

Statutory Restrictions:

“That the City cannot do by act of the city Council it now seeks to accomplish with a lawsuit. The United States Supreme Court has recognized that the judicial process can be viewed as the extension of a government’s regulatory power. As the court explained, ‘[s]tate power may be exercised as much by a jury’s application of a state rule of law in a civil suit,’ as by regulation or ordinance. (citations omitted). Similarly, the City’s instant action seeks to control the gun industry by litigation, an end the City could not accomplish by passing an ordinance.” *Id.* at 4.

Duty:

“[N]o legal duty exists upon these defendants to protect citizens from the deliberate and unlawful use of their products.” *Id.* at 14.

Remoteness:

In its analysis the district court examined the route a gun takes from the manufacturer to Philadelphia streets. (citations omitted). First, the defendant manufacturers sell guns to licensees; second, the licenses (sic) sell the guns to dealers; third, the dealer sells it to a lawful purchaser acting as a straw buyer; fourth, the straw buyer transfers the weapon to a criminal or a youth; fifth, the transferee uses the gun to commit a crime; and finally, demand on the City’s or the organizational plaintiffs’ resources is increased.

Plaintiffs try to shorten the causal chain by arguing that the ‘thriving illegal market . . . injures [them], even before any guns acquired in the illegal market are actually used in the commission of a crime. This statement, however, does not reduce the links that separate a manufacturer’s sale of a gun to a licensee and the gun’s arrival in the illegal market through a distribution scheme that is not only lawful, but also prescribed by statute with respect to the manufacturer’s conduct.

Circuit Judge Greenburg, U.S. Court of Appeals for the Third Circuit, City of Philadelphia v. Beretta U.S.A. Corp., 2002 WL 29740, 4 (3d Cir. Jan. 11, 2002).

WILMINGTON

Duty:

“Concerning the alleged duty of care to prevent firearms from ‘landing in the hands of [criminals],’ a duty like that might apply to retailers. The Court sees no duty on the manufacturers’ part that goes beyond their duties with respect to design and manufacture. The Court cannot imagine that a weapon can be designed that operates for law abiding people, but not for criminals.”

Judge Silverman, Delaware Superior Court, Sills v. Smith & Wesson Corp., C.A. No. 99C-09-283-PSS, 20 (Del. Sup. Ct. Dec. 1, 2000).

Mr. STEARNS. I thank the gentleman, and Ms. Rand, your opening statement, please.

STATEMENT OF M. KRISTEN RAND

Ms. RAND. Thank you, Mr. Chairman, and members of the subcommittee. My name is Kristen Rand, and I am the Legislative Director for the Violence Policy Center. The Violence Policy Center is a research and policy development organization.

We focus exclusively on the gun industry and gun policy. I would like to begin my remarks by pointing out that guns, along with tobacco, are the only unregulated consumer product manufactured in America.

And just as an example, this teddy bear, which we purchased from Smith & Wesson, as you can see has a cute little Smith & Wesson tee-shirt, but this teddy bear is regulated by the Consumer Product Safety Commission for a variety of hazards that it might present to children, including small parts, flammability, hazardous materials.

But guns that Smith & Wesson makes are not regulated. There is no Federal agency with the authority to regulate the design, manufacture, and to a large extent the distribution of firearms in America.

So that leaves the tort system as the only method of regulation for the gun industry, and I think that Elisa's comments speak very clearly and concisely about the function of the tort system.

It is entirely appropriate that any member of the firearms industry be held accountable for its negligent conduct, whether or not that conduct complies with the absolute letter of the law.

And that is actually the main thrust of some of our major concerns with this legislation. That because if a manufacturer or dealer acts in technical compliance with the law, and are on the list maintained by the Secretary of Commerce, they are protected from liability if their guns are used by a third-person to kill or injure.

And, Mr. Chairman, I would respectfully disagree that the bill would not impact cases like the Kitchen case. The way the bill is currently drafted, it would definitely protect someone who goes into a store visibly intoxicated, and buys a gun, and injures a third-person.

And particularly in the Kitchen case, there was no State law that would prevent that sale, and there is no Federal prohibitive category that covers the visibly intoxicated. So that case would clearly fall under the protection of this bill.

Likewise, we have concerns that the definition of manufacturer and dealer in the bill are overly broad. Because it requires that dealers or manufacturers only be licensed to the extent required by law, it would in fact allow manufacturers who manufacture guns at home for their own use, and who are not required to be licensed as manufacturers under Federal law, it would protect those people, people making kit guns at home who may be making occasional sales.

