

## Suing the Firearms Industry: A Case for Federal Reform?

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### I. INTRODUCTION

A wave of lawsuits against the firearms industry for criminal acts of third parties crested and substantially evaporated during the 1980s. Primarily brought by individual plaintiffs, these suits alleged a variety of theories of negligence (including negligent design and marketing), strict liability for defective (actually nondefective) products, and ultra-hazardous activity. Since the firearms at issue worked properly and were made and distributed lawfully, these cases were by and large dismissed as failing to allege cognizable claims.<sup>1</sup>

While such individual actions continue to be brought and are usually dismissed,<sup>2</sup> in the late 1990s municipalities began to bring similar lawsuits against the firearms industry. The same theories continued to be alleged but a new one was added: public

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<sup>1</sup> *E.g.*, *Delahanty v. Hinckley*, 564 A.2d 758, 759-60 (D.C. Cir. 1989) (holding that there is no duty where crime victims had no special relation with manufacturers); *Bennet v. Cincinnati Checker Cab Co.*, 353 F. Supp. 1206 (E.D. Ky. 1973) (holding that there is no duty where no special relationship existed between gun manufacturer and person injured by misuse of gun); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1296 (Ill. App. Ct. 1985) (finding that a manufacturer of nondefective handgun had no duty to control distribution of product to general public). *But see Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1159 (Md. 1985) (finding liability for "Saturday Night Special"), *superseded by MD. CODE ANN., PUB. SAFETY § 5-402(b)* (2003).

<sup>2</sup> *E.g.*, *Bloxham v. Glock Inc.*, 53 P.3d 196, 201 (Ariz. Ct. App. 2002) (noting that "other courts faced with similar issues have almost uniformly refused to impose any duty on businesses related to the legal use and distribution of firearms owed to those harmed by the misuse of those firearms."); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 205 (Ark. 1995) (finding no special relation between manufacturer and handgun purchaser); *Valentine v. On Target, Inc.*, 727 A.2d 947, 953 (Md. 1999) (finding that the inherent danger of guns creates no duty of dealers to persons who may be harmed); *Resteiner v. Sturm, Ruger & Co.*, 566 N.W.2d 53, 54 (Mich. Ct. App. 1997) (finding appeal to be vexatious and awarding attorney's fees; suit involved stolen weapon used in murder). *See also* TIMOTHY A. BUMANN, *THE COMPENDIUM OF REPORTED UNITED STATES FIREARMS PRODUCTS LIABILITY CASES: A SYNOPSIS OF CIVIL LITIGATION AGAINST MANUFACTURERS AND SELLERS* (1995).

nuisance. Under this theory, it is alleged that the firearms industry intentionally supplies the criminal market by manufacturing more firearms than lawful demand would support. During 1998-2003, some thirty-three municipalities and counties filed suits against the firearms industry.<sup>3</sup>

The following briefly analyzes some representative cases of the current litigation against the firearms industry, including discussion of the public nuisance theory and the effect on the constitutionally-guaranteed right to keep and bear arms.<sup>4</sup> It then provides a detailed analysis of the Ninth Circuit's *Ileto v. Glock Inc.*<sup>5</sup> decision, which pushes the envelope by basing its claim of wrongdoing on the marketing of guns to police departments in States with less strict firearm laws. Lastly, this Article evaluates the provisions of the Protection of Lawful Commerce in Arms Act, which is pending in the United States Congress and would preempt these types of suits against the firearms industry.

## II. IS THE RIGHT TO BEAR ARMS A PUBLIC NUISANCE?

Typical allegations made in the current wave of anti-industry lawsuits are summarized in *Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp.*,<sup>6</sup> as follows:

[T]he manufacturers release into the market substantially more handguns than they expect to sell to law-abiding purchasers; the manufacturers continue to use certain distribution channels, despite knowing (often from specific crime-gun trace reports produced by the federal Bureau of Alcohol, Tobacco, and Firearms) that those channels regularly yield criminal end-users . . . . The County makes no allegation that any manufacturer violated any federal or state statute or regulation governing the manufacture and distribution of firearms, and no direct link is alleged between any manufacturer and any specific criminal act.<sup>7</sup>

Actually, manufacturers become aware of traces when the Bureau of Alcohol, Tobacco, and Firearms ("BATF") requests information, but a mere trace request does not imply that any of

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<sup>3</sup> *Litigation Against the Gun Industry*, Violence Policy Ctr., <http://www.vpc.org/litigate.htm> (last visited Mar. 8, 2004); *Taxpayer Funded Reckless Lawsuits Against The Firearms Industry*, Nat'l Rifle Assoc., <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=147> (posted Aug. 19, 2003).

<sup>4</sup> The Second Amendment of the U.S. Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." For a current listing of State arms guarantees, see Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, <http://www1.law.ucla.edu/~volokh/beararms/statecon.htm> (last visited Apr. 15, 2004).

<sup>5</sup> 349 F.3d 1191 (9th Cir. 2003).

<sup>6</sup> 273 F.3d 536 (3d Cir. 2001).

<sup>7</sup> *Id.* at 539.

the links in a distribution channel committed any wrongdoing or even that a crime was committed with the firearm traced.<sup>8</sup> At any rate, the Third Circuit held that “no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce.”<sup>9</sup> It added, “To extend public nuisance law to embrace the manufacture of handguns would be unprecedented under New Jersey state law and unprecedented nationwide for an appellate court.”<sup>10</sup>

In *Penelas v. Arms Technology, Inc.*,<sup>11</sup> Florida’s Third District Court of Appeal affirmed the dismissal of all theories of liability in Miami-Dade County’s suit against the firearms industry.<sup>12</sup> Noting that virtually all appellate decisions from other states precluded liability, the court relied on Florida precedent holding that liability does not exist where the firearm was not defective, its manufacture and distribution were consistent with state and federal law, and no duty was breached by the defendants.<sup>13</sup> *Penelas* observed:

The County’s request that the trial court use its injunctive powers to mandate the redesign of firearms and declare that the appellees’ business methods create a public nuisance, is an attempt to regulate firearms and ammunition through the medium of the judiciary. Clearly this round-about attempt is being made because of the County’s frustration at its inability to directly regulate firearms, an exercise proscribed by section 790.33, Florida Statutes (1999) which expressly preempts to the state legislature the entire field of firearm and ammunition regulation. The County’s frustration cannot be alleviated through litigation as the judiciary is not empowered to “enact”

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<sup>8</sup> Traces frequently implicate nothing about the first retail purchaser, much less the licensee. According to the U.S. Solicitor General: “If the tracing process is successful, it will identify the first retail purchaser of the traced firearm; yet that person may have long since relinquished ownership of the weapon and may have no connection to the underlying crime.” Brief for the Petitioner at 27, *BATF v. City of Chicago*, 537 U.S. 1229 (2003) (No. 02-322) (internal citations omitted). Indeed, “because the agency requesting the trace does not inform ATF of whether possessors and their associates are ever indicted or convicted of any offense, ATF has no way of knowing whether the law enforcement agency requesting the trace believes the possessor or associate to have had any role in the crime.” *Id.* at 10 (internal citations and quotations omitted). Finally, “ATF has informed this Office that approximately 30% of all trace requests do not tie the weapon to any individual possessor.” *Id.* at 41.

<sup>9</sup> *Camden*, 273 F.3d at 540.

<sup>10</sup> *Id.* at 540-41. *See also* *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 419 (3d Cir. 2002) (rejecting liability of firearm manufacturers under negligence, negligent entrustment, and public nuisance theories for costs incurred by city associated with the criminal use of handguns).

<sup>11</sup> 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001).

<sup>12</sup> *Id.* at 1044.

<sup>13</sup> *Id.* (citing *Trespalacios v. Valor Corp. of Fla.*, 486 So. 2d 649, 650 (Fla. Dist. Ct. App. 1986)) (finding no liability for shotgun).

regulatory measures in the guise of injunctive relief.<sup>14</sup>

The court cited references for “additional discussions of the right to bear arms,”<sup>15</sup> but did not explicitly quote Florida’s arms guarantee.<sup>16</sup> Of course, where clear statutory grounds exist for a decision, courts prefer not to raise constitutional issues. But in the final analysis, one wonders how the lawful manufacture and distribution of a constitutionally-guaranteed product could give rise to liability.<sup>17</sup>

Several states have statutes which explicitly preempt municipal regulation of firearms or specifically prohibit municipalities from bringing actions of the type discussed here.<sup>18</sup>

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<sup>14</sup> *Id.* at 1045 (internal citations omitted).

<sup>15</sup> *Id.* at 1045 n.6.

<sup>16</sup> Article I, Section 8 of the Florida Constitution provides: “The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed . . . .”

