

## RECENT LEGISLATION

TORT LAW — CIVIL IMMUNITY — CONGRESS PASSES PROHIBITION OF QUALIFIED CIVIL CLAIMS AGAINST GUN MANUFACTURERS AND DISTRIBUTORS. — Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. §§ 7901–7903, 18 U.S.C. §§ 922, 924).

The year 2002 saw an estimated 30,242 firearm deaths<sup>1</sup> and 58,841 nonfatal firearm injuries.<sup>2</sup> Recently, various municipalities pursued civil actions against firearm manufacturers, alleging negligent distribution of firearms and creation of a public nuisance. The municipalities claimed damages relating to the provision of emergency services to gunshot victims. In response to this trend, thirty states passed laws preempting this type of suit in order to prevent litigation that could possibly cripple commerce in firearms.<sup>3</sup> Due to court decisions and

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<sup>1</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., NAT'L VITAL STATISTICS REPORTS 77 tbl.18 (2004). Of these 30,242 firearm deaths, 17,108 were suicides, 11,829 were homicides, 762 were accidents, 300 were related to law enforcement or war, and 243 were of an undetermined nature. *Id.*

<sup>2</sup> NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., WISQARS NONFATAL INJURY REPORTS, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last visited Mar. 12, 2006). Of these 58,841 nonfatal firearm injuries, 37,321 were assaults, 17,579 were unintentional, 3295 were intentionally self-inflicted, and 646 were law enforcement interventions. *Id.*

<sup>3</sup> Thirty states restrict the ability of individuals or municipalities to file suit against firearm dealers or manufacturers for crimes committed with firearms that were lawfully made and sold. ALA. CODE § 11-80-11(c) (Supp. 2005) (preempting all but the “Attorney General, by and with the consent of the Governor”); ALASKA STAT. § 09.65.155, .270 (2004) (preempting all lawsuits); ARIZ. REV. STAT. ANN. § 12-714 (2003) (preempting “political subdivision[s]”); ARK. CODE ANN. § 14-16-504(2)(b) (1998 & Supp. 2005) (reserving to “the State of Arkansas” the ability to sue); COLO. REV. STAT. § 13-21-501 (2004) (preempting all lawsuits not based on actual defects in a gun’s design or manufacture); FLA. STAT. ANN. § 790.331 (West 2005) (preempting lawsuits by “political subdivision[s]”); GA. CODE ANN. § 16-11-173 (West, Westlaw through 2005 Special Sess.) (reserving the right to sue “exclusively to the state”); IDAHO CODE ANN. § 5-247 (Westlaw through 2005 Special Session) (preempting lawsuits by political subdivisions); IND. CODE § 34-12-3 (Supp. 2001) (preempting all actions); KAN. STAT. ANN. § 60-4501 (Supp. 2004) (preempting lawsuits by municipalities); KY. REV. STAT. ANN. § 65.045 (LexisNexis 2004) (preempting lawsuits by state subdivisions); LA. REV. STAT. ANN. § 9:2800.60 (Supp. 2006) (preempting all lawsuits of this type); ME. REV. STAT. ANN. tit. 30-A, § 2005 (Supp. 2005) (prohibiting suits by municipalities); MICH. COMP. LAWS. ANN. § 28.435(9)–(11) (West 2004) (prohibiting suits by political subdivisions); MISS. CODE ANN. § 11-1-67 (Supp. 2005) (reserving to the state the right to bring a suit on behalf of a governmental entity); MO. ANN. STAT. § 21.750 (West Supp. 2005) (declaring that the “lawful design, marketing, manufacture, distribution, or sale of firearms or ammunition to the public is not an abnormally dangerous activity and does not constitute a public or private nuisance” and prohibiting governments from suing for claims arising from the same); MONT. CODE ANN. § 7-1-115 (2005) (prohibiting suits by “local governmental unit[s]”); NEV. REV. STAT. § 12.107 (2003) (reserving the right to bring suits to the state); N.H. REV. STAT. ANN. § 508:21 (Supp. 2005) (prohibiting suits by individuals and the government); N.C. GEN. STAT. § 14-409.40(g) (2005) (reserving the right to sue to the state); N.D. CENT. CODE § 32-03-54 (Supp.

