

State Laws Forbidding Municipalities from Suing the Firearm Industry: Will Firearm Immunity Laws Close the Courthouse Door?

Jon S. Vernick

Julie Samia Mair

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/jhclp>

 Part of the [Health Law Commons](#), and the [Public Health Commons](#)

Recommended Citation

Jon S. Vernick, & Julie S. 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 (2000).

Available at: <http://digitalcommons.law.umaryland.edu/jhclp/vol4/iss1/8>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Health Care Law and Policy by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**STATE LAWS FORBIDDING MUNICIPALITIES FROM SUING
THE FIREARM INDUSTRY: WILL FIREARM IMMUNITY LAWS
CLOSE THE COURTHOUSE DOOR?**

JON S. VERNICK, J.D., M.P.H.*
JULIE SAMIA MAIR, J.D., M.P.H.**

TABLE OF CONTENTS

I. INTRODUCTION	126
II. MUNICIPAL AND PRIVATE LAWSUITS	129
A. <i>Municipal Lawsuits</i>	129
B. <i>Private Lawsuits</i>	133
III. FIREARM IMMUNITY LAWS	134
A. <i>Basic Provisions</i>	135
B. <i>Causes of Action Effected</i>	136
C. <i>Affect on Private Lawsuits</i>	138
D. <i>Affect on Pending Lawsuits</i>	139
E. <i>Other Notable Provisions</i>	142
IV. FUTURE DEVELOPMENTS	143
A. <i>Other Recently Proposed Bills</i>	143
B. <i>Possible Constitutional Issues</i>	144
V. CONCLUSION	146

I. INTRODUCTION

In 1993, there were nearly 40,000 firearm-related deaths in the United States, including homicides, suicides, accidents, and deaths of undetermined intent.¹ Since then, firearm deaths have declined by

* Assistant Professor, Department of Health Policy and Management, Johns Hopkins School of Public Health; Associate Director, Johns Hopkins Center for Gun Policy and Research; Adjunct Professor of Law, Georgetown University Law Center; B.A., Johns Hopkins University; J.D., George Washington University; M.P.H., Johns Hopkins School of Public Health.

** Research Associate, Department of Health Policy and Management, Johns Hopkins School of Public Health; Core Faculty Member, Johns Hopkins Center for Gun Policy and Research; B.A., Smith College; J.D., University of Pennsylvania; M.P.H., Johns Hopkins School of Public Health.

The authors gratefully acknowledge the support of the Centers for Disease Control and Prevention to The Johns Hopkins Center for Injury Research and Policy, and of the Joyce Foundation and the Funders' Collaborative for Gun Violence Prevention to The Johns Hopkins Center for Gun Policy and Research.

1. See Sherry L. Murphy, *Deaths: Final Data for 1998*, 48 NAT'L VITAL STATISTICS REP. 66, 71 (2000) (reporting 39,595 firearm-related deaths in 1993).

more than twenty-two percent.² Nevertheless, in 1998 (the most recent year for which data are available), there remained more than 30,000 deaths in the United States associated with firearms.³

Between 1993 and 1998, many different interventions intended to address gun violence were implemented. These interventions included federal and state legislation, new police practices, community-based initiatives, and educational efforts.⁴

Two categories of intervention, however, have yet to be widely implemented. Unlike virtually all other consumer products, the safe design of firearms is largely unregulated.⁵ At the federal level, firearms are specifically excluded from the jurisdiction of the Consumer Product Safety Commission (CPSC),⁶ the federal agency with the authority to regulate the safety of most other consumer products.⁷ This can lead to rather ironic results, as when the CPSC announces a recall to protect consumers from defective firearm trigger locks (which *are* within its purview), but is powerless to address potentially defective firearms themselves.⁸

Also largely absent from the firearm policy arena in recent years have been laws enacted by municipalities within a state. Beginning in the early 1980s, the National Rifle Association (NRA) explicitly sought to convince state legislatures to enact firearm preemption laws.⁹ Today, more than forty states preempt localities from enacting some or all types of their own firearm laws.¹⁰

Forbidden to implement most kinds of legislation, and in the absence of comprehensive federal laws, recently municipalities have

2. *See id.*

3. *See id.* at 67 (reporting 30,708 firearm related deaths in 1998).

4. *See* Garen J. Wintemute, *The Future of Firearm Violence Prevention: Building on Success*, 282 JAMA 475, 475-77 (1999).

5. *See* Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PA. L. REV. 1193, 1196 (2000).

6. *See* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 30(e), 90 Stat. 503, 504 (1976), (stating, “[t]he Consumer Product Safety Commission shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition, including black powder or gunpowder for firearms”).

7. *See* 15 U.S.C. § 2052 (2000) (defining CPSC’s jurisdiction over “consumer products”).

8. *See* *Master Lock to Recall Over 750,000 Gun Locks*, REUTERS NEWS SERVICE, July 25, 2000, available in 2000 WL 24357314.

9. *See* Stephen P. Teret et al., *Gun Deaths and Home Rule: A Case for Local Regulation of a Local Public Health Problem*, 9 (Supp. 1) AM. J. PREV. MED. 44, 45 (1993).

10. *See* Jon S. Vernick & Stephen P. Teret, *New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws*, 36 HOUS. L. REV. 1713, 1730 (1999).

sought a new approach – litigation against the firearm industry. In general, these lawsuits allege that firearm manufacturers and dealers are liable to the municipality for costs associated with firearm violence.¹¹ In part, this strategy is based on the theory that litigation can serve a public health purpose. In addition to compensating the injured victim (in this case the city), public health professionals argue that litigation can encourage manufacturers of a potentially dangerous product, like firearms, to manufacture and market that product in ways likely to reduce the risk of injury.¹²

Although some have criticized the municipal lawsuits against the gun industry as usurping legislative prerogatives, state and even federal legislators have been far from silent on the issue. Mirroring its legislative strategy regarding preemption laws, the NRA has led the lobbying effort in state legislatures for the enactment of laws to prevent municipalities from suing the firearm industry.¹³ To date, these so-called firearm “immunity laws” have been enacted in nineteen states; bills are pending in several others.¹⁴

Firearm immunity laws have the potential to interfere with the ability of litigation to serve a public health purpose. Indeed, a careful analysis of the immunity laws thus far enacted yields some surprising results. Several of these laws forbid a very broad array of causes of action, purport to retroactively bar lawsuits filed prior to their enactment, or apply even to actions brought by private citizens. However, a close reading also demonstrates that, in some states, municipalities may retain viable causes of action despite the immunity laws. And the states generally seen as most receptive to litigation against the firearm industry have not yet enacted such laws. On balance, therefore, we believe that firearm immunity laws represent a formidable, but not insurmountable, obstacle to a more general litigation strategy.

In Part II, this article will describe the municipal litigation thus far brought against the firearm industry, including the relevant causes

11. See *id.* at 1713, 1745-52; see also David Kairys, *Legal Claims of Cities Against Manufacturers of Handguns*, 71 TEMP. L. REV. 1 (1998).

