Written testimony on SB23-168, to eliminate firearms businesses via abusive lawsuits

Colorado House of Representatives
Judiciary Committee
State Capitol
Denver, Colorado
Mar. 22, 2023

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This testimony has two parts. Part I details the Colorado 1986 and 2000 statutes enacted to prevent abusive lawsuits that targeted firearms business for making and selling properly-functioning firearms in full compliance with all gun control laws.

Part I also describes a similar federal statute, the Protection of Lawful Commerce in Arms Act (PLCAA), enacted in 2005. None of the laws forbid lawsuits for firearms that are genuinely defective, such as a firearm that discharges when it is dropped. The testimony explains what sorts of lawsuits can and cannot be brought under the Colorado federal laws.

Part II explains how SB23-168, if adopted, would make it simple for states that prohibit abortion, such as Wyoming or Oklahoma, to eliminate abortion services in Colorado. SB23-168 departs from the common law of torts and creates a uniquely punitive system of liability solely for firearms businesses. It allows suits based on conduct that did not occur in Colorado and eliminates the normal tort rule of proximate cause. Further, The bill allows lawsuits to be brought by the Colorado Attorney General or designees of the Attorney General—such as a gun prevention organizations. States with abortion bans could easily copy the SB23-169, change "firearms industry" to "abortion industry," and use their analogue legislation to eliminate abortion services in Colorado.

Part I. Colorado Law

I.A. Limitation on Product Liability Suits

In 1986, the General Assembly enacted, C.R.S. § 13-21-501. It provides:

> The general assembly hereby declares that it shall be the policy in this state that product liability for injury, damage, or death caused by the discharge of a firearm or ammunition shall be based only upon an actual defect in the design or manufacture of such firearm or ammunition and not upon the inherent potential of a firearm or ammunition to cause injury, damage, or death when discharged.

This section forbids some product liability suits. Product liability is one type of tort claim. Unlike many other torts, product liability does not require the plaintiff to prove that the manufacturer or seller of a product acted with any improper state or mind, such as negligence or intentional wrongdoing. While restricting some product liability suits, the Colorado statute allows cases based "upon an actual defect in the design or manufacture of such firearm or ammunition."

Section 501 is supplemented by:

Section 502, with a standard definition of "product liability action."

Section 503, reiterating that product liability cases may not be brought based on the fact that a firearm, by its nature, has the "potential to cause injury, damage, or death when discharged." In a design defect case, the plaintiff must prove "that the actual design was defective." For example, that the gun's hammer could drop forward (which makes the ammunition fire) when the trigger is not pressed.

In a manufacturing defect case, the plaintiff must prove that the firearm "was manufactured at variance from its design." For example, the firing chamber was designed to have a particular strength, to contain the gunpowder explosion, but the particular gun was made with inferior materials that did not contain the explosion.

Section 504 provides specifics for proximate cause as applied to firearms. As explained by the Colorado Supreme Court, proximate cause "means a cause which in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have been sustained." *People v. Stewart*, 55 P.3d 107, 121 (Colo. 2002). For example, an automobile manufacturer knows that when it puts millions of cars into the stream of commerce, some of the cars will be used in intentional crimes (such as running someone over), some of the cars will be used in reckless or negligent crimes (such as accidents caused by drunk driving), and some of the cars will be used in accidents (such as driver hitting a tree because the driver

is focused on changing the channel on the car radio). From the manufacturer's point of view, all the above events are foreseeable.

Under section 504, "the manufacturer's, importer's, or distributor's placement of the product in the stream of commerce shall not be conduct deemed sufficient to constitute proximate cause."

Further, persons using a firearm to perpetrate a crime cannot sue a manufacturer or retailer of the firearm. *E.g.*, "If Beretta has not manufactured a concealable handgun, I would not have tried to rob the liquor store, and if I hadn't tried to rob the liquor store, the police officer wouldn't have shot me."

Section 505 affirms that product liability suits *may* be brought if the firearm "did not function in the manner reasonably expected by the ordinary consumer of such product."

Examples of suits that are allowed:

- When the firearm was dropped, the gun discharged.
- When the user pressed the trigger, the bullet stuck in the firing chamber, and the gun exploded, injuring the user.

Examples of suits that are not allowed:

- The manufacturer chose to make and the retailer chose to sell a small handgun. Because small guns are easy to conceal, criminals often use them.
- The manufacturer chose to make and the retailer chose to sell a handgun that was well-suited for defense of self and others. The very same features that make a handgun usable for defense also make it usable for criminal offense.
- The gun did not contain a design feature that gun prevention lobbies like, but most consumers do not want. For example, if a gun has a magazine disconnect, the gun cannot be fired if there is no magazine inserted in the gun, even though the gun has a round in the firing chamber. A magazine disconnect can prevent accidents caused by reckless people who, seeing that there is no magazine, point the gun at someone and press the trigger. The magazine disconnect can also prevent self-defense. For example, if a person under attack drops the magazine, or the magazine does not seat properly in the gun, the defender can still fire a shot.

