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Soto v. Bushmaster: The Sandy Hook victims notch a stunning victory, but at what cost?

Last week, the Connecticut Supreme Court sent a jolt through the legal commentariat with its decision in *Soto v. Bushmaster Firearms International*, the lawsuit brought against the manufacturers and sellers of the semi-automatic rifle used in the tragic 2012 shooting at Sandy Hook Elementary School. In a 4 to 3 decision, the state Supreme Court held that the plaintiffs—the estates of nine of the Sandy Hook victims—stated legally viable claims under the Connecticut Unfair Trade Practices Act (CUTPA) based on the defendants' alleged "wrongful marketing" of the AR-15 rifle to civilians for use in "offensive, military-style missions." The majority further held that applying CUTPA to the defendants' "militaristic marketing" would not run afoul of the Protection of Lawful Commerce in Arms Act (PLCAA), a federal statute that broadly immunizes gun manufacturers and sellers from civil liability for crimes committed with their products. The state high court remanded the case to the trial court for discovery and eventually a potential trial.

Not surprisingly, much of the early commentary on *Soto* has emphasized the court's preemption analysis under the PLCAA and, in particular, the prospects for further review of that question.[1] That is indeed a major ruling, which may well be headed for the U. S. Supreme Court. But for product manufacturers and sellers that do business in Connecticut, *Soto*'s interpretation of CUTPA is just as noteworthy and in the end may have the more enduring legal impact.

The Connecticut Supreme Court construes the PLCAA

Under the PLCAA, gun manufacturers and sellers enjoy broad immunity from state-law claims seeking to hold them liable for gun violence committed by third parties. 15 U.S.C. § 7902(a), 7903(5)(A). There are exceptions to this immunity, however, one of which permits

> *an action in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms]*, and the violation was a proximate cause of the harm for which relief is sought, including—
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> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the [firearm], or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
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> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18.

§ 7903(5)(a)(iii).

The key question under this so-called "predicate exception" is whether a particular state-law rule qualifies as a "statute applicable to the sale or marketing of [firearms]." *Id*. In past cases, some courts have taken a relatively narrow view of this exception in view of "the specific context in which the term 'applicable' is used and the broader context of the statute as a whole." *E.g., Ileto v. Glock, Inc*., 565 F.3d 1126, 1134 (9th Cir. 2006). These courts have noted that in enacting the PLCAA, Congress expressly "listed examples of predicate statutes," all of which "pertain specifically to sales and manufacturing activities" and most of which "target the firearms industry specifically." *Id.* These statutory examples, combined with

congressional findings that targeted state-law suits seeking an "unjustified 'expansion of the common law,'" have convinced some courts that the predicate exception covers only "statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry," as opposed to "general tort theories that happened to have been codified by a given jurisdiction." *Id*.[2]

The *Soto* majority's analysis is in some tension with this approach. As Justice Palmer's majority opinion notes, "the principal definition of 'applicable'" in *Black's Law Dictionary* "is simply 'capable of being applied.'" There is little doubt that "state consumer protection statutes such as CUTPA" are "capable of being applied to the sale and marketing of firearms." The court did acknowledge that the specific examples of predicate statutes listed by Congress were narrower in scope. The majority also recognized that under the "ejusdem generis canon" of statutory interpretation, "a general category encompasses only things similar in nature to the specific examples that follow." But the court concluded that the ejusdem generis canon "should not be applied ... when the legislative history of a statute reveals a contrary intent." As the court saw it, the legislative history of the PLCAA suggested that the specific statutory examples were not intended "to define, clarify, or narrow the universe of laws that qualify as predicate statutes." The court thus concluded that the PLCAA erected no bar to the imposition of CUTPA liability for gun manufacturers' "unethical" and "militaristic" marketing of the semi-automatic rifle used by Adam Lanza at Sandy Hook.

