LEGISLATION AND LITIGATION

THE IMPACT OF LEGISLATION ON FIREARMS LITIGATION

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I. INTRODUCTION

One of the central and recurring debates within today's firearms litigation is the extent to which the final outcome has been, or can be, dictated by legislation rather than by judicially-applied common law tort or nuisance principles. A related issue is the extent to which there may be Constitutional due process, Commerce Clause or other limitations on certain judicial or legislative actions.

Defendants have traditionally argued (with some success) that the issues before the courts in most firearms litigation are properly characterized as policy determinations that should be left to the elected representatives of the people, *i.e.*, the legislatures. As various municipal and local legislative bodies enter the fray, however, it is the plaintiffs in certain areas who may be seeking to vindicate legislative enactments while the defendants seek to have such local enactments overturned by the courts on preemption, Constitutional or other principles.

The legislative terrain may be viewed as including three broad categories of firearms enactments: (1) Those that tend to protect firearms users and/or manufacturers from harassment; (2) Those that regulate certain aspects of firearms design, possession, or sale; and (3) Those that prohibit or strongly discourage firearms possession, manufacture or sale. The purpose of this article is to provide a brief overview of these three types of legislation and the courts' reactions to them. This overview is provided with the *caveat* that it is largely anecdotal and does not purport to be exhaustive.

II. PROVISIONS THAT MAY PROTECT FIREARMS USERS OR MAKERS

A. The Second Amendment:

The Second Amendment to the U.S. Constitution states:

> 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. (U.S. Const. Amend. II.)

In *U.S. v. Miller*, 307 U.S. 174, 178 (1939), the U.S. Supreme Court found that "the Second Amendment guarantees no right to keep and bear a firearm that does not have some reasonable relationship to the preservation or efficiency of a well regulated militia." The U.S. Supreme Court also has declined to review lower court decisions holding that while the Second Amendment may prevent the federal government from infringing on the rights of individuals to bear arms, the Second Amendment does not prevent states from enacting legislation that limits an individual's right to possess firearms. *See Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942), *cert.* denied, *Velazquez v. U.S.*, 319 U.S. 770 (U.S. Puerto Rico 1943); *Quilici v. Morton Grove*, 695 F.2d 261, 269-271 (7th Cir. 1982), *cert.* denied, 464 U.S. 863 (1983) (holding that the Second Amendment does not apply to a city, and upholding a local ban on handguns in Morton, Illinois).

Some lower courts have gone somewhat farther and stated that: ". . . the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen".[1] At least one other court has, however, found that the Second Amendment does grant rights to individuals in certain circumstances that cannot be infringed by state authorities. *See U.S. v. Emerson*,

[1] *Hickman v. Block,* 81 F.3d 98, 101 (9th Cir. 1996). *See also, Rupf v. Yan*, 102 Cal.Rptr.2d 157 (1st Dist. December 11, 2000) (Kline, P.J.) (Upholding county sheriff's confiscation of firearm from person who was detained for mental evaluation and found to be depressed and/or suicidal.)

46 F.Supp.2d 598 (N.D. Texas 1999) (appeal pending, U.S. Court of Appeals, 5th Cir).[2]

While there is still a live debate regarding scope and possible application of the Second Amendment in some firearms cases, most of these are cases involving an individual's wish to possess firearms rather than a manufacturer's or distributor's possible liability for making or selling firearms. The Second Amendment has to a large degree been peripheral as an issue in litigation by plaintiffs against firearms manufacturers or distributors.

B. Laws Barring Municipal Suits

According to one recent count,[3] fourteen states have passed laws barring municipal lawsuits. *See:* Alaska Rev. Stat., § 09.65.155 (Michie Supp. 1999); Ariz. Rev. Stat. § 12-714 (Supp. 1999); Ark. Code Ann. § 14-16-504(b)(2) (Michie Supp. 1999); Ga. Code Ann. § 16-11-184 (1999); La. Rev. Stat. Ann. § 40:1799 (West Supp. 2000); Me. Rev. Stat. Ann., tit. 30-A, § 2005 (West Supp. 1999); Mont. Code Ann. § 7-1-115 (1999); Nev. Rev. Stat. § 12.107 (1999); Ok. Stat. tit. 21, § 1289.24a (Supp. 2000); 18 Pa. Cons. Stat. § 6120; S.D. Codified Laws §§ 21-58-1, *et seq.*; Tenn. Code Ann. § 39-17-1314(c) (Supp. 1999); Tex. Civ. Prac. & Rem. Code Ann. § 128.001 (West Supp. 2000). Of these, two (Alaska and South Dakota) have barred gun industry suits by all plaintiffs, not just municipal plaintiffs.

