

# Abusive Lawsuits against the Second Amendment

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## Synopsis

S.B. 10 and H.B. 1208 prohibit abusive lawsuits against the exercise of Second Amendment rights. The bills simply close loopholes in existing Colorado state law against abusive lawsuits. Because the prohibition applies to lawsuits brought by any party (not just by local governments), both bills avoid the Home Rule constitutional issue that provoked the veto of a related, but different bill in 1999. Both bills present third parties (such as firearms trade associations) from being sued for the actions of someone else.

## I. The Bills Close Loopholes in Existing Colorado Law

For years, Colorado has prohibited abusive lawsuits against firearms manufacturers. Under existing law (C.R.S. § 13-21-501) no-one in the state (private individuals, local governments, or corporations) may bring product liability suits against firearms manufacturers if the firearm is not defective. In other words, if a handgun explodes in the user's hand, the handgun manufacturer may be sued for making a defective gun. But if a handgun functions normally, the manufacturer may not be sued because a criminal misused a stolen gun in during a robbery.

The existing Colorado law was enacted to address the problem of abusive lawsuits orchestrated by gun prohibition groups against firearms manufacturers. Unfortunately, in states with laws similar to Colorado's, gun prohibition groups have exploited loopholes in state statutes, to bring abusive lawsuits despite statutory prohibitions. For example, in states where (as in Colorado) abusive product liability suits are banned, gun prohibition groups have orchestrated suits under new theories, such as "negligent marketing," or "public nuisance." In all cases, the bottom line is the same: gun prohibition groups seek to usurp legislative power, and misuse the legal system to drive gun manufacturers into bankruptcy.

S.B. 10 and H.B. 1208 close the loopholes in existing law, and prevent abusive lawsuits from being filed in Colorado. Because such abusive lawsuits can be brought by a local government, or by an individual, or by a business, both bills prohibit abusive lawsuits no matter who the plaintiff is. Thus, the bills avoid the Colorado Constitutional problem which was raised by Senate Bill 99-1205, which barred *only* lawsuits brought by local governments, and thus (at least arguably) infringed the Home Rule provisions of the Colorado State Constitution.

The State Constitution grants home rule cities the right to "sue and be sued." Arguably, depriving *only* local governments of a particular right to sue was contrary to the Colorado Constitution.

Of course home rule cities do not have a right to sue under any circumstances. For example, if the Colorado General Assembly enacts a Statute of Limitations about certain lawsuits, home rule cities (like everyone else) cannot bring lawsuits which violate the Statute of Limitations. Because the Statute of Limitations applies to all litigants equally, it does not infringe home rule authority. Likewise, because H.B. 1208 and S.B. 10 apply to all litigants equally, they do not infringe home rule powers.

## II. Comparison of 2000 Bills with 1999 Bill

	Senate Bill 99-1205	Senate Bill 00-10 and House Bill 00-1208
Litigants affected	Local government only.	All plaintiffs equally.
Scope of lawsuit affected	None. Only certain litigants banned.	Close loophole to prohibit abusive lawsuits under any legal theory.
Restriction on lawsuits for genuinely defective firearms	None.	None.
Restriction of lawsuits for breach of contract in firearms sales.	None.	None.
Protection against abusive lawsuits by private litigants.	None.	Complete.
Protection for innocent third parties (e.g. trade associations which do not sell guns).	None.	Specific protection.
Colorado Constitution home rule infringement.	Arguable infringement.	No plausible argument.

## III. Analysis of Abusive Lawsuits

### A. Dangerous "Safety" Devices

Are gun manufacturers legally responsible for gun crime? If so, should we hold Black and Decker liable for the Texas chainsaw massacre, blame the ax industry for Lizzie Borden, and allow General Motors to be sued because of the injuries caused by drunk drivers?

Most anti-gun lawsuits have failed in court--even when brought by people who actually been injured by guns. (As opposed to the latest round of lawsuits, brought by politicians.) For example, in California, after one child shot his brother during careless gun play, the parents (who hand left their gun where children could get it) sued the guns manufacturer (Beretta) and were assisted in the suit by attorneys from the Center to Prevent Handgun Violence (Mrs. Sarah Brady's legal organization). Although the lawsuit was brought in California, hardly a "pro-gun" jurisdiction, the jury rejected the claim that the gun manufacturer should be responsible for the consequences of gun misuse.

The CPHV had argued that Beretta was legally negligent because it had not included a "magazine disconnect" device in the gun that it manufactured. A magazine disconnect prevents a gun from firing when there is a round in the chamber but the magazine is not in the gun.

While some gun owners prefer guns with magazine disconnects, many do not, because they fear that the magazine disconnect might make the gun unable to fire in emergency. For example, if a person were under attack, needed to reload a semiautomatic pistol, and dropped the fresh magazine that he was trying to insert into the gun, the gun would not work. Even though there was still a round left in the chamber, the victim would not be able to use that round to stop the attacker. The magazine disconnect could result in the innocent victim being murdered.

