

Gun Suits Bolstered By New Evidence

Defense Says Evidence Won't Fly In Court

By Amy Johnson Conner

During the four years since the first municipality filed suit against firearms manufacturers for the financial damages governments incur by gun violence, the defense has clearly maintained the advantage.

Of the 20 cases to reach the courts to date (filed on behalf of 34 government entities), plaintiffs have scored only one victory – and that was reversed on appeal.

Six of those cases have ended in defense victories, either through successful motions to dismiss or state laws that bar such suits. A seventh, filed by the City of Boston, has been voluntarily withdrawn. Four more cases are on appeal after successful defense motions to dismiss, five are awaiting court rulings on similar motions and one has been

Litigation

stayed pending the outcome of a similar case in the jurisdiction.

Only three cases – one each in California, New York and Cincinnati – have reached discovery.

But plaintiffs' attorneys expect that to change soon due to new evidence that has surfaced in California and New York – evidence plaintiffs claim will provide the "missing links" that will address the concerns that led courts to dismiss earlier cases.

- In Brooklyn, N.Y., the NAACP has filed a case in U.S. District Court that claims the gun industry has created a public nuisance by continuing to provide firearms to unscrupulous dealers they know to be feeding the crime market. In this case, the court has ordered the federal Bureau of Alcohol, Tobacco and Firearms (ATF) to turn over its gun tracing database in its entirety. Never before released in full, the plaintiffs claim the database – which tracks firearms by serial number from the manufacturer to the last legal purchaser – will prove the industry knows the path their products follow before falling into criminal hands.

The NAACP case is different from the municipal suits because it was filed on behalf of victims of gun violence, but the evidence will be used in all plaintiffs' cases against the industry.

- In the 12 cases consolidated in California, plaintiffs' attorneys obtained a box of documents through discovery that included a letter to a defendant-manufacturer from ATF. That letter encouraged the industry to use the bureau's database to re-evaluate its decisions to sell to problem distributors. Plaintiffs' attorneys plan to assert that the industry's failure to take action upon receipt of this letter demonstrates its callous disregard for public safety.

Those two cases are slated to go to trial in the spring and will be closely watched by attorneys nationwide.

"I think all this evidence is building an extremely powerful case against the gun industry," said Jonathan Loy, a plaintiffs' attorney with the Brady Center to Prevent Handgun Violence, which is representing several municipalities. "We've survived a number of important motions and have developed a very powerful case against the industry."

But defense attorneys scoff at the evidence, saying the documents won't change the courts' views of these cases.

"There is no basis in law for holding the manufacturer of a lawful product liable for the criminal misuses of that product by others," said Chicago's Jim Dorr, who is representing many of the defendants in cases across the country.

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Public Nuisance Charges Hanging On

Municipalities originally used three causes of action to sue the firearms industry – product liability, breach of warranty and violation of public nuisance laws. Because many courts have thrown out cases relying on product liability and breach of warranty, most municipal cases now rely on the public nuisance argument.

David Kairys, a Temple University law professor who developed the public nuisance theory, explained that the cause of action is based on “the facts about how the manufacturers market and distribute through distributors and dealers they know to be feeding the crime market.”

Unlike makers of other products, the plaintiffs allege, the firearms industry is informed when one of its products is used in a crime.

“They’re given a trace request [from ATF] and that is a red flag. If the gun company was acting in a socially responsible manner, they would have an interest as to why or how their gun ended up in a crime and they would try to do something to prevent that

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from happening in the future,” Loy said. “They would, among other things, determine which dealer sold that crime gun and if they were supplying a dealer that got a number of traces, they would do something about it. They would eventually cut off suppliers that had a substantial number of traces, and restrict the sale of guns that are getting into criminal hands.”

The plaintiffs argue that not doing so violates state public nuisance laws.

The industry’s response, as interpreted by Loy, is that it’s not their problem – it’s ATF’s or law enforcement’s problem, and the industry has no role in tracing the ille-

gal use of firearms.

“They say [law enforcement] doesn’t want them to do anything more than they are doing in the distribution of their guns,” he said.

The defense attorneys say this is essentially true, although in a much less flip manner. They contend the law simply does not allow suits like this.

“You can’t sue the manufacturer of a legal, highly regulated, non-defective product when some criminal uses that product to commit a crime,” said Lawrence Keane, general counsel with the National Shooting Sports Council, which is representing the defense in seven municipal suits. “That’s not a novel proposition and that’s why these cases are being dismissed across the country.”

The defense has likened the cases to suing breweries for drunken driving accidents.

New Evidence

Kairys calls the gun tracing information obtained by the NAACP “very significant to the whole [public nuisance] theory against the manufacturers.”

The ATF keeps a database of the trace requests it makes of firearm manufacturers. Among other things, it includes the names of all the sellers of a particular firearm throughout the chain of distribution, Loy explained.

The ATF does not reveal specific information about a particular firearm they’re adding to the database, but they give manufacturers the model and serial number and ask for the name of the distributor to whom the gun was sold. From the distributor, the ATF can track down the individual who purchased the gun.

