Order Code RS21486
Updated March 1, 2004

Protection of Lawful Commerce in Arms Act, H.R. 1036, S. 659, S. 1805, and S. 1806, 108th Congress: Legal Analysis

Henry Cohen
Legislative Attorney
American Law Division

Summary

The Protection of Lawful Commerce in Arms Act, H.R. 1036, 108th Congress, as passed by the House on April 9, 2003, would prohibit lawsuits, except in specified circumstances, against a manufacturer or seller of a firearm or ammunition, or a trade association, for damages resulting from the criminal or unlawful misuse of a firearm or ammunition. A similar bill, S. 659, has been introduced in the Senate, and, except where indicated in a footnote, every statement in this report about H.R. 1036 also applies to S. 659. Subsequently, S. 659 was reintroduced in identical form as S. 1806, and in amended form as S. 1805, and, on November 3, 2003, S. 1805 and S. 1806 were placed on the Senate Legislative Calendar. The differences between S. 1805 and the other Senate bills are noted at the end of this report.

This report examines H.R. 1036, 108th Congress, as ordered to be reported by the House Committee on the Judiciary on April 3, 2003, and passed by the House without amendment on April 9, 2003. H.R. 1036, titled the "Protection of Lawful Commerce in Arms Act," would prohibit lawsuits, except in specified circumstances, against a manufacturer or seller of a firearm or ammunition, or a trade association, for damages resulting from the criminal or unlawful misuse of a firearm or ammunition. The bill would also require that pending lawsuits brought by shooting victims and municipalities "be immediately dismissed by the court in which the action was brought or is currently pending."[1] Among the circumstances when the bill would not preclude[2] a lawsuit to be brought or to continue would be when the defendant violated 18 U.S.C. § 924(h) by transferring a firearm, knowing that it would be used to commit a crime of violence or a drug trafficking crime.

---

[1] The words "or is currently pending"are not in S. 659.

[2] We say "would not preclude" rather than "would allow" because it is state law that allows tort suits. H.R. 1036 and S. 659 would preclude such suits, except in the instances when it would not preclude them.

The bill's findings state that it is "an abuse of the legal system" to hold defendants "liable for harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended." A cosponsor of the bill said, "We're trying to stop making public policy through the courts with these nuisance suits."[3] Opponents of H.R. 1036 "have denounced the proposed legislation as an unfair favor to an industry and a federal usurpation of states' rights," and have said that it "would bring progress toward safer guns to a screaming halt and make it more difficult for gun violence victims to recover damages. . . . It would prevent cities from collecting damages against gun manufacturers who maintain a distribution system which they know ensures the continual supply of guns to the illegal market."[4]

H.R. 1036 would prohibit a "qualified civil liability action" from being brought in any federal or state court, and would require the dismissal of any such action that is pending on the date of enactment of the bill. The bill defines a "qualified civil liability action" as, with five exceptions, "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."[5] It defines a "qualified product" as a firearm (as defined in 18 U.S.C. § 921(a)(3)(A) or (B)), an antique firearm (as defined in 18 U.S.C. § 921(a)(16)), ammunition (as defined in 18 U.S.C. § 921(a)(17)), or a component part of a firearm or ammunition.

H.R. 1036 defines "trade association," used in the definition of "qualified civil liability action" quoted above, as "any association or business organization (whether or not incorporated under Federal or State law) that is not operated for profit, and 2 or more members of which are manufacturers or sellers of a qualified product."

H.R. 1036 defines "manufacturer" to limit it to manufacturers who are licensed under chapter 44 of title 18, U.S. Code. It defines "seller" to include an "importer" (as defined in 18 U.S.C. § 921(a)(9)), a "dealer" (as defined in 18 U.S.C. § 921(a)(11)), and a "person engaged in the business of selling ammunition" (as defined in 18 U.S.C. § 921(a)(17)). An "importer" and a "dealer" would have to be licensed under chapter 44 of title 18, U.S. Code, to be a "seller" under the bill.

The first of the five types of lawsuits that would not be a "qualified civil liability action," and that therefore would not be barred by the bill, would be: "(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." Section 924(h) makes it a crime to "knowingly transfer[ ] a firearm, knowing that such firearm will be used to commit a crime of violence . . . or a drug trafficking crime." The "transferor" who may be sued is

---

[3] John Tierney, "A New Push to Grant Gun Industry Immunity From Suits," *New York Times*, Apr. 4, 2003, p. A10.

[4] *Id*. For background information, see CRS Report RS20126, *Gun Industry Liability: Lawsuits and Legislation* (updated Mar. 30, 1999).

