GUNS IN THE CROSSHAIRS: FIREARMS LITIGATION IN 2002 AND BEYOND

By Craig A. Livingston[1]

Lawsuits involving guns have been around for some time. In recent years, however, they have taken on a decidedly different look. Though relatively few firearms cases reached juries in 2002, there were key trial court rulings and appellate court decisions which will surely affect both pending and anticipated cases for years to come.

The Changing Face of Firearms Litigation

Firearms cases of one sort or another have been a fixture in the modern era of product liability litigation. Early on, suits against gun makers tended toward manufacturing defect claims. In these cases, malfunctions could usually be traced to the use of inferior materials, poorly manufactured component parts, or other similar defects. Such suits typically arose out of isolated incidents and were relatively easy to prove. These early manufacturing defect cases are now viewed as the infancy of firearms litigation as we know it today.

In the last 15 years, firearms claims have gone from mundane to cutting edge. They now involve novel design defect issues and, more recently, issues which have more to do with social policy than tort law. As an example, a recent phenomenon in the field are lawsuits in which design defect claims are based on the *absence* of certain features. One such feature is a magazine disconnect safety, a device which prevents a semi-automatic pistol from firing when the magazine has been partially or completely removed. Similarly, the absence of other features which would prevent or minimize the negligent misuse of firearms – such as loaded-chamber indicators or cocking indicators – are now frequent defect allegations, particularly in cases involving children or young adults.

Finally, design defect suits now include the obligatory inadequate instructions/warnings

---

[1] Mr. Livingston is a partner in the San Francisco office of Schnader Harrison Segal & Lewis LLP where he specializes in representing national and international manufacturers in defense of product liability claims. He is a frequent lecturer and author in the product liability area and is co-chair of his firm's Product Liability and Mass Tort Practice Group. He can be reached at clivingston@schnader.com.

claim. Here, the alleged defect is the manufacturer's failure to adequately warn purchasers of the gun's grave dangers when in the hands of untrained or unauthorized users.

More recently, firearms cases have moved from traditional product liability lawsuits into an all-out effort to change the way firearms are made and distributed. For example, in cases such as *Hamilton v. Accu-Tek* (E.D.N.Y. 1999) 62 F.Supp.2d 802, the focus was on the distribution of firearms. There, plaintiffs sought to prove that firearms manufacturers and distributors were responsible for creating an illegal underground market which supplied firearms to criminals. Plaintiffs also alleged market share liability. However, following the certification of several questions of New York law to the New York Court of Appeals, the state high court held that manufacturers had no generalized duty to prevent criminals from acquiring firearms. (*Hamilton v. Beretta U.S.A. Corp., et al.*, 96 N.Y. 2d 222 (2001).)

In 1998, the City of New Orleans filed the first of what has turned out to be nearly 30 separate lawsuits against the firearms industry brought by municipalities or other governmental entities. These lawsuits have alleged that firearms manufacturers and distributors are responsible for the criminal misuse of their products which has lessened the quality of life in urban centers and necessitated the expenditure of tens of millions of dollars in public funds for police, fire, and emergency medical services. Though the specific claims have varied from case to case, they have fallen into several common areas: (1) public nuisance; (2) negligent distribution; (3) design defect due to the absence of internal locking devices or the failure to supply an external locking device; and (4) unfair and deceptive business practices.

Municipal Firearms Litigation – The Score Card

After taking into account cases that have been coordinated or consolidated, there have been 21 lawsuits filed by cities, counties, and one state (New York) since the fall of 1998. In addition, the NAACP has filed suit against the firearms industry alleging negligent distribution claims akin to those in the municipal cases.

In six of the 21 cases, appellate courts have affirmed or directed dismissals for defendants, and plaintiffs have exhausted their appeals. Those lawsuits were brought by Camden County (New Jersey), and the cities of Philadelphia, Bridgeport (Connecticut), Atlanta,

Miami/Dade County, and New Orleans. The City of Wilmington's case ended in summary judgment and the city elected not to appeal. Finally, in a case brought by the City of Boston, plaintiffs voluntarily dismissed all of their claims after the close of discovery. On March 27, 2002, the Boston plaintiffs requested entry of dismissal after concluding that it could not prevail despite spending as much as $30,000 a month of taxpayer money pursuing the action.