legislative intervention, these suits generally were not successful.<sup>4</sup> However, the claims were still damaging to the gun industry, as municipal leaders pressed on regardless of their chance of success, spending taxpayers' money in a war of attrition against the firearms industry. When one suit was preempted or dismissed in one jurisdiction, another arose in a jurisdiction that had not yet considered the issue. This cycle ended on October 26, 2005, when President George W. Bush signed the Protection of Lawful Commerce in Arms Act<sup>5</sup> (PLCAA) into law, dismissing all current claims of this nature in both federal and state courts and preempting future claims.<sup>6</sup> By passing the PLCAA, Congress and the President indicated that the Second Amendment is an individual right incorporated against the states, perhaps offering persuasive authority to the Supreme Court for use in deciding precisely what right is conferred by the following words: "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."<sup>7</sup>

The congressional findings for the PLCAA demonstrate that the legislature relied on a variety of constitutional provisions to justify limited legal immunity for the firearms industry. Congress found that the Second Amendment guarantees an individual right to keep and bear

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2005) (immunizing dealers and manufacturers from these kind of suits); OHIO REV. CODE ANN. § 2305.401 (West 2004) (immunizing dealers and manufacturers from these kind of suits); OKLA. STAT. ANN. tit. 21, § 1289.24a (West 2002) (declaring that lawful manufacturing and sales do not constitute a nuisance and reserving power to bring suit on behalf of a governmental unit to the state); 18 PA. CONS. STAT. ANN. § 6120(a.1) (West 2000) (preempting lawsuits by "political subdivision[s]"); S.D. CODIFIED LAWS §§ 21-58-1 to -4 (Supp. 2003) (immunizing dealers and manufacturers for injuries caused by another); TENN. CODE ANN. § 39-17-1314 (2003) (declaring that lawful manufacture and sale of firearms is not a nuisance per se and reserving the right to sue to the state); TEX. CIV. PRAC. & REM. CODE ANN. § 128.001 (Vernon 2005) (prohibiting suits by governmental subdivisions); UTAH CODE ANN. § 78-27-64(2) (2002) (preempting suits by the government); VA. CODE ANN. § 15.2-915.1 (2003) (prohibiting localities from bringing suit and reserving that right to the commonwealth); W. VA. CODE ANN. § 55-18-2 (LexisNexis 2000) (reserving the authority to bring suit to the state).

<sup>4</sup> Most suits have been dismissed. *See, e.g.*, *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (per curiam) (holding that under New Jersey law, lawful distribution of handguns is not a public nuisance); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004) (dismissing a nuisance claim for law enforcement and medical services that "failed to state a cause of action"). *But see City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143-47 (Ohio 2002) (holding that claims against gun manufacturer for nuisance, negligence, negligent design, and failure to warn were pled sufficiently under Ohio's notice pleading standard). The claims in *Cincinnati* were withdrawn after the plaintiff determined that they were preempted by later legislation.

<sup>5</sup> Pub. L. No. 109-92, 119 Stat. 2095 (2005) (to be codified at 15 U.S.C. §§ 7901-7903, 18 U.S.C. §§ 922, 924).

<sup>6</sup> The municipalities banding together to harm the gun industry as well as the states banding together to secure national legislation protecting the industry are examples of collective action. For an in-depth review of the benefits and harms of such collective action, see generally Note, *State Collective Action*, 119 HARV. L. REV. 1855 (2006).

<sup>7</sup> U.S. CONST. amend. II.

arms, regardless of whether the individual is part of a militia,<sup>8</sup> and that the law was intended to preserve individual access to firearms “for all lawful purposes.”<sup>9</sup> Notably, Congress used its Section 5 enforcement power under the Fourteenth Amendment to “guarantee a citizen’s rights, privileges, and immunities, as applied to the States”<sup>10</sup> and invoked its Commerce Clause power, noting that firearms and ammunition pass through interstate commerce.<sup>11</sup> Congress also relied on separation of powers and federalism to chastise political subdivisions for trying to regulate guns nationally through litigation.<sup>12</sup>

