

The Legal Side

by Mark Barnes

Express and Implied Warranties in the Sale of NFA Weapons

The purpose of this article is to examine what occurs when a National Firearms Act (NFA) weapon is transferred from seller to buyer and then subsequently seized by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for not being lawfully registered, despite the fact that it had been transferred on the appropriate transfer forms and approved by ATF each time. As often stated by the editor of *Small Arms Review*, some collectors are acquiring NFA weapons for investment purposes rather than just historic or shooting purposes. While I make no judgment regarding those in the com-

munity that do so, collecting for investment should be approached cautiously. NFA weapons are valuable property; therefore I would like to comment on what has sometimes occurred ever since the inception of the NFA. Recently, there have been several reports that ATF has seized or requested owners to abandon registered NFA weapons because their firearms have been unlawfully manufactured or registered. Or for lack of a better term, the weapons have a "defect" in title.

In this article I will concentrate on one of the examples of a defect in registra-

tion. For the purposes of this discussion, assume that an NFA manufacturer decides to misappropriate the serial numbers of already registered, fully transferable "starter" machine guns. This manufacturer acquires a post-ban machine gun, uses the serial number from the pre-May 1986 transferable machine gun, and applies it to the post-ban machine gun. The manufacturer then falsifies the information on the form on which the pre-'86 machine gun is recorded. To complete this fraud, the manufacturer offers for sale a post-ban machine gun as a pre-'86 fully transferable machine gun. An example

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of this is taking a starter machine gun such as a MAC 10, removing the serial number by cutting out a section of metal where the serial number is placed, applying the serial number by weld to a post-ban M1919, and selling the M1919 as a pre-'86 machine gun.

What of course is happening is that the manufacturer is engaging in a criminal undertaking to use a "starter machine gun" serial number and creating a far more valuable fully transferable collector gun. It is beyond the scope of this article to explain how the national registrations came to reflect the so-called make and model of the "upgraded" firearm. But just assume, for the purpose of our discussion, that lawful purchasers for value are assuming that they are getting what the seller purports they are getting: a lawful, fully transferable, highly prized machine gun. This may occur with a chain of innocent transferees as well, where ATF has approved the transfer of the weapon three or four times.

First, I would like to note that ATF does not have the obligation or the ability to verify all registration transactions to en-

sure they are proper. Rather, ATF depends on the NFA and FFL manufacturer and importer communities to correctly represent the firearms they are registering. The Gun Control Act (GCA) and the NFA are each explicit on what is a lawfully registered and fully transferable weapon. If fraud is committed in the chain of title to the weapon, there is no way under law that ATF may waive defects or grandfather the mistake or criminal act by virtue of time and successive transfers of the firearm. Therefore, when ATF finds fraudulently registered NFA firearms, under federal law, ATF has no choice but to commence an investigation and seize or seek abandonment of the weapon.

Seizures have occurred recently and innocent owners have been forced to relinquish their property. The owners are rightly confused, angry, and looking for a remedy to get their money or firearm returned. ATF, unfortunately, is neither empowered nor authorized to help. Protection of an NFA buyer's rights lies primarily with the buyer himself. Accordingly, this article will discuss what processes and legal recourse such an owner may take in order to protect him or herself from such a loss.

In order to explore my point it is important to briefly discuss the law governing contracts of sale. In the United States, the law of contracts is mostly regulated by a set of laws called the Uniform Commercial Code (UCC). The UCC is a comprehensive modernization of various statutes relating to commercial transactions including sales, leases, negotiable instruments, bank deposits and collections, funds transfers, letters of credit, bulk sales, documents of title, investment securities, and secured transactions. Every state, except some odd exceptions in Louisiana, enacted the code with either no or limited substantive modifications. The UCC, therefore, is the default statutory law that governs transactions involving personal property.

But why is this default statutory scheme important? It is important because unless the parties to the transaction agree to create, by oral or written contract, their own terms for a transaction, the default rules proposed by the UCC govern the deal. Therefore, in order to understand which party bears the financial loss in the event that an NFA weapon is seized for

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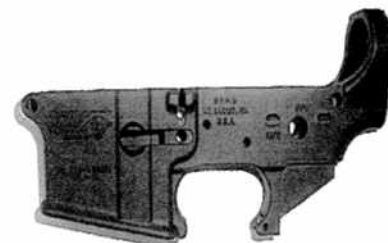
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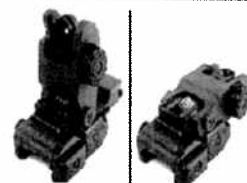
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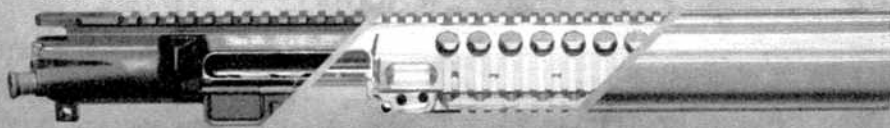
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the reasons I outlined above, it is crucial to understand some of these rules established by the UCC.

