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### A Crack in the Floodgates: New York's Fourth Department, the PLCAA, and the Future of Gun Litigation after *Williams v. Beemiller*

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## NOTE

### **A Crack in the Floodgates: New York's Fourth Department, the PLCAA, and the Future of Gun Litigation After *Williams v. Beemiller***

JACOB S. SONNER†

*"If the plaintiff wins this case . . . it will open the floodgates of [gun] litigation. Trial lawyers will go crazy. They'll bankrupt the [gun industry]."*<sup>1</sup>

#### INTRODUCTION

On October 5, 2012, an appellate court in Rochester, New York allowed a gunshot victim's case against the manufacturers and distributors of the weapon used in his shooting to proceed past the defendants' motions to dismiss.<sup>2</sup> The decision contradicted a wealth of judicial precedent insulating the firearms industry from liability in cases where third parties criminally used guns. Further, the decision reopened a door for gun-control-conscious plaintiffs to enhance public health goals through litigation. This Note traces the history of one violent crime, a statute protecting gun manufacturers, a New York court's interpretation of both, and a social policy shift that may turn the tide in favor

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† J.D. Candidate, Class of 2014, SUNY Buffalo Law School. Thanks to Richard Schaus, Esq. and Barbara Schaus, Esq. for their advice and guidance, and to my family for their love and support.

1. JOHN GRISHAM, *THE RUNAWAY JURY* 113 (1996). Grisham's fictional account of a big tobacco lawsuit directed this warning at the tobacco industry. *Id.* In a 2003 cinematic adaptation of the novel, the firearms industry replaced big tobacco as the threatened defendant. See *RUNAWAY JURY* (Regency Enterprises, New Regency Pictures, Epsilon Motion Pictures 2003).

2. *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 333, 335-39 (App. Div. 4th Dep't 2012), *amended by* 962 N.Y.S.2d 834 (App. Div. 4th Dep't 2013).

of using the judiciary to impose heightened regulatory measures on the firearms industry.

Part I chronicles the facts behind *Williams v. Beemiller*, including an Ohio gun retailer's lax standards and a western New York criminal's illegal firearm trafficking scheme. Part II covers Congress's enactment of the Protection of Lawful Commerce in Arms Act and its effects on lawsuits against the firearm industry. Part III discusses the Fourth Department's decision in *Williams v. Beemiller* and its reasoning behind the holding. Lastly, Part IV evaluates *Williams v. Beemiller* within the context of a revived gun-control movement.

I. 2003: DANIEL WILLIAMS' FUTURE IS TRAGICALLY LINKED TO BEEMILLER, MKS SUPPLY, CHARLES BROWN, JAMES NIGEL BOSTIC, AND CORNELL CALDWELL

In August 2003, sixteen-year-old Daniel "Bud" Williams was playing basketball outside his Buffalo, New York home when eighteen-year-old Cornell Caldwell misidentified the teen as a rival gang member.<sup>3</sup> Caldwell aimed and fired his Hi-Point 9mm semi-automatic handgun<sup>4</sup> at Williams, piercing his target's abdomen with a bullet.<sup>5</sup> Media and law

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3. John Caher, *Panel Revives Suit Against Gun Maker and Distributor*, N.Y. L.J., Oct. 12, 2012, at 1; Susan Schulman, *Court Rules Victim Can Sue Gun Industry*, BUFFALO NEWS, Oct. 9, 2012, at A1.

4. Frequently used in violent crimes and possessing little collector value, Hi-Point 9mm semi-automatic handguns belong to a group of firearms nicknamed "Saturday Night Specials." Brian J. Siebel, *Gun Industry Immunity: Why the Gun Industry's "Dirty Little Secret" Does Not Deserve Congressional Protection*, 73 UMKC L. REV. 911, 919 (2005). In 2000, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) surveyed several cities in North Carolina and found the Hi-Point 9mm semi-automatic pistol was one of the top ten traced firearms in gun crimes. See U.S. DEP'T OF TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, CRIME GUN TRACE REPORTS (2000) GREENSBORO/ HIGH POINT/ WINSTON-SALEM, N.C. 6 (July 2002), <http://www.atf.gov/files/publications/download/ycgii/2000/cityreports/greensboro.nc.pdf>. The gun accounted for nearly 33% of gun crimes committed by North Carolina juveniles under age seventeen, more than any other firearm. *Id.*

5. See Susan Schulman, Lou Michel & Dan Herbeck, *The Damage Done: Two Buffalo Lives Intertwine as a Gun Trafficker's Scheme Shoots Down a Young Athlete's Dream*, BUFFALO NEWS, June 12, 2005, at A1 (in 2005, the

enforcement investigations eventually discovered that Caldwell's pistol arrived on the Buffalo streets courtesy of an infamous gun trafficking scheme responsible for supplying hundreds of illegal weapons used in many of the city's gun crimes.<sup>6</sup>

Caldwell's 9mm was manufactured by Hi-Point (Beemiller), a.k.a. Beemiller, Inc., a federally licensed firearms manufacturer incorporated in Ohio.<sup>7</sup> Beemiller sold the semi-automatic handgun to MKS Supply, Inc. (MKS), an Ohio federally licensed firearm distributor.<sup>8</sup> Subsequently, MKS sold the weapon to Charles Brown, a federal gun licensee.<sup>9</sup> But the Beemiller-MKS-Brown chain was a series of unusually close transactions. In fact, MKS was Beemiller's sole Hi-Point distributor,<sup>10</sup> and Charles Brown was MKS's president.<sup>11</sup> Williams alleged Brown bought Hi-Point firearms from his own company, MKS, to retail at gun shows.<sup>12</sup> Williams also contended Brown was in daily

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Buffalo News published *The Damage Done* series, investigating James Nigel Bostic and proliferation of illegal weapons onto western New York streets).

6. *See id.*

7. *Williams*, 952 N.Y.S.2d at 336. Beemiller/Hi-Point manufacture and market "tough, reliable, [and] affordable" carbines and handguns. *See* HI-POINT FIREARMS, <http://www.hi-pointfirearms.com/index.html> (last visited July 13, 2013). Today, their products retail with local dealers in nearly every state. *See Dealer Locator*, HI-POINT FIREARMS, [http://www.hi-pointfirearms.com/dealer\\_locator/dealer\\_locator.html](http://www.hi-pointfirearms.com/dealer_locator/dealer_locator.html) (last visited July 13, 2013).

8. *Williams*, 952 N.Y.S.2d at 336. Pledging a painless purchasing and servicing experience, MKS distributes Hi-Point and Chiappa firearms and Tuff1 grips. MKS SUPPLY, <http://www.mkssupply.com/> (last visited July 13, 2013).

9. *Williams*, 952 N.Y.S.2d at 336. Charles Brown is currently president of MKS Supply. *See Contact*, MKS SUPPLY, [http://www.mkssupply.com/contact\\_MKS\\_Supply/contact\\_MKS\\_Supply.html](http://www.mkssupply.com/contact_MKS_Supply/contact_MKS_Supply.html) (last visited July 13, 2013).

10. *Williams*, 952 N.Y.S.2d at 339; Brief for Plaintiffs-Appellants at 3, *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333 (App. Div. 4th Dep't 2012) (No. CA 11-02092).

11. *See* Brief for Plaintiffs-Appellants, *supra* note 10, at 3.