Defendants' responses to suits by the cities of Atlanta (Georgia), New Orleans (Louisiana) and Philadelphia (Pennsylvania) have invoked these state laws as defenses. The principal challenge to these laws by plaintiff cities has been to the

[2] *Emerson* has been expressly rejected by a number of courts. *Rupf v. Yan*, 85 Cal.App.4th 411, 421 (App.1 Dist. 2000); *U.S. v. Spriull*, 61 F.Supp.2d 587, 590-591 (W.D. Texas 1999); *U.S. v. Napier*, 233 F.3d 394, 402-404 (6th Cir (Ky.) 2000); *Olympia Arms v. Magaw*, 91 F.Supp.2d 1061, 1071 (E.D. Mich. 2000); *U.S. v. Henson*, 55 F.Supp.2d 528 (S.D. W.Va. 1999).

effect that they are either impermissibly "retroactive" in attempting to bar the cities' suits (Atlanta and New Orleans), or that they are otherwise "unconstitutional" based on due process and separation of powers arguments (Philadelphia). The results have varied:

Georgia

In Georgia, the trial court denied the defendants' motion to dismiss based on the Georgia statute, but an interlocutory appeal is pending and the Georgia Attorney General has apparently sided with the defendants and against the Mayor of Atlanta. It is anticipated that the applicability of the Georgia statute to bar Atlanta's suit will be decided by the Georgia Supreme Court.

Louisiana

In 1999, Louisiana enacted its legislation precluding the imposition of liability on a manufacturer or seller of (non-assault) firearms for the "improper use of a properly designed and manufactured product." La. R.S. 9:2800.60. Before the Legislation was enacted, but after its retroactive effective date, the City of New Orleans had filed a suit against various manufacturers and distributors of firearms to recover for its alleged damages arising from the illegal use of handguns.[4] Defendants responded by filing Preemptory Exceptions of No Right of Action and No Cause of Action pursuant to La. R.S. 9:2800.60.

The Louisiana trial court found that prior to enactment of La. R.S. 9:2800.60, the City of New Orleans had a vested right to pursue the action pursuant to its home charter rule and Louisiana Constitution Article VI, §4. It further found that the retroactive provision of La. R.S. 9:2800.60 violated Louisiana Constitution Article III, § 12, to the extent it directly affected a pending civil lawsuit. For those and other

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[3] Brent W. Landau, "RECENT LEGISLATION: State Bans on City Gun Lawsuits", 37 *Harv. J. on Legis.* 623, n. 2 (Summer, 2000).

reasons, the Preemptory Exceptions were denied. *Morial v. Smith & Wesson*, 2000 WL 248364 at (La. Civil D.Ct.). The matter currently is stayed at the trial court level while an interim appeal to the Louisiana Supreme Court (Docket No. 2000-CA-1132) proceeds on the legality of La. R.S. 9:2800.60. The Supreme Court matter has been briefed and argued but no opinion has been issued.

Pennsylvania

The municipal suit brought by the City of Philadelphia was recently found by the federal district court to be barred by the preemptive "Uniform Firearms Act" (18 Pa. Cons. Stat. Ann. §§ 6101, *et seq.*) *City of Philadelphia v. Beretta U.S.A., et al.* (E.D. Pa. No. 2000-CV-2463), 2000 U.S. Dist. LEXIS 18392 (E.D. Pa. December 20, 2000). An appeal by plaintiffs is anticipated.