II.B. Limitation on other tort suits

In 2000, the general assembly added a section (2) to C.R.S. 13-21-501. It provides:

(2) The general assembly further finds that it shall be the policy of this state that a civil action in tort for any remedy arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm or ammunition shall be based only upon an actual defect in the design or manufacture of such firearm or ammunition or upon the commission of a violation of a state or federal statute or regulation and not upon any other theory of liability. The general assembly also finds that under no theory shall a firearms or an ammunition manufacturer, importer, or dealer be held liable for the actions of another person.

Section (2) expands the protection against abusive lawsuits to other torts. It further provides that one person cannot be held liable for the actions of another person. For example, if a firearm store illegally sold guns, the store can be sued, but not the manufacturer.

A new section 504.5 reiterates and clarifies the above rules:

(1) 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.
(2) In no type of action shall a firearms or ammunition manufacturer, importer, or dealer be held liable as a third party for the actions of another person.
(3) The court, upon the filing of a motion to dismiss pursuant to rule 12(b) of the Colorado rules of civil procedure, shall dismiss any action brought against a firearms or ammunition manufacturer, importer, or dealer that the court determines is prohibited under subsection (1) or (2) of this section. Upon dismissal pursuant to this subsection (3), the court shall award reasonable attorney fees, in addition to costs, to each defendant named in the action.
(4) Notwithstanding the provisions of subsection (1) of this section, **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**. In any action brought pursuant to the provisions of this subsection (4), the plaintiff shall have the burden of proving by clear and convincing evidence that the defendant violated the state or federal statute or regulation.

Examples of suits that are allowed under the 2000 reforms:

- The firearms manufacturer delivered to a retailer, and the retailer sold in Colorado, a type of firearm that is not allowed by Colorado or federal law.
- The firearms retailer did not comply with Colorado or federal law, such as required paperwork and record-keeping, or background checks.
- The firearms dealer, even when complying with paperwork and background checks, transferred a firearm to a person who the dealer knew or reasonably should have known was prohibited by state or federal law. For example, in some straw purchases, one person in the store is the person and picks out the gun, but then a second person comes forward to fill out the paperwork and submit to the background check.
- The firearms dealer delivered a firearm to a person who was obviously intoxicated, since Colorado law forbids carrying a firearm while intoxicated. C.R.S. § 18-12-106.

Examples of suits that are not allowed under the 2000 reforms:

- Selling too many firearms, or firearms that are concealable, or are well-suited for defense, is a public nuisance.
- Government suits for the costs of providing medical care to victims of gun crimes.
- The retailer or manufacturer should have made or sold the firearm in accordance with procedures favored by gun prevention lobbies, but which have not been enacted as law by Congress or the General Assembly.
- Any suit against a retailer or manufacturer who scrupulously complied with all the laws.

I.C. The federal Protection of Lawful Commerce in Arms Act

In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA). 15 U.S.C. § 7901 et seq. PLCAA forbids brining a "qualified civil action" "in any Federal or State court." § 7902)(a). "Qualified civil action" means an action against licensed manufacturers of firearms or ammunition or persons "engaged in the business" of selling firearms or ammunition (that is, retail sellers). A "qualified product" is firearms, ammunition, or components. § 7903(1), (2), (4).

PLCAA forbids "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." *Id.* at (5)(A).

PLCAA has the following exceptions, allowing for suits against gun makers or sellers:

> (i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; [giving a firearm to someone "knowing or having reasonable cause to believe" will be used in a crime.]
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> (ii) an action brought against a seller for negligent entrustment or negligence per se; [*E.g.*, giving a firearm to someone who is actually intoxicated.]
>
> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--
>
> > (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
> > (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18; [*e.g.*, failure to comply with record keeping, transfer to a prohibited person].
>
> (iv) an action for breach of contract or warranty in connection with the purchase of the product; [Colorado law is only for torts, not for breach or contract or warrant; warranty is a type of contract].
>
> (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26. [The main federal gun laws, namely the Gun Control Act and the National Firearms Act.]

How PLCAA and Colorado law are the same:

They allow and prohibit the same types of lawsuits against manufacturers and retailers. If there are any differences in the types of cases allowed, they are very subtle, and have not been identified by the proponents of SB32-168.