12. *Id.*

contact with Beemiller management as both a distributor and retailer.<sup>13</sup>

Then, in October 2000, Brown sold a Beemiller Hi-Point 9mm pistol and eighty-six other handguns to Kimberly Upshaw and James Nigel Bostic at an Ohio gun show.<sup>14</sup> For years, Bostic ran one of the largest gun-trafficking operations in western New York, providing approximately 250 inexpensive firearms to criminals in the greater Buffalo area, Rochester, and New York City.<sup>15</sup> Beemiller's Hi-Point 9mm semi-automatic was his most frequent purchase.<sup>16</sup> Ultimately, Beemiller and MKS supplied 181 firearms to Bostic.<sup>17</sup>

Capitalizing on Ohio's less restrictive gun laws<sup>18</sup> and the anonymity of gun show purchases, Bostic and three women bought firearms under false assertions Bostic was planning on starting his own gun store.<sup>19</sup> Though Bostic purchased a handful of firearms in his own name, most of the weapons trafficked to western New York were purchased in a series

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13. *Id.*

14. *Williams*, 952 N.Y.S.2d at 339. Gun shows are the target of gun control advocates' ire because many shows allow private gun sales without buyer background checks. See Dan Herbeck & Lou Michel, *The Gun-Show Loophole: Private Dealers Require No Background Check*, BUFFALO NEWS, June 14, 2005, at A5.

15. See Schulman, Michel & Herbeck, *supra* note 5.

16. See *id.* Bostic purchased Hi-Point handguns for approximately \$89 each. They retailed on western New York streets for nearly \$300. See *id.*

17. Brief for Plaintiffs-Appellants, *supra* note 10, at 6-7.

18. See Schulman, Michel & Herbeck, *supra* note 5. In 2011, the Brady Campaign to Prevent Gun Violence released a scorecard quantifying gun law strength on a state-to-state basis. Ohio ranked among the least restrictive, while New York was among the most. Ohio's ranking was due, in part, to its lacking regulations and background checks for gun show purchases (an area New York scored high in). See *2011 Brady Campaign State Scorecard*, BRADYCAMPAIGN.ORG, <http://bradycampaign.org/sites/default/files/2011%20Final%20state%20scoresA3-2%20Sheet1.pdf>.

19. See Schulman, *supra* note 3; Schulman, Michel & Herbeck, *supra* note 5.

of illegal “straw purchases” by his three cohorts.<sup>20</sup> The guns were linked to several crimes in Buffalo before Caldwell used one of Bostic’s Hi-Point 9mms to shoot Williams.<sup>21</sup> For their crimes, Caldwell and Bostic were sentenced to six- and seven-year prison terms respectively.<sup>22</sup> Hoping to recover for his gunshot injuries, Daniel Williams sued Brown, Beemiller, and MKS.<sup>23</sup>

## II. 2003: THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT SAVES A GUN INDUSTRY UNDER FIRE

In 2003, the same year Daniel Williams was shot, the firearms industry was under attack. The mass shooting at Columbine High School in 1999 had enflamed the passions of gun-control advocates nationwide,<sup>24</sup> and firearm manufacturers and distributors were taking the worst of their lumps in the courtroom.<sup>25</sup>

The wave of lawsuits filed against firearm manufacturers and distributors mirrored the extensive anti-tobacco litigation that put cigarette companies on the defensive.<sup>26</sup> Though tort lawsuits against tobacco companies began more than fifty years ago, they gained a full head of steam after plaintiff victories in the early 2000s.<sup>27</sup> Anti-gun

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20. See *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 336 (App. Div. 4th Dep’t 2012), *amended by* 962 N.Y.S.2d 834 (App. Div. 4th Dep’t 2013); Schulman, Michel & Herbeck, *supra* note 5.

21. See *Gun by Gun: Five Years of Damage Done by Weapons James Nigel Bostic Bought from Ohio Gun Dealers*, BUFFALO NEWS, June 12, 2005, at A8 [hereinafter *Gun by Gun*]; Schulman, Michel & Herbeck, *supra* note 5.

22. See *Gun by Gun*, *supra* note 21; Schulman, Michel & Herbeck, *supra* note 5.

23. See *Williams*, 952 N.Y.S.2d at 336.

24. See Allen Rostron, *Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46 SANTA CLARA L. REV. 481, 481 (2006) (reviewing *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Timothy D. Lytton ed., 2005)).

25. See *id.*

26. See Stephen D. Sugarman, *Comparing Tobacco and Gun Litigation*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 196, 215, 220-21 (Timothy D. Lytton ed., 2005).

27. See *id.*

lawsuits joined anti-tobacco litigation in a growing trend: using the courtroom to advance public health goals like combating gun violence and smoking.<sup>28</sup>

Many of the goals associated with the anti-gun litigation matched the aims of the tobacco lawsuits.<sup>29</sup> Extreme gun-control and anti-tobacco advocates hoped extensive litigation might bankrupt manufacturers.<sup>30</sup> More realistic proponents aimed at forcing gun and tobacco companies to make their products safer, reveal past malevolent conduct, and assume the costs of injuries their products caused.<sup>31</sup>

But while tobacco lawsuits were often class action ventures,<sup>32</sup> nearly all firearm lawsuits were brought by either: (1) shooting victims seeking compensation for their injuries; or (2) state and local governments trying to reduce costs incurred fighting gun crimes.<sup>33</sup> Gunshot victims and their families sued firearm manufacturers directly under negligence, public nuisance, and strict liability theories.<sup>34</sup> Meanwhile, more than twenty-five municipalities—including cities like Boston, Chicago, Detroit, Los Angeles, New Orleans, Philadelphia, New York, San Francisco, St. Louis, and Washington D.C.—filed similar lawsuits.<sup>35</sup>

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28. *See id.* at 198-02, 205.

29. *See id.* at 205-14.

30. *See id.* at 205-07.

31. *See id.* at 207, 209-10, 212, 214.

32. *See id.* at 216-17.

33. *See Rostron, supra* note 24, at 481-82.

34. *See, e.g., Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 388 (E.D.N.Y. 2004); *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1044 (C.D. Cal. 2003), *aff'd in part, rev'd in part*, 349 F.3d 1191 (9th Cir. 2003); *Smith ex rel. Smith v. Bryco Arms*, 33 P.3d 638, 641 (N.M. Ct. App. 2001).

35. *See H.R. REP. NO. 109-124*, at 11-12 (2005); *see, e.g., City of New York v. Beretta U.S.A., Corp.*, 401 F. Supp. 2d 244, 251 (E.D.N.Y. 2005), *aff'd in part, rev'd in part*, 524 F.3d 384 (2d Cir. 2008); *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 886 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002); *District of Columbia v. Beretta U.S.A., Corp.*, No. Civ. A. 0428-00, 2002 WL 31811717, at \*1, \*3, \*5-6 (D.C. Super. Dec. 16, 2002), *aff'd in part, rev'd in part*, 872 A.2d 633 (D.C. 2005).

In both circumstances, plaintiffs attempted to hold firearm manufacturers, distributors, and retailers liable for negligent behavior despite intervening actions by third-party criminals.<sup>36</sup>

The small firearms industry could not withstand the crippling attack. As early as 2000, insurance companies began dropping gun manufacturers' coverage.<sup>37</sup> A handful of firearm companies were forced out of business.<sup>38</sup> Then, in 2003, a measure of legislative relief offered the firearm industry a glimmer of hope. Gun companies heartily backed the first version of the Protection of Lawful Commerce in Arms Act (PLCAA), a statute aimed at protecting gun manufacturers and distributors from frivolous tort litigation.<sup>39</sup> But Democrats stalled the Act in the Senate, tacking on assault weapons bans, beefed-up background checks, and mandatory trigger locks.<sup>40</sup>

Two years after the first PLCAA failed, momentum swung in the gun industry's favor. Thirty-three states had already taken steps to preclude baseless lawsuits from being filed against gun manufacturers and distributors,<sup>41</sup> but a handful of lawsuits lingered on court dockets, and the industry's legal bills were adding up. By 2005, firearms companies had sunk more than \$200 million into litigation against gunshot victims and municipalities.<sup>42</sup> For the U.S.