[5] The words "or injunctive relief" are not in S. 659.

a person who has been convicted of violating section 924(h) or a comparable or identical law.

The phrase "is so convicted" appears unclear. Does it require that the transferee (*i.e.*, the person who bought the firearm from the transferor and who shoots the plaintiff with it) be convicted? If so, of what? It would not be of section 924(h), because section 924(h) makes it a crime to transfer a firearm, not to receive one or to fire one. In addition, there would be no apparent reason for Congress to create an exception to exception (i) and prohibit lawsuits against transferors who violate section 924(h) merely because the transferee had not been convicted. The transferee, after all, may not have been convicted because he had been killed in self-defense by the plaintiff whom he shot, and this would not seem relevant to the transferor's culpability for the harm he indirectly caused by violating section 924(h).[6]

The second type of lawsuit that would not be a "qualified civil liability action," and therefore would not be barred by the bill, would be: "(ii) an action brought against a seller for negligent entrustment or negligence per se." The bill defines "negligent entrustment" 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 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."[7] This would seem to cover supplying a firearm or ammunition to a person who, because of age, mental disability, intoxication, or violent propensity, seems likely to use the product in a dangerous manner.

A recent case in the State of Washington held that negligent entrustment also occurs when a firearms manufacturer sells firearms to a retail store that it "knew or should have known . . . was operating its store in a reckless or incompetent manner."[8] This suit was by victims of the D.C.-area snipers against, among others, the manufacturer of the assault rifle the snipers used to commit their crimes. The plaintiff alleged that the manufacturer knew or should have known that the retailer had a "history of a large number of weapons for which it could not account." The court found that, if the plaintiff could prove this, then the defendant "may be liable for plaintiffs' injuries under the theory of negligent entrustment." The court therefore denied the defendant's motion to dismiss the suit for failure to state a claim upon which relief can be granted, and ruled that the case may go to trial.

It appears, however, that the bill could preclude an action for negligent entrustment against a manufacturer in the State of Washington. This is because the bill defines "negligent entrustment" as "the supplying of a qualified product by a seller," — not by a manufacturer. The bill defines "seller" to include a "dealer (as defined in section 921(a)(11) of title 18) . . . who is licensed to engage in business as such a dealer."

---

[6] Is "transferee" actually meant to be "transferor"? This seems unlikely because exception (i) speaks of the plaintiff's having been "directly harmed by the conduct" of the transferee, and the plaintiff *would* be directly harmed by the conduct of the transferee. He would be only indirectly harmed by the conduct of the transferor.

[7] The words "in fact" are not in S. 659.

[8] Johnson v. Bull's Eye Shooter Supply, No. 03-2-03932-8, 2003 WL 21639244 (Wash. Super. Ct., June 27, 2003).

Section 921(a)(11) defines "dealer" to include "any person engaged in the business of selling firearms at wholesale or retail." A manufacturer generally sells its products at wholesale, and therefore apparently is a "dealer" under section 921(a)(11). But this does not mean that a manufacturer would be a "seller" under the bill, because, though a manufacturer is a "dealer," it need not be licensed as a dealer, and under the bill it must be both a dealer and licensed to be a "seller." ATF regulations provide that a firearms manufacturer is not required to "obtain a dealer's license in order to engage in business . . . as a dealer,"[9] apparently confirming that a manufacturer is technically a dealer under section 921(a)(11). A manufacturer who is not licensed as a dealer would not a "seller" under the bill, and therefore under the bill apparently would be immune from suits for negligent entrustment. A manufacturer who is licensed as a dealer (even though it is not required to be) would be a "seller" under the bill and therefore apparently would be subject to suits for negligent entrustment.

Although "[n]egligent entrustment is recognized in almost every jurisdiction,"[10] and a manufacturer's selling a potentially dangerous product to a retailer it knows or should know to be reckless may constitute negligence in almost every jurisdiction, this does not mean that jurisdictions besides Washington necessarily label this sort of negligence "negligent entrustment." Because it appears that manufacturers who are licensed as dealers would be subject to suits for negligent entrustment under the bill, it might be advisable for Congress to add to the bill's definition of "negligent entrustment" a statement that negligent entrustment does or does not include a manufacturer's selling a firearm to a dealer that the manufacturer knew or should have known was be likely to be reckless.

