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MEMORANDUM FROM THE DESK OF
C. D. MICHEL

Re: **Was it an Accident? Licensed Gun Dealers Can Lose Their Licenses For "Willful" Violations of the Gun Control Act**
Date: **May 17, 2011**

I. INTRODUCTION

"Willful" acts in violation of law by a firearm dealer can carry dire consequences. Criminal prosecution is possible, and under federal law,[1] a single "willful" violation of the Gun Control Act ("GCA") can result in the Bureau of Alcohol, Tobacco, Firearms and Explosives (commonly referred to as "ATF") revoking a dealer's Federal Firearm License ("FFL").[2]

[1] 18 U.S.C. § 923(e).

[2] 18 U.S.C. § 923(e) provides: "The Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter or fails to have secure gun storage or safety devices available at any place in which firearms are sold under the license to persons who are not licensees (except that in any case in which a secure gun storage or safety device is temporarily unavailable because of theft, casualty loss, consumer sales, back orders from a manufacturer, or any other similar reason beyond the control of the licensee, the dealer shall not be considered to be in violation of the requirement to make available such a device). The Attorney General may, after notice and opportunity for hearing, revoke the license of a dealer who willfully transfers armor piercing ammunition. The Secretary's action under this subsection may be reviewed only as provided in subsection (f) of this section."

As commonly used, "willful" means deliberate, voluntary, or intentional. But words can have a different meaning in the legal world than they do in normal use. "Willful" for example, has a unique meaning in the legal context.

Originally, the GCA did not have a "willfulness" requirement. FFLs could be revoked by ATF for even innocent violations. This led to injustice, and, in 1986, ATF abuses led Congress to amend the GCA - specifically, 18 U.S.C. § 923(e)) - "to ensure that licenses are not revoked for inadvertent errors or technical mistakes," as stated in the Senate Report on the issue.

In amending the law, the Senate adopted the view of the court in *Rich v. United States*, 383 F. Supp. 797 (S.D. Ohio 1974), which rejected mere negligence as a standard for revoking an FFL license. Instead, the Senate endorsed the position that "willful" means "purposeful, intentional behavior."

Although a more limited standard, courts have nonetheless continually struggled to articulate a definitive standard for "willful." Several distinct definitions have resulted.

The court decisions discussed below show that a dealer's acts can be considered "willful" when done repeatedly, after prior warnings, and even without any deliberate intent to violate the law. Thus, in the legal realm, "willful" may include reckless or indifferent acts. Consequently, repeated mistakes and oversights can be considered "willful" even without intent to violate the law involved, especially if they are committed after warning and instruction from ATF. And when courts determine whether a dealer's acts are "reckless" or "indifferent," the dealer is at the mercy of the court, because even those terms are not expressly defined.

II. COURT RULINGS

A. *Article II Gun Shop, Inc. v. Gonzales* (March 20, 2006)

In this case out of the Seventh Circuit the dealer repeatedly violated the GCA. But, as the dissent pointed out, the dealer was responsible for some 51,240 pieces of information on the A&D and 4473 forms, and omitted only 19 of them. The dealer's defense was that omitting the information was not material because the required information was attached to the ATF form. The court rejected that argument and held that making mistakes after being aware of the record keeping requirements, together with having previously made those mistakes, suffices for revocation. *Article II Gun Shop, Inc. v Gonzales,* 441 F.3d 492, 494 (7th Cir. 2006).

B. *Jim's Pawn Shop, Inc. v. Bowers* (September 16, 2008)

In this Fourth Circuit District Court case, the District Court found that although the licensee repeatedly violated the GCA, the licensee's conduct was not "willful." *Jim's Pawn Shop v. Bowers*, 2008 U.S. Dist. LEXIS 97199 (E.D. N.C. 2008).

The FFL licensee was a retailer and pawnbroker of two businesses (Jim's of Fayetteville and Jim's of Wilmington) in North Carolina. Jim's of Fayetteville is the largest firearms dealer in the two-state ATF region of North Carolina and South Carolina. As of 1996, Jim's of Fayetteville had acquired over of 100,000 firearms, and as of 1997, Jim's of Wilmington had acquired about 40,000.

