

Note

Help Me Sue a Gun Manufacturer: A State Legislator’s Guide to the Protection of Lawful Commerce in Arms Act and the Predicate Exception

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Gun violence has become one of the central issues of our time. The number of gun violence victims, gun homicides, and mass shootings break all-time American records nearly every year. As the number of victims of gun violence rises, victims have tried—and largely failed—to hold gun manufacturers civilly liable for the weapons’ role in their injuries. The failure of these suits stems from the Protection of Lawful Commerce in Arms Act (PLCAA), which grants the gun industry broad protection against civil suits for the use of their weapons by third parties. The PLCAA provides limited exceptions to these protections, including the predicate exception, which allows for lawsuits to proceed when manufacturers knowingly violate a federal or state law applicable to the sale or marketing of firearms.

As gun violence in America began to rise in the late 20th century, both private and public plaintiffs found success in holding gun manufacturers liable for acts of gun violence. Concerned with open-ended liability, Congress passed, at the insistence of the gun

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industry, the PLCAA. The result has been the distortion of the litigation process to the benefit of gun manufacturers and the detriment of victims of gun violence.

Since the PLCAA's passage, courts have largely foreclosed the predicate exception to victims. Courts have traditionally interpreted the exception narrowly. Recently, however, litigators have begun to score important wins through the predicate exception, highlighted by a ruling obtained by the Sandy Hook victims in *Soto v. Bushmaster*. States, such as New York, New Jersey, and Delaware, have recently begun to rewrite their laws in the hopes of capitalizing on the exception's opening to make gun manufacturers liable. This Note analyzes and categorizes the statutory language of the laws litigated in these cases to draw conclusions for future litigation.

This Note uses those conclusions to analyze California's recently implemented S.B. 1327 and argues that it will likely trigger the predicate exception and survive PLCAA preemption. This Note then proposes a series of considerations for state legislators to weigh when drafting predicate-exception-focused legislation. Those recommendations include better understanding the hurdles victims have in bringing lawsuits against gun manufacturers, using firearm-specific language, and considering the possibility of amending marketing statutes.

INTRODUCTION

“It started as a very normal Friday.”¹ Like every other weekday, Nicole Hockley walked her two sons, Dylan and Jake, to catch the bus to elementary school.² Like every other weekday, Dylan, six years old and autistic, met his special education assistant, Anne Marie Murphy, at the school’s front door.³ Like every other weekday, Dylan and Anne Marie planned to spend the day together, tackling class lessons and assignments.⁴ A career educator, Anne Marie had grown so close to the boy that her photo hung on the Hockley family refrigerator.⁵ Then, soon after it began, the “normal Friday” ended.⁶ Reports of gunfire at the school began to circulate.⁷ A chaotic scene ensued, the result of which left Nicole Hockley sitting at a local fire station amongst fellow parents, waiting as their children were evacuated from the school.⁸ The kids arrived in waves, one of which included Jake.⁹ As children and their parents reunited, a dwindling but significant group of parents remained, anxiously awaiting a resolution.¹⁰ Then news finally came. Fifteen hours after watching her sons pull away from the curb, Nicole learned that Dylan would not be coming home.¹¹ A gunman, armed with a Bushmaster Model XM15-E2S rifle, had broken into the school and killed

1. Elaine Godfrey, *What It Feels Like to Lose Your Child in a Mass Shooting*, ATLANTIC (May 27, 2022), <https://www.theatlantic.com/politics/archive/2022/05/losing-a-child-in-a-mass-shooting-sandy-hook-parent-interview/639431> [<https://perma.cc/WWU6-DXDP>] (recounting an interview with Nicole Hockley).

2. *Id.*

3. See Tom Cleary, *Dylan Hockley Died in Anne Marie Murphy’s Arms*, CONN. POST (Dec. 17, 2012), <https://www.ctpost.com/news/article/Dylan-Hockley-died-in-Anne-Marie-Murphy-s-arms-4122828.php> [<https://perma.cc/FBF3-86HR>] (describing the relationship between Dylan Hockley and Anne Marie Murphy).

4. *Id.*; Editorial, *26 Reasons to Act: Anne Marie Murphy*, NEW HAVEN REG. (Feb. 23, 2013), <https://www.nhregister.com/connecticut/article/EDITORIAL-26-reasons-to-act-Anne-Marie-Murphy-11421406.php> [<https://perma.cc/VM4J-DDY2>].

5. Cleary, *supra* note 3.

6. Godfrey, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

twenty-six people.¹² He entered Dylan's classroom and shot him, Anne Marie, his teacher Ms. Soto, and twenty-three more students and school staff dead, before turning the gun on himself.¹³ Dylan's body, destroyed by five bullets to the head and back, was found in the arms of Anne Marie, who died trying to shield the six-year-old boy from the gunfire.¹⁴ The gunman also killed his own mother before visiting the school.¹⁵ The gun used in the massacre was one of four firearms possessed by the shooter, all of which he obtained legally.¹⁶

That day in 2012 upended Nicole Hockley's life. Leaving the fire station, she and Jake could not even return home, as the shooter lived across the street from the same driveway where the school bus picked the boys up.¹⁷ Days later, Nicole cremated Dylan in a sweater he was going to receive as a Christmas present.¹⁸ Hockley's marriage also fell apart, unable to "find [her husband] again through the pain."¹⁹ Jake, now a high school graduate,²⁰ has lived his life without a brother.

The Hockley family's extraordinary devastation is not rare in America. Since Dylan's death, over 400,000 Americans have died by gunfire, leaving an uncountable wake of affected parents,

12. Stephen J. Sedensky III, Off. of the State's Att'y Jud. Dist. of Danbury, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012*, STATE OF CONN. DIV. OF CRIM. JUST. 1–2 (Nov. 25, 2013), <https://portal.ct.gov/-/media/DCJ/SandyHookFinalReportpdf.pdf> [<https://perma.cc/2Y2N-9RK9>].

13. *Id.*

14. See Godfrey, *supra* note 1; see also Cleary, *supra* note 3.

15. See Richard Esposito et al., *20 Children Died in Newtown, Conn., School Massacre*, ABC NEWS (Dec. 14, 2012), <https://abcnews.go.com/US/twenty-children-died-newtown-connecticut-school-shooting/story?id=17973836> [<https://perma.cc/2E3A-4S3A>].

16. Sedensky III, *supra* note 12.

17. See Godfrey, *supra* note 1.

18. *Id.*

19. *Id.*

20. See Nicole Moretti Hockley (@nicolehockleyshp), INSTAGRAM (June 16, 2022), <https://www.instagram.com/p/Ce3VURyAuZU/?hl=en> [<https://perma.cc/5SGW-LLQU>] (celebrating Jake's graduation from Newtown High School).

siblings, children, and friends.²¹ During this time, guns have injured hundreds of thousands more.²² The low boil of gun violence creates hundreds of victims a day.²³ Highlighting that pace is the growing frequency of high-profile mass shootings.²⁴ Public places—schools,²⁵ movie theaters,²⁶ malls,²⁷ and more—are routinely targeted in attempts to maximize carnage and media spectacle.²⁸ The impact has left Americans awash in a numbing culture of mass loss and tragedy, stuck in a whirlpool of fear and

21. See *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/past-tolls> [<https://perma.cc/UGS5-B6XA>] (providing annual and contemporaneous data on shooting and gun violence victims).

22. *Id.*

23. *Id.*

24. *Id.*

25. See, e.g., Esposito et al., *supra* note 15 (describing the events of the Sandy Hook shooting).

26. See, e.g., Saja Hindi, *10 Years Later, Colorado Remembers Lives Lost in Aurora Theater Shooting*, DENVER POST (July 20, 2022), <https://www.denverpost.com/2022/07/20/aurora-theater-shooting-10th-anniversary> [<https://perma.cc/8FC5-3ER4>] (reflecting on a mass shooting in a movie theater in Aurora, Colorado). Following the shooting in Aurora, Colorado, the Brady Center (now Brady) represented the victims in a lawsuit in federal court against several arms and ammunition dealers. *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015). The court found that the Protection of Lawful Commerce in Arms Act (PLCAA) barred the claims. *Id.* at 1227. The court held that the plaintiffs failed to state sufficient facts to prove that the defendants knowingly violated the predicate statute. *Id.* at 1227–28. Subsequently, the plaintiffs were hit with around \$200,000 in legal fees pursuant to the state’s PLCAA analog, Colo. Rev. Stat. § 13-21-504.5. *Phillips v. LuckyGunner, LLC*, No. 14-CV-02822-RPM, 2015 WL 3799574, at *8 (D. Colo. June 17, 2015) (order of fees); COLO. REV. STAT. § 13-21-504.5 (2023). In an attempt to demean the plaintiffs, the court stated in its corresponding order that, “[i]t is apparent that this case was filed to pursue the political purposes of the Brady Center and, given the failure to present any cognizable legal claim, bringing these defendants into the Colorado court where the prosecution of James Holmes was proceeding appears to be more of an opportunity to propagandize the public and stigmatize the defendants than to obtain a court order which counsel should have known would be outside the authority of this court.” *Phillips v. LuckyGunner, LLC*, 2015 WL 3799574, at *2.

27. See, e.g., *Police: 5 People Dead in Wash. Mall Shooting; Suspect on the Loose*, CBS NEWS (Sept. 24, 2016), <https://www.cbsnews.com/news/cascade-mall-burlington-shooting-four-dead-active-shooter-on-the-loose-near-seattle> [<https://perma.cc/SZH8-3PEC>] (reporting on a mass shooting in Washington state).

28. See, e.g., Alex Pew et al., *Does Media Coverage Inspire Copy Cat Mass Shootings?*, NAT’L CTR. FOR HEALTH RSCH., <https://www.center4research.org/>

paranoia.²⁹ In 2023, it is common for Americans to think about the day that gun violence could impact them.³⁰

As gun violence has grown devastatingly common,³¹ the accelerating number of victims have been left largely without legal recourse to recoup what they have lost from those that caused their injuries.³² Since 2005, federal law has largely immunized gun manufacturers³³ and other gun companies from lawsuits brought by victims of gun violence.³⁴ The Protection of Lawful

copy-cats-kill [<https://perma.cc/4U79-KDCM>] (discussing the relationship between media attention of mass shootings and their inspiration for later shootings); Melanie Warner, *Two Professors Found What Creates a Mass Shooter. Will Politicians Pay Attention?*, POLITICO (May 27, 2022), <https://www.politico.com/news/magazine/2022/05/27/stopping-mass-shooters-q-a-00035762> [<https://perma.cc/5AXS-XQST>] (discussing how media attention impacts mass shooters); see also Joel A. Capellan & Allan Y. Jiao, *Deconstructing Mass Public Shootings: Exploring Opportunities for Intervention*, REG'L GUN VIOLENCE RSCH. CONSORTIUM 22 (Oct. 2019), <https://rockinst.org/wp-content/uploads/2019/10/10-24-19-Deconstructing-Mass-Shootings-Brief-1.pdf> [<https://perma.cc/Q5KR-NJDR>] (analyzing the disproportionate amount of media attention mass shootings receive).

29. See Press Release, Am. Psych. Ass'n, *One-Third of US Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events* (Aug. 15, 2019), <https://www.apa.org/news/press/releases/2019/08/fear-mass-shooting> [<https://perma.cc/EC5U-2ZQM>] (analyzing the impact on human behavior from fear of mass shootings).

30. See *Poll: Most Americans See Gun Violence as a Major Problem, Want Stricter Gun Laws*, UCHICAGO NEWS (Aug. 23, 2022), <https://news.uchicago.edu/story/poll-most-americans-see-gun-violence-major-problem-want-strictier-gun-laws> [<https://perma.cc/M7EG-WEYB>] (finding that four in ten Americans surveyed anticipate it being at least somewhat likely that they will be the victim of gun violence in the next five years).

31. 2021 set a record for most gun violence deaths in a year on record, with 45,120 killed, and 2022 nearly matched it, with 44,377 deaths. See *Past Summary Ledgers*, *supra* note 21.

32. See Melissa Chan, *Just About Everyone but the Gun Maker Gets Sued After a Mass Shooting*, TIME (Aug. 20, 2019), <https://time.com/5653066/mass-shooting-lawsuits> [<https://perma.cc/RZB4-REM2>] (discussing how the PLCAA affects who gun violence victims sue).

33. As will be discussed in Part I.B, *infra*, the PLCAA protects federally licensed gun manufacturers, sellers, and other entities engaged in the gun business.

34. 15 U.S.C. § 7902(a) (“A qualified civil liability action may not be brought in any Federal or State court.”); § 7903(4) (“The term ‘qualified product’ means a firearm . . . , including any antique firearm . . . , or ammunition . . . , or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.”); § 7903(5)(A) (“The term ‘qualified civil liability action’ means a civil action or proceeding or an administrative proceeding

Commerce in Arms Act (PLCAA) grants that protection,³⁵ preempting lawsuits against gun manufacturers for the actions of third-party shooters.³⁶ The PLCAA states that once the weapon is sold by the company, manufacturers cannot be on the hook for what the gun owner does with it.³⁷ As a result, the law cuts gun manufacturers out of most victims' litigation equation.³⁸ The PLCAA provides victims only six exceptions to litigate within.³⁹ The exceptions primarily focus on the manufacturer's conduct during the sale, marketing, design, and manufacturing processes. The caveats allow a lawsuit to proceed if the plaintiff can prove certain improper conduct by the manufacturer before or during the sale of a gun.⁴⁰

As the creators of firearms, gun manufacturers are the source of the stream that ends in gun violence.⁴¹ Unlike gun dealers and other secondhand sellers, gun manufacturers are positioned to most acutely affect the supply of guns in the market.⁴² Given this positioning, lawsuits against gun manufacturers may provide the biggest impact in reducing the supply of improperly

brought by any person against a manufacturer or seller of a qualified product . . .”).

35. Of the practitioners interviewed for this Note, the use of the term “immunity” to describe the PLCAA’s protections was controversial. Supporters of the PLCAA claimed that the bill was not an immunity bill. *See infra* notes 117–19 and accompanying text. Other gun safety advocates also disagree with the characterization. However, other practitioners, as well as much of the academic literature, do use the word to describe the PLCAA’s protections. This Note will use “immunity” in a colloquial way. *See, e.g., Immunity*, OXFORD LEARNER’S DICTIONARIES, <https://www.oxfordlearnersdictionaries.com/us/definition/english/immunity?q=immunity> [<https://perma.cc/ZGH5-CRMU>] (defining immunity as “the state of being protected from something”).

36. 15 U.S.C. §§ 7902–7903.

37. *See infra* Part I.B.

38. *See Chan, supra* note 32.

39. 15 U.S.C. § 7903(5)(A).

40. *Id.*

41. *See infra* note 86 and accompanying text (explaining the “stream” of gun sales); Telephone Interview with Robert M. Cross, Trial & App. Litig. Couns., Brady United Against Gun Violence (Nov. 10, 2022) (discussing the role manufacturers play in the “stream” of gun production and sales); *infra* Part II.C (explaining the dynamics of the gun market since the implementation of the PLCAA).

42. *See infra* note 86 and accompanying text.

used guns and preventing gun violence.⁴³ However, for nearly fifteen years following its passage—an era of unprecedented gun violence⁴⁴—the PLCAA prevented any new, meaningful lawsuit arising against a gun manufacturer stemming from that violence.⁴⁵

That dam has begun to break in recent years. Following the high-profile mass shooting in Sandy Hook, Connecticut⁴⁶—the same one that claimed Dylan Hockley—the victims successfully pierced through PLCAA’s protection by leveraging the Act’s “predicate” exception.⁴⁷ The predicate exception allows lawsuits to proceed where a gun manufacturer “knowingly violated a State or Federal statute applicable to the sale or marketing” of firearms.⁴⁸ While courts have traditionally interpreted the predicate exception narrowly,⁴⁹ a ruling in the recent lawsuit may show a shift toward embracing a broader interpretation.⁵⁰ This more expansive interpretation presents a notable opportunity for victims to bypass the PLCAA and include gun manufacturers in their lawsuits.⁵¹

43. *Id.* While this Note will focus specifically on lawsuits against gun manufacturers, rather than other gun industry entities such as wholesalers or retailers, much of this Note’s analysis can and does extend to those other entities as well. Further, plaintiffs have had more sustained success litigating against dealers and other downstream entities than manufacturers under the PLCAA. *See generally infra* Part I.I.C (describing the difficulties gun violence victims have in reaching gun companies generally and fulfilling a judgment).

44. *See Firearm Deaths in the US: Statistics and Trends*, USAFACTS, <https://usafacts.org/data/topics/security-safety/crime-and-justice/firearms/firearm-deaths> [<https://perma.cc/TBU9-7KUA>] (showing the rise in gun violence over the last three decades).

45. *See* Telephone Interview with Robert M. Cross, *supra* note 41 (discussing the effect of the PLCAA on civil liability lawsuits against gun manufacturers).

46. *See, e.g.,* Esposito et al., *supra* note 15.

47. *See Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 324–25 (Conn. 2019) (finding the predicate statute applicable to firearms); *see also Parsons v. Colt’s Mfg. Co.*, 499 P.3d 602, 605 (Nev. 2021) (finding the predicate statute applicable to firearms in a suit brought after a shooting in Nevada).

48. 15 U.S.C. § 7903(5)(A)(iii).

49. *See, e.g., City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403–04 (2d Cir. 2008) (holding that statutes of general applicability can rarely be used as predicate statutes).

50. *See Soto*, 202 A.3d at 324–25.

51. *See* Telephone Interview with Robert M. Cross, *supra* note 41 (discussing the significance of the ruling in *Soto*).

These rulings also accompany a legislative effort to create new laws that “appl[y] to the sale or marketing” of firearms. State legislatures in three states have passed “predicate statutes” to facilitate lawsuits against gun manufacturers.⁵² In 2021, the New York legislature passed an updated public nuisance law in order to make it “applicable” to firearms.⁵³ In 2022, Delaware and New Jersey made similar changes.⁵⁴ California has been a recent addition to this trend, passing S.B. 1327 in 2022, which established a bounty-style private right of action while attempting to prevent PLCAA preemption.⁵⁵ S.B. 1327 allows any citizen, regardless of how gun violence has impacted them, to sue any other person or entity that knowingly violates or aids or abets the sale, ownership, or manufacturer of assault rifles, .50 caliber rifles, and guns without serial numbers.⁵⁶ While its preemption abilities have not yet been litigated,⁵⁷ S.B. 1327 presents a new opportunity for a predicate statute in the country’s most populous state. Other states, many with new legislative majorities of sympathetic state legislators,⁵⁸ may follow this

52. See *Gun Industry Immunity*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity> [<https://perma.cc/VX9G-AKQP>] (cataloging where states have passed “Victims’ Access to Justice” laws). During the writing of this Note, five additional states passed and signed updated predicate statutes into law: Colorado, Hawaii, California, Illinois and Washington. *Id.* Because these laws implemented similar schemes to those of highlighted *infra* notes 53–55, the analysis in this Note applies to the new statutes as well, despite not being directly discussed.

53. S.B. 7196, 2021–22 Leg., Reg. Sess. (N.Y. 2021); see *Nat’l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 67 (N.D.N.Y. 2022) (finding the updated New York statute to be “applicable” to the sale or marketing of firearms to satisfy the predicate exception).

