

After Remington Settlement, Attorneys General Aim To Press Forward With Consumer Protection Investigations of Firearms Manufacturers

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Remington recently agreed to a groundbreaking \$73 million settlement of claims brought by families of Sandy Hook school shooting victims. Notably, the plaintiffs secured this settlement by deploying consumer protection claims, which are exempted from the otherwise broad immunity provided to firearm manufacturers under the Protection of Lawful Commerce in Arms Act (“PLCAA”).

Attorneys General now appear to be pursuing a similar strategy of using consumer protection laws against firearm manufacturers, including by using their authority to investigate the companies’ internal files. For example, litigation concerning the New Jersey Attorney General’s subpoena to Smith & Wesson demonstrates how AGs will seek to use their consumer protection investigative powers in this area and further how courts in response will continue to grapple with the intersection between consumer protection law, the PLCAA, and the Second Amendment.

On October 13, 2020, the New Jersey Attorney General served an investigative subpoena to Smith & Wesson pursuant to its authority under the New Jersey Consumer Fraud Act (“CFA”). The New Jersey Division of Consumer Affairs’ preliminary investigation suggested the company’s advertisements to New Jersey residents “may misrepresent the impact owning a firearm has on personal safety and/or safety in the home.” The Agency also noted that certain of the manufacturer’s advertisements “market the concealed carry of firearms while omitting the material fact that, in New Jersey, concealed carry of a firearm requires a permit.”

The Subpoena targeted numerous categories of internal company documents that supported or refuted Smith & Wesson’s advertising claims about the purported safety and protection benefits of its firearms. It also sought whatever documents the company might have on “whether having a Smith & Wesson Firearm or other Firearm makes a home safer”; “whether it is safer to confront a perceived threat by drawing a Firearm rather than seeking to move away from and avoid the source of a perceived threat”; and “whether novice, untrained Consumers could successfully and effectively use a Smith & Wesson Firearm for personal or home defense.”

Smith & Wesson decided to fight the subpoena and on December 15, 2020, it filed a lawsuit in New Jersey federal district court seeking to enjoin any enforcement of the subpoena and declare it void. The New Jersey Attorney General went to state court and filed its own action on February 12, 2021 to enforce the subpoena. And it was the New Jersey state court that first addressed the subpoena’s propriety.

On June 30, 2021, the state court turned aside Smith & Wesson's various arguments and concluded that "It is common for the Attorney General to investigate under the CFA various industries that advertise to New Jersey consumers. This subpoena is not arguably different from those products from other industries." The judge ordered Smith & Wesson to fully comply within 30 days.

Smith & Wesson tried multiple unsuccessful efforts of staying enforcement—seeking stays from the New Jersey trial court, appellate division, and state supreme court. It also made another effort to have the federal court intervene. But on August 2, 2021, the federal court issued an opinion deciding to abstain from exercising jurisdiction and deferred to the state courts' handling of the matter.

The New Jersey Attorney General declared victory. A press release was issued stating that "As a result of these court decisions, Smith & Wesson must fully respond to the State's subpoena immediately." The Attorney General added "no industry is free to evade compliance with New Jersey's consumer protection laws, even when they sell firearms." Subsequent court filings revealed that Smith & Wesson had started producing non-public documents in response to this Subpoena, subject to a protective order that called for their return if the investigation was ever found improper.

Still, Smith & Wesson had an active appeal before the Third Circuit, which handed down a decision on March 10, 2022. The Third Circuit found that the district court was wrong to abstain and directed it to consider Smith & Wesson's federal court challenge to the investigation. Moreover, a concurrence to the opinion laid out some "pointed questions" for the trial court to consider on remand, calling the investigation and the related legal issues "novel."

Indeed, the concurrence suggested that the subpoena might interfere with Second Amendment rights and cause others in the firearm industry to curtail their lawful practices based on fears of receiving similar subpoenas over claims about the "safety" of firearms. It further implied that the Attorney General had an improper motive for this investigation, noting that the State is "for the first time" attempting to use the CFA against firearm manufacturers, and that the Attorney General's "approach to litigation suggests a careful review of New Jersey's entire investigation is warranted." Thus, even though the Attorney General has obtained some documents from Smith & Wesson, his ability to retain those documents remains in question, and the fight remains ongoing.

Outside of New Jersey, other Attorneys General continue to consider this strategy. For example, a coalition of 14 Attorneys General recently filed an *amicus* brief earlier this year in a case Mexico has brought against firearm manufacturers alleging that the manufacturers knew their marketing would appeal to drug cartels and violent gangs. Just as in other areas of public protection, Attorneys General continue to expand the use of the broad investigative powers provided to them in their consumer protection laws. As we have [previously reported](#), AGs will continue to push boundaries even on partisan issues, as consumer protection claims have become an increasingly powerful tool in fulfilling their agendas.