As Chief Justice Robinson explained in his dissent, the majority's conclusions are debatable, and they may well meet with some skepticism at the U.S. Supreme Court. In particular, the majority's refusal to apply statutory canons of construction "when the legislative history reveals ... a contrary intent" is arguably out of step with modern U.S. Supreme Court jurisprudence. Compare *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (where the ejusdem generis canon reveals a clear meaning, the court "need not assess the legislative history"). Moreover, the very legislative history relied upon by the *Soto* majority suggests a congressional intent to foreclose actions seeking an unjustified "expansion of the common law." CUTPA, as the Connecticut Supreme Court has often stated, was enacted by the General Assembly "so that courts might develop a body of law" governing unfair trade practices that "embrace[s] a much broader range of business conduct than does the common law tort action." *Associated Inv. Co. Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 157–58 (1994). The Connecticut Supreme Court's extension of its broad, evolving CUTPA jurisprudence to the "militaristic" marketing of civilian firearms arguably brings this lawsuit within the core of the immunity that Congress sought to establish in the PLCAA.

CUTPA on the march

Because of the importance of the federal preemption question and the tension between *Soto*'s analysis and the reasoning of earlier PLCAA cases, the defendants may have a better chance than most of obtaining U.S. Supreme Court review of the preemption question. That may be why the PLCAA issue has drawn lots of attention from reporters and legal commentators. But whatever the ultimate result on that issue, the most enduring legacy of *Soto* for companies doing business in Connecticut may be the majority's expansion of CUTPA.

The court viewed the plaintiffs' CUTPA claims as being based on two different theories of unfair trade practice: (1) that the sale of assault rifles such as the AR-15 is inherently unreasonable and dangerous, and (2) that the defendants marketed and promoted their AR-15 weapons in an unethical, oppressive, immoral and unscrupulous manner. The court determined that the first of these theories was barred by the statute of limitations. The court's analysis of the second of these theories, related to marketing in an unethical manner, expands the scope of CUTPA beyond anything previously recognized in Connecticut case law.

The *Soto* majority broke new ground in Connecticut law on unfair trade practices and product liability in at least four ways. First, the court held as a matter of first impression that CUTPA permits recovery for personal injuries, fatal or otherwise, that result directly from wrongful advertising practices. The court concluded that the language of the statute itself was ambiguous, and the legislative history was silent on the issue of personal injuries. The court nevertheless concluded that the statute could be reasonably construed to allow claims for personal injuries and that the broad remedial purpose of CUTPA favored this expansive interpretation. In addition, the court looked to the activities of the Federal Trade Commission and rulings under the Federal Trade Commission Act addressing the issue of physical harm as supporting its conclusion. Finally, the court looked to the law in other states, which have allowed personal injury claims pursuant to broadly worded consumer protection statutes. Before the trial court's decision in *Soto*, there had been no decision since 2001 that had allowed for the recovery of

personal injuries under CUTPA. Now the state Supreme Court has officially sanctioned these claims as consistent with Connecticut law.

Second, the *Soto* court determined that a plaintiff does *not* need to have any business relationship with the defendant (such as that of a customer, competitor or consumer) in order to bring a CUTPA claim. This was somewhat surprising in light of earlier Connecticut Supreme Court cases and lower-court case law suggesting or assuming that such a business relationship was critical to CUTPA standing. For example, in 2005, in *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 157 (2005), the plaintiffs argued that a business relationship is not required to have CUTPA standing, and the court rejected that argument, noting that the plaintiffs provided no authority for their position. In contrast, the *Soto* court emphasized that CUTPA refers to "any person who suffers an ascertainable loss," not just persons with whom the defendant has a business relationship. In addition, the court looked to the legislative history of CUTPA and existing case law to determine that courts should apply traditional notions of remoteness and directness rather than a business relationship test to assess whether an injured party has standing. Any party directly injured by conduct resulting from unscrupulous or illegal advertising, the *Soto* majority held, may bring an action pursuant to CUTPA. The *Soto* plaintiffs therefore had standing to sue defendants on the theory that marketing firearms for military-style attack missions could have inspired Adam Lanza or intensified the carnage he inflicted on the victims at Sandy Hook Elementary School.