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36. See, e.g., *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1195 (9th Cir. 2003) (plaintiffs attempting to hold handgun manufacturers and distributors liable for a gunman's shooting spree in a Jewish Community Center culminating in a postal worker's murder); *City of New York v. Beretta U.S.A., Corp.*, 401 F. Supp. 2d at 257-58 (city requesting various forms of injunctive relief against firearm companies whose guns were used in crimes).

37. Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000, at A10.

38. See Bill Sammon, *Gun Makers Halt Settlement Talks with Cities: Blame White House's 'Politically Motivated' Intervention*, WASH. TIMES, Jan. 20, 2000, at A1; Walsh, *supra* note 37.

39. See Brian DeBose, *Bill Seeks to Protect Firearms Industry from Suits*, WASH. TIMES, Feb. 20, 2005, at A03.

40. See *id.*

41. See *id.*

42. See Op-Ed., *Gun Liability Control: The NRA Meets the Trial Bar at High Noon*, WALL ST. J., July 27, 2005, at A12.



firearms industry, whose total profit in 1999 was \$200 million, the legal bills were unmanageable.<sup>43</sup> So, prodded by gun lobbies like the National Rifle Association (NRA), the second PLCAA cleared the Senate in 2005.<sup>44</sup> Its expressed purpose: to insulate firearm manufacturers, marketers, distributors, and importers from liability when “the harm [is] caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.”<sup>45</sup>

The PLCAA provides grounds for immediately dismissing “qualified civil liability actions” in Federal and State courts.<sup>46</sup> Qualified civil liability actions are lawsuits brought “by any person against a manufacturer or seller of a [firearm], or a trade association, for damages . . . or other relief, resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party.”<sup>47</sup>

But the PLCAA exempts six different qualified civil liability actions from automatic dismissal.<sup>48</sup> The first exemption permits litigation against gun transferors who knowingly provide a firearm for some criminal activity which directly injures the plaintiff.<sup>49</sup> The second exemption allows lawsuits against a gun seller for negligent entrustment or negligence per se.<sup>50</sup> The first two exceptions are limited to the immediate firearm seller or transferor. But the third PLCAA exception provides plaintiffs an

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43. See H. Sterling Burnett, *Firearms Cease-fire?*, WASH. TIMES, Mar. 21, 2003, at A21.

44. See Adam Cohen, *Why Is Congress Protecting the Gun Industry?*, TIME (Dec. 24, 2012), <http://ideas.time.com/2012/12/24/why-is-congress-protecting-the-gun-industry>.

45. 15 U.S.C. § 7901(a)(5) (2006).

46. 15 U.S.C. § 7902(a) (2006). It also mandated dismissal of all pending “qualified civil liability actions.” *Id.* § 7902(b).

47. 15 U.S.C. § 7903(5)(A) (2006).

48. See *id.* § 7903(5)(A)(i)-(vi).

49. See *id.* § 7903(5)(A)(i). Gun transferors violate federal firearm trafficking laws when they convey a firearm knowing it will be used in a crime of violence. 18 U.S.C. § 924(h) (2006).

50. 15 U.S.C. § 7903(5)(A)(ii).

opportunity to sue deep pockets—gun manufacturers, distributors, and sellers.<sup>51</sup>

Dubbed “the predicate exception, the third exemption permits claims against gun manufacturers, distributors, and sellers who “knowingly violate[] a State or Federal statute applicable to the sale or marketing of the [firearm].”<sup>52</sup> It also allows claims against manufacturers and distributors who aid, abet, or conspire to complete illegal firearm or ammunition sales.<sup>53</sup> For plaintiffs to recover, the manufacturer or seller’s violation must proximately cause the harm for which relief is sought.<sup>54</sup> Clarifying the exception, the PLCAA offers model “predicate statutes.”<sup>55</sup> Despite the example statutes, courts became mired in a difficult analysis determining whether the defendants’ alleged transgressions violated a statute “applicable” to the sale or marketing of a firearm.<sup>56</sup>

Municipalities and private plaintiffs tried to invoke the predicate exception by alleging the gun manufacturers and distributors had violated state and local nuisance laws.<sup>57</sup>

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51. *See id.* § 7903(5)(A)(iii). The fourth, fifth, and sixth exceptions permit actions for breach of contract or warranty, faulty design or manufacture directly causing plaintiff’s injuries, and certain lawsuits brought by the Attorney General. *Id.* § 7903(5)(A)(iv)-(vi).

52. *Id.* § 7903(5)(A)(iii); *see also* *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1285-86 (C.D. Cal. 2006), *aff’d*, 565 F.3d 1126 (9th Cir. 2009).

53. 15 U.S.C. § 7903(5)(A)(iii)(I)-(II).

54. *Id.* § 7903(5)(A)(iii).

55. They include the defendant’s aiding or abetting a fraudulent gun transfer or purchase and conveying or selling a gun to a person prohibited from owning a firearm under 18 U.S.C. § 922. *See* 15 U.S.C. § 7903(5)(A)(iii)(I)-(II).

56. *See, e.g., Ileto v. Glock, Inc.*, 565 F.3d 1126, 1133-35 (9th Cir. 2009); *City of New York v. Beretta U.S.A., Corp.*, 524 F.3d 384, 399-04 (2d Cir. 2008); (“The core of the question is what Congress meant by the term ‘applicable.’”); *Smith & Wesson Corp. v. City of Gary ex rel. Clay*, 875 N.E.2d 422, 430-33 (Ind. Ct. App. 2007).

57. *See* Russ Sorensen, *The Ninth Circuit Forecloses a Bullet Sized Hole in the PLCAA in Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009), 35 S. ILL. U. L.J. 573, 577 (2011); *see, e.g., Ileto*, 565 F.3d at 1133; *City of New York v. Beretta U.S.A., Corp.*, 524 F.3d at 389; *District of Columbia v. Beretta U.S.A., Corp.*, 940 A.2d 163, 167 (D.C. 2008); *Smith & Wesson Corp. v. City of Gary ex rel. Clay*, 875 N.E.2d at 424.

But most courts refused to label nuisance laws “predicate statutes” because the nuisance laws were not adequately *applicable* to the sale or marketing of firearms.<sup>58</sup> In one notable exception, Indiana’s Court of Appeals broadly interpreted the “applicable” portion of the predicate exception and allowed the City of Gary’s lawsuit to continue despite Smith and Wesson’s motion to dismiss.<sup>59</sup> Though the *City of Gary* case represents a different interpretation of the predicate exception, it—and every other court dealing with the predicate exception—failed to articulate a concrete standard for what laws might be predicate statutes.<sup>60</sup>

The Ninth Circuit’s attempt at defining “predicate statute” was cursory, precluding only general tort theories like public nuisance from the predicate exception.<sup>61</sup> The Second Circuit’s effort didn’t make the predicate exception waters any clearer. After declining to find New York’s public nuisance statute “applicable” to gun marketing or sale, the Second Circuit suggested the predicate exception required violation of “statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms; [or (c)] . . . that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.”<sup>62</sup> But in a dissenting opinion, Judge Katzmann expressed concern that the decision failed to define predicate statutes for future courts.<sup>63</sup>

Without guidance, the only clear examples of predicate statutes are those provided by the PLCAA.<sup>64</sup> The statute

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58. *Ileto*, 565 F.3d at 1137-38; *City of New York v. Beretta U.S.A., Corp.*, 524 F.3d at 404.

