

Approved by the ABA House of Delegates,
February 12, 2007

AMERICAN BAR ASSOCIATION

**SPECIAL COMMITTEE ON GUN VIOLENCE
CRIMINAL JUSTICE SECTION
TORT TRIAL AND INSURANCE PRACTICE SECTION
YOUNG LAWYERS DIVISION**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association supports the traditional property rights
- 2 of private employers and other private property owners to exclude from the workplace
- 3 and other private property, persons in possession of firearms or other weapons and
- 4 opposes federal, state, territorial and local legislation that abrogates those rights.

REPORT

Background

On July 9, 2003, a disgruntled factory worker at a Lockheed Martin assembly plant in Meridian, Mississippi, retrieved a shotgun and semi-automatic rifle from his vehicle and went on a killing rampage in the plant, killing five and injuring nine co-workers before taking his own life. Afterward, investigators recovered three additional guns from the killer's truck, which was parked 50 feet from the factory. This example is just one of thousands of incidents in which supervisors and co-workers have been shot by disgruntled employees, domestic violence has spilled over into the workplace, or other incidents of gun violence have taken place on business premises.

Workplace violence and the prominent role of guns in workplace injuries and death are serious problems. Each year, on average, at least 1,000,000 people in the United States are victims of workplace violence and 1,000 of these are victims of homicide, according to the Bureau of Labor Statistics. The Bureau estimates that firearms are used in close to 80 percent of workplace homicides and that nearly 90 percent of workplace firearm homicides take place in the private sector. Murder was the third leading cause of occupational fatalities in 2003, but the leading cause of death for women in the workplace.¹

Many companies have responded to this threat by prohibiting individuals from having weapons on their property, particularly in parking lots or places of business.

A legislative campaign is underway, however, to erode the rights of private property owners by prohibiting them from barring weapons on their property. In particular, state legislatures are being lobbied to enact statutes to require employers to permit employees to bring firearms on to company property. Legislation modeled after a first-of-a-kind statute enacted in Oklahoma in 2004 and amended in 2005² is being used in this nationwide effort to enable gun owners to possess and carry guns on the private property of others, in derogation of the rights of employers and other private property owners to determine the terms of entry on their land and property. The legislation is characterized by some as "forced entry" legislation because it seeks to override the traditional right of a private property owner to exclude whomever he or she chooses from his or her property and determine the terms on which others may enter on or use that property.

¹ Women's Safety and Health Issues at Work, National Institute for Safety and Health, available <http://www.cdc.gov/niosh/topics/women>.

² See Okla. Stat. tit 21 Section 1289.7a.

The Oklahoma law was enacted in response to the 2002 firing of some employees by the Weyerhaeuser Corporation after the employees were found in breach of a company policy prohibiting gun possession on company property. The fired employees had been found with firearms in their cars in the company parking lot. In 2004, largely in response to the controversy that grew out of the Weyerhaeuser firings, the Oklahoma legislature enacted a new law that strips employers and other property owners of the legal power to regulate possession of firearms on their own property. It provides: “no person, property owner, tenant, employer, or business entity shall maintain, establish, or enforce any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked motor vehicle.... on any property set aside for any motor vehicle.”

A decision by the Court of Criminal Appeals of Oklahoma has held that the Oklahoma law is a criminal statute that subjects violators to imprisonment in the county jail or a fine, or both. *Whirlpool Corp. v Henry*, 110 P.3d 83, 85 (Okla. Crim. App. 2005). It also creates a civil cause of action for persons seeking to enforce the statute against persons who ban gun possession on their property and provides for the award of attorney’s fees and court costs to persons who successfully sue to enforce the law.

