Testing the Immunity of the Firearm Industry to Tort Litigation

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In the absence of congressional action to reinstate the federal ban on assault weapons, tort litigation offers an alternative strategy for regulating what have become the weapons of choice in mass shootings. However, opportunities to bring successful claims are limited. To prevail, plaintiffs must show that their suit fits within exceptions to the broad immunity from tort actions that Congress gave the firearm industry in the 2005 Protection of Lawful Commerce in Arms Act. In one particularly high-profile lawsuit, families of victims of the school shooting in Newtown, Connecticut, in 2012 sued the makers and sellers of the military-style rifle used in the attack, alleging negligence and deceptive marketing. The trial court dismissed the case on October 14, 2016, but the plaintiffs plan to appeal. We review the history of tort litigation against the firearm industry, outline the Newtown families’ claims, and describe the decision.

On a Friday morning in December 2012, Adam Lanza entered Sandy Hook Elementary School in Newtown, Connecticut, and fired 156 bullets in less than 5 minutes, killing 20 children and 6 adults. All but 2 of the shots came from a Bushmaster XM-15 rifle (Bushmaster Firearms International), a civilian version of a combat weapon used by modern armies. Lanza carried more than 400 rounds of ammunition, many housed in 30-round magazines that were emptied quickly and replaced. Assault weapons, like the XM-15, and high-capacity magazines have become the mass killer’s armaments of choice; they have been used in most mass shootings over the past 3 decades.1 The term assault weapon is contested. Although firearm merchants originally coined the label to promote sales,2 gun rights advocates now spurn it and prefer less-aggressive names, such as tactical rifle or modern sporting rifle. The term refers generally to semiautomatic rifles that incorporate military-style features, such as pistol grips, folding stocks, and high-capacity detachable magazines. A federal ban on sales of assault weapons and high-capacity magazines expired in 2004, although 7 states and the District of Columbia have enacted their own bans.3

Gun control advocates decry the availability of assault weapons. Calls to renew the federal ban rank alongside universal background checks as their top priority for reform. Gun rights advocates counter that weapons like the one Lanza used are valuable in self-defense and deterring crime, popular among target shooters, and protected by the Second Amendment4 (although to date the constitutional argument has largely been rejected by federal appellate courts).5,6

Tort litigation offers a potential alternative route for regulating assault weapons. With this goal in mind, parents of 9 children killed in Newtown and 1 survivor have sued the manufacturers and sellers of Lanza’s XM-15 rifle for wrongful death and personal injury.7 The case has attracted substantial media attention. The defendants tried unsuccessfully to have it removed to federal court from the state court (near Newtown) where it was filed. Then, in another pretrial legal maneuver, the defendants filed a motion asking the court to dismiss the case on the basis that the defendants were immune from suit. On October 14, 2016, the Superior Court of Connecticut issued a ruling granting this motion.8

We provide historical context for the case, describe the plaintiffs’ claims, and explain the court’s reasons for rejecting them.

The Rise and Fall of Tort Litigation Against the Firearm Industry

Nearly all producers and sellers of consumer goods can be held liable for injuries arising from defects in product design and manufacture. But the mid-1980s saw the advent of a variety of new kinds of lawsuits over firearm injuries.9,10 Retailers were sued for selling guns that were subsequently used in crimes. These claims were based on a form of tort liability called “negligent entrustment,” which involves provision of an item to someone whom the provider knows (or should know) will be used in a manner that poses high risks of injury to others. Other claims targeted wholesalers and manufacturers, alleging that injuries arose from the failure to include feasible safety features, such as loaded chamber indicators or personalization technology. These claims differed from conventional product liability claims in that the plaintiffs’ injury arose from a product that functioned just as it was intended to. Still other claims focused on allegedly negligent advertising and selling practices.