12. See Stephen P. Teret, *Litigating For the Public's Health*, 76 AM. J. PUB. HEALTH 1027 (1986).

13. See *Junk Lawsuits Against Gun Manufacturers* (visited July 13, 2000) <<http://www.nraila.org/research/19990825-LawsuitPreemption-001.shtml>>. In its Fact Sheet dated Feb. 24, 2000, the NRA position is set forth:

State legislatures across the nation are recognizing that these suits are an attempt at backdoor gun control, and usurp the legislature's power. Lawmakers are reacting by prohibiting cities from filing these suits. Since the first suit was introduced, 14 states have enacted NRA-backed legislation that does just that . . . and more states will soon follow.

14. See *infra* notes 62-127 and accompanying text.

of action.¹⁵ In addition, it briefly notes similarities between municipal and recent private lawsuits in order to provide relevant background information.¹⁶ Part III reviews the state immunity legislation.¹⁷ Specifically, section A notes the basic provisions shared by many of these laws;¹⁸ section B discusses variations among the immunity laws in the specific causes of action that are affected;¹⁹ section C describes the laws' effects on private (not just municipal) lawsuits;²⁰ section D examines efforts by some states to apply their immunity laws retroactively to pending litigation;²¹ and section E highlights several interesting or unusual provisions of some of the laws.²² Part IV discusses possible future developments in this area: analyzing immunity bills proposed in several states, and noting possible grounds for constitutional challenges to these laws.²³

II. MUNICIPAL AND PRIVATE LAWSUITS

A. *Municipal Lawsuits*

Since October 30, 1998, when New Orleans became the first city to sue the gun industry, thirty-one other cities and counties,²⁴ including Atlanta, Chicago, the District of Columbia, Los Angeles, New York

15. See *infra* notes 24-47 and accompanying text.

16. See *infra* notes 48-61 and accompanying text.

17. See *infra* notes 62-119 and accompanying text.

18. See *infra* notes 66-71 and accompanying text.

19. See *infra* notes 72-89 and accompanying text.

20. See *infra* notes 90-98 and accompanying text.

21. See *infra* notes 99-111 and accompanying text.

22. See *infra* notes 112-119 and accompanying text.

23. See *infra* notes 120-140 and accompanying text.

24. As of November 2000, the city and county plaintiffs include the following municipalities: Alameda County, CA (filed 5/25/99), Atlanta, GA (filed 2/4/99), Berkeley, CA (filed 5/25/99), Boston, MA (filed 6/3/99), Bridgeport, CT (filed 1/27/99), Camden City, NJ (filed 6/21/99), Camden County, NJ (filed 6/1/99), Chicago, IL (filed 11/12/98), Cincinnati, OH (filed 4/28/99), Cleveland, OH (filed 4/8/99), Compton, CA (filed 5/25/99), Cook County, IL (filed 11/12/98), Detroit, MI (filed 4/26/99), District of Columbia (filed 1/20/00), East Palo Alto, CA (filed 5/25/99), Gary, IN (filed 8/27/99), Inglewood, CA (joined Los Angeles suit on 7/16/99), Los Angeles, CA (filed 5/25/99), Los Angeles County, CA (filed 8/6/99), Miami-Dade County, FL (filed 1/27/99), Newark, NJ (filed 6/9/99), New Orleans, LA (filed 10/30/98), New York City, NY (filed 6/20/00), Oakland, CA (filed 5/25/99), Philadelphia, PA (filed 4/11/00), Sacramento, CA (filed 5/25/99), San Francisco, CA (filed 5/25/99), San Mateo County, CA (filed 5/25/99), St. Louis, MO (filed 4/30/99), Wayne County, MI (filed 4/26/99), West Hollywood, CA (filed 5/25/99), and Wilmington, DE (filed 9/29/99).

Although a total of thirty-two municipalities have filed suit filed against gun manufacturers, wholesalers/distributors, dealers, trade associations, and others in both state and federal courts, there are only twenty-two separate suits because some of the municipalities filed joint complaints. Specifically, the Los Angeles suit includes Compton, West Hollywood, and Inglewood; the San Francisco suit includes Alameda County, Berkeley,

City, and Philadelphia, have followed its lead. On June 26, 2000, New York became the first state to file suit.²⁵

The municipalities raise a variety of causes of action in their complaints. Public nuisance,²⁶ products liability (including defective or negligent design²⁷ and failure to warn²⁸), and negligent marketing and distribution²⁹ are common. Other causes of action such as civil conspiracy,³⁰ unjust enrichment,³¹ and fraud³² have also been raised.

In its Second Amended Complaint, Camden County provides an example of allegations commonly raised in a public nuisance cause of action:

91. Defendants' conduct – their policies and practices
for marketing and distribution of handguns . . . – has know-

East Palo Alto, Oakland, Sacramento, and San Mateo County; and the Chicago suit includes Cook County.

25. See *People of the State of New York v. Sturm, Ruger & Co.*, No. 402-586-2000 (N.Y. Sup. Ct. filed June 26, 2000); see also *New York Joins the Gun Suits*, N.Y. TIMES, June 28, 2000, at A26.

26. See, e.g., *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, No. 99cv-2518, ¶¶ 91-102, at 34-37 (D.N.J. filed Jan. 6, 2000); *City of Chicago v. Beretta U.S.A. Corp.*, No. 98 CH 015596, ¶¶ 83-97, at 78-82 (Cook County Cir. Ct. filed Mar. 27, 2000); *Archer v. Arms Tech., Inc.*, No. 99-912658, ¶¶ 101-107, at 36-37 (Wayne County Cir. Ct. filed Apr. 26, 1999); *District of Columbia v. Beretta U.S.A. Corp.*, No. 00CA428, ¶¶ 88-94 at 26-27 (D.C. Super. Ct. filed Jan. 20, 2000), *People v. Arcadia Machine & Tool*, No. BC 210894, ¶¶ 142-150, at 34-36 (Sup. Ct. Cal. filed July 16, 1999); *James v. Arcadia Machine & Tool*, No. L-6059-99, ¶¶ 132-147 at 27-29 (Essex County Super. Ct. filed June 8, 1999); *People v. Sturm, Ruger & Co.*, No. 402-586-2000, ¶¶ 63-66 at 18 (N.Y. Sup. Ct. filed June 26, 2000); *City of Philadelphia v. Beretta U.S.A. Corp.*, No.00-04-01-442, ¶¶ 81-94, at 27-31 (Ct. C.P. Phila., filed Apr. 11, 2000) (moved to U.S. Dist. Ct. for the Eastern Dist. of Pa. on May 12, 2000, No. 2000-2463); *City of St. Louis v. Cernicek*, No. 992-01209, ¶¶ 73-82 (St. Louis Cir. Ct. filed Sept. 9, 1999); *Sills v. Smith & Wesson Corp.*, No. 99c-09-283-FSS, ¶¶ 79-96, at 21-24 (Del. Super. Ct. filed Sept. 9, 1999).

27. See, e.g., *City of Atlanta v. Smith & Wesson Corp.*, No.99VS0149217J, ¶¶ 76-85, 18-20 (Fulton County Ct. filed Feb. 4, 1999); *City of Boston v. Smith & Wesson Corp.*, No.SUCV 99-2590, ¶¶ 90-98, at 25-27 (Suffolk County Super. Ct. filed June 26, 2000); *White v. HI-Point Firearms*, No. 381897, ¶¶ 52-63, at 18-21 (Ct. C.P. Cuyahoga County filed Apr. 8, 1999); *James*, ¶¶ 99-108, at 20-22; *City of New York v. Arms Tech., Inc.*, No. CV003641, ¶¶ 112-114, at 22 (E.D.N.Y. filed June 20, 2000).

