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Note

Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability

*Elizabeth T. Crouse**

Every year, tens of thousands of people die from firearm-related injuries in the United States.¹ The long-term statistics are shocking. From 1981 to 1999, firearms were responsible for 271,103 homicides, 337,954 suicides, and 26,294 unintentional deaths in the United States.² Gun violence falls particularly harshly on the young, as tragically evidenced by the shootings at Columbine High School.³ Studies reveal that gun violence is among the leading causes of death among teenagers.⁴ Beyond the statistics, the intangible social costs of gun violence, so clearly demonstrated by the grip of fear that two men were able to impose on the entire D.C. area with the aid of a single rifle,⁵ are immeasurable. Not surprisingly, given these sobering statistics, guns are a prevalent feature of American society. The making and selling of guns is a big business in the United States.⁶ The gun industry and its pro-gun rights supporters,

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1. See Linda Gunderson, *The Financial Costs of Gun Violence*, 131 ANNALS INTERNAL MED. 483, 483 (1999), at <http://www.annals.org/cgi/content/full/131/6/483>.

2. Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & POL'Y 67, 70 (2002).

3. See *Three Detained in Shooting*, CNN, at <http://www.cnn.com/US/9904/20/school.shooting.04/index.html> (Apr. 20, 1999).

4. Bhowmik, *supra* note 2, at 70–71.

5. See generally *Ballistics Match Rifle to Sniper Attacks*, CNN, at <http://www.cnn.com/2002/US/South/10/24/sniper.shootings/> (Oct. 25, 2002).

6. In 1998, the U.S. gun industry's annual sales were approximately \$1.4

most prominently the National Rifle Association (NRA), also wield considerable lobbying power in Congress and in state legislatures.⁷

In the last twenty years, the connection between the gun industry and gun violence has been investigated more closely and disturbing discoveries have been made.⁸ In response, victims of gun violence increasingly have sought to hold the gun industry responsible for its role in arming the perpetrators of gun violence.⁹ Recently, new breeds of plaintiffs, most notably municipalities, alleging innovative causes of action have joined in the wave of lawsuits seeking to hold the gun industry liable for its part in fostering gun violence.¹⁰ In these suits, the plaintiffs argue that numerous gun industry practices, including lax distribution procedures and the designing and advertising of firearms in a manner calculated to appeal to criminals, contribute significantly to the problem of gun violence.¹¹ The plaintiffs also assert that the gun industry plays a key role in gun violence by knowingly permitting its products to fall into the hands of criminals.¹²

The U.S. Congress is now weighing in on this important issue. Prompted by the gun lobby, House Bill 1036 and Senate Bill 659 were introduced during the 2003 session.¹³ These iden-

billion. William L. McCoskey, Note, *The Right of the People to Keep and Bear Arms Shall Not Be Litigated Away: Constitutional Implications of Municipal Lawsuits Against the Gun Industry*, 77 IND. L.J. 873, 901 (2002).

7. See Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1251 (2000).

8. E.g., *UCLA Study Finds Gun Dealers Willing to Aid Illegal Gun Sales*, U.S. NEWSWIRE, June 17, 2003, at 2003 WL 55658955. The alarming practices of Bull's Eye Shooter Supply, a gun dealer in Washington State, and Bushmaster, a gun manufacturer, also provide good examples. See *infra* notes 37–38 and accompanying text.

9. See *infra* notes 16–43 and accompanying text.

10. See *infra* notes 44–63 and accompanying text.

11. See, e.g., Compl. at 6–9, *Johnson v. Bull's Eye Shooter Supply* (Wash. Super. Ct. Pierce County) (No. 03-2-03932-8), available at <http://news.findlaw.com/cnn/docs/gunlawsuits/jhnsnbeye11603cmp.pdf> (last visited Feb. 18, 2004) [hereinafter *Sniper Complaint*].

12. See, e.g., *id.*

13. S. 659, 108th Cong. (2003); H.R. 1036, 108th Cong. (2003); see also *infra* notes 92–119 and accompanying text. In late October of 2003, Senate Bill 1806, which is identical to Senate Bill 659, was introduced. S. 1806, 108th Cong. (2003). Senate Bill 1805, which contained the same basic language and structure of Senate Bill 659 and incorporated alterations suggested by Senators Craig, Daschle, and Baucus, was also introduced in late October of 2003. S. 1805, 108th Cong. (2003); see Brady Ctr. to Prevent Handgun Violence, *Why S. 659, With Proposed Daschle-Craig-Baucus Amendment, Would Deny the*

tical bills would severely limit the ability of victims of gun violence to seek redress against the gun industry for their injuries.¹⁴ The bills are making significant progress in Congress; in April of 2003, the House passed House Bill 1036 by a substantial majority.¹⁵ The proposed legislation, if enacted, would have a tremendous impact on victims' ability to sue the gun industry. Despite these potentially far-reaching effects, the bills have not drawn widespread media attention. This Note seeks to shed light on House Bill 1036, and any similar legislation proposed in the future, by illuminating its provisions, its potential legal shortcomings, and its ultimate impact on litigation against the gun industry.

Part I traces the path followed by gun industry litigation, including the recent trend of municipal lawsuits. It then discusses the response in state legislatures to this growing wave of litigation. Lastly, it introduces House Bill 1036 and describes its genesis. Part II delves into the text of House Bill 1036, comparing and contrasting its provisions with those of state laws dealing with suits against the gun industry and noting potential constitutional problems with the bill. Part III provides an analysis of the impact that House Bill 1036 would have on currently pending suits against the gun industry. Part III concludes by addressing the policy considerations implicated by House Bill 1036 and any similar national legislation attempting to limit the gun industry's liability in suits brought by victims of gun violence.

This Note argues that the proposed legislation would only impede the resolution of what remains the critical issue—the horrific costs of gun violence in American society. The bill would dampen collaboration between the judiciary and the legislature on this vital social issue and would stifle important public debate. The full ramifications of such a law strongly

Rights of the D.C. Sniper Victims and Most Other Victims of Gun Violence, at <http://www.bradycampaign.org/xshare/0903/092903-rel.html> (last visited Feb. 11, 2004). Senate Bill 1805 was defeated by a vote on March 2, 2004 after its opponents succeeded in attaching several unrelated gun control amendments to the bill, prompting the sponsors of the bill themselves to vote against it. 150 CONG. REC. S1999 (daily ed. Mar. 2, 2004); *Senate Kills Bill Protecting Gun Makers*, CNN, at <http://www.cnn.com/2004/ALLPOLITICS/03/02/senate.guns/index.html> (Mar. 3, 2004). The amendments included a requirement for background checks of firearm purchasers at gun shows and an extension of the assault rifle ban. *Senate Kills Bill Protecting Gun Makers*, *supra*.

14. See discussion *infra* Part III.A.

15. See *infra* notes 115–16 and accompanying text.

counsel against the enactment of House Bill 1036 or any similar legislation aimed at shielding the gun industry from civil liability for its conduct.

I. THE ORIGINS OF NATIONAL LEGISLATION LIMITING GUN INDUSTRY LIABILITY

A thorough analysis of the pending gun industry legislation requires an understanding of several underlying areas of law: (1) the litigation instituted against the gun industry by private parties and public entities for injuries resulting from gun violence, (2) the legislative reaction in the states to this wave of litigation, and (3) the impact of these state laws on lawsuits against the gun industry. Further, an examination of the legislative history of House Bill 1036 and its current status in Congress provides useful context for an in-depth analysis of the bill.

A. LITIGATION AGAINST THE GUN INDUSTRY

1. Private Party Lawsuits

The last fifteen years have seen a surge in lawsuits by private parties against the gun industry for injuries arising out of the unauthorized use of firearms by third parties, particularly suits instituted by the families of victims of gun violence.¹⁶ The plaintiffs in these suits have asserted a wide array of causes of action.¹⁷ The first wave of lawsuits by private parties against the gun industry typically asserted claims sounding in products liability and negligence.¹⁸ The products liability claims in these

16. Private parties have long sought to hold gun manufacturers liable for injuries arising from the malfunction of firearms. *See, e.g.*, *Stephan v. Marlin Firearms Co.*, 353 F.2d 819 (2d Cir. 1965); *Piercefield v. Remington Arms Co.*, 133 N.W.2d 129 (Mich. 1965). While such suits are important, this Note focuses on the more recent trend of litigation in which plaintiffs attempt to hold the gun industry responsible for the injuries its products cause when employed illegally, even when the products function precisely as they were designed to function.

17. *See* Matthew Pontillo, Note, *Suing Gun Manufacturers: A Shot in the Dark*, 74 ST. JOHN'S L. REV. 1167, 1172-84 (2000) for a fairly succinct, if somewhat one-sided, description of the most common causes of action alleged by these plaintiffs.

18. *See, e.g.*, *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1205-06 (7th Cir. 1984) (dismissing plaintiffs' strict liability claim); *Delahanty v. Hinckley*, 564 A.2d 758, 759 (D.C. 1989) (discussing plaintiffs' strict products liability and negligence claims); *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1145 (Md. 1985) (enumerating plaintiffs' counts of strict liability and negli-

cases usually centered on an allegation of defective design or failure to warn.¹⁹ Often closely linked to these products liability claims were strict liability claims for abnormally dangerous (also termed ultrahazardous) activity.²⁰

In more recent suits against the gun industry, private parties have asserted additional causes of action, adding claims of negligent distribution, negligent marketing, and public nuisance to their arsenal.²¹ Among these more recent suits is the landmark case of *Young v. Bryco Arms*.²² *Young* is one of the first cases in which a private party's public nuisance claim against the gun industry survived a motion to dismiss.²³ In *Young*, family members of victims of gun violence sued numerous gun manufacturers and gun dealers, alleging that the defendants' business practices constituted a public nuisance by contributing to the creation and maintenance of an underground market where youths and criminals could easily obtain firearms.²⁴ In 2002, the Illinois Appellate Court held that the

gence).

19. *E.g.*, *McCarthy v. Olin Corp.*, 119 F.3d 148, 154 (2d Cir. 1997); *Delahanty*, 564 A.2d at 760–61. Typically these products liability claims invoke the risk/utility test under which a plaintiff argues that a product is defective because the risks posed by the product outweigh its utility. *See, e.g.*, *McCarthy*, 119 F.3d at 155; *Kelley*, 497 A.2d at 1148–49.

20. *E.g.*, *Martin*, 743 F.2d at 1201–02; *Delahanty*, 564 A.2d at 760–61. THE RESTATEMENT (SECOND) OF TORTS § 519 (1977) provides “[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.” *See also* Marnie L. Sayles & The Honorable James R. Lambden, *Stop Shooting Down Tort Liability: It Is Time to Resuscitate the Abnormally Dangerous Activity Doctrine Against Handgun Manufacturers*, 12 STAN. L. & POL'Y REV. 143 (2001) for a detailed discussion of the elements and application of liability for abnormally dangerous activity.

21. *See, e.g.*, *McCarthy*, 119 F.3d at 157 (dismissing plaintiffs' negligent marketing and products liability claims against a gun manufacturer); *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1044 (C.D. Cal. 2002) (addressing public nuisance and negligent distribution claims brought by family members of victims of criminal shootings), *rev'd*, 349 F.3d 1191 (9th Cir. 2003); *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 WL 142359, at *1 (N.D. Ill. Mar. 20, 1998) (dismissing plaintiffs' public nuisance claims against gun industry defendants).

22. 765 N.E.2d 1 (Ill. App. Ct. 2001).

23. *Id.* at 20; *see also* Jon S. Vernick & Julie Samia Mair, *State Laws Forbidding Municipalities from Suing the Firearm Industry: Will Firearm Immunity Laws Close the Courthouse Door?*, 4 J. HEALTH CARE L. & POL'Y 126, 133 (2001).

24. *Young*, 765 N.E.2d at 5. The plaintiffs in *Young* alleged that the defendant gun manufacturers flood the Chicago area with handguns and employ

plaintiffs' complaint stated a viable cause of action for public nuisance against some of the defendants.²⁵

In contrast to *Young*, suits by private parties against the gun industry have almost universally failed.²⁶ Courts frequently cite plaintiffs' failure to point to an actual defect in the firearm or ammunition in dismissing plaintiffs' products liability claims, noting that the firearm or ammunition functioned exactly as it was designed to function.²⁷ In dismissing negligence claims, courts often note the absence of a duty on the defendants' part and the lack of proximate causation due to the intervening actions of a third party.²⁸ Claims regarding abnormally dangerous activity have also proven largely unsuccessful, as courts typically conclude that the marketing of firearms is not itself a dangerous activity.²⁹ In addition, public nuisance claims have been dismissed due to the defendants' perceived lack of control over the nuisance at the time of the plaintiff's injury and the notion that public nuisance does not apply to the lawful sale of products.³⁰ Courts have also articulated a reluctance to impose liability on an industry that is already regulated by statute, often suggesting that the area of gun control is best left to the legislature.³¹

Nonetheless, private parties today continue to file suit against the gun industry, and several such cases are currently

low-end retailers who facilitate the flow of handguns into Chicago. *Id.* at 6.

25. *Id.* at 20.

26. Shaun R. Bonney, Comment, *Using the Courts to Target Firearm Manufacturers*, 37 IDAHO L. REV. 167, 168 (2000). A recent decision by the Ninth Circuit may indicate that this trend is starting to change. In November of 2003, the Ninth Circuit held that a suit brought by survivors and family members of victims of a criminal shooting spree against the manufacturers and dealers of the guns used in the shootings survived the defendants' motion to dismiss, reversing the lower court's decision. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1194 (9th Cir. 2003).

27. *E.g.*, *McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997); *Delahanty v. Hinckley*, 564 A.2d 758, 760 (D.C. 1989). Courts have held that plaintiffs must point to a specific defect in a firearm's design before the products liability risk/utility test can be applied. *E.g.*, *McCarthy*, 119 F.3d at 155; *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1149 (Md. 1985).

28. *E.g.*, *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 30 (2d Cir. 2001); *Bloxham v. Glock, Inc.*, 53 P.3d 196, 198 (Ariz. Ct. App. 2002).

29. *E.g.*, *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204-05 (7th Cir. 1984); *Delahanty*, 564 A.2d at 761.

30. *E.g.*, *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1060-61 (C.D. Cal. 2002), *rev'd*, 349 F.3d 1191 (9th Cir. 2003).