A number of Oklahoma-based companies challenged the forced entry statute in federal court, including ConocoPhillips, a company that has become the subject of a nationwide boycott promoted by the gun lobby. Plaintiff corporations maintained that the state statute conflicts with federal duties owed to employees under the Occupational Health and Safety Act, and that it violates constitutionally protected private property rights and due process rights in violation of the Fifth and Fourteenth Amendments of the United States Constitution. A temporary restraining order granted by the federal court in 2004 against enforcement of the Oklahoma statute remains in effect at this writing. Meanwhile, legislation based on the Oklahoma forced entry statute has been introduced in most state legislatures during the 2006 legislative terms and is expected to be reintroduced in 2007. Some of the proposed laws apply only to parking areas; others are more broad and would affect all private property owners, including homeowners.

The ready accessibility of firearms in any work environment creates potential liabilities and risks that even the most conscientious business owner cannot protect against and should not be forced to shoulder. For this reason, laws that prohibit employers from excluding from the workplace persons possessing firearms violate the due process and property rights of private property owners and must be rejected on these grounds.³

³ Forced entry statutes typically not only prevent employer property owners from excluding persons it chooses to exclude from its property, they force them to admit persons to its property who are in violation of the Brady Handgun Violence Prevention Act (“Brady Act”), 18 U.S.C. §922(g). Section 922(g) prohibits nine (9) categories of persons from possessing firearms: (1) a felon; (2) a fugitive from justice; (3) an unlawful user of or person addicted to any controlled substance; (4) a mental defective or one who has been committed to a mental institution; (5) an alien; (6) a person dishonestly discharged from the Armed Services; (7) a person who has renounced U.S. Citizenship; (8) a person subject to a domestic restraining order; and (9) a person convicted of a misdemeanor crime of domestic violence. Yet, forced entry statutes would force employer businesses to admit persons in categories (2) – (9) onto Plaintiff’s property with

Analysis

Forced Entry Laws Infringe on Constitutionally Protected Property Rights

Forced entry laws violate fundamental rights that are guaranteed by the due process clause of the United States Constitution and State constitutions. Such enactments deprive employer business owners of their fundamental property and liberty rights.⁴ It is well established that state legislatures cannot authorize a violation of either the federal constitution or their state constitution. *U.S. v. Villamonte-Marquez*, 462 U.S. 579, 103 S. Ct. 2573, 77 L.Ed.2d 22 (1983). It is equally well-established that owners of private property have property and liberty rights that are protected from improper state action by the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution. *See Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917). The due process clauses of the Fifth and Fourteenth Amendments provide, respectively, as follows:

No person... shall be deprived of life, liberty, or property, without due process of law (Fifth Amendment);

nor shall any state deprive any person of life, liberty, or property, without due process of law (Fourteenth Amendment).

Forced entry laws violate the traditional rights to exclude others from one's private property, as well as the liberty to decide how, whether and when to do so. Property rights, especially real property rights, "have always been fundamental to and part of the preservation of liberty and personal freedom in the United States." David L. Callies and J. David Breemer, "*The Right to Exclude Other from Private Property: A Fundamental Constitutional Right*", 3 Wash. U. J. L. & Pol. 39 (2000). In *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979), the United States Supreme Court referred to the property owner's "right to exclude others" as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176. Sixty years earlier, Justice Brandeis made a similar statement in *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918), when he remarked that "[a]n essential element of individual property is the legal right to exclude others from enjoying it."

This same principle has also been recognized numerous times by various courts and other legal authorities. *See, e.g. Hodel v. Irving*, 481 U.S. 704, 716, 107, S.Ct. 2076, 2083, 95 L.Ed.2d 668 (1987) ("one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S.Ct. 3164, 3176, 73

firearms in their vehicles who are engaged in criminal conduct *i.e.*, possession of handguns in violation of the Brady Act.

⁴ Reference to property rights in the proposed recommendation and report includes tenants, lessees and other assignees of such rights.