Likewise, it would protect hobbyist gun sellers, who often market their guns at gun shows, bragging that they don't have to conduct a background check. In fact, I have a photo here from a Seattle area gun show.

This is a private seller, and it says, "Private Collection, No Wait, No Phone Call." But these hobbyists are specifically excluded from the licensing requirements of Federal law, and they would clearly be protected under this bill.

I am encouraged by some of the comments from the committee members that there is a willingness to deal with some of these problems, and we think that is important, but the bigger picture is going back to the point of an unregulated industry.

The plaintiffs have to have a wide berth in litigation when you are dealing with an unregulated industry, because that is the only check on the conduct of that industry. So we think that these lawsuits brought by cities, even though the Violence Policy Center has actually be critical of some of the particular aspects of that litigation, it is entirely appropriate, and it is the function of the tort system to change with society, and to address problems that aren't specifically addressed by statute.

And for those reasons, we strongly oppose H.R. 2037, but we thank you for hearing our comments.

[The prepared statement of M. Kristen Rand follows:]

PREPARED STATEMENT OF M. KRISTEN RAND, LEGISLATIVE DIRECTOR, VIOLENCE
POLICY CENTER

INTRODUCTION

Good morning Mr. Chairman and members of the Committee. I am Kristen Rand, legislative director for the Violence Policy Center (VPC). The VPC is a national non-profit organization that conducts research and policy development aimed at reducing gun-related violence. The VPC has conducted numerous studies regarding the impact that tort reform would have on the firearms industry and hence on gun violence-prevention efforts.

As you know, 33 lawsuits have been filed by city, county, and state officials against various gun manufacturers, distributors, dealers, and trade associations. From the moment these suits were filed, the gun industry has poured tremendous resources into shielding themselves from ever having to step into a courtroom to defend themselves and their products. In state legislature after state legislature, the industry—aided by the National Rifle Association—has pushed legislation to insulate itself from suits. These efforts have been very successful. More than 20 states have enacted sweeping immunity legislation preventing cities from filing cases.

The Violence Policy Center has expressed concerns about some aspects of the lawsuits filed by cities against the gun industry. The VPC has expressed concern that some of the suits make overly broad allegations against the gun industry. As a close observer of the industry, the VPC knows that the industry is not a monolith, and cannot be treated as such. The VPC believes that the conduct of each player in the industry must be judged independently. At the same time, when appropriate, the industry should be required to defend its conduct in a courtroom, rather than hide behind special interest legislation that exempts the gun industry from the rules by which all other product manufacturers must play.

The merits of any individual lawsuit are not what we are here today to discuss. We are here to analyze H.R. 2037, the “Protection of Lawful Commerce in Arms Act,” legislation that would make sweeping changes in state tort law; changes designed specifically to benefit the gun industry. The “Protection of Lawful Commerce in Arms Act,” would make it virtually impossible to bring lawsuits against the gun industry in circumstances in which the industry’s conduct contributes to criminal gun violence if the conduct of the industry is in technical compliance with the law. This is a dangerous proposal. Plaintiffs pursuing actions against the gun industry should be allowed a wide berth since the firearms industry is already exempt from federal health and safety regulation.

GUNS—AND TOBACCO—THE LAST UNREGULATED CONSUMER PRODUCTS

Aside from the tobacco industry, the firearms industry is America’s last unregulated consumer product manufacturer. Unlike virtually every other consumer product—from toys to automobiles—firearms and ammunition are subject to no federal safety oversight, and commerce in guns is subject to only modest restrictions. Therefore, the civil justice system serves as the only “regulation” of the conduct of the gun industry. Litigation is the only mechanism available to consumers and victims of firearms violence to hold the gun industry accountable when it acts negligently or recklessly. Weakening the rights of consumers and public officials to sue the gun industry deprives citizens of the sole tool currently available to hold the gun industry accountable for the products it sells, a product that kills nearly 30,000 Americans every year. To put this number in context, that is the equivalent of five fully loaded 747 jumbo jets crashing every month. Despite this death toll, no federal agency has the authority to regulate the design and manufacture of firearms.¹

Taking into account the unregulated status of the gun industry, any weakening of tort law that currently applies to the industry is unwarranted. H.R. 2037 would make it virtually impossible to bring lawsuits against the gun industry in circumstances in which the industry’s conduct contributes to criminal gun violence so long as the conduct of the industry is in technical compliance with the law. The restrictions contained in H.R. 2037 are intended to reach lawsuits like those brought by the 33 cities, counties, and states. The suits target the design, marketing, and distribution practices of the firearms industry in an effort to hold the industry accountable for the allegedly resulting gun violence. Like the tobacco suits filed by state attorneys general, many of these lawsuits against the gun industry argue novel, untested legal theories. The suits attempt to define the parameters regarding the liability of the firearms industry for the gun violence that plagues our country.