In the mid-1990s, local governments joined the fray. Emboldened by novel theories of liability being deployed in tobacco...
litigation, cities and counties began suing to recover the costs of police and emergency services needed to address gun violence. By the end of the 1990s, the firearm industry faced lawsuits from many individual plaintiffs, dozens of municipalities, and the State of New York.\textsuperscript{10}

Few of those lawsuits succeeded. A recurring stumbling block—particularly for claims relating to marketing practices or intervening criminal acts—was the tenuous link between the manufacturers’ behavior and the plaintiffs’ injury. Nonetheless, the onslaught roiled the firearm industry. For the gun control advocates who helped orchestrate many of the cases, such destabilization was a central goal.\textsuperscript{10}

Under heavy lobbying pressure from the National Rifle Association, more than 30 states enacted laws limiting firearm manufacturers’ exposure to tort litigation. In 2005, Congress doubled down and enacted the Protection of Lawful Commerce in Arms Act.\textsuperscript{11}

The Scope of Federal Immunity

The Protection of Lawful Commerce in Arms Act\textsuperscript{11} gave firearm and ammunition manufacturers, dealers, and trade associations broad immunity from claims alleging harms due to the “criminal or unlawful misuse” of their products. The preamble to the act characterizes such claims as an “abuse of the legal system” and a threat to “a basic constitutional right.” The protections covered both pending and future claims.

It was an extraordinary legislative move. When Congress gives an industry tort immunity it usually provides injury victims an alternative source of compensation, but not so here. The National Rifle Association has called the Protection of Lawful Commerce in Arms Act “the most significant piece of pro-gun legislation in 20 years.”\textsuperscript{12} Robert Morgenthau, who served as District Attorney of Manhattan for 35 years, has written that the “legislation encourages arms dealers to turn a blind eye to the lethal consequences of what they peddle, and rewards their breathtaking irresponsibility.”\textsuperscript{13}

Despite its broad reach, the immunity law contains 6 exceptions. The federal government may bring actions to enforce its gun control laws. Design and manufacturing defect claims are preserved in instances in which the gun was used as intended or in a reasonably foreseeable manner and not unlawfully. Also preserved are breach of contract and warranty claims, negligent entrustment claims, and suits against retailers who have been convicted under federal law of selling a gun knowing it will be used in a violent crime. In addition, no immunity exists when the defendant knowingly violated a state or federal statute “applicable to the sale or marketing” of firearms and ammunition and that violation proximately caused the plaintiff’s harm.

In the act’s first decade, the last exception—commonly called the “predicate exception”—has been its most litigated provision. A series of cases have tested what counts as an “applicable” statute. Two federal appellate courts have ruled that the statute the defendant violates must expressly regulate the sale or marketing of firearms or have a clear nexus to firearms,\textsuperscript{14,15} but 2 decisions from state appellate courts\textsuperscript{16,17} have allowed plaintiffs to invoke more general statutes.

Soto et al v Bushmaster Firearms International

The Newtown families sued the manufacturer (Bushmaster), distributor, and retailer of Lanza’s rifle, and the salesperson who sold it. In the legal complaint, the plaintiffs characterize the XM-15 as a weapon of war designed to inflict mass casualties that has no legitimate civilian use.\textsuperscript{7} They point to aggressive marketing campaigns that emphasize the weapon’s lethal features and are aimed at civilian buyers. The Figure shows several Bushmaster advertisements; the one shown in Figure, A is discussed in the complaint.

The lawsuit rests on 2 main legal claims, both framed to fit within the exceptions provided in the federal immunity statute. The first claim is negligent entrustment: the defendants knew or ought to have known that selling the XM-15 to civilians posed an unreasonable risk of harm to others. The second claim asserts that by “unethically, oppressively, immorally, and unscrupulously” marketing “the assaultive qualities and military uses” of the weapon to civilians, the defendants violated Connecticut’s Unfair Trade Practices Act,\textsuperscript{18} thereby extinguishing their immunity.

