

**STATEMENT OF**  
**of**  
**DAVID J. PASTERNAK**  
**on behalf of the**  
**AMERICAN BAR ASSOCIATION**  
**on the subject of the proposed**  
**"PROTECTION of LAWFUL COMMERCE IN ARMS ACT "**  
**H.R.2037**  
**submitted to the**  
**SUBCOMMITTEE ON COMMERCE, TRADE, and CONSUMER PROTECTION**  
**COMMITTEE ON ENERGY AND COMMERCE**  
**U.S. HOUSE OF REPRESENTATIVES**  
**April 18, 2002**

Mr. Chairman and Members of the Subcommittee:

I am David J. Pasternak, an attorney practicing law in Los Angeles, California with the firm of Pasternak, Pasternak & Patton, A Law Corporation. I am a past President of the Los Angeles Bar Association and currently serve as the Chair of the American Bar Association's Special Committee on Gun Violence. I submit this statement at the request of the President of the American Bar Association, Robert E. Hirshon of Portland, Maine, to voice the Association's strong opposition to H.R.2037 and to similar legislation to enact special immunity for the firearms industry from ordinary civil liability.

The American Bar Association, the world's largest, voluntary professional organization with more than 400,000 members, is the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.

The ABA is strongly opposed to H.R.2037, legislation introduced on May 25, 2001, by Representative Cliff Stearns (R-FL) as "the Protection of Lawful Commerce in Arms Act," a bill "to amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce." H.R.2037 would provide that any action for "civil

damages or equitable relief" become a prohibited "restriction on interstate or foreign commerce" when such action is brought against a firearms manufacturer or seller unless it derives from a breach of contract or warranty or "improper functioning of a firearm or ammunition product, when used as intended, due to a defect in design or manufacture."

H.R.2037 would legislate federal preemption of state common law and statutorily authorized actions nationwide brought by any party based on claims of negligence or nuisance, and create a narrow federal product liability standard that would immunize the firearms industry from all but a most narrow group of product liability claims.

H.R.2037 is similar in design to state legislation enacted in 20 states in the last three years creating a special immunity for the firearms industry from claims brought by governmental bodies and to five states' enactment of legislation creating a broad immunity for the firearms industry from any tort claims, including those brought by individuals, based on negligence or nuisance theory.

Based on concerns about such legislation, the ABA House of Delegates, our policy-making body, overwhelmingly approved a recommendation in opposition to legislative proposals such as those contained in H.R.2037 in August 2001. It provides as follows:

RESOLVED, that the American Bar Association opposes federal, state or territorial legislation to create special legal immunity for the firearms industry from civil tort liability.

The ABA believes that legislative proposals that would have the effect of precluding individual citizens, consumers or other parties injured by firearms, from pursuing claims for civil liability in the nation's civil courts are unwarranted legislative interventions into what is properly the role of the courts. H.R.2037, and similar proposals, would enact sweeping protections for this particular industry from ordinary civil actions, actions that have an historical basis in our civil courts that has existed throughout our nation's history.

H.R.2037 would mandate new and unwarranted federal legislative "solutions" to issues that should properly be decided on a case-by-case factual basis in our nation's courts, and would further create the bad precedent that individual industries could obtain a legislative "opt-out" from our civil justice system, by gaining immunity from that system by lobbying in Congress. It would surely follow that if Congress could determine that civil claims against gun manufacturers or sellers are impermissible restraints on interstate commerce, then why should not individual civil actions against other industries be stripped from the jurisdiction of state and federal courts on the same basis. That result, and such a legislating philosophy, would lead to a mish-mash of protectionist laws that could not be relied upon to protect the rights of individuals citizens to seek redress in our courts for harm they have suffered. We believe legislating such immunity would violate the most basic commitments of our Constitution and our system of laws to providing equal justice to all under the law.

## Background

Roughly 30,000 people are killed every year with firearms, more than one every 20 minutes, making firearms second only to motor vehicles as the most frequent cause of injury death in the United States. Since 1965 more than *one million* people have been shot and killed in domestic gun incidents, more than all Americans killed in all foreign wars combined during the twentieth century. In 1998, 64,000 people were treated in hospital emergency rooms for nonfatal firearm injuries. Medical costs associated with hospital care for gun injury have been conservatively estimated at \$1 - \$2 billion per year, most of which is at taxpayer expense.

Gun injury and death has been the subject of civil claims for decades. In an article published June 24, 1993 entitled "Wild West Legacy: Ruger Gun Often Fires if Dropped, but Firm Sees No Need for Recall --- Company Settles Hundreds of Claims, Maintaining The Revolvers Are Safe," the Wall Street Journal documented 40 years of deaths and injuries in incidents with a Ruger revolver that frequently fired when accidentally dropped due to a design problem. Hundreds of cases were settled, but because neither the federal Bureau of Alcohol, Tobacco and Firearms nor the Consumer Product Safety Commission had authority over firearm defects and design, the gun was never recalled.