28. See, e.g., *City of Camden v. Beretta U.S.A. Corp.*, No. L-451099, ¶¶ 109-114, at 28-29 (Camden County Super. Ct. filed June 21, 1999); *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, ¶¶ 94-99, at 30-31 (Ct. C.P. Hamilton County filed Apr. 28, 1999); *White*, ¶¶ 70-74, at 21-22; *Morial v. Smith & Wesson Corp.*, No. 98-18578, ¶ 16, at 14-15 (Orleans Parish Dist. Ct. filed Oct. 30, 1998); *City of New York*, ¶¶ 115-117, at 22-23; *Sills*, ¶¶ 67-70, at 17-18.

29. See, e.g., *City of Atlanta*, ¶¶ 132-136, at 7-9; *City of Boston*, ¶¶ 85-89, at 24-25; *City of Gary v. Smith & Wesson Corp.*, No.45D02-9908-CT355, ¶¶ 76-80, at 29-30 (Lake Super. Ct. filed Aug. 27, 1999); *Sills*, ¶¶ 74-78, at 19-20.

30. See, e.g., *City of St. Louis*, ¶¶ 83-94; *Sills*, ¶¶ 106-108, at 15-26.

31. See, e.g., *White*, ¶¶ 75-78, at 22-23; *James*, ¶¶ 148-157, at 29-30.

32. See, e.g., *City of Atlanta*, ¶¶ 114-121, 4-5; *City of Cincinnati*, ¶¶ 135-142, at 37-38.

ingly created, contributed to and maintained an unreasonable interference with rights common to the general public which is and constitutes a public nuisance under New Jersey Law.

92. Defendants' unrestrained conduct maximizes sales of their lethal products, without any check or precaution, by knowingly establishing, supplying and maintaining an oversaturated handgun market that facilitates easy access for criminal purposes, including access by underage youths and other persons prohibited to purchase or possess handguns under state or federal law. Defendants have full knowledge that their policies and practices will and regularly do result in substantially increased levels of handgun deaths and injuries and handgun use in crime in Camden County, and that their conduct has a continuing, substantially detrimental effect on the County.³³

Boston's First Amended Complaint illustrates a cause of action based on defective design:

Defendants breached their implied warranties of merchantability and of fitness for a particular purpose with respect to their firearms because those firearms were unreasonably dangerous. Yet defendants failed to incorporate feasible alternative designs to their products which would have reduced, if not prevented, injury to [plaintiffs]. . . .³⁴

According to Boston, the defendants should have included such safety features as: "devices that prevent the products from being fired by unauthorized users;"³⁵ "devices that alert users that a round is in the chamber;"³⁶ and "devices that prevent these products from being fired when the magazine is removed."³⁷

Finally, in its cause of action based on "negligent marketing and distribution," New York City alleges that "[d]efendants have a duty to the public and to the plaintiffs to use reasonable care in the market-

33. Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., No 99cv-2518, ¶¶ 91-92, at 34 (D.N.J. filed Jan. 6, 2000).

34. *City of Boston*, ¶ 94 at 26.

35. *Id.*, ¶ 94(a) at 26. For a discussion of these firearms - known as personalized guns - see also, Stephen P. Teret et al., *Making Guns Safer*, ISSUES IN SCI. & TECH. 37, 38 (Summer 1998).

36. *City of Boston*, ¶ 94(c) at 26. For a discussion of these devices - known as loaded chamber indicators - see also, Jon S. Vernick et al., *I Didn't Know the Gun Was Loaded: An Examination of Two Safety Devices That Can Reduce the Risk of Unintentional Firearm Deaths*, 20 J. OF PUB. HEALTH POL'Y 427, 428 (Winter 1999).

37. *City of Boston*, ¶ 94(d) at 26. For a discussion of these devices - known as magazine safeties - see also, Vernick, *supra* note 36, at 428.

ing, distributing and selling of their lethal products so as to reduce the risks of their guns being used inappropriately.”³⁸

All of the municipal suits are in the pre-trial phase of litigation, but are progressing at different rates. As of September 2000, courts have ruled on defendants’ motions to dismiss or their equivalent in ten decisions, involving twenty-three cities and counties.³⁹ In four decisions involving five cities—Bridgeport,⁴⁰ Cincinnati,⁴¹ Miami-Dade County,⁴² and Chicago and Cook County⁴³—the courts granted defendants’ motions in full, and the suits have been dismissed. In all instances, the municipalities have appealed those decisions. In six other decisions involving eighteen municipalities, however, the courts denied defendants’ motions to dismiss, either in full or in part, allowing the cases to proceed. Specifically, defendants’ motions to dismiss were denied in their entirety in the suits brought by New Orleans,⁴⁴ Cleveland,⁴⁵ and twelve California cities.⁴⁶ The courts denied the motions to dismiss in part in the suits filed by Atlanta, Boston, and Detroit (with Wayne County), allowing some or most of the causes of action to proceed.⁴⁷

38. *City of New York v. Arms Tech., Inc.*, CV003641, ¶ 105 at 24 (D.N.Y. filed June 20, 2000).

39. See *infra* notes 40-47 and accompanying text.

40. *Ganim v. Smith & Wesson Corp.*, No. x06-cv-99-01531988, (Conn. Super. Ct.) (order dated Dec. 10, 1999).

41. *City of Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, (Ct. C.P. Hamilton County) (order dated Oct. 7, 1999), *aff'd*, *City of Cincinnati v. Beretta U.S.A. Corp.* (Ohio Ct. App.) (Aug. 11, 2000).

42. *Penelas v. Arms Tech., Inc.*, No. 99-01941 CA-06, (Miami-Dade County Cir. Ct.) (order dated Dec. 13, 1999).

43. *City of Chicago v. Beretta U.S.A. Corp.*, No. 98CH15596 (Cook County Cir. Ct.) (order dated Sept. 15, 2000).

44. *Morial v. Smith & Wesson, Corp.*, No. 98-18578, (Orleans Parish Dist. Ct.) (order dated Feb. 28, 2000).

45. *White v. Smith & Wesson*, No. 99 CV 1134 (N.D. Ohio) (order dated Mar. 14, 2000).

46. *State v. Arcadia Machine & Tool*, No. 4095 (San Diego County Super. Ct.) (order dated Sept. 15, 2000).

47. The State Court of Fulton County dismissed Atlanta’s strict product liability claims, but denied the defendants’ motion to dismiss with respect to the negligence claims. See *City of Atlanta v. Smith & Wesson Corp.*, No. 99VS0149217J (Fulton County Ct.) (order dated Oct. 27, 1999). On May 16, 2000, the Wayne County Circuit Court dismissed Detroit’s and Wayne County’s negligence claims, but denied the defendants’ motion for summary disposition with respect to public nuisance. See *Archer v. Arms Tech., Inc.*, No. 99-912658 NZ (Wayne County Cir. Ct.) (order dated May 16, 2000). On July 13, 2000, the Superior Court of Suffolk County, Massachusetts, denied defendants’ motion to dismiss with respect to all counts but one duplicative count concerning negligent distribution and marketing. See *City of Boston v. Smith & Wesson Corp.*, No. SUCV 99-2590 (Suffolk County Super. Ct.) (order dated July 13, 2000).