<sup>17</sup> Long before the rise of suits against the manufacturers, suits seeking to impose liability on firearm owners for possessing or using firearms were held to be precluded by the existence of the right to bear arms. See *McKellar v. Mason*, 159 So. 2d 700, 701-02 (La. Ct. App. 1964) (holding that an elderly man’s use of firearm in self-defense did not expose him to liability, and stating that, “The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured.”); *Lopez v. Chewiwie*, 186 P.2d 512, 513 (N.M. 1947) (holding that parent who kept loaded firearm in home with unattended child is not liable for tort committed by minor, relying in part on the state constitutional right to bear arms). Of course, a parent may be liable for negligence. *E.g.*, *Kuhns v. Brugger*, 135 A.2d 395, 404 (Pa. 1957) (holding that, “common prudence, in behalf of self-protection, justified the possession of the pistol for immediate use at night,” but owner negligent to absent himself and leave it “in a place frequented by young children.”).

<sup>18</sup> As an example, Florida provides:

(1) Preemption.— Except as expressly provided by general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or regulations relating thereto. Any such existing ordinances are hereby declared null and void . . . .

. . . .

(3) Policy and intent. — (a) It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.

FLA. STAT. ANN. § 790.33 (West 2000). An example of the more recently passed preemption provisions which explicitly prohibit municipal lawsuits against the firearms industry is found in Louisiana:

A. The governing authority of any political subdivision or local or other governmental authority of the state is precluded and preempted from bringing suit to recover against any firearms or ammunition manufacturer, trade association, or dealer for damages for injury, death, or loss or to seek other

Municipal suits against the firearms industry have been dismissed under such statutes; courts have ruled that municipalities have no due process rights which would negate such statutes.<sup>19</sup> It has also been held that cities have no direct injury from criminal violence and, thus, have no standing to sue the firearms industry.<sup>20</sup>

In *Sturm, Ruger & Co. v. City of Atlanta*,<sup>21</sup> the Georgia Supreme Court held that all claims should be dismissed because the State preempted the field of gun regulation and also because a recent statute prohibited municipalities from bringing such suits.<sup>22</sup> The court traced the source of the legislature's authority directly to the state's arms guarantee:

Art. I, Sec. I, Par. VIII of the Georgia Constitution of 1983 provides: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." The General Assembly has exercised this power given by the Constitution to create a regulatory scheme for the distribution and use of firearms.<sup>23</sup>

In several cases, courts have refused to grant motions to

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injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition. The authority to bring such actions as may be authorized by law shall be reserved exclusively to the state.

B. This Section shall not prohibit the governing authority of a political subdivision or local or other governing authority of the state from bringing an action against a firearms or ammunition manufacturer, trade association, or dealer for breach of contract as to firearms or ammunition purchased by the political subdivision or local authority of the state.

LA. REV. STAT. Ann. § 40:1799 (West 2001).

<sup>19</sup> *E.g.*, *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 11 (La. 2001) (holding that the municipal suit was an indirect attempt to regulate lawful firearm manufacture, the state statute precluding such suits applied retroactively, and that municipalities have no due process rights under the Fourteenth Amendment); *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845, 856-58 (Mich. Ct. App. 2003) (holding that the municipality lacked standing to contest the state preemption statute on due process grounds, and the statute did not violate separation of powers).

<sup>20</sup> *E.g.*, *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 118 (Conn. 2001).

<sup>21</sup> 560 S.E.2d 525 (Ga. Ct. App. 2002).

<sup>22</sup> *Id.* at 527, 531-32.

<sup>23</sup> *Id.* at 529 (citing *Rhodes v. R. G. Indus., Inc.*, 325 S.E.2d 465, 466 (Ga. Ct. App. 1984)). *Rhodes* in turn explained:

Appellant first contends that "the trial court erred in holding as a matter of law that handguns are exempt from Georgia's product liability law because the lack of safety connected with such weapons raises a political, nonjusticiable question." Her last contention is that the trial court erroneously held as a matter of law that the R.G. revolver is not unreasonably dangerous when marketed to the general public. We disagree on both points. The Second Amendment to the U.S. Constitution guarantees the right of the people to keep and bear arms, as does Art. I, Sec. I, Par. VIII of the Georgia Constitution 1983 . . . .

*Rhodes*, 325 S.E.2d at 466.

dismiss and the cases have proceeded to discovery. Most were thereafter dismissed when discovery yielded no evidence supporting the allegations that the firearms industry intentionally and purposely distributed firearms to criminals. For instance, the trial-level Superior Court of Massachusetts characterized Boston's public nuisance theory as "unique in the Commonwealth," but declined to dismiss the case on the pleadings.<sup>24</sup> However, after nearly three years of litigation, Boston agreed to a dismissal of its lawsuit against the industry and even acknowledged that the industry had made commitments to safety.<sup>25</sup> It would appear that Boston simply could not prove that the industry intentionally distributed firearms to criminals.

The path of Cincinnati's suit against the industry is intriguing. The Ohio Constitution provides that "[t]he people have the right to bear arms for their defense and security,"<sup>26</sup> and the Ohio Supreme Court has reiterated that "the right to bear arms is fundamental."<sup>27</sup> However, when it came to deciding that a public nuisance action existed against the firearms industry, that right was not so much as mentioned. In *City of Cincinnati v. Beretta U.S.A. Corp.*,<sup>28</sup> the Court upheld the cause of action, stating: "Even though there exists a comprehensive regulatory scheme involving the manufacturing, sales, and distribution of firearms, . . . the law does not regulate the distribution practices alleged in the complaint."<sup>29</sup>

Yet it was perhaps those allegations which would be the Achilles' heel of the plaintiffs' own case. The Court remarked, "While we do not predict the outcome of this case, we would be remiss if we did not recognize the importance of allowing this type of litigation to go past the pleading stages."<sup>30</sup> After the case

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<sup>24</sup> *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 Mass. Super. LEXIS 352, at \*63-64 (July 13, 2000).

<sup>25</sup> In dismissing its case, Boston and the industry agreed to a joint statement which stated in part:

The City acknowledges that the members of the Industry and firearms trade associations are genuinely concerned with and are committed to, the safe, legal and responsible sale and use of their products. . . . The Industry and the City believe that through cooperation and communication they can continue to reduce the number of firearm related accidents, can increase awareness of the issues related to the safe handling and storage of firearms, and can reduce the criminal acquisition of firearms.

Plaintiffs' Unopposed Motion to Dismiss, Ex. A at 3-4, *City of Boston v. Smith & Wesson Corp.*, No. 99-02590-C (Mass. Super. Ct. Mar. 27, 2001).

<sup>26</sup> OHIO CONST. art. I, § 4.

<sup>27</sup> *Klein v. Leis*, 795 N.E.2d 633, 636 (Ohio 2003).

<sup>28</sup> 768 N.E.2d 1136 (Ohio 2002).

<sup>29</sup> *Id.* at 1143.

<sup>30</sup> *Id.* at 1150-51.

was remanded for trial and discovery was completed, the City of Cincinnati voluntarily dismissed its lawsuit.<sup>31</sup> Stanley Chesley, counsel for the City, advised that “he could not justify moving forward with the city’s 4-year-old lawsuit against the gun industry, dealing a major disappointment to gun control advocates across the nation.”<sup>32</sup> Lawrence Keane, counsel for the National Shooting Sports Foundation, stated: “The city can’t prove the allegations, because they’re not true . . . . They’re unbelievably offensive, outrageous and patently false.”<sup>33</sup> Thus, Cincinnati’s lawsuit went the way of Boston’s—down the tubes.

The most active litigation against the firearms industry has undoubtedly proceeded before federal Judge Jack Weinstein of the Eastern District of New York. In these cases he frequently allows causes of action to go forward against the gun manufacturers on multiple theories, despite consistent reversal by the Second Circuit. In *Hamilton v. Accu-tek*,<sup>34</sup> an individual plaintiff suit against the industry, Judge Weinstein allowed claims of market share liability and negligence to go to the jury.<sup>35</sup> On appeal the Second Circuit certified questions to the New York Court of Appeals,<sup>36</sup> which held that handgun manufacturers have no special duty to crime victims regarding the marketing of their products.<sup>37</sup>

In *NAACP v. AcuSport, Inc.*,<sup>38</sup> a public nuisance suit brought by a private association rather than a municipality, Judge Weinstein tried the claims before an advisory jury in Spring 2003. Meanwhile, the New York Appellate Division affirmed the dismissal for failure to state a cause of action of a similar public nuisance case against the industry, brought by New York State Attorney General Eliot Spitzer.<sup>39</sup> Nonetheless, in *AcuSport*, Judge Weinstein proceeded to render an opinion finding that the industry’s distribution practices created a public nuisance, but that the private association plaintiff lacked standing because it did not suffer injury different in kind from that of the general

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<sup>31</sup> *Cincinnati’s Council Decides to Drop Suit Against Gun Makers*, N.Y. TIMES, May 1, 2003, at A24.