On October 30, 1998, New Orleans filed a suit against the gun industry based on claims that the gun industry designed and marketed handguns that lack basic safety features that would prevent shootings by children, teenagers and other unauthorized users. Over the next three years, an additional 33 cities and counties and the State of New York have filed suits against the gun industry, alleging a range of claims based on negligence, nuisance and product liability theory. A significant number of suits brought by individual plaintiffs are based on similar allegations and theories of liability. While the gun industry has successfully had some cases dismissed, many courts have found that cases before them present cognizable claims, and that the plaintiffs are entitled to discovery and, ultimately, a trial on the merits. In response, the gun industry has vigorously pursued legislation to immunize itself from these and most claims of civil tort liability.

Legislation to immunize the firearms industry from civil litigation on a state-by-state basis has been introduced in almost every state legislature in the past three years. To date, 25 states have passed legislation shielding gun manufacturers and dealers from civil liability.

H.R.2037 and similar legislation is premised on claims that, if applied to other industries, would block almost all suits by any claimant seeking damages for tortious behavior. The proposed federal legislation, as is argued by the gun lobby, would merely preclude any gun manufacturer liability unless the firearm fails to work. According to this argument, it is only when a gun will not shoot straight that a gun owner would have an actionable claim against a gun manufacturer. This core premise contained in H.R.2037 as the basis for legislating immunity from suit is a misleading stereotype about the issue at stake and is in fact at odds with basic principles of American tort law. Longstanding product liability principles have provided that a product can be defective in design regardless of

whether it malfunctions. A leading, well-known example is provided by the litigation against the Ford Motor Co. resulting in its being held liable for fires caused by the placement of its Pinto fuel tank. While the fuel tank did not cause the car to malfunction, its placement created an unreasonable risk that passengers would be incinerated after a collision. Similarly, if gun manufacturers fail to install safety devices to prevent gun accidents then the guns may be unreasonably dangerous even if they fire bullets properly.

Second, the proposed legislation incorporates limitations on actions because the gun industry and the bill sponsors maintain that gun manufacturers and sellers cannot be liable in tort law because the product involved is legal. This claim confuses criminal liability, which applies only to illegal conduct, with civil tort liability, which does not. Most civil tort law is concerned with the actions of parties whose actions are legal but nevertheless expose others to an unreasonable risk of harm. In the famous Ford Pinto case, the placement of the gas tank was not in violation of any statute, but it created a hazard such that Ford was held liable.

Third, this legislation is premised on the faulty principle that the gun industry cannot be held liable when its products are misused by others. This notion is contradicted by innumerable examples relating to other industries. If this were the state of the law, our courts could never have held auto manufacturers liable for selling cars without seat belts and other safety features because most car accidents are caused by driver error.

To illustrate how the proposed federal legislation would impact recent litigation, and noting that the proponents of this report have no knowledge of the facts of these cases or the worthiness of the claims they are based on, the following are a list of recent or pending cases that raise claims that presumably could not have been brought if broad immunity legislation was in place:

- *Kitchen v. K-Mart*, 697 So. 2d 1200 (Fla. 1997): A Florida woman, Deborah Kitchen, was rendered a quadriplegic when her ex-boyfriend shot her. A gun dealer sold the gun to the ex-boyfriend even though he was so intoxicated that he could not fill out the federal form without assistance. The intoxicated boyfriend shot Kitchen within hours of the sale. A Florida jury - and the Supreme Court of Florida - found that the dealer's negligence was a cause of the shooting, and should pay damages to Kitchen.
- *Merrill v. Navegar*, 89 Cal. Rptr. 2d 146, 161-85 (Ct. App. 1999), *review granted* (Cal. 2000): A gun maker marketed military assault weapons to the public even though they had no apparent civilian utility, and through print advertising solicited a claimed-criminal market by, for example, boasting of the gun's "excellent resistance to fingerprints." One of its customers used the gun to slaughter eight men and women, and injure six more, in a San Francisco law office. The California Court of Appeals found that the gun maker's negligence could be a legal cause of the shooting.
- *Pavrides v. Niles Gun Show*, 93 Ohio App. 46 (1994): A Canton man, Greg Pavrides, was rendered a paraplegic when he was shot by teenagers who were able to obtain their guns because a gun show's negligence enabled them to stroll about

the show, pick up guns that were lying around on tables, totally unsecured, and walk away with them. A jury - and the Ohio Court of Appeals - agreed that the gun show's negligence was a cause of the shooting, and should pay damages to Mr. Pavlides.

