

## [Products Liability Law Daily Wrap Up, TOP STORY—WEAPONS AND FIREARMS—Conn. Sup. Ct.: Sandy Hook victims may proceed on wrongful marketing claim against gun manufacturers, \(Mar. 15, 2019\)](#)

Products Liability Law Daily Wrap Up

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By Nicole D. Prysby, J.D.

Claims brought by Sandy Hook victims against gun manufacturers go forward, insofar as they are based on a theory that the defendants' marketing of the rifle used in the shooting was an unfair trade practice under CUPTA. Claims based on a theory that it was an unfair trade practice under CUTPA for the defendants to sell the weapon failed.

The Connecticut Supreme Court revived some claims against gun manufacturers brought by victims of the Sandy Hook mass shooting, finding that claims based on a theory of wrongful marketing may go forward. Connecticut Unfair Trade Practices Act (CUPTA) claims that the defendants marketed the rifle used in the shooting, through advertising and product catalogs, in an unethical, oppressive, immoral, and unscrupulous manner, are cognizable under CUTPA although the victim did not have a direct business relationship with the defendants. The court also held that the claims were not time-barred, as the plaintiffs alleged the advertising occurred until the lawsuit. And CUPTA falls within one of the federal Protection of Lawful Commerce in Arms Act (PLCAA) exceptions, the exception permitting civil actions alleging a knowing violation of a statute applicable to the sale or marketing of the firearm. The court rejected, however, the claim that it was negligent and an unfair trade practice under CUTPA for the defendants to sell the weapon. Three justices [dissented](#) and would have held that PLCAA's predicate exception encompasses only those statutes that govern the sale and marketing of firearms and ammunition specifically ([Soto v. Bushmaster Firearms International, LLC](#), March 19, 2019, Palmer, R.).

The case was brought by the estates of nine victims of the 2012 mass shooting at Sandy Hook Elementary School. They sought damages from the manufacturers, distributors, and direct sellers of the semiautomatic rifle that the perpetrator used. The plaintiffs alleged that the defendants negligently entrusted to civilian consumers an assault rifle that is suitable for use only by military and law enforcement personnel and violated CUTPA through the sale or wrongful marketing of the rifle. They had two theories for liability: (1) it was negligent and an unfair trade practice under CUTPA for the defendants to sell the weapon; and (2) the defendants marketed the rifle, through advertising and product catalogs, in an unethical, oppressive, immoral, and unscrupulous manner.

The defendants moved to strike the complaint, contending that the claims were barred by PLCAA. The trial court dismissed the claims [see *Products Liability Law Daily's* October 17, 2016 [analysis](#)] and the plaintiffs appealed.

**Negligent entrustment claim.** The plaintiffs argued that their claims are not precluded by the PLCAA, because they are predicated in part on a theory of negligent entrustment and the PLCAA does not confer immunity on sellers of firearms in actions for negligent entrustment. The court, however, rejected the argument and concluded that negligent entrustment principles apply only when the entrustor believes or has specific reason to believe that the direct trustee (as opposed to a third party) is likely to use the item unsafely. As none of the defendants possessed any knowledge or had any specific reason to believe either that the perpetrator's mother (the purchaser) would share the firearm with her son or that he was especially likely to operate it unsafely or illegally, the negligent entrustment claim failed.

**CUTPA claims.** The plaintiffs predicated their wrongful death claim on alleged CUPTA violations. Because the court concluded that they had not pleaded a legally sufficient negligent entrustment claim under Connecticut

common law, PLCAA barred the wrongful death claims unless (1) the plaintiffs pleaded a cognizable CUTPA violation, and (2) CUTPA constituted a predicate statute for purposes of 15 U.S.C. § 7903(5)(A)(iii).