54. S.B. 302, 151st Gen. Assemb. (Del. 2022); S.B. 1765, 220th Leg. (N.J. 2022).

55. S.B. 1327, 2021–22 Leg., Reg. Sess. (Cal. 2022); CAL. BUS. & PROF. CODE § 22949.65 (West 2023). The Senate Judiciary Committee notes in its committee report on S.B. 1327 that given the statute’s construction, “there are arguably no reasonable [PLCAA] preemption concerns.” S. JUDICIARY COMM., S.B. 1327: FIREARMS: PRIVATE RIGHTS OF ACTION 9 (Cal. 2021).

56. S.B. 1327, 2021–22 Leg., Reg. Sess. (Cal. 2022).

57. The law went into effect on January 1, 2023. Jon Healey, *Californians Have a Green Light to Sue the Gun Industry. How Will That Work?*, L.A. TIMES (Jan. 1, 2023), <https://www.latimes.com/california/story/2023-01-01/californians-will-soon-have-their-chance-to-sue-the-gun-industry> [<https://perma.cc/KX26-Z8MK>].

58. See Nathaniel Rakich, *The Midterms Made State Governments Bluer*, FIVETHIRTYEIGHT (Nov. 17, 2022), <https://fivethirtyeight.com/features/2022>

trend and begin to conceptualize what a predicate statute could look like in their state when attempting to combat gun violence.

This Note argues that the new California statute will be exempted from PLCAA preemption via the predicate exception. Evaluating S.B. 1327 through the lens of predicate exception case law, this Note asserts that the statute will be sufficiently⁵⁹ “applicable” to firearms to allow plaintiffs to pierce a gun manufacturer’s immunity under the PLCAA. This Note will also provide a guide for state legislators seeking to write and implement a successfully “applicable” predicate statute. Using interviews with current and former predicate exception litigators,⁶⁰ this Note offers considerations for state legislators to weigh when creating a predicate statute.

Part I of this Note details the historical background of pre-PLCAA gun litigation and gun manufacturer civil liability. This Part connects this period of litigation to the passage of the PLCAA, discussing the statute’s purpose, its text, and the predicate exception. Part I also discusses the various policy effects that have come as a result of gun manufacturer immunity under the PLCAA. Part II introduces predicate statutes, provides examples of existing predicate statutes, and overviews the recent movement in this legislative space. Part II also discusses the established case law on the predicate exception and illustrates how that case law has developed, if at all, in recent years. Part III analyzes S.B. 1327, the California statute that seeks to provide

-governor-state-government [<https://perma.cc/Z5CB-93NH>] (noting where Democrats have won state legislative chambers); Ryan Faircloth, *Minnesota Democrats Poised to Revive Gun Control Talks After Winning Full Control of Legislature*, STAR TRIB. (Dec. 12, 2022), <https://www.startribune.com/minnesota-democrats-poised-to-revive-gun-control-talks-after-winning-full-control-of-legislature/600235193> [<https://perma.cc/B68Q-YQY9>] (discussing the Minnesota Democratic-Farmer-Labor Party’s legislative plans to enact gun violence prevention measures after winning a state legislative trifecta).

59. In this Note, success is defined as a plaintiff’s ability to survive a defendant’s PLCAA motion to dismiss. This allows a plaintiff to conduct discovery and begin substantive settlement negotiations. *Cf.* Telephone Interview with Robert M. Cross, *supra* note 41 (discussing the importance of discovery in succeeding in a liability lawsuit against a gun company).

60. Interviews conducted for this Note include Minnesota Attorney General Keith Ellison, plaintiff’s attorney in *Soto v. Bushmaster* Josh Koskoff, Trial & Appellate Litigation Counsel at Brady United Against Gun Violence Robert M. Cross, and Director of University of Minnesota Law’s Gun Violence Prevention Law Clinic Megan Walsh.

a new path for plaintiffs against gun manufacturers. Part III explains how California's law is unique from existing gun restrictions and argues that it will be successful in its attempt to prevent PLCAA preemption. Part IV provides recommendations for state legislators who want to create a predicate statute in their state. Drawing from an analysis of the PLCAA case law and S.B. 1327, Part IV offers considerations for how state legislatures should understand the plaintiff's litigation process and how states can facilitate these lawsuits. Finally, Part IV provides feedback from predicate exception litigators on how states can make victims' lawsuits more likely to succeed.

I. THE EVOLUTION OF GUN MANUFACTURER LIABILITY AND ITS POLICY EFFECTS

While the issue of gun violence is widely recognized in American life,⁶¹ legal protections for gun manufacturers prevent substantive change to the status quo. America's succumbence to gun violence has stemmed from decades of push and pull between firearm ownership and regulation.⁶² As the common law began to adjust to the new realities of gun violence, Congress implemented the PLCAA to protect the gun industry from these changes.⁶³ The result has been an inflexible and unrelenting legal reality that harms victims to the benefit of gun manufacturers.⁶⁴

Section A illustrates how changes in firearm ownership and the rise of gun violence—trailed by an evolving system of gun regulations—gave rise to an episode of civil liability for gun manufacturers and a subsequent backlash from the industry. Next, Section B discusses the legislative purpose and text of the Protection of Lawful Commerce in Arms Act and its predicate exception. Lastly, Section C emphasizes how the PLCAA's civil protections distort the ability of victims to recover for their harm to the benefit of gun manufacturers.

61. See *Poll: Most Americans See Gun Violence as a Major Problem, Want Stricter Gun Laws*, *supra* note 30 (“Three-fourths of Americans view gun violence as a major problem, and 8 in 10 say gun violence is on the rise in the United States.”).

62. See *infra* Part I.A.

63. *Id.*

64. See *infra* Part I.C.

A. THE HISTORY OF CIVIL LIABILITY OF GUN MANUFACTURERS

Guns have always been a part of American law and culture.⁶⁵ Early laws mandated men to own a firearm for militia service.⁶⁶ The ratifiers of the Civil War Amendments advocated against the disarming of freedmen in the South after the war.⁶⁷ Yet, following the invention and popular ownership of automatic firearms,⁶⁸ lawmakers and the public began to recognize in the early 20th century the danger that guns posed.⁶⁹ Efforts to change both state and federal law came in response. The National Conference of Commissioners on Uniform State Laws—an effort to implement standardized laws across states—pushed for the implementation of their Uniform Firearms Act in the 1920s and '30s.⁷⁰ The United States Congress answered with the National Firearms Act of 1934,⁷¹ which limited the personal possession of certain guns, and the Gun Control Act of 1968, which limited the interstate sale of firearms.⁷² When crime rates rose in

65. See generally U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”).

66. See Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608> [<https://perma.cc/ZJ6X-MY9U>].

67. *Id.*

68. *Firearms History and the Technology of Gun Violence*, U.C. DAVIS LIBR., <https://library.ucdavis.edu/exhibit/firearms-history-and-the-technology-of-gun-violence> [<https://perma.cc/VJ7L-PKQZ>].

69. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, NAT'L ADVISORY COMM'N CIV. DISORDERS 56, 58 (1968); Winkler, *supra* note 66.

70. See Winkler, *supra* note 66; Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 767 (1926); Sam B. Warner, *The Uniform Pistol Act*, 29 J. CRIM. L. & CRIMINOLOGY 529, 531 (1938); see also, e.g., 18 PA. CONS. STAT. 6101–28 (1931).

71. National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (1934).

72. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). The Gun Control Act of 1968 was later amended by the Firearm Owners Protection Act of 1986, which both rolled back certain provisions of the Gun Control Act. See Firearm Owners Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

the early 1990s,⁷³ Congress responded with a ten-year ban on assault weapons.⁷⁴

The increased legislative scrutiny of gun violence ran concurrently with an increase in proactive litigation. In the 1980s, victims of gun violence⁷⁵ began to turn to the courts for civil compensation, suing gun manufacturers and dealers under theories of tort law.⁷⁶ Both private parties and public entities affected by gun violence began bringing lawsuits against gun manufacturers for the destruction caused by their products, alleging common torts like negligence, negligent marketing, and products liability.⁷⁷ For public entities especially, which felt the wide-ranging effects of gun violence through their citizens, hospitals, and infrastructure, claims of public nuisance became a popular avenue to attempt to hold gun manufacturers liable.⁷⁸

Two developments in the late 1990s encouraged the use of those legal avenues. The first was the success of state Attorneys General in their lawsuit against the tobacco industry, culminating in 1998's Tobacco Master Settlement Agreement.⁷⁹ Bringing negligent marketing and public nuisance claims against the tobacco industry, dozens of state Attorneys General extracted nu-

73. Matthew Friedman et al., *Crime Trends: 1990–2016*, BRENNAN CTR. FOR JUST. (2017), <https://www.brennancenter.org/sites/default/files/publications/Crime%20Trends%201990-2016.pdf> [<https://perma.cc/Q6WD-FDVR>].

74. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XI, §§ 110101–110106, 108 Stat. 1796 (1994).

75. While the colloquial use of “victim” is used to describe individuals, this Note also uses the term to describe public entities who also bear the burden of gun violence. Public entities include municipalities, states, and the federal government, amongst others.

76. Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 3 (2000); Daniel P. Rosner, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 421, 427–30 (2018).

77. Jean Macchiaroli Eggen & John G. Culhane, *Public Nuisance Claims Against Gun Sellers: New Insights and Challenges*, 38 U. MICH. J.L. REFORM 1, 3 (2004).

78. *Id.* at 3–4 (noting the emergence and use of public nuisance claims by public entities in their attempts to hold gun companies liable for gun violence).

79. *The Master Settlement Agreement*, NAT'L ASS'N ATT'YS GEN., <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement> [<https://perma.cc/RZ7X-PJEV>].

merous safety and marketing improvements from multiple lawsuits.⁸⁰ The success inspired other public actors to center the courts in the fight against gun violence.⁸¹ The second development was the Columbine school shooting, modern America's first high profile mass shooting.⁸² Following the massacre, the public's fear of guns and the political support for anti-gun violence measures solidified.⁸³ As one pollster stated a year after the shooting, "the Columbine shootings appear to have awakened parents to the possibility of violence in their children's schools" and communities.⁸⁴ These developments spurred efforts to use the courts as a tool to confront gun violence.

As public entities brought tort lawsuits against gun manufacturers, they found some success.⁸⁵ Plaintiffs alleged that gun

80. *Id.*; Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 906 (2004). Some scholars question whether these tort claims, especially public nuisance, could have ultimately been successful if brought to trial, as the attempts were based on relatively novel theories of what constituted nuisance or duty. However, given the industry concessions came predominantly from settlements, surviving a motion to dismiss was crucial to that end.

81. Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES (Dec. 24, 1998), <https://www.nytimes.com/1998/12/24/us/results-in-tobacco-litigation-spur-cities-to-file-gun-suits.html> [<https://perma.cc/F7XM-XYL2>].

82. See Lytton, *supra* note 76, at 59 (discussing the impact of the Columbine shooting on the political debate over gun control); James Brooke, *Terror in Littleton: The Overview; 2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES (Apr. 21, 1999), <https://www.nytimes.com/1999/04/21/us/terror-littleton-overview-2-students-colorado-school-said-gundown-many-23-kill.html> [<https://perma.cc/HLN7-EPAG>].

83. See, e.g., Mark Gillespie, *One in Three Say It Is Very Likely That Columbine-Type Shootings Could Happen in Their Community*, GALLUP (Apr. 20, 2000), <https://news.gallup.com/poll/2980/One-Three-Say-Very-Likely-Columbine-Type-Shootings-Could.aspx> [<https://perma.cc/7FDX-KCHD>]. Following Columbine, Congress made a series of unsuccessful efforts to respond to public opinion. Most legislative proposals focused on closing a loophole that allowed firearms to be sold at a gun show without a background check. The shooters, both under the age of eighteen, acquired three of their weapons through this loophole. See Jaelyn Schildkraut & Tiffany Cox Hernandez, *Laws That Bit the Bullet: A Review of Legislative Responses to School Shootings*, 39 AM. J. CRIM. JUST. 358, 363 (2014). All of these legislative efforts failed. *Id.* at 363–65.

84. Gillespie, *supra* note 83.

85. Telephone Interview with Robert M. Cross, *supra* note 41; see also, e.g., *Ileto v. Glock Inc.*, 349 F.3d 1191, 1216 (9th Cir. 2003) (allowing wrongful death, public nuisance, and negligence claims to proceed); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1136 (Ohio 2002) (allowing nuisance, negligence,

manufacturers failed to properly monitor and control how their weapons contributed to the gun violence that came downstream from their gun sales and marketing.⁸⁶ With limited success, this strategy survived motions to dismiss by arguing the defendant-manufacturers' improper conduct violated a duty to the victim or the public at large.⁸⁷ When accepted by the courts, this line of argument made gun manufacturers liable for the use of their guns in shootings by third parties.⁸⁸ One notable example is 1999's *Hamilton v. Accu-Tek*, in which a federal district court accepted this argument and allowed a law suit attempting to hold gun manufacturers liable for the acts of a third-party shooter to proceed.⁸⁹ Both gun safety advocates and the gun industry saw the case as a watershed moment, as the potential of significant civil liability for gun manufacturers was placed on the table for the first time.⁹⁰

These developments began to win gun safety advocates reforms via legal settlements. The Clinton Administration led a coalition of state and local public entities in a lawsuit against

and products liability claims to proceed); *Hamilton v. Accu-Tek (Hamilton I)*, 62 F. Supp. 2d 802, 846 (E.D.N.Y. 1999), *vacated sub nom.*, *Hamilton v. Beretta U.S.A. Corp. (Hamilton II)*, 264 F.3d 21 (2d Cir. 2001); Fox Butterfield, *Verdict Against Gun Makers Is Likely to Prompt More Suits*, N.Y. TIMES (Feb. 13, 1999) [hereinafter N.Y. TIMES *Hamilton*], <https://www.nytimes.com/1999/02/13/nyregion/verdict-against-gun-makers-is-likely-to-prompt-more-suits.html> [https://perma.cc/FQ2U-TJGQ].

86. The “stream” of gun sales typically occurs between the manufacturers who create the guns, wholesalers who buy the firearms in bulk, and retailers who sell the guns to individual buyers. Manufacturers are “upstream” and send the guns they make “downstream” to where they meet the individual buyer. See Telephone Interview with Robert M. Cross, *supra* note 41.

87. *Id.*; see, e.g., *Ileto*, 349 F.3d at 1217.

88. See Telephone Interview with Robert M. Cross, *supra* note 41.

89. *Hamilton I*, 62 F. Supp. 2d at 820.

90. N.Y. TIMES *Hamilton*, *supra* note 85. Ultimately, the case was reversed on appeal. *Hamilton II*, 264 F.3d at 21. In retrospect, *Hamilton v. Accu-Tek* is more of an outlier in the case law than the fundamental shift it was perceived to illustrate at the time.

Smith & Wesson—at the time the country’s largest maker of firearms⁹¹—for public damages from gun violence.⁹² The parties settled, agreeing to the creation of new monitoring procedures and safety features for their firearms.⁹³ The changes were heralded as a new “code of conduct” for the industry.⁹⁴

These advancements put gun manufacturers on the defensive. Having witnessed the tobacco industry’s demise, the gun industry—a fraction of the size of the tobacco industry⁹⁵—was financially unprepared to pay the judgments of numerous successful lawsuits.⁹⁶ Worried about the scale of potential liability, some gun manufacturers pulled out of the public firearms market, while others went out of business.⁹⁷

91. Steven A. Holmes, *House Defeats a New Attack on Agreement for Gun Safety*, N.Y. TIMES (June 27, 2000), <https://www.nytimes.com/2000/06/27/us/house-defeats-a-new-attack-on-agreement-for-gun-safety.html> [<https://perma.cc/7LKJ-KP6G>].

92. See *Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States*, U.S. DEP’T HOUSING & URB. DEV. (Dec. 13, 2009), <https://archives.hud.gov/news/2000/gunagree.html> [<https://perma.cc/VL8X-8U7E>] (setting forth the agreement’s terms); *Smith & Wesson Agrees to Install Locks in Unprecedented Deal*, NEV. APPEAL (Dec. 20, 2001), <http://www.nevadaappeal.com/news/2001/dec/20/smith-wesson-agrees-to-install-locks-in-unpreceden> [<https://perma.cc/W9RT-TRVE>] (reporting on Smith & Wesson’s decision to install locks on its guns in exchange for the government dropping its civil charges for damages).

93. *Smith & Wesson Agrees to Install Locks in Unprecedented Deal*, *supra* note 92 (reporting on safety measures in the form of locks on weapons); Rosner, *supra* note 76, at 438–41.

94. *Smith & Wesson Agrees to Install Locks in Unprecedented Deal*, *supra* note 92.

95. In 1997, sales revenue for the gun industry was estimated to be \$1.4 million, compared to \$48 billion for cigarette makers. N.Y. TIMES *Hamilton*, *supra* note 85.

96. For example, the City of Chicago sought \$433 million in damages in its lawsuit against multiple gun industry members. The entire industry revenues were estimated to be worth \$1.5 billion at the time. James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. TIMES (Mar. 18, 2000), <https://www.nytimes.com/2000/03/18/us/under-legal-siege-gun-maker-agrees-to-accept-curbs.html> [<https://perma.cc/V5XL-A7TY>]. *But see* *Hamilton v. Accu-Tek (Hamilton I)*, 62 F. Supp. 2d 802, 846 (E.D.N.Y. 1999), *vacated sub nom.*, *Hamilton v. Beretta U.S.A. Corp. (Hamilton II)*, 264 F.3d 21 (2d Cir. 2001) (entering judgment of a jury award of only \$500,000).

97. See Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST (Mar. 18, 2000), <https://www.washingtonpost.com/archive/politics/2000/03/18/gun-industry-views-pact-as-threat-to-its-unity/b18b920f-afdf-44d1-a252-68b12863a032> [<https://perma.cc/H8TB-4AJD>] (stating that three gun

The rest of the gun industry, however, fought back. Instead of reforming their practices, the industry largely rejected the “code of conduct” as a false implication of the industry’s culpability for ongoing gun violence.⁹⁸ Instead, they moved quickly to insulate themselves from liability using state and federal legislatures.⁹⁹ First, industry representatives successfully lobbied and passed civil liability shield statutes at the state level.¹⁰⁰ Though their scopes varied, these statutes were implemented to protect the gun industry from facing lawsuits that would extract financial or business concessions.¹⁰¹ As of 2023, thirty-four states have gun industry civil immunity statutes on their books.¹⁰² Second, in 2005, the gun industry successfully obtained federal civil

companies went out of business due to the settlement); Dao, *supra* note 96 (“[T]he threat of litigation has caused one leading gun maker, the Colt Manufacturing Company, to stop making guns for retail sale.”). However, the financial ramifications hit smaller gun manufacturers the hardest, with at least three manufacturers shutting down due to legal fees as of 2000. Walsh, *supra* note 97. No major firearm manufacturer was shut down or underwent any major adjustment in the wake of these lawsuits, besides the sale of Smith & Wesson following the boycott of their firearms, discussed *infra*, note 98 and accompanying text.

