

STATE OF INDIANA )  
 ) SS:  
COUNTY OF LAKE )

LAKE SUPERIOR COURT  
CIVIL DIVISION, ROOM FIVE  
HAMMOND, INDIANA

CITY OF GARY, INDIANA, by its Mayor, )  
SCOTT L. KING, )  
Plaintiff, )  
vs. )  
SMITH & WESSON CORP., et al., )  
Defendants. )

CAUSE NO. 45D05-0005-CT-00243

Filed in Open Court

OCT 23 2006

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**ORDER OF OCTOBER 23, 2006**

*Thomas R. Philpott*  
CLERK LAKE SUPERIOR COURT

**INTRODUCTION**

This matter came before the Court upon the Motion to Dismiss, or in the alternative, Motion for Judgment on the Pleadings, filed by the following Defendant Manufacturers: SMITH & WESSON CORP., BERETTA U.S.A. CORP., COLT'S MANUFACTURING COMPANY, INC., BROWNING ARMS COMPANY, B.L. JENNINGS, INC., BRYCO ARMS CORPORATION, GLOCK INC., BEEMILLER, INC., d/b/a HI-POINT FIREARMS i/s/h/a HI-POINT FIREARMS CORP., PHOENIX ARMS, STURM, RUGER & COMPANY, INC., and TAURUS INTERNATIONAL MANUFACTURING, INC. (hereinafter, "Manufacturers").

The basis for Manufacturers' motion is the Protection of Lawful Commerce in Arms Act (hereinafter, "PLCAA"). The PLCAA, codified at 15 U.S.C. § 7901 *et seq.*, became law on October 26, 2005. Manufacturers contend that the PLCAA applies to this case and that the PLCAA provides for the immediate dismissal of this matter.

The Plaintiff, City of Gary, (hereinafter, "City") has filed a Memorandum in Opposition to the Manufacturer's motions and contends that the PLCAA does not apply or is unconstitutional.

**FACTS**

On August 27, 1999, the City brought this action against the Manufacturers and asserted

various claims, including public nuisance and negligence claims. One of the remedies sought by the City was compensatory damages. The City also requested injunctive relief and punitive damages. The City charged that the Manufacturers engaged in “wilful, deliberate, reckless, and negligent distribution of guns” to criminals and high-risk gun dealers, that the Manufacturers refused to take reasonable steps to control the distribution of their hand guns and the Manufacturers negligently designed unsafe hand guns. The Manufacturers moved to dismiss the original complaint for failure to state a claim. The trial court granted the Manufacturers’ motion. The City appealed.

Ultimately, the Indiana Supreme Court held that the City presented valid claims for public nuisance, negligent sales, and negligent design. The case was remanded for further proceedings. See, City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003). During the pendency of this case, Congress enacted, and the President signed into law, the PLCAA. The PLCAA became law on October 26, 2005. In a nutshell, the PLCAA provided a bar to the commencement of a “qualified civil liability action” in state or federal court, and required state and federal courts to immediately dismiss any pending actions or those subsequently brought. The Manufacturers claim this case falls within the purview of the PLCAA and moved to dismiss this case pursuant to the mandate of the act. The City challenges the constitutionality of the PLCAA on the following grounds.

- I. The PLCAA is unlawful preemption;
- II. The PLCAA’s retroactive abolition of pending state court cases violates Due Process;
- III. The PLCAA violates the Principles of Separation of Powers;
- IV. The PLCAA violates the Tenth Amendment and Eleventh Amendments.

ISSUES

I. **Whether the PLCCA is Unlawful Preemption**

The Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land ....” U.S. Const. art. VI, cl.2. As such, Congress has the power to trump state legislation in an area where there is federal regulatory authority. Preemption may be expressly provided for in a federal statute or implied. Further, preemption may be complete or partial. In order for the federal action to be a valid exercise of preemption, it must first be a valid exercise in federal power. Thus, the first inquiry is whether Congress had the power to pass the PLCAA. With regard to this threshold inquiry, the Commerce Clause, U.S. Const. art I §8, confers upon congress the power to regulate activities that substantially impact interstate commerce. Gonzales v. Raich, 125 S.Ct. 2195 (2005). Clearly, this case implicates interstate commerce and therefore the Commerce Clause provides Congress with legislative power in this area. Further, the language of the PLCAA is clear that Congress expressly intended to preempt state tort law in the area of gun manufacturers state tort liability. Since the Commerce Clause provides Congress power to enact the PLCAA to preempt state tort law then preemption is of no moment. The inquiry next turns to whether the PLCAA is constitutionally firm on the other challenged grounds.

II. **Whether the PLCAA’S Retroactive Abolition of Pending State Court Cases Violates Due Process**

Due Process Clauses of the Fifth Amendment guarantee a right to a remedy for injuries to life, liberty, and/or property rights. United States Supreme Court has recognized that laws that eliminate common law causes of action may violate due process. In *Poindexter v Greenhow*, the Court held, “it is not within the powers of the state to deny a person all redress for a deprivation of rights secured by the constitution and that to take away a remedy is to take away the right

itself.” *Poindexter v Greenhow*, 114 U.S. 270 (1885). Under the PLCAA gun manufacturers would not have any responsibility for foreseeable harm caused by negligence in producing and distributing weapons and those harmed, past, present, and future would be wholly without a remedy in state and federal court. Under the Fifth Amendment, the City had a substantial, protectable interest in its tort claim. Inherent in the Due Process Clause, is a “separate and distinct right to seek judicial relief for some wrong.” *Christopher v. Harbury*, 536 U.S. 403 (2002). It is acknowledged that Congress may regulate remedies or even limit state court remedies. Due Process is violated when Congress abolishes an existing remedy and provides no alternative. To deprive the City of its right in interest deprives the City of a vested cause of action without just compensation; thereby, the PLCAA is violative of the Due Process Clause and, therefore, unconstitutional.