In dismissing the suit, the Pennsylvania federal court noted that Pennsylvania's version of the Uniform Firearms Act (§6120) had been previously found by the courts to deprive the City of Philadelphia of the "power to regulate firearms such as assault weapons". 2000 U.S.Dist. LEXIS 18392, at *14, *citing Ortiz v. Commonwealth*, 545 Pa. 279, 681 A.2d 152 (Pa. 1996). In its ruling, the federal court then proceeded to "hold that the UFA also deprives the City of the power to sue in the role of *parens patriae*". *Id.*, footnote deleted. The Court further found that the City of Philadelphia had no "accrued" causes of action for negligence or public nuisance, so that there could be no question of the legislature having unconstitutionally deprived the City of an "accrued" cause of action. *Id.* at *31-*33.

[4] *Morial v. Smith & Wesson, et al.*, Civil District Court for the Parish of Orleans, State of Louisiana, No. 98-18578.

C. Statutes Regarding Product Defect Determinations

Some states have legislative enactments that recognize the inherent tension between product liability doctrines (which tend to discourage the manufacture, sale or distribution of products that unduly increase the risk of personal injury or death) and the peculiar nature of firearms (a principal purpose of which is to inflict injury or death when the user decides to aim and fire the weapon). For example, Louisiana (in addition to passing a law barring municipal suits) has a separate statute that amends the state's statutory product liability law in a way that helps shield firearm manufacturers from claims that their products are "defective" if they do not contain features advocated by plaintiffs. *See La. Rev. Stat. Ann. § 9:2800.60.*

In California, the legislature simply reaffirmed existing law by making the following declaration in Cal. Civil Code § 1714.4:

> (a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.
>
> (b) For purposes of this section:
> (1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.
> (2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.
>
> (c) This section shall not affect a products liability cause of action based upon the improper selection of design alternatives.
>
> (d) This section is declaratory of existing law.

At least one court applying California law has applied this statute to claims of negligence as well as product liability. *See* Judge Fern Smith's decision in *Casillas v. Auto-Ordnance Corp.,* No. C95-3601 FMS, 1996 U.S. Dist. LEXIS 7396 (N.D. Cal. May 21, 1996).

D. Municipal Laws Requiring Firearm Ownership

One of the more interesting attempts by a municipality to enter into the political debate involving the pros and cons of individual possession of firearms is the city of Virgin, Utah's recently-announced "new gun ordinance that requires every head of household to own and maintain a firearm" in their home. While the authors have not yet obtained a copy of this ordinance, a web page printout describing it (and the city of Virgin, Utah) is appended as Attachment 1. Such laws are of course not unprecedented, and can be traced to statutes such as those of the Commonwealth of Virginia that pre-date the founding of our republic. (The polar opposite of Virgin, Utah's approach is represented by the equally unusual Ordinance No. 288-00 recently adopted by the Board of Supervisors of the City and County of San Francisco, a copy of which is appended as Attachment 2 and discussed at the end of this article).

III. LAWS REGULATING FIREARMS

In terms of sheer volume, the bulk of federal, state and local firearms laws fall into a middle category of laws the principal purpose of which is neither to foster nor to ban the manufacture, sale, or possession of firearms, but instead to place varying degrees of control or regulation on these activities. One question that periodically arises is the extent to which the comprehensiveness of a state's firearms regulatory scheme is sufficient to preclude efforts of municipalities or other political subdivisions to add to or alter that regulation. Where the state legislature expressly preempts local ordinances, the matter is easily resolved in favor of preemption.[5]

[5] For example, the State of Washington preempts local regulation of firearms to the extent that local laws are inconsistent with, more restrictive than, or exceed the requirements of state law. RCW 9.41.290.

Where the preemption is not express, the question is more difficult. For example, in two similar cases, the Ninth Circuit recently certified the question of preemption to the Supreme Court of California. *See Great Western Shows, Inc. v. Los Angeles County*, 229 F.3d 1258, 1260 (9th Cir. 2000) ("Does state law regulating the sale of firearms and gun shows preempt a municipal ordinance prohibiting gun and ammunition sales on county property?"), and *Nordyke v. King*, 229 F.3d 1266, 1267 (9th Cir. 2000) ("Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?").

