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Sandy Hook settlement impact on mass shooting cases and legal strategies in defending gun manufacturers and premises owners

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Nine families who lost loved ones in the 2012 Sandy Hook mass shooting that killed 26 people, including 20 six- and seven-year-olds, recently entered a $73 million settlement with the manufacturer of the Bushmaster XM-15 rifle used in the tragedy. The settlement has once again drawn sharp activist attention to the epidemic of mass shootings in this country.

The Protection of Lawful Commerce in Arms Act, passed in 2005, provides a significant shield for gun manufacturers and dealers, preventing all civil liability actions against gun manufacturers or sellers for damages resulting from the criminal conduct of a third party.

On Easter weekend 2022 there were three mass shootings, leaving two dead and at least 26 wounded by gunshots, and others injured in the aftermath. This came on the heels of the Brooklyn, N.Y., subway shooting in which 33 shots were fired, striking 10 individuals.

In this article we will discuss what the Sandy Hook settlement portends for gun manufacturers and premises owners in ongoing and future cases, as well as the legal strategies involved in defending them.

The settlement

The Sandy Hook lawsuit arose out of the Dec. 14, 2012, shooting at Sandy Hook Elementary School in Newtown, Conn. In February 2022, nine of the Sandy Hook victims' families reached a settlement agreement with Remington Arms Co. for $73 million.

In the lawsuit, first filed in 2014, the families alleged that Remington used aggressive and "violence-glorifying" marketing in selling the AR-15 used in the tragedy. The lawsuit faced a significant hurdle in the Protection of Lawful Commerce in Arms Act (PLCAA), which generally protects firearms manufacturers and dealers from liability when crimes are committed with their products.[1]

To get around the PLCAA, the families' attorneys argued that Remington's marketing violated the Connecticut Unfair Trade Practices Act, (CUTPA), which prohibits advertising that promotes criminal conduct.[2] In 2019, the Connecticut Supreme Court allowed the case to move forward under the CUTPA, after the state court dismissed the case.[3] The U.S. Supreme Court declined to hear Remington's appeal.

Before the settlement, in July 2021, Remington offered $33 million to settle the case. The families did not accept this settlement offer "because they wanted to ensure they had obtained enough documents and taken enough depositions to prove Remington's misconduct ..."[4]

According to the press release from the families' attorneys, the $73 million payment comes from four insurers, and is the full amount of coverage available. The families intended that this settlement send a clear message to insurance carriers about the significant risks in issuing policies to businesses in the weapons industry.

In addition to the settlement payment, the plaintiffs "have obtained and can make public thousands of pages of internal company documents" that go to Remington's alleged wrongdoing.

What this means for gun manufacturers and their insurers

The PLCAA, passed in 2005, provides a significant shield for gun manufacturers and dealers, preventing all civil liability actions against gun manufacturers or sellers for damages resulting from the criminal conduct of a third party.[5] Some states might have similar state-law protections.

The Sandy Hook case is the first since 2005 to get around the "bulletproof vest" of the PLCAA, based on the Connecticut Supreme Court's finding that the CUTPA regulated a company's firearms advertising schemes and entitled plaintiffs to a private right of action.

In fact, in 2021, the Texas Supreme Court ruled that the PLCAA protected the business that sold a rifle to the shooter who gunned down 26 people at a Sutherland Springs church in Texas in 2017. While the seller was not permitted to purchase a firearm because of a prior conviction, that information was not in the federal background check system, and the Texas Supreme Court held that one of the six exceptions to the PLCAA did not apply.[6]

The Sandy Hook settlement teaches us that plaintiffs may get around this federal prohibition, and possibly other state law prohibitions, through application of a state's unfair trade practices regulation. The language of the CUTPA is broad, prohibiting "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[7]

We can expect that future victims and their families will attempt to use this language as well as the Connecticut Supreme Court's reasoning to apply in other states, and continue to bring civil liability actions against gun manufacturers in an attempt to avoid the federal liability shield entirely.

The key in any mass shooting case against a property owner or operator will turn on whether the shooting was foreseeable and whether the premises owner was negligent in not taking steps to prevent it.

Gun violence has not ceased in this country. As of the date of this article there have been 142 mass shootings in less than four months, or more than one mass shooting for every day of 2022 so far. Mass shootings are now a daily occurrence in the United States.

With the ever-constant casualties caused by gun violence, arms makers and sellers should be wary of any relevant state law should another lawsuit in line with the Sandy Hook case be brought. Insurers, too, should contemplate the potential risk and exposure, given that the Sandy Hook case has set a high bar in that the plaintiffs obtained full coverage from the four available carriers.

Premises owners face continued risk

Plaintiffs face a difficult challenge

Premises owners, too, will continue to face risk from massacres such as the Sandy Hook shooting. Certainly, the owners and operators of locations where these disasters happen could be brought into lawsuits under claims of premises liability and inadequate security.

Unfortunately, apartment complexes, shopping malls, military bases, places of worship, workplaces, government offices, nightclubs and bars, schools and large public venues face potential significant risk, especially in the past two decades. There is no sanctuary. These entities should work to be prepared in the event an unthinkable tragedy strikes.