The operational text of the Act is brief yet effective. First, “[a] qualified civil liability action may not be brought in any Federal or State court.”<sup>13</sup> Second, “[a] qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.”<sup>14</sup> A “qualified civil liability action” is an action brought against a dealer, manufacturer, or trade association for damages resulting from the unlawful use of a firearm by another.<sup>15</sup> However, six exceptions would pierce the immunity. First, a claim against a transferor of a firearm who knew the firearm would be used in drug trafficking or a violent crime is valid if the plaintiff’s injury was a proximate result.<sup>16</sup> Second, a claim “brought against a seller for negligent entrustment or negligence per se” is not preempted.<sup>17</sup> Third, if a seller knowingly violates a federal or state statute applicable to the sale or marketing of firearms and the violation is the proximate cause of the injury, the claim is not “qualified.”<sup>18</sup> Fourth, a claim may proceed if it is based on a breach of contract or warranty.<sup>19</sup> Fifth, a claim of design defect may proceed if the injury or damage is not the result of inten-

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<sup>8</sup> Protection of Lawful Commerce in Arms Act § 2(a)(1)–(2).

<sup>9</sup> *Id.* § 2(b)(2).

<sup>10</sup> *Id.* § 2(b)(3).

<sup>11</sup> *See id.* § 2(a)(5)–(6).

<sup>12</sup> *See id.* § 2(a)(8).

<sup>13</sup> *Id.* § 3(a).

<sup>14</sup> *Id.* § 3(b).

<sup>15</sup> *Id.* § 4(5)(A).

<sup>16</sup> *Id.* § 4(5)(A)(i); 18 U.S.C.A. § 924(h) (West 2000 & Supp. 2005).

<sup>17</sup> Protection of Lawful Commerce in Arms Act § 4(5)(A)(ii). Negligence per se is negligence as a matter of law, usually arising from a statutory violation. *See* BLACK’S LAW DICTIONARY 1063 (8th ed. 2004). Negligent entrustment is defined as supplying a firearm to someone who the supplier knows, or should know, is likely to, and does, use it in an unreasonably risky manner. Protection of Lawful Commerce in Arms Act § 4(5)(B).

<sup>18</sup> Protection of Lawful Commerce in Arms Act § 4(5)(A)(iii). This section seems superfluous, as any violation of a federal or state statute governing firearm sales would also fall under the exception of negligence per se. *See id.* § 4(5)(A)(ii).

<sup>19</sup> *Id.* § 4(5)(A)(iv).

tional criminal conduct.<sup>20</sup> Finally, the Act does not prevent the Attorney General from enforcing civil penalties that exist in the law.<sup>21</sup>

The PLCAA also contains two secondary, unrelated provisions. First, the Child Safety Lock Act of 2005<sup>22</sup> (CSLA) requires that proper locks accompany all handguns sold.<sup>23</sup> To incentivize their use, the CSLA provides that an individual using such locks is immune from lawsuits if the person who accessed the handgun lacked permission to possess the firearm.<sup>24</sup> The CSLA also provides exceptions for negligent entrustment and negligence per se, allowing such actions.<sup>25</sup> Finally, the PLCAA clarifies the wording of laws related to armor-piercing bullets, making it a federal crime to commit a drug-trafficking offense or crime of violence while in possession of armor-piercing ammunition, and commissions a study to test body armor.<sup>26</sup>

The PLCAA could play a prominent role in the development of two major Second Amendment issues. Courts and commentators have debated whether the Second Amendment creates an individual or collective right and whether the Fourteenth Amendment incorporates this right against the states. When the Supreme Court has the opportunity to answer these questions, it could and should take Congress's beliefs, as demonstrated by the statute, into account as persuasive authority. The enactment of the PLCAA suggests not only that the Second Amendment confers an individual right upon citizens to keep and bear arms, but also that the Fourteenth Amendment incorporates that right against the states. As it stands now, persons rarely succeed in using the Second Amendment as a shield; gun advocates have had to look to the legislature, not the bench, for assistance. In the debate over whether the Second Amendment protects an individual right to keep and bear arms<sup>27</sup> or a collective right of the states to raise militias,<sup>28</sup> the

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<sup>20</sup> *Id.* § 4(5)(A)(v). Notably, this provision states that “where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any result[.]” *Id.* This seems specifically designed to block lawsuits that result from certain accidental shootings. For example, when one party illegally points a gun at another, mistakenly thinking it is unloaded, and pulls the trigger, the victim may not allege that a design defect (for example, lack of a larger loaded-chamber indicator) deprived the criminal shooter of the knowledge that the firearm was loaded.