31. *E.g.*, *Bloxham*, 53 P.3d at 200; *Merrill v. Navegar, Inc.*, 28 P.3d 116, 133 (Cal. 2001).

pending. In *Dix v. Beretta*, a suit that has attracted national attention, the parents of a teenager who was accidentally shot and killed by a friend brought suit against the manufacturer of the firearm asserting defective design and failure to warn claims.³² In 1998, the case went to trial, and the jury returned a verdict in favor of the manufacturer on all counts.³³ However, the plaintiffs were granted a new trial after significant juror misconduct came to light.³⁴ In 2002, the California Court of Appeals upheld the trial court's grant of a new trial, and a new trial took place in December of 2003, ending in a mistrial.³⁵

Most recently, family members of the D.C.-area sniper victims have made headlines by filing a lawsuit against both Bushmaster Firearms (Bushmaster), the manufacturer of the firearm used in the sniper shootings, and Bull's Eye Shooter Supply (Bull's Eye), the retailer from which the gun was obtained.³⁶ The complaint alleges that the retailer committed gross negligence in the operation of its store by permitting numerous firearms to "disappear" and by failing to keep accurate records of its sales.³⁷ The complaint also alleges that Bushmaster should have been aware that the assault rifle used by the D.C. snipers would be a weapon of choice for criminals and would be "particularly well-adapted to sniper military-style as-

32. The facts of *Dix v. Beretta* are utterly tragic. The victim and his teenaged friend were playing with the friend's father's gun. Brady Ctr. to Prevent Handgun Violence, *New Trial Granted in Dix v. Beretta*, at <http://www.bradycampaign.org/press/release.php?release=12> (Sept. 11, 2000) [hereinafter Brady Center: *Dix v. Beretta*]. In jest, the friend removed the loaded ammunition magazine, replaced it with an empty magazine, pointed the gun at Kenzo Dix, and fired, thinking the gun was empty. *Id.* The semiautomatic handgun retained a bullet in its chamber even after the magazine had been removed, and fifteen-year-old Kenzo was killed. *Id.* The plaintiffs are attempting to hold Beretta, the manufacturer of the gun, liable on a defective design theory for failing to incorporate safety devices into the handgun. The Legal Action Project, Brady Ctr. to Prevent Handgun Violence, Current Cases: *Dix v. Beretta U.S.A. Corp.*, at <http://www.gunlawsuits.org/docket/casestatus.asp?RecordNo=25> (last visited Feb. 11, 2004) [hereinafter *Dix Case Status*].

33. *Dix Case Status*, *supra* note 32.

34. Brady Center: *Dix v. Beretta*, *supra* note 32.

35. *Dix v. Beretta U.S.A. Corp.*, No. A093082, 2002 WL 187397 (Cal. Ct. App. Feb. 6, 2002); Kiley Russell, *Civil Trial in Accidental Shooting Ends in Mistrial*, CONTRA COSTA TIMES (Calif.), Dec. 23, 2003, at <http://www.contracostatimes.com/mld/cctimes/news/7559405.htm>; *Dix Case Status*, *supra* note 32. A new trial could be scheduled in early 2004. Russell, *supra*.

36. See Sniper Complaint, *supra* note 11.

37. *Id.* at 3 (alleging that "[a]t least 238 guns 'disappeared' from Bull's Eye in the last three years alone").

saults.”³⁸ The plaintiffs assert public nuisance and negligence claims against the gun industry defendants.³⁹ The case is scheduled for trial in November of 2004.⁴⁰

Lately, organizations, most notably the National Association for the Advancement of Colored People (NAACP), have also filed suits against the gun industry.⁴¹ In its suit, the NAACP alleges that gun manufacturers’ distribution and marketing practices create a public nuisance that disproportionately harms African-Americans.⁴² The federal district court for the Eastern District of New York dismissed the suit, holding that the NAACP failed to demonstrate that it had sustained injuries different in kind from those suffered by the public at large, a necessary element of a public nuisance claim by a private party.⁴³

2. Public Entity Lawsuits

In the last five years, numerous government entities, particularly municipalities, have joined the fray in filing lawsuits against the gun industry. On October 30, 1998, New Orleans became the first city to bring suit against members of the gun industry.⁴⁴ New Orleans filed suit against numerous gun manufacturers, retailers, and distributors under products liability and negligence theories.⁴⁵ Since then more than thirty cities and counties have filed suit against members of the gun industry.⁴⁶ The plaintiffs in these suits raise a variety of causes of action. Public nuisance, strict products liability, negligent mar-

38. *Id.* at 18, 20.

39. *Id.* at 26–30.

40. Pierce County Sup. Ct., Calendar, *Johnson v. Bull’s Eye Shooter Supply*, Case No. 03-2-03932-8, at http://www.co.pierce.wa.us/cfapps/linx/calendar/GetCivilCase.cfm?cause_num=03-2-03932-8 (last visited Feb. 11, 2004).

41. *See, e.g.*, *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003). Several organizational plaintiffs joined the city of Philadelphia in its suit against the gun industry. *Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 419 n.1 (3d. Cir. 2002).

42. *Acusport*, 271 F. Supp. 2d at 446–47, 451.

43. *Id.* at 451.

44. *See Brady Ctr. to Prevent Handgun Violence, New Orleans First City to Sue Gun Manufacturers: Center to Prevent Handgun Violence Co-counsel in Landmark Lawsuit*, at <http://www.bradycampaign.org/press/release.asp?Record=143> (last visited Feb. 24, 2004).

45. *Compl.* at 12–16, *Moial v. Smith & Wesson Corp.* (La. Civ. Dist. Ct. 1998) (No. 98-18578), available at <http://www.gunlawsuits.org/docket/cities/cityview.asp?RecordNo=1>.

46. Annie Tai Kao, Note, *A More Powerful Plaintiff: State Public Nuisance Lawsuits Against the Gun Industry*, 70 GEO. WASH. L. REV. 212, 213 (2002).

keting, negligent distribution, and failure to warn are the most prevalent claims asserted by municipal plaintiffs.⁴⁷ In addition, several suits raise claims for unjust enrichment, deceptive advertising, civil conspiracy, and fraud.⁴⁸

These suits have met with mixed results in the courts. Many have been dismissed for failure to state a claim upon which relief can be granted.⁴⁹ Some municipalities' suits, however, have succeeded in surviving motions to dismiss or have had dismissals reversed on appeal.⁵⁰ In *City of Cincinnati v. Beretta U.S.A. Corp.*, for example, Cincinnati brought suit against members of the gun industry asserting nine causes of action, including negligence, public nuisance, products liability, fraud, and deceptive advertising.⁵¹ The Supreme Court of Ohio

47. *E.g.*, Compl. at 16–18, *Ganim v. Smith & Wesson Corp.* (Conn. Super. Ct. Jan. 27, 1999) (No. CV-99-036-1279) (asserting products liability causes of action), available at <http://www.gunlawsuits.com/downloads/bridgeport.pdf>; Compl. at 25–27, *Dist. of Columbia v. Beretta U.S.A. Corp.* (D.C. Super. Ct. Jan. 20, 2000) (No. 00-0000428) (asserting negligent distribution and public nuisance causes of action), available at <http://www.gunlawsuits.com/downloads/washdc.pdf>; Compl. at 67–70, *City of Chicago v. Beretta U.S.A. Corp.* (Ill. Cir. Ct. Cook County Nov. 12, 1998) (No. 98 CH 015596) (asserting a public nuisance cause of action), available at <http://www.gunlawsuits.com/downloads/chicago.pdf>; Compl. at 24–26, *City of Camden v. Beretta U.S.A. Corp.* (N.J. Super. Ct. Law Div. June 21, 1999) (No. CAM-L-4510-99) (asserting negligent marketing and negligent distribution claims), available at <http://www.gunlawsuits.com/downloads/camdencity.pdf>; Compl. at 28–32, 34–37, *City of Cincinnati v. Beretta U.S.A. Corp.* (Ohio Ct. C.P. Hamilton County Apr. 28, 1999) (No. A9902369) (asserting products liability, failure to warn, negligence, and public nuisance causes of action), available at <http://www.gunlawsuits.com/downloads/cincin.pdf>.

48. *E.g.*, Compl. at 18–20, 32–34, *Ganim* (No. CV-99-036-1279) (asserting deceptive advertising and civil conspiracy causes of action); Compl. at 31–32, *City of Camden* (No. CAM-L-4510-99) (asserting an unjust enrichment claim); Compl. at 37–40, *City of Cincinnati* (No. A9902369) (asserting fraud, unjust enrichment, and negligent misrepresentation claims).

49. *E.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 419 (3d Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 542 (3d Cir. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001); *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845, 862 (Mich. Ct. App. 2003).

50. *E.g.*, *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 830 (N.D. Ohio 2000); *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16, 31 (Ill. App. Ct. 2002); *James v. Arms Tech., Inc.*, 820 A.2d 27, 53 (N.J. Super. Ct. App. Div. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141 (Ohio 2002).

51. *City of Cincinnati*, 768 N.E.2d at 1140 (“The gist of the complaint is that appellees have manufactured, marketed, and distributed their firearms in ways that ensure the widespread accessibility of the firearms to prohibited us-

reversed the trial court's dismissal of Cincinnati's claims and permitted the city to proceed on all of the causes of action alleged.⁵²

Similarly, in *City of Chicago v. Beretta U.S.A. Corp.*, the Illinois Court of Appeals reversed the lower court's dismissal of Chicago's public nuisance claim against members of the gun industry.⁵³ The city alleged that the defendants' distribution and sales practices, including oversupplying the market for handguns and failing to properly supervise gun dealers, "unreasonably facilitate the unlawful possession and use of firearms in Chicago," thereby creating a public nuisance.⁵⁴ The Chicago lawsuit is currently pending.⁵⁵

In June of 2000, following the municipalities' lead, New York became the first state to file suit against the gun indus-

ers, including children and criminals."); see also Compl. at 28-40, *City of Cincinnati* (No. A9902369).

52. *City of Cincinnati*, 768 N.E.2d at 1141. The court also concluded that the doctrine of remoteness did not operate to bar the city's claims. *Id.* at 1149. The doctrine of remoteness imposes a limit on tort liability by providing that a plaintiff generally cannot recover for injuries sustained by third parties. Anne Giddings Kimball & Sarah L. Olson, *Municipal Firearms Litigation: Ill Conceived from Any Angle*, 32 CONN. L. REV. 1277, 1288 (2000). As the Supreme Court has articulated it, a plaintiff "who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992). The remoteness doctrine thus requires that the harm suffered by the plaintiff be a direct, rather than remote, result of the defendant's conduct. *Ganim*, 780 A.2d at 118-20. Courts faced with municipal lawsuits against the gun industry have frequently relied on the doctrine of remoteness in dismissing the plaintiffs' claims, concluding that the municipalities' injuries are merely derivative of the injuries sustained by the individual victims of gun violence. See, e.g., *City of Philadelphia*, 277 F.3d at 422-24; *Ganim*, 780 A.2d at 121-23 (discussing the remoteness issue in the context of standing).

Facing mounting legal costs and an uncertain outcome, Cincinnati elected to drop its suit in May of 2003. The Legal Action Project, Brady Ctr. to Prevent Handgun Violence, *Reforming the Gun Industry*, at <http://www.gunlawsuits.org/docket/cities/cityview.asp?RecordNo=11> (last visited Feb. 16, 2004).

53. *City of Chicago*, 785 N.E.2d at 31.

54. *Id.* at 20. The defendants' practices are particularly egregious in this case in light of the fact that most handguns are illegal within the Chicago city limits. See Compl. at 11-12, *City of Chicago v. Beretta U.S.A. Corp.* (Ill. Cir. Ct. Cook County Nov. 12, 1998) (No. 98 CH 015596).

55. Suits by Cleveland and Newark are also pending, having survived motions to dismiss. See The Legal Action Project, Brady Ctr. to Prevent Handgun Violence, *Public Entity Firearms Litigation*, at <http://www.gunlawsuits.org/docket/cities/public.asp> (last visited Feb. 16, 2004).

try.⁵⁶ In its complaint, New York alleged that the gun industry defendants' marketing, manufacturing, and distribution practices create a public nuisance in New York.⁵⁷ The trial court dismissed the state's claims, and the New York Appellate Division affirmed the dismissal.⁵⁸ The Appellate Division concluded that the state's injuries were too remote from the defendants' conduct for the state to maintain its cause of action.⁵⁹

In addition to the suits in which plaintiffs' claims have survived a motion to dismiss, a victory of another kind came for plaintiffs in March of 2000 when Smith & Wesson signed a settlement agreement with numerous municipalities and two states.⁶⁰ In the agreement, Smith & Wesson agreed to a number of reforms of its distribution and manufacturing practices in exchange for being dropped from lawsuits instituted by the agreement's signatories.⁶¹ The settlement has been widely hailed as a victory for the plaintiffs, as it takes steps towards resolving many of the concerns expressed by the plaintiffs in their complaints.⁶² The settlement, however, raised a furor among gun rights groups who felt that Smith & Wesson had

56. Kao, *supra* note 46, at 213.

57. *People v. Sturm, Ruger & Co., Inc.* 761 N.Y.S.2d 192, 194 (N.Y. App. Div. 2003).

58. *Id.* at 204.

59. *Id.* at 201.

60. *See Save Our Guns, Smith & Wesson Agreement*, at <http://www.saveourguns.com/Smith%20%26%20Wesson%20Agreement03.htm> (Mar. 17, 2000). The parties to the agreement included the states of New York and Connecticut and several cities, including Atlanta, Georgia; Berkeley, California; Bridgeport, Connecticut; Camden, New Jersey; Detroit, Michigan; Gary, Indiana; Los Angeles, California; and St. Louis, Missouri. *Id.*

61. *See id.* Some of the more significant provisions of the agreement include a requirement that dealers perform background checks on purchasers at gun shows, the termination of sales to dealers whose guns are disproportionately linked to crimes, the installation of internal locking devices on all firearms manufactured by Smith & Wesson within two years, the installation of personalized technology on all new firearms within three years, and the requirement of a hidden serial number on all firearms. *Id.* As part of the agreement, the federal government also has agreed not to file suit against Smith & Wesson, as it had threatened to do. Amy Paulson, *Smith & Wesson Agrees to Landmark Gun Safety Settlement*, CNN, at <http://www.cnn.com/2000/ALLPOLITICS/stories/03/17/gun.lawsuit/> (Mar. 17, 2000).