Another six of the 21 cases are currently winding their way through the appellate courts. In four of those six cases, dismissal motions brought by the defendants were granted. Those cases were brought by New York State, the cities of Gary (Indiana) and Chicago, and the District of Columbia. In *City of Newark*, the Appellate Division of the Superior Court of New Jersey recently affirmed the trial court's denial of defendants' dismissal motion as to plaintiffs' negligence, public nuisance, and punitive damages claims. In the sixth case, the consolidated City of Detroit/Wayne County action, a dismissal motion was denied and an interlocutory appeal is pending.

Two of the 21 cases – those brought by the Cities of Cincinnati and Cleveland – are currently in the discovery phase. In *City of Cincinnati*, the trial court dismissed the case on a defense motion and a unanimous panel of the Ohio Intermediate Appellate Court affirmed. However, the Ohio Supreme Court reversed by a 4-3 decision to remand the case to the trial court for further proceedings.

In California, 12 different cities and counties filed three separate lawsuits which were then coordinated before Judge Vincent DiFiglia in San Diego County Superior Court (*California Coordinated Cases*). In *California Coordinated Cases*, the suit included causes of action for public nuisance and unfair business practices. Following denial of a motion to dismiss, the trial court allowed fact and expert discovery to go forward. With discovery closed and an April 2003 trial date fast approaching, Judge DiFiglia granted certain defendants' summary judgment motion on March 7, 2003. In his ruling, Judge DiFiglia granted the motion as to the manufacturers, trade associations, and several distributors; however, the suit was allowed to proceed against certain other distributors and a number of retailers.

Finally, four of the 21 cases have not yet reached the point where a dispositive motion

has been filed or ruled upon. In two cases, one filed by the City of Camden (New Jersey) and the other by the City of St. Louis, dismissal motions are pending. The other two cases, one brought by the City of Jersey City and the other by New York State, are not yet ripe for the filing of a dispositive motion.

Preemptive Federal Legislation

As if the horizon was not dark enough for plaintiffs in the municipal firearms cases, a bill was reintroduced on February 27, 2003, in the U.S. House of Representatives with the goal of ending existing suits against the firearms industry and of preventing future suits. The Protection of Lawful Commerce in Arms Act (H.R. 1036) was introduced by Reps. Cliff Stearns (R-FL), Chris John (D-LA), Melissa Hart (R-PA), and Rick Boucher (D-VA) in the 108th Congress. A similar bill had been introduced in the 107th Congress as H.R. 2037, but it was pulled from consideration when the political climate changed during the Washington, D.C. sniper episode. Advocates of the legislation argue that the bill would protect manufacturers from politically motivated and frivolous lawsuits seeking to hold them liable for the criminal misuse of firearms. Supporters also argue that H.R. 1036 would prevent gun-control advocates from using the courts to bankrupt a lawful industry which makes legal products – products that are subject to strict regulations administered by the Treasury Department's Bureau of Alcohol, Tobacco and Firearms.

Gun-control advocates view the legislation as another NRA-backed effort to limit access to the courts by those harmed by gun violence. Other opponents of H.R. 1036, such as the Brady Campaign to Prevent Gun Violence, say the bill also prevents them from using the legal system to control the conduct of an industry that is exempt from oversight by the Consumer Product Safety Commission. Though there appears to be a clear support in the House for such legislation, success in the Senate is more difficult to predict.

State Legislation

State legislative efforts will surely have an impact on future firearms litigation as well. For example, in the wake of the municipal firearms litigation, nearly 30 state legislatures passed laws barring their cities and counties from filing lawsuits against firearms manufacturers,

dealers, and trade associations. Indeed, such legislation formed the basis for dismissing some of the existing suits like those brought by the cities of Atlanta and New Orleans.

Other legislative efforts in statehouses around the country will change the legal landscape for future firearms cases. For example, the California legislature last year passed a bill repealing Civil Code section 1714.4, a statute many believed provided the firearms industry with immunity from product liability suits. On September 25, 2002, Governor Gray Davis signed the bill into law which became effective on January 1, 2003. For over 15 years, this statute precluded suits against gun manufacturers where it was claimed that the "benefits of the product did not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged." This statute was enacted in 1984 in response to the "Saturday Night Special" suits made famous by Texas lawyer Windle Turley. This provision, and others like it around the country, seemed to provide manufacturers with immunity from the "guns are bad" type of product liability suits.

