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Legislative Bulletin……October 19, 2005

Contents:

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: Amount for one new study

Effect on Revenue: $0

Total Change in Mandatory Spending: $0

Total New State & Local Government Mandates: Several

Total New Private Sector Mandates: Several

Number of *Bills* Without Committee Reports: 0

Number of *Reported* Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

S. 397—Protection of Lawful Commerce in Arms Act (Senator Craig)

Order of Business: The bill is scheduled to be considered on Wednesday, October 19th, subject to a closed rule (H.Res. 493). That is, no amendments may be offered, though one motion to recommit is allowed. While it is not known what the motion to recommit will include this year, the motion to recommit H.R. 1036 in the last Congress would have struck this language from the underlying bill: *DISMISSAL OF PENDING ACTIONS- A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.* The motion failed 140-282: http://clerk.house.gov/evs/2003/roll123.xml

Summary: Last Congress, the House passed a similar bill, H.R. 1036, by a vote of 285-140: http://clerk.house.gov/evs/2003/roll124.xml

S. 397 would prohibit civil liability actions from being brought or continued in any state or federal court against interstate manufacturers, distributors, dealers, or importers of firearms or ammunition (or their trade associations) for damages resulting from the criminal or otherwise unlawful misuse of their products.

S. 397 would explicitly **NOT** prohibit (thus would still allow):

- an action brought by a harmed person against someone who intentionally transferred a firearm knowing that it would be used in a violent or drug-trafficking crime;
- an action brought against a seller for negligence or negligent entrustment (the selling of a firearm when the seller knows or should know that the buyer is likely to [and does] use the product in a manner involving unreasonable risk of physical injury to himself and others);
- an action in which a manufacturer or seller of a qualified product knowingly and willfully 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;
- an action for breach of contract or warranty in connection with the purchase of the product; or
- an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

Unlike H.R. 1036 last Congress or H.R. 800 this year, S. 397 contains a section regarding child safety locks and armor-piercing ammunition:

Child Safety Locks

S. 397 would make it unlawful for any licensed importer, manufacturer, or dealer to sell, deliver, or transfer any handgun (not long guns) to any person (other than the licensee), unless the transferee is provided with a secure gun storage or safety device for that handgun. (Note: this does not mandate the USE of such safety devices, nor does it affect private transfers between individuals). Civil penalties for violations are detailed in the legislation. The bill would exempt government, law enforcement, and relic firearms from this provision.

According to the National Rifle Association, "virtually all new handguns today are sold with some type of secure storage or safety device. The [child safety locks language] would primarily affect sales of used handguns—probably no more than one eighth of U.S. firearms sales each year."

The bill would also shield from state and federal liability any person who has lawful possession and control of a handgun and who uses a secure gun storage or safety device with the handgun, when a civil action seeks damages for the actions of a third party. Such liability protection would only apply when the handgun was accessed by another person who did not have the permission of the rightful possessor to have access to it and at the time access was

gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device. This protection would NOT apply to an action brought against a seller for negligence or negligent entrustment (see definition above).

Nothing in this section of the bill should be taken as creating a cause of action against any person for any civil liability or as establishing any standard of firearms care. Details regarding compliance with these new provisions could not be used as evidence in a court or other such legal proceeding.

Armor-Piercing Ammunition

S. 397 would re-state the current prohibitions on armor-piercing ammunition (18 U.S.C. 922(a)(7,8)) and sharply increase penalties for the use of armor-piercing ammunition in any gun-related crime of violence or drug-trafficking. The minimum *additional* sentence would be for 15 years, and the death penalty would be allowed if death resulted from said crime. Note: this section would neither ban nor change the definition of armor-piercing ammunition.

The Attorney General would have to conduct a study (and report to Congress) to determine whether a uniform standard for the testing of projectiles against body armor is feasible.