98. Instead of embracing Smith & Wesson’s settlement with the U.S. Government, the gun industry and gun owners punished the company with a “blistering rebuke.” Industry groups saw the agreement as an admission of wrongdoing, a stance the industry was unified against. Walsh, *supra* note 97. The NRA led a boycott of the company, causing a 40% decrease in sales and resulting in the sale of the company. Christina Austin, *How Gun Maker Smith & Wesson Almost Went out of Business When It Accepted Gun Control*, BUS. INSIDER (Jan. 21, 2013), <https://www.businessinsider.com/smith-and-wesson-almost-went-out-of-business-trying-to-do-the-right-thing-2013-1> [<https://perma.cc/AGR8-U5F6>]; Rosner, *supra* note 76; Emma Carson, Note, *From (Someone Else’s) Cold, Dead Hands: Disarming the PLCAA with the Sales and Marketing Predicate Exception Post Soto v. Bushmaster*, 39 J.L. & COM. 181, 182 (2021).

99. See Sean Gregory, *The ‘Shocking’ Law That Protects Gunmakers After Mass Shootings Like Las Vegas*, TIME (Oct. 3, 2017), <https://time.com/4967018/las-vegas-shooting-gun-lawsuits> [<https://perma.cc/WJ8V-97JE>] (reporting on the effects of the PLCAA’s passage in Congress).

100. See N.Y. TIMES *Hamilton*, *supra* note 85. While the gun industry was very organized politically at the time, gun violence prevention interests had little to no organizational capacity to fight the passage of both the PLCAA and comparable state laws. Zoom Interview with Megan Walsh, Dir., Univ. of Minn. L. Sch. Gun Violence Prevention L. Clinic (Jan. 20, 2023).

101. *Gun Industry Immunity*, *supra* note 52.

102. *Id.*

immunity for itself through the passage of the Protection of Lawful Commerce in Arms Act.¹⁰³ The election of President George W. Bush in 2000, supported heavily by the gun industry, laid the groundwork for passage of the law.¹⁰⁴ Since its creation, the PLCAA has protected gun manufacturers at the federal level from most legal liability stemming from everyday gun violence.¹⁰⁵

B. THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT, THE PREDICATE EXCEPTION, AND ITS SELECTIVE PROTECTION OF GUN MANUFACTURERS

While PLCAA supporters framed the Act as a holistic attempt at civil protection for the gun industry,¹⁰⁶ legislators intended a narrower scheme. The bill's exceptions exemplify this intention, especially the predicate exception. Section One defines the PLCAA's purpose through its legislative history. Section Two discusses how the text of the PLCAA and its predicate exception embodies that purpose.

1. The Purpose of the PLCAA Was to Civilly Protect the Gun Industry, but with Certain Limits

Amidst a perceived rising tide of legal liability and the threat of more reforms,¹⁰⁷ the PLCAA was the firearm industry's most important safeguard. Wayne LaPierre, the Executive Vice President of the National Rifle Association—the premier gun rights advocacy organization—called the act “the most significant piece of pro-gun legislation in 20 years.”¹⁰⁸ But while the

103. Jacob S. Sonner, Note, *A Crack in the Floodgates: New York's Fourth Department, the PLCAA, and the Future of Gun Litigation After Williams v. Beemiller*, 61 BUFF. L. REV. 969, 975–76 (2013).

104. At the time of George W. Bush's election, the gun industry bragged that they were now able to “set up an office in the White House.” Zoom Interview with Megan Walsh, *supra* note 100.

105. Telephone Interview with Robert M. Cross, *supra* note 41. *But see* Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 434 (Ind. Ct. App. 2007) (successfully piercing PLCAA's protections).

106. This perception has been perpetuated by both gun manufacturers and some courts. *See infra* Part II.B.

107. *See, e.g.*, N.Y. TIMES *Hamilton*, *supra* note 85 (noting successful lawsuits against gun manufactures in the years prior to PLCAA's passage).

108. Tom Hamburger et al., *NRA-backed Federal Limits on Gun Lawsuits Frustrate Victims, Their Attorneys*, WASH. POST (Jan. 31, 2013), <https://www>

political purpose of passing the PLCAA was to protect the gun industry, members of Congress also called for a more nuanced application of the new law.¹⁰⁹

The PLCAA's primary purpose was to prevent courts from allocating liability to the gun industry for the acts of third parties, suits that the supporting members of Congress saw as "frivolous."¹¹⁰ As one supporting legislator stated:

What we are not going to do . . . is create a duty on the part of sellers and manufacturers for an event that they can't control, which is the intentional misuse of a weapon to commit a crime or something akin to that, something that you can't control, nor should you be required to be responsible for the actions of others in that area of life.¹¹¹

The PLCAA's passage would make it much harder for plaintiffs to hold gun manufacturers liable under a tort-based duty.¹¹² Specifically, legislators focused on the type of lawsuit brought in the late 1990s. Responding directly to the fears of the gun industry, Senator Max Baucus of Montana, a lead cosponsor of the legislation, put it clearly:

This bill is only intended to protect law-abiding members of the firearms industry from nuisance suits that have no basis in current law, *that are only intended to regulate the industry or harass the industry or put it out of business*, none of which are appropriate purposes for a lawsuit.¹¹³

Legislators argued that if the litigation against the gun industry went unmitigated, the weight of legal liability may fall not just

.washingtonpost.com/politics/nra-backed-federal-limits-on-gun-lawsuits-frustrate-victims-their-attorneys/2013/01/31/a4f101da-69b3-11e2-95b3272d604a10a3_story.html [https://perma.cc/26KY-HANL].

109. See *infra* notes 110–15 and accompanying text.

110. 151 CONG. REC. 19129 (2005) (statement of Sen. Kay Bailey Hutchison).

The purposes of this Act are as follows: (1) To prohibit causes of action against manufacturers . . . of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended. . . . (4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(2)(b)(1), (4).

111. 151 CONG. REC. 18920 (2005) (statement of Sen. Lindsey Graham).

112. Telephone Interview with Robert M. Cross, *supra* note 41.

113. 151 CONG. REC. 18104 (2005) (statement of Sen. Max Sieben Baucus) (emphasis added).

on gun companies, but on other, comparable products.¹¹⁴ To prevent such a sizeable impact, supporters contended, the lawsuits brought by private and public entities against gun manufacturers must be curbed.¹¹⁵

Despite legislators' defense of the industry, the bill did not completely immunize gun manufacturers. Gun manufacturers could be held liable under the Act's six exceptions for their improper acts relating to the sale, marketing, or manufacture of a firearm.¹¹⁶ "This bill does not shut the courthouse door."¹¹⁷ Legislatures often highlighted the predicate exception to make that point. One of the Act's cosponsors, Senator Lindsey Graham, stated that states were free to create legal duties for manufacturers via the Act's predicate exception.¹¹⁸ Litigants could use a breach of state and federal law to open the door to liability for the gun industry.¹¹⁹ As long as litigants proved wrongdoing by the gun manufacturers, the PLCAA would not preclude the lawsuit. The predicate exception—the Act's third exception—encompassed this principle by expressly granting flexibility to Congress and state legislatures to create new legal duties and restrictions related to the sale or marketing of firearms.¹²⁰

114. "If a gun manufacturer is held liable for the harm done by a criminal who misuses a gun, then there is nothing to stop the manufacturers of any product used in crimes from having to bear the costs resulting from the actions of those criminals." *Id.* at 18085 (statement of Sen. Lawrence Edwin Craig).

115. 151 CONG. REC. 18104 (2005) (statement of Sen. Max Sieben Baucus).

116. See 15 U.S.C. § 7903(5)(A) (excluding protection for claims of (1) knowingly transferring a gun that will be used in a crime; (2) negligent entrustment; (3) knowingly violating a statute governing the sale or marketing of a firearm [the predicate exception]; (4) breach of purchase contract or warranty; (5) defective design or manufacture; and (6) certain Attorney General enforcement actions).

117. 151 CONG. REC. 18057 (2005) (statement of Sen. Lawrence Edwin Craig).

118. *Id.* at 18920 (statement of Sen. Lindsey Graham) ("[The PLCAA] doesn't let a seller or a distributor off the hook for violating a statute or making a sale illegally because it says, if you violate the law that exists, then you have broken a duty. Duty can be established by relationships. It can be established by a statute.").

119. *Id.*

120. 15 U.S.C. § 7903(5)(A)(i)–(vi). The Act's purpose section stated that the law intended to protect legislatures from "maverick" judges attempting to circumvent the legislative process.

The liability actions commenced . . . attempt to use the judicial branch to circumvent the Legislative branch of government to regulate

2. The PLCAA and the Predicate Exception

The core of the PLCAA is its protection of gun industry members—including gun manufacturers¹²¹—from qualified civil liability actions.¹²² Qualified civil liability actions are defined broadly to cover nearly all suits or disputes stemming from the unlawful use of a firearm:

The term “qualified civil liability action” means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party¹²³

The broad definition, without its exceptions, would prevent litigants from legally reaching gun manufacturers when injured from gun violence. The definition also enshrines two important goals of the gun industry and supporting legislators. The first is that it clarifies that gun manufacturers do not have a duty to protect victims from the acts of third parties when its firearms are “misuse[d].”¹²⁴ Gun manufacturers can only be reached by litigation for their own misconduct. The second is satisfying concerns that plaintiffs use litigation as a regulatory device. Barring nearly all avenues of relief, gun manufacturers cannot be forced to make any changes to their products or business that they did not want. The PLCAA would prevent the kind of situation in

interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

15 U.S.C. § 7901(a)(7)–(8).

121. 15 U.S.C. § 7903(2) (“The term ‘manufacturer’ means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under [federal law].”). The statute does not cover manufacturers that are not federally licensed. *Id.* Further, “engaged in business” is defined, in the context of a firearms manufacturer, as “a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.” *Id.* at § 7903(1).

122. 15 U.S.C. §§ 7902(a), 7903(5)(A).

123. *Id.* at § 7903(5)(A).

124. *Id.*

which an industry giant like Smith & Wesson could be leveraged into reforms that implied their responsibility for gun violence.¹²⁵

The PLCAA includes six exceptions to a qualified civil action.¹²⁶ Each of those exceptions focuses on the improper acts certain gun industry members may commit during the sale, marketing, or manufacture of the firearm.¹²⁷ The bulk of the exceptions, such as the negligent entrustment and defective design exceptions, focus on specific claims where tort litigation has existed.¹²⁸ Among the six exceptions is the predicate exception, which is the broadest in plain language, excluding from a qualified civil action any “[actions] in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm], and the violation was a proximate cause of the harm for which relief is sought”¹²⁹ The predicate exception, unlike the others, does not encompass just a single claim or statutory violation, but instead recognizes a tranche of federal and state legislative action regulating firearms.¹³⁰

The predicate exception comprises three main components. First, the state or federal law has to be “applicable to the sale or marketing” of the firearm.¹³¹ As highlighted by supportive legislators, this exception allows state legislatures to establish their own statutory duties governing gun manufacturers as long as those duties are “applicable to the sale or marketing” of firearms.¹³² The second is that the gun manufacturer must “knowingly” violate the statute, demanding that the manufacturer acted purposefully.¹³³ This requires victims to prove that the

125. See Austin, *supra* note 98 (recounting the backlash that Smith & Wesson faced after accepting a settlement with the federal government).

126. 15 U.S.C. § 7903(5)(A)(i)–(vi).

127. *Id.*

128. *Cf.* H.R. Rep. No. 109-124, at 9, 17 n.104 (2005) (highlighting the product defect exception as one that rests on a “foundation of personal responsibility” as well as the preservation of these exceptions in analog state legislation).

129. 15 U.S.C. § 7903(5)(A)(iii).

130. *Id.*

131. *Id.* This component—especially the word “applicable”—is the crux of the contention in predicate exception jurisprudence. This will be analyzed at length. See *infra* Part II.

132. 15 U.S.C. § 7903(5)(A)(iii); 151 CONG. REC. 18920 (2005) (statement of Sen. Lindsey Graham) (noting that duties may be established by statute).

133. 15 U.S.C. § 7903(5)(A)(iii).

manufacturer knew of the violation in order to prevent their lawsuit from being preempted.¹³⁴ The third is that the violation of the statute is a “proximate cause” of the harm.¹³⁵ Even if a law is “applicable,” the plaintiff still has the burden of proving the manufacturer “knowingly” violated the law and that the violation “proximately cause[d]” their injury.¹³⁶

The predicate exception includes two examples as potential predicate statute violations, both relating to existing federal gun laws.¹³⁷ The first example determines that false recordkeeping of the sale of a firearm would be a predicate violation.¹³⁸ The second cites 18 U.S.C. § 922, which governs who cannot buy a firearm.¹³⁹ The exception states that the sale of a firearm to those with a certain criminal record or who are unlawful residents is a predicate violation.¹⁴⁰ The predicate exception provides no further examples or explanation of what an acceptable state or federal predicate statute could be. However, the examples provided are explicitly non-exhaustive.¹⁴¹ The exception also does not clarify to what extent a predicate federal or state statute must be “applicable” to the sale or marketing of a firearm, or what about the examples provided makes them sufficient predicate statute

134. This often requires litigants to plead a substantial factual record to carry this burden. *See infra* Part IV.B; Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, Att’y, Koskoff, Koskoff & Bieder (Nov. 11, 2022); Zoom Interview with Keith Ellison, Att’y Gen., Minn. (Dec. 9, 2022).

135. 15 U.S.C. § 7903(5)(A)(iii).

136. *Id.*

137. *Id.* (“[A]ny 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 [firearm]; or (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a [firearm], knowing, or having reasonable cause to believe, that the actual buyer of the [firearm] was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18 . . .”).

138. *Id.* § 7903(5)(A)(iii)(I).

139. *Id.* § 7903(5)(A)(iii)(II); 18 U.S.C. § 922(g), (n).

140. 15 U.S.C. § 7903(5)(A)(iii)(II); 18 U.S.C. § 922(g), (n).

141. The two examples provided are prefaced with the word “including.” 15 U.S.C. § 7903(5)(A)(iii).

violations.¹⁴² However, even with the predicate exception included, the passage of the PLCAA fulfilled its goal of protecting gun manufacturers from most civil liability.

C. THE PLCAA WARPS GUN VIOLENCE LITIGATION TO THE BENEFIT OF GUN MANUFACTURERS

Civil liability lawsuits against gun manufacturers serve two main purposes: (1) to compensate victims of gun violence and (2) to penalize improper and unsocial behavior by gun manufacturers.¹⁴³ Since the passage of the PLCAA, a new status quo has emerged, one that has distorted effects on both gun manufacturers and gun violence victims. One of the most significant victories for gun manufacturers has been the PLCAA's chilling effect on potential lawsuits against them.¹⁴⁴ Immunizing gun manufacturers—and the subsequent inhibition of victims to bring lawsuits against them¹⁴⁵—has consequences well beyond the two parties in these lawsuits. The status quo increases the number of guns available, which ripples out and contributes to the rise of gun violence currently plaguing the United States.¹⁴⁶ Without

142. *Id.*

143. See Michael L. Wells, *Some Objections to Strict Liability for Constitutional Torts*, 55 GA. L. REV. 1277, 1279 (2021) (discussing vindication and deterrence the two goals of tort law); *Gun Industry Immunity*, *supra* note 52 (discussing civil liability suits as a means to achieve justice for victims and accountability for gun manufacturers); TIMOTHY D. LYTTON, *SUING THE GUN INDUSTRY 2* (2006) (discussing victim compensation and industry reform as the principle goals of tort claims against gun manufacturers); *cf. Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States*, *supra* note 92 (demonstrating gun manufacturer concessions resulting from pending civil lawsuits).

144. Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, *supra* note 134; Zoom Interview with Megan Walsh, *supra* note 100; see also *supra* text accompanying note 26 (discussing the *Phillips v. Lucky Gunner* lawsuit that resulted in around \$200,000 in lawyers' fees being awarded to the defendant gun companies).

145. Zoom Interview with Megan Walsh, *supra* note 100.

146. "More guns, more gun violence. That has become very clear in America." Zoom Interview with Megan Walsh, *supra* note 100. See also Eggen & Culhane, *supra* note 77, at 19–23 (describing how manufacturer practice facilitates a vast flow of firearms to the unregulated secondary market from where many guns used in shootings are sourced); Daniel Semenza, *More Guns, More Death: The Fundamental Fact That Supports a Comprehensive Approach to Reducing Gun Violence in America*, ROCKEFELLER INST. OF GOV'T (June 21, 2022), <https://rockinst.org/blog/more-guns-more-death-the-fundamental-fact-that-supports>

this mechanism of accountability, victims can do little—and manufacturers have voluntarily done little—to prevent the next shooting.¹⁴⁷

Victims of gun violence suffer the most acute harm at the hands of the PLCAA. While the passage of the Act focused on the financial woes of the gun industry, the PLCAA's burden falls most squarely on those who have been permanently injured, mentally tormented, or killed by the industry's weapons.¹⁴⁸ Victims of gun violence are stacked with costs from medical treatment, lost wages, property damage, funeral costs, lawyer's fees, and more.¹⁴⁹ Often, a damage award is only an attempt to fill the hole created by a firearm, including pain, suffering, and emotional damages.¹⁵⁰ In comparable, non-firearm-related scenarios, such as a car crash, a victim would sue the harming party—one with sufficient financial resources or insurance—to make themselves whole.¹⁵¹ When it comes to victims of gun violence, that route is largely foreclosed by the PLCAA.¹⁵²

-a-comprehensive-approach-to-reducing-gun-violence-in-america [https://perma.cc/F2TP-73C4] (describing how a greater number of guns in circulation equates to a greater number of gun casualties).

147. *What Is PLCAA?*, BRADY, <https://www.bradyunited.org/fact-sheets/what-is-plcaa> [https://perma.cc/XW3D-YGBF] (noting that PLCAA removes incentives for the gun industry to adopt safe sales practices or incorporate safety devices into their products).

148. *See Gun Industry Immunity*, *supra* note 52 (discussing how legal immunities provided by the PLCAA have insulated the gun industry from shouldering any burden following a mass shooting); LYTTON, *supra* note 143, at 1–5 (describing the great lengths injured plaintiffs have gone attempting to hold gun manufacturers accountable).

149. Telephone Interview with Robert M. Cross, *supra* note 41; Zoom Interview with Megan Walsh, *supra* note 100; *What Is PLCAA?*, *supra* note 147 (“PLCAA denies victims their constitutional right to civil justice under the 5th Amendment, preventing them from receiving compensation for medical bills, pain and suffering, lost wages, and other debilitating effects of gun violence.”).

150. *See* LYTTON, *supra* note 143, at 2 (noting that many lawsuits against gun manufacturers demand monetary damages only for injuries suffered by victims of gun violence).

151. *See* David Goguen, *Personal Injury Damages and Compensation*, NOLO, <https://www.nolo.com/legal-encyclopedia/damages-how-much-personal-injury-32264.html> [https://perma.cc/CF6B-2ABU] (describing the purpose of compensatory damages as making the prevailing plaintiff as “whole” as monetarily possible).

152. *See infra* Part II.A.