In the California case, *Dix v. Beretta*, the judge applied California law, and ordered the Center to Prevent Handgun violence to pay some of Beretta's litigation costs.

## **B. Destroying Companies through Legal Expenses**

The one exception to the failure of anti-gun lawsuits is the *Hamilton* case in Brooklyn. There, a jury awarded some damages to one plaintiff against three handgun companies.

But even in *Hamilton*, the damages were much smaller than the legal costs incurred by each of the two dozen gun companies which were sued.

***So the real danger of the lawsuits, not that they will result in money awards against the gun companies, but that lawsuits filed all over the country can impose such crippling litigation costs on handgun manufacturers that many of them will be driven out of business.*** Already, several handgun manufacturers have been forced into bankruptcy because of the abusive

lawsuits. If you wrapped the whole gun manufacturing business into a single company, that company still would not be a member of the Fortune 500.

The lawsuits are cleverly structured to prevent the defendants from filing a motion to consolidate the cases (which would reduce legal costs). And the lawyers working at CPHV's direction have been smart enough not to sue ammunition manufacturers, who are much wealthier than gun companies, and who could easily afford to pay for lawyers to handle every case from start to finish.

So unlike the cigarette companies, the handgun companies cannot buy off the tort lawyers, politicians, and private litigants by giving them a share of the companies' profits. And unlike cigarette executives, handgun company officers have never claimed that handguns do not kill.

But besides killing, handguns also save many innocent lives (sometimes by killing criminals). That is why every police department in America buys handguns from the very same companies that the mayors are suing. How hypocritical for the mayors or other litigants to sue the very companies which enhance public safety by providing police departments with firearms.

Indeed, most of the mayors who have filed abusive lawsuits are protected 24 hours a day by taxpayer-paid police bodyguards who are outfitted with firearms supplied by the lawsuit victims. If the gun-hating Mayors actually believe that magazine disconnects, trigger locks, palm-print readers, and other "safety" devices do not make guns unreliable, they would insist that their own bodyguards use guns equipped with such devices.

Legislation to outlaw the abusive lawsuits has been enacted in fifteen states, including Texas, where Gov. Bush enthusiastically signed the bill just a few weeks after Columbine.

Notably, reform legislation is supported by groups like the United States Chamber of Commerce, which have little interest in guns per se, but which recognize that if the gun cases succeed, then companies that make alcohol, automobiles, high-fat food, knives, and many other products will be next in line for tort lawyer predation.

Although the CPHV protests that the legislative reforms interfere with its litigation rights, there is no right to bring vexatious litigation which chills the exercise of constitutional rights; that is why the Supreme Court, in the 1964 case *New York Times v. Sullivan*, restricted libel suits which chilled First Amendment rights. ***Legislation to ban lawsuit abuse reaffirms the fundamental principle of our republican government that policy decisions about important matters (such as banning guns) are the responsibility of the legislature acting under the Constitution.***

### **C. Lawsuits to Undermine Self-Defense**

All these lawsuits are, in one way or another, based on Mrs. Sarah Brady's premise that "To me, the only reason for guns in civilian hands is for sporting purposes." (Tom Jackson, "Keeping the Battle Alive," *Tampa Tribune*, Oct. 21, 1993.)

For example, if handguns were to be used only for target shooting, and never for self-defense, that a magazine disconnect might be the kind of thing that every manufacturer should be required to put on their guns. Once in a while, a magazine disconnect might prevent a careless person from causing an accident, and since the gun would never be used for self-defense, the magazine disconnect would be a net gain for safety.

Similarly, Chicago Mayor Richard Daley's lawsuit against handgun manufacturers, a lawsuit which the CPHV has orchestrated, complains that handgun manufacturers have improved their products too much. In the last decade, handgun companies have, responding to consumer demand, produced models there are smaller, that have larger ammunition capacity, and that have greater accuracy and firepower.

Mayor Daley complains the production of such guns is catering to criminal market. And certainly if handguns were meant exclusively for target ranges, then large guns would long barrels might be the main kind of gun produced. But since it is lawful to use guns for protection, smaller guns with greater firepower have a great deal of utility to law-abiding persons. The usefulness to a person carrying handgun for protection on her person or in a car is obvious. Although compactness is less important in the home, a gun used mainly for home protection might sometimes be carried out of home. Or if the gun is kept at home full-time, a smaller gun might be easier for the particular person to hold, easier to store in a particular place, or easier to keep concealed from children.

While the claim that gun companies have improved their products too much is inconsistent with the fact that all 50 states recognize a right to use the deadly force of handguns for protection against certain felonious criminal attacks, it is true that handgun companies have brought out a variety of new models in the last decade in response to consumer demand. Amazingly, the lawsuits engineered by Mrs. Brady's organization also claim that handgun companies haven't improved their products enough. This claim is obviously wrong.