62. Paulson, *supra* note 61. Even more recently, two gun dealers and three gun distributors agreed to alter their practices in exchange for being released from a lawsuit brought by several California cities and counties. Brady Ctr. to Prevent Handgun Violence, *Gun Dealers, Distributors Agree to Reforms to Curb Illegal Market in California*, at <http://www.bradycampaign.org/press/release.php?Record=503> (Aug. 21, 2003).

weakened the position of the gun industry by breaking ranks with other manufacturers.⁶³

B. THE LEGISLATIVE RESPONSE IN THE STATES

There has been a significant legislative response at the state level to the explosion of suits against the gun industry, particularly the suits by municipalities.⁶⁴ The Georgia state legislature was the first to address the recent wave of lawsuits.⁶⁵ In 1999, the Georgia General Assembly enacted a statute that prohibits governmental units of the state from bringing suit against the gun industry for “damages, abatement or injunctive relief” resulting from the “lawful design, manufacture, marketing, or sale of firearms or ammunition.”⁶⁶ Following in Georgia’s footsteps, approximately thirty states have enacted laws limiting the gun industry’s liability for injuries resulting from the manufacture, sale, and use of firearms.⁶⁷ Four years after the

63. See Will Evans, *Gun Company Agrees to Safety Standards*, THE DAILY CALIFORNIAN, Mar. 20, 2000, available at <http://www.dailycal.org/article.php?id=1980>; Gun Owners of Am., *GOA Announces Boycott of Clinton & Wesson—Sell-out Worse than Originally Reported*, at http://www.hipweb.net/jgrisafi/points/GOA_Alert.html (Mar. 21, 2000).

64. The state laws limiting gun industry liability can be divided into two rough categories. The first category includes statutes aimed specifically at barring suits by political subdivisions of a state, all of which have been enacted in the last five years. *E.g.*, ARK. CODE ANN. § 14-16-504 (Michie Supp. 2003); KAN. STAT. ANN. § 60-4501 (Supp. 2002); KY. REV. STAT. ANN. § 65.045 (Michie Supp. 2003). The second category is composed of laws, typically passed under state products liability statutes, which specifically limit products liability actions against the gun industry. *E.g.*, COLO. REV. STAT. §§ 13-21-501 to -505 (2003); LA. REV. STAT. ANN. § 9:2800.60 (West Supp. 2004). This Note discusses both types of statutes in tandem because both have an impact on plaintiffs’ ability to sue the gun industry.

65. GA. CODE ANN. § 16-11-184 (2003).

66. *Id.* The Georgia statute was enacted largely in response to a suit instituted by the city of Atlanta against numerous gun manufacturers and gun dealers. See Brent W. Landau, *State Bans on City Gun Lawsuits*, 37 HARV. J. ON LEGIS. 623, 626-27 (2000).

67. ALA. CODE § 11-80-11 (Supp. 2003); ALASKA STAT. § 09.65.155 (Michie 2002); ARIZ. REV. STAT. ANN. § 12-714 (West 2003); ARK. CODE ANN. § 14-16-504; COLO. REV. STAT. §§ 13-21-501 to -505; FLA. STAT. ANN. § 790.331 (West Supp. 2004); GA. CODE ANN. § 16-11-184; IDAHO CODE § 5-247 (Michie Supp. 2003); IND. CODE ANN. §§ 34-12-3-1 to -5 (Michie Supp. 2003); KAN. STAT. ANN. § 60-4501; KY. REV. STAT. ANN. § 65.045; LA. REV. STAT. ANN. § 9:2800; LA. REV. STAT. ANN. § 40:1799 (West 2001); ME. REV. STAT. ANN. tit. 30-A, § 2005 (West Supp. 2003); MICH. COMP. LAWS ANN. § 28.435 (West Supp. 2003); MISS. CODE ANN. § 11-1-67 (Supp. 2004); MONT. CODE ANN. § 7-1-115 (2002); NEV. REV. STAT. ANN. 12.107 (Michie Supp. 2003); N.C. GEN. STAT. § 14-409.40 (2003); N.C. GEN. STAT. § 99B-11 (2003); N.D. CENT. CODE § 32-

Georgia statute was enacted, states continue to enact such laws.⁶⁸ Much of this legislation has been spearheaded by the lobbying efforts of the NRA, which has been highly critical of the recent suits against the gun industry.⁶⁹

These state laws vary widely in their scope, but a few provisions are common to many of the laws. In particular, the majority of the state laws limiting suits against the gun industry only bar suits brought by governmental subdivisions of the state.⁷⁰ Such statutes generally reserve to the state and to private parties the right to sue the gun industry.⁷¹ These statutes also typically contain an exception to the general prohibition on

03-54 (Supp. 2003); OHIO REV. CODE ANN. § 2305.40.1 (Anderson 2003); OKLA. STAT. ANN. tit. 21, § 1289.24a (West Supp. 2004); 18 PA. CONS. STAT. ANN. § 6120 (West Supp. 2003); S.C. CODE ANN. § 15-73-40 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS §§ 21-58-1 to -4 (Michie Supp. 2003); TENN. CODE ANN. § 39-17-1314 (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 128.001 (Vernon Supp. 2003); UTAH CODE ANN. § 78-27-64 (2002); VA. CODE ANN. § 15.2-915.1 (Michie 2003); W. VA. CODE ANN. §§ 55-18-1 to -2 (Michie Supp. 2003).

68. *E.g.*, N.H. REV. STAT. ANN. § 508:21 (passed as 2003 N.H. Laws 267:2 on July 15, 2003). New Hampshire's law went into effect on January 1, 2004. *Id.* In addition, in May of 2003, the Missouri General Assembly passed Senate Bill 13, curtailing political subdivisions' ability to sue the gun industry, and in September of 2003, the General Assembly enacted the bill into law over the governor's veto. MO. ANN. STAT. § 21.750 (West Supp. 2004); 2003 Bill Tracking Mo. S.B. 13.

In contrast, California recently *repealed* its laws limiting suits against the gun industry. After a controversial decision by the California Supreme Court, the California legislature repealed section 1714.4 of the California Civil Code, which provided gun manufacturers with immunity from suit under a products liability risk/utility cause of action. CAL. CIV. CODE § 1714.4 (West 2001) (repealed 2002); *see also* John Fowler, *Will a Repeal of Gun Manufacturer Immunity from Civil Suits Untie the Hands of the Judiciary?*, 34 MCGEORGE L. REV. 339, 347-48 (2003).

69. Vernick & Mair, *supra* note 23, at 128. The recent surge in lawsuits against the gun industry has also drawn criticism from numerous legal scholars who argue that the causes of action alleged in these suits lack legal merit. *E.g.*, Lawrence S. Greenwald & Cynthia A. Shay, *Municipalities' Suits Against Gun Manufacturers—Legal Folly*, 4 J. HEALTH CARE L. & POL'Y 13 (2000); Pontillo, *supra* note 17. *But see* Bhowmik, *supra* note 2 (arguing that litigation against the gun industry is an essential means of encouraging the gun industry to change its harmful practices); Sayles & Lambden, *supra* note 20 (arguing that the abnormally dangerous activity doctrine should be applied in suits against the gun industry as a way to hold the industry accountable for its conduct).

70. *See, e.g.*, ALA. CODE § 11-80-11; ARK. CODE ANN. § 14-16-504; GA. CODE ANN. § 16-11-184; KAN. STAT. ANN. § 60-4501; KY. REV. STAT. ANN. § 65.045; TEX. CIV. PRAC. & REM. CODE ANN. § 128.001; VA. CODE ANN. § 15.2-915.1; W. VA. CODE ANN. §§ 55-18-1 to -2.

71. *See, e.g.*, sources cited *supra* note 70.

suit by governmental subdivisions for causes of action based on breach of warranty or breach of contract.⁷²

Some of the state laws, however, bar a wider spectrum of suits. For instance, Utah's statute prohibits the state as well as political subdivisions of the state from suing the gun industry.⁷³ Colorado's statute forbids both private parties and governmental entities from bringing suit for injuries caused by a firearm under any legal theory other than products liability.⁷⁴ Alaska's statute, one of the broadest, bars nearly all civil actions instituted by private parties and governmental entities if the "action is based on the lawful sale, manufacture, or design of firearms or ammunition."⁷⁵ Indiana's statutory limitation on suit also applies to actions by both private parties and public entities.⁷⁶ In addition, many of the state statutes contain explicit statements of the law intended to limit the gun industry's liability under particular causes of action.⁷⁷ These laws typically prohibit suits brought on the products liability theory that firearms are defective in design because their risks outweigh their social utility.⁷⁸ Several of the state laws also contain provisions specifying that the statute shall apply retroactively to actions pending at the time of enactment as well as to future lawsuits.⁷⁹

72. See, e.g., sources cited *supra* note 70.

73. UTAH CODE ANN. § 78-27-64 (2002).

74. COLO. REV. STAT. §§ 13-21-501 to -505 (2003).

75. ALASKA STAT. § 09.65.155 (Michie 2002). The only permissible causes of action against the gun industry under this statute are for negligent design, manufacturing defect, and breach of contract or warranty. *Id.*

76. IND. CODE ANN. §§ 34-12-3-1 to -5 (Supp. 2003).

77. *E.g.*, COLO. REV. STAT. § 13-21-503 ("The inherent potential of a firearm or ammunition to cause injury, damage, or death when discharged shall not be a basis for finding that the product is defective in design or manufacture."); GA. CODE ANN. § 16-11-184 (2003) ("[T]he lawful design, marketing, manufacture, or sale of firearms or ammunition to the public is not unreasonably dangerous activity and does not constitute a nuisance per se."); S.D. CODIFIED LAWS § 21-58-1 (Michie Supp. 2003) ("[T]he unlawful use of firearms, rather than their lawful manufacture, distribution, or sale, is the proximate cause of any injury arising from their unlawful use.").

78. *E.g.*, COLO. REV. STAT. § 13-21-503; LA. REV. STAT. ANN. § 40:1799 (West 2001); N.C. GEN. STAT. § 99B-11 (2003) ("[W]hether a firearm or ammunition shell is defective in design shall not be based on a comparison or weighing of the benefits of the products against the risk of injury . . ."). These provisions are targeted at claims such as those discussed *supra* note 19 and accompanying text.

79. *E.g.*, LA. REV. STAT. ANN. § 40:1799; MICH. COMP. LAWS ANN. § 28.435 Sec. 15 (West Supp. 2003); MO. REV. STAT. § 21.750 (2003).

C. THE IMPACT OF STATE LAWS BARRING SUITS AGAINST THE GUN INDUSTRY

Many of the state statutes have already had effects on lawsuits against the gun industry, particularly on suits brought by municipalities. In *Sturm, Ruger & Co., Inc. v. City of Atlanta*, the Georgia Court of Appeals upheld the lower court's dismissal of Atlanta's negligence and strict liability claims against members of the gun industry.⁸⁰ The court held that the city's claims were barred by the recently enacted section 16-11-184 of the Georgia Code, which prohibits any governmental unit other than the state from bringing suit against a firearms manufacturer, dealer, or trade association for any cause of action other than breach of contract or warranty.⁸¹ The court further held that the retroactive application of the statute to bar a suit that had been filed before the statute was enacted did not pose any constitutional problems.⁸²

Similarly, in *Morial v. Smith & Wesson Corp.* the Supreme Court of Louisiana held that section 40:1799 of the Louisiana Revised Statutes acted retroactively to bar New Orleans's suit against members of the gun industry.⁸³ The court rejected the city's contention that the statute violated the Louisiana Constitution and the U.S. Constitution when applied to a suit commenced before it was enacted.⁸⁴ The court also concluded that the statute was a valid exercise of the state's police power and did not violate the separation of powers doctrine.⁸⁵

More recently, the Michigan Court of Appeals relied on sec-

80. *Sturm, Ruger & Co. v. City of Atlanta*, 560 S.E.2d 525, 527 (Ga. Ct. App. 2002).

81. *Id.* at 530; see also GA. CODE ANN. § 16-11-184. The statute was enacted only five days after Atlanta filed its suit. *City of Atlanta*, 560 S.E.2d at 527.

82. *Id.*, at 531. The court also rejected the city's argument that section 16-11-184 of the Georgia Code did not apply to the city's claims because the statute only bars suits arising from the *lawful* manufacture and marketing of firearms, while the city was alleging *unlawful* conduct. *Id.*; see also GA. CODE ANN. § 16-11-184.

83. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 7 (La. 2001); see also LA. REV. STAT. ANN. § 40:1799 ("The governing authority of any political subdivision . . . of the state is precluded and preempted from bringing suit to recover against any firearms or ammunition manufacturer, trade association, or dealer for damage . . . resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition.").

84. *Morial*, 785 So. 2d at 13.

85. *Id.* at 15, 19.

tion 28.435 of the Michigan Compiled Laws in dismissing Detroit's suit against the gun industry.⁸⁶ The court concluded that Michigan's law effectively prohibits suits by municipalities against the gun industry on a wide range of causes of action.⁸⁷ The courts in all of these cases have consistently noted the broad power of states to limit the conduct of municipalities.⁸⁸

The state statutes have also impacted suits instituted by private parties. In *Merrill v. Navegar*, in a controversial decision, the California Supreme Court held that section 1714.4 of the California Civil Code barred an action brought by family members of victims of a mass shooting in San Francisco.⁸⁹ The statute provided that in "*a products liability action*, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause . . . death when discharged."⁹⁰ The court held that the statute necessitated the dismissal of the plaintiffs' negligence claim because the negligence claim required the same risk/benefit analysis as a products liability claim.⁹¹

These cases provide ample evidence that the state statutes have had a significant impact on lawsuits against the gun industry. These state statutes, however, cannot affect gun industry litigation taking place outside of those states. A national

86. *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845, 855 (Mich. Ct. App. 2003); *see also* MICH. COMP. LAWS ANN. § 28.435 (West Supp. 2003) ("[A] political subdivision shall not bring a civil action against any person who produces a firearm or ammunition.").

87. *Mayor of Detroit*, 669 N.W.2d at 861–62. The court rejected the plaintiffs' arguments that the statute violates due process, the separation of powers doctrine, and the Title-Object Clause of the Michigan Constitution. *Id.* at 854–62.

88. *Sturm, Ruger & Co., Inc. v. City of Atlanta*, 560 S.E.2d 525, 531 (Ga. Ct. App. 2002); *Morial*, 785 So. 2d at 11–13; *Mayor of Detroit*, 669 N.W.2d at 856.

89. *Merrill v. Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001); *see also* CAL. CIV. CODE § 1714.4 (West 2001) (repealed 2002). The California legislature has since repealed the statute. 2002 Cal. Stat. 913 § 2.