Additional Background: The bill contains several findings, two of which are:

1. The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

2. The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the Framers of the Constitution, by the Congress, or by the legislatures of the several states. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

According to information contained in the House Judiciary Committee's Report #109-24 (for H.R. 800 in the 109th Congress, a bill that is nearly identical to H.R. 1036 from the 108th Congress), the following are among the municipalities that have filed suit against the firearms industry in attempt to win damages for firearms misuse: Atlanta; Boston; Bridgeport; City of Camden; County of Camden; Chicago; Cincinnati; Cleveland; Detroit; Wayne County, Michigan; Gary, Indiana; City of Los Angeles; County of Los Angeles; Miami-Dade County; Newark; New Orleans; Philadelphia; San Francisco; St. Louis; and Wilmington.

Tobacco companies spend about $600 million a year defending against lawsuits brought by states with similar motives, according to the House Judiciary Committee. Since the gun industry grosses only $1.5 billion a year, it is unlikely that gun companies would be able to finance a similar defense.

According to the National Rifle Association (NRA), 31 states have enacted legislation similar to S. 397. See House Report #109-24 for a list of court cases that have ruled that firearms companies are not liable for the misuse of their products.

Committee Action: S. 397 was not referred to any committee, as it is being held at the desk in the House. The House Judiciary Committee marked up and reported a related bill, H.R. 800, by a vote of 22-12 on May 25, 2005.

Administration Position: The Administration "strongly supports" S. 397: http://www.whitehouse.gov/omb/legislative/sap/109-1/s397sap-s.pdf

Cost to Taxpayers: Although no cost estimate is available for S. 397, CBO's cost estimate for H.R. 800, which mirrors the first several sections of S. 397, indicates that the bill would have no significant impact on the federal budget and would not affect mandatory spending or revenues. The remaining portions of S. 397 (regarding child safety locks and armor-piercing ammunition) do not appear to have any cost implications, other than a new study, the costs of which would likely be insignificant.

Does the Bill Expand the Size and Scope of the Federal Government?: The bill would use the Constitution's commerce clause to prohibit certain types of legal actions.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes. The bill would impose several intergovernmental and private-sector mandates by prohibiting state, local, and tribal governments and the private sector from pursuing certain lawsuits and would preempt state liability laws and the authority of state courts to hear such cases. The bill also contains a mandate regarding child safety locks on transferred guns.

Constitutional Authority: Although a committee report citing constitutional authority is not required to be filed in the Senate, the House Judiciary Committee, in House Report 109-24, cites constitutional authority in Article I, Section 8, Clause 3 (the congressional power to "regulate Commerce…among the several States").

Outside Organizations: The National Rifle Association (NRA) strongly supports the passage of this legislation. Guns Owners of America has said that S. 397 "is unacceptable to gun owners" mainly because they see the safety-locks language as a slippery slope to mandatory, universal safety-lock laws.

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H.R. 554—Personal Responsibility in Food Consumption Act (Keller)

Order of Business: The bill is scheduled to be considered on Wednesday, October 19th, subject to a structured rule (H.Res. 494) that makes in order the five amendments summarized below.

Summary: The House passed a nearly identical bill, H.R. 339, last Congress by a vote of 276-139: http://clerk.house.gov/evs/2004/roll054.xml.

H.R. 554 would prohibit certain lawsuits (including class-action lawsuits) against the manufacturers, marketers, distributors, advertisers, or sellers of food or non-alcoholic beverage products (or their trade associations) that comply with applicable statutory and regulatory requirements. That is, civil liability actions regarding obesity, weight gain, or any associated conditions could not be brought in any federal or state court against the food industry, and any pending action in this regard would be immediately dismissed upon enactment of this legislation. This limitation on civil actions would **NOT** apply to:

- actions for breach of express contract or express warranty in connection with the purchase of a qualified product (provided that the grounds for recovery are unrelated to weight-gain);
- actions in which a manufacturer or seller of a qualified product (as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(f))) knowingly and willfully violated a federal or state statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product, and the violation was a proximate cause of injury related to a person's weight gain, obesity, or any health condition associated with a person's weight gain or obesity;
- actions regarding the sale of a qualified product that is adulterated (as described in section 402 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342)).