B. *Private Lawsuits*

In addition to these municipal lawsuits, several individuals and private organizations have also filed suits against the gun industry based on similar legal theories. For example, the National Association for the Advancement of Colored People and the National Spinal Cord Injury Association have filed two complementary suits, one against gun manufacturers and the other against gun wholesalers and distributors, employing a theory of negligent marketing and distribution.⁴⁸

In *Dix v. Beretta*,⁴⁹ the parents of a fifteen year-old unintentionally shot by his 14-year-old friend brought a products liability case against Beretta.⁵⁰ Plaintiffs claimed, in part, that the gun used to kill their son was defective because it lacked an adequate loaded chamber indicator which would have alerted the user that a round was still in the chamber of the gun.⁵¹

In addition, at least one individual lawsuit has employed a nuisance theory. The families of Michael Ceriale, Andrew Young, and Salada Smith filed separate suits against various gun manufacturers, distributors and retail sellers in the Circuit Court of Cook County, Illinois for the shooting deaths of the decedents.⁵² Each of these suits raised a public nuisance cause of action, alleging that defendants "have created and maintained a channel of firearm distribution through which thousands of guns have been funneled to children in the City of Chicago."⁵³ In all three cases, Defendants filed a motion to dismiss with respect to the nuisance claims, which the court rejected in a consolidated opinion.⁵⁴

48. See *National Association for the Advancement of Colored People v. A.A. Arms, Inc.*, 99CV3999, (D.N.Y. filed Oct. 5, 1999) (original complaint filed July 16, 1999); *NAACP v. Acusport Corp.*, 99 CV 7037 (E.D.N.Y. filed Oct. 29, 1999).

49. No. 750681-9 (Cal. Super. Ct. filed Apr. 15, 1998).

50. See *id.*

51. On Nov. 16, 1998, the jury, by a vote of nine to three, found for Beretta. The Dixes filed a motion for a new trial, claiming juror misconduct, which the trial court judge rejected on January 15, 1999. On June 28, 2000, however, the First Circuit Court of Appeals ordered the trial judge to examine possible bias by one of the jurors. On September 8, 2000, a new trial was granted. See Henry K. Lee, *Case Against Gunmaker Gets New Trial*, S. F. CHRON., Sept. 12, 2000, at A17.

52. See *Ceriale v. Smith & Wesson Corp.*, No. 99 L 5628 (Cook County Cir. Ct. 1999); *Smith v. Bryco Arms*, No. 99 L 13465 (Cook County Cir. Ct. 1999); *Young v. Bryco Arms*, No. 98 L 6684 (Cook County Cir. Ct. 1999).

53. *Ceriale Complaint*, *supra* note 51, ¶ 46; *Smith Complaint*, *supra* note 51, ¶ 52; *Young Complaint*, *supra* note 51, ¶ 48.

54. See *Ceriale* (order dated Nov. 30, 1999); *Smith* (order dated Nov. 30, 1999); *Young* (order dated Nov. 30, 1999).

Perhaps the best known private suit is *Hamilton v. Accu-Tek*⁵⁵—the first case using a negligent marketing theory to hold some gun manufacturers liable for not taking certain steps to make it harder for their products to reach unauthorized users like juveniles or criminals.⁵⁶ In *Hamilton*, the relatives of six people killed by handguns, along with an injured survivor and his mother, sued twenty-five handgun manufacturers for negligence, claiming that the manufacturers' marketing and distribution practices contributed to the illegal market for handguns.⁵⁷ On February 11, 1999, the jury found fifteen of the defendants negligent,⁵⁸ nine of which were found to have proximately caused the injury to one or more plaintiffs.⁵⁹

At the end of the trial, Defendants moved for judgment as a matter of law.⁶⁰ In his opinion denying defendant's motion, Senior United States District Court Judge Jack B. Weinstein held that "it is the duty of manufacturers of a uniquely hazardous product, designed to kill and wound human beings, to take reasonable steps available at the point of their sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them."⁶¹ The case is now before the Second Circuit Court of Appeals.

III. FIREARM IMMUNITY LAWS

On February 9, 1999, Georgia became the first state to enact a firearm immunity law.⁶² Just eighteen months later, as of August 1, 2000, nineteen states had enacted laws specifically designed to affect the ability of municipalities to bring litigation against the firearm industry. These states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Kentucky, Louisiana, Maine, Michigan, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas,

55. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

56. *See id.* at 825.

57. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999).

58. *Id.* at 811.

59. Ultimately, the jury awarded damages to only one plaintiff, Stephen Fox and his mother, apportioning liability among just 3 manufacturers. *See id.* at 824.

60. *See id.* at 825.

61. *Id.*

62. GA. CODE ANN. § 16-11-184 (2000).

Utah, and Virginia.⁶³ Bills have also been introduced or proposed in several other states⁶⁴ and in Congress.⁶⁵

A. *Basic Provisions*

Many of these state immunity laws employ very similar, core language. For example, the full text of Maine's law is as follows:

A municipality may not commence a civil action against any firearm or ammunition manufacturer for damages, abatement or injunctive relief resulting from or relating to the lawful design, manufacture, marketing or sale of firearms or ammunition to the public. This section does not prohibit a municipality from bringing an action against a firearm or ammunition manufacturer or dealer for breach of contract or warranty for firearms or ammunition purchased by a municipality.⁶⁶

Many other states have employed this same two-part structure: 1) prohibiting lawsuits by local governments against firearm manufacturers; and 2) providing an exception for causes of action based on breach of contract or warranty for guns purchased by the local government.⁶⁷ The exception might apply where, for example, a local government had contracted with a manufacturer to provide handguns for its police force. If the guns were not as ordered, or were otherwise unfit for their intended use, the locality would still have the ability to bring an appropriate action against the manufacturer.⁶⁸

63. 2000 Ala. Acts 762 § (1)(c); ALASKA STAT. § 09.65.155 (Michie 1999); ARIZ. REV. STAT. § 12-714 (1999); ARK. CODE ANN. § 14-16-504(b)(2) (Michie 1999); H.B. 1208, 62d Gen. Assembly, 2d Reg. Sess. (Colo. 2000); GA. CODE ANN. § 16-11-184(b)(2) (1999); H.B. 15, Reg. Sess. (Ky. 2000); LA. REV. STAT. ANN. § 40:1797.1 (West 1999); ME. REV. STAT. ANN. tit. 30 § 2005 (1999); 2000 Mich. Pub. Acts 265; MONT. CODE ANN. § 7-1-115 (1999); NEV. REV. STAT. ANN. § 12.107 (Michie 1999); OKLA. STAT. tit. 21 § 1289.24a (1999); 18 PA. CONS. STAT. § 6120 (1999); S.D. CODIFIED LAWS § 21-58-1, § 21-58-2, § 21-58-3, § 21-58-4 (Michie 2000); TENN. CODE ANN. § 39-17-1314 (b)-(d) (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 128.001 (West 1999); UTAH CODE ANN. § 78-27-64 (2000); VA. CODE ANN. § 15.2-915.1 (Michie 2000).