<sup>32</sup> Gregory Krote, *Drop Suit, City Advised*, CINCINNATI ENQUIRER, Apr. 30, 2003, available at [http://www.enquirer.com/editions/2003/04/30/loc\\_guncase30.html](http://www.enquirer.com/editions/2003/04/30/loc_guncase30.html).

<sup>33</sup> *Id.*

<sup>34</sup> 62 F. Supp. 2d 802 (E.D.N.Y. 1999), *vacated sub nom.*, *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001).

<sup>35</sup> *Hamilton*, 62 F. Supp. 2d at 835-36, 839.

<sup>36</sup> *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 39 (2d Cir. 2000).

<sup>37</sup> 750 N.E.2d 1055, 1059 (N.Y. 2001).

<sup>38</sup> 271 F. Supp. 2d 435 (E.D.N.Y. 2003).

<sup>39</sup> *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194 (N.Y. App. Div. 2003), *appeal denied*, 801 N.E.2d 421 (N.Y. 2003).

public.<sup>40</sup> Reaching the merits and then dismissing for lack of standing reversed the normal order of proceeding—if no standing exists, no reason exists to address the merits.

Judge Weinstein's holding that the industry is at fault was based in large part on the false equation of *traced* guns with "crime guns." He relied particularly on plaintiff's expert testimony that guns in the trace database were crime guns.<sup>41</sup> Yet the court itself observed that "[a] trace does not mean that the FFL retailer or the first purchaser engaged in illegal or wrongful activity" and that "[p]laintiff's statistical experts . . . were unable to identify specific dealers who had committed wrongdoing."<sup>42</sup> However, those facts did not prevent the firearm prohibitionist lobby from using the same trace data to compile a list of what they called the ten worst "bad apple" gun dealers.<sup>43</sup> Calling such assertions "misleading," BATF responded:

Many other factors – including high volume or sales; the type of inventory carried and whether the gun [dealer] is located in a high crime area – contribute to the percentages cited by the Brady campaign.

. . . Gun traces, for example, indicate only that a gun has come to the attention of law enforcement. They do not automatically implicate a dealer or purchaser in any wrongdoing.

Large volume gun dealers will by their very frequency of sales have more guns come to the attention of law enforcement than a dealer who sells relatively few firearms.<sup>44</sup>

The extent to which information in trace records is subject to

<sup>40</sup> *AcuSport*, 271 F. Supp. 2d at 455.

<sup>41</sup> *Id.* at 522.

<sup>42</sup> *Id.* at 504.

<sup>43</sup> Mark Bowes, *Gun Report's Worth at Issue: Misleading, ATF Says of Findings*, RICHMOND TIMES-DISPATCH, July 28, 2003, at B1. The media committed the same error. *E.g.*, Katie Cornell Smith & Marianne Garvey, *N.Y. Gun Shop Shoots to 3rd on Crime-Weapon List*, N.Y. POST, Apr. 18, 2003, at 17 (equating traced guns with "crime guns").

<sup>44</sup> Press Release, ATF, *Statement on Brady Campaign Allegations Regarding Federally Licensed Firearms Dealers* (July 16, 2003) (on file with author). The same statistics from the *AcuSport* litigation were later used in a publication by an organization calling itself "Americans for Gun Safety" to support allegations such as "Chuck's Gun Shop ranked No. 1 in the nation among stores that sold firearms that turned up in criminals' hands from 1996 to 2000." Frank Main, *Gun-safety Group Names 4 Area Stores*, CHI. SUN-TIMES, Jan. 13, 2004, Special Ed., at 9, available at <http://www.suntimes.com/output/news/cst-nws-gun13.html>. However, as the article noted:

The owner of Chuck's has never been charged with a crime. When the store applied for a new federal firearms license last year, the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives approved the request.

"There was no evidence of any criminal wrongdoing that would prevent him from reapplying and getting a license," ATF spokesman Tom Ahern said of Chuck's owner John Riggio . . . .

*Id.*

disclosure has been controversial. Judge Weinstein ruled in the *AcuSport* litigation that BATF had to disclose trace records to plaintiff's experts but imposed a protective order ruling that the experts could make public only the number of traces and the identities of the licensees.<sup>45</sup> Moreover, the end result of anti-industry litigation by the City of Chicago is that such records are not subject to disclosure under the Freedom of Information Act.<sup>46</sup>

In dismissing *AcuSport*, Judge Weinstein briefly addressed the federal Second Amendment.<sup>47</sup> Given that making and distributing a constitutionally-protected product would presumably not be a public nuisance, one might assume the right to keep and bear arms to be pertinent in this case. Instead, the opinion suggests that the scope of the right is virtually meaningless and concludes that "whatever view is taken of the Second Amendment is immaterial in this case. . . . There is no justification in the federal Constitution for private persons failing to exercise reasonable care in meeting their legal responsibility to help ensure a safe society."<sup>48</sup>

Regardless of the meaning of the Second Amendment,<sup>49</sup> the state arms guarantees protect individual rights to obtain and

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<sup>45</sup> NAACP v. AcuSport Corp., 210 F.R.D. 268, app. B at 430-32 (E.D.N.Y. 2002) (approving report and reserving discretion for court to modify stipulation on disclosure between plaintiff and BATF). After the court dismissed the action, plaintiff moved the court to allow the experts to disclose further information for use in academic publications and in other lawsuits. Memorandum in Support of Application for Modification of the Protective Order for the BATF Firearm Trace Database at 1, NAACP v. AcuSport Corp., 210 F.R.D. 268 (E.D.N.Y. 2002) (No. 99 Civ 3999, 99 Civ 7037). Judge Weinstein denied the motion, commenting that "no public interest overrides the government's interest" and that "this case is dead." Proceedings in open court, Oct. 27, 2003 (author's notes).

<sup>46</sup> See Dep't of Justice, *BATFE v. City of Chicago*, 123 S.Ct. 1352 (2003) (mem.), *vacating & remanding* 287 F.3d 628 (7th Cir. 2002). The Supreme Court remanded the case to consider the effect of an appropriations rider prohibiting ATF from disclosing firearms trace records except as previously disclosed. See Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, div. J, tit. 6, § 644, 117 Stat. 11, 473-74 (2003). Congress considered that disclosure of the law enforcement databases in question "would not only pose a risk to law enforcement and homeland security, but also to the privacy of innocent citizens." H.R. REP. NO. 107-575, at 20 (2002).

Before passage of the rider by Congress, the Solicitor General pointed to various provisions of the Gun Control Act which deny records to BATF itself or limit disclosure of records by law enforcement. Brief for the Petitioner at 24-25, Dep't of Justice, *BATFE v. City of Chicago*, 123 S.Ct. 1352 (2003) (No. 02-322) ("[18 U.S.C.] Section 923(g)(3)(B)'s strict prohibition on retention and release of multiple sales information by state and local authorities would be wholly pointless if any member of the public could obtain the same data from ATF pursuant to the FOIA [Freedom of Information Act]."). The Solicitor General also stated that "the GCA specifically precludes ATF from imposing any system for the registration of firearms, firearms owners, or firearms transactions or dispositions." *Id.* at 26 (citing 18 U.S.C. § 926(a)). See also 18 U.S.C. § 923(g)(1)(D) (1996) (providing that ATF may release licensee records only to a federal, state, or local law enforcement agency and only in regard to "persons prohibited from purchasing or receiving firearms").

<sup>47</sup> 271 F. Supp. 2d at 462-63.

<sup>48</sup> *Id.* at 462.

<sup>49</sup> See *infra* note 114 and accompanying text.

possess firearms. It seems curious that such guarantees have been given such short shrift by some courts. Two decades ago, the guarantee of the right of private citizens to bear arms under the Illinois Constitution was cited in part as precluding an action against handgun manufacturers for ultra-hazardous activity giving rise to strict liability.<sup>50</sup> However, that same constitutional right did not merit mention in the recent decision of the Illinois Court of Appeals upholding Chicago's public nuisance suit against the industry.<sup>51</sup>

Another case in point is the decision of the Indiana Supreme Court in *City of Gary v. Smith & Wesson Corp.*<sup>52</sup> The Indiana Bill of Rights provides that "[t]he people shall have a right to bear arms, for the defense of themselves and the State."<sup>53</sup> In prior precedent which upheld a civil rights claim against the City of Gary for refusing to provide and process handgun carry permits, the Indiana Supreme Court stated:

[This] right of Indiana citizens to bear arms for their own self-defense and for the defense of the state is an interest in both liberty and property which is protected by the Fourteenth Amendment to the Federal Constitution. . . . This interest is one of liberty to the extent that it enables law-abiding citizens to be free from the threat and danger of violent crime. There is also a property interest at stake, for example, in protecting one's valuables when transporting them, as in the case of a businessman who brings a sum of cash to deposit in his bank across town.<sup>54</sup>

In *Gary v. Smith & Wesson Corp.*, the Indiana Court of Appeals relied on the above in part in refusing to recognize a public nuisance claim for manufacture and distribution of handguns.<sup>55</sup> The court noted that the U.S. Congress and the Indiana General Assembly pervasively regulated the

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<sup>50</sup> As the Seventh Circuit explained:

We are also concerned that plaintiffs' argument would thwart Illinois' policy regarding possession of handguns. The right of private citizens in Illinois to bear arms is protected, at least against all restrictions except those imposed by the police power, by the Illinois Constitution. . . . The State of Illinois regulates, but does not ban, the possession of handguns by private citizens. . . . Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns.

*Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984).

<sup>51</sup> *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16 (Ill. App. Ct. 2002), *appeal granted*, 788 N.E.2d 727 (Ill. 2003). Oral argument before the Illinois Supreme Court has taken place and a decision on the appeal is pending. Christi Parsons, *Justices Take Up Firearms Control*, CHI. TRIB., Sept. 11, 2003, Metro, at 1.

<sup>52</sup> 776 N.E.2d 368 (Ind. Ct. App. 2002), *rev'd*, 801 N.E.2d 1222 (Ind. 2003).

<sup>53</sup> IND. CONST. art. I, § 32.

<sup>54</sup> *Kellogg v. City of Gary*, 562 N.E.2d 685, 694 (Ind. 1990).

<sup>55</sup> 776 N.E.2d at 387.

manufacture, distribution, sale, and use of handguns and, thus, had evaluated the benefits and evils thereof. These legislative bodies represented the people in the democratic process and “struck the appropriate balance between the societal costs of handguns and the historical right to bear arms.”<sup>56</sup>

The Indiana Supreme Court disagreed. It held that the complaint stated a claim against the firearms industry based on allegedly wrongful sales practices, negligent designs, and deceptive advertising.<sup>57</sup> The court actually agreed with the manufacturers that “in every one of over 1,000 Indiana state court and 50 federal public nuisance decisions,” public nuisance claims were recognized only where a statute was violated or the nuisance resulted from use of real property.<sup>58</sup> Nonetheless, the court concluded that a municipality has a viable claim for public nuisance based on “an unreasonable interference with a public right,” even where the activity is lawful and does not involve land.<sup>59</sup>

The *Gary* court cited the provisions of law dealing with the sale of handguns and also fleetingly referred to Indiana’s constitutional guarantee that the citizens have a right to bear arms.<sup>60</sup> Without any discussion of how exercise of a constitutional right could give rise to liability, the court concluded that lawful activity could be conducted unreasonably and give rise to nuisance.<sup>61</sup>

The court made no attempt to reconcile upholding the deceptive advertising component of the public nuisance claim and the constitutional right to bear arms (the most absolute element of which is the right to keep arms in the home).<sup>62</sup> The court stated about that claim:

The City also asserts claims of misleading and deceptive advertising and marketing of guns. . . . Specifically, the City alleges that guns are presented as adding to a homeowner’s safety when in fact the opposite is true. . . . For the same reasons applicable to the allegation of contributing to unlawful sales practices, we agree that these claims, if proven, state a claim for injunctive relief based on an action for public

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<sup>56</sup> *Id.*

<sup>57</sup> *City of Gary v. Smith & Wesson, Corp.*, 801 N.E.2d 1222, 1227, 1247 (Ind. 2003).

<sup>58</sup> *Id.* at 1231 (internal quotations omitted).

<sup>59</sup> *Id.* at 1233.

<sup>60</sup> *Id.* at 1234 (citing IND. CONST. art. I, § 32 (right to bear arms) and IND. CODE §§ 35-47-2.5-1 to -15 (1998) (sale of handguns)).

<sup>61</sup> *Id.*

<sup>62</sup> *See, e.g., State v. Hamdan*, 665 N.W.2d 785, 805 (Wis. 2003) (discussing the unreasonableness of regulating “sensible conduct” on one’s private property).

nuisance and negligence theories.<sup>63</sup>

Indiana's constitutional right to bear arms should have resolved the fact that guns may add to a homeowner's safety. The court's holding questions the very legitimacy of this provision and implies that the right to bear arms for defense is a false value. Are we to accuse the framers and ratifiers of the Indiana Constitution of deceptive advertising? In reality, the question of homeowner safety and gun ownership is one that is best left to the political process. It should be beyond the purview of the courts to decide that the people of Indiana are incorrect in the factual assumptions that underlie the constitutional right they created.<sup>64</sup>

Despite the *Gary* court's holding that a claim was stated in the pleadings, whether the plaintiffs can prove their allegations is another matter. The court itself agreed that "legislative policy permitting lawful distribution of guns is relevant here."<sup>65</sup> Moreover, the court further recognized: "The conclusory allegations of the complaint leave much unanswered. For the reasons cited, there may be substantial barriers to recovery of any or all of these damages."<sup>66</sup> In other words, the plaintiffs' sweeping allegations that the members of the firearms industry are somehow conniving conspirators intent on supplying criminals with guns may be unprovable and false.

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<sup>63</sup> 801 N.E.2d at 1247.

<sup>64</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (invalidating Brady Act amendment to Gun Control Act and noting of comparison of constitutional systems different from that of the United States, "such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one"); *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982) (stating that some constitutional rights are not "in some way less 'fundamental' than [others]. Each establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution."); *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956) ("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it."); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993) ("We are cognizant of the current controversy that exists in Ohio and across our nation over the right of an individual to possess firearms. . . . [I]t is our charge to determine and not to disturb the clear protections provided by the drafters of our Constitution."); *State v. Kessler*, 614 P.2d 94, 95 (Or. 1980) ("We are not unmindful that there is current controversy over the wisdom of a right to bear arms. . . . Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.").

<sup>65</sup> 801 N.E.2d at 1244.

<sup>66</sup> *Id.*

III. “NEGLIGENT MARKETING” TO POLICE IN STATES WITH “LESS STRICT” GUN CONTROL: THE NINTH CIRCUIT’S *ILETO V. GLOCK INC.* DECISION

In 1999, Buford Furrow shot and wounded five persons at a local Jewish Community Center in California and then shot and killed Joseph Iletto, a postal worker, at a nearby locality.<sup>67</sup> He used a Glock pistol that had originally been sold to a police department in the State of Washington and was later unlawfully purchased by Furrow, who was ineligible to possess firearms.<sup>68</sup> While aware that Furrow may have been in unlawful possession, police failed to follow up. As a law enforcement officer noted after the tragedy, “We planned to [search Furrow’s home]; we just hadn’t gotten around to it yet.”<sup>69</sup> The inevitable lawsuit was filed against several firearm manufacturers and distributors, and in *Iletto*, the Ninth Circuit—in a 2-1 opinion by Circuit Judge Richard Paez—held that the defendants who made or sold the firearms used by Furrow could be subject to liability under California tort law for negligence and public nuisance.<sup>70</sup>

The court held that sufficient factual issues over whether the industry owed a duty of care and breached that duty were raised by plaintiffs’ allegations that “the defendants created an illegal secondary firearms market that was intentionally directed at supplying guns to prohibited gun purchasers like Furrow.”<sup>71</sup> This is the mantra of the current onslaught of lawsuits against the firearms industry, which would be shocking if supported but seems more fantasy than reality. This is made clear in the more particularized allegations of the complaint, which the court summarizes as follows:

Plaintiffs allege that Glock’s marketing and distribution strategy includes the purposeful oversupply of guns to police departments and the provision of unnecessary upgrades and free exchange of guns with police departments to create a supply of post-police guns that can be sold through unlicensed dealers without background checks to illegal buyers at a profit. Glock allegedly targets states like Washington, where the gun laws are less strict than in California, in order to increase sales to all buyers, including illegal purchasers, who will take their guns into neighboring California. The ATF has provided Glock with the names of the distributors who are responsible for the sales of guns that end up in the hands of criminals, but Glock

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<sup>67</sup> *Iletto v. Glock Inc.*, 349 F.3d 1191, 1194 (9th Cir. 2003).

<sup>68</sup> *Id.* at 1197.

<sup>69</sup> *Evening News with Dan Rather: Furrow Faces Death Penalty; Tragedy Revives Gun Debate* (CBS News television broadcast, Aug. 12, 1999).

<sup>70</sup> *Iletto*, 349 F.3d at 1217 (9th Cir. 2003).

<sup>71</sup> *Id.* at 1204.

has ignored the information and continues to supply these same distributors.<sup>72</sup>

Upholding the claims under such allegations raises serious questions regarding the fundamental system of American federalism, under which the states are free to experiment with their own versions of republicanism. In the words of Justice Brandeis: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>73</sup>

First, contrary to *Ileto*, it is not Glock but the State of Washington that enacts "gun laws [that] are less strict than in California."<sup>74</sup> Indeed, almost all states in the United States have gun laws that are less strict than California.<sup>75</sup> While California's Constitution has no arms guarantee, the Washington Bill of Rights provides: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired."<sup>76</sup> The Washington courts have held that this provision must be strictly followed.<sup>77</sup> Under plaintiffs' theory, would not the State of Washington be ultimately responsible because it has "less strict" gun laws?

