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Negligent Entrustment in Gun Industry Litigation: A Primer

By Kate E. Britt

Deep pocket jurisprudence, where plaintiffs name corporations as codefendants of less wealthy individual tortfeasors, is not uncommon in tort litigation. When the plaintiffs are victims of gun violence and the corporate defendants are firearms manufacturers, however, these suits are particularly controversial. Instead of aiming to make the victims whole, these suits are opposed (or supported) as attempts to regulate the firearms industry on a widespread basis. This article explores some of the resources available to understand the recent history of suits against firearms manufacturers.

Protection of Lawful Commerce in Arms Act

In 2005, the Protection of Lawful Commerce in Arms Act (PLCAA) was enacted to protect the firearms industry from facing what it considered frivolous litigation.¹ The act found that “imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system.”² To prevent this abuse, the PLCAA prohibits “qualified civil liability actions” against firearms manufacturers.³ One of the six exceptions to the act’s definition of “qualified civil liability action” is “negligent entrustment.”⁴ The act defines negligent entrustment as “the supplying of a qualified product by a seller for use by another person when the seller knows...the person to whom the product is supplied is likely to...use the product in a manner involving unreasonable risk of physical injury to the person or others.”⁵ To survive PLCAA scrutiny, plaintiffs in negligence cases frame their allegations against manufacturers to fit this narrow window of culpability.



Negligent entrustment cases

In practice, only two cases have gone to a jury under the negligent entrustment exception to the PLCAA. In the first, *Estate of Kim v Coxe*, the estate of a woman who was murdered with a stolen gun brought a wrongful death action against the store owner. The trial court ruled that the defendant was immune, but the Alaska Supreme Court vacated that decision, holding that the case could fall within one of the PLCAA’s exceptions.⁶ A jury ultimately ruled in favor of the store owner.⁷

The second (and at present, final) case to make it to jury trial under the negligent entrustment exception is *Norberg v Badger Guns*,⁸ which involved a gun store clerk who had reason to know a customer was conducting a straw man purchase; the gun was then used to shoot two police officers in the head. As the first and only successful case against the firearms industry under the PLCAA, *Norberg* has the potential to alter gun retail practices.⁹

A third case, *Janet S. Delana v CED Sales*, was allowed to proceed under the negligent entrustment exception but settled before reaching a jury. In *Delana*, a woman

personally begged a retailer not to sell a gun to her daughter, who later shot and killed her father.¹⁰

The plaintiffs in another high-profile case are hoping to have the second successful trial under the negligent entrustment exception. The Connecticut Supreme Court is currently deciding whether it will allow the estates of several Sandy Hook massacre victims to proceed with their case against gun manufacturers in *Soto v Bushmaster*.¹¹ In contrast to the typical allegation that defendants are liable for a third party’s malfeasance, the *Soto* plaintiffs claim that the manufacturers violated the law by marketing the firearms to inappropriate customers. If allowed to proceed, this case could have even greater implications than *Norberg*.¹² As of early May 2018, the Connecticut Supreme Court’s decision is still pending.

The Connecticut Supreme Court website hosts the docket for *Soto v Bushmaster* along with a long list of amici involved in this case.¹³ These include a group of law professors with “a professional interest in seeing tort law develop in a way that is consistent with accepted common law principles”¹⁴ and the Connecticut Citizens’ Defense League, which fears a “dramatic reduction

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in the availability in Connecticut of *all* firearms” held for lawful purposes.¹⁵

Regulation through litigation

A number of scholars have examined whether the courts are a proper or effective tool to effect firearms regulation. The book *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts*, edited by Timothy D. Lytton, provides a comprehensive analysis of lawsuits against firearms manufacturers.¹⁶ In “Lawsuits Against the Gun Industry,” Lytton claims that the tort system ought to “play an active policymaking role in reducing gun violence.”¹⁷ In contrast, Peter H. Schuck in his contribution to *Suing the Gun Industry* reasons that judges are not equipped to take on regulation of the industry.¹⁸ Patrick Luff in “Regulating Firearms through Litigation” concludes that the judiciary is an effective institution for regulating firearms but its positive potential is preempted by the PLCAA.¹⁹

