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Trends in Product Liability Litigation & Legislation in New York

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Musings on the Remington/ Sandy Hook Settlement and its Meaning for Consumer Product Manufacturers

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Musings on the Remington/Sandy Hook Settlement and its Meaning for Consumer Product Manufacturers

The families of nine victims of the Sandy Hook Elementary School shooting agreed to a landmark $73 million settlement of their lawsuit against Remington Arms Company, the manufacturer of the Bushmaster AR-15 rifle used in the school shooting. But this was not your typical products liability or wrongful death lawsuit and settlement. Both the settlement and the claims underlying it were somewhat nuanced.

The plaintiffs, the families of five children and four adults who were tragically killed on December 14, 2012, did not claim that the AR-15 rifle malfunctioned, was illegally purchased, or that Remington manufactured or designed an unsafe gun. Nor did they allege that Remington was directly responsible for the acts of the shooter, a claim against which gun manufacturers have long been shielded under the Protection of Lawful Commerce in Arms Act ("PLLCA") of 2005.

Rather, the victims' families focused on the exception found in the PLLCA, which permits claims against gun manufacturers who "knowingly violated a State or Federal statute applicable to the sale or marketing of the product." The Connecticut Unfair Trade Practices Act ("CUTPA") was the relevant state statute in this instance. The families argued that Remington violated CUTPA by intentionally advertising and marketing sales of the AR-15 rifle to troubled young men with a proclivity for violence, such as the Sandy Hook shooter. The plaintiffs contended that Remington extolled the militaristic qualities of the gun during videogames geared towards young men. It characterized the AR-15 rifle as a "combat weapon," and used graphic imagery and violence-inducing slogans like "Control Your Destiny," "Bravery on Duty," "Justice for All," and "React With Proven Confidence."

Remington countered that this theory improperly circumvents the PLLCA, in that these claims are exactly what the federal statute was intended to preempt. Remington was met with early success when a Connecticut state court granted its pre-answer motion to dismiss the Sandy Hook plaintiffs' complaint on preemption grounds. That decision, however, was reversed on appeal, and the complaint was reinstated. The U.S. Supreme Court declined Remington's ensuing application to hear the case.

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Remington, in turn, filed for bankruptcy in 2020. Its four insurance companies assumed the defense and indemnification of Remington in the lawsuit and agreed to settle the Sandy Hook plaintiffs' claims for $73 million, the aggregate limits of all policies. But the money was just one element of the settlement. Another was the release to the public of Remington's internal documents concerning its plans and strategies to market the AR-15 rifle used in the shooting. The plaintiffs' objective was to prevent future tragedies of this magnitude by delivering a message to the gun industry as a whole that its immunity is not absolute, and its marketing strategies will be subject to public scrutiny in the future.

The emergent question is whether the outcome in the Sandy Hook matter is an anomaly or the harbinger of similar claims and settlements against manufacturers of firearms, ammunition, or related supplies. Remington, and others in the gun industry, have been quick to point out that the settlement was agreed to by Remington's insurance companies, not Remington itself. These insurers were only empowered to settle because of Remington's bankruptcy filing. In this same vein, the gun industry emphasized that the settlement did not entail a concession of liability or wrongdoing on Remington's part (which likely explains why the plaintiffs insisted on the disclosure of Remington's internal documents, figuring that the public could draw its own conclusions on responsibility). The industry also appeals to broader public policy issues concerning the adverse implications to business owners at large, arguing that this outcome shifts the blame from the criminal to his chosen weapon.

Notably, neither CUTPA nor the Sandy Hook plaintiffs' theory of liability is a particularly unique means of seeking damages against product manufacturers. Other states, including New York, have long adopted similar consumer protection statutes under which manufacturers can be held liable for improper or unlawful product marketing and advertising.[1] But historically, plaintiffs have had little success applying these statutes to gun manufacturers. Over 20 years ago, New York's Court of Appeals weighed in on whether gun manufacturers owe a duty of care under General Business Law § 349(a) to victims who were injured or killed by users of their firearms: "Imposing such a general duty of care would create not only an indeterminate class of plaintiffs but also an indeterminate class of defendants whose liability might have little relationship to the benefits of controlling illegal guns."[2] *Hamilton v. Beretta U.S.A. Corp.,* 96 N.Y.2d 222, 236 (2001).

However, the tide may be changing as incidents of mass shootings continue to

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1. *See* N.Y. General Business Law § 349(a), enacted in 1970, prohibiting "[d]eceptive acts or practices in the conduct of any business, trade or commerce in the furnishing of any service in the state", and permitting a private cause of action where (1) the defendant has engaged in "consumer-oriented" conduct, (2) that conduct was materially misleading, and (3) the plaintiff suffered an injury as a result.

2. The Sandy Hook shooter's guns were legally obtained by the shooter's mother, a "gun enthusiast".

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mount and become an increasingly frequent story on newsfeeds across the country. In New York, the Court of Appeals has issued recent decisions suggesting that its interpretation of G.B.L. § 349(a) is broadening,[3] which could make it a viable means in the future of asserting claims against the gun industry, or their insurers.

Further, in July 2021, New York's Legislature enacted General Business Law §§ 898-A through 898-E. This statute creates a private right of action against gun manufacturers, under a public nuisance theory, for any person or entity that is harmed by the unlawful or reckless creation of, or contribution to, any condition that endangers public safety through the sale, manufacture, and marketing of firearms, ammunition, or related supplies. In conjunction with increasingly sophisticated data-tracking, recent court decisions that are favorable to plaintiffs,[4] the public outcry surrounding mass shootings, and the impact of a significant settlement against a centuries-old gun manufacturer — this legislation suggests that the Sandy Hook settlement may give rise to more litigation against product manufacturers, even beyond the weapons industry.

It is therefore vital for consumer product manufacturers generally to get ahead of this potential trend by consulting counsel about their current marketing strategies.

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3. *See, e.g., Himmelstein, McConnell, et al. v. Matthew Bender & Co., Inc.,* 37 N.Y.3d 169 (2021) (although plaintiff's claims were ultimately dismissed, the court took a broad view of what may constitute "consumer-oriented" behavior"); *Plavin v. Group Health Inc.,* 35 N.Y.3d 1, 12-13 (2020) (finding consumer-oriented conduct even when it involved an underlying insurance contract negotiated by sophisticated entities, noting that the statute does not require that consumer-oriented conduct be directed to all members of the public).

4. *See, e.g., King v. Klocek,* 187 A.D.3d 1614, 1615 (4th Dep't 2020) (where gun seller's motion to dismiss involving a 20-year-old shooter was denied because "[p]laintiffs' allegations, if true, establish that defendant committed a predicate offense under 15 USC §7903(5)(A)(ii) [because of defendant's potential violation of NY Penal Law §270.00(5)] and, as a result, establish that this action is not a qualified civil liability action and not subject to immediate dismissal."); *Williams v. Beemiller, Inc.,* 100 A.D.3d 143, 150 (4th Dep't 2012)(dismissal motion denied against gun manufacturers based on the allegations that defendants knew or should have known that the guns were being distributed to unlawful users based on their notification that over 13,000 of their guns were used in crimes over the 1988-2000 time period); *Chiapperini v. Gander Mountain Co., Inc.,* 48 Misc. 3d 856, 887 (Sup. Ct. Monroe Cnty. 2014)(where defendant's dismissal motion was denied as to the PLCAA preemption contention and the failure to state valid claims as to the public nuisance and negligent entrustment causes of action).