

4/3/01

# SUPREME COURT OF LOUISIANA

*No. 00-CA-1132*

MAYOR MARC H. MORIAL AND THE CITY OF NEW ORLEANS

Versus

SMITH & WESSON CORPORATION ET AL.

LEMMON, J., Concurring

Exercise of Police Power

Although agreeing with the majority in the dismissal of the action on the exception of no right of action, I also agree with the dissenters that La. Acts 1999, No. 291, enacting La. Rev. Stat. 40:1799 (after the filing of the suit at issue), was not a regulation of firearms, but was a regulation of tort actions, and did not constitute the exercise of the police power of the state.

La. Rev. Stat. 40:1796, enacted in 1985 (before the filing of the suit at issue), did regulate firearms by preempting local governments from enacting any legislation or regulation, concerning the sale, purchase, possession, ownership, transfer, transportation, license or registration of firearms, that was more restrictive than state law. The 1998 suit by the City did not violate Section 1796, because the suit was not an ordinance or a rule or regulation concerning firearms. The suit was an action for tort damages caused to the City by the defendants' allegedly negligent design or manufacture of firearms.

The 1998 suit would have violated Section 1799, if it had been in effect when the suit was filed. However, Section 1799 was not intended to regulate any aspect of the sale, purchase, possession, ownership, transfer, transportation, license or registration of firearms. Section 1799 was clearly a regulation of certain tort suits by

limiting the persons and entities who can recover damages. The Act legislatively removed from local governments the right to file suit for damages caused by the negligent design and manufacture of firearms, while reserving to the state the right to sue for such damages.<sup>1</sup>

This new legislation that preempted local governments of their right of action to file certain types of tort suits was a policy decision to set limits and define the scope of liability in such actions, just as the legislative limitation of the right of action to certain persons in the recovery of wrongful death damages under La. Civ. Code art. 2315.1 was a policy decision. The policy decision in Section 1799 was perhaps designed to strike a balance in the filing of such actions, without which many questions regarding proper party plaintiffs may have arisen, but the policy decision to preempt the field clearly was not the exercise of police power to promote the general public health, safety, welfare and morals or to protect and promote the vital interests of the people as a whole.

#### Effect on Pending Litigation

The issue in this suit is the effect of the Act 291 on pending litigation. In this respect, but for different reasons, I concur in the majority's result that Act 291 validly removed the City's right of action to recover this type of damages.

The majority reasoned that the Legislature intended Act 291 to apply to actions pending on the effective date; that a political subdivision of the state is not entitled to the protections of the Contracts and Due Process Clauses of the federal and state constitutions afforded to private citizens; that the City, as a home rule charter

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<sup>1</sup>Contrary to defendants' argument, a decision by this court in the present action finding negligence in the design or manufacture of certain firearms would apply uniformly throughout the state and would not vary from parish to parish, even though only one city brought this action.

government existing at the time of the adoption of the 1974 Constitution, nevertheless, retained its existing powers, functions and duties under La. Const. art. VI, §4 which may not be changed by state law unless necessary in the exercise of the state's police power;<sup>2</sup> and that Act 291 was a valid exercise of that police power.

I would not reach the police power issue because I disagree with the application in this case of La. Const. art. VI, §4, as broadly interpreted in City of New Orleans v. Board of Commr's of Orleans Levee Dist., 93-0690 (La. 7/5/94), 640 So. 2d 237 (a decision in which I did not participate).<sup>3</sup> La. Const. art. VI, §4 does not, in my view, universally prohibit the Louisiana Legislature from preempting the powers of local government except in the exercise of the state's police power.

The purpose of Article VI was best stated in R. Gordon Kean, Jr., Local Government and Home Rule, 21 Loy.L.Rev. 63, 66 (1975), as follows:

Municipalities and other local governmental units are, of course, an integral part of state government. "Home rule" does not mean complete autonomy - it should be more properly viewed as a rule by which local government has the freedom and flexibility to manage its own local affairs without undue legislative interference. In matters of true state-wide concern and in matters of private or civil relationships, the state should be supreme. The "home rule" provisions of Article VI were designed with this in mind; therefore, these provisions do not go as far in granting home rule powers as some might have preferred. They do not place the substantive powers and functions of local government beyond legislative control through general law. Article VI does not create separate city-states; it does, however, afford the means by which a home rule charter unit may exercise any necessary power or function except as may be expressly limited by its charter and the general laws, or as may be inconsistent with other provisions of the Constitution. With regard to "structure and organization", the home rule charter unit is supreme, as it should be. Thus, the concept embodied in Article VI completely reversed the theory of local government as a "creature of the state" with

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<sup>2</sup>If this suit had been filed by a local government with a home rule charter adopted after 1974, the exercise of police power would not be an issue.

<sup>3</sup>That decision involved the issue of the power of the City of New Orleans to institute legislation restricting the zoning and use of land owned by the state. That decision did not involve the City's immunity from legislative control.

only delegated authority. The old strict constructionist theory is also replaced by one which recognizes that so long as the Legislature does not deny a power, local government possesses it, thereby rendering any further enabling legislation unnecessary. (emphasis added).

Article VI granted all local governments with home rule charters the right, without seeking legislative authority, to manage their own affairs in any manner which is not inconsistent with the Constitution or with the charter itself, and which is not limited by general law. Section 4 of Article VI specifically reserved to local governments with home rule charters adopted before the 1974 Constitution the right to retain their existing powers, functions and duties. The purpose of that provision, however, was to continue the substantive authority of such local governments, while according them the additional powers granted to other local governments under the 1974 Constitution. Kean at 67. That provision was not intended to guarantee to those local governments with preexisting charters that there would be no interference by the Legislature, particularly in matters of statewide concern.

The broad right granted to the City of New Orleans by its Charter to “sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings” did not give the City an unconditional right to sue for damages, arising from injuries to numerous citizens domiciled throughout the state, which were indirectly incurred by the City as well as by all other municipalities and parishes and by the state. In this type of action involving a matter of statewide concern and an interest shared with other local governments and the state, the state necessarily has the right to preempt political subdivisions as the proper party to bring such an action. Act 291 merely codifies this preemption (although it does not regulate firearms).

The Legislature had the inherent power, within constitutional limits, to determine which parties should have a right of action to sue for this type of damages and may preempt the power of local governments to file this type of action by reserving that

right to the state. Accordingly, Act 291 (even if not an exercise of police power) validly preempted the City's powers and could do so with respect to pending suits, because the City does not enjoy the protections afforded to private citizens by the Due Process and Contracts Clauses of the federal and state constitutions.