Repeal of the PLCAA and state laws

Creative theories of liability in gun litigation are necessitated (and often thwarted) by the existence of the PLCAA. In recent terms, members of Congress have attempted to do away with the act altogether. In October 2017, the same month a gunman killed 58 people and injured another 851 in Las Vegas, Sen. Richard Blumenthal introduced S. 1939 “to repeal the Protection of Lawful Commerce in Arms Act”²⁰ and Rep. Adam Schiff introduced H.R. 3984 as Equal Access to Justice for Victims of Gun Violence Act.²¹ The text of these bills, along with information about their status and sponsors, is available at www.Congress.gov. Calls for repeal often coincide with high-

publicity shootings; the website Mass Shooting Tracker is a user-friendly database of all mass shootings since 2013 and is available at www.massshootingtracker.org.

Repealing the PLCAA would minimally affect plaintiffs in the 34 states that provide similar levels of immunity for the gun industry, including Michigan. Under MCL 28.435(7), if the sale of a firearm complies with state and federal law, federally licensed firearms dealers are not liable in Michigan for damages arising from its use or misuse. The Giffords Law Center to Prevent Gun Violence website organizes federal and state gun laws by jurisdiction and policy area, including a page summarizing immunity statutes in Michigan.²² ■



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ENDNOTES

1. PL 109-92 § 2(a) and 15 USC 7901-15 USC 7903. See Bush, *Presidential Statement on House of Representatives Passage of Protection of Lawful Commerce in Arms Legislation*, The American Presidency Project (October 20, 2005) <<http://www.presidency.ucsb.edu/ws/?pid=73812>>. All websites cited in this article were accessed May 12, 2018.
2. 15 USC 7901(a)(6).
3. 15 USC 7902(a).
4. 15 USC 7903(5)(A)(ii).
5. 15 USC 7903(5)(B).
6. *Estate of Kim v Cox*, 295 P3d 380 (2013). See also Miller, *Alaska Supreme Court remands gun case back to trial court*, Juneau Empire (February 26, 2013) <<http://juneauempire.com/local/2013-02-26/alaska-supreme-court-remands-gun-case-back-trial-court>>.

7. Miller, *Jury finds Ray Cox*, Juneau Empire (June 16, 2015) <<http://juneauempire.com/local/2015-06-16/jury-finds-ray-coxe-not-responsible-murder>>.
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9. Lytton, *Milwaukee case could encourage gun stores to reduce illegal sales*, The Conversation (October 19, 2015) <<https://theconversation.com/milwaukee-case-could-encourage-gun-stores-to-reduce-illegal-sales-49277>>.
10. *Delana v CED Sales*, 486 SW3d 316 (2016).
11. Brief of Plaintiffs-Appellants, *Donna L. Soto v Bushmaster Firearms International, LLC* (Conn 2017) (No. SC 19832 and No. SC 19833) <<http://www.ctnewsjunkie.com/upload/2017/10/soto-v-bushmaster-brief-koskoff-2017-10-05.pdf>>.
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14. Brief for Professors Nora Freeman Engstrom, et al, as Amici Curiae Supporting Plaintiffs-Appellants, *Donna L. Soto v Bushmaster Firearms International, LLC* (Conn 2017) (No. SC 19832), p iii <<https://law.stanford.edu/publications/brief-of-amici-curiae-professors-in-support-of-plaintiffs-appellants-donna-l-soto-administratrix-of-the-estate-of-victoria-l-soto-v-bushmaster-firearms-international-et-al/>>.
15. Application of Connecticut Citizens Defense League for Permission to Appear as Amicus Curie and to File Brief in Support of Defendant-Appellees, *Donna L. Soto v Bushmaster Firearms International, LLC* (Conn May 30, 2017) (No. SC 19832 and No. SC 19833), p 2 <<http://ccd.us/blog/uploads/2017/05/Application-of-CCDL-for-permission-to-appear-as-amicus-curiae.pdf>>.
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18. Schuck, *Why Regulating Guns Through Litigation Won't Work in Suing the Gun Industry*, pp 225-249 <<https://www.press.umich.edu/pdf/0472115103-ch9.pdf>>.
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