64. See *infra* notes 120-27.

65. See Firearms Heritage Protection Act of 1999, H.R. 1032, 106th Cong. (1999).

66. ME. REV. STAT. ANN. tit. 30-A, § 2005 (1999).

67. States which, in part, incorporate this language or some variation include: Alabama (2000 Ala. Acts 762); Georgia (GA. CODE ANN. § 16-11-184(b)(2) (1999)); Kentucky (H.B. 15, Reg. Sess. (Ky. 2000)); Louisiana (LA. REV. STAT. ANN. § 40:1799(B) (West 1999)); Maine (ME. REV. STAT. ANN. tit. 30-A, § 2005); Nevada (NEV. REV. STAT. ANN. § 12.107(2) (Michie 1999)); Pennsylvania (18 PA. CONS. STAT. ANN. § 6120(A.1) (2) (1999)); Tennessee (TENN. CODE ANN. § 39-17-1314(c)(2) (1999)); Utah (UTAH CODE ANN. § 78-27-64(A)(2) (2000)); and Virginia (2000 Va. H.B. 905, to be codified as VA. CODE ANN. § 15.2-915.1).

68. See *supra* text accompanying note 66.

In some states that employ this basic language, however, there are modest variations in the parties to be protected from a municipal lawsuit. For example, in the Maine law, only firearm or ammunition manufacturers are protected.⁶⁹ But in Georgia, firearm trade associations and dealers are also immune from suit.⁷⁰ And in Virginia, protection is further extended to firearm marketers and distributors.⁷¹

B. Causes of Action Effected

Several of the immunity statutes prohibit the plaintiffs from bringing specific causes of action, many of which have been raised in the complaints filed by the municipalities. By comparison, several of the statutes expressly permit certain causes of action, affording new municipalities and/or individuals the opportunity to file suit.

For example, the Georgia immunity statute provides: "The General Assembly further declares that the lawful design, marketing, manufacturing, or sale of firearms or ammunition to the public is *not unreasonably dangerous activity* and does *not constitute a nuisance per se*."⁷² Immunity laws in Tennessee and Oklahoma have nearly identical language.⁷³ Many of the complaints in the municipal suits specifically allege that the defendants' activities are "unreasonably dangerous"⁷⁴ or that they create a nuisance.⁷⁵ In Atlanta's Complaint, for example, it alleges: "at the time the guns were manufactured, and at the time they left the control of Defendants, the guns were *unreasonably dangerous*"⁷⁶ Similarly, Atlanta also alleges that "Defendants' conduct constitutes a nuisance as thousands of the firearms produced by Defendants will be illegally trafficked into Atlanta, illegally possessed and

69. See ME. REV. STAT. ANN. tit. 30-A, § 2005 (1999).

70. See GA. CODE ANN. § 16-11-184 (b)(2) (1999).

71. See Va. H.B. 905 § 1, amending VA. CODE ANN. § 15.2-915.1 (Michie 2000).

72. GA. CODE ANN. § 16-11-184(a)(2) (1999) (emphasis added).

73. See TENN. CODE ANN. § 39-17-1314(b) (1999). Oklahoma's immunity statute appears to provide even more protection to the gun industry by prohibiting actions based on "nuisance" rather than "nuisance per se." See OKL. ST. ANN. tit. 21, § 1289.24(a) (West 1999).

74. See, e.g., First Amended Complaint and Jury Demand, ¶ 94, at 26, City of Boston v. Smith & Wesson Corp., No. 99-2590 (Suffolk County Super. Ct. filed June 26, 2000); Complaint, ¶ 53, at 18; ¶ 65, at 20; ¶ 71, at 21, White v. HI-Point Firearms, No. 381897 (Ct. C.P. Cuyahoga County filed Oct. 30, 1999); Complaint, ¶¶ 12, 13, 24, 25, Morial v. Smith & Wesson Corp., No. 98-18578 (Orleans Parish Dist. Ct. filed Oct. 30, 1998); Complaint, ¶¶ 113, 115, at 22, City of New York v. Arms Tech., Inc., No. CV 00 3641 (E.D.N.Y. filed June 20, 2000).

75. See *supra* note 26.

76. Complaint, ¶ 94, at 22, City of Atlanta v. Smith & Wesson Corp., No. 99VS0149217J (Fulton County Ct. filed Feb. 4, 1999) (emphasis added).

illegally used in Atlanta and will remain illegally in the hands of persons until the illegal possession of these firearms is detected.”⁷⁷

Michigan’s immunity statute also appears to have been tailored to the complaints filed by various municipalities, expressly prohibiting, in part, actions based on a manufacturer’s “[f]ailure to sell with or incorporate into the product a device or mechanism to prevent a firearm or ammunition from being discharged by an unauthorized person unless specifically provided for by contract.”⁷⁸ Many of the municipalities have raised causes of actions based on failure to incorporate safety devices preventing unauthorized users from operating the firearms.⁷⁹

Under Colorado’s immunity statute almost all tort actions against the gun industry are prohibited, except for certain products liability actions: “a person or other public or private entity *may not bring an action in tort, other than a product liability action*, against a firearms or ammunition manufacturer, importer, or dealer for *any remedy* arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm or ammunition.”⁸⁰

Some state immunity laws, however, specifically protect certain causes of action. Under South Dakota’s immunity legislation, several causes of action are still available to potential plaintiffs, including:

actions for deceit, breach of contract, or expressed or implied warranties, or for injuries resulting from failure of firearms to operate in a normal or usual manner due to defects or negligence in design or manufacturer . . . [or] to actions arising from the unlawful sale or transfer of firearms, or to instances where the transferor knew, or should have known, that the recipient would engage in the unlawful sale or transfer of the firearm, or would use, or purposely allow the use of, the firearm in an unlawful, negligent, or improper fashion.⁸¹

77. Plaintiff’s First Amendment to Complaint, ¶ 107, at 2 (filed Sept. 15, 1999).

78. 1999 MICH. PUB. ACTS § 15 (11).

79. See *supra* notes 34-37 and accompanying discussion.

80. H.B.1208, 62d Gen. Assembly, 2d Reg. Sess. (Colo. 2000) (to be codified at COL. REV. STAT. ANN. § 13-21-504.5(A)(1)) (emphasis added). Colorado’s immunity statute, however, does exempt certain actions from its purview: “a firearms or ammunition manufacturer, importer, or dealer may be sued in tort for any damages proximately caused by an act of the manufacturer, importer, or dealer in violation of a state or federal statute or regulation.” H.B. 1208. In such actions, the plaintiff must prove that the defendant violated the state or federal statute or regulation by clear and convincing evidence. *Id.* This exception, however, does not exempt the common law theories of liability raised by the municipalities.

81. S.D. CODIFIED LAWS § 21-58-4 (Michie 2000).

Accordingly, South Dakota's immunity law does not extend to a cause of action for negligent design or manufacture, a claim raised in several of the municipal suits.⁸² In addition, actions based on deceit are still permitted.⁸³

Similarly, Alaska's immunity statute permits a cause of action based on negligent design.⁸⁴ And Virginia's immunity statute exempts, *inter alia*, "an action for injuries resulting from negligence."⁸⁵ Many of the complaints filed by the municipalities raise negligence claims, including negligent marketing and distribution.⁸⁶

Texas' immunity statute, in addition to exempting the standard breach of contract or warranty action for guns bought by municipalities,⁸⁷ also exempts: "damage or harm to property owned or leased by the governmental unit caused by a defective firearm or ammunition; personal injury or death, if such action arises from a governmental unit's claim for subrogation;⁸⁸ injunctive relief to enforce a valid ordinance, statute, or regulation; or contribution under Chapter 33, Civil Practices and Remedies."⁸⁹ None of these exemptions appear to apply to the type of municipal suits filed so far.