59. See *Smith & Wesson Corp. v. City of Gary ex rel. Clay*, 875 N.E.2d at 434-35. Public nuisance claims brought by private individuals receive different—and often more favorable—treatment than those brought by government entities. See Ingrid M. Evans & Allen Rostron, *Litigating Against the Firearm Industry*, 84 AM. JUR. *Trials* 109 § 21 (2013).

60. See Sorensen, *supra* note 57, at 592-93.

61. See *Ileto*, 565 F.3d at 1138; Sorensen, *supra* note 57, at 592.

62. *City of New York v. Beretta U.S.A., Corp.*, 524 F.3d at 404.

63. See *id.* at 406 (Katzmann, J., dissenting).

64. 15 U.S.C. § 7903(5)(A)(iii)(I)-(II) (2006).

allows qualified civil liability actions based on violations of state or Federal record-keeping laws.<sup>65</sup> It also permits claims alleging firearms manufacturers or distributors directly aided, abetted, or conspired to falsify information relating to gun sales.<sup>66</sup> But the PLCAA cites only one specific Federal gun law as a predicate statute: 18 U.S.C. § 922, subsections (g) and (n).<sup>67</sup> Subsection (g) makes it unlawful for firearm distributors to knowingly sell guns to, among others, fugitives, drug users, aliens, convicts released after one year or more in jail, and persons adjudicated mentally defective.<sup>68</sup> Similarly, subsection (n) makes it unlawful for any person indicted for a crime punishable by one or more years in prison to receive or convey a firearm in interstate or foreign commerce.<sup>69</sup>

Without a clear definition for “predicate statutes,” the predicate exception remains a difficult requirement for plaintiffs to satisfy. And the PLCAA became a nearly-impervious shield barring most qualified civil liability actions against gun manufacturers, distributors, and sellers.

### III. 2012: NEW YORK’S FOURTH DEPARTMENT IS AMONG THE FIRST TO ALLOW A QUALIFIED CIVIL LIABILITY ACTION TO SURVIVE THE PLCAA

But on October 5, 2012, the Supreme Court of New York Appellate Division, Fourth Department became the first post-PLCAA court to sustain a qualified civil liability action since the City of Gary, Indiana’s lawsuit against Smith and

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65. *Id.* § 7903(5)(A)(iii)(I); *see, e.g.*, 18 U.S.C. § 923(g)(1)(A) (2006) (requiring records to be kept for importation, production, shipment, receipt, or sale of guns during a period decided by the Attorney General); 27 C.F.R. § 478.124(a) (2012) (demanding nearly all changes in a firearm’s disposition be documented on the weapon’s transaction record).

66. 15 U.S.C. § 7903(5)(A)(iii)(I).

67. *Id.* § 7903(5)(A)(iii)(II).

68. 18 U.S.C. § 922(g) (2006).

69. *Id.* § 922(n).

Wesson.<sup>70</sup> Daniel Williams' complaint against Beemiller and MKS was dismissed at the trial court level after the firearms manufacturer and distributor moved to dismiss the claim under the PLCAA.<sup>71</sup> But on appeal, Williams' attorneys<sup>72</sup> argued the case fell within the PLCAA's predicate exception and was not automatically dismissible.<sup>73</sup>

They contended Beemiller and MKS knowingly marketed and sold firearms to criminals.<sup>74</sup> Williams also claimed the defendants knowingly violated statutes prohibiting straw purchases and sales to convicted felons.<sup>75</sup> The plaintiff gave several reasons why Beemiller and MKS knew or should have known their sales to Bostic were illegal: (1) bulk handgun purchases are common practice for illegal gun traffickers; (2) repeat handgun purchases are evidence an illegal gun trafficker is restocking his inventory; (3) large cash firearm sales indicate illegal trafficking; (4) "Saturday Night Specials" like Hi-Point 9mm handguns are criminal favorites; (5) Hi-Point 9mms have no collector value; and (6) Bostic and Upshaw's actions were obviously illegal straw purchases.<sup>76</sup>

The Fourth Department agreed with Williams and overturned the trial court's dismissal.<sup>77</sup> Though the court recognized Williams' case fit the very definition of a qualified civil liability action, it decided the lawsuit fell within the PLCAA's predicate exception.<sup>78</sup> The Fourth

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70. See *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 339 (App. Div. 4th Dep't 2012), *amended by* 962 N.Y.S.2d 835 (App. Div. 4th Dep't 2013); Caher, *supra* note 3; Schulman, *supra* note 3.

71. *Williams*, 952 N.Y.S.2d at 336-37.

72. Daniel Williams was represented at the Fourth Department by Connors & Vilardo, LLP, Buffalo, NY and the Brady Center to Prevent Gun Violence, Washington, D.C. *Id.* at 335.

73. *Id.* at 337.

74. See Brief for Plaintiffs-Appellants, *supra* note 10, at 5-6.

75. See *id.* at 7-8.

76. See *id.*

77. *Williams*, 952 N.Y.S.2d at 337. The Honorable Erin M. Peradotto penned the Fourth Department's decision. *Id.* at 336.

78. *Id.*

Department's theory on the PLCAA and accomplice liability, holding Beemiller and MKS liable for the criminal actions of a third-party retailer and third-party buyer, may provide future plaintiffs a better crack at firearm manufacturers and distributors.<sup>79</sup>

A. *The Fourth Department and the Predicate Exception*

Before analyzing Williams' case in light of the PLCAA, the Fourth Department reflected on the traditional standard for motions to dismiss plaintiffs' claims.<sup>80</sup> Courts "accept as true the facts as alleged in the complaint and . . . accord plaintiffs the benefit of every possible favorable inference."<sup>81</sup> This standard would form the basis for the Fourth Department's decision to allow Williams' case to continue past dismissal.<sup>82</sup> Further, it allowed the appellate court to identify statutory violations in Williams' complaint though the plaintiff's complaint did not specify any.<sup>83</sup>

Without detailing specific laws, Williams' complaint alleged Beemiller, MKS, and Brown "violated federal, state, and local statutes, regulations, and ordinances by engaging in illegal gun trafficking and illegally selling the Hi-Point handgun."<sup>84</sup> The defendants argued Williams' failure to identify specific statutes precluded a finding under the predicate exception.<sup>85</sup> But the court decided it would not require Williams to identify specific predicate statutes violated by the defendants.<sup>86</sup>

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79. *See id.* at 339.

80. *See id.* at 338.

81. *Id.*

82. *See id.*

83. *See id.*

84. *Id.*

85. *See id.* New York General Municipal Law principles demand specific pleadings. *See* N.Y. GEN. MUNIC. LAW § 205-e (McKinney 2007).