¹Firearms and ammunition are specifically exempt from the jurisdiction of the Consumer Product Safety Commission, see 15 USC § 2052(a)(1)(E).

In the view of the Violence Policy Center, this is entirely appropriate. Law professor Carl Bogus makes this point forcefully in his discussion of the lawsuits filed by cities against the gun industry in his book *Why Lawsuits are Good for America: Disciplined Democracy, Big Business and the Common Law*, "Flexibility is one of the hallmarks of tort law... tort law is necessarily elastic. It must be able to be stretched to fit new situations as courts deem it necessary to do so."²

However, the real-world effects of H.R. 2037 would reach far beyond these novel lawsuits and would adversely affect many lawsuits brought under traditional, accepted tort theories. The bill would also operate to protect corrupt gun dealers and negligent gun show promoters, some of the gun industry's worst actors. The VPC would like to use the bulk of our testimony to discuss these perhaps unintended consequences of the bill.

DEFINITIONS OF "MANUFACTURER" AND "DEALER" WOULD PROTECT THOSE WHO MAKE GUNS AT HOME AS WELL AS GUN SHOW "HOBBYIST" SELLERS

The definitions contained in section 13 of H.R. 2037 would operate to protect firearm and ammunition manufacturers and dealers who are "licensed to engage in business" as a manufacturer or seller "to the extent required" under title 18 of the United States Code. Title 18 requires any person who "devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured" to obtain a manufacturer's license.³ But an individual who manufactures or assembles a firearm for his own personal use (or to give as a gift) is not required to be licensed under existing federal law. Nevertheless, such persons would be eligible to register with the Secretary of Commerce as a "manufacturer" under H.R. 2037 because they are "licensed to the extent required" by federal law.

The potential danger of shielding do-it-yourself gun manufacturers is starkly demonstrated by a growing trend in firearms market: "kit guns" or "parts sets." Gun publications such as *Shotgun News* are replete with advertisements for "kit guns," firearms that can easily be assembled from parts. Parts sets are available for a wide variety of firearms, including handguns and assault weapons.⁴ Under H.R. 2037, entities that manufacture such parts sets as well as people who use such parts kits to manufacture guns at home could register with the Secretary of Commerce and be eligible for protection from civil liability.

Likewise, a person "who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms," must obtain a dealer's license under current federal law. However, the federal licensing statute specifically excludes from the definition of "dealer," any person "who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." Anyone who falls within this latter exclusion for "hobbyists" could register with the Secretary of Commerce as a "seller" under H.R. 2037 because they are "licensed to the extent required" by federal law and be protected from liability.

This makes so-called "hobbyists" who make occasional sales at gun shows eligible to qualify as "a seller in interstate or foreign commerce of a firearm or ammunition product," under H.R. 2037. This would have the effect of protecting from liability private gun sellers who often compete with federally licensed gun dealers at gun shows by bragging that they do not have to conduct background checks. In fact, I have with me a photo taken at a gun show depicting a display of handguns accompanied by a handwritten sign reading, "Private Collection; No Wait; No Phone Call." Under H.R. 2037, these "hobbyist" gun show dealers would be immune from civil liability resulting from the criminal use of a gun he sold so long as he takes the time to register as a "seller" with the Secretary of Commerce.

² Carl T. Bogus, *Why Lawsuits are Good for America: Disciplined Democracy, Big Business and the Common Law*, 199 (New York University Press 2001). See also Robert L. Rabin, *Enabling Torts*, 49 DePaul L. Rev. 435 (1999) (discussing how gun industry liability for negligent marketing and distribution practices fits into a category the author describes as "enabling torts.")

³ 18 USC § 921(a)(21)(A).