Beginning in 1996 and continuing through 2005, ATF inspectors found multiple clerical and bookkeeping errors, which can be considered violations of the GCA. Finally, on June 6, 2005, ATF issued a Final Notice of Revocation of Firearms License to both businesses, asserting that the various violations of the GCA were "willful." ATF relied primarily on the petitioner's repeated violations to establish willfulness.

The Fourth Circuit court found that petitioner repeatedly violated the GCA, and thus had to determine whether those violations were "willful." The court, quoting *Prino v. Simon,* 606 F.2d 449, 451 (4th Cir. 1979), defined "willful" as "action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, regardless of venal motive."

Regarding whether the errors amounted to "willfulness," the court held that the evidence failed to show the violations were "willful." The court reasoned that despite the numerous violations of the GCA by the dealer, evidence suggesting "willfulness" may be "countered by evidence of petitioners' attempts to comply with the GCA and related regulations, and their efforts to be helpful in addressing issues raised during ATF's inspections." The court noted that out that both businesses took steps to increase their compliance with the GCA, including "printing an employee manual dedicated to proper cataloging techniques, holding repeated training courses on how to keep proper records, establishing a calendar system to keep up with multiple sales, and designating one staff member at each store to be in charge of the acquisition and disposition books."

Additionally, the court relied on evidence that both businesses showed a pattern of improvement during the years in which the inspections took place, a conscious effort to comply with the GCA, and had reduced the number of errors compared with the large number

transactions at the two businesses. The businesses' employees were also very helpful and courteous to ATF inspectors, even pointing out errors and trying to resolve them with ATF.

Although some of the dealer's alleged violations were repeat violations, the court found that they did not constitute the type of "'conscious, intentional, deliberate, [and] voluntary"' actions that are deemed willful and overruled the revocation of the federal firearms licenses. The court further held the dealer was not required to take ATF's suggestion to install a computer system, and the dealers failure to do so did not constitute "willfulness."

C. *Armalite, Inc. v. Lambert* (October 14, 2008)

This case, decided October 2008 by the Sixth Circuit U.S. Court of Appeals, involved ArmaLite, Inc., a well-known and reputable Illinois gun manufacturer that also had a FFL for an Ohio location.

ATF revoked the FFL for ArmaLite's Ohio location due to repeated alleged violations of the GCA. Specifically, in 2004, Armalite failed to complete two NICS background checks, omitted identification from three buyers, improperly executed or completed eleven forms, and failed to separate Form 4473 transactions four times. *See Armalite, Inc. v. Lambert*, 544 F.3d 644, 645 (6th Cir. 2008)).

Despite being notified by ATF of the violations, including being given instruction on how to remedy the violations, and being warned that future violations of the same kind may be considered "willful" violations, ArmaLite continued to improperly complete various 4473 forms, and committed several other new violations, including improperly recording firearms in its inventory.

ArmaLite's Vice President, who personally dealt with the ATF on these matters, attributed the violations to mere human error, and on that basis appealed the revocation of the FFL through the courts. *See id*. at 645-646.

ArmaLite lost in the trial court and appealed the decision, arguing that the lower court incorrectly applied the GCA's willfulness requirement. The issue on appeal was whether "willfulness" under the GCA includes mere negligent behavior by the FFL, or, as ArmaLite insisted, the FFL must act "knowingly"or "recklessly."

The Sixth Circuit Court of Appeals clarified its previous decisions by agreeing with several other Circuits and adopted the standard urged by ArmaLite, saying that an FFL only commits a "willful" violation when it "intentionally, knowingly or [with plain indifference]

recklessly violates known legal requirements." *Id*. at 647.