Given the cost imposed on a shooting victim—and the shooter’s likely legal fees or imprisonment—the shooter or firearm owner is unlikely to be able to fulfill a legal judgment against them.¹⁵³ Most gun owners do not carry insurance that covers firearm injuries, as no state requires a gun owner to hold insurance on their firearm.¹⁵⁴ Most insurers do not even inquire about the potential of firearm injuries or damage, simply excluding it from their offered policies.¹⁵⁵

Without that option, victims can sometimes cast incredibly wide nets to find a judgment-filling defendant. This can include bringing disparate and vaguely implicated parties into a lawsuit in a process some refer to simply as “scapegoating.”¹⁵⁶ Often, however, the involvement of these third parties do raise valid questions of culpability.¹⁵⁷ But without a clear defendant, like the gun manufacturer, the result can become overinclusive and, ultimately, punitive.

153. Michael Steinlage, *Liability for Mass Shootings: Are We at a Turning Point?*, AM. BAR ASS’N (Feb. 7, 2020), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2019-20/winter/liability-mass-shootings-are-we-a-turning-point [<https://perma.cc/66HL-UJ64>] (discussing who may face litigation exposure following a mass shooting).

154. See Jason Abaluck & Ian Ayres, *The Case for Mandatory Gun-Liability Insurance*, WASH. POST (June 17, 2022), <https://www.washingtonpost.com/outlook/2022/06/17/gun-insurance-reform-uvalde-liability> [<https://perma.cc/CK4U-ESNK>] (discussing the possibility of requiring gun insurance).

155. See *id.*; Michael Steinlage et al., *Mass Shootings and Insurance Coverage*, IRMI (2019), <http://shermanhoward.com/wp-content/uploads/2019/07/Mass-Shootings-and-Insurance-Coverage.pdf> [<https://perma.cc/TS7Y-Z5G6>] (“[L]iability insurers generally do not inquire whether an applicant owns or possesses guns in the home and, as a result, do not engage in the regulation of guns through underwriting, pricing, education or loss control.”); Steinlage, *supra* note 153 (noting insurance companies’ selective exclusion of gun-related injuries from coverage).

156. Chan, *supra* note 32 (discussing how federal laws shielding the gun industry from lead to scapegoating people with more tenuous connections to mass shootings).

157. See, e.g., Complaint at 3, *Tretta v. Osman*, 2022 WL 3334319 (Cal. Super. Ct. Dec. 22, 2020) (No. 20STCV48910) (arguing that a parent was negligent in allowing her juvenile son to get his hands on a gun used to injure the victim).

In this process, relatives of the shooter can be brought in.¹⁵⁸ The shooter's employer can be brought in.¹⁵⁹ The location where the victim was injured—whether a school, a restaurant, or a club—is a common defendant.¹⁶⁰ The owner of that location can also be brought in personally.¹⁶¹ Anyone responsible for protecting the location or responding to the threat could be brought in, too.¹⁶² This includes often naming individual security guards or emergency dispatchers regardless of their response to the shooting.¹⁶³ Social media entities as large as Google or Facebook may also be brought in, claiming the platforms facilitated, encouraged, or even incited the violence.¹⁶⁴ Even with as many as dozens of defendants named—each with growing attenuation—victims are unlikely to find a successful result in any meaningful way.¹⁶⁵

158. *Id.*; see Adam Tamburin, *Victim's Family Reaches Settlement in Suit Against Waffle House Shooting Suspect's Father*, TENNESSEAN (Apr. 24, 2019), <https://www.tennessean.com/story/news/2019/04/24/nashville-waffle-house-shooting-victim-settlement-reinking-lawsuit/3562658002> [<https://perma.cc/YRT5-RMTT>] (describing how parents of a shooter compensated victims in a settlement).

159. Chan, *supra* note 32 (“[M]embers of slain Pulse victims and survivors also sued . . . the gunman’s employer, his wife and Pulse owner Barbara Poma . . .”).

160. *Id.*; see Niraj Chokshi, *More Than 450 Las Vegas Shooting Victims Sue over Attack*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/us/vegas-shooting-lawsuits.html> [<https://perma.cc/4T94-U595>] (highlighting lawsuit of 450 victims of Las Vegas shooting against MGM resort, where the shooter was located; Live Nation, the festival promoter; and the estate of Stephen Paddock, the shooter).

161. *Id.*

162. Chan, *supra* note 32 (describing how the police officer in charge of Pulse nightclub’s security was sued following the attack); see *Vielma v. Gruler*, 808 F. App’x 872, 874 (11th Cir. 2020) (per curiam) (affirming dismissal of a lawsuit against a police officer who responded to the Pulse nightclub shooting).

163. Chan, *supra* note 32.

164. *Id.* (noting that family members of slain Pulse victims and survivors sued Google, Facebook, and Twitter); Steinlage, *supra* note 153. In similar circumstances, such as terrorist attacks, plaintiffs have attempted to hold tech companies liable for their injuries with limited success. See *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 478 (2023) (per curiam) (considering if Twitter can be held liable for aiding and abetting a terrorist attack); *Gonzalez v. Google, LLC*, 598 U.S. 617, 622 (2023) (per curiam) (considering if Google can be held directly and secondarily liable for a terrorist attack).

165. Chan, *supra* note 32 (noting how in many cases nearly anyone remotely connected to a mass shooting is sued except the gun industry).

Regardless of the outcome, each party, irrespective of the level of their involvement, is required to hire a lawyer to respond to a lawsuit that may be futile. Some of these potential defendants would likely be sued even with the presence of gun manufacturer liability, depending on the involvement and their responsibility.¹⁶⁶ This can often include negligent family members or business owners.¹⁶⁷ The alternative, however, is the suing of substitute defendants—none of which made the gun—just in an attempt to fulfill a judgment. The result is a legal landscape where gun manufacturers cannot be touched to the detriment of everyone else.

The status quo created by the PLCAA not only insulates gun manufacturers legally but also insulates them from the penalties of their business decisions. In this status quo, guns and gun manufacturing are uniquely hot commodities. Every year, as gun sales on the whole continue to increase,¹⁶⁸ gun manufacturers' revenues and stock valuations have grown to unprecedented heights.¹⁶⁹ Even though gun ownership in the United States is historically low,¹⁷⁰ existing gun owners have consistently and repeatedly returned to supplement their private armories with

166. See *supra* note 157 and accompanying text.

167. *Id.*

168. Joe Walsh, *U.S. Bought Almost 20 Million Guns Last Year — Second-Highest Year on Record*, FORBES (Jan. 5, 2022), <https://www.forbes.com/sites/joewalsh/2022/01/05/us-bought-almost-20-million-guns-last-year---second-highest-year-on-record/?sh=41dc84f413bb> [<https://perma.cc/R2B7-4E3F>] (noting that 2020 and 2021 were the two years with the highest number of gun sales up until that point).

169. See Elliott Ramos & Joe Murphy, *6 Charts that Show the Rise of Guns in the U.S. — and People Dying from Them*, NBC NEWS (May 25, 2022), <https://www.nbcnews.com/data-graphics/6-charts-show-rise-guns-us-people-dying-rcna30537> [<https://perma.cc/5CSN-CJGA>] (noting how share prices for Smith & Wesson and Sturm, Ruger & Co. outperformed the S&P 500 the day following the Uvalde shooting).

170. Tom W. Smith & Jaesok Son, *General Social Survey Final Report: Trends in Gun Ownership in the United States, 1972-2014*, NORC 1 (Mar. 2015), <https://www.norc.org> (search for “Trends in Gun Ownership in the United States”) [<https://perma.cc/BLM3-M62G>] (noting that household ownership of firearms has declined in recent decades).

more and increasingly sophisticated firearms.¹⁷¹ Firearm purchases often spike after high profile mass shootings¹⁷² or the latest legislative push for gun violence prevention measures.¹⁷³ Gun ownership has also grown during the COVID pandemic.¹⁷⁴

In response, gun manufacturers make more guns.¹⁷⁵ As the number of firearms in the United States grows, so has the number of shootings and victims.¹⁷⁶ Gun manufacturers—conscious of their role in the flow of guns to shooters¹⁷⁷—have done little to prevent the subsequent gun violence.¹⁷⁸ The lack of improvements in firearm design and distribution also affects public

171. Sabrina Tavernise, *An Arms Race in America: Gun Buying Spiked During the Pandemic. It's Still Up.*, N.Y. TIMES (May 30, 2021), <https://www.nytimes.com/2021/05/29/us/gun-purchases-ownership-pandemic.html> [<https://perma.cc/8N2X-BRMP>] (noting that gun sales often spike around elections and following high profile shootings).

172. See Sissi Cao, *Gun Sales Surge After Mass Shootings, and So Do the Shares of Firearms Companies*, OBSERVER (May 25, 2022), <https://observer.com/2022/05/texas-school-shooting-gun-stock-rise-firearm-sales> [<https://perma.cc/HZN6-44WC>] (noting that the share prices of the largest American gun manufacturers spiked following the Uvalde shooting); Rachael A. Callcut et al., *Effect of Mass Shootings on Gun Sales—A 20-Year Perspective*, 87 J. TRAUMA & ACUTE CARE SURGERY 531, 531–40 (2019) (discussing the effect of mass shootings on gun sales).

173. Callcut et al., *supra* note 172 (discussing the paradoxical increase in gun sales following the passage of gun control regulation in California).

174. Cao, *supra* note 172 (noting that during the first two years of the pandemic one in twenty American adults purchased a handgun for the first time); Ramos & Murphy, *supra* note 169 (noting that gun sales in the U.S doubled during the COVID-19 pandemic).

175. Ramos & Murphy, *supra* note 169 (discussing a recent boom in domestic gun manufacturing).

176. *Id.* (“Gun sales in the U.S. are rising. So are the deaths caused by those firearms.”); Zoom Interview with Megan Walsh, *supra* note 100 (“More guns, more gun violence. That has become very clear in America.”).

177. Telephone Interview with Robert M. Cross, *supra* note 41; see *Smoking Guns: Exposing the Gun Industry’s Complicity in the Illegal Gun Market*, BRADY CTR. TO PREVENT GUN VIOLENCE 10–11 (2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111318 [<https://perma.cc/G8HC-TVZL>] (“Manufacturers acknowledge that selling unlimited quantities of guns is irresponsible even as they continue to allow dealers to do it.”); Eggen & Culhane, *supra* note 77, at 22 (“The gun industry is well aware of these practices that feed and facilitate the secondary market and place guns in the hands of criminals and other persons likely to use them irresponsibly.”).

178. See Eggen & Culhane, *supra* note 77, at 20–23 (noting that despite awareness of the flow of their products to the unregulated secondary market—

health, with more people succumbing to firearm-related injury and death than ever.¹⁷⁹ With only a trickle of litigation getting through the PLCAA's exceptions, the status quo greatly rewards gun manufacturers.

The lack of economic incentive to change their products or business procedures has left gun manufacturers unmoved to make changes that would reduce gun violence, even as the social cost of their firearms continues to rise.¹⁸⁰ This is clearest to victims of gun violence. The parent of one Sandy Hook shooting victim surmised that “[i]t makes no logical sense If their wallets were threatened, they would have a greater interest in making firearms safer.”¹⁸¹ Protected by the PLCAA, gun manufacturers have refused to implement safety features and substantive sales checks.¹⁸² Gun manufacturers have also ignored the downstream sales of their firearms.¹⁸³ Instead of working to prevent the sale of guns to criminal actors, they have often knowingly aided and abetted unlawful purchases as a way to increase sales.¹⁸⁴ Without liability, gun manufacturers have little reason to worry if the firearms they sell end up being used to commit a

where many guns used in crimes are known to be sourced—most gun manufacturers do nothing to ensure dealers don't facilitate the illegal acquisition of firearms by criminals).

179. See Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 AM. J. PUB. HEALTH 1991, 1995–96 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2040374/pdf/0971991.pdf> [<https://perma.cc/M7GC-MLUG>] (discussing how PLCAA insulates gun manufacturers from litigious public feedback that—in other industries—motivates safety innovations); Ramos & Murphy, *supra* note 169 (noting record numbers of gun related injuries and deaths in recent years).

180. See Vernick et al., *supra* note 179.

181. Hamburger et al., *supra* note 108.

182. *What Is PLCAA?*, *supra* note 149 (noting that PLCAA removes incentives for the gun industry to adopt safe sales practices or incorporate safety devices into their products).

183. *Smoking Guns: Exposing the Gun Industry's Complicity in the Illegal Gun Market*, *supra* note 177.

184. Lytton, *supra* note 76, at 5 (suggesting that gun manufacturers seek legal avenues to supply guns to criminals in order to increase sales); Eggen & Culhane, *supra* note 77, at 20–23 (noting that despite awareness of the flow of their products to the unregulated secondary market—where many guns used in crimes are known to be sourced—most gun manufacturers do nothing to ensure dealers don't facilitate the illegal acquisition of firearms by criminals); Telephone Interview with Robert M. Cross, *supra* note 41.

crime.¹⁸⁵ All of this could end if the threat of civil liability incentivized gun manufacturers to change.¹⁸⁶

Reconstructing a path to hold gun manufacturers civilly liable for their products and oversight can incentivize that change.¹⁸⁷ Just the potential of financial ramifications can provide a compelling force for reform.¹⁸⁸ For example, Smith & Wesson agreed to modify their firearms' safety mechanisms when it became apparent that financial and legal ramifications were potentially forthcoming.¹⁸⁹ Further, other industries subject to civil suits have seen significant progress in making their products or services safer, providing better outcomes for consumers and the

185. Adam Cohen, *Why Is Congress Protecting the Gun Industry?*, TIME (Dec. 24, 2012), <https://ideas.time.com/2012/12/24/why-is-congress-protecting-the-gun-industry> [<https://perma.cc/27NE-8Z2J>] (noting that PLCAA took away the incentive for manufacturers to work on safety).

186. In a telling statement on the floor of the Senate, PLCAA cosponsor Senator Max Baucus framed these policy effects as the dangers of potential litigation:

Let me list some of the demands so you get a flavor of how credible these lawsuits are. Some of these lawsuits would require one-gun-a-month purchase restrictions not required by State law. *Others require firearm manufacturers and distributors to participate in a court-ordered study of lawful demand for firearms and to cease sales in excess of lawful demand, if you can imagine.* Others require a prohibition on sales to dealers who are not stocking dealers with at least \$250,000 in inventory, talking about the small gun dealers. *Others would require systematic monitoring of dealers' practices by manufacturers and distributors.*

151 CONG. REC. 18103 (2005) (statement of Sen. Max Sieben Baucus) (emphasis added).

187. "If there is more regulation at the level, there is more risk of litigation at the level, [the gun manufacturers] are going to be more careful." Zoom Interview with Megan Walsh, *supra* note 100. Lawsuits against the gun industry also have the power to reach the industry in ways that legislation is not always best suited to do. *Id.*

188. Telephone Interview with Robert M. Cross, *supra* note 41; *see, e.g.*, Dao, *supra* note 96 (noting how Smith & Wesson agreed to accept restrictions on how it made, sold, and distributed firearms in exchange for the dropping of several lawsuits that had threatened to bankrupt it); *Smith & Wesson Agrees to Install Locks in Unprecedented Deal*, *supra* note 92.

189. Rosner, *supra* note 76, at 438–41 (discussing how Smith & Wesson agreed to install safety features to mitigate accidental shootings); *Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States*, *supra* note 92.

public.¹⁹⁰ Major lawsuits have resulted in widespread consumer product improvements, such as the availability of safe airbags in cars.¹⁹¹ Conscious of these policy effects, federal lawmakers have introduced legislation that would repeal the PLCAA.¹⁹² Despite some legislative movement,¹⁹³ the bill is unlikely to become law in the near future.¹⁹⁴

In the meantime, as mass shooting after mass shooting passes, families of victims have made repeated pleas: do not let

190. “There are very limited other examples of industries that create dangerous products that have this much freedom from liability.” Zoom Interview with Megan Walsh, *supra* note 100. Civil litigation has reformed numerous industries to the benefit of consumers and the public, including the tobacco industry, car industry, and airline industry. The fear of a lawsuit can also motivate businesses to install safer practices or face the chance that they will be sued. In many instances, comprehensive reforms are completed by the settlement following the lawsuit, often led by a public entity with the resources and motivation to accept product reforms rather than monetary damages. State Attorneys General are a common example of an actor using civil litigation in the hopes of enacting industry reforms. *See generally* John H. Boswell & George Andrew Coats, *Saving the General Aviation Industry: Putting Tort Reform to the Test*, 60 J. AIR L. & COM. 553 (1994) (discussing how lawsuits helped incentivize reform in the general aviation industry); Paul Nolette, *Settlements and Enforcement Actions*, STATE LITIG. & AG ACTIVITY DATABASE, <https://attorneysgeneral.org/settlements-and-enforcement-actions> [<https://perma.cc/ZZ5H-XAQ8>] (discussing the impacts of multi-state AG enforcement suits and subsequent settlements).

191. Vernick et al., *supra* note 179 (contrasting the lack of reform in the gun industry caused by the PLCAA’s protections and major reforms in the pharmaceutical and automotive industries motivated by litigation); Chan, *supra* note 32 (noting reforms in the automotive and airline industries motivated by lawsuits).

192. Equal Access to Justice for Victims of Gun Violence Act of 2022, H.R. 2814, 117th Cong. (2022); Assault Weapon Ban Act of 2021, H.R. 1808, 117th Cong. (2021).

193. *H.R. 2814, H.R. 1808*, HOUSE OF REPRESENTATIVES JUDICIARY COMM. (July 20, 2022) <https://judiciary.house.gov/committee-activity/markups/hr-2814-hr-1808> [<https://perma.cc/AW24-XL4M>] (documenting full House Judiciary Committee markup of the bill).

194. The 117th Congress’s version of the Equal Access to Justice for Victims of Gun Violence Act obtained only 85 cosponsors, significantly fewer than the 218 votes that a majority of the U.S. House of Representatives requires. *See H.R. 2814 (117th): Equal Access to Justice for Victims of Gun Violence Act of 2022*, GOVTRACK (2021), <https://www.govtrack.us/congress/bills/117/hr2814> [<https://perma.cc/2JXT-9QZL>]. Republicans—who have traditionally been protective of the gun industry and opposed to restricting gun rights—have regained the majority in the 118th Congress. When reported out of the Democratically controlled Judiciary Committee in the 117th Congress, every attending Republican committee member voted against it. H.R. REP. NO. 117-436, at 17 (2022).

this happen to anyone else.¹⁹⁵ But without accountability for gun manufacturers, little has been done by these companies to prevent the next shooting. However, as America grapples with the effects of the PLCAA, litigants and state legislatures have focused on the predicate exception in an attempt to mitigate these effects.

II. LITIGATING THE PREDICATE EXCEPTION

Gun manufacturers have found success in using the PLCAA to protect themselves from civil liability. The courts have played an active role in contributing to and supporting the status quo established by the PLCAA. However, that may be changing. This Part provides background on predicate statutes and predicate exception jurisprudence. Section A analyzes the text of various statutes litigated under the predicate exception. Starting with the text of the PLCAA, the Section discusses how both sales and marketing-related statutes have fared. Next, Section B surveys the predicate exception case law that followed the implementation of the PLCAA and how it traditionally interpreted the exception's language to the benefit of gun manufacturers. Finally, Section C illustrates how predicate exception jurisprudence may be changing to the benefit of gun violence victims.

