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House Bill 1131: An Enigma

By Robert E. Powell, Esq. & Catherine A. Potthast, Esq.

The 1988 General Assembly passed House Bill 1131, which will be subject to referendum in the November, 1988, general election. The overriding purpose of that legislation was to reduce the crime rate or incidence of violent crimes in the state through the prohibition of the manufacture and sale of certain handguns. It also had an avowed secondary purpose of overruling the controversial decision of the Court of Appeals of Maryland in *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 497 A.2d 1143 (1985), by prohibiting the imposition of strict liability for damages caused by the criminal use of handguns.

While the Act repeals the vague and potentially unconstitutional decision of the court of appeals and does provide a more reasonable method for the control of firearms manufactured and sold in this state, it is doubtful that it will have a far reaching effect on either the crime rate or the incidence of violent crimes.

Kelley v. R.G. Industries, Inc. — Judicial Precursor of House Bill 1131

In *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 497 A.2d 1143 (1985), the Court of Appeals of Maryland held that a manufacturer or marketer of a "Saturday Night Special" handgun could be held strictly liable to persons who suffered gunshot injuries from the criminal use of the handgun. The *Kelley* court was unable to clearly define a "Saturday Night Special" handgun, and held that the determination was

to be made on case-by-case basis by a jury considering

the gun's barrel length, concealability, cost, quality of materials, quality of manufacture, accuracy, reliability, whether it has been banned from import by the Bureau of Alcohol, Tobacco and Firearms, and other related characteristics. Additionally, the industry standards, and the understanding among law enforcement personnel, legislators and the public, at the time the weapon was manufactured and/or marketed by a particular defendant, must be considered.

Id. at 157, 497 A.2d at 1159.

The *Kelley* decision represented a novel and unprecedented departure from established principles of product liability law. Nearly every court considering this issue had held, prior to the *Kelley* decision, that a manufacturer of a properly functioning handgun could not be held liable when a third party intentionally used the gun in the commission of criminal acts. *E.g.*, *Perkins v. F.I.E. Corporation*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *Patterson v. Robm Gesellschaft*, 608 F. Supp. 1206 (D. Tex. 1985); *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762 (E.D. N.Y. 1981); *Bennet v. The Cincinnati Checker Cab Co.*, 353 F. Supp. 1206 (E.D. Ky. 1973); *Coulson v. DeAngelo*, 493 So.2d 98 (Fla. App. 1986); *Rhodes v. R.G. Indus-*

tries, Inc., 173 Ga. App. 51, 325 S.E.2d 465 (1984); *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642, 477 N.E.2d 1293 (1985); *Burkett v. Freedom Arms, Inc.*, 299 Or. 551, 704 P.2d 118 (1985). These courts recognized that strict liability is predicated upon the existence of a defect in a product which causes injury to a plaintiff. Regardless of the standard used to determine the existence of a defect, the courts agreed that a functional handgun is not defective solely by reason of the fact that it may present a danger.

The *Kelley* court recognized that its decision was not compatible with traditional principles of product liability law, but nonetheless chose to fashion a new cause of action against manufacturers of "Saturday Night Specials" based upon its perception of the public policy of the state. *See Kelley*, 304 Md. at 157, 497 A.2d at 1159.¹

The *Kelley* decision has been criticized by courts and commentators throughout the country. *E.g.*, *Shipman v. Jennings Firearms*, 791 F.2d 1532 (11th Cir. 1986); *Moore v. R.G. Industries*, 789 F.2d 1326 (9th Cir. 1986); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987); *Brady v. Hinckley*, No. 82-0549 (D.D.C. 1986), appeal pending, 815 F.2d 724 (D.C. Cir. 1987); *Trespacios v. Valor Corporation of Florida*, 486 So. 2d 649 (Fla. App. 1986); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. App. 1988); *Knott v. Liberty Jewelry and Loan, Inc.*, 50 Wash. App. 267, 748 P.2d 661 (1988). *Robertson v. Grogan* (continued on page 10)

(continued from page 7)

Investment Co., 710 S.W.2d 678 (Tex. App. 1986). One serious flaw in the *Kelley* decision concerns the lack of any meaningful standard as to what constitutes a "Saturday Night Special." Without such a standard, handgun manufacturers, distributors, and users are simply unable to determine what products, if used by criminals, will subject them to liability. The "criteria" of "barrel length, concealability, cost, quality of materials, quality of manufacture, accuracy, reliability... and other related characteristics" are so vague as to constitute no standard at all. The *Kelley* decision fails to provide the type of adequate criteria and standards required to give manufacturers and consumers the notice requisite to due process.

Moreover, the inadequate criteria and standards provided impermissibly delegated basic policy matters to judges and juries for resolution on an *ad hoc* subjective basis. "A statute is unconstitutionally vague if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application." *Lemeros v. Laurel Racecourse, Inc.*, 489 F. Supp. 1376, 1388 (D. Md. 1980). Although the constitutional requirement of definiteness primarily arises in a criminal context, the application of the "void-for-vagueness" doctrine is not limited to such a context, and can invalidate a civil "rule or standard" as well as a statute. See generally *Small Company v. American Sugar Refining Co.*, 267 U.S. 233 (1925); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). The *Kelley* decision does not permit a person of ordinary intelligence to ascertain with any degree of precision which handguns are prohibited, except in the extremes.

