



No. 55

February 24, 2004

S. 1805 – Protection of Lawful Commerce in Arms Act

Calendar No. 363

Referred to Judiciary Committee. No hearings held. Read the second time and placed on the Senate Calendar on November 3, 2003; no written report.

Noteworthy

- On February 23, the Majority Leader filed a cloture petition on the motion to proceed to S. 1805. Under Senate rules, a cloture vote will occur on Wednesday.
- S. 1805 is the product of negotiations related to S. 659, introduced in March 2003 by Senators Craig and Baucus and 50 other Senators. That bill was referred to the Judiciary Committee, where no further action was taken. It presently has 54 cosponsors.
- S. 1805 preserves all the policy goals of S. 659 but includes additional clarifying language requested by Senator Daschle.
- The House passed H.R. 1036, a bill similar to S. 659, 285-140, in April 2003.

Background

For the past decade, the U.S. firearms industry — from gun manufacturers to distributors to local sellers — has been under assault by legal activists attempting to hold the industry legally responsible for the criminal conduct of others. These lawsuits are not limited to individual or even class action claims, however. Since 1998, more than 30 cities and counties and one state have filed unprecedented lawsuits against the firearm industry to demand compensation for the public costs associated with gun violence, such

as police investigation, emergency personnel, public health resources, courts, and prisons. Although many courts have rejected these lawsuits, anti-gun activists and government officials continue to press their claims.

These suits expose the industry to heavy litigation expenses and the risk of crippling judgments. In testimony before a House subcommittee in 2003, the General Counsel of the National Shooting Sports Foundation, Inc., stated, “industry-wide cost of defense to date [against these lawsuits] now exceeds \$100 million. This is a huge sum of money for a small industry like ours. The firearms industry taken together would not equal a Fortune 500 company.”¹

Three varieties of lawsuits plague the firearms industry:

Product Liability (Defective Product). Activists have alleged that guns are defective products, even when produced as designed and used as intended. For example, in *Hurst v. Glock, Inc.*, plaintiffs alleged that a gun contained a product defect because it did not have a device to prevent a discharge when the ammunition magazine was removed (but where a bullet remained in the chamber). 684 A.2d 970, 971-972 (N.J. Super. App. Div. 1996).

Nuisance or Negligent Distribution and Marketing. Some lawsuits allege that manufacturers, distributors, and sellers have created a public nuisance by marketing firearms that are sometimes used illegally, or that they have been negligent in supplying guns to criminals. Plaintiffs argue that manufacturers, distributors, and sellers either know or should know that some guns will be used illegally, and so are responsible for any criminal misuse.

Deceptive Marketing or Advertising. These lawsuits contend that the industry engages in unfair business practices by allegedly misrepresenting the benefits of gun ownership. Plaintiffs contend that manufacturers, distributors, and sellers give the allegedly false impression that gun ownership enhances personal safety.

The common thread in all these lawsuits is an attempt to hold gun manufacturers and distributors liable for injuries caused by illegal use of firearms by others. None of these lawsuits is aimed at the criminal wrongdoer who maims or kills another with a gun. One law professor describes this development as follows: “Widening the liability net would ensnare the morally innocent and erode the crucial distinction between responsible and irresponsible behavior that is the bedrock of American justice.”²

¹ Testimony of Lawrence G. Keane, National Shooting Sports Foundation, Inc., before the House Judiciary Subcommittee on Commercial and Administrative Law (April 2, 2003). The NSSF now believes the litigation expenses have exceeded \$150 million.

² Bruce Kobayashi (George Mason School of Law), “Gun-Liability Lawsuits Aim at the Wrong Target,” *The Orange County Register* (April 21, 1996).

Key Bill Provisions

- S. 1805 has two substantive provisions. First, section 3(a) states that “a qualified civil liability action may not be brought in any Federal or State court.” Second, section 3(b) orders the immediate dismissal of any “qualified civil liability action” pending on the date S. 1805 becomes law.
- The key to S. 1805 is the definition of “qualified civil liability action,” which is addressed in the “Definitions” found in Section 4. A qualified civil liability action is defined as a lawsuit “brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by a person or a third party.” Sec. 4(5). The definition then excludes five categories of lawsuits from coverage under S.1805:
 - 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 transferee’s conduct.
 - an action brought against a seller for negligent entrustment or negligence per se. “Negligent entrustment” is defined in section 4(5)(A) as “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 supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person and others.”
 - 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.
 - an action for breach of contract or warranty in connection with the purchase of the product.
 - an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a manner that is reasonably foreseeable.
- Senator Daschle’s desired amendments to S. 659 are also embodied in S. 1805. Those amendments primarily add additional clarifying language to the definition of qualified civil liability action. That language, included in S. 1805, serves the following functions:
 - amends the text to permit suits against manufacturers or dealers who engage in “straw purchase” transactions, (that is, when one individual purchases a firearm on behalf of a third party);

- makes clear that criminal or unlawful acts are never “reasonably foreseeable” for the purposes of a product defect lawsuit excluded in section 4(5)(A)(v).
- makes clear that the bill’s definition of “negligent entrustment” does not require harm both to the buyer and to others; harm to either is enough, if all the other requirements of the definition are met;
- adds a rule of construction to ensure that none of the exceptions in the definition of “qualified civil liability action” is intended to create an excessively high standard that would trump any of the other exceptions, and makes clear that the existence of the exceptions does not create any new basis for lawsuits against the industry;
- redefines “trade association” to eliminate frivolous arguments that the bill would allow criminal gangs or trafficking rings to be considered trade associations; and
- redefines “unlawful misuse” to clarify the type of harmful conduct that would not be allowed as a basis for a lawsuit.

Administration Position

- At press time, the Administration had not released a Statement of Administration Position. However, the Administration strongly supported House passage of H.R. 1036.

Possible Amendments

- **Craig/Manager’s Technical Amendment**
Senator Craig intends to offer an amendment for three narrow purposes: (a) ensure that appellate courts have the power to dismiss qualified cases pending before them by including language adopted by the House of Representatives to accomplish that end; (b) conform to House language ensuring that this legislation applies to qualified lawsuits seeking injunctive relief or other remedies as well as those seeking monetary damages; and (c) tighten the definition of “possessory offenses” by describing it more precisely so that it does not create an unintended loophole in the bill.
- **Extension of Semi-Automatic Gun Ban**
Senator Feinstein may offer an amendment to repeal the 2004 sunset on the Clinton ban on certain semi-automatic weapons. Senator Feinstein has offered S.

1034 to this effect, which also includes a ban on importing certain “ammunition feeding devices.”

- **S. 1807 — “Gun Show” Background Checks**

Senator McCain or Senator Reed may offer S. 1807 as an amendment. This amendment would regulate firearm transfers at special firearms events. The amendment further prohibits any person from operating a special firearms event without notifying the Attorney General and sets forth (1) responsibilities of special firearms events operators and firearms licensees and transferors other than licensees at such events, including with regard to criminal background checks; (2) special firearms event license application requirements; and (3) penalties for violation of this Act.

- **Concealed-Carry Laws for Law Enforcement**

Senator Campbell may offer an amendment to exempt qualified current and former law enforcement officers from state laws that prohibit the carrying of concealed handguns; this is a provision embodied in S. 253, which has been reported from the Judiciary Committee and has 67 cosponsors.

- **Amendment re: Qualified Civil Liability Action Definition**

An amendment may be offered to clarify the meaning of “qualified civil liability action” to require in certain circumstances that the plaintiff alleging a criminal or unlawful act actually state with particularity the federal and state statutes, ordinances, or regulations allegedly violated.