⁴ Although it is very difficult to determine how many of such "kit guns" have been used in crime, such a gun was used to murder a Millbrae, California police officer in 1998. Officer David Chetcuti was shot with a "home constructed semiautomatic resembling an AR-15," according to authorities investigating the killing. Sheriff's deputies who executed a search warrant at the suspect's home reported finding bomb-making materials along with parts used in the "home-made" weapon. Tyche Hendricks and Jim Herron Zamora, "Cop killing: No Fremont tie..." *San Francisco Examiner*, April 27, 1998.

H.R. 2037 WOULD UNDERMINE EXISTING STATE COMMON LAW

The bill would wipe out cases utilizing the well-established legal theory of negligent entrustment. This theory applies where there is clear evidence of a negligent sale by a manufacturer or dealer, yet the conduct is not illegal.⁵

For example, in *Deborah Kitchen v. K-Mart Corporation* Thomas Knapp purchased a .22 caliber rifle and a box of bullets at a K-Mart after a day-long drinking spree. He then shot his ex-girlfriend, Deborah Kitchen, leaving her a quadriplegic. By his own estimate, Knapp had consumed a fifth of whiskey and a case of beer before driving to K-Mart to make the purchase. The K-Mart clerk who sold Knapp the rifle testified that Knapp's handwriting on the federal form required for firearm purchase was illegible, and that he helped Knapp fill out the form. Knapp had no recollection of what occurred at K-Mart. K-Mart was found liable in a civil suit filed by Kitchen, but the Florida Court of Appeals reversed the decision concluding that since "there is no statutory prohibition against the sale of a firearm to a person who is intoxicated, the seller is not responsible to a third person for the improper use of the firearm." The Florida Supreme Court overturned the Court of Appeals ruling that "an action for negligent entrustment . . . is consistent with Florida public policy in protecting its citizens from the obvious danger of the placement of a firearm in the hands of an intoxicated person . . ."⁶

The seller in this case would be eligible for protection from civil liability under H.R. 2037 since the conduct of the seller was technically in compliance with the letter of state law (federal law also does not prohibit the sale of a firearm to a visibly intoxicated individual).⁷

In a similar case, *Pavrides v. Niles Gun Show, Inc.*, a gun show promoter was held liable for the injuries inflicted by two teenagers who had stolen weapons from his event.⁸ Although several thefts of firearms had occurred at the promoter's shows, and the promoter had knowledge of the previous thefts, vendors were not required to secure their weapons. In January, 1992, the promoter held a gun show at a local civic center. Although the promoter had a policy of refusing admission to unsupervised minors, Jayson Troyer, age 13, Edward Tilley III, age 16, and a companion were able to pay the admission fee and enter the gun show. No one questioned them about their ages, or asked for identification. While they were at the show, several vendors offered to sell the boys firearms and ammunition. At one point, the boys left the show to pick up a 15-year-old friend. Upon returning, the three re-entered the show, gaining re-admission by showing the stamps on their hands. Their friend paid the admission fee and entered the show. Again, the boys were not questioned about their ages, nor asked for identification. Once inside, the boys began stealing firearms. According to the boys, most of the firearms were not secured, making the thefts easy. One boy stole a .25 pistol. Another took two handguns: a .22 derringer and a .38 handgun. Each time the boys stole a firearm, they left the show to store the gun, and again re-entered by showing their stamps. Later in the afternoon, a vendor sold one of the boys 38 caliber ammunition. After approximately two and one-half hours, they departed for the home of one of the boys. There, they inhaled gasoline fumes. They then decided to break into cars parked along the street. Discovering a car with keys, they took the car. When it began to snow, they began purposely sliding the car into trash cans for amusement.

Gregg Pavlides witnessed the boys' activities from his house. He then got into his car and followed the boys. Another driver also began following the boys. Shortly thereafter, the boys lost control of the car and went off the road. Pavlides and the other driver stopped their cars and approached the boys. As Pavlides neared the car, one of the boys fired at him shooting him twice. One bullet punctured his lung, and the other lodged in his spinal cord rendering him a paraplegic. The Court of Appeals

⁵The bill would not have the same impact on cases based on the similar theory of negligence *per se*. But it is important to note that negligent entrustment and negligence *per se* are separate and distinct causes of action requiring different elements of proof. Negligent entrustment is based in common law negligence, and proof is required that the seller breached a duty of care to the public to avoid sales to dangerous individuals because such sales could foreseeably result in harm to the buyer or a third party. Liability based on negligence *per se*, on the other hand, arises from the seller's failure to comply with specific statutory duties, e.g. the federal Gun Control Act or similar state law. In *Knights v. Wal-Mart Stores, Inc.* 889 F. Supp. 1532 (S.D. Ga. 1995), for example, it was determined that employees of Wal-Mart, by inquiring whether the purchaser of a firearm had been adjudicated mentally incompetent, had fulfilled their statutory duty and therefore could not be negligent *per se*. However, the court held that the same employees could be found liable under traditional common law principles of negligence.