C. *Effect on Private Lawsuits*

In addition to affecting municipal lawsuits, the immunity laws of three states—Alaska, Colorado, and South Dakota—also explicitly bar some or all lawsuits that might be brought by individuals. With recent victories for the plaintiffs in some private lawsuits,⁹⁰ extending the

82. For municipal suits alleging negligent design, see *supra* note 27.

83. See *supra* text accompanying note 81.

84. Alaska's statute provides that although civil suits may not be based "on the lawful sale, manufacture, or design of firearms or ammunition," the immunity "does not prohibit a civil action resulting from a *negligent design*, a manufacturing defect, a breach of contract, or a breach of warranty." ALASKA STAT. § 09.65.155 (Michie 1999) (emphasis added).

85. VA. CODE ANN. § 15.2-915.1 (Michie 2000). This portion of the statute states in its entirety:

This section shall not prohibit (i) a locality from bringing an action against a firearms or ammunition marketer, manufacturer, distributor, dealer, seller, or trade association for breach of contract or warranty or negligence as to firearms or ammunition purchased by the locality or (ii) an action for injuries resulting from negligence or breach of warranty or contract.

Id.

86. For municipal suits alleging negligent marketing or distribution, see *supra* note 29.

87. See notes 66-71 and accompanying text, for a discussion of this "standard" language.

88. Texas recognizes two types of subrogation: conventional, which arises by contract, and legal, which arises by operation of law or in equity to prevent injustice. See *In re Texas Prop. & Cas. Ins. Guar. Assoc.*, 989 S.W.2d 880, 885 (Tex. App. 1999); *Dickey v. Healthcare Recoveries*, 1998 Tex. App. LEXIS 425, *7-*8 (Tex. App. 1998).

89. TEX. CIV. PRAC. & REM. CODE § 128.001(d) (1-5) (West 1999).

90. See *supra* notes 55-58 and accompanying text.

firearm industry's protection to these suits as well may represent a future trend.

Alaska's law provides that civil actions may not be brought "if the action is based on the lawful sale, manufacture, or design of firearms or ammunition," and is not limited to municipalities.⁹¹ Specifically excepted from Alaska's immunity law are actions resulting from "a negligent design, a manufacturing defect, a breach of contract, or a breach of warranty."⁹² Under this language, an individual lawsuit like the *Dix* case (based on negligent design) would not be prohibited, but one like *Hamilton* (based on negligent marketing) would be.⁹³

In Colorado, the lawsuit prohibitions explicitly apply to "a person or other public or private entity."⁹⁴ In South Dakota, firearm manufacturers, distributors, and sellers are immune from liability to "*any person or entity . . . for any injury suffered, including wrongful death and property damage, because of the use of [a] firearm by another.*"⁹⁵ This seems to suggest that if the injury is self-inflicted, whether accidentally or intentionally, the victim might retain a cause of action.

By comparison, two states specifically exclude lawsuits brought by individuals from the reach of their immunity law. Oklahoma's law provides that it "shall not be construed to prohibit an individual from bringing a cause of action based upon an existing recognized theory of law."⁹⁶ In Tennessee, individual lawsuits based on breach of contract, breach of warranty, or defective manufacture are protected.⁹⁷ The Tennessee law further (and perhaps redundantly) assures that the protections afforded the firearm industry "shall not apply in any litigation brought by an individual" ⁹⁸ It is unclear whether, even in the majority of states that do *not* specifically affect individual lawsuits, firearm industry defendants will nevertheless attempt to invoke the immunity laws as a shield against liability in private actions.

D. *Effect on Pending Lawsuits*

The immunity legislation enacted in at least four states—Georgia, Kentucky, Louisiana, and Michigan—purports to apply to pending lawsuits. If given effect, the legislation could provide a basis for dis-

91. ALASKA STAT. § 09-65.155 (Michie 2000).

92. *Id.*

93. See *supra* notes 49-61 and accompanying text.

94. H.B. 1208, 62d Gen. Assembly, 2d Reg. Sess. (Colo. 2000).

95. S.D. CODIFIED LAWS § 21-58-2 (Michie 2000) (emphasis added).

96. OKLA. STAT. tit. 21, § 1289.24 (a)(2) (1999).

97. See TENN. CODE ANN. § 39-17-1314 (c)(3) (1999).

98. TENN. CODE ANN. § 39-17-1314 (c)(4) (1999).

missal of the suits previously filed by the cities of Atlanta, Detroit, New Orleans, and Wayne County.

Georgia's immunity statute states that it applies "to any actions pending on or brought on or after February 9, 1999 . . ." ⁹⁹ Shortly after the law's enactment, several of the defendants in the Atlanta suit (filed on February 4, 1999), filed a motion to dismiss based partly on the immunity statute. ¹⁰⁰ Although the court denied Defendants' motion in part, its opinion barely touched upon the statute, and did not address directly the retroactivity of the immunity law. ¹⁰¹ As of the end of 2000, this issue was before the Georgia Supreme Court, and discovery had been stayed pending a decision. ¹⁰²

Louisiana's immunity statute is similar to the Georgia law in that it explicitly provides for retroactive application: "The provisions of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date." ¹⁰³ Louisiana's immunity statute has also been tested in court. On February 28, 2000, the civil district court in the City of New Orleans' suit denied Defendants' Peremptory Exceptions of No Right of Action and No Cause of Action (equivalent to a motion to dismiss). ¹⁰⁴ Unlike the Georgia decision, however, the court devoted almost half of its opinion to the (un)constitutionality of the retroactive provision in Louisiana's immunity law. ¹⁰⁵ Notably, however, the court did not address the prospective application of the law. On April 3, 2001, the Supreme Court of Louisiana reversed in part and vacated in

99. GA. CODE ANN. § 16-11-184(b)(2) (1999).

100. See Smith & Wesson Corp.'s Memorandum in Support of Its Motion to Dismiss, at 3-8, *City of Atlanta v. Smith & Wesson Corp.*, No. 99VS0149217J (Fulton County Ct.) (filed Sept. 15, 1999).

101. In its October 27, 1999 order, the court stated in a footnote:

In reaching its decision, the Court did not find to be of merit Plaintiff's argument that House Bill 189, approved *in toto* by Governor Barnes on Feb. 9, 1999, was enacted as Amended O.C.G.A. § 16-11-184 excluding Section 3 of the same which provides: "This act shall apply to any action pending on or brought on or after the date this act becomes effective."

City of Atlanta, No. 99VS0149217J, at 2 n.2 (order dated Oct. 27, 1999).