Second, it is difficult to blame Glock for the policies of Washington police departments which result in, as alleged by *Ileto*, "the purposeful oversupply of guns to police departments and the provision of unnecessary upgrades and free exchange of guns with police departments."<sup>78</sup> The premise of the complaint is that police departments buy, upgrade, exchange, and sell too many guns. Again, under plaintiffs' theory, would not the Washington police departments be responsible because of their own purchase and exchange policies?

In the final analysis, the question is raised of whether California policymakers are entitled to play schoolmarm to the policymakers of Washington and almost all other states. It would make as much sense to allow victims of crime in

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<sup>72</sup> *Id.* at 1204-05.

<sup>73</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>74</sup> *Ileto*, 349 F.3d at 1204-05.

<sup>75</sup> See STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK, app. A (West 2003) (summarizing state firearms laws).

<sup>76</sup> WASH. CONST. art. I, § 24.

<sup>77</sup> *E.g.*, *State v. Spiers*, 79 P.3d 30, 31 (Wash. Ct. App. 2003) (holding that a statute "unconstitutionally infringes on the right to bear arms by criminalizing firearm ownership for persons merely charged with a 'serious offense,' regardless of whether they have relinquished possession").

<sup>78</sup> *Ileto*, 349 F.3d at 1204.

Washington to blame California and its police departments for disarming law-abiding citizens and allowing armed criminals to run amok, thereby allowing such criminals to spill over the borders and commit crimes in Washington.<sup>79</sup>

Third, *Ileto* claims that “[t]he ATF has provided Glock with the names of the distributors who are responsible for the sales of guns that end up in the hands of criminals, but Glock has ignored the information.”<sup>80</sup> This allegation is based on the unwarranted insinuation that, because ATF has requested that Glock trace certain firearms, the distributors to which Glock transferred such firearms are criminals or knowingly sell guns to criminals. Yet firearm traces mean little. Neither Washington law nor federal law provides that a manufacturer may not sell firearms to a distributor or dealer which has been the subject of BATF trace requests.

It is simply false to suggest that traced firearms necessarily have “end[ed] up in the hands of criminals.”<sup>81</sup> Nothing in the law provides for revocation of firearms licenses based merely on the number of traces. The federal Gun Control Act mandates license revocation upon the willful violation of the law or regulations<sup>82</sup> and provides authority to trace firearms,<sup>83</sup> but nowhere implies that traces are evidence of criminality of federally licensed firearms manufacturers, importers, or dealers. Revocation of a license based on the number of traces would violate the Gun Control Act and basic due process.

Any number of reasons exist to explain why one dealer would have more traces than another. The first would be sales volume—a large dealer which sells thousands of guns per year, for instance, would obviously have more traces than a small retailer. An urban dealer could have more traces because it does business in a high crime area. The higher crime rate in such areas does not necessarily indicate wrongdoing by the dealers or their customers.<sup>84</sup> For instance, persons who lawfully purchase

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<sup>79</sup> Indeed, in a hypothetical suit plaintiffs could turn the *Ileto* claims upside down and allege that as a result of the adoption of the *Ileto* rule, the marketing and distribution policies of firearm manufacturers have resulted in the undersupply of guns to Washington police departments and law-abiding citizens, and it was foreseeable that plaintiff X would be unable to obtain a firearm and protect herself from the crime described herein.

<sup>80</sup> *Ileto*, 349 F.3d at 1205.

<sup>81</sup> *Id.* at 1205.

<sup>82</sup> 18 U.S.C. § 923(e) (2002).

<sup>83</sup> *Id.* § 923(g)(7).

<sup>84</sup> For instance, a federal court rejected a lawsuit against inexpensive handgun makers for criminal acts based in part on the following:

[W]hile blighted areas may be some of the breeding places of crime, not all residents of [such areas] are so engaged, and indeed, most persons who live there are lawabiding but have no other choice of location. But they, like their

firearms from licensed dealers may themselves be crime victims by reason of having their firearms stolen. Stolen firearms which are recovered will be traced and, in many instances, returned to their owners.

Some dealers will always have a greater number or a higher proportion of firearm traces than others. Statistically, all dealers will never have an identical percentage of firearms traced. If the dealers with an “above average” number of traces were eliminated, then the remaining set of dealers would also have an “above average” subset. The further elimination of “above average” dealers would ultimately leave just one dealer in the universe. Yet, it is rather unremarkable that some dealers have more traces than others. A world in which all dealers have a “below average” number of traces is no more possible than one in which “all of the children are above average.”<sup>85</sup>

The *Ileto* court upheld a cause of action for breach of duty based on the following more embellished allegations of the complaint:

First, plaintiffs alleged that the ATF provided manufacturers detailed reports of the distributors, dealers, and gun shows that consistently supply the guns used in crimes. Plaintiffs further alleged that the defendant manufacturers and distributors failed to utilize distribution techniques that were commonly used by other businesses to avoid distribution to illegal end users. Furthermore, the plaintiffs alleged that Glock and other defendant manufacturers negotiate contracts with distributors . . . and dealers that do not include basic provisions to address the risk of acquisition of firearms by prohibited purchasers despite the fact that other forms of incentive provisions regularly were included in the contracts. According to plaintiffs, the defendants also fail to utilize basic training instruction that would help dealers and distributors recognize straw buyers or avoid distribution to illegal purchasers.<sup>86</sup>

As explained previously, ATF’s requests for trace information constitute no reliable index for “guns used in crime.”

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counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. . . . To remove cheap weapons from the community may very well remove a form of protection assuming that *all* citizens are entitled to possess guns for defense.

*Delahanty v. Hinckley*, 686 F. Supp. 920, 929 (D.D.C. 1986).

<sup>85</sup> Note the registered trademark of Garrison Keillor: “Where the women are strong, the men are good looking, and all of the children are above average.” <http://www.prairiehome.org/content/trademarks.shtml> (last visited Jan. 27, 2004).

<sup>86</sup> *Ileto*, 349 F.3d at 1205.

A study by the Congressional Research Service explains:

[A] law enforcement officer may initiate a trace request for any reason. No crime need be involved. No screening policy ensures or requires that only guns known or suspected to have been used in crimes are traced. . . . [T]he extent to which trace requests focus on guns not involved in crimes cannot be determined . . . .<sup>87</sup>

As to the industry's failure to prevent ineligible persons from ever obtaining firearms, all licensed firearm dealers are subject to the federal Brady Act requirement that a criminal background check must be conducted on transferees.<sup>88</sup> They are held criminally responsible for transferring a firearm to any person they know or have reasonable cause to believe is ineligible to receive a firearm.<sup>89</sup> They must also follow whatever requirements state law mandates. The plaintiffs allege essentially that federal and state law requirements are insufficient and that somehow the members of the industry must achieve a more perfect world in which no criminal ever obtains a firearm.

Federal and state legislators have not figured out the panacea for crime, yet the *Ileto* court insists that "the defendants have the knowledge and the means to distribute guns in a manner that would reduce the risk of access and use by prohibited persons."<sup>90</sup> The court applies the same reasoning in upholding the public nuisance claim. It seems, in the court's opinion, that the defendants "market, distribute, promote, and sell their products with reckless disregard for human life and for the peace, tranquility, and economic well being of the public."<sup>91</sup> The court adds:

[T]he fact that the manufacture and sale of guns is legal does not prevent the plaintiffs from pursuing their nuisance claim.

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<sup>87</sup> Congressional Research Service, *Report for Congress; "Assault Weapons": Military Style Semiautomatic Firearms Facts and Issues, 1992*, app. B, at 66. The report explained further:

For example, a trace may be conducted on a firearm found at the residence of a suspect though the firearm itself is not associated with a criminal act. Traces may also be requested with respect to abandoned firearms, those found by chance, those seen by officers for sale at guns shows or pawn shops, or those used by suicide victims. In addition, traces may be requested with respect to firearms seized pursuant to an investigation not directly related with a violent criminal offense, such as tax evasion or a technical violation of the Gun Control Act provisions. It is not possible to identify how frequently firearms traces are requested for reasons other than those associated with violent crimes.

*Id.* at 70.

<sup>88</sup> 18 U.S.C. § 922(t)(1) (1996 & Supp. 2003).

<sup>89</sup> *Id.* at § 922(d).

<sup>90</sup> *Ileto*, 349 F.3d at 1206.

<sup>91</sup> *Id.* at 1210.