“So it would show the dealers who have sold a substantial number of crime guns, dates of sale, and calculate the ‘time to crime,’ which is an important factor that ATF recognizes,” Loy said. “If it’s a short time between the retail sale and recovery in a crime, it’s an indicator the gun was trafficked.”

This database is crucial because it proves that nearly every day manufacturers are put on notice about “which distributors ... are feeding the crime market,” said Kairys, who noted that every minute of every work day, the industry receives a call from the ATF seeking information about a firearm for the database. It also allows for a complete analysis of the sources of crime guns, Loy added.

In the past, even under Freedom of Information Act requests, the ATF has not turned over the database to plaintiffs’ attorneys.

“They’ve said in a generalized way that it would affect their law enforcement role,” by

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jeopardizing ongoing investigations, said Loy. That argument was rejected by the Brooklyn court in the NAACP's case and the court ordered ATF to turn over the full database to the plaintiffs.

Plaintiffs hope this information will affect jurors.

"Picture yourself in the business of selling a product that is designed to kill that you market on the basis of how effectively, quickly and inexpensively the product does that. You know it's connected to an incredible level of deaths. And then suppose the government calls you multiple times during the day. After a week or two weeks, certainly a year, you'd have to close your eyes intentionally not to notice that you're getting an awful lot of calls about Distributor A and hardly any calls about Distributors B, C, or D," Kairys said.

The plaintiffs plan to present the database to a jury with the suggestion that gun manufacturers should take action against distributors whose names continually appear as the result of an ATF trace request.

"I can't imagine jurors anywhere wouldn't be very upset, infuriated, by this," Kairys said.

The second new piece of evidence is a letter from the ATF to Taurus International Manufacturing. Loy found the letter minutes before he was scheduled to depose a chief executive at Taurus for the California cases.

"I was given a box of documents by Taurus counsel moments before the deposition was to begin," he recalled. He asked for a break to examine the documents "and in that [box] was this letter."

Taurus asked the ATF whether it should use the trace information for any purpose, assuming they'd get the same answer they'd always received in the past - don't take any action that might jeopardize ongoing investigations. The plaintiffs characterize the inquiry as an effort to secure ATF's support for manufacturers in these cases.

But what they received instead was a letter from ATF "saying you can and should look at your trace and if you determine an unusually high number of firearms being traced, you should look at your business practices more carefully," Loy explained.

"ATF is saying what we and cities are saying in these cases. It really cuts out the legs of their major defense."

The letter will be used in cases across the country, not just California's, he said.

Kairys believes that once jurors know how tracing is conducted and that the ATF told a manufacturer flat out that it should be doing inventory control with the database, they'll be furious.

"To me it's not only the letter itself, it's the reaction," he said.

According to Kairys, one industry executive was quoted in the *New York Times* saying the industry has no responsibility to keep track of the traces - that it's not their problem.

"I think you present that to a jury anywhere and that industry's in trouble," he said.

But according to Keane, the letter is taken out of context. The particular letter the plaintiffs have is one of a series of letters between Taurus and the bureau, and Taurus replied to ATF seeking a clarification of the sentence plaintiffs have seized upon, but Taurus has yet to receive a response.

He also pointed out that ATF officials have testified in the past and in recent court cases that they do not want firearms' manufacturers following up on gun traces.

Defense: Evidence Not Damaging

The defense isn't worried about any of this evidence because they have an argument they say trumps it all: The industry has never had access to any ATF information on which it could take action.

When manufacturers receive trace calls from the ATF, they are not told why the re-

Continued on page 23

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Continued from page 14

quest is being made. For all they know, a widow is turning in her husband's firearm collection after his death. A trace inquiry is not always made in response to a crime, explained Dorr, the Chicago defense attorney.

"The manufacturer isn't told this information. It's all kept confidential within law enforcement," he said. "It's hard to argue they should have done something with information they never had access to. The plaintiffs are attempting to misuse that data to bootstrap themselves into a case that has no foundation.

"The New York Court of Appeals found quite correctly that you can't draw any inference of wrongdoing" from a trace request, Dorr said.

The defense anticipates it won't have to argue against the tracing information and the ATF letter because cases have been, and will continue to be, thrown out based on the most successful defense argument yet: the law.

"The cases ... have been dismissed on the law because the courts have found that the cases do not state a legitimate cause of action," said the National Shooting Sports Council's Keane.

"In terms of the legal issues, the courts are still quite overwhelmingly holding, and particularly at the appellate level, that you can't hold the manufacturer of a lawful, non-defective product responsible for the criminal action of third parties," Dorr said.

Few courts have allowed these cases to proceed, and when they do, Dorr added, "they express skepticism about the cases."

If the cases do make it to trial, the defense will employ these arguments and also present evidence of industry education campaigns and each manufacturer's initiatives to distribute trigger locks for free to the owners of its guns, programs they hope will show manufacturers do take action to prevent the misuse of firearms.