<sup>21</sup> *Id.* § 4(5)(A)(vi); 18 U.S.C.A. §§ 921–931 (West 2000 & Supp. 2005); 26 U.S.C.A. §§ 5801–5872 (West 2002 & Supp. 2005).

<sup>22</sup> Protection of Lawful Commerce in Arms Act § 5.

<sup>23</sup> *Id.* § 5(c)(1).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* § 6.

<sup>27</sup> See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 802 (1998).

<sup>28</sup> See, e.g., Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHL-KENT L. REV. 291, 294 (2000); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 667 (2000).

latter view has been adopted by a majority of circuits to have considered the issue in upholding gun regulations.<sup>29</sup> The issue is not settled law, however, and the PLCAA may be a harbinger of change.

Congress's opinion, expressed through the PLCAA, could have persuasive authority with respect to the interpretation of the Second Amendment because of the lack of precedent in the area. What lower court precedent exists is contradictory and offers little guidance. While the Fifth Circuit, in *United States v. Emerson*,<sup>30</sup> espoused the view that the Second Amendment confers an individual right to keep and bear arms on all citizens of the United States,<sup>31</sup> several circuits have favored the "collective right" interpretation, believing that the right to bear arms is intertwined with a state right to maintain a militia.<sup>32</sup> The Supreme Court has not spoken on this issue, and the absence of a case directly holding for or against an individual right to bear arms leaves the question open for the Court to decide.<sup>33</sup>

Precedent contradicts the claim that the Second Amendment is incorporated against the states; however, the issue is not settled law.<sup>34</sup> In *United States v. Cruikshank*,<sup>35</sup> the Supreme Court held that the Second Amendment "has no other effect than to restrict the powers of the

<sup>29</sup> See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1066 (9th Cir. 2002).

<sup>30</sup> 270 F.3d 203 (5th Cir. 2001).

<sup>31</sup> *Id.* at 260 ("We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with *Miller*, that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms . . . that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*.").

<sup>32</sup> See *Silveira*, 312 F.3d at 1066; *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995) (holding that "the Second Amendment preserves a collective, rather than individual, right"); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (holding that "there can be no serious claim to any express constitutional right of an individual to possess a firearm" (quoting *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971))).

<sup>33</sup> The Court's most recent Second Amendment case, *United States v. Miller*, 307 U.S. 174 (1939), held that the government could ban a shotgun with a barrel less than eighteen inches long. *Id.* at 178. This case provides weak support for both sides because the ban was upheld due to an "absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* Furthermore, Miller's failure to argue his case may have caused the absence of evidence. *Id.* at 175 ("No appearance for appellees."). Chief Justice Roberts supported this view during his confirmation hearings:

I know the *Miller* case side-stepped that issue. An argument was made back in 1939 that this provides only a collective right. And the court didn't address that. They said, instead, that the firearm at issue there — I think it was a sawed-off shotgun — is not the type of weapon protected under the militia aspect of the Second Amendment. So people try to read the tea leaves about *Miller* and what would come out on this issue. But that's still very much an open issue.

*Transcript: Day Three of the Roberts Confirmation Hearings*, WASH. POST, Sept. 14, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091402308.html>.

<sup>34</sup> *Emerson* did not address this concern, as a federal regulation deprived Emerson of his right to bear arms. *Emerson*, 270 F.3d at 260.

<sup>35</sup> 92 U.S. 542 (1876).

national government.”<sup>36</sup> In *Presser v. Illinois*,<sup>37</sup> the Court held that the “amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States.”<sup>38</sup> However, both decisions were written well before any provisions of the Bill of Rights were incorporated through the Fourteenth Amendment<sup>39</sup> and likely are not good law anymore.<sup>40</sup> Although in recent decisions circuit courts have written that the Second Amendment is not incorporated against the states,<sup>41</sup> the courts held for the collective rights interpretation in these same cases.<sup>42</sup> So not only is any discussion about incorporation dicta, but it also makes little sense because a state cannot incorporate its own right against itself. Because the collective rights debate is logically prior to the incorporation debate and because there is little precedent relating to the collective rights debate, it follows that there is also little valid precedent relating to the incorporation debate.