⁶*Kitchen v. K-Mart Corp.*, 697 So. 2d 1200; 1997 Fla. LEXIS 1052; 22 Fla. L. Weekly S 435, July 17, 1997.

⁷See 18 USC § 922(d) for the list of the federal prohibited categories.

⁸*Gregg L. Pavlides v. Niles Gun Show, Inc.*, 112 Ohio App 3d 609, 679 N.E. 2d 728, (1996).

of Ohio affirmed the judgment in favor of the plaintiff awarding \$750,000 in compensatory damages and \$12,000 in punitive damages.

H.R. 2037 would operate to protect negligent gun show promoters. Such promoters would fall under subsection (d)(6)'s definition of "seller," since a gun show promoter "otherwise is involved in placing a firearm or ammunition product in the stream of commerce." H.R. 2037 would have protected the promoter in the *Pavrides* case since the promoter's conduct was negligent but not criminal.

VIOLATORS OF SOME FEDERAL GUN CONTROL STATUTES WOULD BE PROTECTED

The bill would protect conduct by manufacturers, sellers, and trade associations who are listed with the Secretary of Commerce and whose conduct is "lawful under chapter 44 of title 18, United States Code, or under applicable State law." Chapter 44 of title 18 of the U.S. Code contains many of the major federal gun control laws, including the Gun Control Act of 1968, the federal assault weapons ban, and the Brady Handgun Violence Prevention Act. Other major federal firearm regulatory statutes are not included in title 18, however. The bill would preclude civil actions against manufacturers, sellers, and trade associations whose conduct violates these other federal statutes since the conduct is "lawful" under Chapter 44 of title 18.

For example, the National Firearms Act (NFA), the federal law regulating the possession and transfer of machine guns, silencers, sawed-off rifles and shotguns, and "destructive devices" including grenades and rockets, is codified at Chapter 53 of title 26 (the Internal Revenue Code). H.R. 2037, therefore, would make it difficult if not impossible to bring a lawsuit against illegal machine gun traffickers whose conduct contributes to the death or injury of third parties. To obtain protection, the traffickers would merely have to notify the Secretary of Commerce that they qualify as a manufacturer, seller, or trade association as defined by the bill. Many corrupt dealers would not hesitate to register with the Secretary of Commerce. There are many documented incidents of individuals who hold federal firearms licenses (FFLs)—all of whom would be eligible for registration as "sellers" under the bill—trafficking in NFA weapons. The Department of the Treasury's June 2000 study, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, identified 33 investigations of illegal trafficking of NFA weapons by Federal Firearms License holders. Under H.R. 2037, any innocent victims of these trafficked weapons would have no remedy in the courts.

The same problems would exist with respect to other federal statutes such as the Arms Export Control Act, the primary federal law controlling the export of firearms.⁹

CONCLUSION

The Violence Policy Center is opposed to any legislation restricting the rights of public officials, consumers, or any other injured party to hold the gun industry accountable for its actions and its products. H.R. 2037 is an unwarranted assault on the rights of public officials to protect their citizens from gun violence. Moreover, the bill would significantly undermine existing, well-established tort law thereby intruding in an area traditionally the prerogative of the states. It would also operate to protect some of the worst actors in the gun industry, such as unscrupulous gun dealers and negligent gun show promoters. The Violence Policy Center urges the Committee to reject this dangerous legislation.

Thank you for considering our view.

Mr. STEARNS. I thank the gentlelady.

Mr. Reh.

STATEMENT OF JEFF REH

Mr. REH. Thank you, Mr. Chairman. Mr. Chairman and members of the committee, my name is Jeff Reh, and I am General Counsel and a member of the board of directors for Beretta USA Corporation.

Beretta USA supplies the standard sidearms to all branches of the U.S. Armed Forces, and is a supplier of sidearms to hundreds of law enforcement departments throughout the United States, and to civilian customers as well.

⁹Chapter 39, title 22 United States Code § 2778 et seq.