How PLCAA and Colorado law differ:

1. PLCAA specifically mentions "components" and Colorado law does not.

2. Only PLCAA forbids lawsuits against "a trade association." As a practical matter, this means primarily the National Shooting Sports Foundation (NSSF), which is the trade association for firearms businesses. In the late 1990s and early 20th century, many of the abusive lawsuits against firearms businesses also named NSSF as a defendant, in retaliation for NSSF's successful public advocacy and lobbying on behalf of its members. The suits against NSSF never had any possibility winning a verdict, since NSSF's activities are protected by the First Amendment. The suits against NSSF were harassment, for purpose of inflicting litigation costs.

3. PLCAA does not change the normal system for the awards of attorney's fees to a successful plaintiff or defendant. In general, courts may award "costs" to a successful party. Costs include out-of-pocket expenses such as filing fees in courts, or an expert's hourly fee for time spent being deposed by the other party. "Costs" do not include attorney's fees.

Under Federal Rule of Civil Procedure 11 and Colorado Rule of Civil Procedure 11, attorney's fees can be awarded in situations of egregious misconduct. For example, if one side knowingly filed a falsified affidavit, the other side may recoup attorney's fees for time spent responding to the affidavit.

Attorney's fees may also be awarded against a plaintiff who brings a "frivolous" case. A frivolous case does *not* include a case asking in good faith for a change in the common law. For example, under the ordinary common law, the City of Denver win a case against Smith & Wesson for the costs of medical treatment of indigent victims of crime who were injured by criminals who used S&W guns. But the City of Denver could, in good faith, ask the courts to change the common law as applied to firearms, so the suit by Denver would not be "frivolous" under the meaning of Rule 11.

In Colorado, if the plaintiff has a firearms case that is or plausibly might be allowed under Colorado law, then the case can move forward in the ordinary way. The winner at trial will be the party with the stronger evidence. In such a case, the ordinary rules about costs and attorney's fees apply.

On the other hand, suppose that the case is obviously in violation of Colorado law, so the defendant files a motion to dismiss. In evaluating a motion to dismiss, the judge must assume that all of the facts alleged by plaintiff in the complaint are true. Fed. R. Civ. Pro. 12(b), Colo. R. Civ. Pro. 12(b). While assuming that the facts are exactly as the plaintiffs claim them to be, a judge must dismiss a case if the plaintiffs have failed to state a legal claim upon which relief will be granted.

In Colorado, if a plaintiff brings a case that is dismissed under Rule 12(b), then the defendants "shall" be awarded attorney's fees. This means that the plaintiffs did not bring a good-faith legal claim. Even if all their alleged facts were true, their case was plainly forbidden by Colorado law.

The Colorado law about attorney's fees in firearms cases was necessary because the lawyers for gun prevention lobbies at the time publicly stated their intention to bankrupt the firearms industry through litigation costs, even if the lawyers could never win a case in court. *See* David B. Kopel, *Protecting Law-abiding Firearms Businesses from Abusive Lawsuits*, Independence Institute Issue Paper No. 1-2023, pp. 6-7 (collecting quotes).

II. SB23-168 provides the model for other states to eliminate abortion providers in Colorado

SB23-168 repeals the above Colorado protections against abusive lawsuits. Those protections were enacted in response to decades of malicious lawsuits by gun prevention lobbies. Those lawsuits were contrary to the common law of torts, and were intended to destroy firearms businesses through sheer litigation costs.

But SB23-168 does more than repeal protections against misuse of the courts. Even if there were no specific Colorado or federal protections, the types of lawsuits brought by gun prevention lobbies would have little chance of winning a verdict for the plaintiffs, because the tort theories on which the lawsuits are based are so wildly beyond the ordinary common law. It's true that the lawsuits might be able to drive some businesses out of business through the sheer cost of litigation. That was what was happening nationally, before reforms were enacted. Kopel, *supra*, p. 7. But at least the gun prevention lobbies would not be able to win judgements in court.

SB23-168 would change the situation by creating specially liability rules applicable only to the firearms industry. These include:

- Eliminating the defense of compliance with all specific gun control laws.
- Eliminating the principle of proximate cause.
- Allowing lawsuits for conduct in another state that was in full compliance with the laws of the other state.
- Allowing lawsuits for all design, sales, or marketing "targeted at minors." Even though it is and always has been lawful for minors to use firearms, sometimes subject to restrictions not applicable to adults.
- Allowing lawsuits even when the actual victim of gun misuse does not want to sue, but the Colorado Attorney General does.
- Allowing the Attorney General to delegate lawsuit power to a third party, which is to say, one or more gun prevention lobbies.
- Allowing lawsuits against for firearms stores or businesses that do not have alleged "reasonable controls," even though SB23-168 does not specific any actual reasonable control.
- A court "shall" award costs and attorney's fees to any winning plaintiff.
- A court "shall" award punitive damages.

Now imagine that another state, where abortion is illegal, such as Oklahoma or Wyoming, copies SB23-168, and changes the words "firearms industry" to "abortion industry." A state statute declares than an unborn child is a person, is a resident of the state, and is protected by state laws against homicide.