Also included in this intermediate group are laws such as those enacted in Maryland, Massachusetts and New York that impose significant new requirements on the design, safety features and sale of certain handguns. While these (and regulations under them) have largely withstood court challenges based on vagueness and other grounds, they are perceived in some quarters as being intended to substantially reduce the availability of firearms in general. Others defend these laws as being reasonable exercises of the states' police powers that are designed simply to get "junk guns" out of the marketplace. The reactions of manufacturers to these regulations depends to a considerable degree on the extent to which they feel their products are being unfairly targeted.

In order to illustrate the scope of the federal, state and local regulatory structures that apply to firearms, we describe them briefly below:

A. Federal laws and regulations.

The most comprehensive regulation of firearms comes from Federal Regulation which has, over time, alternately expanded and restricted various aspects of gun sales and possession.

As is well known, firearms are exempted from the scope of the Consumer Products Safety Commission's authority. Enforcement of the Federal laws is vested instead with the U.S. Bureau of Alcohol, Tobacco and Firearms (BATF).

The National Firearms Act of 1934 (26 U.S.C. §§ 5801-5802; 5811-5812; 5821-5822; 5841-5849; 5851-5854; 5861; 5871-5872) was the first Federal legislation to regulate firearms. Created as part of the infamous Internal Revenue Code it was intended to impose taxes upon the manufacture, sale and transfer of certain classes of firearms including machine guns, short barrel rifles and shotguns. To facilitate the collection of taxes, the National Firearms Act of 1934 required that such firearms be registered.

In 1938 the Federal Firearms Act (ch. 850, 52 Stat. 1250 (1938) (repealed 1968)) was codified to regulate the interstate sale of firearms. In addition to prohibiting the transfer of firearms to certain categories of people such as convicted felons, the Act required that manufacturers, importers and dealers obtain Federal Firearms Licenses and maintain records of the names and addresses of customers.

The National Firearms Act was amended and the Federal Firearms Act was repealed by the Gun Control Act of 1968 (18 U.S.C. §§ 921-930), which passed shortly after the fatal shootings of Robert F. Kennedy and Martin Luther King, Jr. The Gun Control Act expanded upon the list of persons who were not permitted to purchase or possess firearms, prohibited the interstate sale of handguns, required the inclusion of serial numbers on firearms, established minimum age requirements for the purchase of firearms, and prohibited the importation of firearms contemplated by the National Firearms Act.

In turn, portions of the Gun Control Act were modified in 1986 by the Firearms Owners' Protection Act (18 U.S.C. §§ 921-930), which is also known as the McClure-Volkmer Act. Significantly, this 1986 Act expressly permits holders of

Federal Firearms Licenses to sell guns at gun shows in their home states, a practice that is now vehemently condemned by municipalities that have brought litigation against the firearms industry, alleging that the practice facilitates the sale of handguns to criminals. At the same time, the Act bans future sales of machine guns and the importation of barrels for certain "junk" guns.

The Gun Control Act of 1986 was further modified in 1993 by the Brady Handgun Violence Protection Act (18 U.S.C. § 922(s)). The Brady Bill imposed a 5 day waiting period for the sale of handguns by licensed dealers to non-licensed purchasers, thus providing an opportunity for law enforcement authorities to run background checks to determine whether the purchaser was prohibited from completing the purchase. The Brady Bill was expanded in 1998 to include rifles and shotguns in the background check provisions, but was also amended to exclude persons licensed to carry concealed firearms from the waiting period. However, the 5 day waiting period has been replaced by an instant background check which can extend the purchase period to three days for further checking if the initial results are ambiguous.

B. State laws and regulations.

CALIFORNIA:

California serves as an example of how one of the larger and more populous states has chosen to regulate firearms. In large part, California adopts Title 18 of the United States Code. For example, California defines a "wholesaler" as a person licensed as a dealer pursuant to 18 U.S.C. 921, and excludes from its definition of "wholesaler" manufacturers and importers who are licensed to engage in those activities pursuant to the same provision. Cal. Penal Code § 12001.