Grunow v. Valor Corp.

Perhaps the most significant and closely watched firearms case to proceed to trial in 2002 was *Grunow v. Valor Corp.* (No. CL 00-9657 AB, 15th Judicial Circuit, Palm Beach County, Florida.). This case arose out of the murder of school teacher Barry Grunow by seventh-grade student Nathaniel Brazill on May 26, 2000. Brazill shot Grunow with a Raven MP-25 pistol which he had stolen from a relative's home. Though the pistol was made by Raven Arms Company of California, the suit went forward against the distributor, Valor Corp., as Raven was no longer in business when suit was filed. Plaintiffs asserted a design defect claim alleging the Raven was inaccurate and unreliable, easily concealed, and particularly suited for disproportionate use by criminals. Plaintiffs also alleged that the Raven was defective because it did not include reasonable safety measures, such as an internal locking device, which would have prevented Brazill's unauthorized use. Finally, plaintiffs asserted negligence claims against Valor for its role in distributing the allegedly defective pistol.

On November 14, 2002, the jury concluded that Valor Corp. was negligent in supplying the subject pistol without feasible safety measures; however, it also concluded that the pistol was

not defective. The jury apportioned 5% of the fault to Valor and 95% of the fault to other parties, including the Palm Beach County School Board, and awarded over $24 million in damages.

Valor filed a post-trial motion challenging the verdict. On January 27, 2003, Circuit Court Judge Jorge Labarga granted the motion finding that the jury's verdict was fatally inconsistent. More specifically, Judge Labarga ruled that the jury's finding of negligence in supplying the Raven pistol without feasible safety measures "was legally dependent upon the finding that the Raven was *defective and unreasonably dangerous* without such 'feasible safety measures.' Given the jury's decision that the failure to include such 'reasonable safety measures' did *not* render the Raven pistol defective, its finding of negligence on the part of Valor in supplying the pistol without such safety measures rendered the verdict fatally inconsistent and without evidentiary support." (No. CL 00-9657 AB at p.10 [emphasis in original].)

The Future of Firearms Litigation

There can be no doubt that firearms litigation is here to stay. This is so because gun-control advocates such as the Brady Campaign have vowed to continue their fight against the industry case by case, courthouse by courthouse. Admittedly, the failure of gun-control efforts in statehouses around the country have forced such groups to move the battle to the courts, and there is no sign this trend will end soon. Even in the absence of significant victories, these individual product liability suits will likely continue unabated, particularly those where Brady Campaign lawyers have chosen to serve as co-counsel for plaintiffs. One such case is *Dix v. Beretta U.S.A. Corp.* (Alameda County Superior Court Case No. 750681), which resulted in a defense verdict in 1998, has been before the California Court of Appeals twice, and is slated for a retrial in September 2003 – with Brady Campaign lawyers involved at every stage of the proceedings.

The recent trend toward municipal suits may take a different course. To be sure, the majority of municipal suits filed since 1998 have been resolved in favor of the firearms manufacturers. Moreover, in the two cases that were litigated the longest – the *City of Boston* case and the *California Coordinated Cases* – the defendants prevailed as well, after both sides

expended thousands of hours and millions of dollars during discovery. Add to this the fact that many states have enacted preemptive statutes and the likelihood of a second wave of municipal cases diminishes greatly.

Though it was a commonly held view early on, few believe now that firearms litigation is the next "tobacco." This is so because at their core the cases are very different. Unlike Big Tobacco, firearms manufacturers have never tried to conceal or misrepresent the fact that their products could pose grave dangers in the hands of criminals and children. Indeed, the patchwork of federal regulations and state laws regulating the sale, purchase, and possession of firearms demonstrates otherwise. And now, with at least one case on each coast having moved through full discovery, it does not appear that the "smoking gun" documents plaintiffs have been searching for indeed exist.

C/M: 0001276-0000
SHSL: 600315