In a suit against a property owner for injuries that occur from a mass shooting on its premises, the plaintiff ordinarily faces the difficult burden of showing that the property owner somehow was negligent and did not take appropriate steps to warn or protect others from a foreseeable danger.

Therefore, the key in any mass shooting case against a property owner or operator will turn on whether the shooting was foreseeable and whether the premises owner was negligent in not taking steps to prevent it. Given the rise in shootings, foreseeability alone is becoming more difficult to challenge and the bar for preventive steps has been raised significantly.

Criminal acts as a superseding cause

Furthermore, plaintiffs have the burden of proving that the alleged breach of duty proximately caused the deaths and injuries. The components of proximate cause are cause-in-fact and foreseeability.

Section 448 of the Restatement (Second) of Torts sets forth the concept of superseding cause:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

When a defendant presents evidence that the plaintiff's injuries resulted from intervening criminal conduct that rises to the level of a superseding cause based on considerations such as those in section 442, the defendant has negated the ordinary foreseeability element of proximate cause.

The burden then shifts to the plaintiff to raise a fact issue by presenting controverting evidence that, despite the extraordinary and abnormal nature of the intervening force, the criminal act was foreseeable.

Generally, foreseeability involves whether a reasonable person in a given situation should know of a possible risk of safety to others and, if so, take reasonable measures to prevent the occurrence.

But foreseeability involves a complicated analysis and usually involves several factual considerations of what the premises owner knew or should have known **before** the criminal act occurred, including:

- **Proximity**: Proximity points to whether there is evidence that other crimes have occurred on the property or in its immediate vicinity. Criminal activity occurring farther from the landowner's property may be less relevant because crime rates may be expected to vary significantly within a large geographic area.
- **Publicity**: The existence of any publicity surrounding previous crimes may help in determining whether a landowner knew or should have known of a foreseeable danger.
- **Recency and Frequency**: A criminal act is more likely foreseeable if numerous prior crimes are concentrated within

a short time span than if few prior crimes are diffused across a long-time span.

- **Similarity**: In addition to the recency and frequency of past crimes, a court must consider the similarity of the past crimes to the criminal conduct in question.

Foreseeability gives rise to a duty to take reasonable measures to prevent the foreseeable acts. Plaintiffs will argue that such reasonable measures include an increased security presence at the property. The true battlefield will be foreseeability and the reasonableness of the measures implemented, or measures that arguably could have been implemented.

In the environment of nuclear verdicts, more and more we see the bar for what constitutes a "reasonable" standard being raised. As such, burdensome, expensive and invasive preventive measures, though often the result of the benefit of hindsight, are considered to be more reasonable than they once were.

Have we reached the tipping point?

Once upon a time, such mass shootings were far from foreseeable — the unthinkable acts of violence, rather than being the norm, were rare occurrences. Courts historically found that the actions of mass shooters were so unexpected and remote that no rational juror could find that a business owner or operator should have foreseen them as a matter of law. Claims premised on a duty to warn fared no better.

However, as we have seen in recent decades, these "rare" tragedies are not so rare anymore. Since 2009, there have been roughly 270 mass shootings in America in which four or more people were shot and killed. That figure does not include the numerous tragedies resulting from the general increase in gun violence. In 2020, the United States experienced 45,222 total gun deaths, a 14 percent increase from the year before according to the Pew Research Center.[8]

As mass shootings have become so much more frequent, as noted above, the perception of whether such events are foreseeable has started to shift. The more they occur, the more difficult it will become for premises owners and operators to declare they are unforeseeable for their property or venue.

Specifically, it becomes easier for a plaintiff to create a fact issue as to whether defendants knew or should have known of such risks.

Still, today, imposing liability on owners and operators for the criminal acts of third-party shooters remains a challenging legal case for victims to make. It is undisputed that the safety and security of citizens is important. The question is at what cost? The costs to businesses are extended to the customers, and what about the cost to the individual liberties and freedoms that we hold so dear?

Absent serious change at the legislative level that may have the most impact on some of these tragic shootings, attorneys representing defendants should take advantage of the favorable law in their jurisdictions to file dispositive motions and motions for summary judgment to obtain leverage as soon as practicable.

Central to those motions should be the issues and arguments raised here and the significant truth that we cannot anticipate everything, and that the imposition of standards and verdicts that require preventive measures at any cost determined with the benefit of hindsight will not be the solution.

Notes

[1] 15 U.S.C. §§ 7901-7903.

[2] Mike Curley, "Remington Settles with Sandy Hook Families for $73M," Law360 (Feb. 15, 2022), https://bit.ly/3s0NwMp.

[3] *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019).

[4] "Sandy Hook Families Achieve Historic Victory Holding Gunmaker Accountable for Role in School Massacre," Koskoff, Koskoff & Bieder, https://bit.ly/3KmV825.

[5] 15 USC §§ 7901-7903.

[6] Allyson Waller, "Academy Sports Chain Can't Be Sued for Selling Gun Used in Texas' Deadliest Mass Shooting, State Supreme Court Says," Texas Tribune (June 25, 2021), https://bit.ly/3vPQ6WO.

[7] Conn. Gen. Stat. §§ 42-110a — 42-110q.

[8] John Gramlich, "What the Data Says About Gun Deaths in the U.S.," Pew Research Center (Feb. 3, 2022), https://pewrsr.ch/3EVQmaN

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