86. *See Williams*, 952 N.Y.S.2d at 338. The defendants primarily relied on General Municipal Law principals demanding specific pleading requirements. *See, e.g.*, MUNIC. § 205-e. But cases outside those arising under General Municipal Law do not typically require such specificity. *See Williams*, 952 N.Y.S.2d at 338. In their brief to the Fourth Department, the plaintiffs

Instead, the Fourth Department read several statutory violations into Williams' complaint, each a component of the Gun Control Act of 1968.<sup>87</sup> In 1968, Congress made a concerted effort to regulate the passage of firearms through interstate commerce.<sup>88</sup> Today, many of the Act's sections regulate the purchase and transportation process.<sup>89</sup> Each violation recognized by the court was directly committed by Brown, including: (1) failing to adequately record identifying information from gun purchasers; (2) transferring firearms on the buyer's fraudulent representations despite the seller knowing or having reason to believe their falsehood; and (3) knowingly or negligently conveying a firearm to a convicted felon.<sup>90</sup>

Despite being the first court to utilize the predicate exception against a firearm manufacturer or distributor in five years, the Fourth Department added little to clarify the vague standard.<sup>91</sup> The court found Williams sufficiently alleged violations satisfying the predicate exception.<sup>92</sup>

But the court's analysis of whether the specific provisions violated were predicate statutes was brief. Each firearm statute implicated by the Fourth Department was part of the 1968 Gun Control Act.<sup>93</sup> And the only statutes deemed predicate statutes by the PLCAA are sections of the 1968 Gun Control Act.<sup>94</sup> Thus, an in-depth analysis was not necessary to decide whether portions of the same Act were

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identified federal and state statutes allegedly violated by the defendants. See Brief for Plaintiffs-Appellants, *supra* note 10, at 17-18.

87. See *Williams*, 952 N.Y.S.2d at 338-39.

88. The 1968 Act's passage was driven by high-profile assassination victims like John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr. See William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 80-83 (1999).

89. See generally 18 U.S.C. §§ 921-924, 926, 926A (2006).

90. See *Williams*, 952 N.Y.S.2d at 338-39. The specific statutes violated were 18 U.S.C. §§ 923(g), 922(b), 922(m), and 922(d)(1).

91. See *id.* at 337-39.

92. See *id.*

93. See 18 U.S.C. §§ 922-923; *Williams*, 952 N.Y.S.2d at 338-39.

94. See 15 U.S.C. § 7903(5)(A)(iii)(II) (2006).

predicate statutes.<sup>95</sup> Instead, the court safely assumed each federal gun law was applicable to the sale and/or marketing of firearms.<sup>96</sup>

However, the Fourth Department wasn't content in deciding only the federal gun laws were predicate statutes. The court amended its decision on February 1, 2013, and tacked on one sentence allowing Williams' public nuisance claim to survive the PLCAA.<sup>97</sup> Citing *Johnson v. Bryco Arms* and *City of New York v. A-1 Jewelry and Pawn, Inc.*, the Fourth Department concluded Williams had adequately brought a public nuisance claim against Beemiller and MKS.<sup>98</sup> But the cursory rationale for allowing Williams' public nuisance claim rests on shaky authority. The decisions cited by the Fourth Department to support public nuisance statutes being "applicable" to firearm sales or marketing are not entirely convincing since: (1) *Johnson v. Bryco Arms* was decided in 2004,<sup>99</sup> before the PLCAA's enactment;<sup>100</sup> and (2) *City of New York v. A-1 Jewelry and Pawn, Inc.* was a 2007 district court case<sup>101</sup> decided before the Second Circuit issued its 2008 opinion barring public nuisance laws from being predicate statutes.<sup>102</sup>

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95. See *Williams*, 952 N.Y.S.2d at 338-39. *But see* *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132-38 (9th Cir. 2009); *City of New York v. Beretta U.S.A., Corp.*, 524 F.3d 384, 399-04 (2d Cir. 2008); *District of Columbia v. Beretta U.S.A., Corp.*, 940 A.2d 163, 169-72 (D.C. 2008); *Smith & Wesson Corp. v. City of Gary ex rel. Clay*, 875 N.E.2d 422, 431-35 (Ind. Ct. App. 2007).

96. See *Williams*, 952 N.Y.S.2d at 338-39.

97. See *Williams v. Beemiller, Inc.* 962 N.Y.S.2d 834, 836 (N.Y. App. Div. 4th Dep't 2013).

98. See *id.*

99. *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 383 (E.D.N.Y. 2004).

100. 15 U.S.C. § 7902 (2006).

101. *City of New York v. A-1 Jewelry Pawn, Inc.*, 247 F.R.D. 296, 296 (E.D.N.Y. 2007).

102. *City of New York v. Beretta U.S.A., Corp.*, 524 F.3d 384, 399-400 (2d Cir 2008). In fact, a judicial order was issued in the *A-1 Jewelry & Pawn* case after the Second Circuit's decision. The new order acknowledged that general state laws (like public nuisance) were not predicate statutes. See *City of New York v. A-1 Jewelry & Pawn, Inc.*, 252 F.R.D. 130, 132 (E.D.N.Y. 2008).



Though the Fourth Department's decision divorced itself from generally accepted principles of public nuisance and the predicate exception, its decision in *Williams* does little to illuminate the current predicate exception standard. The elusive definition remains—a law applicable to gun sales or marketing whose violation proximately causes harm for which relief is sought—without any clarification of “applicable.”<sup>103</sup> The Second Circuit hinted at a less-strict approach, but no clear standard has emerged to determine whether a law or regulation *indirectly* concerning the gun industry may serve as a predicate statute.<sup>104</sup>

### B. *The Fourth Department, the PLCAA, and Accomplice Liability*

The Fourth Department had little trouble finding Charles Brown's statutory violations triggered the predicate exception. And since Brown was, in effect, MKS, determining the distributor's complicity in the violation was not a stretch.<sup>105</sup> But Beemiller's role in the gun-selling scheme was more attenuated.<sup>106</sup> Still, the Fourth Department decided *Williams* had sufficiently established both Beemiller and MKS's complicity in the violations.<sup>107</sup>

Wielding accomplice liability to capture a gun manufacture in litigation is nearly an unprecedented leap. Only one line of cases ties manufacturers and distributors

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103. See 15 U.S.C. § 7903(5)(A)(iii) (2006).

104. See *City of New York*, 524 F.3d at 404 (acknowledging a law indirectly regulating the gun industry but directly implicating firearm sales or marketing might be a predicate statute).

105. See Brief for Plaintiffs-Appellants, *supra* note 10, at 3.

106. See *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 339 (App. Div. 4th Dep't 2012), *amended by* 962 N.Y.S.2d 834 (N.Y. App. Div. 4th Dep't 2013).

107. See *id.* Gun control advocates argue firearm manufacturers perversely promote illegal gun sales and trafficking by ignoring problems like corrupt dealers, straw purchases, high-volume sales, gun shows without background checks, superficial security measures, and unsafe weapon designs. See LEGAL ACTION PROJECT, BRADY CTR. TO PREVENT GUN VIOLENCE, SMOKING GUNS: EXPOSING THE GUN INDUSTRY'S COMPLICITY IN THE ILLEGAL GUN MARKET 2-16 (2003).

to firearm retailers under an accomplice liability theory.<sup>108</sup> In *City of Gary ex rel. King v. Smith & Wesson* (some stages of the litigation proceeding as *Smith & Wesson v. City of Gary ex rel. Clay*), the Supreme Court of Indiana allowed the municipality's case to continue past a motion for dismissal after it found gun manufacturers and distributors—including Beemiller, who was a named defendant in the Indiana case—were accomplices to the violation, though they had not directly violated a firearm statute.<sup>109</sup>

But the *City of Gary* line of cases is an outlier on the spectrum of firearm lawsuits, and it directly opposes Ninth Circuit and Second Circuit decisions on whether nuisance laws comport with the predicate exception.<sup>110</sup> For five years, *City of Gary* was the only case employing accomplice liability in a PLCAA motion for dismissal.<sup>111</sup> Tellingly, the Fourth Department cited the *City of Gary* case for general PLCAA principles—not for the meat of its predicate exception or accomplice liability analyses.<sup>112</sup>

Unaided by significant case law, the Fourth Department accepted Williams' allegations that Beemiller and MKS were accomplices to Brown's statutory violations.<sup>113</sup> The court only cited one Sixth Circuit decision to support its theory on accomplice liability.<sup>114</sup> The decision, *United States v. Carney*, was a criminal case decided in 2004, one year before the PLCAA's enactment.<sup>115</sup> The *Carney* court found two firearm dealers had aided and

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108. See *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1235 (Ind. 2003).