The court first concluded that the plaintiffs have standing under CUPTA. They were third-party victims who did not have a direct consumer, commercial, or competitor relationship. However, because the principal evils associated with unscrupulous and illegal advertising are not ones that necessarily arise from or infect the relationship between an advertiser and its customers, competitors, or business associates, the court found that a party directly injured by conduct resulting from such advertising can bring an action pursuant to CUTPA even in the absence of a business relationship with the defendant. The statutory text of CUPTA creates a right of action for "any person" injured by unfair trade practices; it does not limit the right to persons who have a direct business relationship with a defendant. Although a business relationship initially was required to bring a CUTPA action, the legislature chose to eliminate that privity requirement. The court rejected the defendants' argument that prior cases have recognized a business relationship requirement, because it has not held that every CUTPA claim requires a business relationship between a plaintiff and a defendant. In the present case, the plaintiffs allege that the defendants' wrongful advertising magnified the lethality of the Sandy Hook massacre by inspiring the perpetrator or causing him to select a more efficiently deadly weapon for his attack. If this can be proven, the link between the allegedly wrongful conduct and the plaintiffs' injuries would be far more direct and less attenuated than cases in which the court has found a lack of standing. The gravamen of a wrongful advertising claim is that an advertisement models or encourages illegal or unsafe behavior. In such instances, the immediate victims are just as likely to be third parties who are not customers, whether it be individuals who engage in inappropriate conduct inspired by the advertisements or the direct victims of that conduct.

**Statute of limitations.** The court then considered whether the plaintiffs' claims were time-barred for failure to comply with CUPTA's three-year statute of limitations. The rifle was purchased in March 2010, the Sandy Hook massacre took place on December 14, 2012, and the complaint was filed December 13, 2014. The defendants argued that, because all of the relevant transfers of the rifle occurred no later than March of 2010, and because the present action was not initiated until more than four years later, in December 2014, the plaintiffs' CUTPA claims were time-barred.

The court found that the plaintiffs' wrongful death claims must comply with both the statute of limitations that governs wrongful death actions and CUTPA's statute of limitations. Therefore, because the manufacture, distribution, and final sale of the rifle all occurred at least three years prior to the commencement of the present action, the wrongful death claims predicated on a theory that any sale to the civilian market of military style assault weapons represented an unfair trade practice were time-barred. However, the wrongful death claims predicated on a theory that the defendants violated CUTPA through advertising and marketing could go forward because the plaintiffs alleged those activities continued through the time the complaint was filed.

**Connecticut Product Liability Act preemption.** The court then considered whether the exclusivity provision of the state Product Liability Act barred the plaintiffs' advertising theory CUTPA claims and concluded that it did not. The defendants offered no explanation supporting their argument that the plaintiffs' wrongful advertising claims represented veiled product liability claims. Also, in a matter of first impression, the court held that CUTPA permits recovery for personal injuries that result directly from wrongful advertising practices. The court rejected the defendants' argument that because a financial loss is required to bring a claim under CUPTA, recovery is necessarily limited to damages of that type.

**PLCAA exception.** The court also concluded that CUPTA fell within one of PLCAA's exceptions—the exception permitting civil actions alleging a knowing violation of a State or Federal statute applicable to the sale or marketing of the firearm. CUPTA is a statute "applicable to" the sale or marketing of firearms. If Congress had intended to limit the scope of the predicate exception to violations of statutes that are directly, expressly, or exclusively applicable to firearms, it easily could have used such language, but it did not. Although Congress sought to immunize the firearms industry from liability for third-party criminal conduct, that immunity was intended to extend only to harm that is solely caused by others, not by actions of the manufacturers themselves. There is no indication in the statutory text or statement of findings and purposes that Congress intended to restrict

the power of the states to regulate wrongful advertising, particularly advertising that encourages consumers to engage in egregious criminal conduct. Therefore, PLCAA does not bar the plaintiffs' wrongful marketing claims and, at least to the extent that it prohibits the unethical advertising of dangerous products for illegal purposes, CUTPA qualifies as a predicate statute.

**Dissent.** Judges Robinson, Vertefeuille, and Elgo dissented in part. They would have found that the PLCAA's predicate exception encompasses only those statutes that govern the sale and marketing of firearms and ammunition specifically, as opposed to generalized unfair trade practices statutes that, like CUTPA, govern a broad array of commercial activities. In the dissent's view, canons of statutory construction support such a finding. The predicate exception should be construed narrowly. In addition, the legislative history supports a narrow reading of the predicate exception as limited only to those statutes that govern the sale and marketing of firearms specifically.

This case is No. [SC 19832 and SC 19833](#).

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