90. CAL. CIV. CODE § 1714.4 (emphasis added).

91. *Merrill*, 28 P.3d at 125. Additionally, the Arizona Court of Appeals referred to an Arizona statute that barred *municipalities* from suing the gun industry in dismissing a case brought by a *private party* against a gun manufacturer. *Bloxham v. Glock, Inc.*, 53 P.3d 196, 200 (Ariz. Ct. App. 2002); *see also* ARIZ. REV. STAT. ANN. § 12-714 (West 2003). The court noted that the import of the statute, that firearms manufacturers should not be held liable for harm caused by the misuse of their products, while not binding on the court in that particular case, "deserves considerable weight as a legislative expression of public policy." *Bloxham*, 53 P.3d at 200.

law limiting lawsuits against the gun industry therefore would change the landscape of gun industry litigation significantly.

D. CONGRESS TAKES ACTION: HOUSE BILL 1036

In response to the growing wave of lawsuits against the gun industry, members of Congress have proposed two identical bills, House Bill 1036 and Senate Bill 659, that would severely limit the liability of gun and ammunition manufacturers, dealers, distributors, and trade associations.⁹² House Bill 1036 purports to “prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.”⁹³ House Bill 1036 is fairly uncomplicated in structure.⁹⁴ Its first two sections state its short title and recite at great length the purposes behind the bill.⁹⁵ These stated purposes include the preservation of citizens’ Second Amendment rights, the protection of interstate commerce, and the prevention of “an abuse of the legal

92. S. 659, 108th Cong. (2003); H.R. 1036, 108th Cong. (2003). The short title of the bill is the “Protection of Lawful Commerce in Arms Act.” S. 659 § 1; H.R. 1036 § 1. Representative Clifford Stearns, Republican of Florida, introduced the House version, House Bill 1036, on February 27, 2003. 149 CONG. REC. H1464 (daily ed. Feb. 27, 2003). Senator Larry Craig, Republican of Idaho, introduced the Senate version, Senate Bill 659, on March 19, 2003. *Id.* S3998 (daily ed. Mar. 19, 2003). Craig later introduced another identical version of the bill, Senate Bill 1806. *Id.* S13711 (daily ed. Oct. 31, 2003).

Another version of the bill was also introduced in the House by Representative Everett, Republican of Alabama, on January 27, 2003, entitled “Firearms Heritage Protection Act of 2003.” H.R. 357, 108th Cong. (2003). The provisions of that bill are similar to those of House Bill 1036, although the scope of immunity from suit was a bit broader under House Bill 357. *Id.* The passage of House Bill 1036 rendered House Bill 357 unnecessary.

93. H.R. 1036.

94. Currently, Senate Bill 659 is identical in structure and content to House Bill 1036. However, Senators Daschle, Craig, and Baucus have circulated proposed amendments to Senate Bill 659. *See* Brady Ctr. to Prevent Handgun Violence, *supra* note 13. These amendments were incorporated into Senate Bill 1805, a newer version of Senate Bill 659, which was introduced in October of 2003. S. 1805, 108th Cong. (2003). Senate Bill 1805 proposed ten changes to Senate Bill 659, none of which dramatically changed its scope. *Id.* In March of 2004, Senate Bill 1805 was voted down in the Senate after opponents attached unrelated gun control amendments to it. *See supra* note 13. This Note therefore focuses on the provisions of House Bill 1036 but notes areas of potential difference with Senate Bill 1805 since that version of the bill garnered significant bipartisan support, making it likely that a future bill would include the same or similar alterations embodied in Senate Bill 1805. *See* Brady Ctr. to Prevent Handgun Violence, *supra* note 13.

95. H.R. 1036.

system.”⁹⁶

After outlining the bill’s context, the bill tersely provides that “[a] qualified civil liability action may not be brought in any Federal or State court.”⁹⁷ Section 4 of the bill then fleshes out the meaning of this prohibition by providing numerous definitions. Most critically, the term “qualified civil liability action” is defined as any civil lawsuit instituted against a gun or ammunition manufacturer, dealer, importer, or trade association seeking redress of injuries “resulting from the criminal or unlawful misuse” of a firearm, subject to five listed exceptions.⁹⁸

Congressional proponents and opponents of House Bill 1036 have vigorously defended their respective stances on the issue of gun industry immunity from suit. Advocates for the bill argue that it is a necessary measure to stem the tide of “frivolous” lawsuits that, in their opinion, threaten to put an entire industry out of business.⁹⁹ Supporters of the bill express concerns that the potential bankrupting, or at least significant damaging, of the U.S. gun industry would have other adverse effects, including restricting the supply of weapons available to the military.¹⁰⁰ Additionally, proponents of the bill argue that the potential financial impact of litigation on the gun industry could deprive individuals of their Second Amendment right to keep and bear arms.¹⁰¹ Proponents of the bill also articulate a

96. *Id.* § 2(5).

97. *Id.* § 3(a).

98. *Id.* § 4(5). The five exceptions are: (1) an action against a transferor convicted under 18 U.S.C. § 924(h); (2) an action for negligence per se or negligent entrustment; (3) an action in which the defendant knowingly and willfully violated a state or federal statute; (4) an action for breach of contract or warranty; and (5) an action for injuries arising from a defect in design or manufacture of a firearm when used as intended. *Id.* § 4; *see also infra* notes 138–159 and accompanying text (discussing the exceptions in greater detail).

99. *E.g.*, 149 CONG. REC. H2972 (daily ed. Apr. 9, 2003) (statement of Rep. John); *id.* S3998 (daily ed. Mar. 19, 2003) (statement of Sen. Craig).

100. *E.g.*, *id.* H2973 (daily ed. Apr. 9, 2003) (statement of Rep. Miller).

101. *E.g.*, *id.* H2976 (statement of Rep. Otter); *id.* H2969 (statement of Rep. Sensenbrenner). While this position is frequently asserted by supporters of House Bill 1036, the exact nature of the right protected by the Second Amendment is widely debated. *See* Anthony Gallia, Comment, “Your Weapons, You Will Not Need Them”: Comment on the Supreme Court’s Sixty-Year Silence on the Right to Keep and Bear Arms, 33 AKRON L. REV. 131, 132–34 (1999). The debate centers on whether the Second Amendment provides an individual right or a collective right associated with the maintenance of a militia. Gallia, *supra*, at 137–38. The existence of an individual right to own and use firearms is far from settled. In fact, the Supreme Court, on the three occasions on which it has considered the scope of the Second Amendment, has consistently held that it pertains only to the right to bear arms within the context of a state mi-

concern with a slippery slope of liability for manufacturers of a wide array of goods which can injure or kill when misused, such as automobiles.¹⁰²

Further, the bill's supporters criticize lawsuits against the gun industry as an attempt by the judiciary to craft gun control laws outside of the legislative process.¹⁰³ Imposing restrictions on inherently dangerous products is a task for the legislature, not the judiciary, so the argument goes.¹⁰⁴ Legal scholars opposed to lawsuits against the gun industry by victims of gun violence have argued that judicial attempts to "regulate" the firearms industry through punitive damages awards and injunctive relief violate the separation of powers.¹⁰⁵ Others assert that the legislature is the appropriate forum for determining gun industry liability because legislative action would represent a broader social consensus than can be obtained through the judicial system.¹⁰⁶

On the other side of the debate, opponents of the bill argue that it provides unwarranted and unprecedented support for an industry that is already exempt from many regulations.¹⁰⁷ Opponents contend that the bill would deprive the gun industry of

litia, free from congressional infringement. *See* *United States v. Miller*, 307 U.S. 174, 178–79 (1939); *Presser v. Illinois*, 116 U.S. 252, 264–66 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHL.-KENT L. REV. 3, 3 (2000). Further, a majority of federal courts have taken the position that the Second Amendment guarantees only the right of a state to maintain a militia. Gallia, *supra*, at 151.

102. *E.g.*, 149 CONG. REC. H2974 (daily ed. Apr. 9, 2003) (statement of Rep. King); *see also* Pontillo, *supra* note 17, at 1204–05.

103. *E.g.*, 149 CONG. REC. H2971 (daily ed. Apr. 9, 2003) (statement of Rep. Boucher); Amanda B. Hill, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 TEX. TECH L. REV. 1387, 1415–17 (2000); Pontillo, *supra* note 17, at 1199–1200.

104. Hill, *supra* note 103, at 1415–16.

105. Kimball & Olson, *supra* note 52, at 1303–04.

106. Andrew S. Cabana, Comment, *Missing the Target: Municipal Litigation Against Handgun Manufacturers: An Abuse of the Civil Tort System*, 9 GEO. MASON L. REV. 1127, 1168 (2001).

107. *E.g.*, 149 CONG. REC. H2971 (daily ed. Apr. 9, 2003) (statement of Rep. Moran); *id.* H2975 (statement of Rep. Watt); Eva Ritchey, *Bill to Give Gun Industry More Immunity Is Last Thing We Need*, THE ASHEVILLE CITIZEN-TIMES, May 8, 2003, at 7A. For instance, the firearms industry is exempt from the oversight of the Consumer Safety Protection Commission. John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 303–05 (2001).

any incentive to operate in a socially responsible manner.¹⁰⁸ In addition, they express concern that the bill would deny victims of gun violence the right to have their day in court.¹⁰⁹

House Bill 1036 is not the first of its kind to be introduced in Congress. Two similar bills have been proposed within the last five years.¹¹⁰ The earlier bills contained provisions comparable to the provisions of the bill currently pending.¹¹¹ In particular, the bill introduced in 1999 was strikingly similar to House Bill 1036, although it contained fewer exceptions to the gun industry's immunity from suit than does House Bill 1036.¹¹² The number of cosponsors of these bills has been steadily increasing, and House Bill 1036 has more supporters than either of the prior bills.¹¹³

The current bill has been making more rapid progress in Congress than either of the preceding bills. Neither of the prior bills reached a vote in either house.¹¹⁴ In contrast, House Bill 1036 passed the House of Representatives in April of 2003 by a significant majority.¹¹⁵ Two Senate counterparts to House Bill 1036, Senate Bill 659 and Senate Bill 1806, are currently pending in the Senate.¹¹⁶ As of January of 2004, Senate Bill 659 had

108. *E.g.*, 149 CONG. REC. H2975 (daily ed. Apr. 9, 2003) (statement of Rep. Langevin); *id.* H2976 (statement of Rep. Waxman); Ritchey, *supra* note 107, at 7A; Brady Ctr. to Prevent Handgun Violence, *H.R. 1036/S. 659 Is Dangerous to Our Nation's Health*, at <http://www.gunlawsuits.org/immunity/hr1036.asp> (last visited Jan. 25, 2004).

109. *E.g.*, 149 CONG. REC. H2971 (daily ed. Apr. 9, 2003) (statement of Rep. Moran); *id.* H2975 (statement of Rep. Emanuel); Philip Compton, *Letters: A Right to Recourse*, TAMPA TRIBUNE, May 23, 2003, at 18; Jason Dearen, *Calif. Jury Awards \$50.9 Million in Accidental Shooting*, THE LEGAL INTELLIGENCER, May 12, 2003, at 4.

110. H.R. 2037, 107th Cong. (2d Sess. 2001); H.R. 1032, 106th Cong. (1st Sess. 1999). This Note will not discuss these earlier bills in detail, as there is enough overlap between the prior bills and House Bill 1036 that a complete discussion of all three bills would be redundant.

111. H.R. 2037; H.R. 1032.

112. H.R. 1032.

113. House Bill 1036 has 252 cosponsors while the earlier versions, House Bill 2037 and House Bill 1032, had 232 and 98 cosponsors respectively. 2003 Bill Tracking H.R. 1036; 2001 Bill Tracking H.R. 2037; 1999 Bill Tracking H.R. 1032.

114. *See* 2001 Bill Tracking H.R. 2037; 1999 Bill Tracking H.R. 1032.

115. 149 CONG. REC. H2998-2999 (daily ed. Apr. 9, 2003). House Bill 1036 passed the House on April 9, 2003, by a vote of 285 to 140. *Id.*

116. *See* NRA Inst. for Legislative Action, *Continue to Support S. 659/S. 1806*, at <http://www.nra.org/CurrentLegislation/Read.aspx?ITNDrop=897> (Nov. 25, 2003). Another Senate version of the bill, Senate Bill 1805, was defeated on March 2, 2004, although not for lack of support of the gun industry

fifty-five cosponsors.¹¹⁷ President Bush will almost certainly sign the bill into law if it passes the Senate.¹¹⁸ Even if the current bill does not pass the Senate, however, it is very likely that a similar or identical bill will be introduced in future Congressional sessions since the bill has aggressive supporters lobbying on its behalf.¹¹⁹ Furthermore, should the current bill fail to be enacted, the constitutional issues, the practical implications, and, most importantly, the policy considerations associated with House Bill 1036 would persist in any similar future legislation. Consequently, a thorough analysis of House Bill 1036 has import regardless of whether this particular version of the legislation is ultimately enacted.

II. ANALYSIS OF HOUSE BILL 1036

A. THE PROVISIONS OF HOUSE BILL 1036: A COMPARISON WITH STATE LAWS

House Bill 1036, while in some ways similar to the state laws, goes far beyond the vast majority of the state laws to preclude a much broader array of suits against the gun industry. Nonetheless, House Bill 1036 is not simply a blanket prohibi-

immunity provisions of the bill as originally drafted, which had fifty-five cosponsors and was originally expected to pass. See Edward Epstein, *Gun Liability Bill Dies in Senate*, S.F. CHRON., Mar. 3, 2004, at A16, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/03/03/MNGSN5CQTE1.DTL>; *supra* note 13. Instead, the bill's defeat stemmed from unrelated amendments added at the last minute, prompting the bill's sponsors to call for the rejection of the amended version of the bill. See Epstein, *supra*.

117. Senator Daschle's support for the bill brought the number of cosponsors to fifty-five. Hunting & Shooting Sports Leadership Symposium, *Remarks by Senate Democratic Leader Tom Daschle on the Protection of Lawful Commerce in Arms Act (S. 659)*, at http://www.heritagefund.org/PDF/Daschle_remarks.pdf (Sept. 24, 2003).

118. In fact, when he was governor of Texas, George W. Bush signed into law the Texas statute barring suits by municipalities against the gun industry. See Hill, *supra* note 103, at 1427.