Congress’s belief that the Second Amendment is an individual right incorporated against the states, though not dispositive, should be afforded some persuasive weight. To be consistent with *City of Boerne v. Flores*,<sup>43</sup> Congress may not redefine the substantive right, but may merely “deter[] or remed[y] constitutional violations.”<sup>44</sup> The violation that Congress is seeking to deter is the de facto ban on civilian gun sales that would result from the excessive imposition of liability on dealers and manufacturers; this end, in turn, is only valid if there is an individual right to keep and bear arms that is incorporated against the states.<sup>45</sup> If the Supreme Court had already defined the substantive nature of the Second Amendment, then *Boerne* would prevent Congress from redefining it. However, because Congress has rendered its (non-binding) opinion before the Supreme Court has decisively acted, some weight should be given to the belief of a majority of the democratically elected legislators when the Court eventually defines the right.

If the Supreme Court were to decide the question now, the analysis would likely, by analogy to the incorporation of constitutional rights related to criminal procedure, ask whether the Second Amendment is a right among those “fundamental principles of liberty and justice which

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<sup>36</sup> *Id.* at 553.

<sup>37</sup> 116 U.S. 252 (1886).

<sup>38</sup> *Id.* at 265.

<sup>39</sup> This process can be thought to have started with *Gillow v. New York*, 268 U.S. 652 (1925).

<sup>40</sup> See *United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001).

<sup>41</sup> See, e.g., *Hickman v. Block*, 81 F.3d 98, 103 n.10 (9th Cir. 1996).

<sup>42</sup> See, e.g., *id.* at 102.

<sup>43</sup> 521 U.S. 507 (1997).

<sup>44</sup> *Id.* at 518.

<sup>45</sup> One explicit purpose of the PLCAA was to “preserve a citizen’s access to a supply of firearms and ammunition.” Protection of Lawful Commerce in Arms Act § 2(b)(2).

lie at the base of all our civil and political institutions.”<sup>46</sup> This may be an extremely close question. On one hand, historical documents show that the framers of both the Second and Fourteenth Amendments thought the right to bear arms was fundamental; on the other hand, one might think the right to bear arms is anachronistic today.<sup>47</sup> When the Supreme Court resolves this question, Congress’s opinion should have some persuasive authority.

This bill is the latest in a series of developments that could presage the rise of an individual rights interpretation of the Second Amendment that is incorporated against the states. Congress has explicitly rejected the collective rights interpretation of the Second Amendment in favor of the more textually and historically sound individual rights interpretation. The executive branch has supported an individual rights interpretation as well; in a memorandum to the Attorney General, the Office of Legal Counsel (OLC) wrote that both historical and textual considerations support an individual rights interpretation.<sup>48</sup> Moreover, the OLC concluded that the Second Amendment is incorporated against the states.<sup>49</sup> Although the Supreme Court has never decided whether the Second Amendment confers an individual right, Chief Justice Roberts stated during his confirmation hearings that he “think[s] that issue is one that’s likely to come before the court” due to the existing circuit split.<sup>50</sup> It seems the day is approaching when, as Justice Thomas wrote, the “Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’”<sup>51</sup>

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<sup>46</sup> *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)) (internal quotation marks omitted).

<sup>47</sup> See Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 907 (2004) (reviewing DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT* (2003)).

<sup>48</sup> Whether the Second Amendment Secures an Individual Right, Op. Off. Legal Counsel 106 (2004), available at <http://www.usdoj.gov/olc/secondamendment2.pdf>.

<sup>49</sup> See *id.* at 100–01. The OLC opinion provides an extensive originalist analysis, detailing why both the framers and the ratifiers of the Fourteenth Amendment believed it would prohibit the states from infringing upon the Second Amendment rights of citizens. See *id.*

<sup>50</sup> *Transcript: Day Three of the Roberts Confirmation Hearings*, *supra* note 31. After Senator Feingold, who said he favors the “individual right” interpretation, asked Chief Justice Roberts which interpretation he preferred, Chief Justice Roberts responded as follows:

Well, anytime you have two different courts of appeals taking opposite positions, I think you have to regard that as a serious question. That’s not expressing a view one way or the other. It’s just saying, “I know the 9th Circuit thinks it’s only a collective right. I know the 5th Circuit thinks it’s an individual right. And I know the job of the Supreme Court is to resolve circuit conflicts.” So I do think that issue is one likely to come before the court.

*Id.*

<sup>51</sup> *Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) (quoting 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1890, at 746 (Boston, Hilliard, Gray & Co. 1833)).