A second criticism of the *Kelley* decision is its potential discriminatory effect. Insofar as the *Kelley* opinion seeks to outlaw handguns on the basis of cost to the consumer, the opinion raises other questions. First, the elimination of low cost guns from the market may deprive a poor person of his ability to defend himself. Second, because of the lower labor and material costs in other countries, the *Kelley* opinion may have the net effect of discriminating against alien manufacturers and providing preferential treatment to domestic manufacturers. Moreover, the decision draws an irrational distinction between victims shot with expensive guns and those persons shot with low cost guns. The effect of the decision would be

to impose liability on some manufacturers, while not imposing liability on others even though the handguns manufactured or sold by all may be used for criminal purposes. In short, it would seem to be better for a potential

victim to be shot or injured by [a] cheap gun, than by an expensive one because in the case of the former, the victim could sue the manufacturer who no doubt would have a deeper pocket.

Brady v. Hinckley, No. 82-0549 (D.D.C. 1986), appeal pending, 815 F.2d 724 (D.C. Cir. 1987).

Some critics further suggest that the *Kelley* decision is inconsistent with federal law and subject to federal preemption. The sale and distribution of firearms is heavily regulated on both the federal and state levels. *E.g.*, 18 U.S.C. 921-929 (1976). Section 907 of the Federal Firearms Act authorizes the Secretary of the Treasury to prescribe rules and regulations pertaining to the transport of firearms in Interstate and Foreign Commerce. The Bureau of Alcohol, Tobacco and Firearms (BATF) promulgated detailed regulations pursuant to this mandate. See 26 C.F.R. Parts 177-178. These regulations have the effect of placing manufacturers on notice as to the nature of the weapons which may be approved, and provide a means by which a license and approval can be obtained.

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The federal regulatory scheme is thus a uniform mechanism by which weapons manufacturers and sellers may market the product. The need for uniformity of regulation is obvious when dealing with interstate and foreign commerce. Manufacturers and importers need to know what weapons may be marketed.

The BATF regulations provide this uniformity and, indeed, provide a specific ruling on each and every model of gun. This federal regulation thus delicately balances the competing values of safety, commerce, the right to bear arms, and uniformity in laws. The doctrine of preemption precludes the States from upsetting this delicate balance established by federal law. Federal law can preempt state law in three ways. First, when enacting a federal statute, Congress may expressly state an intent to preempt state law. *E.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, even absent express preemptive language, Congress may otherwise indicate

its intention to preempt state law by legislating so comprehensively that it has "left no room for the states to supplement federal law." *E.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, even absent an express or implied intent by Congress to preempt state law, state law is preempted if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The *Kelley* decision potentially stands as an obstacle to the federal scheme of importation and commerce, because it requires jurors, on a case-by-case basis, to make the determination of which handguns are marketable and which are not. Nothing in *Kelley* prohibits two juries from making inconsistent proclamations on the same model gun. The rule set forth in *Kelley* is thus arguably preempted by federal law.

HOUSE BILL 1131: Kelley's Aftermath

House Bill 1131 was enacted in response to the *Kelley* decision. Although the Bill attempts to correct some of the deficiencies in the *Kelley* opinion, questions as to its net effect remain unanswered. Moreover, it is unlikely that the bill will have the effect of reducing the incidence of violent crime.

The bill's preamble articulates the General Assembly's finding that "certain handguns have no legitimate socially useful purpose and are not suitable for law enforcement, self-protection, or sporting activities," and sets forth its intention to "remove these handguns from the streets of this state." To that end, the bill establishes a "Handgun Roster Board," consisting of nine members appointed by the Governor. The Board members are to include the Superintendent of the Maryland State Police, and representatives of the Association of Chiefs of Police, the Maryland State's Attorneys' Association, handgun manufacturers, the Maryland Chapter of The National Rifle Association, Marylanders against Handgun Abuse, and three citizen members. The Board is charged with the responsibility of compiling a handgun roster of permitted handguns that are "useful for legitimate sporting, self-protection, or law enforcement purposes."

The bill requires the Board, in compiling the roster, to consider the following characteristics: "concealability, ballistic accuracy, weight, quality of materials, quality of manufacture, reliability as to safety, caliber, detectability by security equipment, and utility for legitimate sporting activities, self-protection, or law enforcement." These factors are no less

vague, and are, nearly identical to the "criteria" adopted by the Court of Appeals in the *Kelley* decision. The sole difference is that the criteria of "low cost" has been eliminated from the factors to be considered by the Board. Cost may, however, enter into the question inadvertently by virtue of consideration of the quality of materials and manufacture.

