Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***National Shooting Sports Foundation, Inc. et al. v. State of California***, Superior Court Case No. 14CECG00068

Hearing Date: **April 14, 2015 (Dept. 502)**

Motion: Defendants' Motion for Judgment on the Pleadings

Tentative Ruling:

To deny.

Explanation:

Defendants move for judgment on the pleadings, first arguing that the separation of powers doctrine precludes plaintiffs' claim of "impossibility." Defendants rely on a number of cases with holdings to the effect that the separation of powers doctrine precludes courts from invalidating laws based on their own view of the wisdom or desirability of the laws in question. (See, e.g., *Burnsed v. State Bd. of Control* (1987) 189 Cal.App.3d 213, 219.) "[T]he separation of powers doctrine [holds] that in the absence of some overriding constitutional, statutory or charter proscription, the judiciary has no authority to invalidate duly enacted legislation." (*City and County of San Francisco v. Cooper* (1975 13 Cal.3d 89, 915.) Plaintiffs assert no constitutional claim in this action.

Plaintiffs explain that their claim arises initially from the equitable maxim that "[t]he law never required impossibilities." (Civ. Code § 3531.) "Consistent with this maxim, the law recognizes exceptions to statutory requirements for impossibility of performance." (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 300.) Plaintiffs rely on *San Diego Tuberculosis Assn. v. City of East San Diego* (1921) 186 Cal. 252, 255, and *Neary v. Town of Los Altos Hills* (1959) 172 Cal.App.2d 721, as examples of cases recognizing impossibility as a ground to enjoin the enforcement of a statute. To the contrary, neither case involved a claim of impossibility. Both cases involved challenges to an ordinance as unreasonable exercises of police power.

However, though no impossibility was found in that case, *McMahon* does indicate that impossibility of compliance with a state law is ground for enjoining enforcement of a statute. (*McMahon, supra,* 219 Cal.App.3d at 299-300.) Accordingly, the motion will not be granted on this ground.

Defendants next argue that the claim of impossibility fails because plaintiffs themselves recognize that microstamping is in fact possible. Defendants' argument

requires the court to reach multiple conclusions: (1) that plaintiffs have conceded that microstamping is possible on the firing pin; (2) that the section 31910(b)(7)(A) is susceptible to the interpretation that the two microscopic arrays can both be placed on the tip of the firing pin and still comply with the statute; and, (3) that it is possible to apply two microscopic arrays to the tip of the firing pin.

On the first point, the court notes that granting judicial notice of exhibits A and B would be improper. Exhibit A is not a record subject to judicial notice under Evidence Code section 452. Moreover, the court cannot take judicial notice of the truth of the factual assertions Exhibits A and B. (See *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-114.) However, plaintiffs do appear to concede in their opposition that it is possible to place a microscopic array on the tip of a firing pin. (See Oppo. p. 4, fn. 2 ["it is not possible to microstamp any part or surface of a semi-automatic pistol other than its firing pin."])

Assuming microstamping is possible on the firing pin, defendants contend that there is no indication in the statute that microstamping on the firing pin could not be placed twice on the firing pin. It is not clear that the statute is susceptible to that interpretation, either based on the plain language, or when legislative history is taken into consideration.

Penal Code section 31910, subdivision (b)(7)(A), defines an "unsafe handgun" as a semiautomatic pistol not already on the roster that is "not designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted *in two or more places* on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired, provided that the Department of Justice certifies that the technology used to create the imprint is available to more than one manufacturer unencumbered by any patent restrictions." (Emphasis added.) The regulations provide that each semiautomatic pistol submitted for testing shall be "designed and equipped with a FIN etched or otherwise imprinted *in two or more places* on the interior surface or internal working parts of the pistol that are transferred by imprinting on each cartridge case expended from the pistol when the pistol is fired ..." (11 Cal. Code Regs. § 4059(d)(5), emphasis added.)

The court notes that defendants point out that the tip of a firing pin, where the microcsopic array would be etched, is typically about 0.075 inches in diameter. (Defendants' Memorandum 11:21.) Putting it twice on the head of a pin doesn't sound like two different "places." And defendants have not referenced any facts, alleged in the complaint or subject to judicial notice, indicating that the microscopic array could be placed twice in that space. The court concludes that best, section 31910, subdivision (b)(7)(A), is ambiguous as to whether both microscopic arrays may be placed on the same part of the pistol. It is ambiguous because the language could mean that both microstamps can be placed on the pistol's firing pin, but it could just as reasonably mean that only one of those microstamps can be placed on the pistol's firing pin. Accordingly, the court may look to legislative history. (See *People v. Ramirez* (2009) 45 Cal.4th 980, 987.)