With respect to the negligent entrustment claim, the court in Connecticut in dismissing the case noted that under state law the provider of the dangerous object must know, or reasonably be expected to know based on the circumstances, that the recipient will use it in a manner involving unreasonable risk to himself or others. The plaintiffs faced an uphill battle on this point: the XM-15 that Adam Lanza used was sold lawfully, approximately 2 years earlier, to his mother. Hence, proving that the gun shop, much less the distributor or the manufacturer, should have foreseen its use in a mass killing was always going to be a stretch. Anticipating this, the plaintiffs tried to focus on the larger picture, emphasizing the weapon’s extreme potential for lethality when circulating in the civilian population and the likelihood that it would eventually fall into the hands of a mass killer. But this was a step too far for the court. It was not prepared to label as negligent entrustment “the sale of a legal product to a population that is lawfully entitled to purchase such a product.”\textsuperscript{18} To extend the negligent entrustment doctrine in this way “would imply that the general public lacks the ordinary prudence necessary to handle an object the Congress regards as appropriate for sale to the public.”\textsuperscript{18}

The court went on to say that the plaintiffs also had not shown negligent entrustment as that term is defined in the PCLAA. After reviewing the Congressional debates that preceded enactment of the statute, the court found that only “direct entrustments to a shooter”\textsuperscript{18} qualified as negligent entrustment, “regardless of what an entrustor knew or should have known.”\textsuperscript{18} In other words, unless Adam Lanza himself had been the purchaser there was no possibility of fitting within the PCLAA’s exception for negligent entrustment claims.

To evaluate the plaintiffs’ illegal marketing claim, the court had to address the same threshold question that has divided other courts—namely, whether violating a sales or marketing statute that is generally applicable to firearms is sufficient to trigger the predicate exception in the immunity statute, or whether the violation must be of a statute that specifically regulates firearms. The plaintiffs won this crucial point. Applying a test set down in an earlier appellate court decision,\textsuperscript{14} the court held that even though the Connecticut consumer protection statute did not
regulate firearms expressly, it was enough that the state’s courts had enforced the statute in previous litigation involving the sale or marketing of firearms.

Although this key hurdle was cleared, the illegal marketing claim ran into another problem. The court pointed to prior Connecticut appellate court decisions holding that in order to qualify to bring a claim under the consumer protection statute, a plaintiff must have “some business relationship with the defendant,” such as consumer or competitor. Because there was no such relationship between the victims of the Newtown shooting and the defendants, the judge dismissed the illegal marketing claim. Although the statute itself makes no mention of a business relationship requirement, the trial court felt bound to follow the prior decisions rejecting claims by plaintiffs who lacked such relationships.

Conclusions

The Soto decision is a major setback for the plaintiffs but does not necessarily spell the end of the case. The plaintiffs’ lawyer has already vowed to appeal. The prospects for overturning the denial of the negligent entrustment claim seem dim; this was not the strongest part of the plaintiffs’ case, and its rejection was carefully reasoned and resounding. The illegal marketing claim, on the other hand, was grounded on a single point. The restriction the court imposed on eligible plaintiffs is not in the consumer protection statute itself; it has been read in by the Connecticut courts over time, and the Connecticut Supreme Court may be willing to revise it.

More generally, the court’s holding that violation of a general statute such as a consumer protection law can satisfy the predicate exception will be welcomed by gun control advocates. In Connecticut, it suggests that a different plaintiff—for example, an assault weapon purchaser who accidentally harmed himself or others—may be successful. In other states with consumer protection statutes that don’t require a business relationship, it suggests that mass shooting victims may yet find a path through PCLAA immunity. Thus, although the Soto decision is unwelcome news for the Newtown plaintiffs, it illuminates a potentially important chink in the legal armor that shields the firearm industry from tort liability.
7. Soto et al v Bushmaster Firearms et al, FBT CV 15 6048103 Superior Court, Judicial District of Bridgeport, First amended complaint (October 29, 2015).
15. Ileto v Glock Inc, 565 F3d 1126 (9th Cir 2009).