The procedure for gaining approval of handguns is specified by the bill, and allows a person to petition for a specified handgun inclusion on the approved roster. A petitioner whose handgun is denied placement on the list may request a hearing, and may appeal an adverse ruling in accordance with the Maryland Administrative Procedure Act. Rulemaking authority to carry out the provisions of the act is granted to the Secretary of Public Safety and Correctional Services.

The Act overrules the *Kelley* decision which imposed civil tort strict liability upon a handgun manufacturer for the criminal use of a handgun by a third person, and instead, substitutes criminal penalties for manufacturing, distributing, or selling handguns that are not included on the approved roster. The maximum fine under the Act is \$10,000 for each violation. Each handgun sold, manufactured or distributed is considered a separate violation. In addition, the bill enables the Superintendent of the Maryland State Police to obtain a temporary or permanent injunction precluding the manufacture or sale of handguns not included on the handgun roster. Surprisingly, there is no specific prohibition in the Act on the use of non-approved handguns.²

Bill 1131 thus attempts to correct some of the deficiencies in the *Kelley* decision. By establishing a handgun roster in advance of marketing and sale, it attempts to add the elements of certainty and notice lacking in the *Kelley* decision. No longer will juries make an *ad hoc* and subjective determination of approved handguns, an approach which can only lead to inconsistent results. The *ad hoc* and subjective application of the *Kelley* criteria is instead delegated to the Board. The fact that one rulemaking body has been substituted may lead to more consistency, provided the Board does not act in an arbitrary fashion. The manner in which the Board interprets and applies the prescribed factors will determine whether the General Assembly has successfully overcome the flaws inherent in the *Kelley* decision.

There still remain many unanswered questions concerning the effect of the Act, and whether the roster or regulations under the Act are preempted by Federal law. Much depends upon the manner in which the Board applies the factors designated in the bill to specific handguns.

Questions to be addressed in evaluating the roster and the regulations to be promulgated under the Act are whether there is consistency between similar handguns of different manufacturers, whether there is any pattern of approval in favor of domestic manufacturers,³ and the extent to which the Roster is consistent with, or contrary to the regulations promulgated by the BATF.

The rulemaking power granted pursuant to the Act potentially can clarify the vague "criteria" set forth in the Act, and perhaps preclude a successful "void-for-vagueness" challenge to the Act. The Secretary should adopt comprehensive regulations specifically defining the criteria for ballistic accuracy, permissive weight, caliber and the parameters for the quality of materials and manufacture. It is suggested that, to avoid challenges to the Act on preemption grounds, any such regulations adopted follow the applicable BATF regulations. Such an approach would preclude inconsistency between state and federal regulation and would ease the burden on the free flow of interstate commerce.

It is interesting that in all of the arguments presented in favor of this bill by the Office of the Attorney General and various police organizations, no reference has been made to any definitive studies which support a theory that inexpensive, poorly made and inaccurate handguns are preferred by criminals. To the contrary, recognized criminologists have demonstrated that the majority of guns used in the commission of crimes, especially street crimes, are stolen and are of good quality. *E.g.*, Wright and Rossi, *Armed and Considered Dangerous* (1985); Brill, *The Traffic (Legal and Illegal) in Guns*, Harper's, Sept. 1977 at 37-44. In fact, while it is far from definitive, a cursory review of recent newspaper releases, where reference is made to the weapon, reveals that good quality weapons are preferred.

Both the *Kelley* decision and House Bill

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1131 seek to remove from the streets "Saturday Night Specials." Aside from the fact that there is no true definition of a "Saturday Night Special," neither addresses the real issue which is the misuse of firearms. Banning the manufacture or

sale of handguns, regardless of the description, only places a prohibition upon manufacturers and merchants. It does not preclude the importation of handguns, nor does it impose any penalties on the theft of guns. All that this bill does is to theoretically reduce the number of guns available on the legitimate market. While its language may be sufficient to encompass the black market, there certainly is no practical means of policing such activity.

In actuality, House Bill 1131 simply precludes the marketing of defective or unreliable handguns. The regulations of the Federal Bureau of Alcohol, Tobacco, and Firearms already prescribe specific criteria for accomplishing that end. Most of the criteria suggested by the bill are addressed to functionability, quality of manufacture, and safety of the user. While concealability and detectability are referred to, those characteristics become superfluous when considerations of self-protection and law enforcement are injected into the equation.

In summary, although the Act does attempt to remedy the gross deficiencies in the *Kelley* opinion, it is unlikely to fulfill its primary purpose.

FOOTNOTES

¹ *Kelley* never addressed whether the handgun at issue was a "Saturday Night Special" under its articulation. In fact, the gun at issue was a 38 Special, similar in size and caliber to a police revolver.

² Other Maryland statutes, however, provide criminal penalties for weapon related crimes. *E.g.*, Md. Ann. Code art. 27, § 36E (1) (1987); Md. Ann. Code art. 27, § 36G (b) (1987); Md. Ann. Code art. 27, § 488 (1987); Md. Ann. Code art. 27, § 445 (c) (1987).

³ The bill specifies that the Board member representative of the gun manufacturing industry be "preferably a manufacturer from the State."

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