A. PREDICATE STATUTES

A predicate statute is a federal or state statute whose violation triggers the PLCAA's predicate exception. To satisfy the exception, the statute must be "applicable to the sale or marketing" of a firearm.¹⁹⁶ The predicate exception states that the predicate statute must be violated "knowingly" by the defendant and be a proximate cause of the plaintiff's injury.¹⁹⁷ However, the text of the predicate exception does not provide much guidance on what may work as a state or federal predicate statute.¹⁹⁸ Specifically, the exception does not clarify to what extent a predicate federal or state statute has to be "applicable" to the sale or marketing of

195. See, e.g., *Hamburger et al.*, *supra* note 108 ("I am looking at anything that can be done to prevent this from happening to another family[.]").

196. 15 U.S.C. § 7903(5)(A)(iii).

197. *Id.*

198. See *supra* Part I.B.2.

firearms. The statutory text does not explain what about the examples make for sufficient predicate statute violations.¹⁹⁹ It also does not specify whether the law can be either civil or criminal. The two examples included in the exception reference only federal laws that apply to the sale, rather than the marketing, of a firearm.²⁰⁰ Despite this, litigants have often used state laws in their lawsuits against gun manufacturers.²⁰¹ The statutes that have been litigated have concerned both sale and the marketing aspects of the gun manufacturing business.²⁰²

1. Statutes Litigated Governing the Sale of a Firearm

Statutes that govern the sale of firearms have absorbed the bulk of the predicate exception litigation.²⁰³ Often these statutes focus on both the sales process and the effects of the sale. The statutes can be broken up into two different categories. The first is pure sales restrictions, often coming from federal law. Generally, these statutes have been successful in triggering the predicate exception.²⁰⁴ The Gun Control Act of 1968—primarily codified in 18 U.S.C. §§ 921–923—implemented many restrictions on the sale of firearms.²⁰⁵ They include who could purchase a firearm, what information was necessary to provide to a seller, and which types of firearms were prohibited from sale.²⁰⁶ The Gun Control Act has provided fertile ground for predicate exception litigators because, significantly, the second example provided in the text of the PLCAA’s predicate exemption originates from the Act.²⁰⁷ These statutes’ applicability to the sale of firearms is also

199. *Id.*; 15 U.S.C. § 7903(5)(A)(iii).

200. 15 U.S.C. § 7903(5)(A)(iii)(I)–(II).

201. *See, e.g.*, *Ileto v. Glock Inc.*, 349 F.3d 1191, 1216 (9th Cir. 2003) (litigating state statutory public nuisance and negligence claims).

202. Examples are provided *infra* and the cases in which they were litigated are discussed at length in Parts II.B and II.C.

203. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 389 (2d Cir. 2008). Of the cases read and analyzed for this Note, only one litigates a non-sale governing statute. *See Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 272 (Conn. 2019).

204. *See, e.g.*, *Parsons v. Colt’s Mfg. Co.*, No. 2:19-cv-01189-APG-EJY, 2020 WL 1821306, at *1 (D. Nev. Apr. 10, 2020).

205. Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (codified as 18 U.S.C. §§ 921–928).

206. *Id.* §§ 921–923.

207. 18 U.S.C. § 922(g), (n); 15 U.S.C. § 7309(5)(A)(iii)(II).

straightforward: they regulate the ins and outs of the sales process.

Numerous restrictions in § 922 have been used to sidestep PLCAA preclusion.²⁰⁸ This section includes bans on certain weapons, like machine guns or short-barreled firearms, from being sold or modified.²⁰⁹ Recordkeeping requirements²¹⁰ have also been litigated successfully.²¹¹ Section 922 also requires recording the sale of any firearm, registering the name, age, and place of residence of the recipient of the gun.²¹² This provision extends to gun manufacturers as sellers of their firearms to dealers or, if applicable, directly to the public.

Similarly, a ban on false statements during the record-keeping process has also been litigated.²¹³ This law is expressly laid out in the first predicate exception example,²¹⁴ but is also codified in § 922.²¹⁵ This statute requires gun manufacturers to not

208. *Parsons*, 2020 WL 1821306, at *2–3.

209. 18 U.S.C. § 922(b) (“It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . (4) to any person any destructive device, machinegun . . . , short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity.”).

210. 18 U.S.C. § 922(b)(5) (“[The sale of] any firearm . . . to any person unless the [seller] notes in his records . . . the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.”).

211. *See, e.g., Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 149–50 (N.Y. App. Div. 2012) (finding that a complaint sufficiently alleges a records violation where it includes facts suggesting that a seller is involved with “straw purchases”).

212. 18 U.S.C. § 922(b)(5).

213. *Beemiller*, 100 A.D.3d at 149–50 (“Further, a licensed dealer may be criminally liable for aiding and abetting a gun purchaser’s making of false statements or representations in the dealer’s firearms transfer records.” (citing *United States v. Carney*, 387 F.3d 436, 441, 445–46 (6th Cir. 2004)).

214. 15 U.S.C. § 7903(5)(A)(iii)(I) (“[Prohibiting] 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 [firearm] . . .”).

215. 18 U.S.C. § 922(m) (“It shall be unlawful for any . . . licensed manufacturer . . . knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to [the licensing requirements of § 923].”).

only keep proper records on who they sell their firearms to but also penalizes them if they knowingly keep incorrect information.²¹⁶ This includes aiding and abetting the keeping or making of false records,²¹⁷ which is also noted in the predicate exception example.²¹⁸ Each of these federal sales restrictions has been litigated and found to trigger the predicate exception successfully.²¹⁹

The second category of sales-related predicate statutes is torts. These are primarily state statutes, such as nuisance or public nuisance. Torts often fail to trigger the predicate exception because they are held to be inadequately “applicable” to the sale or marketing of firearms.²²⁰ The nuisance²²¹ and public nuisance²²² statutes litigated in the cases analyzed, *infra*, are similar to one another, though not identical, and each failed to trigger the predicate exception in their respective lawsuit. An example is New York’s former public nuisance law, which reads,

216. *Id.*

217. *See* United States v. Carney, 387 F.3d 436, 448 (6th Cir. 2004) (finding that a party could be held criminally liable for the keeping of false records under § 922, rather than just creating them).

218. 15 U.S.C. § 7903(5)(A)(iii)(II).

219. In *Williams v. Beemiller, Inc.*, the New York state court found that the actions pled by the plaintiff violated the second and third federal statutes listed here, despite the fact the complaint did not specifically cite those statutes. Nonetheless, the court found those statutes satisfied the predicate exception. *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 148–52 (N.Y. App. Div. 2012).

220. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390–91 (2d Cir. 2008) (describing City’s claim of public nuisance). In the case of *Ileto v. Glock, Inc.*, the Ninth Circuit held that torts could not violate the predicate exception. 565 F.3d 1126, 1138 (9th Cir. 2009) (“The purpose of the PLCAA leads us to conclude that Congress intended to preempt general tort law claims . . .”); *see* analysis *infra* Part II.B.

221. “Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance.” CAL. CIV. CODE § 3479 (West 2023). This statute was litigated in *Ileto v. Glock, Inc.*, analyzed *infra* note 266 and accompanying text. *Ileto*, 565 F.3d at 1155.

222. “Whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.” IND. CODE § 32-30-6-6 (2023). This statute was litigated in *Smith & Wesson Corp. v. City of Gary*, analyzed *infra* notes 274–81 and accompanying text. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434 (Ind. Ct. App. 2007).

[b]y conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons.²²³

These nuisance and public nuisance statutes can be difficult for plaintiffs to use as predicate statutes. They often require plaintiffs to show linkages between specific conduct by manufacturers and specific instances of harm that generate the nuisance.²²⁴ Simply showing that a manufacturer’s conduct contributed to a nuisance by increasing overall levels of gun violence—without proving a connection between the manufacturer’s conduct and specific events—may be insufficient.²²⁵ Ultimately, that evidentiary burden is irrelevant if the predicate statute is not “applicable” to the sale or marketing of a firearm.²²⁶

State legislatures have begun to update these general tort statutes with the hope of evading PLCAA preemption. Statutes recently passed in New York, Delaware, and New Jersey with the purpose of triggering the predicate exception have made two significant changes to existing public nuisance laws.²²⁷ The first is to clarify their application to firearms. In 2021, New York updated its public nuisance law to create a gun industry-specific public nuisance-style statute, stating:

No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a [firearm].²²⁸

223. N.Y. PENAL LAW § 240.45 (McKinney 2023). This statute was litigated in *City of New York v. Beretta U.S.A. Corp.*, analyzed *infra* notes 250–58 and accompanying text. *City of New York*, 524 F.3d at 399.

224. Telephone Interview with Robert M. Cross, *supra* note 41.

225. *Id.*

226. 15 U.S.C. § 7903(5)(A)(iii).

227. *See, e.g.*, S.B. 302, 151st Gen. Assemb., 2d Sess. (Del. 2022) (“[The] PLCAA was intended only to limit such claims under the common law, and recognizes the ability of the states to enact statutes applicable to the sale or marketing of firearms, and expressly provides that causes of action may proceed where there are violations of such statutes.”).

228. N.Y. GEN. BUS. LAW § 898-b (McKinney 2023). This statute was litigated in *National Shooting Sports Foundation, Inc. v. James*, analyzed *infra* notes 299–301 and accompanying text. *Nat’l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 62 (N.D.N.Y. May 25, 2022). This portion of the statute is followed by one implementing control requirements on gun manufac-

The law made few substantive changes to New York's prior public nuisance law but did add "gun industry member" to clarify its applicability.²²⁹ This amendment was found to trigger the predicate exception because the statute expressly regulates firearms.²³⁰

The second change these statutes made is to lower or clarify the evidentiary burden for plaintiffs. Delaware enacted a similar law to New York's statute in 2022.²³¹ In it, the law creates and applies a negligence-like standard to the gun industry, simplifying the plaintiff's task.²³² Before, plaintiffs had to prove that the manufacturer knowingly violated or aided and abetted violations of a firearm-specific law.²³³ Under the updated laws, plaintiffs must only show that the manufacturers knowingly failed to employ the reasonable measures enumerated in the statute.²³⁴ This change helps focus the litigant's challenge to the measures prescribed by statute. Further, the law clarifies how the plaintiff must prove that the violation caused their injury.²³⁵ These two

turers. N.Y. GEN. BUS. LAW § 898-b(2) ("All gun industry members who manufacture, market, import or offer for wholesale or retail sale any [firearm] in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state."); *see infra* notes 232–35 and accompanying text (discussing reasonableness controls).

229. N.Y. GEN. BUS. LAW § 898-b (McKinney 2023).

230. *Nat'l Shooting Sports Found., Inc.*, 604 F. Supp. 3d at 57–60; *see infra* notes 300–01 and accompanying text. This case is currently on appeal with the Second Circuit Court of Appeals.

231. 83 Del. Laws ch. 332 (2022).

232. DEL. CODE ANN. tit. 10, § 3930(b) (2022) ("A firearm industry member, by conduct unlawful in itself or unreasonable under all the circumstances, may not knowingly or recklessly create, maintain, or contribute to a public nuisance through the sale, manufacturing, importing, or marketing of a firearm-related product." (emphasis added)).

233. Through this route, plaintiffs would have to show gun manufacturer culpability under an accomplice or coconspirator theory. This might require showing that the nature of the circumstances and frequency of transactions of a highly regulated dangerous product puts the manufacturer on notice. *See Direct Sales Co. v. United States*, 319 U.S. 703, 714–15 (1943) (finding a corporation's mass advertising, bargain-counter discounts, and large quantities of morphine supplied sufficient to show it conspired to illegally distribute morphine).

234. Telephone Interview with Robert M. Cross, *supra* note 41; *see* N.Y. GEN. BUS. LAW § 898-b(2) (noting the "reasonable" control measures implemented in New York).

235. DEL. CODE ANN. tit. 10, § 3930(e) (2022) ("A firearm industry member's conduct constitutes a proximate cause of the public nuisance if the harm to the

changes lighten the evidentiary load for plaintiffs who bring claims against gun manufacturers.

For states without updated torts statutes, courts in predicate exception cases have deemed them statutes of “general applicability.”²³⁶ While the broad scope of these statutes is naturally more extensive, they lack the specificity to the gun industry to make them clearly “applicable” to firearms. Instead, litigants must rely on whether the courts accept a broader interpretation of “applicable,” a relatively unlikely outcome.²³⁷ The updated New York, Delaware, and New Jersey public nuisance laws, however, significantly clarify their applicability by including the “gun industry member” language while lowering the evidentiary burden for plaintiffs.

2. Statutes Litigated Governing the Marketing of a Firearm

For the first fourteen years of existence of the PLCAA, the marketing half of the predicate exception went largely untouched by litigators. That changed in 2019, when the Connecticut Supreme Court found the state’s Unfair Trade Practices Act triggered the predicate exception.²³⁸ The unfair trade practices statute, like its counterparts in each of the fifty states,²³⁹ was implemented to prevent unfair and deceptive business acts.²⁴⁰ Litigants have used the statute to prevent business entities of all kinds from engaging in a wide variety of improper conduct.²⁴¹ Past plaintiffs in Connecticut had used the law in cases against

public is a *reasonably foreseeable* effect of the conduct, notwithstanding any intervening actions, including criminal actions by third parties.” (emphasis added)).

236. See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 399 (2d Cir. 2008) (“It is not disputed that New York Penal Law § 240.45 is a statute of general applicability that has never been applied to firearms suppliers for conduct like that complained of by the City.”).

237. See *infra* Parts II.B and II.C.

238. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 272–73 (Conn. 2019).

239. See *Deceptive Trade Practices and False Advertising State Law Survey*, LEXIS+ (Oct. 10, 2022), <https://plus.lexis.com/api/permalink/b0560716-5715-4ee9-a5ce-4c9948ef9640/?context=1530671> [<https://perma.cc/Q35N-988W>] (surveying state unfair trade practices laws).

240. CONN. GEN. STAT. § 42-110b(a) (2023) (“No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”).

241. *Soto*, 202 A.3d at 304–08 (collecting cases).

the gun industry for misleading advertising.²⁴² Despite the plaintiffs conceding that the statute was one of general applicability,²⁴³ the court found that the Act was sufficiently “applicable” to firearms to serve as a predicate statute.²⁴⁴ The court reasoned that past use of the Act against the gun industry, as well as the lack of advertising laws specific to firearms,²⁴⁵ made the law “applicable” under the predicate exception.²⁴⁶ The court also relied on a broad interpretation of the word “applicable” to find that the marketing statute regulated firearms.²⁴⁷ The case has created an opening for gun violence victims to use other marketing-related statutes as predicate statutes in PLCAA litigation.²⁴⁸

Whether sales-related or marketing-related, the acceptance of these predicate statutes has ultimately turned on a court’s interpretation of the word “applicable” in the predicate exception. Early predicate exception case law created a trend of interpreting the word narrowly.

B. ESTABLISHED CASE LAW NARROWS THE PREDICATE EXCEPTION AND DENIES MOST VICTIMS THE ABILITY TO LITIGATE THEIR CLAIMS AGAINST GUN MANUFACTURERS

Since its passage in 2005, the PLCAA has preempted nearly all meaningful civil lawsuits against gun manufacturers that have resulted from gun violence.²⁴⁹ Most courts’ interpretation of the predicate exception has contributed to this preemption.

242. *Id.*

243. Brief of Plaintiffs-Appellants at 32–33, *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262 (No. SC 19832 & SC 19833).

244. *Soto*, 202 A.3d at 302–03.

245. Firearm-specific advertising statutes, on the other hand, regulate to whom, in what way, and where firearms can be marketed to the public, such as limits on advertisements to children. Telephone Interview with Josh Koskoff, *supra* note 134.

246. *Soto*, 202 A.3d at 303–08.

247. *Id.* at 302–03.

248. “The marketing exception is really where there have been successes. . . . But that’s really been the main opening that people have had to make really meaningful change.” Zoom Interview with Megan Walsh, *supra* note 100. Survivors of the Uvalde shooting have recently filed a lawsuit against gun manufacturer Daniel Defense using a similar theory. Sam Gringlas, *A Year After Uvalde, Lawsuits Will Test Firearms Industry’s Immunity Protections*, NPR (May 23, 2023), <https://www.npr.org/2023/05/23/1177652537/Uvalde-lawsuit-daniel-defense-gun-manufacturer-ar15-immunity> [<https://perma.cc/WU5J-6GLJ>].

249. Telephone Interview with Robert M. Cross, *supra* note 41.

Despite statements of legislators granting flexibility to states to legislate via the predicate exception, the case law arising in the wake of the PLCAA largely understood the exception’s “applicable” language narrowly.²⁵⁰ This interpretation excludes the vast majority of statutes used by litigants from triggering the predicate exception. However, a few courts have accepted a more encompassing understanding.

The Second Circuit was the first federal circuit court to provide guidance on interpreting “applicable” in the predicate exception context, holding that the word should be understood narrowly. In *City of New York v. Beretta U.S.A. Corp.*, the court dismissed a lawsuit against a group of gun manufacturers for nuisance.²⁵¹ The plaintiffs claimed—and the district court agreed—that the manufacturer’s violation of the New York state criminal nuisance law²⁵² was “applicable” to the sale or marketing of a firearm under the plain meaning of the word.²⁵³ However, analyzing the statutory construction of the predicate exception, the Second Circuit held that the New York law did not trigger the exception.²⁵⁴ The court held that the nuisance law was a statute of general applicability and did not sufficiently encompass the conduct of gun manufacturers to be a predicate statute.²⁵⁵ The court curiously dismissed the plain and natural reading of “applicable,” instead reasoning that the word did not mean simply “capable of being applied.”²⁵⁶ Instead, only those statutes that either expressly or “clearly can be said to implicate the pur-

250. See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2d Cir. 2008) (holding that “applicable” must be interpreted “narrowly in order to preserve the primary operation of the [general rule].” (citation and quotations omitted)).

251. *Id.* at 388–90.

252. N.Y. PENAL LAW § 240.45 (McKinney 2023) (“A person is guilty of criminal nuisance in the second degree when [b]y conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons.”).

253. *City of New York*, 524 F.3d at 399.

254. *Id.*

255. *Id.* at 399–400.

256. *Id.* at 400, 404. The court rejected the plain meaning of “applicable” by referring to it as “out of context,” stating that the use of the dictionary definition of the word could not accurately reflect the intent of Congress. *Id.* at 400.

chase and sale of firearms” are “applicable” under the exception.²⁵⁷ The court drew on the Act’s two predicate exemption examples for support of this view.²⁵⁸ The court concluded that a broad—or plain—reading of “applicable” could “swallow the statute,” allowing just about any statute to trigger the exception.²⁵⁹

However, the court did not exclude all statutes of general applicability from satisfying the predicate exception.²⁶⁰ Instead, the court determined three categories of statutes that could be predicate statutes.²⁶¹ The first category is statutes that expressly regulate firearms.²⁶² The second is statutes that have historically been held by the courts to apply to the sale or marketing of firearms.²⁶³ The third category is statutes that do not expressly regulate firearms but clearly implicate the purchase and sale of firearms.²⁶⁴ The court held that the nuisance statute did not fall into any of these three categories and thus was not “applicable.”²⁶⁵

The Ninth Circuit is the only other federal circuit court to weigh in on the issue, reaching a similar decision in *Ileto v. Glock, Inc.*²⁶⁶ Following a shooting at a Jewish summer camp, the victims sued multiple gun manufacturers, alleging that California’s codified common law tort statutes—nuisance and negligence—were predicate statutes.²⁶⁷ The court disagreed.²⁶⁸ First, similar to the Second Circuit, the court rejected the argument that the dictionary definition of “applicable” was the one used in

257. *Id.* at 400, 404.