119. Gun rights activists, particularly the NRA, have vociferously supported this bill. See NRA Inst. for Legislative Action, *Transforming Public Opposition to Reckless Lawsuits into Legislative Reality*, at <http://www.nraila.org/CurrentLegislation/Read.aspx?ID=898> (Nov. 26, 2003). In addition, statements made by the NRA's executive vice president and by the primary sponsor of the Senate versions of House Bill 1036 following the defeat of Senate Bill 1805 leave no doubt that the bill's supporters intend to continue their push in Congress for gun industry immunity legislation. See *Senate Kills Bill Protecting Gun Makers*, *supra* note 13; Letter from Wayne R. LaPierre, Jr., Executive Vice President, NRA, to U.S. Senators (Mar. 2, 2004), at <http://www.nraila.org/CurrentLegislation/Read.aspx?ID=999>.

tion on suit—it contains several specifically enumerated exceptions to the ban on suits against the gun industry.¹²⁰ In practice, however, these exceptions would be of limited usefulness to plaintiffs attempting to circumvent the obstacle posed by House Bill 1036.¹²¹

1. The Prohibition on Suit

The most striking difference between House Bill 1036 and the state laws dealing with gun industry liability is the broad range of plaintiffs to which House Bill 1036 applies. While most state laws only bar suits brought by political subdivisions of the state, the prohibition on suit in House Bill 1036 applies to both private parties and public entities.¹²² Moreover, the public entities barred from suit by House Bill 1036 are not limited to political subdivisions of states, but also include the states themselves as well as the federal government.¹²³ In contrast, the majority of the state laws explicitly reserve to the state the right to sue the gun industry.¹²⁴ Unlike these state laws, which simply shift to the state and to private parties the right to sue the gun industry, House Bill 1036 would severely restrict suits against the gun industry across the board, providing the gun industry with much broader protection than do the state laws.¹²⁵

House Bill 1036 also differs in scope from some state laws in that it applies to actions brought against a wide spectrum of participants in the gun industry, including manufacturers, dealers, importers, distributors, and trade associations.¹²⁶ Not

120. See *infra* notes 138–59 and accompanying text.

121. See discussion *infra* Part III.A.

122. H.R. 1036, 108th Cong. § 4(3) (2003).

123. See *id.*

124. *E.g.*, ARK. CODE ANN. § 14-16-504 (Michie Supp. 2003); GA. CODE ANN. § 16-11-184(b)(2) (2003); KAN. STAT. ANN. § 60-4501 (Supp. 2002); KY. REV. STAT. ANN. § 65.045 (Michie Supp. 2003).

125. No state law affects the rights of as broad a spectrum of plaintiffs as does House Bill 1036 because the state laws cannot limit the right of the federal government to bring suit. See U.S. CONST. art. VI, cl. 2. Thus, even those state laws which bar actions by the state, its subdivisions, and private parties do not affect as many potential plaintiffs as does House Bill 1036. See, *e.g.*, ALASKA STAT. § 09.65.155 (Michie 2002).

126. H.R. 1036 § 4. Trade associations are defined 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.” *Id.* § 4(a).

An amendment was proposed in the House that would have scaled back the scope of House Bill 1036 and rendered it applicable only to manufacturers

all state laws are as broad in their application. For instance, Maine's law only bars actions against firearm or ammunition manufacturers but says nothing about suits against dealers, distributors, or trade associations.¹²⁷

Another noteworthy aspect of House Bill 1036 is its application to currently pending actions. The bill provides for the immediate dismissal of any prohibited action pending on the date of enactment.¹²⁸ Only four of the state laws also contain similar retroactive application provisions.¹²⁹

A more minor difference lies in the fact that House Bill 1036 was drafted pursuant to Congress's power to regulate interstate and foreign commerce.¹³⁰ Consequently, the bill applies only to firearms and ammunition that have "been shipped or transported in interstate or foreign commerce" and to manufacturers and sellers who are engaged in manufacturing or selling in interstate or foreign commerce.¹³¹ In theory, this scope is narrower than that of the state laws, which apply to manufacturers and dealers who operate in intrastate as well as interstate commerce.¹³² In reality, however, this distinction is illusory, as the gun industry, like most industries today, is national in scope.¹³³

There are also substantial differences between House Bill 1036 and many of the state laws in regards to the causes of action that are barred. House Bill 1036 begins by prohibiting actions for damages arising out of the "criminal or unlawful mis-

of firearms and ammunition. 149 CONG. REC. H2991 (daily ed. Apr. 9, 2003). The amendment was not adopted. *Id.* H2994.

127. ME. REV. STAT. ANN. tit. 30-A, § 2005 (West Supp. 2003). *But see* ALA. CODE § 11-80-11 (Supp. 2003) (applying its restrictions to suits brought against manufacturers, dealers, and trade associations).

128. H.R. 1036 § 3(b).

129. *See* MICH. COMP. LAWS ANN. § 28.435(13) (West Supp. 2003); MO. REV. STAT. § 21.750 (Supp. 2003); Act of Feb. 9, 1999, No. 4 § 3, 1999 Ga. Laws 2, 3; Act of June 11, 1999, No. 291, 1999 La. Acts 1168, 1169.

130. *See* H.R. 1036 § 2 (making repeated reference to interstate and foreign commerce).

131. *Id.* § 4.

132. *See, e.g.*, ALASKA STAT. § 09.65.155 (Michie 2002) (drawing no distinction between gun manufacturers engaged in interstate versus intrastate commerce); GA. CODE ANN. § 16-11-184 (2003) (same); N.D. CENT. CODE § 32-03-54 (Supp. 2003) (same).

133. It strains the imagination to envision a suit against a gun manufacturer or dealer that would be permissible under House Bill 1036 simply because the defendant was engaged solely in intrastate commerce and the firearm in question had never moved in interstate commerce.

use” of a firearm.¹³⁴ Most of the state laws contain a somewhat different formulation of the prohibited causes of action, typically barring suits “resulting from or relating to the lawful design, manufacture, distribution or sale of firearms.”¹³⁵ From this language alone, the state laws appear to prohibit more causes of action than House Bill 1036 since the language of the state laws precludes suits arising from the *lawful use* of a firearm as well as suits arising from its *unlawful use*, as long as the manufacture or sale itself was lawful.¹³⁶ Many of the state laws, however, carve out exceptions to the prohibition on suit for defective design and breach of warranty claims, both typically associated with lawful use, thus bringing the range of causes of action barred closer to par with House Bill 1036.¹³⁷

134. H.R. 1036 § 4(5).

135. MISS. CODE ANN. § 11-1-67(1) (Supp. 2003); *see also* ARK. CODE ANN. § 14-16-504 (Supp. 2003); GA. CODE ANN. § 16-11-184(b)(2); KAN. STAT. ANN. § 60-4501 (Supp. 2002); KY. REV. STAT. ANN. § 65.045 (Michie Supp. 2003).

Two state laws, however, contain very similar language to House Bill 1036. *See* ARIZ. REV. STAT. § 12-714 (2003); N.H. REV. STAT. ANN. § 508:21 (Supp. 2004). The Arizona law is nearly identical in structure and content to House Bill 1036, although it contains only one of the five exceptions listed in the federal bill to the prohibition on suit. ARIZ. REV. STAT. § 12-714. Overall, however, the Arizona law is much narrower in its application because it applies only to political subdivisions of the state. *Id.*

The recently enacted New Hampshire law also utilizes the same structure and content as House Bill 1036. *See* N.H. REV. STAT. ANN. § 508:21. Like the Arizona law, New Hampshire's statute contains only one exception to the prohibition on suit. *Id.* Unlike the Arizona law, however, the New Hampshire law applies to public as well as private plaintiffs, rendering it one of the most restrictive of all the state laws, arguably more restrictive than House Bill 1036. *Id.*

136. For example, under this language, a municipality would be barred from suing for injuries to a police officer whose gun malfunctioned while firing. Most state laws, however, contain an exception for a defective design cause of action in order to permit cases such as this to proceed. *See infra* note 137 and accompanying text.

137. *See, e.g.,* KAN. STAT. ANN. § 60-4501(b); MICH. COMP. LAWS ANN. § 28.435(10) (Supp. 2003); MISS. CODE ANN. § 11-1-67(1); N.D. CENT. CODE § 32-03-54; TEX. CIV. PRAC. & REM. CODE ANN. § 128.001(d) (Vernon Supp. 2003). Thus, a plaintiff who was injured by a lawfully employed, but malfunctioning, firearm would be able to sue the gun industry for defective design or breach of warranty under most state laws. *See, e.g.,* KAN. STAT. ANN. § 60-4501; MICH. COMP. LAWS ANN. § 28.435; MISS. CODE ANN. § 11-1-67; N.D. CENT. CODE § 32-03-54; TEX. CIV. PRAC. & REM. CODE ANN. § 128.001. Some of the state laws permit a defective design suit even if the use of the firearm that caused the injury was unlawful. *See, e.g.,* KAN. STAT. ANN. § 60-4501; TEX. CIV. PRAC. & REM. CODE ANN. § 128.001.

2. Exceptions to the Prohibition on Suit

House Bill 1036 contains five specifically enumerated exceptions to the overarching prohibition on suit for injuries arising from the unlawful use of firearms.¹³⁸ These exceptions differ from the provisions of most of the state laws and, given their significance to plaintiffs, warrant close attention.

The first exception permits an action instituted against a transferor of firearms already convicted under 18 U.S.C. § 924(h), or a similar state felony law, as long as the action is brought “by a party directly harmed by the conduct of which the transferee is so convicted.”¹³⁹ Section 924(h) of title 18 provides penalties for an individual who “knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence . . . or a drug trafficking crime”¹⁴⁰ Most of the state laws do not contain a comparable exception.¹⁴¹ The exception, however, is very limited due to the requirement that the transferor must first be *convicted* of this felony in order to permit suit.¹⁴²

The second exception to the prohibition on suit permits “an action brought against a seller for negligent entrustment or negligence per se.”¹⁴³ Negligence per se is not defined in the bill but is generally understood as negligence arising from a statutory violation.¹⁴⁴ The bill defines negligent entrustment as the supplying of a firearm or ammunition to a person when the seller knows or should know that the person is likely to use the product “in a manner involving unreasonable risk of physical

138. H.R. 1036 § 4(5)(A)(i).

139. *Id.*

140. 18 U.S.C. § 924(h) (2000).

141. *See supra* notes 64–79 and accompanying text (discussing the provisions of state laws barring suits against the gun industry).

142. An amendment was proposed in the House to remove the requirement that the transferor be convicted before being susceptible to suit. 149 CONG. REC. H2982 (daily ed. Apr. 9, 2003) (statement of Rep. Scott). The amendment was not adopted. *Id.* H2995. Another amendment was proposed to add a sixth exception that would permit suit against a transferor convicted under 18 U.S.C. § 922(d), which makes it a federal crime to transfer firearms to a person whom the transferor has reason to believe is a user of a controlled substance. 18 U.S.C. § 922(d); *see also* 149 CONG. REC. H2984 (daily ed. Apr. 9, 2003). This amendment also was rejected by vote. 149 CONG. REC. H2995 (daily ed. Apr. 9, 2003).

143. H.R. 1036 § 4(5)(A)(ii). An amendment to include an exception for general common law negligence was proposed and rejected. 149 CONG. REC. H2987, 2995–96 (daily ed. Apr. 9, 2003).

144. *See* BLACK'S LAW DICTIONARY 1057 (7th ed. 1999).

injury to the person and others," and the person does in fact so use the product.¹⁴⁵ This definition seriously restricts the scope of the exception. In suits instituted by victims of gun violence, plaintiffs frequently allege that the gun industry's practices facilitate "straw purchases" in which an eligible purchaser buys a firearm for an ineligible purchaser who then uses the firearm illegally, harming the plaintiff.¹⁴⁶ In such cases, the shooter did not obtain the firearm directly from the dealer. A negligent entrustment claim, therefore, could not be brought against such a dealer because it was not the actual purchaser who injured the plaintiff. Further, under this formulation, a negligent entrustment claim may be brought only against a *seller* of a firearm, not against a manufacturer.¹⁴⁷ Of all of the state laws, only Virginia's contains a similar exception.¹⁴⁸

The third exception to the prohibition on suit in House Bill 1036 allows an action against a manufacturer or seller who "knowingly and willfully" violates a state or federal law applicable to the sale or marketing of firearms or ammunition.¹⁴⁹ In addition, the violation must be "the proximate cause of the harm for which relief is sought."¹⁵⁰ None of the state laws contains a comparable exception.¹⁵¹ This exception too has limited application because of the high mens rea requirement of "knowingly and willfully" that it imposes.¹⁵²

The fourth exception permits an action for breach of contract or breach of warranty.¹⁵³ Many of the state laws contain a similar provision.¹⁵⁴ This exception, however, is unlikely to be

145. H.R. 1036 § 4(5)(B).

146. *See, e.g.*, Compl. at 25–26, *City of Cincinnati v. Beretta U.S.A. Corp.* (Ohio Ct. C.P. Hamilton County Apr. 28, 1999) (No. A9902369).

147. H.R. 1036 § 4.

148. VA. CODE ANN. § 15.2-915.1 (2003). The negligence exception in Virginia's law is broader than that in House Bill 1036, permitting an "action for injuries resulting from negligence." *Id.* This exception renders Virginia's prohibition on suit fairly limited, as negligence is a popular claim for plaintiffs in suits against the gun industry. *See supra* notes 16–63 and accompanying text.

149. H.R. 1036 § 4(5)(A)(iii).

150. *Id.*

151. *See supra* notes 64–79 and accompanying text.

152. H.R. 1036 § 4(5)(A)(iii).

153. *Id.* § 4(5)(A)(iv).

