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PERSPECTIVE

Lawsuits could be a reckoning for the gun industry

By Arash Homampour

The bullet-proof armor that has effectively shielded U.S. gun manufacturers from liability for so many years is starting to be pierced. As a result of recent legal developments, the industry, which has weathered lawsuits and legislative efforts to clip its wings with impunity, is in an unprecedented state of vulnerability.

At the end of July, gun manufacturer Remington offered a \$33 million settlement to families of nine children who died in the 2012 shooting at Sandy Hook Elementary School in Newton, Connecticut. Remington, which twice filed for bankruptcy, clearly did a calculus when it made the settlement offer. After years of litigation, and with the apparent approval of the bankruptcy trustee, the gun maker decided that settlement was the best way to cut its losses.

Remington's settlement offer is both a recognition of the financial exposure the gun manufacturer faces as well as an acknowledgment of the viability of the families' claims. That the amount was this high – though perhaps not high enough for still-grieving families whose damages have been alleged to be over \$1 billion – speaks to the potentially astronomical verdict a jury could have returned had it heard the case.

The families' lawsuit was previously revived by the Connecticut Supreme Court when it ruled that the families should be able to prove that Remington violated Connecticut Unfair Trade Practices law by marketing the XM15- E2S assault rifle to civilians for criminal purposes, and that those wrongful marketing tactics caused or contributed to the Sandy Hook massacre.

Remington's settlement offer follows on the heels of a California case in which a judge ruled on July 2 that victims of a 2019 Poway synagogue shooting could, in fact, bring claims against Smith & Wesson for its potential role in their injuries. In the case of *Goldstein v. Earnest*, No. 37-2020-00016638-CUPO- CTL, (filed June, 2021) in California Superior Court for San Diego County, victims and their families sued the gun maker for marketing and selling, through a local gun shop, a gun that was made to be easily modified into a military-style assault rifle. Such a weapon, purchased by the 19-year old unlicensed shooter, was prohibited under California law and constituted an automatic-fire "machine gun" prohibited under federal law, according to the lawsuit.

The plaintiffs argued that Smith & Wesson, the nation's largest gunmaker, intentionally designed its AR-15 style rifle so it could easily be modified to become an automatic rifle in violation of both state and federal law. The manufacturer didn't just know that its guns could be repurposed to shoot multiple rounds, according to the lawsuit, it deliberately marketed this feature to appeal to potential customers, such as the young shooter intent on killing Jews on the last day of Passover. Smith & Wesson, the plaintiffs alleged, engaged in a "reckless, deceptive and illegal marketing campaign" targeted at young people looking to acquire assault-type rifles.

Gun manufacturers have historically enjoyed considerable immunity under the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§7901-7903. The federal law provides manufacturers and sellers with immunity against "civil action[s] ... for damages ... injunctive relief ... or other relief, resulting from the

criminal or unlawful misuse" of firearms, and it was intended to bar causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for harm caused solely by the criminal or unlawful misuse of firearm products."

The California case puts Smith & Wesson on the hot seat for marketing a product design that lets purchasers turn rifles into automatic weapons. The judge ruled that the plaintiffs had alleged sufficient facts to bring an action against Smith & Wesson under the "predicate exception" to the PLCAA, which permits lawsuits "where a manufacturer knowingly . . . violated a State or Federal Statute applicable to the sale or marketing of the product, where violation proximately caused the harm sued upon." He found that the complaint stated sufficient grounds for potential liability under the National Firearms Act, the federal statute prohibiting sale of machine guns. He also ruled that there were grounds for a cause of action based on Smith & Wesson's knowing violation of California's Unlawful Competition Law.

Critically, the judge also ruled that Smith & Wesson, as well as the gun shop, could be held liable for punitive damages – damages designed to punish and deter bad corporate conduct that can continue to harm us all – based on the allegation that in 2000, the company had promised in settlement agreements with various cities and the federal government to reform business practices that arguably fostered criminal misuse of its guns. Specifically, the judge found compelling plaintiffs' allegation that Smith & Wesson agreed not to sell weapons that could easily be modified into illegal automatic weapons but did the opposite: It continued marketing and selling easily modifiable firearms knowing they would

continue to be converted to automatic assault weapons and used in other mass shootings.

Both of these cases should force the gun industry to change how it designs and markets its products to the public. For the first time, manufacturers face the very real prospect of liability, and these lawsuits could finally hold them accountable. For too long, gun makers have operated according to a profits-over-safety equation on steroids. They have sought and reaped obscene profits by exploiting the public with little concern about the consequences.

The cases against Remington and Smith & Wesson now open the door for more claims against gun manufacturers who engage in similar practices. Like the opioid cases against Purdue Pharma and other big drug companies, which have been settling for ten-figure sums, such litigation plays an essential role in forcing accountability and deterring evil corporate behavior. ■

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