



Badger Guns Case Highlights Retailers' Legal Risk and Need for Compliance and Training

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A Wisconsin gun shop, Badger Guns, has been held liable for almost \$6 million for injuries to two police officers who were shot with a gun purchased at the shop. The jury's verdict in the case, handed down on October 13, 2015, found that a gun shop employee acted negligently and, consequently, his employer was responsible for the employee's actions when he sold a handgun to a person who was actually a straw purchaser for Julius Burton, who was too young to purchase the handgun. Burton used the same handgun a month after the purchase to shoot the officers.

The plaintiffs in the case—the two police officers—claimed that a number of red flags were raised by the straw purchaser and by Burton on the day of the sale and that the gun shop employee should have identified the transaction as an illegal straw purchase. Meanwhile, the gun shop contended that the straw purchaser and Burton went to great lengths to disguise the straw purchase as a legitimate transaction.

This case highlights the serious legal risks if retail firearms sellers do not employ adequate procedures to ensure that sales are lawful. The case also emphasizes the need for retail FFLs to implement and enforce a compliance program that guards against illegal sales.

Sellers of firearms ordinarily have absolute protection from liability when criminals use firearms in crimes. A federal law, known as the Protection of Lawful Commerce in Arms Act, or the PLCAA, **15 U.S.C. §§ 7901 - 7903**, absolutely bars such liability. This law is founded on the principle that a manufacturer or seller of firearms cannot be the legal cause of injury when a criminal uses a firearm to commit a crime.

PLCAA protection does not apply in two key instances. First, if a seller "negligently entrusts" a firearm, PLCAA protection is lost. Negligent entrustment is a legal doctrine that will hold a person liable if he gave (or "entrusted") an instrument to a person under circumstances where the person entrusting the instrument should have foreseen that the other person would harm others with the instrument. The

other key exception to PLCAA liability protection is when a seller knowingly violates state or federal law in making the sale, such as when a seller knows that he is selling a handgun to a straw purchaser, and the violation of law is the proximate cause of the injury. Under this PLCAA exception, "knowingly" selling in violation of the law ordinarily means that the seller knew the sale was unlawful or the seller was willfully blind to facts that would lead him to conclude that the sale was unlawful.

As these PLCAA exceptions indicate, retail FFLs are in a unique position regarding potential tort liability for gun sales because they will know more about purchasers of firearms than anyone else who might benefit from PLCAA protection. For example, many firearms sales are completed after a conversation between the buyer and seller about the buyer's needs and intended use of the firearm. A retail FFL also will process the buyer's ATF Form 4473, and might even assist the buyer with completing the form. By the time a retail sale is complete, the seller likely knows a great deal about the buyer and how the firearm might be used.

This knowledge carries additional legal risk. As indicated by the PLCAA exceptions discussed above, the law is structured so that its exceptions chiefly deal with situations in which a seller personally interacted with a buyer. After all, the manufacturer of a firearm simply could not be in the position of having negligently entrusted the gun, and any violations of law that could be committed by a manufacturer likely would not be the proximate cause of injury. For retailers, the situation is vastly different due to the personal interaction with the buyer.

Moreover, the law that governs the underlying liability generally places a higher burden on a retail seller. Under general negligence law principles, a person who has additional skills or information is obligated to use those additional skills or information in order to avoid foreseeable harm. Therefore, when a retail seller interacts with a consumer, takes background information, and otherwise discusses the purchase with the consumer, it is likely that this additional information imposes a heightened duty to monitor the sales process and prevent sales in violation of law.

So how does a retail FFL ensure that its operations are in compliance with the law and receive the full protection of the PLCAA? The answer is a formal compliance program combined with robust training of employees. Retail FFLs should establish written procedures that reflect applicable law and regulation, educate employees on these procedures, and conduct their operations in a way that compliance with the written procedures can be checked and verified. A number of resources are available, from private consultants, such as **Orchid Advisors**, to the ATF itself. Each of these resources offers compliance information, and sound advice is available.

Lawsuits against the industry members are not going away, and indications are that they might increase. Moreover, the record in **certain lawsuits** makes clear that some litigation is aimed not at recovering compensation for injury but instead at shutting down or harming the industry. FFLs therefore must be aware of the potential for overwhelming liability and take action before problems arise.

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