Plaintiffs request judicial notice of a large stack of documents compiled by Legislative Intent Service, Inc. As pointed out in the reply, requesting judicial notice of this mass of documents, with no reference to or discussion of most of them, in a single request is problematic, as it includes records that would not be subject to judicial notice, such as PowerPoint presentations by the Department of Justice, letters, notes, etc. The court will not grant judicial notice of the entirety of the exhibit. However, there are documents that can be subject of judicial notice that support plaintiffs' interpretation. These include the 9/11/07 analysis of the Senate Rules Committee, which states that "... the technology consists of engraving microscopic characters onto the firing pin *and other interior surfaces* ..." (RJN Exh. A pp. 793-794, emphasis added.) And the 9/19/07 analysis prepared by the Governor's Office of Planning and Research, stating, the proponents of the bill "suggest that parts of the gun that come into contact with the bullet casing, *other than the firing pin*, can be similarly microengraved to make filing the engraving away more difficult." (RJN Exh. A, p. 774, emphasis added.)

In short, it is not apparent that the plain language of the statute supports an interpretation that microengraving two microscopic arrays onto the tip of the firing pin constitutes engraving it "in two or more places on the interior surface or internal working part of the pistol ..." As conceded by defendants' reply brief, the legislative history cited by plaintiffs shows that the Legislature understood that a microstamp could be made with a firing pin and that the statute would require another placement. (Reply p. 7, fn. 2.)

While this may be a matter subject to debate, the court cannot conclusively determine, at the pleading stage and on this record, that microstamping is possible, or that placing the microscopic array twice on the tip of a firing pin is either possible or compliant with Penal Code section 31910, subdivision (b)(7)(A). This is an issue that will likely require more extensive analysis of the legislative history of the statute in future proceedings.

Defendants next argue that plaintiffs cannot maintain their claim of impossibility because they do not allege that they have proposed an alternative to microstamping. Penal Code section 31910, subdivision (b)(7)(B) provides that, as an alternative to the requirements for microstamping, the Attorney General may approve a method of equal or greater reliability. Defendants argue that "Plaintiffs fail to allege that they have attempted to comply with the microstamping provisions by providing an alternative method to the Attorney General to approve and that alternative method has been rejected." (Defendants' MPA 12:18-20.)

Simply put, subdivision (b)(7)(B) imposes no obligation on anyone to propose an alternative to microstamping.

Finally, defendants again argue that plaintiffs fail to allege facts sufficient to constitute an actual legal controversy for purposes of seeking declaratory relief. This argument was already rejected in connection with the demurrer to the complaint.

"An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation[.]" (*Alameda County Land*

Use Assn. v. City of Hayward (1995) 38 Cal.App.4th 1716, 1723; *see also Californians for Native Salmon and Steelhead Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1427 ["Declaratory relief is appropriate to obtain judicial clarification of the parties' rights and obligations under applicable law."].)

In their complaint, plaintiffs allege that Penal Code section 31910, subdivision (b)(7)(A) is invalid as a matter of law and cannot be enforced because it is impossible for a firearm manufacturer to implement microstamping technology in compliance therewith because no semiautomatic pistol can be designed or equipped with a microscopic array of characters identifying the make, model, and serial number of the pistol that are etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol and that can be legibly, reliably, repeatedly, consistently, and effectively transferred from both such places to a cartridge case when the firearm is fired. (Complaint ¶¶ 10 & 13.) Further, plaintiffs assert that the application of Penal Code section 31910, subdivision (b)(7)(A) is currently preventing plaintiffs' firearm manufacturer members from selling any semiautomatic pistols in California that do not comply with the statute because if the firearm manufacturers sold any non-compliant semiautomatic pistols in California, each sale would subject them to potential criminal prosecution pursuant to Penal Code section 32000, subdivision (a). (Complaint ¶ 14.) Finally, plaintiffs allege that defendants contend that Penal Code section 31910, subdivision (b)(7)(A) is valid and enforceable. (Complaint ¶¶ 7-8 & 10.) As the court previously held, plaintiffs have sufficiently alleged a viable cause of action for declaratory relief.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB (Judge's initials) **on** 4-28-15 (Date).