The limitation on civil actions in H.R. 554 *would* apply to actions, for example, in which a party claims that eating too much of a certain food product made him or her overweight. In more technical terms, the civil actions prevented by this bill would be those:

> …brought by any person against a manufacturer, marketer, distributor, advertiser, or seller of a qualified product, or a trade association, for damages, penalties, declaratory judgment, injunctive or declaratory relief, restitution, or other relief arising out of, or related to a person's accumulated acts of consumption of a qualified product and weight gain, obesity, or a health condition that is associated with a person's weight gain or obesity, including an action brought by a person other than the person on whose weight gain, obesity, or health condition the action is based, and any derivative action brought by or on behalf of any person or any representative, spouse, parent, child, or other relative of that person.

Note: the term "person" in this context means "any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity."

The bill would require that any claim seeking to impose liability based on accumulative acts of consumption of a qualified product list:

- each element of the cause of action;
- the federal and state statutes or other laws that were allegedly violated;
- the specific facts alleged to constitute the claimed violation of law; and
- the specific facts alleged to have caused the claimed injury.

H.R. 554 would **not** limit the ability of Congress, state legislatures, or regulatory agencies to determine appropriate laws, rules, and regulations to address the problems of weight gain, obesity, and other health conditions associated with weight gain or obesity. The bill explicitly states that nothing in this legislation should be construed to create a public or private cause of action or remedy.

The resolution notes in its "Findings" that:

- "a person's weight gain, obesity, or a health condition associated with a person's weight gain or obesity is based on a multitude of factors, including genetic factors and the lifestyle and physical fitness decisions of individuals, such that a person's weight gain, obesity, or a health condition associated with a person's weight gain or obesity cannot be attributed to the consumption of any specific food or beverage; and
- "because fostering a culture of acceptance of personal responsibility is one of the most important ways to promote a healthier society, lawsuits seeking to blame individual food and beverage providers for a person's weight gain, obesity, or a health condition associated with a person's weight gain or obesity are not only legally frivolous and economically damaging, but also harmful to a healthy America."

Amendments Made in Order under the Rule (H.Res. 494):
All amendments are debatable for ten minutes. Summaries are based on RSC staff review of actual amendment text.

Sensenbrenner (R-WI). Manager's Amendment. Adds the phrase "for each defendant and cause of action" and other clarifying language to emphasize that a judge would have to apply the bill's pleading requirements (the requirements for claims to include details on what laws were violated, what facts led to the alleged injury, etc.) to *each* specific claim and that such requirements would have to include an explanation of why the claim qualifies as an *exception* to the lawsuit prohibition in the underlying legislation. The Judiciary Committee notes that these clarifications would prevent a plaintiff from using a claim that is not barred by H.R. 554 as a means of pursuing obesity-related claims that are barred by H.R. 554 against the same or other defendants. Also makes several technical changes.

Jackson-Lee (D-TX). Expands the prohibited civil actions to include those actions brought by a manufacturer or seller of a qualified product, or a trade association, against any person. *Last Congress, this exact amendment failed by voice vote.*

Filner (D-CA). Provides that this bill would not apply to actions brought by, or on behalf of, a person injured at or before the age of eight, against a seller that, as part of a chain of outlets at least twenty of which do business under the same trade name (regardless of form of ownership of any outlet), markets qualified products to minors at or under the age of eight. *Last Congress, this exact amendment failed by voice vote.*

Scott (D-VA). Provides that this legislation would not apply to an action brought by a state agency to enforce a state consumer protection law concerning mislabeling or other unfair and deceptive trade practices. *Last Congress, this exact amendment failed by a vote of 177-241: http://clerk.house.gov/evs/2004/roll048.xml.*

Waxman (D-CA). Provides that the underlying bill would not apply to lawsuits involving a dietary supplement relating to a person's weight gain, obesity, or any health condition associated with weight gain or obesity.

Additional Background: The Judiciary Committee pointed out that, during the summer of 2002, New York attorney Sam Hirsch filed a multi-billion-dollar lawsuit against McDonald's, saying that the fast-food chain "negligently, recklessly, carelessly and/or intentionally" markets to children food products that are "high in fat, salt, sugar, and cholesterol" while failing to warn of those ingredients' links to "obesity, diabetes, coronary heart disease, high blood pressure, strokes, elevated cholesterol intake, related cancers," and other conditions. Mr. Hirsch's efforts were stunted twice. On September 3, 2003, a federal district judge in New York threw out Mr. Hirsch's lawsuit for the second time because Mr. Hirsch again failed to state a claim, despite having been given explicit guidance by the court when his first case was dismissed with instructions for what he needed to demonstrate for his case to proceed.