Here, the alleged nuisance is not premised on the legal manufacture and design of the guns or the sale of guns to individuals who are legally entitled to purchase them. On the contrary, the nuisance claim rests on the defendants' actions in creating an illegal secondary market for guns by purposefully over-saturating the legal gun market in order to take advantage of re-sales to distributors that they know or should know will in turn sell to illegal buyers.<sup>92</sup>

In short, an industry which abides by all federal and state requirements should nonetheless know that it sells too many products and must not "over-saturate" the market. One can imagine the application of this theory to the beer industry. Brewers over-saturate the market knowing full well that some customers under the age of twenty-one will buy beer. Unscrupulous groceries and convenience markets merely card buyers without developing sure-fire techniques of weeding out straw purchasers (those persons over twenty-one purchasing for those under twenty-one). Manufacturers are well aware of high-violation zones, such as college towns, yet still ship beer to dealers at such places. Thus, the brewers must be responsible for all alcohol related injuries and deaths.

In a dissenting opinion, Circuit Judge Cynthia Holcomb Hall wrote that the action was in reality a products liability action and, therefore, was barred by a California statute that provided, "[i]njuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product."<sup>93</sup> In *Merrill v. Navegar, Inc.*,<sup>94</sup> the California Supreme Court rejected a similar attempt to redefine a product liability action into a negligent marketing action, which would have avoided that statute.<sup>95</sup> Judge Hall wrote:

In *Merrill*, the plaintiffs alleged that the defendant gun manufacturer was negligent in that it marketed its guns to the general public while knowing that the guns would find their

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<sup>92</sup> *Id.* at 1214.

<sup>93</sup> *Id.* at 1218-19 (internal quotations omitted) (Hall, J., dissenting) (quoting CAL. CIV. CODE § 1714.4(b)(2) (Deering 2002)).

<sup>94</sup> 28 P.3d 116 (Cal. 2001).

<sup>95</sup> *Id.* at 130. The *Merrill* court wrote:

[V]irtually every person suing for injuries from firearm use could offer evidence the manufacturer knew or should have known the risk of making its firearm available to the public outweighed the benefits of that conduct, and could therefore raise a triable issue of fact for the jury. In each of these cases, the jury would be asked to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm. The result would be to resurrect the very type of lawsuit the Legislature passed section 1714.4 to foreclose . . . .

way to criminals. Here, appellants allege that the appellee gun manufacturers were negligent by marketing their guns to *law enforcement* while knowing that the guns will find their way to criminals. But appellants' allegation that the gun manufacturers purposefully "over-marketed" their product to law enforcement, which made the guns reach illegal markets faster, is not legally cognizable. . . . In general, a manufacturer of a legal product has no duty to refrain from attempting to sell as many products as possible.<sup>96</sup>

Judge Hall also would have rejected the public nuisance claim because such cases invariably related to the use of real property not products.<sup>97</sup> She concluded: "The debate over the extent to which gun manufacturers should be held liable to victims of gun violence belongs in the democratic process. The public debate benefits from able advocates on all sides—we need not enter it."<sup>98</sup>

On remand, should *Ileto* proceed through discovery and summary judgment, plaintiffs will have to offer evidence that firearm manufacturers and police departments are in cahoots to distribute firearms to a vast criminal network. And, should the case go to trial, they will have to convince a jury that by selling guns to police the industry thereby arms the underworld. *Ileto* well illustrates the extent to which the suits against the firearms industry keep getting, in the words of Alice in Wonderland, "curiouser and curiouser."<sup>99</sup>

#### IV. THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

The Protection of Lawful Commerce in Arms Act, designated as H.R. 1036 and sponsored by Rep. Cliff Stearns (R-Fla.), passed the House of Representatives on April 9, 2003, with a 285 - 140 vote.<sup>100</sup> It is described as "[a] bill to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others."<sup>101</sup>

The original Senate bill, S. 659, introduced by Senators Larry Craig (R-Idaho) and Max Baucus (D-Mont.), contained identical language as H.R. 1036.<sup>102</sup> Senator Thomas Daschle (D.-

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*Id.*

<sup>96</sup> *Ileto*, 349 F.3d at 1222 n.3 (Hall, J., dissenting).

<sup>97</sup> *Id.* at 1224 (Hall, J., dissenting).

<sup>98</sup> *Id.* (Hall, J., dissenting).

<sup>99</sup> LEWIS CARROLL, ALICE IN WONDERLAND 11 (1974).

<sup>100</sup> Protection of Lawful Commerce in Arms Act, H.R. 1036, 108th Cong. (2003). *See also* 149 CONG. REC. H2996-99 (daily ed. Apr. 9, 2003).

<sup>101</sup> 149 CONG. REC. H2,863 (daily ed. Apr. 7, 2003).

<sup>102</sup> S. 659, 108th Cong. (2003).

S.D.), the Minority Leader, announced his support for the bill subject to clarifying amendments.<sup>103</sup> That led to the introduction of S. 1805, the Daschle-Craig-Baucus version of S. 659.<sup>104</sup> A threatened filibuster did not materialize, as S. 1805 was debated February 25-March 2, 2004.<sup>105</sup> President Bush, who has stated that he will sign the bill if it passes, urged the Senate to enact “a clean bill” without amendments which would interfere with its ultimate passage.<sup>106</sup>

However, the Senate voted to add to the bill controversial provisions renewing the federal “assault weapons” prohibition, which was scheduled to expire,<sup>107</sup> and requiring background checks at gun shows for transactions between unlicensed persons.<sup>108</sup> This led the proponents of S. 1805 to join its opponents in voting against final passage of the amended bill, which went down in flames by a vote of 8 to 90.<sup>109</sup>

The following analyzes H.R. 1036 and S. 1805 (referred to below as the Daschle version). While enactment of the substance of these bills is uncertain, the support thereof by majorities in

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<sup>103</sup> Press Release, Tom Daschle, U.S. Senator, Daschle Announces Support for Legislation Limiting Liability for Gun Manufacturers (Sept. 25, 2003), <http://daschle.senate.gov/~daschle/pressroom/releases/03/09/2003926416.html>.

<sup>104</sup> Senator Craig introduced S. 1805, which incorporates the Daschle amendments, and S. Res. 1806, which is an unamended version of S. 659. See 149 CONG. REC. S13,711 (daily ed. Oct. 31, 2003).

<sup>105</sup> 150 CONG. REC. S1897-98 (daily ed. Feb. 27, 2004).

<sup>106</sup> Press Release, Institute for Legislative Action, National Rifle Association, Unions, Commerce and Conservation Organizations Urge Passage of S. 659, The “Protection Of Lawful Commerce In Arms Act” (Sep. 9, 2003), <http://www.nraila.org/news/read/releases.aspx?ID=3029>. A policy statement by the Bush Administration states:

The Administration strongly supports Senate passage of S. 1805. The Administration urges the Senate to pass a clean bill, in order to ensure enactment of the legislation this year. Any amendment that would delay enactment of the bill beyond this year is unacceptable. The manufacturer or seller of a legal, non-defective product should not be held liable for the criminal or unlawful misuse of that product by others. 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, sets a poor precedent for other lawful industries, will cause a loss of jobs, and burdens interstate and foreign commerce. S. 1805 would help curb frivolous litigation against a lawful American industry and the thousands of workers it employs and would help prevent abuse of the legal system. At the same time, the legislation would carefully preserve the right of individuals to have their day in court with civil liability actions. These civil actions are enumerated in the bill and respect the traditional role of the States in our Federal system with regard to such actions.

Statement of Administration Policy, Executive Office of the President, Office of Management and Budget, S. 1805 - Protection of Lawful Commerce in Arms Act (Feb. 24, 2004), <http://www.whitehouse.gov/omb/legislative/sap/108-2/s1805sap-s.pdf>.

<sup>107</sup> See 150 CONG. REC. S1971 (daily ed. Mar. 2, 2004).

<sup>108</sup> *Id.* at S2,006-08.

<sup>109</sup> *Id.* at S1,976.

both the House and Senate suggests that some version of the bills may be enacted at a future time.

H.R. 1036 begins with significant Findings and Purposes, none of which would be changed by the Daschle version.<sup>110</sup> The first Finding declares: “Citizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms.”<sup>111</sup> While that claim is being hotly debated in the courts,<sup>112</sup> Congress has passed similar declarations on three previous occasions,<sup>113</sup> and much of the scholarship supports the individual rights interpretation.<sup>114</sup> The Finding has significance for two purposes. First, given that having arms is a constitutional right, it hardly makes sense to allow lawsuits against manufacturers for making constitutionally-protected products.<sup>115</sup> Second, this right would provide federal jurisdiction to preempt state law that may authorize lawsuits against the industry merely for supplying this constitutionally-protected product to “the people” whom the Second Amendment protects.<sup>116</sup>

<sup>110</sup> Compare H.R. 1036, 108th Cong. (2003), with S. 1805, 108th Cong. (2003).

<sup>111</sup> H.R. 1036, 108th Cong. § 2(a)(1) (2003).