102. See *Glock, Inc. v. City of Atlanta*, No. 1999CV16402 (Fulton County Ct.) (order dated Apr. 12, 2000).

103. LA. REV. STAT. ANN. § 40:1797.1 (West 2000).

104. See *Morial v. Smith & Wesson*, No. 98-18578 (Orleans Parish Dist. Ct.) (order dated Feb. 28, 2000).

105. The court found three reasons supporting its conclusion that the Louisiana immunity statute could not apply retroactively: (1) plaintiffs have a vested right to bring suit under the City of New Orleans' home rule charter; (2) the retroactive provision of § 1797.1 is a prohibited special law; and (3) as a substantive law, § 1797.1 cannot be applied retroactively. See *id.* at 7. For a detailed discussion of this order and the retroactive application of § 1797.1, see student note, this issue.

part holding that Louisiana's immunity law could in fact be retroactively applied to the City's suit. The Supreme Court found that the law was enacted pursuant to a reasonable exercise of the state's police power and its retroactive provision was not a constitutionally prohibited local or special law.¹⁰⁶

The Michigan immunity law took effect immediately when signed by the Governor on June 29, 2000.¹⁰⁷ Regarding its applicability, the statute provides: "[The immunity provisions] are intended only to clarify the current status of the law in this state, are remedial in nature, and, therefore, apply to a civil action pending on the effective date of this act."¹⁰⁸ The wording of this provision may have been chosen to thwart the kind of arguments raised by plaintiffs in the Atlanta and New Orleans suits – that immunity legislation cannot be applied retroactively to pending lawsuits.¹⁰⁹ On March 23, 2001, the Circuit Court for the County of Wayne denied defendants' motion to dismiss Detroit and Wayne County's suits based on the immunity legislation. Specifically, the Court found that the retroactive language "is an unconstitutional violation of separation of powers because the legislature has in effect acted as the Court of Appeals and dictated what law should be applied in a case presently pending before this court." The Court also found that the retroactive application of the statute is unconstitutional because it takes away a vested right to sue. The Court explicitly held, however, that the immunity law could be applied prospectively.¹¹⁰ Finally, although the Kentucky legislature intends that its immunity statute has retroactive effect,¹¹¹ no municipal cases have yet been filed in that state and therefore the retroactivity issue will never arise.

Given the mixed results to date, it is too early to definitively determine whether most immunity legislation will ultimately invalidate pending lawsuits.

106. See *Morial v. Smith & Wesson Corp.*, No. 00-CA-1132 (La. Sup. Ct.) (order dated April 3, 2001).

107. See 2000 Mich. Pub Acts 265.

108. See *id.*

109. See *supra* notes 100-106 and accompanying text.

110. On April 26, 1999, both Detroit and Wayne County filed suit against the gun industry in two separate filings. See Complaint and Demand for Jury Trial, *Archer v. Arms Tech., Inc.*, No. 99912658 (Wayne County Cir. Ct. filed Apr. 26, 1999); Complaint and Demand for Jury Trial, *McNamara v. Arms Tech., Inc.*, No. 9912662 (Wayne County Cir. Ct. filed Apr. 26, 1999).

111. See H.B. 15, Reg. Sess. (Ky. 2000).

E. Other Notable Provisions

Several of the immunity statutes have particular provisions worth noting. For example, both the Michigan and Colorado statutes grant costs and attorney fees if civil actions have been filed in violation of the immunity provisions.¹¹² Texas and Alabama only permit municipal suits with certain approval. In Texas, otherwise prohibited suits may be brought "if the suit is approved in advance by the legislature in a concurrent resolution"¹¹³ or by enactment of a law.¹¹⁴ Alabama, on the other hand, vests any authority to sue with the Attorney General upon consent of the Governor.¹¹⁵ Also in Texas, the attorney general is expressly exempted from the immunity provisions.¹¹⁶ By comparison, in Virginia, "any state governmental entity, including a department, agency, or authority" is expressly forbidden from suing in this capacity,¹¹⁷ and in Utah, even the state may not sue.¹¹⁸

Finally, while no immunity legislation has been enacted in Wyoming, a statute entitled, the "Second Amendment defense," gives authority to the attorney general, with approval from the Governor, to intervene or file an amicus curiae brief in lawsuits filed in Wyoming against the gun industry or certain individuals in other jurisdictions "if in his judgment, the action endangers the constitutional right of citizens of Wyoming to keep and bear arms."¹¹⁹

112. See 2000 Mich. Pub. Acts § 15(9); COLO. REV. STAT. § 13-21-504.5(3) (1999).

113. See *The Texas Legislature Online* (visited Nov. 13, 2000) <<http://www.capitol.state.tx.us/capitol/legproc/other.htm>>. (Defining a concurrent resolution as:

A resolution is a legislative document used to express the collective will of the members of the legislature or of either house . . . A concurrent resolution is used when both houses have an interest in a particular matter. Such resolutions may originate in either house but must be adopted by both. A concurrent resolution passed by both houses may be used for matters affecting operations and procedures of the legislature, such as joint sessions or adjournment sine die. Frequently, concurrent resolutions are used to memorialize the U.S. Congress, give directions to a state agency or officer, or express views of the legislature. Concurrent resolutions, except those that pertain solely to procedural matters between the two houses, must be submitted to the governor for approval).

114. TEX. CIV. PRAC. & REM. CODE ANN. § 128.001(c) (West 1999).

115. See H.B. 105, Reg. Sess. (Al. 2000).

116. See TEX. CIV. PRAC. & REM. CODE § 128.001(e) (West 1999).

117. VA. CODE ANN. § 15.2-915.1 (Michie 2000).

118. See UTAH CODE ANN. § 78-27-64(2) (2000).

119. WYO. STAT. ANN. § 9-14-101 (Michie 1999). Wyoming's Second Amendment defense statute states in full:

The attorney general may seek to intervene or file an amicus curiae brief in any lawsuit filed in any state or federal court in Wyoming, or filed against any Wyoming citizen or firm in any other jurisdiction for damages for injuries as a result of the use of fire arms that are not defective, if in his judgment, the action endangers the constitutional right of citizens of Wyoming to keep and bear arms. The attorney general is directed to advance arguments that protect the constitutional

IV. FUTURE DEVELOPMENTS

A. *Other Recently Proposed Bills*

During 2000, immunity legislation was under consideration in at least four other states: Delaware, Massachusetts, Ohio, and Vermont.¹²⁰ Vermont's proposed legislation not only prohibited municipalities from bringing suit against the gun industry, but the state was also barred unless the general assembly approves the suit.¹²¹ Massachusetts' proposal is relatively simple and similar to many of the earlier statutes.¹²²

The proposed immunity bills in Ohio and Delaware, however, were far more comprehensive. Ohio House Bill 498 gives extensive protection to "a member of the firearm industry," which is broadly defined,¹²³ and then lists certain circumstances under which this protection is forfeited or exempted.¹²⁴ Moreover, Ohio House Bill 498 explicitly states that the immunity legislation it proposes has both prospective and retroactive application,¹²⁵ and therefore, if enacted, threatens the lawsuits filed by the cities of Cleveland and Cincinnati.

Delaware's proposed immunity legislation, which is set forth in House Bill 350, also provides extensive protection for members of the gun industry.¹²⁶ Interestingly, the bill expressly states that its purpose is to thwart the use of "questionable legal theories" or municipal lawsuits designed to "extort money from members of the industry"¹²⁷

right to bear arms. Before intervening in any lawsuit pursuant to this section, the attorney general shall obtain the approval of the governor.

Id.

120. See The Coalition to Stop Gun Violence, Immunity Legislative Update (visited Aug. 1, 2000) <http://www.csgv.org/content/coalition/coal_immunity_update_07_08_00.html>.

