Notes

"WE'RE NOT SELLING ICE CREAM HERE"[1]: PLCAA, THE PREDICATE EXCEPTION, AND PROVIDING RELIEF FOR PLAINTIFFS

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ABSTRACT

In 2005, the Protection of Lawful Commerce in Arms Act ("PLCAA") put a stop to most civil litigation against the firearms industry. In the nineteen years since, victims of gun violence have attempted to bring claims against members of the firearms industry, with varying degrees of success, using an exception to PLCAA known as the predicate exception. Recently, states have begun to pass legislation creating a right of action for plaintiffs to take advantage of the predicate exception. Whether the new legislation will be successful, however, remains to be seen.

This Note examines all of the available cases considering the predicate exception, revealing areas where the current regulatory framework fails plaintiffs and the distinguishing characteristics of successful cases. In light of this analysis, Part III discusses recent state legislation, identifies gaps in the legislation, identifies areas for improvement, and forecasts challenges to the legislation. The Appendix contains a chart organizing the cases that consider the predicate exception by whether they were successful and the predicate statute considered by the court in each case.

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1. Ali Watkins, *When Guns Are Sold Illegally, A.T.F. Is Lenient on Punishment*, N.Y. TIMES (June 3, 2018), https://www.nytimes.com/2018/06/03/us/atf-gun-store-violations.html [https://perma.cc/8VBP-AP2F].

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INTRODUCTION

> "The industry as a whole [is] fully aware of the extent of the criminal misuse of handguns. . . . In spite of their knowledge, however, the industry's position has consistently been to take no independent action to insure responsible distribution practices."
>
> Robert Haas, former senior vice president at firearms manufacturer Smith & Wesson[2]

In 2006, a man named Jason Coday entered Rayco Sales, a licensed gun shop in Juneau, Alaska.[3] He appeared disheveled, like he had been 'living in the woods.'"[4] After discussing different firearms with the store clerk, Coday said he would have to think about what he wanted to purchase.[5] The employee then walked to the back of the store, leaving Coday alone at the counter.[6] Later that day, employees at the shop reported to Juneau Police that a rifle was missing from the shop.[7] Two days later, Coday used that rifle to kill Simone Kim.[8]

These are the facts of *Estate of Kim ex rel. Alexander v. Coxe*,[9] and it is unclear exactly how Coday took possession of the firearm.[10] But when this case went to trial, the jury could not consider if the store may have acted negligently by failing to secure their firearms, by leaving Coday alone at the firearms counter, or by failing to use video surveillance at the counter.[11] They could only consider whether the

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2. First Amended Complaint ¶ 45, City of Gary v. Smith & Wesson Corp., No. 45D05-0005-CT-243, 2001 WL 34129723 (Ind. Super. Ct. Jan. 11, 2001) (subsequent history omitted).

3. Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 385 (Alaska 2013).

4. *Id.*

5. *See id.* ("After discussing the rifles and prices, Coday indicated he would have to think about a purchase.").

6. *Id.*

7. *Id.*

8. *Id.*

9. Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380 (Alaska 2013).

10. *See id.* at 385 (describing how the gun salesman "noticed a rifle was missing" after leaving Coday in the store alone).

11. *See id.* at 388 (holding that PLCAA bars simple negligence claims arising from the sale of a firearm). The court acknowledged that no video surveillance captured footage of these events, *id.* at 385, and the plaintiffs included in their complaint that the store had no security for their firearms. Complaint for Wrongful Death ¶¶ 32, 44, 79, Estate of Kim *ex rel.* Alexander v. Coxe, No. 1JU0800761, 2008 WL 11194611 (Alaska Super. Ct. July 31, 2008). The jury eventually found for the defendants. Matt Miller, *Jury Says Rayco Sales Wasn't Liable for Simone Kim's Murder*, KTOO (June 15, 2015), https://www.ktoo.org/2015/06/15/jury-says-rayco-sales-wasnt-liable-simone-kims-murder [https://perma.cc/DAF8-ZFSL].

store purposely sold Coday the rifle.[12] The plaintiffs could not argue that the store had negligent practices that allowed the gun to be stolen, and the court could not hold the store liable for negligence. Instead, those claims were blocked by the Protection of Lawful Commerce in Firearms Act ("PLCAA").