154. *See, e.g.*, ALA. CODE § 11-80-11 (Supp. 2003); ARK. CODE ANN. § 14-16-504 (Michie Supp. 2003); FLA. STAT. ANN. § 790.331 (West Supp. 2004); GA. CODE ANN. § 16-11-184 (2003); KAN. STAT. ANN. § 60-4501 (Supp. 2002); KY. REV. STAT. ANN. § 65.045 (Michie Supp. 2003); LA. REV. STAT. ANN. § 40:1799 (West 2001); ME. REV. STAT. ANN. tit. 30-A, § 2005 (West Supp.

used since plaintiffs in suits against the gun industry rarely have facts that would support a breach of contract or breach of warranty claim.¹⁵⁵

The final exception in House Bill 1036 permits an action for damages “resulting directly from a defect in design or manufacture of the product, when used as intended.”¹⁵⁶ This exception has the potential to be quite broad as it seemingly permits products liability actions against the gun industry. The qualification “when used as intended,” however, severely limits the usefulness of this exception. A court could conclude that the “used as intended” requirement excludes any suit arising from the criminal use of a firearm, because firearms are not intended for illegal use.¹⁵⁷ In contrast, while many of the state laws explicitly permit products liability actions arising from defective design or manufacture, the state laws typically do not contain a “when used as intended” requirement.¹⁵⁸

Due to the five exceptions to the prohibition on suit and the narrower starting premise of suits arising from “criminal or unlawful misuse,” House Bill 1036 initially appears to bar fewer causes of action than do the state laws. However, the nationwide applicability of House Bill 1036 and the fact that it encompasses an extremely wide range of potential plaintiffs and defendants ensure that House Bill 1036 would affect many more litigants than the state laws. Further, the limited usefulness of the “exceptions” renders the bill broader than it first appears.¹⁵⁹

2003); MISS. CODE ANN. § 11-1-67 (Supp. 2003); NEV. REV. STAT. ANN. 12.107 (Michie Supp. 2003).

155. See *supra* notes 16–63 and accompanying text (discussing the common causes of action alleged in suits against the gun industry).

156. H.R. 1036 § 4(5)(A)(v).

157. See *infra* notes 205–13 and accompanying text for a more detailed discussion of the potential problems with the “when used as intended” language. This exception would have very limited application in most suits arising from criminal shootings because the plaintiffs in those suits typically cannot demonstrate a defect in the firearm—on the contrary, the firearm causing their injuries functioned all too well.

158. See, e.g., ALASKA STAT. § 09.65.155 (Michie 2002); MISS. CODE ANN. § 11-1-67; N.D. CENT. CODE § 32-03-54 (Supp. 2003); S.D. CODIFIED LAWS § 21-58-1 to -4 (Supp. 2003). *But see* LA. REV. STAT. ANN. § 9:2800.60 (West Supp. 2004) (precluding gun industry liability for “any action of any person who uses a firearm in a manner which is unlawful, negligent, or otherwise inconsistent with the purposes for which it was intended” (emphasis added)).

159. See discussion *infra* Part III.A (examining the limited effect that the exceptions would have on currently pending lawsuits).

B. LEGAL SHORTCOMINGS OF HOUSE BILL 1036

House Bill 1036 suffers from several potential legal deficiencies. Some of these issues relate to constitutionality, while others stem from vagueness concerns.¹⁶⁰

1. Constitutional Concerns¹⁶¹

One constitutional hurdle that House Bill 1036 would face if enacted is the Due Process Clause of the Fifth Amendment.¹⁶² The retroactive application of House Bill 1036 could implicate due process concerns by depriving litigants of a vested right to pursue a cause of action that has already been instituted.¹⁶³ The U.S. Supreme Court has held that a “cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause” in certain situations,¹⁶⁴ a holding that could be applied to the Fifth Amendment as well. Federal circuit courts, on the other hand, have repeatedly held that “a legal claim affords no definite or enforceable [sic] property right until reduced to a final judgment.”¹⁶⁵

The decisions in the circuit courts came in connection with the Federal Employees’ Liability Reform and Tort Compensation Act of 1988 (FELRTCA), a federal law aimed at limiting plaintiffs’ ability to recover for tort claims against federal employees acting within the scope of their employment.¹⁶⁶ Three

160. A detailed analysis of each of these issues could fill an entire book and consequently is beyond the scope of this Note. The constitutional issues in particular, however, would provide fruitful ground for future scholarship.

161. Plaintiffs in suits against the gun industry have raised some of the same constitutionality issues in regards to state laws dealing with gun industry liability. See *supra* notes 84 and 87 and accompanying text. For a fairly detailed analysis of the constitutional issues raised by the state laws, see Vernick & Mair, *supra* note 23, at 144–46. Certain hurdles faced by the state laws would not be implicated by the federal bill since it will not have to contend with the restrictions imposed by state constitutions.

162. U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property without due process of law.”).

163. See *supra* note 128 and accompanying text.

164. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

165. *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989); see also *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990).

166. 28 U.S.C. § 2679 (2000); see also Perry H. Apelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?*, 8 CORNELL J.L. & PUB. POL’Y 591, 611–12 (1999). The law provides that tort claims against federal employees must be brought against the federal government rather than against the individual employee. 28 U.S.C. § 2679. FELRTCA, therefore, is similar to House Bill

circuit courts rejected the argument by various plaintiffs that the retroactive application of FELRTCA violated the Due Process Clause, noting that the plaintiffs' pending claims were not a property right.¹⁶⁷ A plaintiff challenging the retroactive application of House Bill 1036 would have to overcome this precedent.

To do so, a plaintiff challenging the retroactive application of House Bill 1036 as a violation of due process could attempt to distinguish it from FELRTCA by emphasizing the fact that House Bill 1036 wholly eliminates a plaintiff's ability to sue in certain situations, while FELRTCA simply requires injured parties to sue a different defendant.¹⁶⁸ A plaintiff could argue that, while the retroactive application of FELRTCA does not violate due process, the retroactive application of House Bill 1036 does indeed violate due process because it is much more severe, terminating a plaintiff's ability to sue the gun industry without providing any alternative defendant.¹⁶⁹ However, even if a court considering a due process challenge to House Bill 1036 were to conclude that a Fifth Amendment property interest is implicated due to the bill's extremely harsh consequences for injured parties, the court would apply only the lenient "rational basis test" in ascertaining the bill's constitutionality, making it unlikely that the plaintiff would prevail.¹⁷⁰

While municipal plaintiffs have raised due process claims in regards to certain state laws barring their suits against the gun industry, the reasoning in those cases would not be applicable to a private party's challenge to House Bill 1036. Municipal plaintiffs have contested the retroactive application of the Louisiana and Michigan laws limiting gun industry liability.¹⁷¹ The courts in both cases rejected the plaintiffs' arguments, noting that the due process guarantees of the U.S. Constitution do not apply to political subdivisions of the state.¹⁷² This reasoning would not be relevant to a due process challenge to House Bill 1036 by a private party deprived of his right to sue.

House Bill 1036 also calls into question the constitutional-

1036 in that it too is a federal law that restricts plaintiffs' ability to sue certain parties. *See id.*

167. *Salmon*, 948 F.2d at 1143; *Arbour*, 903 F.2d at 420; *Sowell*, 888 F.2d at 805; *see also supra* note 165 and accompanying text.

168. *Compare* 28 U.S.C. § 2679, with H.R. 1036, 108th Cong. § 4 (2003).

169. *See* H.R. 1036 § 4.

170. *See* *Apelbaum & Ryder*, *supra* note 166, at 644-45.

171. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 8 (La. 2001); *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845, 856 (Mich. Ct. App. 2003).

172. *Morial*, 785 So. 2d at 11; *Mayor of Detroit*, 669 N.W.2d at 855-58.

ity of a law that completely abrogates a cause of action without providing any compensating legal benefits to injured parties.¹⁷³ The Supreme Court has not definitively ruled on the issue of whether the Due Process Clause of the Fifth Amendment requires a “legislative quid pro quo” in regards to a law that restricts an individual’s common law rights, as does House Bill 1036.¹⁷⁴ In dicta, however, the Supreme Court has expressed skepticism that such a constitutional requirement exists.¹⁷⁵ These comments suggest that the success of a due process challenge to House Bill 1036 would be doubtful. Nonetheless, this dicta has not been translated into a definitive ruling in regards to any one of the handful of existing federal “tort reform” laws that entirely deprive a plaintiff of his right to bring a particular suit,¹⁷⁶ since none of these laws has yet been the subject of a due process challenge, leaving some leeway for a plaintiff to challenge House Bill 1036.

It is also conceivable that a court considering a due process challenge to House Bill 1036 would conclude that while neither the retroactive application provision nor the bill’s complete nullification of a plaintiff’s cause of action alone violates due process, the combined effect of these two aspects of House Bill 1036 unreasonably infringes on due process rights. For example, a plaintiff with a jury verdict against a gun industry defendant for which a motion for judgment notwithstanding the verdict is pending would not only have the jury award retroactively stripped away by passage of House Bill 1036, but would also be denied any further method of obtaining redress for injuries that a jury concluded were caused by members of the gun industry.¹⁷⁷ The due process implications of a federal “tort reform”

173. See Apelbaum & Ryder, *supra* note 166, at 659.

174. *Id.*

175. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 88 (1978) (“[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.”); see also Apelbaum & Ryder, *supra* note 166, at 659.

176. *E.g.*, 21 U.S.C. §§ 1601–1606 (2000) (prohibiting suits against suppliers of materials for medical devices); 42 U.S.C. § 1791 (2000) (prohibiting suits against nonprofit organizations that supply donated food to needy individuals as well as against many suppliers of that food); *id.* §§ 14501–14505 (granting liability protection for volunteers).

177. The jury verdict in this hypothetical does not constitute a final judgment, and thus a vested property interest, because it is still reviewable. See *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (“[R]ights in tort do not vest until there is a final, unreviewable judgment.”).

law that presents both of these characteristics have not yet been considered by a court.

House Bill 1036 would also be vulnerable to a challenge under the equal protection component of the Fifth Amendment.¹⁷⁸ A plaintiff precluded from suing the gun industry by House Bill 1036 could argue that she is being singled out for negative treatment solely because her injuries stem from a different type of product than those of another plaintiff with similar injuries. Such a challenge likely would be reviewed under the deferential "rational basis test," since House Bill 1036 seemingly involves no "suspect class" or "fundamental right" that would necessitate a heightened standard of review.¹⁷⁹ Moreover, rational basis review is the standard of review that

178. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that the Fifth Amendment Due Process Clause incorporates an equal protection component).

179. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.").

While the Supreme Court has held that there exists a "fundamental constitutional right of access to the courts," *Bounds v. Smith*, 430 U.S. 817, 828 (1977), cases addressing this right have typically centered on the rights of indigent individuals to defend themselves against criminal charges, in spite of their financial situation. See, e.g., *Douglas v. California*, 372 U.S. 353, 357-58 (1963) (finding a constitutional right for an indigent criminal defendant to have counsel on an initial appeal of his case); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (holding that indigent defendants in a criminal matter have a constitutional right to be provided with legal counsel by the state). Courts have not identified a broader general constitutional "right to sue." See, e.g., *Ortwein v. Schwab*, 410 U.S. 656, 660-61 (1973) (upholding, on rational basis review, a filing fee that prevented a welfare recipient from filing a suit to seek review of an adverse welfare decision). Consequently, the fundamental right to access the courts is not implicated by House Bill 1036, and the bill would likely be subject to rational basis review. A plaintiff barred from suing the gun industry by House Bill 1036 could argue for an acknowledgment of a more general constitutional right to seek legal redress for injuries caused by another. However, the Supreme Court has expressed reluctance to expand the category of fundamental rights. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30-35 (1973).

If a court were to conclude that House Bill 1036 infringes on a fundamental right, the court would apply strict scrutiny to the bill. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right."). Strict scrutiny review requires that the law be narrowly tailored to serve a compelling government interest in order to be upheld as constitutional. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). If this exacting standard were applied to House Bill 1036, a plaintiff would have a good chance of having it declared unconstitutional.

has typically been applied to constitutional challenges to federal tort reforms.¹⁸⁰

Rational basis review would pose a significant hurdle for plaintiffs challenging House Bill 1036. Rational basis review requires only that the law be “rationally related to a legitimate state interest.”¹⁸¹ Successfully challenging a law that is subject merely to rational basis review is no small feat, since any conceivable legitimate purpose for the law will suffice to uphold its constitutionality.¹⁸² For instance, a court could conclude that House Bill 1036 is reasonably related to the purpose of protecting the firearms industry, which is necessary in order to arm the nation’s police forces and maintain national security.¹⁸³

In addition, House Bill 1036 poses a potential problem regarding its interaction with current state laws dealing with suits against the gun industry. By dint of the Supremacy Clause of the U.S. Constitution, federal laws preempt state laws when the two come into conflict.¹⁸⁴ Preemption can be either explicit or implied by congressional intent.¹⁸⁵ House Bill 1036 does not contain an explicit preemption clause nor does it address how it would interact with state laws that apply stricter limitations on suits against the gun industry.¹⁸⁶ Other federal tort reform laws contain explicit provisions pertaining to these preemption issues.¹⁸⁷

While most of the state laws impose fewer restrictions on

180. See Apelbaum & Ryder, *supra* note 166, at 644; Vernick & Mair, *supra* note 23, at 145–46. Congress in the past has enacted “tort reform” laws that apply only to a particular industry, yet none of these laws has been challenged as a violation of equal protection. Vernick & Mair, *supra* note 23, at 145 (discussing the General Aviation Revitalization Act).

181. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

182. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314–15 (1993) (noting that rational basis review is a “paradigm of judicial restraint” and that a statute subjected to rational basis review comes to the court “bearing a strong presumption of validity”).

183. This argument has actually been advanced by proponents of House Bill 1036 as a reason for supporting its passage. See *supra* note 100 and accompanying text.

184. See U.S. CONST. art. VI (declaring that federal laws “shall be the supreme Law of the Land”).

185. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 304 (Aspen Law & Business ed., 2001).

186. H.R. 1036, 108th Cong. (2003).

187. *E.g.*, General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 (2001) (“This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action . . .”).

suits than does the proposed federal law, a provision detailing House Bill 1036's interaction with state laws would still be useful in regards to those few state laws that are more stringent than the proposed federal law, as well as state laws that may be passed in the future. For a concrete example, consider the New Hampshire law limiting lawsuits against the gun industry.¹⁸⁸ The New Hampshire law prohibits a broader array of causes of action than does House Bill 1036. While it begins with the same foundational language as House Bill 1036, barring suit for damages resulting from criminal or unlawful use of a firearm, it contains only one exception to the prohibition on suit, for actions brought against a gun industry defendant already convicted of a felony.¹⁸⁹ Would a victim of a criminal shooting who brings a suit in New Hampshire for negligent entrustment against gun industry defendants be barred from doing so by the New Hampshire law, or would House Bill 1036 preempt the New Hampshire law and permit the suit under the second exception to the prohibition on suit?¹⁹⁰ Since House Bill 1036 lacks an explicit preemption clause, the doctrine of implied preemption must be applied to determine whether it preempts state laws.¹⁹¹

The Supreme Court has articulated two forms of implied preemption. One is field preemption, where the federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."¹⁹² The other is conflict preemption, where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁹³

Both types of preemption would be applicable to the hypothetical posited above, yet they seemingly yield different results. The length and detail of House Bill 1036 strongly suggests that Congress intended to occupy the field of gun industry liability and did not aim to leave room for differing state

188. N.H. REV. STAT. ANN. § 508:21 (2003).

189. *Id.*; see also *supra* note 135.