258. *Id.* at 400, 403.

259. *Id.* The court determined that the intent of the PLCAA was “to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets.” *Id.* at 403. In order to protect its broad interpretation of Congress’s intent, the court stated that “applicable” should be “construed narrowly in order to preserve [this] primary operation” of the statute. *Id.* (citations omitted).

260. *Id.* at 400.

261. *Id.* at 404.

262. *Id.* The two predicate exception examples would fall into this category.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009).

267. *Id.* at 1133, 1135.

268. *Id.* at 1132–33.

the exception.²⁶⁹ Concerned with statutes of general applicability, the court reasoned from the PLCAA's purpose and the predicate exception's examples that Congress intended to preempt all common law claims, even if codified by a state legislature.²⁷⁰ The court stated that the purpose of the PLCAA was to prevent gun industry members from being held liable under tort-like schemes developed by the common law.²⁷¹ Beyond that, the court refused to lay down a test to determine the adequacy of a predicate statute.²⁷²

A limited number of state appellate courts have allowed claims to proceed against defendant-manufacturers, taking a different approach to the predicate exception than that in *City of New York*²⁷³ and *Ileto*. In *Smith & Wesson Corp. v. City of Gary*, an Indiana appeals court found "applicable" to be defined broadly, reasoning that the language of the predicate exception was unambiguous.²⁷⁴ The court allowed a public nuisance suit to proceed against a gun manufacturer under the predicate exception.²⁷⁵ Even if the public nuisance statute was not directly applicable to firearms, the court stated, the plaintiffs sufficiently

269. *Id.* at 1133.

270. *Id.* at 1135–36. The court leaned on two pieces of the Congressional Record, statements by Senator Larry Craig of Idaho and Representative Cliff Stearns of Florida, which cited *Ileto* as a case that PLCAA was intended to preempt. *Id.* at 1137. The court then stated these specific statements had only "limited persuasive value." *Id.*

271. *Id.* at 1135–36. In its analysis, the court asserts that allowing codified common law claims to proceed under the predicate exception would undermine Congress's intention to create national uniformity. *Id.* at 1136. However, the very nature of the predicate exception—allowing states flexibility to formulate what rules govern firearms—demonstrates that Congress intended the opposite. The court also does not cite any piece of the Act or the Congressional Record to support its assertion.

272. *Id.* at 1138 n.9.

273. Litigators interviewed for this Note referred to *City of New York v. Berretta* as "*City of New York*." This is true of the other *City* cases involving the gun industry, including *City of Gary* and *City of Austin*. See, e.g., Telephone interview with Robert M. Cross, *supra* note 41 (referring to the case as *City of New York*).

274. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434 (Ind. Ct. App. 2007).

275. *Id.* at 435.

alleged that the manufacturers violated state gun sale regulations not explicitly named in the complaint.²⁷⁶ Similarly, in *Williams v. Beemiller, Inc.*, a New York appeals court did not conduct a statutory interpretation analysis of “applicable” in finding for the plaintiffs.²⁷⁷ The court reasoned that, although the complaint did not specify which gun laws the companies had violated, the City pled facts sufficient to find that the companies knowingly violated federal gun sale laws.²⁷⁸

This case law creates a structure that governs predicate exception litigation. As in *City of New York and Iletto*, “applicable” has been interpreted to prevent laws of general applicability from triggering the predicate exception. Although that interpretation differed in *Beemiller* and *City of Gary*, the courts still hedged their analysis by observing that the plaintiffs had alleged violations of gun sales restrictions, not statutes of general applicability. *City of New York* also lays out the clearest framework for predicate statute interpretation, holding that statutes that expressly regulate firearms, have historically been held by the courts to apply to the sale or marketing of firearms, or do not expressly regulate firearms but clearly implicate the purchase and sale of firearms to be “applicable.”²⁷⁹ Further, *Iletto* finds that torts, even when codified by a state legislature, cannot be predicate statutes.²⁸⁰ Together, these cases leave a narrow path for litigants to be successful in predicate exception litigation.²⁸¹

C. PREDICATE EXCEPTION JURISPRUDENCE MAY BE AMIDST A CHANGE THAT ALLOWS MORE PLAINTIFFS TO SURVIVE PLCAA PREEMPTION

The narrow path left by more than a decade of predicate exception litigation may be getting wider.²⁸² Following the attack at Sandy Hook in 2012, Nicole Hockley and the families of eight

276. *Id.* at 432–33; see IND. CODE ANN. § 35-47-2.5-1–15 (repealed 2012) (listing regulations governing the sale of firearms).

277. *Williams v. Beemiller, Inc.*, 100 A.D.3d 143 (N.Y. App. Div. 2012).

278. *Id.* at 149.

279. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008).

280. *Iletto v. Glock, Inc.*, 565 F.3d 1126, 1136 (9th Cir. 2009).

281. That path is by proving that the manufacturers knowingly aided and abetted and/or conspired to enable the violation of a firearm-specific law. Telephone interview with Robert M. Cross, *supra* note 41.

282. Zoom Interview with Megan Walsh, *supra* note 100.

other victims filed suit against gun manufacturer Remington.²⁸³ They argued that the Connecticut Unfair Trade Practices Act (CUTPA)²⁸⁴ was “applicable” to the sale or marketing of firearms.²⁸⁵ In 2019, the Connecticut Supreme Court agreed in *Soto v. Bushmaster Firearms International, LLC*.²⁸⁶ Affirming the reasoning of *City of Gary* and rejecting that of *City of New York*, the court held that the plain meaning of “applicable” was broadly encompassing.²⁸⁷ Even though the CUPTA was a statute of general applicability, the court held it was “applicable” to the marketing of firearms in the plain meaning of the word.²⁸⁸ Focusing on the marketing aspect of the predicate exception, the court found support for the use of general applicability marketing statutes in the absence of any federal firearm-specific advertisement laws at the time of the PLCAA’s passage.²⁸⁹ Further, the court adopted the three-part rule set out in *City of New York*, saying that the CUTPA clearly implicated the purchase and sale of firearms, while also having been historically applied by courts in this way.²⁹⁰ The court found support in numerous advertising-focused cases brought against gun manufacturers prior to the PLCAA at the federal and state level with marketing laws of general applicability.²⁹¹ Finally, however, the court confirmed that certain statutes of general applicability, specifically public nuisance, were preempted by the PLCAA.²⁹²

283. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 273 n.2 (Conn. 2019). The defendants attempted to appeal the court’s interpretation to the United States Supreme Court, but their writ of certiorari was denied. *Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019) (denying certiorari).

284. CONN. GEN. STAT. §§ 42-110a–110q (2023). The case, after years of motions and appeals, settled for \$73 million in 2022. Kim Bellware, *Sandy Hook Families Announce \$73 Million Settlement with Remington Arms in Landmark Agreement*, WASH. POST (Feb. 15, 2022), <https://www.washingtonpost.com/nation/2022/02/15/remington-sandy-hook-settlement> [<https://perma.cc/PJN2-3HE5>].

285. *Soto*, 202 A.3d at 262.

286. *Id.*

287. *Id.* at 302.

288. *Id.* at 302–03.

289. *Id.* at 304.

290. *Id.* at 306.

291. *Id.* at 306–07. The court also found support from the purpose of the PLCAA as analyzed, *supra*, Part I.B.1. *Soto*, 202 A.3d at 309–11.

292. *Soto*, 202 A.3d at 311.

Through *Soto*, the path of successful predicate exception litigation may be widening.²⁹³ *Soto* held for the first time that a marketing statute of general applicability could be “applicable to the sale or marketing” of firearms.²⁹⁴ Primarily, this interpretation built on the reasoning of *City of Gary* and *Beemiller*, establishing that “applicable” could include some statutes of general applicability. However, the court also noted that the extent of what is encompassed by “applicable” might be limited to marketing and consumer protection laws.²⁹⁵ *Soto* also displayed how a marketing-related law could be used successfully as a predicate statute, a shift in the litigation landscape.²⁹⁶

Building on the momentum of *Soto* and in response to the further escalation of gun violence, state legislatures began to proactively adopt new laws that could act as predicate statutes.²⁹⁷ In 2021, New York passed an update to the nuisance law litigated in *City of New York*.²⁹⁸ The Act adopted similar language as the general public nuisance statute challenged in *City of New York* but replaced “person” with “gun industry member.”²⁹⁹ In 2022, a federal court held that the new statute triggered the predicate exception. That case, *National Shooting Sports Foundation, Inc. v. James*, held that that amendment was enough for the statute to now “expressly regulate[] firearms.”³⁰⁰ The court stated that no set of statutory interpretative tools

293. “I think *Soto* is huge because it gave people a path, it gave people hope.” Zoom Interview with Megan Walsh, *supra* note 100. See also *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1139 (D. Nev. 2019) (finding a violation of a deceptive trade practices act satisfied the predicate exception); *Goldstein v. Earnest*, 37-2020-00016638-CU-PO-CTL at *4 (Cal. Sup. Ct. 2021) (minute order) (finding a deceptive trade practices act satisfied the predicate exception).

294. *Soto*, 202 A.3d at 306–07.

295. *Id.* at 302 (recognizing the defendant’s narrow definition is “plausible”).

296. “The marketing exception is really where there have been successes. . . . [T]hat’s really been the main opening that people have had to make really meaningful change.” Zoom Interview with Megan Walsh, *supra* note 100.

297. See *Gun Industry Immunity*, *supra* note 52.

298. N.Y. GEN. BUS. LAW § 898-b (McKinney 2023); *Nat’l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 55–56 (N.D.N.Y. 2022).

299. See *Nat’l Shooting Sports Found., Inc.*, 604 F. Supp. 3d at 59; *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390, n.1 (2d Cir. 2008) (stating the text of the original nuisance statute); *supra* Part II.A.1 (comparing the text of the original and updated statutes).

300. *Nat’l Shooting Sports Found., Inc.*, 604 F. Supp. 3d at 59–60.

could understand the statute to not be “applicable” to firearms.³⁰¹ *National Shooting Sports Foundation* also confirmed that states have great leeway, even with just the tweaking of statutory language, to legislate within the PLCAA and the predicate exception. That confirmation further opens the door for state legislatures to draft and implement new predicate statutes.³⁰²

Since the PLCAA’s passage in 2005, numerous federal and state statutes, varying in their text and applicability, have been litigated under the Act’s predicate exception.³⁰³ Despite the broad, plain meaning of the exception, many of these attempts have failed. Courts have traditionally interpreted the exception’s “applicable” language narrowly, precluding statutes of general applicability. Instead, they restricted the predicate exception’s use to those statutes that make explicit reference to—or historically have been applied to—the sale or marketing of firearms. The success of the plaintiffs in *Soto* may be shifting that trend through the court’s acceptance of both a wider interpretation of “applicable” and the use of a marketing statute to trigger its language. Following this lead, California has joined the growing movement of states formulating new predicate statutes. Weighing lessons from predicate statute litigation, California’s S.B. 1327 will make a successful attempt at evading PLCAA preemption.

III. CALIFORNIA’S S.B. 1327 WILL LIKELY SATISFY THE PREDICATE EXCEPTION

California is one of the most recent states attempting to take advantage of the opening that the predicate exception creates to combat gun violence. S.B. 1327 implemented a unique legal scheme to regulate certain firearms while attempting to prevent PLCAA preemption. This Part analyzes the Act and argues that it will likely trigger the predicate exception when the statute is litigated. Section A discusses the text of S.B. 1327 and the unusual legal scheme it creates. Section B contends that the explicit firearm-related text satisfies the predicate exception.

301. *Id.* at 59.

302. *Gun Industry Immunity*, *supra* note 52. This case is currently on appeal with the Second Circuit Court of Appeals.

303. *See supra* Part II.A.I (providing an overview of the statutes litigated as predicate statutes).

A. BACKGROUND ON S.B. 1327

California's S.B. 1327 was passed in 2022 as a part of an effort to combat gun violence.³⁰⁴ S.B. 1327 created a cause of action for any person to sue another person or entity if they knowingly sell or transfer an assault weapon, .50 caliber rifle, or a firearm that lacks a serial number.³⁰⁵ The statute went into effect on January 1, 2023.³⁰⁶ The California legislature drafted S.B. 1327 in response to Texas's use of a novel bounty-style enforcement scheme to enforce the state's abortion laws.³⁰⁷ This bounty-style system creates a cause of action for any citizen, regardless of their connection to the violation of the law, to sue the lawbreaker for damages.³⁰⁸ The structure deputizes all citizens to enforce the underlying law.³⁰⁹ Texas's S.B. 8 implemented this scheme to avoid judicial review and prevent the law from being enjoined by the courts.³¹⁰ Even with these motivations, the United States Supreme Court allowed the law to go into effect in

304. S. JUDICIARY COMM., S.B. 1327: FIREARMS: PRIVATE RIGHTS OF ACTION 2 (Cal. 2021) (stating the purposes of the bill to establish a privately enforced civil cause of action against manufacturers thereby giving individuals the ability to take action).

305. CAL. BUS. & PROF. CODE §§ 22949.62, .65(a) (West 2023).

306. Healey, *supra* note 57. On December 19, 2022, a U.S. District Court found the statute's fee-shifting provision to be unconstitutional. *Id.* That ruling did not affect the rest of the statute, including the sections analyzed in this Note, from going into effect. *See id.* (noting ruling in *Miller v. Bonta*); *Miller v. Bonta*, No. 22cv1446-BEN (JLB), 2022 WL 17811114 (S.D. Cal. Dec. 19, 2022) (holding S.B. 1327's court fee-shifting provision to be unconstitutional).

307. *See* Healey, *supra* note 57; Matt Ford, *Taking Cues from Texas, California Proposes Its Own Bounty Law—Against Guns*, NEW REPUBLIC (May 27, 2022), <https://newrepublic.com/article/166641/bounty-law-guns-supreme-court> [<https://perma.cc/GH2W-AYZY>] (describing S.B. 1327 as a "bounty-style law").

308. *See, e.g.*, Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [<https://perma.cc/PFN2-EJBT>] (describing how S.B. 8 in Texas "allows private citizens to file a civil lawsuit against anyone" who has violated the state's abortion law).

309. *Id.*

310. *Id.* (explaining that a civil enforcement mechanism will face fewer challenges than a criminal one).

September 2021.³¹¹ California Governor Gavin Newsom introduced S.B. 1327 to mimic Texas’s S.B. 8, even including an expiration provision in S.B. 1327 if S.B. 8 becomes invalidated.³¹²

S.B. 1327 copies the same bounty system used in Texas’s S.B. 8, but instead focuses on the enforcement of gun regulations.³¹³ The statute constructs this system in two parts. First, the statute sets up the bounty-style system, authorizing a universal cause of action.³¹⁴ Section 22949.65 provides that any person can sue any other person who violates the underlying gun

311. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (denying the application for injunctive relief or an order to vacate the stay).

312. CAL. BUS. & PROF. CODE § 22949.71 (West 2023) (“This chapter shall become inoperative upon invalidation of Subchapter H (commencing with Section 171.201) of Chapter 171 of the Texas Health and Safety Code in its entirety by a final decision of the United States Supreme Court or Texas Supreme Court, and is repealed on January 1 of the following year.”); Press Release, Off. of Governor Gavin Newsom, Governor Newsom Issues Statement After Court Strikes Down Provision of Gun Safety Law (Dec. 19, 2022), <https://www.gov.ca.gov/2022/12/19/governor-newsom-issues-statement-after-court-strikes-down-provision-of-gun-safety-law> [<https://perma.cc/FLQ7-47S3>] (“SB 1327 was enacted after the Supreme Court allowed Texas’ SB 8 to go into effect to ensure that if courts will allow Texans to sue to stop abortions, then California could use that same legal mechanism to protect Californians from gun violence on our streets.”).

313. See Press Release, Off. of Governor Gavin Newsom, Californians Will Be Able to Sue Those Responsible for Illegal Assault Weapons and Ghost Guns (July 22, 2022), <https://www.gov.ca.gov/2022/07/22/californians-will-be-able-to-sue-those-responsible-for-illegal-assault-weapons-and-ghost-guns> [<https://perma.cc/9LNC-YS62>] (likening California’s legislation to Texas’ antiabortion bill); Meredith Deliso, *California Governor Signs Gun Bill Modeled After Texas Abortion Law*, ABC NEWS (July 22, 2022), <https://abcnews.go.com/Politics/california-governor-signs-gun-bill-modeled-texas-abortion/story?id=87253528> [<https://perma.cc/MFD9-MXM2>] (“The law is modeled after the Texas ‘heartbeat act,’ SB 8, which prohibits abortions as early as six weeks into a pregnancy. That law relies on private citizens filing lawsuits to enforce it by placing \$10,000 bounties on doctors, providers and others involved in providing abortion care.”).

314. CAL. BUS. & PROF. CODE § 22949.65(a), (e) (West 2023) (“An act or omission in violation of Section 22949.62 shall be deemed an injury in fact to all residents of, and visitors to, this state, and any such person shall have standing to bring a civil action pursuant to this section.”).

regulation.³¹⁵ This portion qualifies that the violation of the underlying regulation must be done “knowingly.”³¹⁶ The law also makes clear that it encompasses someone who knowingly engages in conduct that helps someone else break the law, even if they did not know that person was going to violate the statute.³¹⁷

The second part of the law establishes the underlying gun restriction. Section 22949.62 broadly defines the prohibited conduct to include the sale and exposing for sale of the firearm, distribution and importation of the firearm, as well as giving or lending of the gun to another.³¹⁸ Significantly, the law only applies to three types of firearms: assault weapons, .50 caliber rifles, and guns without serial numbers.³¹⁹ The scheme does not apply to the violation of any other gun law.³²⁰ The scope of the underlying regulation is broad, however, prohibiting nearly all

315. CAL. BUS. & PROF. CODE § 22949.65(a) (West 2023) (“Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who does any of the following: (1) Knowingly violates Section 22949.62. (2) Knowingly engages in conduct that aids or abets a violation of Section 22949.62, regardless of whether the person knew or should have known that the person aided or abetted would be violating Section 22949.62. (3) Knowingly commits an act with the intent to engage in the conduct described by paragraph (1) or (2).”).

316. *Id.* However, “[a]ny claim that the firearm . . . at issue was not misused, or was not intended to be misused, in a criminal or unlawful manner” is not a defense. *Id.* at § 22949.65(f)(8). Further, not knowing the law or that it governs a particular situation is not a defense. *Id.* at § 22949.65(f)(1). The only affirmative defense is when the defendant “reasonably believed, after conducting a reasonable investigation, that the person was complying with this chapter” *Id.* at § 22949.65(g)(1).