- *Hooper v. Wal-Mart*, Civ.-98-C-1496-NE (N.D. Ala. 1998): Wal-Mart sold a shotgun to James Michael White, even though he was under a domestic violence restraining order and was therefore prohibited from buying a firearm under federal law, and he truthfully filled out his purchase form stating that he was under a court order. Within two weeks of buying the shotgun, Mr. White used it to murder his estranged wife and her brother. The victims' families sued, and Wal-Mart agreed in settlement to pay \$16 million to the 2-year old and 5-year old daughters of the slain Mrs. White. Even though Wal-Mart's conduct was illegal, it would be immune from suit at least under one of the federal bills.
- *White v. Smith & Wesson*, 97 F.Supp.2d 816 (N.D. Ohio 2000): The City of Cleveland sought damages and injunctive relief on the grounds that gun makers negligently sold guns without taking reasonable steps to prevent criminals and kids from obtaining them, and failed to implement reasonable life-saving safety devices and warnings. An Ohio federal district judge held that the gun makers could be liable under Ohio negligence, nuisance, and product liability law.
- *Boston v. Smith & Wesson Corp.*, 2000 WL 1473568 (Mass. Super. 2000): The City of Boston brought a similar case against gun makers and sellers, seeking damages and injunctive relief to abate the public nuisance caused by the gun industry's negligent design and sale of guns. A state trial court denied defendants' motion to dismiss, and the Court of Appeal refused to grant an interlocutory appeal of that decision.
- *People, et. al. v. Arcadia Machine & Tool, Inc.*, No. 303 753, BC 210 894, BC 210 784 (Sup. Ct. Cal., County of San Diego 2000): Twelve California cities and counties, including Los Angeles, San Francisco, and Sacramento, sued gun makers and sellers for violations of California's Businesses and Professions Code and creating a nuisance. The state trial court denied defendants' motion to dismiss.
- *Other examples*: Sting operations in Chicago, Gary, and Detroit found that many gun dealers apparently sell to "straw purchasers," despite knowing that the gun is intended for a felon. Not only is this apparently actionable negligent conduct by the dealers, but it is claimed that distributors and manufacturers negligently continue to supply these dealers even after learning of their irresponsible practices. Under immunity bills, victims of this misconduct would be left without a civil remedy.

## Conclusion

Should those who make and sell guns be given a special exemption from common law principles of negligence, nuisance and product liability that apply to manufacturers and sellers of all other products? Should persons who believe that they have been injured as a result of tortuous conduct by the gun industry be deprived of their rights to have the courts determine whether the law entitles them to compensation? Or should legislatures

prohibit the courts from determining whether allegedly negligent gun sellers and manufacturers should be liable under the common law?

The gun industry's legislative clout has prevented laws regulating much of its conduct, and made guns the only consumer product (other than tobacco) exempt from federal safety oversight. Thus, unlike other products, guns cannot be recalled by the federal government when they are unreasonably dangerous or lack feasible safety devices. Of course, the fact that the gun industry has been able to prevent the enactment of legislation and regulation that governs all other consumer products in the United States does not exempt it from liability under common law principles of negligence, nuisance, or product liability. If anything, the existing lack of federal regulation makes the role of civil suits all the more fundamental to a system that is devoted to achieving individual justice and makes it more necessary for Congress to be vigilant in this area to maintaining sound public policy and laws that encourage the industry to behave responsibly and with regard to public safety.

The American Bar Association has long supported the principle that more accountability - not less - is needed with respect to the legal duties of firearm manufacturers, gun dealers, parents and individuals regarding their respective roles in how firearms are used and misused in our society. Dating back to 1965, the ABA has repeatedly and steadfastly called for tougher law enforcement in the area of gun crimes, regulating gun dealers, gun sales and possession and aspects of individual ownership of guns. The ABA has also advocated holding the gun industry to the same regulatory safety standards that protect the public in regard to all other manufactured products. In August 1994, the ABA House of Delegates called for Congress to amend the federal Consumer Product Safety Act to bring an end to the unique status of firearms as the only consumer product manufactured and sold in the United States not subject to federal health or safety regulation. The ABA has also long opposed federal preemption of state product liability laws and has an even longer history of opposing federal "court-stripping" proposals to legislatively limit jurisdiction of the courts on controversial subject matter.

We urge the Subcommittee to reject H.R.2037 in favor of its consideration of the historic, traditional role of the courts. This fundamental role of the courts - in making case-by-case determinations of whether individual civil tort claims are properly brought - is at the heart of our civil justice system. There should be uniform agreement that it is up to the courts to determine whether the gun industry or any other industry is liable under applicable state common law within the context of a given set of facts. There is no legitimate reason why this industry should be exempt from the same common law principles that govern all other industries and their practices, through negligence, nuisance, and product liability law. Nor is there a legitimate reason why innocent persons injured as a result of tortious conduct by gun manufacturers and sellers should be denied their opportunity to seek redress in the courts, simply because they were injured by a negligently-designed or negligently-sold gun, rather than, say, a negligently-designed toaster oven, lawnmower, or automobile. Raw political power exercised to create special laws for a particular industry makes for unsound public policy and bad precedent for the future. The

Subcommittee should strongly disfavor H.R.2037 or similar proposals seeking special immunity from our civil laws in the name of interstate commerce.

Thank you for your consideration of our views.

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