Some of the alleged improvements, like "magazine disconnects" aren't really improvements in all. Their devices which some consumers may legitimately want, and other consumers may just as legitimately not want.

Likewise, devices such as trigger locks, while useful for some consumers, should not be mandated by courts (or by legislatures) because of the potential deadly consequences. As *The Weekly Standard* magazine detailed, at the December 1998 meeting of the U.S. Conference of Mayors, CPHV attorney

Dennis Henigan attempted to demonstrate how easy it is to remove a trigger lock. But instead, he fumbled with the lock for a long time before finally getting it off. Good thing that he wasn't trying to use the gun in emergency; he would have been dead before the "safety device" was removed. (But again, if guns are legitimate only for sports and not for protection, then it doesn't matter whether a safety device takes a long time to remove.)

#### **D. Lawsuits for Gun Companies Supposedly Ignoring Huge Profit Opportunities**

The charge that gun companies have deliberately failed to bring out "smart gun" technology is silly. If any gun manufacturer who really were holding up the introduction of such technology, that manufacturer would be guilty of a very serious breach of its fiduciary duty to its shareholders to earn a profit.

The so-called smart gun to use uses a computer chip in the butt of the gun to read the palmprint or otherwise identify the shooter; the chip will prevent the gun from shooting if the gun is held by an unauthorized user. There are plenty of people for whom a smart gun would be too dangerous. For example, a police officer might want his gun to be usable by any other police officer he happened to be working with. Or any person might worry that the chance that the computer chip might not work or might work too slowly in emergency is not worth taking.

But there is also be a huge market of people who do not currently own guns but who have told pollsters that they would be interested in buying a smart gun. (About a quarter of all persons who do not currently own guns have said that they would like to purchase a "smart gun.") Even though the smart gun can be defeated, (with a little time a thief can remove some or all of the smart gun components), the smart gun does offer some protection against misuse by unauthorized persons (especially by unsophisticated persons, such as younger children). At the same time, a properly functioning smart gun can be available in emergency (unlike trigger locks and similar devices, which require at least several seconds or minutes to open).

So the first company that brings a high-quality smart gun to the market is going to make a lot of money. It takes a genuine anti-gun extremist to believe that handgun companies are so hostile to safety that they are refusing to produce products which could earn many millions of dollars.

#### **E. Exercise of Constitutional Rights as "Public Nuisance"**

Another claim against the gun companies is under the theory of public nuisance. Normally, a public nuisance claim can be brought against an illegal business, such as a house of prostitution which causes problems in its neighborhood. But it is outrageous to claim that a business operating in full compliance with the law, and which causes no harm to its neighbors, is somehow a "public nuisance."

In the Supreme Court case *South Carolina Coastal Commission vs. Lucas*, a regulatory agency wanted to forbid a man from building a home on his beachfront property. The agency refused to pay the man anything for the agency's taking of nearly all the economic value of the property; instead, the agency claimed that by forbidding the house construction, the agency was preventing the creation of a public nuisance, and accordingly did not owe any compensation.

Justice Antonin Scalia's opinion for the Supreme Court bluntly explained that building a home is not a public nuisance. And neither is selling a firearm, building a church, selling newspapers, or engaging in any other activity protected by the Constitution of United States.

## **F. Stores and Trade Associations Victimized**

Unfortunately, handgun manufacturers are not the only victims of these vexatious lawsuits. In Chicago, for example, suburban firearm stores have been sued. Mayor Daley claims that these stores sold handguns undercover Chicago police officers posing as gang members who said that they were planning to use guns for murders. Yet the Chicago police department has refused to release of any tape recordings of these supposed transactions. More likely, the evidence will show that the firearm stores complied with civil rights laws by not turning away customers because of their dark skinned and their clothing style.

If a gun store really did knowingly sell a handgun to a criminal, or to a person who said he would transfer the gun to criminal, that sale is already a very serious felony under the laws of the United States and the state of Illinois.

Pushing the assault on constitutional rights even further, the CPHV has convinced the cities also to sue firearms industry trade associations: the National Shooting Sports Foundation, the American Shooting Sports Council, and the Sporting Arms and Ammunition Manufacturers Institute. None of these organizations sells or makes guns. Instead, the organizations' activities consist almost exclusively in the exercise off First Amendment rights. The organizations conduct public education campaigns, and lobby against various bills supported by the gun prohibition groups.

Suing someone in revenge for their lawful exercise off First Amendment rights is a common stratagem to destroy political opposition. The tactic is known as a SLAPP-- a Strategic Lawsuit Against Public Participation. It should not be surprising that politicians and lawyers who hold the Second Amendment in contempt should also treat the First Amendment with disdain.

***If the abusive anti-gun suits are allowed to proliferate, then legislatures will become irrelevant. With most handgun companies driven out of business, and the rest forced to raise prices sky-high to cover attorney fees, then America***

*will suffer de facto handgun prohibition. The First and Second Amendment rights of all Americans will have been irreparably injured due to legislators' failure to assert their own authority to make the law.*

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