This question of who is financially responsible for the loss is controlled by the law of warranties under the UCC. (For the purposes of this article, all UCC references will be based on the ALI version of the Uniform Commercial Code (as amended 2003). It is important to remember that while the UCC is substantially the same in each state, it does change in some jurisdictions. If you have a question regarding the specific applicability of the UCC to a transaction in which you are involved, it is important to contact an attorney in the state of the transaction for guidance and advice.) Generally speaking, a warranty in commercial transactions is an assurance of the character, quality, fitness or title of the goods offered for sale. For our discussion, we will focus on two types of warranties: 1) express (UCC § 2-313), and 2) implied warranty of title (UCC § 2-312).

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statement by the seller of the goods. An express warranty can take the form of 1) *an affirmation of fact or promise*; 2) a *description* of the firearm which formed part of the *basis for the bargain*; or 3) a *sample* or *model* shown by the seller which is presented as a representation of the firearm you are receiving. (See UCC § 2-313(1)) However, statements of opinion by the seller or affirmations of value do not constitute a warranty.

In order for a buyer to protect him or herself in a transfer of NFA weapons, it is important to ask the seller pointed questions about the specific firearm he or she is considering purchasing. Some ques-

tions may include whether the firearm is fully transferable and what its legal status is under the NFA. When possible, such affirmations should be obtained in writing from the seller and should include the date of manufacture, the actual manufacturer, and when the seller acquired the weapon. Such specific affirmations by the seller that the firearm is fully "transferable" may protect the buyer in the event the firearm is not truly what was advertised and may help in any ensuing litigation or settlement discussions to collect the money paid for the firearm because the firearm did not conform to the "express affirmations" by the seller to the

buyer in the individual transaction.

Of course, there is a caveat to creating an express warranty under the UCC. The seller can disavow such status by specifically *disclaiming* that he or she warrants the legal status of the firearm under the NFA. By doing so, the seller would be attempting to create an "as is" agreement. Buyers should be wary of such a tactic.

The second kind of guaranty is warranty of title, which is an implied promise that the seller in fact owns the item offered for sale. The UCC provides that in a contract for sale there is an implied warranty that 1) the title conveyed to the buyer is good and its transfer is rightful and 2) the

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goods delivered are free from any security interest or other encumbrance of which the buyer has no knowledge. The seller may exclude this kind of warranty only by specific language or circumstances that put the buyer on notice that there is a possible issue with the title. Furthermore, merchants, or those who regularly deal in firearms sales, are presumed to warrant the title unless the parties agree otherwise. Essentially, the UCC provides that there is rightful title to the goods without the need for any express affirmations. This section of the UCC is the gravamen

for any claim against the seller for financial liability resulting from an illegal transfer of an NFA. This provision alone can create a situation that helps protect the buyer from financial loss when the firearms are seized for defects in registration status, assuming, of course, that the seller has assets to go against. While each of the above sections may provide individual protection for an NFA firearms buyer, utilizing both of these provisions is important. This is because under the UCC, both express warranties and implied warranties of title permit different methods by which a seller, in a contract for sale, can contract away the responsibilities under a warranty. Additionally, because courts have not taken up the unique issue of firearms sales with defective NFA registration status, it is important to understand that different standards may be imposed upon different sellers. Under much of the UCC, sellers who deal in the specific goods as a business are held to a higher standard and are more likely to be found liable under warranties for a loss. On the other hand, private sellers or collectors who do not engage in transferring firearms for a business will likely

20

The Small Arms Review • Vol. 12 No. 3 • December, 2008

enjoy greater freedom under the UCC from being held to the rigorous warranty standards. Therefore, it is imperative that the buyer inspect any sale documents for warranty provisions and attempt to procure an express affirmation by the seller that the firearm is indeed transferable and lawful title is held on it.

Warranties are a complicated field of law and there are numerous provisions which exist that may impact the rights of both seller and buyers. In summation, those purchasing NFA firearms should keep in mind the following: 1) ATF is not responsible for and does not have the authority to protect your financial interests; 2) obtain assurances from the seller to the questions outlined in this article, preferably in writing or with a witness present, and/or a notarized or witnessed contract for sale; and 3) do not accept a disclaimer of title or a title with encumbrances unless you are prepared to bear the financial risk of loss. As with any important decisions that may affect significant property, I urge you to speak with an attorney on questions regarding contracts for a sale and any individual situation that you may have.