<sup>112</sup> Compare *United States v. Emerson*, 270 F.3d 203, 232 (5th Cir. 2001) (holding that the Second Amendment guarantees an individual right), with *Silveira v. Lockyer*, 312 F.3d 1052, 1063 (9th Cir. 2003) (holding that the Second Amendment guarantees only State militia power), *reh'g denied*, 328 F.3d 567 (9th Cir. 2003) (denying a rehearing en banc over dissenting opinions by Judges Pregerson, Kozinski, Kleinfeld, and Gould), *cert. denied*, 124 S. Ct. 803 (2003).

<sup>113</sup> Freedmen's Bureau Act, ch. 200, § 14, 14 Stat. 173, 176-77 (1866) (“[T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . .”); Property Requisition Act, Pub. L. No. 274, 55 Stat. 742, 742 (1941) (prohibiting construction of law to allow requisition or registration of “firearms possessed by any individual for his personal protection or sport” or “to impair or infringe in any manner the right of any individual to keep and bear arms”); Firearms Owners' Protection Act, Pub. L. No. 99-308, §1(b)(1)(A), 100 Stat. 449, 449 (1986) (declaring “the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution”).

<sup>114</sup> *But see* *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (citing scholarship supporting *both* sides of the issue).

<sup>115</sup> See generally Stephen P. Halbrook, *Tort Liability for the Manufacture, Sale, and Ownership of Handguns?*, 6 *HAMLIN L. REV.* 351, 364-72 (1983). That the existence of a constitutional right limits state tort law is illustrated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964) (addressing “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.”).

<sup>116</sup> This presupposes that the Fourteenth Amendment incorporates the Second Amendment (as it does most of the rest of the Bill of Rights) and that Congress is using its enforcement power under the Fourteenth Amendment to prevent State infringement on the right. See STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876* (1998). But, Congress could do this under its militia power as well. U.S. CONST. art. I, § 8, cls. 15 & 16. As the Supreme Court long ago noted:

All citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government . . . the states cannot, even laying the constitutional provision in question [the Second Amendment] out of view,

Lawsuits have been commenced, the Findings continue, against the firearms industry for damages and other relief for the harm caused by criminals and other third parties who misuse firearms.<sup>117</sup> However, “[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws.”<sup>118</sup> Indeed, the federal Gun Control Act was originally passed under the Commerce Clause,<sup>119</sup> which is another jurisdictional hook for the proposed bill. As the Findings recite, businesses “are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition that has been shipped or transported in interstate or foreign commerce,” and they should not be liable for the harm caused by unlawful misuse of firearms that function as designed and intended.<sup>120</sup>

Such imposition of liability on an industry abuses the legal system, erodes public confidence in the law, “threatens the diminution of a basic constitutional right and civil liberty,”<sup>121</sup> destabilizes other industries in the free enterprise system of the United States, and—again, the clincher for federal jurisdiction—“constitutes an unreasonable burden on interstate and foreign commerce of the United States.”<sup>122</sup>

Such liability actions, which have been commenced or contemplated by the United States, various States, municipalities, and private interest groups, are unprecedented and are not “a bona fide expansion of the common law.”<sup>123</sup> The

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prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

Presser v. Illinois, 116 U.S. 252, 265 (1886).

<sup>117</sup> H.R. 1036, 108th Cong. § 2(a)(2) (2003).

<sup>118</sup> *Id.* § 2(a)(3).

<sup>119</sup> See *United States v. Lopez*, 514 U.S. 549, 561 (1995). As is clear on its face, the Arms Export Control Act was passed under Congress’ authority to regulate commerce with foreign nations. The National Firearms Act, by contrast, was passed under the tax power and is part of the Internal Revenue Code. See *Sonzinsky v. United States*, 300 U.S. 506, 511 (1937).

<sup>120</sup> H.R. 1036, § 2(a)(4).

<sup>121</sup> Statement of Administration Policy, *supra* note 106.

<sup>122</sup> H.R. 1036, § 2(a)(5). Justification of the bill under the Commerce Clause seems to be clear given the Supreme Court’s upholding of most legislation (including Gun Control Act provisions) even purporting to be passed under that clause, particularly laws that include findings that an activity affects interstate and foreign commerce and that include elements requiring such commercial nexus. See *Lopez*, 514 U.S. at 1630. Indeed, this bill seeks to override attempts by single states to suppress commerce with foreign countries and among other states. See, e.g., *Ileto v. Glock*, 349 F.3d 1191 (9th Cir. 2003) (imposing liability on Austrian manufacturer and Georgia importer for sales to law enforcement in Washington).

<sup>123</sup> H.R. 1036, § 2(a)(6).

sustaining of these actions by a “maverick” judge or jury would expand liability in a manner never contemplated by the Constitution’s Framers or by the federal or state legislatures.<sup>124</sup> And now for yet another jurisdictional hook: “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.”<sup>125</sup> Those rights would presumably include the right to keep and bear arms and the right to due process of law.

The above constitutional aspects are further clarified in the Purposes clause to the bill. The immediate purpose, of course, is to prohibit causes of action against the firearms industry for harm caused by criminals and others who unlawfully misuse firearms.<sup>126</sup> The values of the Second Amendment are reflected further in the Purposes: “[t]o 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,” and “[t]o 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.”<sup>127</sup> Section 5 is, of course, the Enforcement Clause.

After repeating the purpose of preventing such lawsuits from imposing “unreasonable burdens on interstate and foreign commerce,”<sup>128</sup> a new purpose is interjected—that of protecting the First Amendment rights of members of the firearms industry, including their trade associations, “to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.”<sup>129</sup> These rights were undoubtedly included because some of the suits alleged a conspiracy to defraud the public into believing that firearms are useful for self-defense, that associating and speaking together amounted to a plot to oversupply police and the public with firearms so that the criminal element could get them, and that petitioning Congress against passage of various firearms prohibitions helped criminals to obtain firearms.<sup>130</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* § 2(b)(1).

<sup>127</sup> *Id.* § 2(b)(2), (3).

<sup>128</sup> *Id.* § 2(b)(4).

<sup>129</sup> *Id.* § 2(b)(5).

<sup>130</sup> Among the defendants named in *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 Mass. Super. LEXIS 352, at \*1 (July 13, 2000), were the American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc., and the Sporting Arms & Ammunition Manufacturers Institute, Inc.

The meat of the bill is contained in a single sentence: “A qualified civil liability action may not be brought in any Federal or State court.” Further, any such pending action “shall be dismissed immediately.”<sup>131</sup> The remainder of the bill contains various definitions which clarify the nature of the prohibited civil actions in contrast with the types of traditional actions that are unaffected.

The term “qualified product” means a firearm, antique firearm, ammunition, or a component part thereof “that has been shipped or transported in interstate or foreign commerce.”<sup>132</sup> The term “qualified civil liability action” is defined as “a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages or injunctive relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.”<sup>133</sup> In short, no action at law or in equity may be filed against a gun maker or seller where a criminal or other person unlawfully misused a firearm. (The Daschle version would add the definition of “unlawful misuse” as “conduct that violates a statute, ordinance or regulation as it relates to the use of a qualified product.”<sup>134</sup> That would nip in the bud an action alleging an unlawful “use” rather than “misuse.”)

The term “person” includes an individual, corporation, other specified groups, “or any other entity, including any governmental entity.”<sup>135</sup> Thus, persons who could not file suit include private as well as governmental entities, such as municipalities, state attorneys general, and federal agencies—all of which have brought such suits in the past. Entities shielded from such lawsuits are federal firearms licensees, including a “manufacturer” (a person engaged in the business of manufacturing a qualified product in interstate or foreign commerce)<sup>136</sup> and a “seller” (which includes a firearm importer or dealer or a person engaged in the business of selling

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<sup>131</sup> H.R. 1036, § 3.

<sup>132</sup> *Id.* § 4(4). As the bill specifies, the definition of “firearm” is limited to the two “firearm” definitions in 18 U.S.C. § 921(a)(3)(A) and (B), which include a weapon which expels a projectile by the action of an explosive (or is designed or may be readily converted to do so), and the frame or receiver of such weapon. That excludes the definitions of firearm in (C) and (D) respectively as a firearm muffler or silencer, and as a destructive device, which includes explosive devices and certain non-sporting firearms with barrels over .50 caliber. The bill’s definition of “firearm” also includes an antique firearm, which § 921(a)(16) defines to include firearms made before 1898 and certain replicas. The definition of “ammunition” may be found in § 921(a)(17), and includes both ammunition and components.

<sup>133</sup> H.R. 1036, § 4(5)(A).

<sup>134</sup> S. 1805, 108th Cong. § 4(9) (2003).

<sup>135</sup> H.R. 1036, § 4(3).

<sup>136</sup> *Id.* § 4(2).

ammunition).<sup>137</sup> The term “engaged in the business” refers to a person who devotes time, attention, and labor to the activity in question as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the product.<sup>138</sup>

Also exempted is a “trade association,” which is any non-profit association or business, regardless of whether incorporated, of which at least two members are manufacturers or sellers of a qualified product.<sup>139</sup> The Daschle version would add the further meaning that the association “is involved in promoting the business interests of its members, including organizing, advising, or representing its members with respect to their business, legislative or legal activities in relation to the manufacture, importation or sale of a qualified product.”<sup>140</sup> This would further clarify the legitimate nature of such organizations and their First Amendment right to freedom of association.