109. See *id.*; see also *Smith & Wesson Corp. v. City of Gary ex rel. Clay*, 875 N.E.2d 422, 423-24 (Ind. Ct. App. 2007).

110. See Sorensen, *supra* note 57, at 583, 593.

111. *Williams v. Beemiller* became the second in October, 2012. See *Williams*, 952 N.Y.S.2d at 339.

112. See *id.* at 337-39.

113. *Id.* at 339.

114. See *id.* (citing *United States v. Carney*, 387 F.3d 436, 446-47 (6th Cir. 2004)).

115. See 15 U.S.C. § 7902 (2006); *Carney*, 387 F.3d at 441-42.

abetted fraudulent and illegal gun purchases, making them accomplices to criminal actions.<sup>116</sup>

The distinctions between Beemiller and MKS, and the *Carney* defendants are striking.<sup>117</sup> First, the defendants in *Carney* faced criminal charges.<sup>118</sup> Beemiller and MKS are in danger of being found civilly liable for Daniel Williams' injuries.<sup>119</sup> Second, as dealers, the *Carney* defendants were directly involved in statutory violations committed by third parties.<sup>120</sup> In the *Williams* case, Brown—a federally licensed gun dealer—played the same role.<sup>121</sup> But Brown's company, MKS, was one step removed from Bostic and the illegal purchases.<sup>122</sup> Similarly, Beemiller, the manufacturer, was even further removed from Brown's statutory violations.<sup>123</sup> Williams argued, and the court agreed, that Beemiller and MKS made themselves accomplices to Brown's statutory violations when they learned 13,000 of their guns were used to commit crimes.<sup>124</sup> Other persuasive factors included Brown's employment with MKS and the distributor's position as "sole marketer and distributor of Hi-Point firearms."<sup>125</sup> But beyond learning their guns were frequently used in crimes, the only link establishing Beemiller's complicity in the statutory violations was daily phone calls between Brown and the manufacturer.<sup>126</sup>

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116. *See Carney*, 387 F.3d at 441, 446.

117. Evidencing the unprecedented nature of the Fourth Department's decision, the court chose a criminal case decided before the PLCAA's enactment to aid its decision in a civil case concerning a motion to dismiss under the PLCAA.

118. *Carney*, 387 F.3d at 441.

119. *Williams*, 952 N.Y.S.2d at 336.

120. *See Carney*, 387 F.3d at 442 (detailing the defendant's repeated sales to a convicted felon through straw purchasers).

121. *See Williams*, 952 N.Y.S.2d at 336 (chronicling Bostic and his cohorts' straw purchases from Brown at Ohio gun shows).

122. *See id.*

123. *See id.*

124. *Id.* at 339.

125. *Id.*

126. *See* Brief for Plaintiffs-Appellants, *supra* note 10, at 3, 5.

The Fourth Department's accomplice liability reaches substantially farther than *Carney's*, but does the PLCAA leave gun manufacturers and distributors vulnerable to accomplice liability? The answer is not as clean as the Fourth Department's analysis.

Title 18 of the United States Code codifies various federal criminal laws,<sup>127</sup> and chapter 44 is entirely devoted to gun crimes including those violated by Brown and Bostic.<sup>128</sup> A defendant is an accomplice to a federal criminal law when he "aids, abets, counsels, commands, induces or procures [the crime's] commission."<sup>129</sup> However, courts have not universally found chapter 44 laws comporting with accomplice liability.<sup>130</sup> And even if Beemiller and MKS could be accomplices to Brown's chapter 44 violations, claims against the manufacturer and distributor may still be dismissible under the PLCAA.

Broadly, the PLCAA insulates manufacturers, marketers, distributors, importers, and sellers from liability when third parties criminally misuse their firearms.<sup>131</sup> It accomplishes its purpose by subjecting qualified civil liability actions to immediate dismissal.<sup>132</sup> A qualified civil liability action is brought against firearm manufacturers or distributors for damages caused by criminal action by a *person* or third party.<sup>133</sup> For the PLCAA, *person* means "any individual, corporation, company, association . . . or any other entity."<sup>134</sup> The definition does not exclude gun retailers who sell firearms on behalf of manufacturers and distributors.<sup>135</sup> So, it would seem manufacturers and

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127. See 18 U.S.C. §§ 2-2725(2006).

128. See *id.* §§ 921-931.

129. *Id.* § 2 (punishing accomplices as principals); *United States v. Carney*, 387 F.3d 436, 446 (6th Cir. 2004).

130. See *United States v. Dedrick*, 665 F. Supp. 2d 535, 539 (W.D.N.C. 2009) (referencing *United States v. Wegg*, 919 F. Supp. 898, 907-08 (E.D. Va. 1996)).

131. See 15 U.S.C. § 7901(b)(1) (2006).

132. See 15 U.S.C. § 7902(a)-(b) (2006).

133. 15 U.S.C. § 7903(5)(A) (2006).

134. *Id.* § 7903(3).

135. See *id.*

distributors might be insulated from immunity when retailers unlawfully use or sell their firearms.

As described above, the predicate exception allows qualified civil liability actions to proceed when the defendant has knowingly violated a predicate statute, and the violation proximately caused the harm for which the plaintiff is trying to recover.<sup>136</sup> If plaintiffs can show defendants aided, abetted, or conspired with any person to make a false or fraudulent purchase of a firearm, the predicate exception is triggered.<sup>137</sup> But the Fourth Department's accomplice liability theory goes beyond the illegal purchase. It captures manufacturers and distributors, parties who may not have been present at—or have knowledge of—the sale or conveyance.

And even if they are accomplices, complicity does not automatically establish liability. Firearm manufacturers and distributors are not liable for injuries caused by negligent sales or marketing unless they: (1) proximately cause the plaintiff's injuries; and (2) have knowledge (or can be reasonably expected to have knowledge) of the retailer's malfeasance.<sup>138</sup>

First, proximate causation limits civil liability, but there may be multiple proximate causes of the same injury.<sup>139</sup> Further, negligence of an intervening party does not necessarily insulate a prior actor's negligence from liability.<sup>140</sup> Therefore, the proximate cause element may be satisfied even in accomplice liability cases. The Fourth Department had little trouble deciding Williams adequately showed Brown, MKS, and Beemiller proximately caused his injury.<sup>141</sup>

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136. *Id.* § 7903(5)(A)(iii).

137. *See id.* § 7903(5)(A)(iii)(I).

138. *See id.* § 7903(5)(A)(iii).

139. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (2010).

140. *See* RESTATEMENT (SECOND) OF TORTS § 447 (1965).

