

**SUPREME COURT OF LOUISIANA**

**No. 00-CA-1132**

**MAYOR MARC H. MORIAL, AND THE  
CITY OF NEW ORLEANS**

**v.**

**SMITH & WESSON CORPORATION, ET AL**

**ON APPEAL FROM THE  
CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
HONORABLE LLOYD J. MEDLEY, JUDGE**

**CALOGERO, Chief Justice, dissenting.**

I dissent from the majority's conclusion that continuation of the City's lawsuit abridges the police power of the state in contravention of La. Const. art. VI, § 9(B). The majority reaches this result by concluding that the City's lawsuit is an indirect attempt to regulate the lawful design, manufacture, marketing and sale of firearms. Further, the majority concludes that 1999 La. Acts 291 (hereinafter "Act 291") was passed as a valid exercise of the state's police power to make it clear that regulation of firearms is exclusively a state function. I disagree with both conclusions.

First, the City's lawsuit does not attempt in any way to regulate the firearms industry. It is merely a suit for damages. To conclude otherwise would be to say that an injured plaintiff is attempting to regulate the automobile industry when he sues to recover damages caused by faulty brakes, or that a survivor is attempting to regulate the airline industry when he sues the airline because his spouse was killed in an airplane crash. The City does not request any relief in the form of a mandatory injunction that would require gun manufacturers to change their way of doing business; rather, the City is ostensibly only seeking damages in accordance with causes of action created

by products liability statutes in existence at the time the lawsuit was filed.

According to *Black's Law Dictionary*, Fourth Edition (1968), to “regulate” means “to fix, establish or control” or “to direct by rule or restriction.” The City’s lawsuit does neither. The City’s goal is the collection of monies to compensate it for damages resulting from the actions of defendants -- nothing more, nothing less.

Second, Act 291 is not a valid exercise of the state’s police power sufficient to trump the City’s powers enumerated in its Home Rule Charter, which pre-dated the La. Constitution of 1974. For the same reasons stated above, Act 291 is not an attempt to regulate the firearms industry (which likely is within the state’s police power), but rather is only a legislative assertion of who has the right of action to sue for damages in certain cases. Act 291 was not passed in response to a pressing public need or a vital public interest. Rather, it was passed in response to the City’s lawsuit with the obvious intent to halt the City’s litigation.

Even if Act 291 constituted a “regulation,” it does not rise to the level of a valid exercise of the state’s police power sufficient to override the powers granted to the City of New Orleans in its Home Rule Charter, which pre-dated the 1974 Louisiana Constitution. In *City of New Orleans v. Bd of Com’rs of Orleans Levee Dist.*, 93-0690, p. 27 (La. 7/5/94), 640 So. 2d 237, 252, we discussed the state-local government relationship contemplated by Article VI of the La. Const. of 1974, which “strikes a balance in favor of home rule that calls for a corresponding adjustment in judicial attitude.” We went on to caution that “home rule abilities and immunities are to be broadly construed, and any claimed exception to them must be given careful scrutiny by the courts.” *Id.* at 252. Act 291 as a claimed exception to the powers of the City’s Home Rule Charter does not pass the careful scrutiny that is required in this case.

While the state's police powers are admittedly broad, they are limited to such measures "as are reasonable." *City of New Orleans v. Bd of Dir. of LSM*, 98-1170, p. 11 (La. 3/2/99), 739 So2d 748, 757. In determining what is reasonable, we have held that "the action taken must be, under all the circumstances reasonably necessary and designed to accomplish a purpose properly falling within the scope of police power." Accordingly, "to sustain an action under the police power, the court must be able to see that its operation tends in some degree to prevent an offense or evil or otherwise to preserve public health, safety, welfare or morals." *Id.* at 757, *Francis v. Morial*, 455 So 2d 1168, 1173 (La. 1984). The first question to be answered in determining whether the state police power has been abridged by a home rule municipality's local law is whether the local law conflicts with an act of the state legislature that is necessary to protect the "vital interest" of the state as a whole. *City of Baton Rouge v. Williams*, 95-0308, pp. 5-6 (La. 10/16/95), 661 So2d 445, 449; *City of New Orleans v. Bd of Com'rs*, *supra*.

I simply do not see where the State, in reserving for itself the exclusive right to recover against the firearms industry for damages for injury, death, or loss, is attempting to prevent an offense or evil or is attempting to preserve public health, safety, welfare or morals. I also do not agree that the Legislature acted to protect a vital interest of the state. In fact, quite the opposite could be argued in that the State is in effect hurting the public welfare by restricting the public's right to recover damages for injuries resulting from the act of another, as well as cloaking an entire industry with immunity from suit by certain plaintiffs.

I acknowledge that these conclusions leave unanswered a myriad of legal issues raised in this litigation. However, as I write as a dissenter and not as a member of the majority, I choose to pretermitt the remaining legal issues raised by my conclusions,

such as the effect of 1999 La. Acts 1299 (La. R.S. 9:2800.60) on the City's lawsuit.