L.Ed. 2d 868 (1982) (“the power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of rights”); *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1277 (9th Cir. 1986) (same); and Jan Laitos, *Law of Property Protection*, § 5.03[A] (1999) (the right to exclude is one of those property “rights valued so highly that the abolishment will result in the offending law being declared unconstitutional”). In *Hendler v. United States*, 952 F.2d 1364, 1374-75 (Fed. Cir. 1991), the Federal Circuit described the nature of the property owner’s right to exclude, as follows: “In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession – the right to exclude strangers, or for that matter friends, but especially the government. The notion of exclusive ownership as a property right is fundamental to our theory of social organization. In addition to its central role in protecting the individual’s right to be let alone – the ability to exclude freeriders – is now understood as essential to economic development, and to the avoidance of wasting of resources found under common property systems.”

Similarly, Professor Thomas W. Merrill wrote as follows regarding the property owner’s right to exclude: “The right to exclude others is more than just ‘one of the essential’ constituents of property – it is the *sine qua non*. Give someone the right to exclude others from a valued resource, i.e. a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.” “*Property and the Right to Exclude*”, Thomas W. Merrill, 77 Neb.L.Rev. 730 (1998). See also Restatement of Property Section 7 (1936) (possessor interest in land exists when person has such control over it as to be able to exclude other members of society in general from the land).

Numerous state courts have recognized this same principle regarding the fundamental nature of a property owner’s right to exclude. See, e.g., *Sammons v. American Automobile Association*, 912 P.2d 1103, 1105 (Wyo. 1996) (“[o]wnership of property implies the right of possession and control, and includes the right to exclude others... exclusive possession is a fundamental element of property ownership...”); *Gardener v. New Jersey Pinelands Commission*, 593 A.2d 251, 262 (N.J. 1991) (distinguishing a restrictive covenant “because it does not impair plaintiff’s right to exclude others from his land, arguable a more fundamental element of the bundle of property rights than even the freedom to use property as desire.”); *Alderwood Associates v. Washington Environmental Council*, 635 P.2d 108, 120 (Wash. 1981) (“[t]he right to exclude others is an essential stick in the bundle of property rights”).

Forced entry laws deprive employer businesses and other property owners of their fundamental right to exclude individuals who possess firearms from their property. Further, such laws place substantial burdens on employer businesses by subjecting them to the risks associated with firearms in their workplaces without due process. They can only be justified if they “substantially advance legitimate state interests.” *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L. Ed. 2d 677 (1987). These laws cannot be said to substantially advance a legitimate state interest because they increase, rather than decrease, the risk of personal injury in the workplace. Arguably, they do not even meet a rational basis test. Certainly if personal safety is the policy objective of the

forced entry laws, that objective can be achieved by much less restrictive means than the forced entry law. *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 Ld. 2d 274 (1972); *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed. 2d 772 (1997); and *United States v. Deters*, 143 F.3d 577 (10th Cir. 1998).

Such legislation fails to serve the state interest of public safety. Even those forced entry laws that prohibit private property owners from excluding firearms from only parking areas do nothing to advance any state interest because firearms are just as capable of being fired in a parking area as they are inside a building or home. Thus, while the state interest in public safety is proper, such laws do not substantially advance that interest.

If a state's forced entry law is upheld against such challenges, the application of the law to individual properties may be further subject to the limitations of public "taking" of individual property rights subject to compensation by the state. The rights of the property owner to exclude others are clearly not absolute, but subject to broad limits when the state's interest meet certain criteria. The state's removal of a property owner's fundamental right to exclude others may not be a "taking" in a constitutional sense when the state's limitation (1) promotes the public safety or welfare (2) does not diminish the value of the private property owner's economic interest, and (3) does not interfere with reasonable expectations regarding the use of the property. See Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 15.12 (3rd ed. 1999). Opening a private property to a public use and admission of persons the property owner wishes to exclude is a taking of a property interest that requires compensation. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (federal action requiring opening of navigable private lagoon in Hawaii to public use is a taking requiring compensation). But see *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), upholding a California court ruling that private shopping centers could not exclude persons who wanted to engage in non-disruptive speech. *Nollan v. California Coastal Commission*, 483 U.S.825 (1987), conditioning a permit to build a house on coastal lands upon a requirement that the owner permit the public an easement to reach the beach did not substantially advance a legitimate state interest and therefore as a taking of property.