190. H.R. 1036 § 4 (permitting suits for negligence per se and negligent entrustment in certain situations).

191. H.R. 1036; see also *Rector v. Labone, Inc.*, 208 F. Supp. 2d 987, 990 (E.D. Ark. 2002).

192. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

193. *Gade*, 505 U.S. at 98 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

laws.¹⁹⁴ Thus, field preemption analysis indicates that House Bill 1036 would control over a more stringent state law, and the plaintiff in the hypothetical would be able to sue for negligent entrustment. On the other hand, the objective of Congress in passing House Bill 1036 was to protect the gun industry from what Congress considers to be frivolous lawsuits.¹⁹⁵ Since the New Hampshire law provides the firearms industry with even more protection from liability, it appears to further congressional goals.¹⁹⁶ Conflict preemption analysis may therefore require that more stringent state laws prevail, and the fictitious plaintiff above would be barred from suing under the New Hampshire law. Without an express preemption provision, the interaction of House Bill 1036 with more stringent state laws is therefore unclear.

Finally, House Bill 1036 also raises federalism concerns regarding its potential infringement on an area of traditional state regulation.¹⁹⁷ The existence of numerous state laws addressing gun industry liability reveals that litigation against the gun industry has been largely regulated by the states.¹⁹⁸ House Bill 1036 thus would be susceptible to a challenge that it is an unconstitutional infringement by the federal government on the ability of states to regulate an area of law that they have heretofore been free to control. It is unlikely, however, that such federalism concerns would induce a court to invalidate House Bill 1036, since “[c]ourts have previously not been accommodating of Tenth Amendment federalism concerns in the context of federal tort reform laws.”¹⁹⁹ Current Tenth Amendment doctrine requires that a federal law actively commandeer the state’s legislative process in order to be found to violate the Tenth Amendment.²⁰⁰ The provisions of House Bill 1036 do not

194. See *supra* Part II.A (describing the provisions of House Bill 1036).

195. H.R. 1036 § 2.

196. The conflict preemption argument could also cut the other way: Congress, in defining the causes of action barred by House Bill 1036 as it did, specified the full array of lawsuits that Congress deems “frivolous” and from which the gun industry warrants protection. If the New Hampshire law bars suits outside of this defined range, it indeed poses an obstacle to the fulfillment of the purpose behind House Bill 1036 by prohibiting suits from which Congress did not conclude that the gun industry deserves protection.

197. See U.S. CONST. amend. X.

198. See *supra* Part I.B.

199. Apelbaum & Ryder, *supra* note 166, at 653 (footnote omitted).

200. See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”); *New York v. United States*, 505

compel or coerce a state legislature into adopting a particular regulatory program.²⁰¹ Thus, a court would have to be willing to expand on current Tenth Amendment doctrine in order to invalidate House Bill 1036 on Tenth Amendment grounds.²⁰²

2. Vagueness Concerns

Aside from the constitutional issues, the vagueness of two of House Bill 1036's most important provisions also gives cause for concern. The phrase "when used as intended," found in the fifth exception to the prohibition on suit, is not defined anywhere in the bill.²⁰³ The exception, permitting certain products liability actions, could be either quite narrow or quite broad depending on the construction given to that phrase, making the absence of a definition especially unfortunate.²⁰⁴

In particular, the interpretation of the exception turns on whether "when used as intended" includes a reasonable foreseeability component.²⁰⁵ If "when used as intended" is construed to include the reasonably foreseeable use of a firearm, products liability suits arising from the criminal use of a firearm would likely be permitted under the fifth exception since it is arguably foreseeable that a firearm would be used criminally.²⁰⁶ If, on the other hand, no "reasonably foreseeable" component exists, gun industry defendants could argue that the fifth exception in

U.S. 144, 161 (1992).

201. H.R. 1036, 108th Cong. (2003).

202. See Apelbaum & Ryder, *supra* note 166, at 653–54.

203. See *supra* notes 156–57 and accompanying text. The fifth exception permits suits for damages "resulting directly from a defect in design or manufacture of the product, when used as intended." H.R. 1036 § 4.

204. Representative Watt, who proposed that the language "when used as intended" be removed from the bill, noted that the failure of the bill to define this phrase left serious doubt as to the scope of the fifth exception. 149 CONG. REC. H2979 (daily ed. Apr. 9, 2003).

205. Under the proposed Daschle-Craig-Baucus amendments to Senate Bill 659, embodied in the now-defeated Senate Bill 1805, products liability suits arising from the criminal use of firearms would not be permitted despite the recognition of a reasonable foreseeability component. While Senate Bill 1805 specifically included a reasonable foreseeability element, the bill provided that "reasonably foreseeable," for purposes of the fifth exception, "does not include any criminal or unlawful misuse of a qualified product, other than possessory offenses." S. 1805, 108th Cong. (2003). Thus, although Senate Bill 1805 clarified this exception, it significantly limited its usefulness.

206. See *James v. Arms Tech., Inc.*, 820 A.2d 27, 47 (N.J. Super. Ct. App. Div. 2003) (noting that the plaintiffs' injuries were reasonably foreseeable to the gun industry defendants because "the dangerous propensity of handguns is self-evident and the consequence of their misuse is well documented").

House Bill 1036 does not permit suits arising from the criminal use of firearms because firearms are not intended for criminal use.

Precedent provides no clear answer to this question, as courts are divided over the issue.²⁰⁷ A recent case from the Eleventh Circuit highlights this split. In *Jennings v. Bic, Inc.*, the Eleventh Circuit considered whether a cigarette lighter manufacturer could be held liable on a products liability theory for damages caused when a three-year-old obtained a lighter and set his brother's clothing on fire.²⁰⁸ The court noted that products liability applies only when the product is used as intended.²⁰⁹ The court reasoned that since lighters are not intended for use as children's playthings, the manufacturer could not be held liable.²¹⁰ The dissent vigorously contested this conclusion, arguing that the majority failed to consider that "intended use" incorporates a reasonable foreseeability element.²¹¹ The dissent argued that, by application of a reasonable foreseeability component, the defendant should be held liable because "the very statistics cited by the majority regarding the annual number of deaths caused by children playing with lighters support the conclusion that the child's use of the lighter was reasonably foreseeable."²¹² Such divergent positions as those taken by the majority and the dissent in the *Jennings* case could dramatically affect the import of the fifth exception in House

207. Compare *Jennings v. Bic, Inc.*, 181 F.3d 1250 (11th Cir. 1999) (failing to consider a reasonable foreseeability component to the notion of "intended use"), and *Monaco v. Red Fox Gun Club, Inc.*, No. 2000-P-0064, 2001 Ohio App. LEXIS 6008, at *14-15 (Ohio Ct. App. Dec. 28, 2001) (discussing a firearm's "intended use" without reference to reasonable foreseeability), with *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001) (noting that a product can be defective under a products liability theory if "the product has failed to perform as safely as an ordinary consumer would expect when used in an *intended or reasonably foreseeable manner*" (quoting *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 452 (Cal. 1978)) (emphasis added)), and *Cobb v. Insured Lloyds*, 387 So. 2d 13, 17-18 (La. Ct. App. 1980) (discussing intended or normal use in the context of reasonably foreseeable use).

208. *Jennings*, 181 F.3d at 1253.

209. *Id.* at 1256.

210. *Id.* Adapting this logic to firearms litigation, a court could conclude that firearms are not intended to be used unlawfully to shoot people, thus limiting dramatically the scope of the fifth exception in House Bill 1036. This argument is tenuous, however, since the purpose of a firearm is undoubtedly to shoot things—targets, animals, and, if necessary, people.

211. *Id.* at 1261 (Barkett, J., dissenting).

212. *Id.*

Bill 1036.²¹³

In addition, the critical phrase “criminal or unlawful misuse,” key to understanding what constitutes a prohibited action, is not defined in House Bill 1036.²¹⁴ It is unclear whether conduct that is merely civilly negligent qualifies as “unlawful misuse,” thereby falling within the ambit of the bill’s prohibition on suit.²¹⁵ The failure of the bill to define these crucial phrases leaves serious doubt regarding its actual scope.²¹⁶

The interplay between the “unlawful misuse” requirement and the fifth exception in House Bill 1036 is another gray area in the bill. While the bill bars suits arising from the “criminal or unlawful misuse” of a firearm, the fifth exception permits products liability suits when the injury results from the use of the firearm “when used as intended.”²¹⁷ However, if “unlawful misuse” does not include mere negligent misuse and if “when used as intended” excludes the criminal use of a firearm, what purpose does this fifth “exception” serve? If suits arising from the negligent misuse of firearms are not affected by the general

213. See *supra* note 206 and accompanying text.

214. H.R. 1036, 108th Cong. (2003) (defining a qualified civil liability action as any action brought against a gun industry defendant for “damages [or injunctive relief] resulting from the criminal or unlawful misuse of a qualified product by the person or a third party”).

215. Senate Bill 1805, encompassing the Daschle-Craig-Baucus amendments to Senate Bill 659, contained a definition of “unlawful misuse” that explicitly excluded negligent misuse. S. 1805, 108th Cong. (2003). Thus, a suit based on the civilly negligent use of a firearm would not be barred by the bill. *Id.* Such an alteration to House Bill 1036, however, would still not allow any currently pending case, which otherwise would be barred by the bill, to go forward because most suits by victims of gun violence involve conduct by the shooter that is more than merely civilly negligent. See *supra* Part I.A.

216. State laws dealing with gun industry liability offer little guidance in addressing these vagueness concerns. While Louisiana’s products liability law refers to the notion of intended use, providing that no manufacturer or dealer who has complied with state and federal laws can be held liable for “any action of any person who uses a firearm in a manner which is unlawful, negligent, or otherwise inconsistent with the purposes for which it was intended,” the law leaves no doubt that both criminal and negligent use are excluded as a basis for suit. LA. REV. STAT. ANN. § 9:2800 (West Supp. 2004). No other state law dealing with gun industry liability makes reference to “intended use.” See *supra* notes 64–79 and accompanying text.

Additionally, only three of the state laws refer to “criminal or unlawful misuse.” See ARIZ. REV. STAT. ANN. § 12-714 (West 2003); IND. CODE ANN. § 34-12-3-1 to -5 (Michie Supp. 2003); N.H. REV. STAT. ANN. § 508:21 (2003). These laws do not shed light on House Bill 1036, however, because none of them contains a definition of the phrase nor has the issue been litigated in regards to these laws.

217. H.R. 1036.

prohibition on suits arising from "criminal or unlawful misuse," what sorts of cases would the fifth "exception" permit that otherwise would have been barred by the bill?

House Bill 1036 suffers from numerous legal shortcomings, ranging from constitutional issues to serious vagueness concerns, leaving litigants uncertain as to the bill's actual import. Nonetheless, the bill, if enacted, would have significant nationwide ramifications in the area of gun industry litigation. Whether they understood the bill or not, plaintiffs would undoubtedly feel its presence.

III. THE IMPACT OF HOUSE BILL 1036

A. THE PRACTICAL IMPLICATIONS OF HOUSE BILL 1036

House Bill 1036, if enacted, would have a tremendous impact on litigation against the gun industry. While state laws dealing with gun industry liability have already affected suits in several states, the reach of the proposed federal law would be even greater. House Bill 1036 would dismiss many suits that are currently proceeding unhampered by state laws. These suits are not without legal merit, as evidenced by the fact that many have survived motions to dismiss.²¹⁸ On the contrary, they seek to hold a powerful industry responsible for its sometimes egregious misconduct.²¹⁹ Given the power wielded by the gun rights lobby in Congress, the courts are one of the few remaining forums for individuals seeking to hold the gun industry accountable for its conduct, underscoring the importance of these suits.²²⁰

Significantly, House Bill 1036 would affect suits in the approximately twenty states that do not have gun industry immunity laws. In addition, the bill would bar suits instituted by private parties, which are unaffected by most of the state laws.²²¹ Further, the proposed legislation would bar suits by the states themselves.²²²

Concrete examples of the impact that House Bill 1036 would have on currently pending lawsuits are useful in ascertaining the true reach of the proposed law. For instance, House

218. See cases cited *supra* note 50.

219. See *supra* notes 38 and 54 and accompanying text.

220. See Lytton, *supra* note 7, at 1251.

221. See *supra* note 122 and accompanying text.

222. See *supra* notes 123-24 and accompanying text.

Bill 1036 would stop the landmark Chicago lawsuit dead in its tracks.²²³ Since the suit alleges injuries arising out of the criminal misuse of firearms, it would fall within the ambit of the bill's prohibition.²²⁴ None of the exceptions in House Bill 1036 would save Chicago's public nuisance claims. The city does not allege any statutory violations, nor have the defendants been convicted under 18 U.S.C. § 924(h), thus rendering the first and third exceptions unavailable to the plaintiff.²²⁵ In addition, the city has not alleged negligent entrustment, making the second exception inapplicable.²²⁶ Likewise, the fourth and fifth exceptions are inapplicable to the public nuisance claims because those exceptions deal only with breach of contract or products liability causes of action.²²⁷ Thus, despite the Illinois Court of Appeals ruling that the city has properly stated a claim for public nuisance under well-established common law principles, the proposed federal legislation would deprive the city of the opportunity to present its case to a jury.²²⁸

As evidenced by the example of the Chicago suit, House Bill 1036 essentially provides that members of the gun industry who have not violated a state or federal law are incapable of creating or contributing to the public nuisance of gun violence.²²⁹ Without a statutory violation, the first and third exceptions of House Bill 1036 are inapplicable.²³⁰ The second, fourth, and fifth exceptions do nothing to save a public nuisance cause of action because they explicitly permit only negligence, breach of contract, or products liability suits.²³¹

223. *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16 (Ill. App. Ct. 2002); see also *supra* notes 53–55 and accompanying text.

224. See H.R. 1036 § 4.

225. See *supra* notes 139–42 and 149–52 and accompanying text.

226. See *supra* notes 143–47 and accompanying text.

227. See *supra* notes 153–57 and accompanying text.

228. *City of Chicago*, 785 N.E.2d at 31. For these same reasons, House Bill 1036 would also cut short the NAACP's appeal of the dismissal of its public nuisance suit against the gun industry. See *supra* notes 41–43 and accompanying text.