The bill does not define "negligence per se." The term means "[n]egligence established as a matter of law, so that breach of the duty is not a jury question."[11] This means that, once a defendant's conduct is determined to have violated a relevant statute, the defendant is automatically deemed negligent, and the jury is not asked to determine whether the defendant acted in a reasonable manner. This is apparently the rule in "probably a majority of the courts."[12] "Some courts appear to have limited the 'per se' rule to situations where there has been a violation of a *specific* requirement of a law, etc. – legislation that expresses rules of conduct in specific and concrete terms as opposed to general or abstract principles. In some few states – at least in older cases not apparently disapproved – a distinction has been drawn as to ordinances, and violation of an *ordinance*, rather than violation of a statute, has been ruled to constitute, at most, *evidence* of negligence."[13]

---

[9] 27 C.F.R. § 478.41.

[10] J.D. Lee and Barry Lyndahl, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 33:1 (rev. ed. 2002).

[11] BLACK'S LAW DICTIONARY (7th ed.1999) at 1057.

[12] W. Page Keeton, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) at 230. "The courts of many states" follow this rule. Stuart M. Speiser, Charles F. Krause, Alfred W. Gans, 2 THE AMERICAN LAW OF TORTS (1985, cum. supp. 1998) at 1029.

[13] Stuart M. Speiser, Charles F. Krause, Alfred W. Gans, 2 THE AMERICAN LAW OF TORTS (1985, cum. supp. 1998) at 1034-1035 (emphasis in original).

Thus, whether a violation of a statute constitutes negligence per se is a question of state law, unless a federal statute provides that one who violates it shall be strictly liable in a civil action. One could therefore interpret this provision of H.R. 1036 to mean that, if a plaintiff alleges that the defendant violated a statute, and the statute is a federal statute that provides that one who violates it shall be strictly liable in a civil action, or the applicable state law provides that one who violates a statute or ordinance of the sort violated shall be strictly liable, then the plaintiff may proceed. If, however, applicable state law allows the question of negligence to go to the jury even when the defendant has violated a statute – *i.e.*, if there is no negligence per se rule – then H.R. 1036 would preclude a lawsuit, unless one of its other five exceptions in the definition of "qualified civil liability action" applied.

The other three exceptions in the definition of "qualified civil liability action" – *i.e.*, the other three types of actions that H.R. 1036 would not bar – are:

> (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,[14] and the violation was a proximate cause of the harm for which relief is sought;[15]
>
> (iv) an action for breach of contract or warranty in connection with the purchase of the product; or
>
> (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.

In sum, with the five exceptions noted, H.R. 1036 would prohibit civil actions "for damages or injunctive relief resulting from the criminal or unlawful misuse of a" firearm or ammunition as defined in the bill.

S. 1805, 108th Congress

S. 1805 and S. 1806, 108th Congress, were introduced October 31, 2003, and placed on the Senate Legislative Calendar on November 3, 2003. S. 1806 is identical to S. 659; S. 1805 is different, and we now examine its differences.

- In S. 659, the third exception in the definition of "qualified civil liability action" – *i.e.*, the third type of action that S. 659 would not bar – is:

> (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;

---

[14] Note that this exception, unlike the first exception, which requires that the defendant have been *convicted* under 18 U.S.C. § 924(h), requires that the defendant merely have *violated* a state or federal statute, which the plaintiff would have to prove by a preponderance of the evidence.

[15] It is difficult to predict when a defendant's violation of a statute would be deemed the proximate cause of a third party's criminal or unlawful misuse of a firearm or ammunition.

S. 1805 would drop the words "knowingly and willfully" from the provision. This would enlarge the exception and therefore could increase the likelihood that a defendant would be found liable. S. 1805 would also add a list of three specific types of cases that would be included under exception (iii).

- In S. 659, the fifth exception in the definition of "qualified civil liability action" is:

(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.

S. 1805 would add at the end: "or in a manner that is reasonably foreseeable," thereby expanding this exception as well. S. 1805, however, would also define "reasonably foreseeable" so as to exclude "any criminal or unlawful misuse of a qualified product, other than possessory offenses."

- S. 1805 would make two apparently technical changes to the definition of "negligent entrustment."

- S. 1805 would add a rule of construction that would appear to prescribe what courts would do anyway, in the absence of the rule.

- S. 659 would define "seller" to include a seller of ammunition in a manner "consistent with Federal, State, and local law. S. 1805 would change "consistent with" to "in compliance with."

- S. 659 would define "trade association" as "any association or business organization . . . that is not operated for profit, and 2 or more members of which are manufacturers or sellers of a qualified product." S. 1805 would adds another prerequisite to being a trade association: an association or business organization must also be "involved in promoting the 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." This new language would thus limit the definition of "trade association" to groups that actually do what trade associations typically do.

- S. 1805 would add a definition of "unlawful misuse," a term that is used in the definition of "qualified civil liability action," and in the second item in this list. "Unlawful misuse" would be defined as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product."