Unfortunately for ArmaLite, however, the court *also* decided that ArmaLite's violations factually met that higher legal standard and were enough to justify the revoking its FFL in Ohio. The court reasoned that ArmaLite's continued failure to ensure all 4473 Forms were accurately completed by its employees amounted to *indifference* to known legal requirements. *See id.* at 650. The court pointed to the fact that ATF had notified ArmaLite's Vice President of the violations and warned that future violations could result in license revocation as evidence of ArmaLite's indifference.[3]

In so deciding, the court recognized that a single violation could constitute "willfulness," but in this case it was the continual violations that persuaded them of ArmaLite's "willfulness," citing the legal rule set out by the Fourth Circuit in *RSM v. Herbert,* 466 F.3d 316, 322 (4th Cir. 2006) that "[a]t some point, repeated negligence becomes recklessness." *Id*.

That court stated: "a single . . . inadvertent error[] in failing to complete forms may not amount to "willful" failures, even when the legal requirement to complete the forms was known. Yet at some point, when such errors continue . . . in the face of repeated warnings . . .by enforcement officials, accompanied by explanations of the severity of the failures, one may infer as a matter of law the licensee simply does not care about the legal requirements. At that point, the failures show the licensee's plain indifference and therefore become willful." *Id*.

D. *The General Store v. Richard Van Loan* (March 31, 2009)

In this Ninth Circuit Court of Appeals decision, the court affirmed the ATF's revocation of The General Store's FFL, citing numerous "willful" violations of the GCA. *See General Store, Inc. v. Van Loan*, 560 F.3d 920, 921-923 (9th Cir. 2009).

Over a three years span, The General Store received Reports of Violations, Repeat Violations, and ultimately Notice, and Final Notice, of Revocation of Firearms License from the ATF. During that time, the General Store failed to keep accurate records of when firearms were acquired and disposed, transfer dates, and when firearms were received and returned for repairs.

The General Store argued that while errors were made, they were not "willful" violations of the GCA. *See id*. at 924. The Court of Appeals disagreed. According to the Court of Appeals,

[3] Other courts have deemed repeat violations of the GCA after warnings from the ATF as sufficient to establish "willfulness." See *Breit & Johnson Sporting Goods, Inc. v. Ashcroft,* 320 F. Supp.2d 671 (2004).

"willful" acts may include a *reckless violation, or even plain indifference,* to the law. The General Store acted "willfully" for purposes of the GCA when it *understood requirements of law but knowingly failed to follow or was consciously indifferent* to law. *See Id*. at 923-924.

For instance, the law requires licensed firearms dealers to "enter into a record each receipt and disposition of firearms." 27 C.F.R. § 478.125(e). The General Store was cited twice before their FFL was revoked for failing to keep accurate records. See *General Store*, 560 F.3d at 925.

The continued violations were considered by the court to be a "willful" violation of the GCA.

E. *Am. Arms Int'l v. Herbert* (April 20, 2009)

In this case out of the Fourth Circuit, the court looked again at the definition of "willful." See *Am. Arms Int'l v. Herbert*, 563 F.3d 78 (4th Cir. 2009).

The dealer had multiple GCA violations over a period of years. The first inspection occurred in 1984. *See id*. at 79. Over the next 19 years the dealer had repeated bookkeeping and clerical violations. *See id*. at 80-81. Finally, in 2003, when multiple violations were discovered, ATF issued a Notice of Revocation of License. The dealer's FFL was revoked by ATF for "willfully" engaging in repeat violations of the GCA. *See Id*. at 81.

ATF's decision was appealed and the Fourth Circuit discussed the definition of "willful." The court determined "'[A] single, or even a few, inadvertent errors'" would not amount to a "willful" violation. *Am. Arms Int'l*, 563 F.3d 78 (citing *Prino v. Simon*) At some point, however, a repeated failure to comply with known regulations can move a licensee's conduct from inadvertent neglect into reckless or deliberate disregard (and thus willfulness), where the "number and seriousness [of violations] . . . in the face of repeated warnings undoubtedly satisf[ied] the willfulness requirement." *Am. Arms Int'l*, 563 F.3d at 85-87.

Despite the court's seeming willingness to forgive innocent mistakes, the dealer's numerous clerical and bookkeeping errors over time was considered more than mere human error, and the court confirmed the ATF's revocation of the FFL.