Forced Entry Laws Conflict With Federal And State Obligations to Provide a Safe Workplace.

The federal Occupational Health and Safety Act of 1970 (OSHA) requires that "each employer furnish to each of his employees....a place of employment ..free from recognized hazards that are likely to cause death or serious harm to his employees." This statutory duty applies to all private employers in the United States.

The courts have interpreted this duty to include criminal acts of violence in the workplace among other "feasibly preventable" hazards. At present, employers have adopted policies that forbid employees from possessing firearms on company property as a means of fulfilling this statutory duty. Once subject to a forced entry statute, these employers would be required to permit employees access to guns on business premises, including parking areas that could be accessed readily by angry or disgruntled employees. These

employers would be unable to meet their duty under OSHA if they comply with that forced entry statute.

The vast majority of employers are also subject to state workplace safety statutes and regulations that impose a duty to provide a safe workplace. In the absence of state statutory law, the common law has generally imposed a duty of care on employers to protect the safety of invitees on their property. If employers are required to permit persons in actual or constructive possession of guns on their premises, they open themselves up to greatly increased risk that incidents of gun violence will occur on their property for which employers may be held liable. Employers would also be required to expend substantial sums of money to ensure that employees who bring guns on the premises are supervised more closely. When employers are aware of a safety hazard, such as guns on their property, the courts have held that they must take reasonable steps to ensure that the guns are safeguarded and secured. Employers in states that have not adopted forced entry laws generally avoid potential legal liability by prohibiting the possession of guns on the business premises. Under the forced entry statutes, employers no longer have this option unless they wish to risk criminal and civil liability under the forced entry law.

Numerous courts have also addressed this issue. See *Dunn v. Nordstrom, Inc.* No. IP 98-1599 C-M/S, 2000 US Dist. LEXIS 20513 at 18, 2000 WL 33309373 at 6 (S.D. Ind June 27, 2000)(terminating employee for violating company prohibition against bring firearms onto premises is legitimate and justifiable reason for termination), aff'd in part and rev'd in part on other grounds, 260 F.3d 778 (7th Cir. 2001); *Misco, Inc. v. United Paperworkers Int'l Union*, 768 F.2d 739, 742-43 (5th Cir. 1985) (“In adopting plant rules, an employer is not narrowly limited to denouncing acts already made criminal by the law, but may, at a minimum, adopt reasonable prophylactic measures going beyond the statutes. As examples, we think it is scarcely open to doubt that rules forbidding the introduction of ...firearms (loaded or not) [onto plant premises] would be valid...”), rev'd on other grounds, 484 US 29 (1987)

ABA Policy

The Association has adopted broad policy urging employers to take action to reduce workplace violence and has adopted numerous recommendations aimed at reducing gun violence in our society but has not addressed the issue raised by legislation to require employers to permit gun possession on employer premises.

The ABA House of Delegates at the 1998 Annual Meeting approved a recommendation sponsored by the National Association of Women Lawyers, the National Association of Women Judges, the Criminal Justice Section, the Tort and Insurance Practice Section and the Commission on Domestic Violence... “urging employers to address work place violence by adopting policies and practices to help them better prevent and manage on-site violence and threats.” While this policy provides support for employer actions to reduce workplace violence, it does not address policies related to state legislation to

override employer property rights to permit employees to possess firearms on employer or other private property; nor do the numerous ABA-approved recommendations regarding policies to reduce gun violence. A new resolution is needed for the Association to express its views and advocate sound policy on this issue.

Respectfully Submitted,

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on Gun Violence
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