Third, the *Soto* court considered when the statute of limitations begins to run for CUTPA claims based on marketing a product in an unethical, oppressive, immoral or unscrupulous manner. The court determined that where wrongful death claims are brought pursuant to CUTPA, a plaintiff must satisfy both the wrongful death and CUTPA statute of limitations. For claims based on marketing, the CUTPA statute of limitations does not run from the time of the purchase or sale of the product, as some might have expected, but instead begins running only once the challenged marketing scheme ends or causes an injury, which in *Soto* was the date of the shooting.

Fourth, the court held that the exclusivity provision of the Connecticut Product Liability Act (CPLA) did not bar plaintiffs' CUTPA personal injury claims relating to marketing and advertising. The CPLA provides in part that a product liability claim "may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product." Conn. Gen. Stat. § 52-572n(a). Until *Soto*, the scope of this exclusivity provision seemed to be settled by two earlier Connecticut Supreme Court decisions, *Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120 (2003), and *Hurley v. Heart Physicians*, P.C., 278 Conn. 305, 326 (2006). In *Gerrity*, the court held the CPLA was the exclusive remedy for a party who seeks recompense for "personal injury, death or property damage ..." caused by a product defect but that the exclusivity provision did not serve as a bar to additional claims, including one brought under CUTPA, either for an injury not caused by the defective product or if the party is not pursuing a claim for "personal injury, death or property damage ... ." Thus, the court held that the plaintiff's claims for financial injury—being forced to pay a higher price for cigarettes than she would have had to pay in the absence of the claimed wrongful conduct—were outside the scope of CPLA and could be brought under CUTPA. Three years later, in *Hurley*, the court held that the plaintiffs' CUTPA count sought to recover for personal injuries caused by the defendant's product, and "[a]ccordingly, the plaintiffs' claim falls within the scope of the liability act and thus is barred by the exclusivity provision under § 52–572n (a)."

In *Soto*, the court recognized that a "product liability claim" includes all claims or actions for injury, death or property damage caused by a variety of activities relating to a product, including marketing, but held that prior case law regarding the exclusivity provision of the CPLA applied only to claims for damages caused by a *defective* product. This distinction between injuries caused by defective products and injuries caused by marketing products in an unethical manner is not well-developed and will create significant line-drawing problems. The *Soto* court suggested that one way to distinguish these two categories might be to determine whether marketing materials affect only the specific products at issue or the commercials create a risk as to other similar products. The court used as an example the risk that a viewer of a car commercial featuring unsafe driving practices with the disclaimer "professional driver, closed course, do not attempt this at home" might try the same stunt at home in any car, not just the advertised car. How this line of reasoning may be applied in future cases is difficult to predict and may well lead to expansive new claims against product sellers under CUTPA.

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Soto's federal preemption holding has rightly grabbed headlines. But even putting that important issue to one side, the decision also represents a significant expansion of CUTPA liability that could well ensnare many product manufacturers and sellers that do business in Connecticut.

It is sometimes said that bad facts make bad law. The horrific massacre of innocent children and educators at Sandy Hook Elementary School is about as bad as the facts can get, and those facts have now led to a significant expansion of Connecticut unfair trade practices law. Whether *Soto*'s expansive view of CUTPA liability will have staying power in other areas not involving the marketing of firearms remains to be seen. But even if *Soto*'s holdings are narrowly limited to their unique facts, at the very least, Connecticut businesses face the prospect of years of motion practice, trials and appeals testing the decision's broader impact.

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[1] *See,* e.g., Timothy D. Lytton, "Sandy Hook lawsuit court victory opens crack in gun maker immunity shield," *The Conversation* (March 15, 2019); Mark Joseph Stern, "Connecticut Supreme Court Issues Stunning Decision Allowing Sandy Hook Families to Sue Gun Manufacturer," *Slate* (March 14, 2019); David French, "The Connecticut Supreme Court Just Placed the Firearms Industry under Legal Threat," *National Review* (March 18, 2019).

[2] See also *City of New York v. Beretta U.S.A. Corp*., 524 F.3d 384, 403-04 (2d Cir. 2008).

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