In closing, I will leave you with the following: it is unfortunate that these transfers of fraudulent NFA firearms have occurred. In every industry there are those who are more concerned with making a profit by whatever means that they can conjure up, with no regard for the financial, lawful or emotional impact that their actions have on the transferee. I would note that the National Firearms Act Trade and Collector's Association is currently exploring the idea of title insurance for the NFA community. If an affordable program can be fashioned, it would no doubt help protect innocent owners from these very unfortunate property losses.

Mark Barnes is an attorney with over 20 years of experience. He began his career in public policy serving in both the legislative and executive branches of federal government. His firm, Mark Barnes and Associates, is located in Washington, D.C. and has been specializing in all aspects of federal firearms law since 1993. He can be contacted by e-mail at MarkB17@aol.com.

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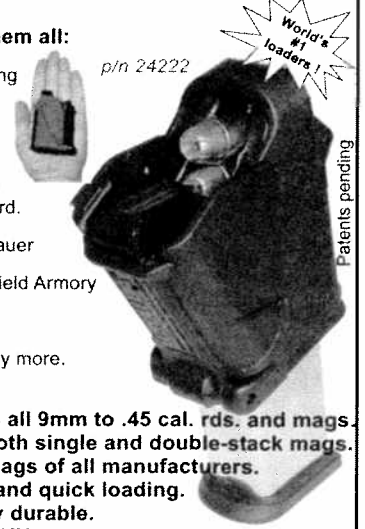
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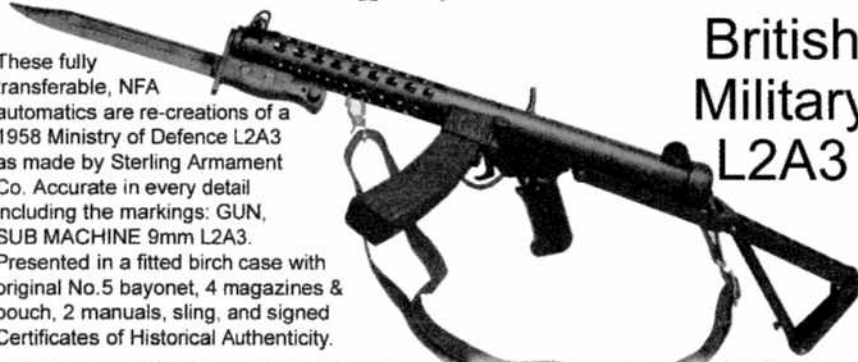
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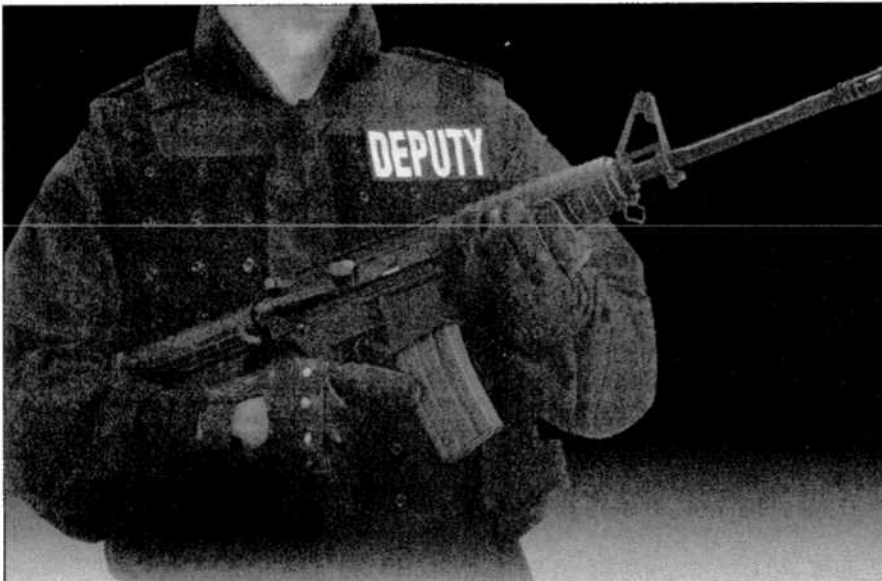


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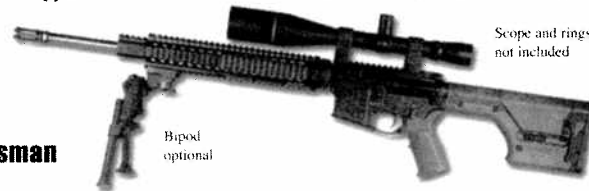


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