121. See H.B.155, 65th Biennial Sess. (Vt. 1999); see also S.B. 32, 65th Biennial Sess. (Vt. 1999).

122. See An Act Relative to Manufacturer Protection, Docket No. 1872 (proposing to amend Chapter 140 of the General Laws by inserting Section 131Q after section 131P).

123. See H.B. 498 § 1, 123d Gen. Assembly Reg. Sess. (Ohio 1999-2000) (to be codified at OHIO REV. CODE ANN. § 2305.401(B)).

124. See H.B. 498 § 1, 123d Gen. Assembly, Reg. Sess. (Ohio 1999-2000) (to be codified at OHIO REV. CODE ANN. § 2305.401(C) (1)). In addition to these forfeiture provisions, House Bill 498 also exempts two civil actions from its immunity provisions: an action (1) seeking damages for harm based on a product liability claim as defined elsewhere; and (2) for a breach of an express warranty. H.B. 498 § 1, 123d Gen. Assembly Reg. Sess. (Ohio 1999-2000) (to be codified at OHIO REV. CODE ANN. § 2305.401(C) (2), (3)).

125. See H.B. 498 § 2, 123d Gen. Assembly, Reg. Sess. (Ohio 1999-2000). If the Ohio Supreme Court deems the retroactive provision unconstitutional, however, that provision is to be severed and the law given prospective application only. *Id.*

126. See H.B. 350, 104th Gen. Assembly (Del. 1999).

127. *Id.* The bill's synopsis provides in part:

B. Possible Constitutional Issues

Municipalities are creations of the state. As such, it is well settled that a municipality or other political subdivision of a state generally may not raise federal constitutional challenges to laws limiting its powers enacted by its creating state.¹²⁸ However, as has been described, several of the state immunity laws apply to individual lawsuits as well.¹²⁹ Private litigants in those states would certainly have standing to challenge the constitutionality of the immunity laws.¹³⁰

One future challenge to the immunity legislation may derive from the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law."¹³¹ The United States Supreme Court has held that, under certain circumstances, "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."¹³² Thus, by foreclosing the right to sue members of the gun industry,

Several large municipalities in other states have recently become involved in law suits against members of the firearms industry based upon unique and sometimes questionable legal theories for the apparent purpose of obtaining money damages which may then be used to finance medical and social programs in those municipalities. If successful, such suits have the very real potential of severely damaging or destroying the firearms industry in those states. . . . The purpose of this Act is to ensure that any such suits brought by political subdivisions of the State of Delaware undergo a review process to ensure that any such suits are, in fact, meritorious and are not being brought simply for the purpose of harming the legitimate firearms industry or extorting money from members of the industry. . . .

Id. See also ARIZ. REV. STAT. § 12-714 (B) (1999) (demonstrating that Arizona's enacted immunity statute specifically discusses the municipal lawsuits as well). New immunity bills were also introduced in several state legislatures during the 2001 legislative session. See, e.g. S.B. 218, 415th Gen. Assembly, Reg. Sess. (Md. 2001).

128. See, e.g., *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923).

129. See *supra* notes 90-98 and accompanying text.

130. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992) (discussing the elements necessary to satisfy the standing requirement).

131. U.S. CONST. amend. XIV, § 1.

132. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (discussing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). See also *Martinez v. California*, 444 U.S. 277, 281-282 (1980) ("Arguably, the cause of action for wrongful death that the State has created is a species of 'property' protected by the Due Process Clause."); Peter Zablotsky, *From a Whimper to a Bang: The Trend Toward Finding Occurrence Based Statutes of Limitations Governing Negligent Misdiagnosis of Diseases with Long Latency Periods Unconstitutional*, 103 DICK. L. REV. 455, 485 (Spring, 1999) ("The procedural due process analysis begins with the universally accepted premise that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause, and that Due Process Clauses protect civil litigants who seek recourse in the courts as plaintiffs attempting to redress grievances.").

individuals might argue that the state has deprived them of their property in violation of due process.

State constitutions, moreover, often provide additional protections through due process, access to court, and right to remedy provisions.¹³³ Louisiana's constitution, for example, provides: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."¹³⁴ The Texas constitution grants similar protection: "All courts shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law."¹³⁵ Indeed, of the nineteen states with immunity legislation, at least fifteen of their state constitutions have such provisions.¹³⁶ Therefore, the scope of due process protection or whether it applies at all, may depend upon the state in which the suit was brought.

Similarly, the Fourteenth Amendment also forbids a state to "deny any person within its jurisdiction the equal protection of the laws."¹³⁷ It might be argued that singling out one industry for protection from liability would deny a plaintiff the opportunity to sue simply because his or her injuries were caused by a firearm, where a plaintiff with similar injuries caused by some other product (say, a carpenter's nail gun) would not be so barred.

In the past, however, Congress has chosen to provide protection to certain industries that others do not enjoy. For example, in 1994, Congress enacted the General Aviation Revitalization Act.¹³⁸ The Act imposes an eighteen-year statute of repose for product liability suits against manufacturers of certain small planes.¹³⁹ No court has addressed whether the Act presents any equal protection problems.

133. See Zablotzky, *supra* note 132, at 478.

134. LA. CONST. art I, § 22.

135. TEX. CONST. art. I, § 13.

136. See ALA. CONST. art. 1, § 13; ARIZ. CONST. art. 18, § 6; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; GA. CONST. art. 1 §, 1; KY. CONST. Bill of Rights, § 14; LA. CONST. art. I, § 22; ME. CONST. art 1, § 19; MONT. CONST. art. II, § 16; OKLA. CONST. art. II, § 6; PA. CONST. art. 1, § 11; S.D. CONST. art. VI, § 20; TENN. CONST. art I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. 1, § 11. See also Zablotzky, *supra* note 132, at 486-87.

137. U.S. CONST. amend. XIV, § 1.

138. General Aviation Revitalization Act, Pub. L. No. 103-298, 108 Stat. 1552 (1994).

139. See *id.* Of course, unlike firearms, numerous standards regulate the safe design of these aircraft. See 14 CFR § 21.1 *et seq.*

However, the constitutionality of other so-called “tort reform” laws has generally been analyzed on a mere rational basis standard.¹⁴⁰

V. CONCLUSION

In general, if litigation is to serve a public health purpose, the courthouse doors must remain open. Firearm immunity laws attempt to close those doors. For a number of reasons discussed in this article, however, the inhibitory effects of the immunity laws may be mitigated. In many of the states that have enacted these laws, certain causes of action are still available even to municipal plaintiffs. In others, attempts to retroactively apply an immunity law to pending suits have thus far met with mixed success.

Of course, it is also important to recall that the majority of states have not enacted an immunity law at all. And as an intervention, litigation is fundamentally different from legislation. For gun control *legislation* to be successful, a national approach may be required. But *litigation* has the potential to dramatically affect an industry even if it is only implemented in a few receptive states. For example, the major gun manufacturer Smith & Wesson recently agreed to change the way it manufactures and markets its products in exchange for being dismissed from most (but not all) of the municipal lawsuits—before a single one had even approached trial.¹⁴¹

For now, then, even in many states with immunity laws, the courthouse door remains at least ajar. And in many other states, litigation by both individuals and municipalities continues to be among the most active areas of the gun policy arena.

140. See generally, Perry H. Applebaum & 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 (1999).

141. See James Dao, *Commercials By Gun Industry Will Try to Counter Litigation*, N.Y. TIMES, July 28, 2000, at A16.