As noted above, a qualified civil liability action may not be brought in any court. However, five types of causes of action are excluded from the definition of “qualified civil liability action,” and may continue to be brought.<sup>141</sup> They include the following:

“(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*”<sup>142</sup> The referenced section punishes “[w]hoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence . . . or drug trafficking crime.”<sup>143</sup> As noted, the transferor must be convicted of this or a comparable state offense, and the crime of violence or drug trafficking crime of which the transferee is convicted must directly harm the party who would bring an action.

“(ii) *an action brought against a seller for negligent entrustment or negligence per se*”<sup>144</sup> The term “negligent entrustment” means:

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<sup>137</sup> *Id.* § 4(6) (referring to 18 U.S.C. § 921(a)(9), which defines “importer,” § 921(a)(11), which defines “dealer,” and § 921(a)(17), which defines “ammunition”).

<sup>138</sup> *Id.* at § 4(1) (referring to 18 U.S.C. § 921(a)(21), which defines “engaged in the business”).

<sup>139</sup> *Id.* at § 4(8).

<sup>140</sup> S. 1805, § 4(8)(C).

<sup>141</sup> H.R. 1036, § 4(5)(A).

<sup>142</sup> *Id.* § 4(5)(A)(i) (emphasis added).

<sup>143</sup> 18 U.S.C. § 924(h) (1996) (defining crime of violence as in § 924(c)(3) (felonies involving use or threat of force against person or property) and drug trafficking crime as in § 924(c)(2) (federal drug felonies)).

<sup>144</sup> H.R. 1036, § 4(5)(A)(ii) (emphasis added).

the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others.<sup>145</sup>

(The Daschle version would say “or others”).<sup>146</sup> That might mean supplying a firearm to an irresponsible youth or to a person known to be mentally ill. An action involving “negligence per se” might include, for instance, the sale of a firearm to a known violent felon.

“(iii) an action in which a manufacturer or seller of a qualified product knowingly and willfully 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”<sup>147</sup> The Daschle version would strike “knowingly and willfully,” reflecting the fact that the federal Gun Control Act requires proof that specific offenses be proven as either knowing or willful.<sup>148</sup> However, some state firearm statutes have been interpreted to impose a “knew or reasonably should have known” standard akin to civil cases,<sup>149</sup> or even to impose strict liability.<sup>150</sup> In such states, depending on how broadly a court interpreted proximate cause, this portion of the Daschle amendment may not preclude the types of lawsuits sought to be prohibited.

The Daschle version would also add to the above language clauses explicitly including cases in which a manufacturer or seller “knowingly made any false entry in, or failed to make

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<sup>145</sup> *Id.* § 4(5)(B).

<sup>146</sup> S. 1805, § 4(5)(B).

<sup>147</sup> H.R. 1036, § 4(5)(A)(iii) (emphasis added). Compare *Robinson v. Howard Bros. of Jackson, Inc.*, 372 So. 2d 1074 (Miss. 1979) (holding that the sale of a pistol to a person who certified that he was over twenty-one years of age—but whose driver’s license indicated that he was actually twenty years old—violated the Gun Control Act but was not the proximate cause of the unforeseeable murder), and *Hulsman v. Hemmeter Dev. Corp.*, 647 P.2d 713 (Haw. 1982) (holding that a gun seller was entitled to summary judgment because “federal statutes regulating firearm sale did not create a duty on a seller in a negligence action nor did it create a private right of action for damages”), with *Decker v. Gibson Prods. Co.*, 679 F.2d 212 (11th Cir. 1982) (holding that whether sale of a firearm to a felon whose civil rights were restored and whose purchase was approved by sheriff could be reasonably foreseen to result in murder was a question for the jury).

<sup>148</sup> S. 1805, § 4(5)(A)(iii).

<sup>149</sup> *In re Jorge M.*, 4 P.3d 297, 299, 312 (Cal. 2000) (holding that defendant knew or should have known that rifle was an “assault weapon”).

<sup>150</sup> See *State v. Pelleteri*, 683 A.2d 555, 557-58 (N.J. Super. Ct. App. Div. 1996) (holding that no scienter element is required regarding assault weapon ban, in that “knowledge of the character of the weapon is not an element of the offense”). By contrast, federal law requires proof of knowledge of “the characteristics that brought [the weapon] within the statutory definition.” *Staples v. United States*, 511 U.S. 600, 602 (1994). “[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country.” *Id.* at 610.

appropriate entry in, any record required to be kept under Federal or State law;<sup>151</sup> or aided, abetted, or conspired with any person either in making a false statement regarding a fact material to the lawfulness of the sale of a qualified product,<sup>152</sup> or to sell such product, “knowing or having reasonable cause to believe that the actual buyer” was prohibited from receipt of a firearm under federal law.<sup>153</sup> These are crimes which typically would involve sales directly to prohibited persons or “straw sales” in which a prohibited person obtains a firearm using a proxy to conduct the transaction. Once again, the proximate cause requirement would exist for civil liability.

“(iv) *an action for breach of contract or warranty in connection with the purchase of the product*”<sup>154</sup> Actions for breach of contract or warranty arise in diverse circumstances—for instance, a firearm was not delivered when due or did not work properly where needed<sup>155</sup>—but in this context such conduct is exempted from causes of action related to “the criminal or unlawful misuse of a qualified product by the person or a third party.”<sup>156</sup> While it is unclear what causes of action might arise in that context, the exemption for those arising under contract and warranty is probably listed just to show that those actions generally are unaffected by the bill.

“(v) *an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended*”<sup>157</sup> This is the classic strict product liability case, and the bill clearly exempts such traditional actions. The Daschle version would add, “or [when used] in a manner that is reasonably foreseeable,” provided that “‘reasonably foreseeable’ use does not include any criminal or unlawful misuse of a qualified product, other than possessory offenses.”<sup>158</sup> The exclusion of unlawful misuse is consistent with traditional legal norms.<sup>159</sup> However, it is unclear what effect on the lawsuits at issue will stem from the condition that unlawful possession may be reasonably foreseeable.

The Daschle version would add a rule of construction that

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<sup>151</sup> S. 1805, § 4(5)(A)(iii)(I) (this is an offense under 18 U.S.C. § 922(m)).

<sup>152</sup> *Id.* § 4(5)(A)(iii)(II) (such a false statement is an offense under 18 U.S.C. § 922(a)(6)).

<sup>153</sup> *Id.* § 4(5)(A)(iii)(III) (such a transfer is an offense under 18 U.S.C. § 922(d)).

<sup>154</sup> H.R. 1036, 108th Cong. § 4(5)(A)(iv) (2003) (emphasis added).

<sup>155</sup> *E.g.*, *Thomas v. Olin Mathieson Chem. Corp.*, 63 Cal. Rptr. 454 (Cal. Ct. App. 1967) (involving situation where a rifle allegedly failed to discharge while the plaintiff was hunting big game).

<sup>156</sup> H.R. 1036, § 4(5)(A).

<sup>157</sup> *Id.* § 4(5)(A)(v) (emphasis added).

<sup>158</sup> S. 1805 §§ 4(5)(A)(v), 4(5)(C).

<sup>159</sup> Restatement (Third) of Torts: Product Liability § 2 cmt. p (1997).

the above exceptions “shall be construed so as not to be in conflict and no provision of this Act shall be construed to create a Federal private cause of action or remedy.”<sup>160</sup> This is a statement about the perils of legal linguistics and how lawyers have the ability to twist imperfectly worded rules. Under this clause, one exception would not trump another. Further, nothing in the enactment would create a new basis for actions against the firearms industry.

As noted, the above legislation has a good chance of passage. If it does, it will be challenged as beyond Congress’ power, violative of federalism, and inconsistent with due process. One can be sure that novel theories will be devised to attack the firearms industry.

## V. CONCLUSION

The current nationally-orchestrated efforts to suppress the firearms industry through litigation is premised on the theory that federal and state firearms laws do not go far enough and that the industry is to blame for not creating a more perfect world than the Congress or the state legislatures have devised. Indeed, the right of the people to keep and bear arms, as guaranteed by the Second Amendment and most state constitutions, and the manufacture and distribution of firearms, which are necessary to the exercise of that constitutional right, are depicted as being a public nuisance.

It is hardly a secret that this onslaught of litigation is primarily promoted by special interest lobbies that have failed to prohibit firearms ownership through the legislative process and have turned to the courts to obtain judicial legislation. While most courts have rejected this end run around the democratic process, some have embraced an activist role. Congress would be fully warranted in passing preemption legislation to end this disruption of a legitimate form of commerce, which is itself a penumbra of a basic constitutional right.

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160 S. 1805, §4(5)(D).