141. The Fourth Department added a proximate causation analysis in its amended opinion. It decided the criminal shooting did not automatically sever the chain of causation, leaving the question of whether Beemiller and MKS had

Second, plaintiffs must also adequately allege each defendant “knowingly violated a State or Federal statute applicable to the sale or marketing of the product.”<sup>142</sup> In *Williams*, the Fourth Department found Brown had knowingly violated several predicate statutes.<sup>143</sup> Then, it decided Beemiller and MKS knew or should have known about Brown’s violations.<sup>144</sup> If the Fourth Department’s decision to hold Beemiller and MKS liable arose from the portion of the predicate exception allowing lawsuits against defendants who aid or abet fraudulent purchases, it demanded little evidence.<sup>145</sup> Brown’s employment at MKS provided a sufficient link to capture the distributor, but the best evidence *Williams* offered against Beemiller was the company’s daily contact with MKS/Brown.<sup>146</sup> Neither the Fourth Department’s decision, nor the plaintiff’s brief provided evidence the manufacturer directly oversaw any of Brown’s transactions.<sup>147</sup>

Without Beemiller or MKS’s direct violation of a predicate statute, the Fourth Department needed to categorize the companies as accomplices to keep them in the litigation. But perhaps such a novel approach warrants more elaborate justification.<sup>148</sup> The rocky framework for marrying accomplice liability and the PLCAA is exacerbated by the PLCAA’s very purpose—protecting firearm manufacturers and distributors when a third party (like a retailer) misuses their products.<sup>149</sup> Though the Fourth

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proximately caused *Williams*’ injuries to a future jury. See *Williams v. Beemiller, Inc.*, 962 N.Y.S.2d 834, 836 (App. Div. 4th Dep’t 2013).

142. 15 U.S.C. § 7903(5)(A)(iii).

143. See *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 338-39 (App. Div. 4th Dep’t 2012), amended by 962 N.Y.S.2d 834 (App. Div. 4th Dep’t 2013).

144. See *id.* at 339.

145. Note: the Fourth Department did not cite the aiding and abetting portion of the PLCAA in regards to Beemiller and MKS. See *id.*

146. See *id.*; Brief for Plaintiffs-Appellants, *supra* note 10, at 3.

147. See *Williams*, 952 N.Y.S.2d at 339; Brief for Plaintiffs-Appellants, *supra* note 10, at 3.

148. The Fourth Department limited its accomplice analysis to one paragraph. See *Williams*, 952 N.Y.S.2d at 339.

149. See, e.g., 15 U.S.C § 7901(b)(1) (2006).

Department's decision is innovative, it will likely demand more extensive review by future courts presiding over PLCAA motions to dismiss.

#### IV. THE FOURTH DEPARTMENT, WILLIAMS V. BEEMILLER, AND THE FUTURE OF GUN CONTROL

Due to the timing of the *Williams* decision, the Fourth Department's ruling could help reinvigorate public-health-motivated litigation against the gun industry. Gun violence has not decreased in the ten years since municipalities and gunshot victims first attempted to take down the firearm industry in the courtroom.<sup>150</sup> In 2004, one year before the PLCAA's enactment, 29,569 people were killed by firearms.<sup>151</sup> Six years later, in 2010, 31,672 people suffered the same fate.<sup>152</sup> For years, gun-control advocates have lobbied legislatures, proliferated propaganda, and encouraged lawsuits hoping to reduce the number of deaths from firearms.<sup>153</sup> The opposing side on this hot-button issue has been equally aggressive, rallying behind the NRA and

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150. See Ctrs. for Disease Control and Prevention, *Web-Based Injury Statistics Query & Reporting System (WISQARS) Fatal Injury Reports, 1999-2010, for National, Regional, and States (Restricted)*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL (last updated Feb. 19, 2013), [http://webappa.cdc.gov/sasweb/ncipc/dataRestriction\\_inj.html](http://webappa.cdc.gov/sasweb/ncipc/dataRestriction_inj.html) (Agree to data use restrictions; under "Report Options," select "All Intentions"; under "Mechanism of Injury," select "Firearm"; under "Year(s) of Report," select "1999"; click "Submit Request"; repeat process, increasing the year each time until year 2010).

151. See *id.* (the data includes accidental shootings and those killed by police in emergency response).

152. See *id.* Though the total number of gun-caused deaths rose by nearly 2,000, when measured against the population increase, the overall rate only marginally increased. Gun violence is heavily concentrated in certain demographic groups; e.g., black males ages fifteen to twenty-four. See Julie Samia Mair, Stephen Teret & Shannon Frattaroli, *A Public Health Perspective on Gun Violence Prevention*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 39, 44-46 (Timothy D. Lytton ed., 2005).

153. See Peter H. Schuck, *Why Regulating Guns Through Litigation Won't Work*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 225, 225 (Timothy D. Lytton ed., 2005).

the Second Amendment.<sup>154</sup> Gun-control advocates' aims are simple. They point to three common areas deserving improved regulation: design, sale, and possession.<sup>155</sup>

Proposed design regulations often include additional security measures like trigger locks, chamber indicators, and personalized safeties.<sup>156</sup> But the most commonly suggested regulations affect gun sales at the retail level. Some gun-control advocates support banning firearms disproportionately used in crime, and others promote restrictions on the number of guns that can be bought in a single purchase.<sup>157</sup> More invasive regulations have been suggested to monitor firearm sales.<sup>158</sup> Gun-control advocates believe forcing firearm manufacturers to take responsibility for their weapons through the chain of sale might encourage them to micromanage retailers, reducing irresponsible selling.<sup>159</sup>

Of the three commonly suggested modes of regulation, gun-owner behavior is the most difficult to affect. Safe ownership not only includes learning the capabilities and dangers of each firearm, but it also demands secure storage to prevent children, criminals, and untrained adults from accessing guns.<sup>160</sup>

The need to prevent guns from falling into the wrong hands has been tragically reinforced within the last year. Shootings at a movie theater, shopping mall, and primary school have thrust mental health and gun ownership issues together as federal and state governments scramble to propose new legislation and regulation on who may own and

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154. See Paul Nowell, *NRA Vows 2nd Amendment Celebration*, ASSOCIATED PRESS, May 20, 2000, available at <http://www.apnewsarchive.com> (search "NRA Vows 2nd Amendment Celebration"; click the first link titled "NRA Vows 2nd Amendment Celebration-Associated Press").

155. See Mair, Teret & Frattaroli, *supra* note 152, at 50-61.

156. See *id.* at 50-51.

157. See *id.* at 53-54.

158. See *id.* at 56.

159. See *id.*

160. See *id.* at 56-57.



buy firearms.<sup>161</sup> On January 15, 2013, New York Governor Andrew Cuomo signed into law the nation's strictest gun control legislation.<sup>162</sup> Little over one month after the mass shooting at Sandy Hook Elementary School, President Barack Obama briefed the press on a sweeping set of proposed regulations aimed at the gun industry.<sup>163</sup>

An avalanche of control sentiment has some legislation moving quickly.<sup>164</sup> But in the past, legislative failures slowed gun-control progress.<sup>165</sup> For many advocates, litigation against the firearm industry presented a more effective route to promote regulation.<sup>166</sup> Holding gun companies liable as accomplices when their products are misused or criminally used would force them to take greater responsibility for their retailers and consumers. Common issues in the future might be: When is a firearm manufacturer/distributor/retailer liable for a person with mental health problems using their weapon to commit a violent crime? Must they know the person has mental health issues? Should they be expected to know a buyer has a history of mental health concerns?