A pregnant women in Wyoming or Oklahoma travels to Colorado for a surgical abortion. The Attorney General of Wyoming or Oklahoma can bring a wrongful death lawsuit in Wyoming or Oklahoma against the Colorado clinic that performed the abortion.

The same case could be brought against a Colorado company, Just The Pill, that presently uses an unmarked van to sell abortion pills to customers from out of state. Leigh Paterson, *How one unmarked van is quietly delivering abortion pills on Colorado's border*, KUNC radio (NPR), Oct 27, 2022.

Further, lawsuits could also be brought against the manufacturers of abortion pills or of tools for surgical abortions. The lawsuits would allege that the manufacturers did not have "reasonable controls." For example, the manufacturers sold to clinics without checking if the clinics had controls to prevent the products from being used for women from states where abortion is illegal.

The anti-abortion lawsuits can go further. Abortion pills are illegal in Wyoming. A pregnant woman in Wyoming asks a Colorado friend to buy some abortion pills in Colorado. Then the Colorado woman gives the abortion pills to the Wyoming woman. The Wyoming woman has committed a Wyoming crime. Can the Wyoming Attorney General manufacturer sue the manufacturer of the abortion pills, even

though the manufacturer complied with Colorado law? Certainly yes, under the principles of SB23-168.

The Wyoming Attorney General's lawsuit would allege that the manufacturer did not have "reasonable controls" on the sale of its pills. According to the Attorney General, the manufacturer, the Colorado pharmacy, or the mail-order pill business selling to Colorado residents did not have "reasonable controls" to prevent "diversion" of pills to Wyoming. The lawsuit could argue that "reasonable controls" mean that abortion pills should only be sold in-person, to prevent a buyer some using someone else's drivers license as identification. Abortion pill manufacturers should only sell to in-person pharmacies.

A pharmacy should only sell to a customer if the pharmacy administers an on-the-spot pregnancy test, in which a pharmacy employee directly observes the women urinating on the test stick. This could be said to be a "reasonable control," because some doctors might write a prescription for a Colorado woman to help the woman help her friend in Wyoming. Or the Colorado woman might really be pregnant, but she wants to obtain abortion pills for her Wyoming friend. So a "reasonable control" would be for the Colorado woman to be required to take the first pill at the pharmacy. Then the Colorado woman must come back to pharmacy to ingest the second and third pills there.

As the Wyoming Attorney General could argue, three trips to a pharmacy for an abortion is eminently reasonable. In Colorado, under the soon-to-be enacted firearms waiting period law, if you go out of town for a one-week vacation and want to leave your guns with a neighbor so they don't get stolen, you and the neighbor will need to make four separate trips to a gun store, and spend six total days of waiting for the transfer and return of the firearms. *See* David B. Kopel, *Written testimony on HB23-1219, to delay the acquisition of firearms*, Colo. House of Reps., State Affairs Committee. Mar. 6, 2023, pp. 13-14.

The size of verdicts in wrongful death cases varies. Awards in the millions of dollars are not uncommon, and punitive damages can take them much higher. Under SB23-168, punitive damages "shall" be awarded.

If a court in Wyoming or Oklahoma enters a multi-million dollar judgement against abortion providers and abortion tool/pill manufacturers, could a Colorado court (or a court in the manufacturer's state) refuse to enforce the judgement? The answer is no.

The U.S. Constitution, article IV, section 1, provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

A court in state A has does not power to refuse to enforce a court judgement from state B.[1] Specifically, state B cannot refuse to enforce a state A judgement that contravenes the public policy in state B. A foundational case is the U.S. Supreme Court's *Fauntleroy v. Lum*. In that case, Mississippi had a strong public policy against gambling, so Mississippi courts were forbidden by state law to enforce gambling debts. But the U.S. Supreme Court held that Mississippi must enforce the gambling debt that a resident had incurred while in Missouri. 210 U.S. 230 (1908).

In Colorado, the abortion industry is cherished by the majority in the state legislature. In many other states, including Wyoming and Oklahoma, the firearms industry is cherished.

SB23-168 is an act of interstate aggression, written to make Colorado a center for the destruction of the firearms industry nationwide. Supporters of SB23-168 should not be surprised if at least one other state copies SB23-168 and begins using it to destroy the abortion industry in Colorado and nationwide.

The SB23-168 approach would also be easy to apply to other controversial matters, such as transgender treatments in Colorado for children who reside in other states.

[1] The Full Faith and Credit Clause does not apply to judgements that are not final, judgements that were not on the merits, judgements that were obtained by fraud, or judgements where the out-of-state court lacked jurisdiction. There also limits on a state A court deciding the title of real property in state B.