229. This proposition flatly contradicts established common law doctrine, which does not require a statutory violation as a prerequisite to a public nuisance. See David Kairys, *The Governmental Handgun Cases and the Elements Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1182 (2000) (“Handgun manufacturers, like the rest of us, can be held civilly liable for their conduct even if it falls within the framework and regulations of statutory law.”).

230. H.R. 1036, 108th Cong. § 4 (2003).

231. *Id.*

House Bill 1036 would also bar the *Dix* lawsuit.²³² The Dixes' suit falls within the bill's scope because it too seeks damages for injuries resulting from the unlawful use of a firearm—the use of a gun by a minor.²³³ The Dixes' products liability claims for defective design and failure to warn likely would not fall under the fifth exception, for products liability actions, due to the “when used as intended” requirement. A court following the logic of the *Jennings* case²³⁴ could conclude that a firearm is not intended for use by minors, thus rendering the exception inapplicable.²³⁵

House Bill 1036 would also necessitate the dismissal of the suit brought by family members of victims of the D.C.-area snipers.²³⁶ The public nuisance count would be barred for the reasons noted in regards to Chicago's public nuisance claims.²³⁷ Similarly, House Bill 1036 would prohibit the plaintiffs' negligent sale and negligent distribution claims because they arise from the criminal misuse of a firearm and do not qualify for either of the negligence exceptions.²³⁸ Since the defendants did not violate any statutory provisions, the negligence per se exception is inapplicable.²³⁹ Nor is a negligent entrustment claim

232. *Dix v. Beretta U.S.A. Corp.*, No. A093082, 2002 WL 187397 (Cal. Ct. App. Feb. 6, 2002).

233. See *Dix Case Status*, *supra* note 32.

234. *Jennings v. Bic, Inc.*, 181 F.3d 1250 (11th Cir. 1999); see also *supra* notes 207–13 and accompanying text.

235. See *supra* notes 205–16 and accompanying text. Senate Bill 1805, which added “reasonably foreseeable” language to the products liability exception in House Bill 1036, would not have changed this conclusion. S. 1805, 108th Cong. (2003). Senate Bill 1805 also provided that criminal acts, other than possessory offenses, are not deemed reasonably foreseeable for purposes of the exception. *Id.* Since Dix's friend shot and killed Dix, his offense goes beyond a possessory offense to include manslaughter or negligent homicide, therefore falling outside of the scope of the exception even in a gun industry immunity bill that adopted the provisions of Senate Bill 1805. See *id.*; *supra* note 32.

236. See *supra* notes 36–40 and accompanying text.

237. See *supra* notes 223–28 and accompanying text.

238. See *supra* notes 143–47 and accompanying text. As with public nuisance, the import of House Bill 1036 is that a firearms manufacturer is incapable of committing negligence unless it also has violated a statutory provision, which would permit an action for negligence per se. See H.R. 1036, 108th Cong. § 4 (2003). The only other exceptions that would permit a negligence cause of action are the first and the third, both of which require a statutory violation. See *id.* Such a limitation on negligence flies in the face of well-established tort principles. See *Kairys*, *supra* note 229, at 1182–83.

239. This fact also precludes the application of the third exception for knowing and willful violations of a state or federal law. H.R. 1036 § 4.

a viable option for the plaintiffs. To fall under the negligent entrustment exception, a plaintiff must be able to show that the seller supplied a firearm to a person who the seller "knows or should know" would use the firearm in a manner involving unreasonable risk to others.²⁴⁰ Bull's Eye Shooter Supply, the defendant dealer, did not sell the sniper weapon to John Lee Malvo; Bull's Eye "lost" it.²⁴¹ Since Bull's Eye did not know who had obtained the firearm from its store, the requirement that the seller "know or should know" that the purchaser would misuse the firearm is not satisfied in this case.²⁴² Thus, House Bill 1036 would wholly bar the plaintiffs' suit. As evidenced by these three diverse cases, House Bill 1036 would effectively prohibit all, or nearly all, suits attempting to hold the gun industry responsible for its contribution to the gun violence that plagues U.S. society.

B. THE POLICY IMPLICATIONS OF HOUSE BILL 1036

Beyond the practical impact that House Bill 1036 would have on currently pending suits, numerous policy considerations strongly counsel against the enactment of House Bill 1036 or any similar national legislation shielding the gun industry from lawsuits by victims of gun violence. One of the primary purposes that tort litigation serves is the deterrence of bad behavior.²⁴³ Giving the gun industry artificial protection from lawsuits would remove a significant incentive for the industry to produce safer guns and to change its marketing and distribution practices.²⁴⁴ Without the prospect of liability, the gun industry remains free to continue even the most flagrant misconduct, such as that demonstrated by Bull's Eye Shooter Supply

240. *Id.*

241. Sniper Complaint, *supra* note 11, at 7. In fact, Bull's Eye has no record of any transfer of the sniper weapon from their store. *Id.* It appears that Malvo stole the weapon from Bull's Eye. *Id.* at 15.

242. This case illustrates the hollowness of the negligent entrustment exception. The language of the exception entirely precludes its use in instances in which the firearm has been stolen and in instances in which a middleman purchases a firearm from the seller and subsequently furnishes the weapon to the shooter. *See supra* notes 146–47 and accompanying text.

243. *See* Jean Macchiaroli Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. REV. 115, 179 (2002).

244. *See* Lytton, *supra* note 7, at 1254 (noting that the "threat of tort liability provides incentives for the industry to police itself").

in connection with the D.C. sniper shootings.²⁴⁵ Moreover, it would be particularly unwise to remove the restraint provided by the threat of litigation from an industry that already is subject to only minimal regulation.²⁴⁶

In addition, gun violence is an extremely complex problem that will require the concerted efforts of all branches of government in order to achieve a national solution.²⁴⁷ Neither the legislature nor the judiciary can solve this problem alone. Yet both branches fulfill important functions in addressing this issue—the threat of litigation and the imposition of damages or injunctive relief by the judiciary can encourage the gun industry to monitor itself, while the legislature can craft nationwide regulations that set standards for gun industry practices. Further, the ability of the gun industry and its supporters to influence the legislative process makes the participation of the judiciary even more critical.²⁴⁸ By preventing an entire branch of government from taking part in efforts to address the factors that contribute to gun violence, House Bill 1036 would hinder

245. See *supra* note 37 and accompanying text.

246. See Culhane & Eggen, *supra* note 107, at 303–05 (noting that regulation of firearms in the United States is inadequate). Most notably, the gun industry is entirely exempt from the oversight of the Consumer Safety Protection Commission. *Id.* at 304. Moreover, “[a]lthough the general public may have the impression that [the Bureau of Alcohol, Tobacco and Firearms] has broad jurisdiction to address all gun transactions, [its] jurisdiction is narrowly circumscribed.” Eggen & Culhane, *supra* note 243, at 130.

247. Lytton, *supra* note 7, at 1248 (“Solving complex social problems typically requires the cooperation of several policymaking institutions . . .”). In his article, Lytton argues insightfully that the tort system is a necessary complement to the legislative process in the policing of the gun industry. *Id.*

248. *Id.* at 1251 (“The tort system provides an alternative forum for policy debate when powerful interests have squelched legislative discussion.”). Telling evidence of the gun lobby’s power in Congress lies in the fact that the House of Representatives passed House Bill 1036 just two weeks before the NRA national convention, a coincidence not lost on the bill’s opponents. See *House Approves Common-Sense Legal Reform in Protection of Lawful Commerce in Arms Act*, CONNECTICUT SPORTSMEN, at http://www.ctsportsmen.com/house_of_representatives_passes.htm (last visited Dec. 30, 2003).

The defeat of Senate Bill 1805 following the addition of gun control amendments to the bill further demonstrates the NRA’s power in Congress and its significant control over the legislative push for gun industry immunity. Just hours after the NRA’s executive vice president, Wayne LaPierre, sent a facsimile message to senators urging them to oppose Senate Bill 1805 as amended, approximately sixty senators who originally supported the bill obediently voted against it. See Sheryl Gay Stolberg, *Senate Leaders Scuttle Gun Bill Over Changes*, N.Y. TIMES, Mar. 3, 2004, at A1; Letter from Wayne R. LaPierre, *supra* note 119.

resolution of this vital social issue.

Underlying House Bill 1036 is the larger debate over the role that courts should play in overseeing and regulating the manufacturing and marketing of potentially harmful products, including firearms, via common law doctrines.²⁴⁹ Proponents of House Bill 1036 often argue that the judiciary has no part to play in regulating the gun industry, as that function falls squarely within the bounds of the legislature.²⁵⁰ However, when faced with a problem as serious as gun violence, it is a terrible waste of resources to ignore the power of the common law, in the form of negligence, public nuisance, and products liability doctrines, and to prevent it from complementing the regulatory measures implemented by the legislatures. Tort law and legislative regulation can and should complement each other in this arena.

Nonetheless, the very text of House Bill 1036 seemingly rejects the need for cooperation between the legislative and judicial branches. The bill expresses misgivings about the judiciary's ability to handle litigation against the gun industry.²⁵¹ This distrust is misplaced. In innumerable areas of law the judiciary is called upon to assess plaintiffs' claims and dismiss meritless suits.²⁵² The bill and its supporters fail to specify why the area of gun industry liability is different—why the judiciary is incapable of properly applying the law in this particular field. In reality, the judiciary has proven itself willing to dismiss cases brought by victims of gun violence when the judge considers the plaintiff's case too weak to warrant a trial.²⁵³ The

249. See generally CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA (2001) (examining the critical and often beneficial role that litigation plays in U.S. society).

250. See, e.g., 149 CONG. REC. H2969 (daily ed. Apr. 9, 2003) (statement of Rep. Sensenbrenner); *id.* H2971 (statement of Rep. Boucher).

251. H.R. 1036, 108th Cong. § 2 (2003) (stating that one of the purposes of the bill is to avoid suits "based on theories without foundation" being sustained by a "maverick judicial officer").

252. Further, the legal claims raised in the vast majority of gun industry lawsuits are claims sounding in negligence, products liability, and public nuisance, areas of law in which the judiciary has long wielded power. See Sayles & Lambden, *supra* note 20, at 155 (refuting the notion that gun industry liability should be determined by legislatures, because "the doctrine of strict liability . . . has always been developed by the judicial, not the legislative, branch of government"). In these suits, the judiciary has merely applied to the gun industry the same well-recognized doctrines that are applied to other defendants in countless cases each year.

253. See, e.g., NAACP v. Acusport, Inc., 271 F. Supp. 2d 435 (E.D.N.Y. 2003); *Dist. of Columbia v. Beretta U.S.A. Corp.*, No. Civ.A.0428-00, 2002 WL

sentiment of distrust that House Bill 1036 directs at the judiciary will undermine public confidence in the ability of two powerful branches of government to work together to address the problem of gun violence, or any other issue of national importance.²⁵⁴

Finally, litigation against the gun industry fulfills the important social function of promoting dialogue about the problem of gun violence. This dialogue occurs at several levels. The litigants involved in the lawsuits engage in a dialogue between a powerful industry and the individuals injured by its products. This dialogue in the courts can achieve positive results with far-reaching effects, as evidenced by the landmark Smith & Wesson settlement and the more recent settlement between California cities and numerous gun dealers.²⁵⁵ Dialogue between litigants thus can produce concrete steps toward the resolution of the problem of gun violence.

The recent wave of gun industry litigation has also prompted national attention to and public dialogue about the problem of gun violence and the conduct of the gun industry.²⁵⁶ Public debate is critical to generate the momentum necessary to obtain a solution to such a pervasive social ill as gun violence. Without the national spotlight that litigation brings, public discourse about gun violence and the gun industry could more readily be silenced.

Dialogue and the collective efforts that can spring only from dialogue are thus essential. The enactment of House Bill 1036, or any similar national legislation barring suits against

31811717 (Super. Ct. D.C. Dec. 16, 2002); *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845 (Mich. Ct. App. 2003).

254. Writing about state laws limiting suits against the gun industry, Lytton notes, "The success of industry efforts to obtain legislative immunity from municipal lawsuits also threatens to undermine the integrity of the tort system, determining liability on the basis of political muscle rather than judicial procedure." Lytton, *supra* note 7, at 1266.

255. See *supra* notes 60–63 and accompanying text. The dialogue between litigants also has the ability to reshape public discourse about gun violence. Lytton, *supra* note 7, at 1263 ("[B]y highlighting the claims of gunshot victims and the social costs of gun violence, lawsuits against the gun industry may reframe the debate over gun-violence policy by downplaying disagreement over the right to bear arms and highlighting concern for public safety.").

256. News headlines abound regarding suits against the gun industry by the victims of gun violence. See, e.g., *NAACP to Sue Gun Makers*, CNN, at <http://www.cnn.com/US/9907/12/naacp.guns.02/> (July 12, 1999); Christy Oglesby, *Sniper Victim Families Sue Gun Maker, Retailer*, CNN, at <http://www.cnn.com/2003/LAW/01/16/sniper.lawsuit/> (Jan. 16, 2003).

the gun industry, would stifle this productive discourse and would hinder cooperation between the legislative and judicial branches in resolving the problem of gun violence currently facing U.S. society.

CONCLUSION

If enacted, House Bill 1036 would have a tremendous impact on the growing wave of litigation against the gun industry by victims of gun violence. The vast majority of cases in which victims of gun violence attempt to hold members of the gun industry responsible for the role that they play in fostering gun violence would be summarily dismissed by House Bill 1036. The impact of House Bill 1036 would go far beyond that of the state laws limiting suits against the gun industry. The bill would render the gun industry largely immune, on a nationwide scale, from negligence, public nuisance, and other well-established common law theories of liability in suits arising from gun violence, unless the defendant were also guilty of a statutory violation. Furthermore, House Bill 1036 presents a host of constitutional issues as well as the potential for significant confusion regarding the interpretation of several of its main provisions.

House Bill 1036, or any similar national legislation, is eminently unwise from a policy perspective. The bill would remove a significant incentive for the gun industry to police its own conduct. Moreover, the bill sends a disturbing message about the inability of the legislative and judicial branches to cooperate toward the resolution of the problem of gun violence. Finally, the bill would stifle vital dialogue about gun violence, both in the courts and among the public. Such a bill, therefore, would only impede the resolution of an issue that, without hyperbole, can be termed a national crisis.