As a measure of success, Keane points to a new study that found the incidents of firearm accidents is down more than 58 percent over the past 10 years, even though there has been an increase in the number of homes with firearms. Nearly 280 million firearms are currently in civilian hands.

Immunity Legislation

Another recent development has been the race to convince Congress and State Houses across the country to ban frivolous plaintiffs' claims against the firearms industry.

Some 30 states have passed legislation barring plaintiffs from filing suits against the industry in some circumstances, including those that spawned the municipalities' public nuisance cases. Bills are also pending in the House (HR 2037) and Senate (S 1996) that would curtail municipalities from filing such suits.

The black sheep has been California, which in September became the first state in the country to repeal a statute giving special legal immunity to the gun industry.

"There is no greater proof" of the merit of these cases, Loy said, than the fact that "the industry sees the only way to escape liability is to get bailed out by their friends in Congress, because they know that there [will] be some juries and judges that are not going to stand for what they've done."

Loy calls the legislation extraordinary. "There is no precedent to it. People think of tobacco as a powerful lobby, tobacco never got anything like this," he said.

Loy said it is extraordinary that the industry has been able to exempt itself from basic common law principles.

"They apply to everyone else," he said. "They apply to people who sell explosives, people who sell teddy bears, you and me if we don't shovel our sidewalks of snow, but you get a special privilege if you make and sell firearms. If you happen to be the victim of gun violence the door is locked shut to you."

The industry defends the legislation saying it doesn't prevent suits from being filed against truly defective products. If it protects the industry from a witch hunt, so be it, they say.

The legislation is "not designed to provide immunity, it's to prevent the firearms industry [from being held to a] higher legal standard than the manufacturers of other products," Keane retorted. "The bills don't provide special protection against legitimate product liability claims."

He also takes issue with the comparison to tobacco claims.

"The difference between firearms and tobacco is that firearms isn't hiding anything," Keane said. "There isn't a person alive who doesn't understand that a firearm is dangerous."

Unlike tobacco, which when used as intended will cause cancer and kill people, "when a firearm is used as intended, it saves lives," he continued.

He suspects Congress will vote on the legislation sometime during the next session.

Success Anyone's Guess

Both sides in the litigation insist that the momentum is on their side.

"We're extremely pleased with the way these cases are progressing," said Loy. "We're mounting an extremely powerful case and that's why the gun industry is desperately trying to get special protection on Capitol Hill. The gun industry is terrified of what a judge or a jury is going to do to them when they see the evidence of their conduct over the past decade."

Until some recent rulings in the plaintiffs' favor the industry hadn't lost a suit alleging liability for crimes committed with guns, Kairys noted.

"If you put aside the cases where states have been successful in banning [the suits], at the motion to dismiss stage, about half have been dismissed and half have been allowed. It's quite a shift in the industry," he said.

Dorr takes issue with the 50-50 score. Of the original group of 20 municipal suits filed, already 10 have been dismissed and

six of those are completely over, having progressed through the appellate process with unsuccessful results. The remaining four of the 10 are on appeal.

"So right away you've got half of the lawsuits gone before they even reach discovery," Dorr said. "The Boston case survived the motion to dismiss and then went through the complete discovery phase ... and there was nothing there."

For the record, the plaintiffs in the Boston case never said specifically that they didn't find any evidence of the industry's liability. What they did say was that the city "learned that members of the firearm industry have a longstanding commitment to reducing firearm accidents and to reducing criminal misuse of firearms."

In an attachment to the plaintiffs' request to dismiss their suit with prejudice in March, it was noted that "the City and the Industry have now concluded that their common goals can be best achieved through mutual cooperation and communication, rather than through litigation, which has been expensive to both the Industry and taxpayers, time-consuming and distracting in a time of national crisis." The attachment also notes that in the wake of the Sept. 11 terrorist attacks, the country has decided to "reorganize our priorities and to emphasize cooperation among Americans rather than confrontation."

With half the cases dismissed as a matter of law, Dorr thinks the rest are headed in the same direction. He predicts the California cases will end the same way Boston did - with enormous spending during discovery

and, in the end, the case will be dismissed. Keane predicts the Cincinnati case will also end the same.

The defense can't be sure but most believe they have seen the last of the new filings. New Orleans filed first in October 1998 and only one - Jersey City, N.J. - has been filed since June 2000. Jersey City, which is represented by the Brady Center, filed the day after Boston dismissed its suit, which was also handled by the Brady Center.

"I'm not aware of any city contemplating filing but I do know other cities that have considered it and rejected it," Keane said.

Dorr hopes municipalities will soon realize that the suits have little hope of success. He wants the plaintiffs to put their resources toward working with the industry to continue preventing handgun violence and accidents, instead of costly and "pointless" litigation.

The plaintiffs don't see settlement as a likely outcome.

"In any industry where they're used to winning they usually don't settle," Kairys said. "Smith & Wesson settled very early ... but it's hard to say in this particular industry. If you listen to them talk, it's not just about business, it's about doing the nation's work or the Constitution's work. Ultimately, it's owned by business people and corporations and at some point they'll think seriously about settlement. But it's too early, I think, for that."

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