Order Code RS22074
Updated November 8, 2005

CRS Report for Congress

Limiting Tort Liability of Gun Manufacturers and Gun Sellers: Legal Analysis of P.L. 109-92 (2005)

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Summary

The Protection of Lawful Commerce in Arms Act, P.L. 109-92 (2005), prohibits civil actions and administrative proceedings, except in six 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. P.L. 109-92 also, with exceptions, requires child safety locks on handguns, and amended 18 U.S.C. §§ 922(a) and 924(c), which, with exceptions, prohibit the manufacture or importation of armor piercing ammunition, and establish penalties for the commission of crimes with such ammunition.

This report examines P.L. 109-92 (2005), which passed the Senate and the House as S. 397, 109th Congress and was signed by the President on October 26, 2005. Titled the "Protection of Lawful Commerce in Arms Act," it prohibits "a civil action or proceeding or an administrative proceeding," except in six 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.[1] The statute requires 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."

The statute's findings state that it is "an abuse of the legal system" and "an unreasonable burden on interstate and foreign commerce" to hold defendants "liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended." Senator Craig, the sponsor

[1] The six exceptions, discussed below, are instances in which the statute does not preclude lawsuits. It would be incorrect, strictly speaking, to say that the statute allows lawsuits in these instances, because it is state law that allows tort suits. The statute precludes them except in the six circumstances in which it does not preclude them.

of S. 397, reportedly said that the bill "will put an end to politically-motivated lawsuits against the firearms industry," and added, "These outrageous lawsuits attempting to hold a law-abiding industry responsible for the acts of criminals are a threat to jobs and the economy, jeopardize the exercise of constitutionally-protected freedoms, undermine national security, and circumvent Congress and state legislatures."[2] An opponent of the bill, Dennis Henigan, Director of the Brady Legal Action Project, reportedly said, "The gun lobby is trying to radically change the rules, to make irresponsible gun dealers and the makers of defective guns the only businesses in American exempt from longstanding principles of negligence, nuisance and product liability."[3] He had previously argued that the 108th Congress version of the bill "would bring progress toward safer guns to a screaming halt," "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," and would be a "radical intrusion by the Congress into the workings of state courts."[4]

The statute provides: "A qualified civil liability action may not be brought in any Federal or State court," and requires the dismissal of any such action that is pending on the date of enactment of the statute. The statute defines a "qualified civil liability action" as, with six exceptions, "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. . . ."[5]

Whether the statute covers administrative proceedings is not clear, because it prohibits qualified civil liability actions from being brought in courts, and administrative proceedings are not brought in courts (although appeals of them may be). If the statute does cover administrative proceedings, then the effect of its doing so is not clear. The first five exceptions in the statute, discussed below, all refer to "an action" that the statute does not prevent from being brought; it is also not clear, therefore, whether these exceptions apply to administrative proceedings. A sixth exception in S. 397, however, which was added when the Senate passed the bill, does not bar any "action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26, U.S. Code." These include proceedings of the Bureau of Alcohol, Tobacco, Firearms and Explosives.

The statute 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)),

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[2] "Lawsuit Reform Legislation Introduced," *U.S. Fed News* (Feb. 16, 2005).

[3] "Brady Campaign to Prevent Gun Violence: Extreme Gun Lobby Trying Again to Protect Reckless Gun Dealers," *U.S. Newswire* (Feb. 16, 2005).

[4] John Tierney, "A New Push to Grant Gun Industry Immunity From Suit," *New York Times*, April 4, 2003, p. 12. For background information, see CRS Report RS20126, *Gun Industry Liability: Lawsuits and Legislation*, by Henry Cohen. For a "Summary of Lawsuits Filed by Cities and Counties Against the Gun Industry," see [http://www.vpc.org/litigate.htm].

[5] The statute defines "unlawful misuse" as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product."

ammunition (as defined in 18 U.S.C. § 921(a)(17)), or a component part of a firearm or ammunition. In addition, any of these products have to have "been shipped or transported in interstate or foreign commerce" to be a "qualified product."

The statute defines "trade association," which is used in the definition of "qualified civil liability action" quoted above, as "any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private individual or shareholder." In addition, to be a "trade association," an entity must be "an organization described in section 501(c)(6) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code," and two or more members of the organization must be manufacturers or sellers of a qualified product.

The statute defines "manufacturer" to limit the term 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"has to be licensed under chapter 44 of title 18, U.S. Code, to be a "seller" under the statute. Persons in all three categories of "seller," to be a "seller," must be "engaged in the business," which the statute gives "the meaning given that term in" 18 U.S.C. § 921(a)(21), and, as applied to a seller of ammunition, defines as "a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business . . . ."

The Six Exceptions

The first of the six types of lawsuits that is not a "qualified civil liability action," and that therefore is not be barred by the statute, is "(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."[6] 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" whom the statute does not preclude from being sued is a person who has been convicted of violating section 924(h) or a comparable or identical state felony law.