317. *Id.* at § 22949.65(a)(2). A knowing violation is also a requirement of the PLCAA to trigger the predicate exception. 15 U.S.C. § 7903(5)(A)(iii) (“[Actions] in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm], and the violation was a proximate cause of the harm for which relief is sought” (emphasis added)).

318. CAL. BUS. & PROF. CODE § 22949.62 (West 2023) (“Notwithstanding any other law, no person within this state may manufacture or cause to be manufactured, distribute, transport, or import into the state, or cause to be distributed, transported, or imported into the state, keep for sale, offer or expose for sale, or give or lend, any assault weapon, .50 BMG rifle, or unserialized firearm”).

319. *Id.*

320. *Id.* at § 22949.65(a).

modes of possession, ownership, sale, or transfer of those particular firearms.³²¹ Notably, for purposes of potential predicate exception applicability, the statute explicitly prohibits the sale of these types of firearms as well as the ability to “expose for sale.”³²² The inclusion of “manufacture” in the prohibited conduct also shows that the drafters intended the law to encompass gun manufacturers.³²³ Together, these two parts of the statute allow any person to sue anyone who violates this underlying law. A successful suit by a plaintiff allows for the receipt of no less than \$10,000 in damages for each violation.³²⁴

The California State Legislature was cognizant of the PLCAA when drafting S.B. 1327. In the Senate Judiciary Committee’s report on the bill, the legislators expressed optimism that the statute would not be preempted, stating, “[g]iven that liability attaches in this bill only for the conduct of a potential defendant, regardless of the action of another party, there are arguably no reasonable preemption concerns.”³²⁵ The committee report highlights what the drafters of the PLCAA stated to be true: the PLCAA does not protect gun companies from the accountability of their own wrongful acts.³²⁶ While not citing the predicate exception explicitly, the committee’s statement shows that the legislature was aware of their ability to legislate within it, a goal that will likely be successful with S.B. 1327.

321. *Id.* at § 22949.62 (including the “manufacture or cause to be manufactured, distribute, transport, or import into the state, or cause to be distributed, transported, or imported into the state, keep for sale, offer or expose for sale, or give or lend” of the firearm).

322. *Id.* Expose for sale is the public display of a good to attract a sale. *EXPOSE Definition & Legal Meaning*, L. DICTIONARY, <https://thelawdictionary.org/expose> [<https://perma.cc/H44B-BQ2J>]. The statute does not explicitly criminalize the advertisement of these firearms. CAL. BUS. & PROF. CODE § 22949.62 (West 2023).

323. CAL. BUS. & PROF. CODE § 22949.62 (West 2023).

324. *Id.* at § 22949.65(b)(2)(A)(i).

325. S. JUDICIARY COMM, *supra* note 304, at 9.

326. *See supra* Part I.B.1.

B. S.B. 1327 SATISFIES PLCAA'S PREDICATE EXCEPTION

Since going into effect at the beginning of 2023, S.B. 1327 is just beginning to be litigated by victims of gun violence.³²⁷ However, for plaintiffs hoping to sue gun manufacturers, S.B. 1327 will likely bypass the PLCAA's protections and trigger the predicate exception. The binding decision from the Ninth Circuit's *Ileto*, as well as the persuasive value of *City of New York*, support that conclusion. Taking lessons from these cases, S.B. 1327 would likely be "applicable to the sale or marketing" of firearms because it is not a statute of general applicability, the law applies explicitly to the sale of firearms, and it is not a tort that is derived from the common law.³²⁸

First, S.B. 1327 is not a statute of general applicability. Each case analyzed *supra*, regardless of their interpretation of "applicable," raised concerns about statutes of general applicability triggering the predicate exception.³²⁹ *City of New York* stated the concern that any law that could possibly apply to firearms would "allow the predicate exception to swallow the statute," destroying the purpose of the law altogether.³³⁰ However, the text of the S.B. 1327 is clear: this law is solely intended to govern firearms.³³¹ A violation of the law can only come from firearm-related conduct. Violations stem from the possession, manufacture, and sale of either an assault weapon, .50 caliber rifle, or unserialized firearm.³³² Each gun model listed in the definition of "assault weapon" is a firearm, while including no non-firearm weapons.³³³

Further, S.B. 1327 cannot be used to penalize non-firearm-related conduct. Only three acts can break the law: knowingly violating the gun restrictions in section 22949.62, knowingly engaging in conduct that assists a violation, or intending to violate

327. See S.B. 1327 Court Docket Search, BLOOMBERG L., <https://www.bloomberglaw.com/product/blaw/search/results/f1cb9350ea95b7753ec1e60707ac787c> [<https://perma.cc/XR7D-SH3Z>] (showing fourteen court filings as of October 10, 2023 for lawsuits claiming S.B. 1327 violations).

328. See *supra* Parts II.B, II.C.

329. See, e.g., *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1134–35 (9th Cir. 2009).

330. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2d Cir. 2008).

331. See CAL. BUS. & PROF. CODE §§ 22949.62(a), .65(a) (West 2023).

332. *Id.* at § 22949.62(a).

333. *Id.* at § 22949.61(b)(1).

the restrictions.³³⁴ Should the courts look to the persuasive value of *City of New York* for a broader framework to determine what is “applicable,” the statute passes that test since the statute expressly regulates firearms.³³⁵

Opponents may note that the law could reach those who unknowingly aid another in breaking the law.³³⁶ Opponents may therefore contend that this lack of a scienter requirement allows the statute to encompass non-firearm-specific conduct.³³⁷ Further, because aiding and abetting is explicitly encompassed by the statute, the applicability of the statute is more generalized than just firearm-related conduct. However, while the statute could be used to encompass non-firearm-specific conduct, the illegality of that conduct ultimately stems from a firearm-specific action. This prevents S.B. 1327 from being deemed a statute of general applicability.

Finally, S.B. 1327 is not a tort derived from the common law. Because California is within the Ninth Circuit’s jurisdiction, California’s S.B. 1327 must comply with the Ninth Circuit Court of Appeals’ decision in *Ileto v. Glock, Inc.* S.B. 1327 survives the requirements laid out in *Ileto*. While *Ileto* was generally concerned with the statutes of general applicability, the court was focused on the use of the state’s codified common law torts as predicate statutes.³³⁸ S.B. 1327 does not create a tort action and does not give rise to tort liability.³³⁹ The law does not originate from common law nor does its scheme of liability.³⁴⁰ Further, it does not hold gun manufacturers liable for third-party acts, like a tort could, but only for the defendant’s own acts that violate the statute.³⁴¹ The inclusion of the qualifier “knowingly” in order to establish a violation emphasizes that point.³⁴² Together, the specificity of S.B. 1327 to firearms should allow the law to act as a successful predicate statute in a lawsuit.

334. *Id.* at § 22949.65(a).

335. *City of New York*, 524 F.3d at 404.

336. CAL. BUS. & PROF. CODE § 22949.65(a)(2) (West 2023).

337. *Id.*

338. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135–36 (9th Cir. 2009).

339. *Id.* at 1136.

340. *Id.* at 1135.

341. *Id.* at 1131–32, 1135.

342. CAL. BUS. & PROF. CODE § 22949.65(a) (West 2023).

If using S.B. 1327 as a predicate statute, however, plaintiffs may encounter two hurdles when litigating certain aspects of the statute. Those hurdles are the sufficiency of the regulation's relation to the sale or marketing of a firearm as well as the statute's expiration clause. The predicate exception is triggered when a gun manufacturer violates a statute applicable to the sale or marketing of a firearm.³⁴³ The actions covered by S.B. 1327 likely go beyond the sale or marketing of a firearm. Section 22949.62 prohibits the "manufacture or cause to be manufactured, distribute, transport, or import into the state, or cause to be distributed, transported, or imported into the state, keep for sale, offer or expose for sale, or give or lend" of the qualifying firearms.³⁴⁴ If a litigant were to bring a claim concerning the sale-related aspects of S.B. 1327, that claim would likely be encompassed by the predicate exception because it is substantially similar to the sales restrictions used in successful predicate exception cases.³⁴⁵

However, the rest of the statute, on a plain reading, may fall outside the "sale or marketing" qualifier. It is unclear if the manufacture, distribution, transportation, importation, giving, or lending is "related to the sale or marketing" of a firearm like the predicate exception demands. If a plaintiff files a lawsuit on one of these grounds, they should be prepared with statutory interpretation and PLCAA-based arguments. For instance, plaintiffs may use the *noscitur a sociis* canon³⁴⁶ to argue that those prohibited actions in section 22949.62 that are not clearly related to the sale of a firearm should be read in light of their proximity to the clear sales-specific restrictions. This helps illustrate that those prohibitions are related to the sale of firearms. Further, plaintiffs could also argue that the purpose of the PLCAA was to prevent liability for gun manufacturers for third-party actions, not for the manufacturers' own improper acts.³⁴⁷ Because each

343. 15 U.S.C. § 7903(5)(A)(iii).

344. CAL. BUS. & PROF. CODE § 22949.62(a) (West 2023).

345. See *supra* Part III.A.1.

346. *Noscitur a sociis* is a tool of statutory construction that states that the meaning of an ambiguous word should be determined by the words immediately surrounding it. *Noscitur a sociis*, BLACK'S LAW DICTIONARY (11th ed. 2019); see *McDonnell v. United States*, 579 U.S. 550, 568–69 (2016) ("Under the familiar interpretive canon *noscitur a sociis*, a word is known by the company it keeps." (citation and quotations omitted)).

347. See *supra* Part I.B.1.

of the restrictions governs the acts of the manufacturer, rather than a third-party, the restrictions should trigger the predicate exception. However, courts analyzing the predicate exception have not determined what types of gun laws may be sufficiently sale or marketing based.³⁴⁸ Nonetheless, in cases where the plaintiffs brought unsuccessful claims like negligence or public nuisance, no court stated that those statutes failed because they were not sufficiently sales or marketing related.³⁴⁹ Given the lack of case law on this point, plaintiffs should be prepared to raise supportive arguments in this area.

Finally, S.B. 1327's expiration clause may also impact a potential case. Drafted and passed in response to Texas's S.B. 8,³⁵⁰ S.B. 1327 includes an expiration clause, stating that the statute would become ineffective if S.B. 8 were found to be unconstitutional.³⁵¹ This may leave potential litigants up in the air about whether the predicate statute in their lawsuit will still exist through the long push of litigation. Victims of gun violence should weigh these two considerations carefully when considering a lawsuit using S.B. 1327. However, given the explicit firearms-related language in the statute, it is likely S.B. 1327 would satisfy the predicate exception of the PLCAA.

California's S.B. 1327 implements a novel legal strategy to regulate firearms. The law creates a bounty-style cause of action that allows anyone to sue another person or entity that knowingly sells or transfers an assault weapon, .50 caliber rifle, or a firearm without a serial number.³⁵² If litigated, S.B. 1327 would

348. *See, e.g.,* *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1127–28 (9th Cir. 2009) (holding that the predicate exception did not apply to certain claims).

349. *Id.*

350. *See* Healey, *supra* note 57; Ford, *supra* note 307.

351. CAL. BUS. & PROF. CODE § 22949.71 (West 2023) (“This chapter shall become inoperative upon invalidation of Subchapter H (commencing with Section 171.201) of Chapter 171 of the Texas Health and Safety Code in its entirety by a final decision of the United States Supreme Court or Texas Supreme Court, and is repealed on January 1 of the following year.”). Texas's S.B. 8 has survived its constitutional challenges so far, while S.B. 1327's fee-shifting portion was deemed unconstitutional before the law went into effect. *See* *Whole Woman's Health v. Jackson*, 31 F.4th 1004, 1006 (5th Cir. 2022) (remanding a challenge to S.B. 8 back to district court to dismiss the constitutional challenge); *Miller v. Bonta*, No. 22cv1446-BEN (JLB), 2022 WL 17811114, at *25 (S.D. Cal. Dec. 19, 2022) (holding S.B. 1327's court fee-shifting provision to be unconstitutional).

352. *See supra* note 55 and accompanying text (describing S.B. 1327's practical implications).

likely trigger the predicate exception because it is not a statute of general applicability, the law applies explicitly to the sale of firearms, and it is not a tort that was derived from the common law.³⁵³ S.B. 1327's structure and scheme, as well as the case law and other successful statutory amendments, should guide state legislators working to combat gun violence and draft predicate statutes at the state level.

IV. CONSIDERATIONS FOR STATE LEGISLATURES WHEN CREATING PREDICATE STATUTES

As gun violence continues to burden states, municipalities, and their citizens, state legislators may be interested in legislating on the issue. In an era of federal political gridlock on gun violence prevention policy,³⁵⁴ state legislatures are in a strong position to take advantage of the predicate exception and circumvent PLCAA protections for gun manufacturers.³⁵⁵ Of the gun violence reduction measures to be considered, states should look to New York, New Jersey, Delaware, and now, California, for guidance on how to draft a plaintiff-friendly predicate statute in their state. Using interviews with current and former predicate exception litigators and analysis of litigated and updated predicate statutes, this Note offers considerations for state legislators to weigh when drafting a predicate statute.

353. *See id.*

354. *See, e.g., supra* note 194 and accompanying text (describing the partisan split around a bill to repeal the PLCAA); Annie Karni, *As Mass Shootings Continue, Gridlock on Guns Returns to Washington*, N.Y. TIMES (Jan. 24, 2023), <https://www.nytimes.com/2023/01/24/us/politics/biden-democrats-gop-gun-control.html> [<https://perma.cc/88C6-9V6T>] (stating that, despite the adoption of a “modest” gun control measure in 2022, Congress is “unlikely” to pass additional legislation following recent high-profile shootings).

355. *See, e.g., supra* note 58 and accompanying text (noting how recent elections have produced state legislatures sympathetic to new gun violence prevention measures).

A. WORK BACKWARDS TO SOLVE THE PROBLEM OF GUN VIOLENCE

Predicate statutes are intended to help correct an issue: gun violence. Allowing gun manufacturers to operate with civil immunity has broad effects beyond the courtroom.³⁵⁶ With gun violence at an all-time high,³⁵⁷ state legislators should supplement their focus on predicate statutes with consideration of other legislative remedies that target the issue. Identifying the specific issues underlying each community's rise in gun violence is crucial to identifying its legislative corrective.³⁵⁸ Once a solution is proposed, legislators should run a predicate exception analysis using the considerations provided in this Note.³⁵⁹ Shaping their legislation through the lens of the PLCAA's predicate exception can add another layer of potential reform to a new regulation that legislators create. State legislators can also include a private right of action to the proposed statute, or to other existing gun laws.³⁶⁰

However, the focus of state legislators should be on reducing gun violence. For example, the updated public nuisance statute passed by Delaware in 2022 came as part of a package of gun safety legislation that included strengthening background checks and banning the sale of assault weapons.³⁶¹ New Jersey's statute was a piece of a similar package.³⁶² When considering the creation of a predicate statute, state legislators should always consider it as one tool towards the reduction of gun violence.

356. *See supra* Part I.C.

357. *See Past Summary Ledgers, supra* note 21 (showing growth in gun violence).

358. Telephone Interview with Josh Koskoff, *supra* note 134.

359. *See id.* (recommending that state legislators should do predicate exception analyses on bills they are proposing).

360. *Id.*

361. Press Release, Governor John Carney, Off. of the Governor, State of Del., Governor Carney Signs Package of Gun Safety Legislation (June 30, 2022), <https://news.delaware.gov/2022/06/30/governor-carney-signs-package-of-gun-safety-legislation> [<https://perma.cc/BXE2-T483>]. Colorado and Washington's statutes were a part of similar packages. *See Pereira, supra* note 52.

362. Press Release, Governor Phil Murphy, State of N.J., Governor Murphy Signs Sweeping Gun Safety Package 3.0 to Continue the Fight Against Gun Violence (July 5, 2022), <https://nj.gov/governor/news/news/562022/approved/20220705a.shtml> [<https://perma.cc/D5UZ-9GUF>].

B. UNDERSTANDING THE PLAINTIFF'S PROCESS IS CRUCIAL TO SUPPORTING IT

The PLCAA presents a series of complex issues for plaintiffs in their lawsuits against gun manufacturers. State legislators should be aware of the process litigants follow and the burden plaintiffs bear when bringing a lawsuit. Lawsuits against gun manufacturers raise two primary issues for plaintiffs: first, the obtaining of information necessary to formulate a complaint with sufficient detail to survive a motion to dismiss, and second, the chilling effect caused by the financial risk facing litigators bringing these lawsuits. To combat these issues, states should implement reforms to facilitate the flow of information to plaintiffs and consider subsidizing the litigation through fee-shifting language.

The first significant hurdle facing predicate exception plaintiffs is obtaining sufficient information to draft a complaint against the defendant manufacturers. Plaintiffs are not initially focused on what predicate statute they can use, but on obtaining the information they need to develop a fact record.³⁶³ No two cases are the same.³⁶⁴ Plaintiffs are concerned with what a potential defendant did wrong in this case, not necessarily looking to the law first to see if the defendant violated it.³⁶⁵ Because of this, plaintiffs focus on compiling the best information they can to determine if a potential defendant has violated an underlying statute.³⁶⁶

This process is necessary to meet the evidentiary hurdles imposed by the PLCAA and the predicate exception. First, even if a predicate statute is sufficiently “applicable” to the sale or marketing of firearms, that violation must be done “knowingly.”³⁶⁷ Proving the mens rea of constructive knowledge is difficult and calls for a considerable amount of supporting circumstantial information.³⁶⁸ Further, plaintiffs must also prove that

363. Zoom Interview with Keith Ellison, *supra* note 134; Telephone Interview with Josh Koskoff, *supra* note 134.

364. “These cases are fact specific.” Zoom Interview with Keith Ellison, *supra* note 134.

365. *Id.*

366. *Id.*

367. 15 U.S.C. § 7903(5)(A)(iii).

368. Telephone Interview with Robert M. Cross, *supra* note 41. This is also one of the reasons that gun dealers are often less difficult to reach under the

their injuries were proximately caused by the knowing violation of the predicate statute, adding another element that the plaintiff must show.³⁶⁹ This burden requires plaintiffs to conduct pre-suit investigations to compile that information for their complaint.³⁷⁰ Litigators attempt to find all the information that might be available, including from government and other public databases, from past lawsuits, and from former employees of gun manufacturers or other industry experts.³⁷¹ For instance, private equity firms, which have increasingly purchased gun manufacturers, are required to file public disclosures with the U.S. Securities and Exchange Commission, which include key company information.³⁷² The fact-specific nature of these allegations require an exhaustive investigative process in order to draft a complaint that litigators are confident will survive a motion to dismiss.³⁷³

A specific source of rich information for plaintiffs is firearm trace data.³⁷⁴ Trace data is compiled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and includes information on firearms recovered in criminal investigations.³⁷⁵ This information includes the make and model of the gun, who sold it, where it was sold, when it was sold, and to whom it was

predicate exception than gun manufacturers. Dealers are often closer to the end user and may well have had direct interactions with the ultimate shooter. *Id.*

369. 15 U.S.C. § 7903(5)(A)(iii). Proximate cause can be defined differently from state to state. *See, e.g.*, DEL. CODE ANN. tit. 10, § 3930(e) (2022) (“A firearm industry member’s conduct constitutes a proximate cause of the public nuisance if the harm to the public is a *reasonably foreseeable* effect of the conduct, notwithstanding any intervening actions, including criminal actions by third parties.” (emphasis added)).

370. Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, *supra* note 134; Zoom Interview with Keith Ellison, *supra* note 134.

371. Telephone Interview with Josh Koskoff, *supra* note 134.

372. *Id.*

373. “These cases are fact specific . . . [in order to feel confident] you never stop investigating.” Zoom Interview with Keith Ellison, *supra* note 134.

374. Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, *supra* note 134; Zoom Interview with Keith Ellison, *supra* note 134.

375. Zoom Interview with Keith Ellison, *supra* note 134 (“What was really critical for us is the information we got from the ATF.”); *see also Firearms Trace Data - 2019*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (May 17, 2022), <https://www.atf.gov/resource-center/firearms-trace-data-2019> [https://perma.cc/5YVX-MBEN] (providing background on firearm trace data); Telephone Interview with Robert M. Cross, *supra* note 41.

sold.³⁷⁶ This information is often crucial to prove that a gun manufacturer knew that the firearm they were selling—or to whom they were selling it—was improper.³⁷⁷ Gun manufacturers have also been known to ignore red flags in the trace data.³⁷⁸ This behavior includes continuing to sell firearms to dealers who have suspiciously high numbers of traces, data that indicate that the dealer may be intentionally supplying the criminal market.³⁷⁹ However, trace data is sometimes difficult to obtain by either public or private litigants.³⁸⁰ If unable to do so, plaintiffs are required to look elsewhere to find applicable information to their lawsuit.³⁸¹

Plaintiffs' dependence on obtaining relevant and high-quality information for their complaint underscores the importance of surviving the pleading stage. Surviving a motion to dismiss and getting into the discovery phase allows plaintiffs to obtain the most specific and relevant information they can from manufacturers.³⁸² However, if unable to plead sufficient facts, their lawsuit will end before it begins.³⁸³ State pleading standards can also play a crucial role in this process. Cases like *City of Gary*

376. See Telephone Interview with Robert M. Cross, *supra* note 41; *Firearms Trace Data - 2019*, *supra* note 375.

377. Zoom Interview with Keith Ellison, *supra* note 134 (“That trace data was very important and you really do need it.”); see also Telephone Interview with Robert M. Cross, *supra* note 41.

378. Telephone Interview with Robert M. Cross, *supra* note 41.

379. *Id.*

380. *Id.* The 2003 Tiahrt Amendment placed restrictions on the availability of trace data to the public. See *Repeal Restrictions on Gun Trace Data*, EVERYTOWN, <https://www.everytown.org/solutions/gun-trace-data> [<https://perma.cc/RRL4-43GY>] (explaining the Tiahrt Amendments). Some courts have held that the Tiahrt Amendment prevents the disclosure of trace data within the possession of gun dealers to private litigants. See, e.g., *Williams v. Beemiller, Inc.*, 975 N.Y.S.2d 647, 650 (N.Y. Sup. Ct. 2013). However, other courts have interpreted the Tiahrt Amendment more narrowly as only applying to trace information within the possession of ATF and whose disclosure would require the use of federally appropriated funds. See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 429 F. Supp. 2d 517, 526 (E.D.N.Y. 2006) (addressing the admissibility of trace data already within the possession of the city).

381. See Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, *supra* note 134.

382. Judges can play a crucial role in the discovery process and may prevent plaintiffs from getting the documents they need. See Telephone Interview with Robert M. Cross, *supra* note 41.

383. See FED. R. CIV. P. 12(b)(6) (requiring sufficient facts to “state a claim upon which relief can be granted”).

and *Beemiller* survived largely because of their state's liberal pleading standards.³⁸⁴ However, plaintiffs face gun industry defendants who are often represented by aggressive and strategic lawyers looking to dismiss the lawsuit early.³⁸⁵ Considering this opposition, plaintiffs must be confident in facts of their complaint and the applicability of the underlying predicate statute to bring a case in the first place.

The second significant hurdle is the looming financial threat facing a litigator when bringing a predicate exception challenge against this type of forceful opposition. State legislatures should also implement or amend fee-shifting language or other subsidy schemes to facilitate the introduction of this type of litigation. The stakes of obtaining the necessary information to formulate a sufficient complaint are high: counsel for gun manufacturers have shown themselves to be aggressive in seeking lawyers' fees under applicable state laws following unsuccessful PLCAA-related challenges.³⁸⁶ Past predicate exception lawsuits, when preempted by the PLCAA, have resulted in large lawyer's fees awards against the plaintiffs and their attorneys.³⁸⁷ This threat has chilled the number of litigators willing to take on PLCAA-related lawsuits.³⁸⁸ By implementing plaintiff-friendly fee-shifting language—or repealing adverse language—state legislatures can further help facilitate plaintiffs' ability to bring successful predicate exception litigation.³⁸⁹

384. See *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 432–33 (Ind. Ct. App. 2007) (finding that the allegations in the complaint likely violated gun laws that were not explicitly listed); *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 338 (N.Y. App. Div. 2012) (finding that gun laws alleged were violated despite complaint not specifying which ones).

385. Zoom Interview with Keith Ellison, *supra* note 134; Telephone Interview with Robert M. Cross, *supra* note 41.

386. See, e.g., *supra* text accompanying note 26 (discussing the *Phillips v. Lucky Gunner, LLC* case that resulted in over \$200,000 in lawyers' fees being charged against the plaintiffs).

387. *Id.*

388. Zoom Interview with Megan Walsh, *supra* note 100. Recognizing this effect on lawyers' interest in bringing PLCAA cases, Everytown for Gun Safety created the Everytown Law Fund to subsidize efforts to bring these claims. *Everytown Law Fund*, EVERYTOWN FOR GUN SAFETY, <https://everytownlaw.org/fund> [<https://perma.cc/3X4S-L9LZ>].

389. An example of fee-shifting statutory language is 42 U.S.C. § 1988. For an attorney who successfully litigates a civil rights claim under one of the preceding sections, the statute allows for attorney's fees. 42 U.S.C. § 1988(b) (“[T]he

C. FOCUS ON USING FIREARM SPECIFIC LANGUAGE

State legislators drafting a predicate statute should make sure to include firearm or gun industry-specific language. The predicate exception presents many challenges for plaintiffs. But as seen in the case law,³⁹⁰ the most litigated challenge is whether the underlying predicate statute is “applicable” to the sale or marketing of a firearm.³⁹¹ While firearm-specific language may not always be necessary,³⁹² a statute with firearm-specific language will be much more likely to survive PLCAA preemption.³⁹³ As counsel for the Sandy Hook families in *Soto* stated: “[state legislatures] could end any colorable issue by just using and specifying that [the law] applies to the gun industry or gun marketing.”³⁹⁴ Updated public nuisance statutes, like the New York law affirmed by *Nat’l Shooting Sports Found., Inc.*, have embraced this change.³⁹⁵ New York, New Jersey, and Delaware each made that exact amendment by replacing general subject language with “gun industry members.”³⁹⁶ The nuisance statute litigated in *City of New York* failed, in part, for lacking an explicit tie to firearms.³⁹⁷ In contrast, the updated nuisance statute’s use of firearm language made it undeniably “applicable” to firearms in *National Shooting Sports Foundation*.³⁹⁸ Using firearm specific language is a crucial component for any new predicate statute.

court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs . . .”).

390. See *supra* Parts II.B & II.C.

391. 15 U.S.C. § 7903(5)(A)(iii).

392. See, e.g., *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 317–18 (Conn. 2019) (finding that a statute of general applicability is still “applicable” within the predicate exception).

393. See, e.g., *Nat’l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 57–60 (N.D.N.Y. 2022) (holding that no reasonable interpretation of “applicable to” could exclude “gun industry members”).

394. Telephone Interview with Josh Koskoff, *supra* note 134.

395. See *Nat’l Shooting Sports Found., Inc.*, 604 F. Supp. 3d at 59–60.

396. See, e.g., N.Y. GEN. BUS. LAW § 898-b (McKinney 2023); see also *Nat’l Shooting Sports Found., Inc.*, 604 F. Supp. 3d at 58 (noting the change in statutory language).

397. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 399–400 (2d Cir. 2008).

398. *Nat’l Shooting Sports Found., Inc.*, 604 F. Supp. 3d at 59–60.

D. MARKETING AND UNFAIR TRADE PRACTICES ACTS PROVIDE
UNIQUE BENEFITS AND CONCERNS AS PREDICATE STATUTES

Marketing and unfair trade practice statutes provide certain advantages for plaintiffs to obtain the information they need and may provide a fertile place for predicate exception-focused amendments.³⁹⁹ However, given *Soto*'s determination that these laws are statutes of general applicability, state legislators should make these amendments firearm-specific in a similar way to sales restrictions.

Because the building of a factual record is so important to bringing civil liability suits,⁴⁰⁰ marketing and unfair trade practices acts may have unique advantages in helping litigants obtain useful information on their defendants. First, every state has a law governing deceptive trade practices and improper marketing.⁴⁰¹ States could amend these existing laws to build an applicable predicate statute, instead of constructing a new one. Another benefit is that the marketing information these statutes rely on is inherently transparent. Advertisements are displayed publicly. This allows litigants to compile this information with relative ease.⁴⁰² Further, misleading or false public statements by manufacturers may also violate these laws.⁴⁰³ Gun manufacturer sales data and procedures, on the other hand, are less likely to be public, requiring plaintiffs to find the information through a prior disclosure or former employee.⁴⁰⁴ Finally, the construction of state marketing laws also provides a benefit. Some statutes authorize pre-suit investigative processes that

399. "There's fertile ground [in marketing statutes]." Zoom Interview with Keith Ellison, *supra* note 134.

400. See *supra* Part IV.B.

401. See *Deceptive Trade Practices and False Advertising State Law Survey*, *supra* note 239 (surveying state unfair trade practices laws).

402. Telephone Interview with Josh Koskoff, *supra* note 134. Mr. Koskoff noted that the family of a Sandy Hook shooting victim came across numerous Remington advertisements online shortly after the shooting that killed their family member. *Id.*

403. Zoom Interview with Keith Ellison, *supra* note 134.

404. Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, *supra* note 134.

can allow plaintiffs to learn more about a defendant before drafting a complaint.⁴⁰⁵ Together, these marketing statute advantages may help plaintiffs get their hands on the necessary information to draft a sufficient complaint.

Utilizing marketing statutes also has significant hurdles, however. Marketing statutes are more likely to be statutes of general applicability, which courts disfavor.⁴⁰⁶ Even *Soto*, which accepted the use of the Connecticut Unfair Trade Practices Act as a predicate statute, found CUTPA to be a statute of general applicability.⁴⁰⁷ Because of this, the alteration of a marketing or unfair trade practices statute should make similar, firearm-specific language amendments to those governing sales restrictions.

Obtaining legal standing while suing under a marketing statute is another difficulty. Some state marketing and unfair trade practices statutes have been interpreted to require that the plaintiff and the business entity—in this case, the gun manufacturer—have been in a business relationship.⁴⁰⁸ This would require the victim to have entered into some agreement with the manufacturer to have the standing to sue for their injuries.⁴⁰⁹ However, many gun violence victims are third parties to the transaction, rather than the purchaser of the weapon.⁴¹⁰

Finally, proving causation using these statutes can be especially difficult. The predicate exception requires that the viola-

405. See, e.g., MASS. GEN. LAWS ch. 93A, § 6 (2023); see also Heidi Li Feldman, *Why the Latest Ruling in the Sandy Hook Shooting Litigation Matters*, HARV. L. REV. BLOG (Mar. 18, 2019), <https://papers.ssrn.com/abstract=3355075> [<https://perma.cc/PG7F-R3W5>] (discussing the use of marketing statutes in predicate exception cases after *Soto v. Bushmaster*).

406. See, e.g., *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1136 (9th Cir. 2009) (“We find it more likely that Congress had in mind only these types of statutes—statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry—rather than general tort theories that happened to have been codified by a given jurisdiction.”).

407. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 317 (Conn. 2019) (“Rather, the report indicated that state consumer protection laws, such as CUTPA, also qualified as predicate statutes, even though they are laws of general applicability . . .”).

408. Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, *supra* note 134.

409. Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, *supra* note 134.

410. Telephone Interview with Robert M. Cross, *supra* note 41; Telephone Interview with Josh Koskoff, *supra* note 134.

tion of the marketing statute be a proximate cause of the plaintiff's injury.⁴¹¹ A gun violence victim must prove that the advertising itself proximately caused the shooter to use the gun that injured them.⁴¹² That includes providing circumstantial evidence that the shooter was exposed to the advertising and that it impacted their thinking.⁴¹³ With the information constraints plaintiffs already face, this may prove difficult.

Marketing and unfair trade practices statutes make for a unique opportunity for gun violence victims looking to sue gun manufacturers. While the statutes can help facilitate the collection of crucial information, state legislators should focus on adding firearm-specific language when amending these statutes to offset the statutes' general applicability.

E. LOWER THE EVIDENTIARY BURDEN FOR PLAINTIFFS TO PROVE A PREDICATE STATUTE VIOLATION

In recognizing the substantive and evidentiary burdens plaintiffs face when bringing civil liability cases against gun manufacturers, state legislators should attempt to lower their evidentiary burden.⁴¹⁴ The predicate exception requires plaintiffs to prove three components: (1) that the law violated applies to the sale or marketing of firearms; (2) that the defendant knowingly violated the law; and (3) that the violation was a proximate cause of the injury.⁴¹⁵ State legislators should think creatively about how to help plaintiffs satisfy those three components.

The updated, predicate-exception-focused statutes passed in New York, New Jersey, and Delaware help plaintiffs meet those requirements.⁴¹⁶ Older statutes required plaintiffs to show that the gun manufacturers had constructive knowledge that the downstream effects of their sales violated the law.⁴¹⁷ These updated statutes redefine the manufacturers' duty to a clear set of

411. 15 U.S.C. § 7903(5)(A)(iii).

412. Telephone Interview with Robert M. Cross, *supra* note 41.

413. *Id.* This can be particularly difficult if the shooter is dead or significantly injured following the shooting.

414. *See supra* Part IV.B.

415. 15 U.S.C. § 7903(5)(A)(iii).

416. Telephone Interview with Robert M. Cross, *supra* note 41.

417. *Id.* Under these statutes, plaintiffs would have to prove gun manufacturer culpability under an accomplice or co-conspirator theory. This might re-

reasonable measures, requiring a showing only that the manufacturer knew that they failed to comply.⁴¹⁸ Specifically, legislatures should outline a set of procedures which, if manufacturers fail to adhere to, will constitute a knowing violation of the statute and trigger the predicate exception. Similarly, the updated predicate statutes also clearly define how to prove proximate cause.⁴¹⁹ By proactively redefining these three components in plaintiff-friendly terms, a predicate statute can help facilitate these lawsuits for information-deficient victims.

F. BE AWARE OF THE POLITICAL CHALLENGES

There are many dynamics that state legislators should weigh when drafting a predicate statute. Political challenges are an important—or, arguably, the most important—consideration. First, while every state is different, state legislators should expect significant and organized pushback by the gun industry and its supporters.⁴²⁰ Legislators may consider broadening the scope of the law, such as banning the marketing of firearms to children alongside other inappropriate content, in the hopes of defusing some of that opposition.⁴²¹ Ultimately, however, the public is tired of gun violence and wants reform.⁴²² With limited ability to pass substantive gun violence prevention reforms at the national level, state legislators can still make change at the state level

quire showing that the nature of the circumstances and frequency of transactions in a highly regulated, dangerous product put the manufacturer on notice. *See* *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

418. Telephone Interview with Robert M. Cross, *supra* note 41; *see, e.g.*, DEL. CODE ANN. tit. 10, § 3930(b) (2022) (“A firearm industry member, *by conduct unlawful in itself or unreasonable under all the circumstances*, may not knowingly or recklessly create, maintain, or contribute to a public nuisance through the sale, manufacturing, importing, or marketing of a firearm-related product.” (emphasis added)).

419. *See, e.g.*, DEL. CODE ANN. tit. 10, § 3930(e) (2022) (“A firearm industry member’s conduct constitutes a proximate cause of the public nuisance if the harm to the public is a *reasonably foreseeable* effect of the conduct, notwithstanding any intervening actions, including criminal actions by third parties.” (emphasis added)).

420. *See* Natalie Akane Newcomb, *Pushback Begins for Washington’s Latest Gun Safety Proposals*, KUOW (Jan. 12, 2023), <https://www.kuow.org/stories/pushback-begins-for-washington-s-latest-gun-safety-proposals> [<https://perma.cc/9H3K-YTXV>] (describing resistance to a proposed predicate statute law in Washington state).

421. Telephone Interview with Josh Koskoff, *supra* note 134.

422. Zoom Interview with Keith Ellison, *supra* note 134.

while facilitating progress through the courts.⁴²³ State legislators could also point to New York, New Jersey, and Delaware as proof that political support on the issue exists.⁴²⁴

Second, states should identify and repeal state-level analogs that grant civil immunity to the gun industry. Thirty-four states protect the gun industry from civil liability, some of which have statutes that may be significantly more protective than the PLCAA.⁴²⁵ Finally, state legislators should keep in mind that only the Second and Ninth Circuits have precedents governing the predicate exception.⁴²⁶ The United States Supreme Court has also chosen not to weigh in on the issue.⁴²⁷ While the Second and the Ninth Circuits have spoken on the issue, without binding precedent in their circuit or state, states may have more flexibility in their approach to the predicate exception. State legislators should be mindful of these dynamics when drafting a predicate statute.

CONCLUSION

Gun violence in the United States has reached extraordinary heights. Despite this reality, the Protection of Lawful Commerce in Arms Act has prevented many victims of gun violence from suing gun manufacturers for their injuries. Among the Act's exceptions is the predicate exception, which allows litigants to sue gun manufacturers if the manufacturer has violated a federal or state statute "applicable to the sale or marketing" of firearms.⁴²⁸ In recent years, the predicate exception jurisprudence that has tightly restricted the success of victims' lawsuits has shifted, which may present more flexibility for plaintiffs in triggering the predicate exception. Following that shift, California's newly implemented S.B. 1327 should trigger the predicate exception and survive preemption. State legislators concerned with gun violence and gun manufacturer liability may be interested

423. Zoom Interview with Megan Walsh, *supra* note 100.

424. *Id.* Legislators could also point to Colorado or Washington, where updated predicate statutes have passed their legislatures during the writing of this Note. See *supra* text accompanying note 52.

425. See *Gun Industry Immunity*, *supra* note 52; Telephone Interview with Robert M. Cross, *supra* note 41.

426. See *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1136 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008).

427. See *Remington Arms Co. v. Soto*, 140 S. Ct. 513 (2019), *cert. denied*.

428. 15 U.S.C. § 7903(5)(a)(iii).

in drafting new predicate statutes to help facilitate these lawsuits. Legislators should understand a plaintiff's process, use firearm-specific language, and lower or clarify the evidentiary burden for plaintiffs.