F. *Borchardt Rifle Corp. v. Cook* (February 27, 2010)

This Tenth Circuit District Court case, the definition of "willful" was examined once again. See *Borchardt Rifle Corp. v. Cook*, 727 F.Supp.2d 1146 (D. N.M. 2010).

The firearms dealer had multiple GCA violations over several years, with the first compliance inspection of Borchardt Rifle occurring in 2002. *Id.* at 1148. From the period of 2002 until 2009, when the ATF revocation of Borchardt Rifle's FFL came before the court, the dealer had a number of violations.

When the dealer appealed the license revocation, the court adopted the Fifth Circuit's definition of "willfulness" as the most articulable standard. The Fifth Circuit's definition required that, in order "[t]o prove that a firearms dealer 'willfully' violated the law, ATF must show that the dealer either intentionally and knowingly violated its obligations or was recklessly or plainly indifferent despite the dealer's awareness of the law's requirements." See *id.* at 1162-1163 (quoting *Athens Pawn Shop, Inc. V. Bennett*, 364 Fed.Appx.58, 59 (5th Cir. 2010).

While the court reiterated that "[n]egligence is insufficient to show willfulness," (*Borchardt Rifle*, 727 F. Supp.2d at 1168) and that "the element of willfulness is rarely provable by direct evidence," (*Id.* at 1164) it relied on the circumstantial evidence in the record and came to the conclusion that "the undisputed evidence . . . conclusively establishe[d] that Borchardt Rifle was aware of the regulations imposed on it and yet, despite that knowledge, Bordchart Rifle continued to violate those same regulations." *Id.* at 1171.

Despite the dealer's statements that his myriad of clerical and bookkeeping errors over the span of several years was due to his lack of schooling (*Id.* at 1168) and getting distracted while talking to friends and thereby ignoring the necessary paperwork (*Id.* at 1167), the court found that Borchardt Rifle's knowledge of the laws and instruction on how to correct the errors from ATF, combined with his failure to pay more attention to the important paperwork was enough for a confirmation of ATF's revocation of Borchardt Rifle's FFL.

III. CONCLUSION

While standing alone they seem insignificant, Acquisition & Disposition log errors and mistakes on 4473s can add up to big trouble for FFLs. As the court in *Am. Arms Int'l* stated, "a *single* uncontested violation suffices to uphold the ATF's revocation decision." *Am. Arms Int'l*, 563 F.3d 78; *see also Armalite, Inc. v. Lambert*, 544 F.3d 644, 649 (6th Cir. Ohio 2008) (emphasis added).

In the case of *General Store,* the store owners were cited repeatedly for inadequate Acquisition and Disposition records over a three year period. *General Store*, 560 F.3d at 923). Those simple clerical mistakes resulted in the revoking the General Store's Federal Firearm License.

Identically in *Armalite, Inc*., the owner of American Arms International and Gilbert Indoor Range, LLC, Charles Gilbert, lost his thirty-year-old federal firearms dealer's license for poor record keeping and inventory practices. *Armalite, Inc.*, 563 F.3d at 80-82. Repeat errors or problems complying with the GCA and the Code of Federal Regulations can result in denial of a license renewal or license revocation for "willful" violations. Bookkeeping, record keeping, and clerical work is important and should not be taken lightly.

These court decisions mean that in future cases around the country, the ATF will have to meet a very low standard to revoke FFLs.

The NRA remains committed to tightening the standard for ATF actions by legislation in Congress, and legislation is pending that may accomplish this. Watch the NRA's website for developments. Those facing problems with ATF should go to www.nraila.org/batfe or call (703) 267-1160 for more information. There are resources available to assist dealers in keeping up-to-date with bookkeeping requirements and making certain 4473 errors do not happen. Another good source of information is FFL Guard which can be located at: http://www.chiafullogroup.com/fflguard/home.html. The National Shooting Sports Foundation also has materials available at www.nssf.org.

If you are a dealer in California and face an ATF compliance inspection, or have received Notice of Revocation, feel free to immediately contact the law offices Michel & Associates, P.C. at (562) 216-4444 for a free consultation. Our attorneys will be happy to discuss your concerns and answer your questions.

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