI/ Anthony J. SEBOK (2000), *Liability Without Cause? Further Ruminations On Cause-In-Fact As Applied To Handgun Liability*, 32 Conn. L. Rev. 1379, 1387