Perhaps Congress and/or fifty state legislatures will enact the far-reaching reforms gun-control advocates are calling for. But any new law will undoubtedly face vociferous objection from the NRA, other gun lobbies, and

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161. See Aaron C. Davis & Michael Laris, *Mental Health Clouding Gun Effort: O'Malley Fears Tougher Policy Could Lead People to Avoid Treatment*, WASH. POST, Jan. 26, 2013, at A1.

162. See Laura Nahmias, *Cuomo Signs Gun Laws*, WALL ST. J., Jan. 16, 2013, at A15.

163. See Jackie Kucinich & Aamer Madhani, *Obama Presses Broad Gun Plan: Controls Certain to Provoke NRA's Strong Opposition*, USA TODAY, Jan. 16, 2013, at 1A.

164. *Gun Control: The Battle Begins*, THE ECONOMIST, Jan. 19, 2013, at 30. Though early in its existence, the gun-control fervor after the most recent high-profile shootings is of an unparalleled intensity compared to other mass acts of violence. See, e.g., Edward Epstein & Carla Marinucci, *Virginia Tech Massacre; Gun Control: Democrats, Eyes on Majority, Apt to Go Slow on Restrictions*, S.F. CHRON., Apr. 18, 2007, at A8.

165. See Schuck, *supra* note 153, at 225.

166. See *id.*

Senators and Representatives sensitive to gun rights.<sup>167</sup> If progress slows, litigants might look to the Fourth Department's decision in *Williams v. Beemiller* as a means to reopen the portal to legal action against the gun industry.

However, it must be recognized that *Williams v. Beemiller* is a state appellate court decision carrying little precedential value outside New York. Still, the decision might inspire potential plaintiffs and attorneys to seek creative ways around the PLCAA. And if more courts are willing to hold manufacturers and distributors liable as accomplices to retailer's illegal sales, gun-control advocates will have promising litigation opportunities.

Many guns used in violent crimes are trafficked by dealers engaging in a variety of illegal sales like the straw purchases made for James Nigel Bostic.<sup>168</sup> Straw purchases present an ongoing problem for law enforcement nationwide.<sup>169</sup> And if courts decide the PLCAA does not insulate manufacturers and distributors from liability when their retailers violate federal and state gun-sale laws, many will face lawsuits from gunshot victims. Under the Fourth Department's analysis, gun manufacturers and distributors will be on notice of their responsibility for their dealers if their firearms are frequently used in crimes.<sup>170</sup> Thirteen thousand Hi-Point guns used in crimes was enough for the

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167. See Laura Meckler, Peter Nicholas & Colleen McCain Nelson, *Obama's Gun Curbs Face a Slog in Congress: Divisions Among Democrats, Opposition by House GOP Pose Hurdles to Many Proposals; NRA Sees Areas for Cooperation*, WALL ST. J., Jan. 17, 2013, at A4. One NRA webpage bears a rallying cry "Stand and Fight." See NAT'L RIFLE ASS'N, <http://www.nrandandfight.com> (last visited June 9, 2013). Fight against what? Likely any effort at additional gun regulation. See, e.g., *First State Salvo on Gun Control Fired in N.Y.*, NAT'L RIFLE ASS'N INST. LEGISLATIVE ACTION (Jan. 18, 2013), <http://www.nraila.org/news-issues/articles/2013/1/first-state-salvo-on-gun-control-fired-in-ny.aspx>.

168. Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 POLICING: INT'L J. POLICE STRATEGIES & MGMT., 220, 221-23 (1998).

169. See, e.g., *Curbing Straw Sales: Philadelphia Gun Purchase Case Gives Hope*, Pittsburgh Post-Gazette, July 6, 2009, at B6; Judy Harrison, *Tracing Traffickers: Officials Say the Use of 'Straw Buyers,' Particularly Women, Is a Part of a Growing Crime Trend*, BANGOR DAILY NEWS, Nov. 18, 2009, at A1.

170. See *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 339 (App. Div. 4th Dep't 2012), amended by 962 N.Y.S.2d 834 (App. Div. 4th Dep't 2013).

Fourth Department.<sup>171</sup> And some of the largest gun manufacturers—like Smith & Wesson, Ruger, and Mossberg—design and produce firearms commonly used by criminals.<sup>172</sup>

Time will tell how the Fourth Department's decision in *Williams v. Beemiller* will affect firearm litigation and the PLCAA. But if the winds of change continue to favor greater gun regulation, it will not be surprising to see litigation against the firearms industry reborn. In fact, little over one month after the Fourth Department allowed Daniel Williams' case to proceed past a PLCAA challenge, a handful of Missouri plaintiffs cited the case in their own effort to avoid PLCAA dismissal.<sup>173</sup>

In April 2007, David W. Lodgson offered a stolen credit card to purchase ammunition and magazines from Shawnee Gun Shop.<sup>174</sup> Lodgson used the ammunition to kill the Missouri plaintiffs' family members in a deadly shopping center shooting.<sup>175</sup> The Missouri plaintiffs sued Shawnee Gun Shop and used *Williams v. Beemiller* in an attempt to fit their case into one of the PLCAA's exceptions to dismissible qualified civil liability actions.<sup>176</sup>

#### CONCLUSION: PRESSING THE FLOODGATES

The Fourth Department's decision in *Williams v. Beemiller* doesn't open the gun companies up to the

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171. *Id.*

172. See Elaine Shannon, *America's Most Wanted Guns*, TIME, July 12, 2002, <http://www.time.com/time/nation/article/0,8599,320383,00.html> (last visited July 13, 2013).

173. See Appellants' Amended Brief at 20-21, *Noble v. Shawnee Gun Shop, Inc.*, Nos. 0916-CV01331-01 and 0816-CV38499-01, (Mo. Ct. App. filed Dec. 14, 2012).

174. *Id.* at 2.

175. *Id.*

176. See *id.* at 20-21. The plaintiffs seem to have mistakenly interpreted the Fourth Department's decision as finding for Williams on negligent entrustment grounds. See *id.* at 21. In its responding brief, Shawnee Gun Shop noted the Missouri plaintiffs' apparent confusion. See Respondent's Brief at 26-27, *Noble v. Shawnee Gun Shop, Inc.*, Nos. 0916-CV01331-01 and 0816-CV38499-01 (Mo. Ct. App. filed Jan. 13, 2013).

extensive litigation that threatened to bankrupt the firearm industry a decade ago. The facts behind the case are too narrow to be generally applied.<sup>177</sup> Charles Brown's close relationship with MKS Supply and Beemiller is not common amongst firearm manufacturers, distributors, and retailers.<sup>178</sup> But it helped the Fourth Department deploy its theory on accomplice liability. Further, the PLCAA still presents a high hurdle for future firearm plaintiffs to overcome. But if the PLCAA is a floodgate holding back a tide of unchecked firearm litigation, *Williams v. Beemiller* represents a crack in the dam. Future litigants may rely on—or be inspired by—*Williams v. Beemiller* in efforts to circumvent PLCAA dismissal.

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177. See Nicholas J. Johnson, *Are Gun Manufacturers Under Renewed Assault?*, LIBRARY OF LAW & LIBERTY (Oct. 18, 2012), <http://www.libertylawsite.org/2012/10/18/are-gun-makers-under-renewed-assault/>.

178. *Id.*; see *Williams v. Beemiller*, 952 N.Y.S.2d 333, 339 (App. Div. 4th Dep't 2012), *amended by* 962 N.Y.S.2d 834 (App. Div. 4th Dep't 2013).