In 1996 the California Legislature added California Penal Code § 12039, requiring the Attorney General of the State to issue annual reports (beginning in

1998) "on the specific types of firearms used in the commission of crimes based upon information obtained from state and local crime laboratories."

In 1999, the California Legislature added a number of California Penal Code sections establishing physical testing standards, to be run and enforced by the Department of Justice, but funded by charges to the manufactures and importers of handguns. Based upon the testing, a roster was issued on January 1, 2001, (which will be maintained) of handguns, capable of being carried concealed, which can be sold in California because they have been deemed to "not be unsafe". Cal. Penal Code § 12131; *see also* Cal. Penal Code § 12131.5 (regarding procedures for "similar" firearms). Conversely, California Penal Code § 12126, defines "unsafe handguns" to include concealable pistols, handguns and revolvers that do not meet the "firing" and "drop safety" tests required by Cal. Penal Code §§ 12127 and 12128, and do not have prescribed safety devices.

NEW YORK:

A New York State license to carry or possess a handgun, unless specifically limited in scope to place and time, is valid throughout the state with the exception of New York City. Licenses issued by the state are (with few exceptions) only valid in New York City to transport a handgun in a locked case while passing through on a "continuous and uninterrupted" trip. N.Y. Penal Code § 400.00.

The City of New York enacted Legislation in 1999 (which became effective February 1, 2000) making it illegal for any person or business to dispose of a firearm that does not include a safety locking device authorized by the police commissioner of that city. It further imposes labeling requirements on licensed manufacturers, importers and dealers, requiring them to provide warning language regarding the storage of firearms by two methods, affixation of a printed label on the firearm itself

and inclusion of the warning on a separate sheet of paper in the packaging. NYC Code § 10-311.

IV. LAWS PROHIBITING FIREARMS POSSESSION OR MANUFACTURE

The final category of laws are those that unabashedly seek to prohibit firearm possession or ownership. The City of Chicago, for example, has such an ordinance and has pointed to it as a basis for its "nuisance" complaint[6] against sellers who, the City believes, market their products in such a way that it is foreseeable that they will enter Chicago where they are prohibited.

WASHINGTON D.C.:

The District of Columbia has gone much farther by enacting a series of controversial measures, under the title "Strict Liability Act", purporting to make manufacturers and sellers throughout the world liable to injured parties should their products ever find their way into the District of Columbia. Effectively, the act purports to make the manufacturer or seller the involuntary insurer of anyone injured by its product in the District of Columbia (where such products are banned). The act requires no culpable negligence or other act by the manufacturer, and makes no allowance for the possibility that the manufacturer or seller may have absolutely no control over the movement of its product after its initial sale. This statute is one of the bases for a suit brought by the District of Columbia (joined by several individual plaintiffs) against a wide variety of firearms manufacturers. A motion to dismiss the complaint is pending in the District of Columbia trial courts before Judge Zeldon, and the motion challenges the enforceability and applicability of the Draconian DC law.

SAN FRANCISCO:

The City and County of San Francisco has recently adopted an Ordinance that is similar in its approach to the D.C. law. A copy of the San Francisco Ordinance is appended as Attachment 2. The San Francisco Ordinance actually repeals a purported ban on handguns that had been previously enacted (perhaps because of preemption issues) and instead adds a "Firearm Strict Liability Act" purporting to make manufacturers of handguns the insurers as to any injuries or deaths caused by their products. The Ordinance has not yet been applied or tested in court.

CONCLUSION

The legislative arena (including the world of municipal ordinances) is replete with laws and ordinances that are likely to be seized upon by both sizes of the ongoing firearms litigation. The extent to which a legislative pronouncement (retroactive or otherwise) can "trump" lawsuits purporting to be brought under common law remains in dispute in a number of cases. Litigation in the District of Columbia (and possibly in the future in San Francisco) also will test the jurisdictional and Constitutional limits of municipal edicts. The final outcome is unlikely to be known for many months, and possibly several years. In the meantime, the legislative aspect of firearms cases will continue to loom large.

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6 The Chicago trial court dismissed the complaint for failure to state a claim, but an appeal has been filed and is pending.