The fear is that other suits like the McDonald's suit may start appearing. As personal injury attorney John Banzhaf said recently, "You may not like it . . . but we'll find a judge. And then we'll find a jury" that will find restaurants liable for their customers' overeating.

According to a recent Gallup Poll, as cited by the Judiciary Committee in House Report 109-130: "[n]early 9 in 10 Americans (89%) oppose holding the fast-food industry legally responsible for the diet-related health problems of people who eat that kind of food on a regular basis. Only 9% are in favor. Those who describe themselves as overweight are no more likely than others to blame the fast-food industry for obesity-related health problems, or to favor lawsuits against the industry."

The Judiciary Committee notes that the food service industry employs about 11.7 million people in the United States, making it the nation's largest employer besides government.

Committee Action: On May 25, 2005, the Judiciary Committee marked up and ordered the bill reported to the full House by a party-line vote of 16-8.

Possible Conservative Concerns: There are no known conservative objections to this legislation. [See "Constitutional Authority" section below.]

Administration Position: Although a Statement of Administration Policy (SAP) for H.R. 554 is not yet available, the SAP for H.R. 339 last year indicated that the Administration "strongly supports" the legislation: http://www.whitehouse.gov/omb/legislative/sap/108-2/hr339sap-h.pdf.

Cost to Taxpayers: CBO confirms that H.R. 554 would not have a significant effect on the federal budget.

Does the Bill Expand the Size and Scope of the Federal Government?: The bill would use the Constitution's commerce clause to prohibit certain types of legal actions. [See "Constitutional Authority" section below.]

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes. H.R. 554 would prohibit state and local governments and the private sector from pursuing certain civil lawsuits concerning obesity, weight gain, or related health conditions and would preempt certain state liability laws and the authority of state courts to hear such cases. [See "Constitutional Authority" section below.]

Constitutional Authority: The Judiciary Committee, in House Report 109-130, cites constitutional authority in Article I, Section 8, Clause 3 (the congressional power to regulate commerce among the states).

The Judiciary Committee includes the following statement in its committee report:

> The lawsuits against the food industry that H.R. 339 addresses directly implicate core federalism principles articulated by the United States Supreme Court in *BMW of North America, Inc.* v. *Gore,* which has made clear that "one State's power to impose burdens on the interstate market . . . is not only subordinate to the Federal power over interstate commerce, but is also constrained by the need to respect the interests of other States . . ." Congress can of course exercise its authority under the Commerce Clause to prevent a few State courts from bankrupting the food industry, the largest non-governmental employer in the Nation.
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> In fast food lawsuits, personal injury attorneys seek to obtain through the courts stringent limits on the sale and distribution of food beyond the court's jurisdictional boundaries. By virtue of the enormous compensatory and punitive damages sought, and because of the types of injunctive relief requested, these complaints in practical effect would require manufacturers of lawfully produced food to curtail or cease all lawful commercial trade in that food in the jurisdictions in which they reside—almost always outside of the States in which these complaints are brought—to avoid potentially limitless liability. Insofar as these complaints have the practical effect of halting or burdening interstate commerce in food, they can be appropriately addressed by Congress.
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> The Supreme Court in *Healy* v. *Beer Institute* elaborated on these principles concerning the extraterritorial effects of State regulations as follows:
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> > The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. . . . [T]he practical effect of the statute must be evaluated not only by considering the consequences of the [law] itself, but also by considering how the challenged [law] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted

> similar [laws]. Generally speaking, the Commerce Clause protects against inconsistent [laws] arising from the projection of one State regulatory regime into the jurisdiction of another State.

Outside Organizations: The U.S. Chamber of Commerce has previously expressed "strong support" for the legislation and has urged Members to "vote against any weakening or hostile amendments." The Chamber may use votes on or related to this bill in its annual "How They Voted" scorecard.

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