Further, our Supreme Court has long recognized laws that are applied retroactively and/or laws that serve as a deprivation of existing rights are particularly unsuited to a democracy such as ours. Our sovereign’s distaste for retroactivity was discussed in *Landgraf v USI Film Prods.*, 114 S.Ct. 1483 (1994). In *Landgraf*, the Court stated:

“The presumption against retroactive legislation is deeply rooted in our jurisprudence, it embodies a legal doctrine centuries older than the Republic.”

Our founding fathers were very aware of the pit-falls of retroactive legislation and have safeguarded the Republic with various provisions of the Constitution, including the *Ex-Post Facto* clause, the Fifth Amendment’s Takings Clause, prohibitions on Bills of Attainder, and our Due Process clause. In discussing these principles against retroactive statutes, the *Landgraf* Court stated:

“These provisions demonstrate that retroactive statutes raise particular concerns the legislatures unmatched power allow it to sweep away settled expectations suddenly and without individualized

consideration. Its responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals...restricts governmental power by restraining arbitrary and potentially vindictive legislation.” *Landgraf*, 114 S.Ct. 1483.

While it is recognized that *Landgraf* was a case involving an analysis as to whether or not retroactive application was implied by the statute in question rather than expressly provided for, *Landgraf* nevertheless sets forth sound reasons for close review of statutes with retroactive affect. Additionally, the suspect and unjust nature of retrospective legislation was examined in *Kaiser Aluminum & Chemical Corp. v Bonjorno*, as follows:

“The United States Constitution itself so far reflects these sentiments that it proscribes all retroactive application of punitive law and prohibits (or requires compensation for) all retroactive laws that destroy vested rights.”

*Kaiser Aluminum & Chemical Corp. v Bonjorno*, 110 S.Ct. 1570, 1587 (1990). (Internal citations omitted). Further, the *Kaiser* Court recognized that retrospective laws are highly injurious, oppressive, and unjust, and that retrospective laws should not be made either for the decision of civil causes or the punishment of offenses.

In the case at bar, the retroactive legislation may not be a means of retribution against unpopular groups or individuals; however, it is clearly an act which was passed in response to pressure from the gun industry. Further, it is clear that the PLCAA destroys the City’s cause of action and valid state court remedies. These vested rights may not be destroyed by legislative fiat without violating our Constitution. As such, the retroactive abolition of an existing state cause of action is unconstitutional since its retroactive affect is an unconstitutional deprivation of existing

rights, and is an unconstitutional *Ex-Post Facto* law.

**III. Whether the PLCAA Violates Principles of Separation of Powers**

Further, in *United States v Klein*, 80 U.S. 128 (1872), the United States Supreme Court established an Article III limitation on congressional law making power. The holding in *Klein* was simply that Congress cannot, through legislation, direct the outcome of pending cases since to do so would infringe upon the judiciary's role in deciding cases and violate the Separation of Powers as guaranteed by the Constitution. The scope of the PLCAA clearly and unmistakably directs the outcome of this pending case; and, therefore, is a clear and unmistakable violation of the Separation of Powers as guaranteed by the Constitution; and is, therefore, unconstitutional.

**IV. Whether the PLCAA Violates the Tenth Amendment and Eleventh**

**Amendment**

The Tenth Amendment sets forth: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Recent Supreme Court decisions have set forth an increased protection of state sovereignty through restrictions on congressional law making power where congressional acts are deemed "commandeering of state governments." See *Printz v United States*, 117 S.Ct. 2365 (1997). In *Printz*, the Supreme Court held that federal legislation known as the Brady Handgun Violence Prevention Act (hereinafter, "Brady Act") was unconstitutional because it required state law enforcement officers to temporarily work for the federal government. The Brady Act created a national system of instant background checks with regard to gun purchases. The Brady Act required local law enforcement to process identification forms in an attempt to verify the legality of gun purchases. The Supreme Court held that:

"Congress cannot compel the States to enact or enforce a federal

regulatory program...[or] circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the states to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Prinz*, 521 U.S. at 935.

Under the Tenth Amendment, the federal government may not dictate that state court officers take action to enforce a federal program; to do so would be commandeering of state power. The PLCAA, in the instant case, is not commandeering of state judicial power because, amongst other things, it allows the state court judge to determine whether the act applies in first instance. Further, the PLCAA does not implicate any state immunity from suit. As such, the PLCAA does not violate the Tenth or Eleventh Amendments.

**CONCLUSION**

Upon the points and authorities cited herein, the PLCAA is unconstitutional; and, therefore, the Motion to Dismiss and Motion for Judgment on the Pleadings filed by the Defendant Manufacturers are DENIED

**ALL OF WHICH IS ORDERED** October 23, 2006.



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ROBERT A. PETE, JUDGE