The phrase "is so convicted" appears unclear. It appears to require that the transferee (i.e., the person who bought the firearm from the transferor and who shoots the plaintiff with it) be convicted. But of what? It is 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 have created an exception to exception (i) and prohibit lawsuits against transferors convicted under 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 had indirectly

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[6] The 2004 Cumulative Annual Pocket Part to the U.S. Code Annotated sets forth subsection (h) of section 924 as subsection (g), incorrectly noting that Public Law 108-174 (2003) redesignated the subsections of section 924.

caused by violating section 924(h). The drafters of the statute may have meant to refer to the conduct in which the transferee engaged, rather than the conduct of which he was convicted.[7]

The second type of lawsuit that is not be a "qualified civil liability action," and therefore is not barred by the statute, is "(ii) an action brought against a seller for negligent entrustment or negligence per se." The statute defines "negligent entrustment" as "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." This apparently covers 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. It seems questionable whether it contemplates a dealer's, rather than an individual purchaser's, using the product in a manner involving unreasonable risk.

Under Washington law, however, negligent entrustment can apply to sales by manufacturers to dealers. A case in the State of Washington held that negligent entrustment 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 brought by victims of the D.C.-area snipers against, among others, the manufacturer of the assault rifle that the snipers used to commit their crimes. The plaintiffs 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 plaintiffs 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. The defendant subsequently settled the case for $2.5 million.[9]

It appears, however, that the statute, even though it does generally not preclude actions for negligent entrustment, could preclude an action for negligent entrustment against a manufacturer in the State of Washington, even if the statute's definition of "negligent entrustment" is construed to cover sales by manufacturers to dealers and not merely to individual purchasers. This is because the statute defines "negligent entrustment" as "the supplying of a qualified product by a seller" — not by a manufacturer. The statute 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." 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 may be a "dealer" under section 921(a)(11). But this

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[7] Could "transferee" actually be intended 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.

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

[9] *The Washington Post*, p. C03 (Dec. 12, 2004).

does not mean that a manufacturer is be a "seller" under the statute, because, though a manufacturer apparently may be a "dealer" under section 921(a)(11), it need not be licensed as a dealer, and under the statute it must be both a dealer and licensed as one. Regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives provide that a firearms manufacturer is not required to "obtain a dealer's license in order to engage in business . . . as a dealer,"[10] apparently confirming that a manufacturer may be a dealer under section 921(a)(11). A manufacturer who is not licensed as a dealer is not a "seller" under the statute, and therefore under the statute apparently is immune from suits for negligent entrustment. A manufacturer who is licensed as a dealer (even though it is not required to be) is a "seller" under the statute and therefore apparently would be subject to suits for negligent entrustment, provided that the statute's definition of "negligent entrustment" is construed to cover sales by manufacturers to dealers and not merely to individual purchasers.[11]

The second exception to the definition of "qualified civil liability action" does not bar suits not only for negligent entrustment, but for "negligence per se," a term that the statute does not define. The term generally means "[n]egligence established as a matter of law, so that breach of the duty is not a jury question."[12] 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."[13] "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."[14]

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 held strictly liable in a civil action. One could therefore interpret this provision of the statute 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 held strictly liable in a civil action,

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[10] 27 C.F.R. § 478.41(b).

[11] Although "[n]egligent entrustment is recognized in almost every jurisdiction" (J.D. Lee and Barry Lyndahl, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 33:1 (rev. ed. 2002)), 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."

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

[13] 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.

[14] 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).

or the applicable state law provides that one who violates a statute or ordinance of the sort violated shall be held 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 the statute would preclude a lawsuit, unless one of its other six 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 the statute does 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,[15] and the violation was a proximate cause of the harm for which relief is sought . . . ;
> (iv) an action for breach of contract or warranty in connection with the purchase of the product; or
> (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except 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 resulting death, personal injuries or property damage; or
> (vi) an[ ] action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26, U.S. Code.

The exception to exception (v) raises questions. The exception to exception (v) would apparently come into play if, for example, a criminal fired a gun without aiming at his victim, but, because of a defect in the gun, the bullet hit the victim. In such a case, the manufacturer would be immune from suit. But suppose that the criminal used the gun in a hold-up, but did not pull the trigger, yet a defect caused the gun to fire spontaneously. Would the hold-up constitute a "volitional act" that would immunize the manufacturer from suit? In addition, would "constituted a criminal offense" mean that the gunman had to have been convicted by proof beyond a reasonable doubt, or merely that the plaintiff would have to prove, by a preponderance of the evidence, that the defendant's "volitional act . . . constituted a criminal offense"? If the latter, would the plaintiff be permitted to prove that the defendant's volitional act constituted a criminal offense even if the defendant had previously been acquitted with regard to that volitional act?

S. 397, as passed, contains two sections that were originally added on the Senate floor. Section 5, with exceptions, requires child safety locks on handguns, and section 6 amended 18 U.S.C. §§ 922(a) and 924(c), which, with exceptions, prohibit the manufacture or importation of armor piercing ammunition, and establish penalties for the commission of crimes with such ammunition.

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[15] 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. The plaintiff presumably would have to prove a violation by a preponderance of the evidence, whereas a conviction requires proof beyond a reasonable doubt. 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.