PLCAA gives the firearm industry unique protections, banning any "qualified civil liability action" in federal or state courts.[13] A "qualified civil liability action" is any civil action against a manufacturer or seller of a firearm arising out of the "criminal or unlawful misuse" of a firearm.[14] While proponents maintain that PLCAA "is only intended to protect law-abiding members of the firearms industry,"[15] the reality is that PLCAA protects the firearms industry from being held accountable for wrongful conduct.[16] Common law claims such as nuisance and negligence are categorically barred.[17] PLCAA includes small exceptions for actions on negligent entrustment,[18] negligence per se, and actions where a "manufacturer or seller . . . knowingly violated a State or Federal statute applicable to the sale or marketing of" firearms, which is known as the predicate exception.[19] Yet these exceptions have been strictly construed, particularly the predicate exception.[20]

Recently, some state legislatures have sought to use the rights reserved to them in the predicate exception to better protect the public

12. *See Estate of Kim*, 295 P.3d at 395 (holding that claims against the store could proceed as exceptions to PLCAA only if the store purposely sold the rifle).

13. 15 U.S.C. § 7902(a).

14. 15 U.S.C. § 7903(5)(a).

15. 151 CONG. REC. S9107 (daily ed. July 27, 2005) (statement of Sen. Baucus).

16. *See generally* Kaya van der Horst & León Castellanos-Jankiewicz, *Ensuring Access to Courts for Gun Victims: The Case for Repealing PLCAA*, JUST SEC. (Sept. 8, 2022), https://www.justsecurity.org/82922/ensuring-access-to-courts-for-gun-victims-the-case-for-repealing-plcaa [https://perma.cc/9WMN-VVP8] (discussing how PLCAA shields the firearms industry).

17. *See* 15 U.S.C. § 7902(a) ("A qualified civil liability action may not be brought in any Federal or State court.").

18. Negligent entrustment is defined by the statute to mean a seller giving a firearm to someone "the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B).

19. 15 U.S.C. § 7903(5)(a)(iii). This exception means that a claim may proceed if the defendant violated an underlying, or predicate, statute.

20. *See id.* (limiting the exception to cases where the federal or state statutory violation was a proximate cause of the plaintiff's injury).

from firearms. In the past two years, California, New York, New Jersey, Delaware, Hawaii, Colorado, and Washington have each passed laws establishing codes of conduct for the sale and marketing of firearms.[21] These statutes create codes of conduct for the firearms industry and may allow plaintiffs to use the predicate exception to pursue their claims despite PLCAA.[22] Because these statutes are so recent, and some have yet to take effect, there are few cases and no scholarship considering this type of law, its potential effects, and likely challenges.[23]

Plaintiffs have historically seen little success using the predicate exception, and thus, cases and scholarship have seldom considered the exception.[24] However, prior jurisprudence informs the potential shortcomings and successes of this new wave of state legislation. Additionally, a few recent victories by plaintiffs demonstrate how the predicate exception can be used effectively, even in states that do not pass codes of conduct for the firearms industry.[25]

This Note is the first to comprehensively survey the cases considering the predicate exception and offer a framework for analyzing the range of jurisprudence.[26] Part I will discuss the

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21. *See, e.g.*, 2021 N.Y. Sess. Laws, ch. 237 (McKinney) (enacted as N.Y. GEN. BUS. LAW § 898–d (McKinney 2021)) (effective July 6, 2021); 2022 Del. Laws, ch. 332 (enacted as DEL. CODE ANN. tit. 10, § 3930(f) (2022)) (effective June 30, 2022); 2022 N.J. Sess. Law Serv., ch. 56 (West) (enacted as N.J. STAT. ANN. § 2C:58–35(3)(b)) (effective July 5, 2022); 2022 Cal. Legis. Serv., ch. 98 (West) (enacted as Firearms Industry Responsibility Act, div. 3, pt. 4, tit. 20, § 3273.52(c)(1)) (effective July 1, 2023).

22. *See infra* Part III (discussing recent state legislation).

23. *Id.*

24. *See infra* Part II (providing a survey of predicate exception cases).

25. *See infra* Part II.B (discussing instances of successful predicate exception litigation).

26. This Note considers all of the cases analyzing the predicate exception available on Westlaw and Lexis. A chart summarizing this research can be found in the Appendix. These cases have been collected by searching "adv: 'PLCAA' AND "predicate exception'" in both Westlaw and Lexis. *See also* Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 FLA. L. REV. 833, 878–79 (2023) (discussing the major predicate exception cases and the role of federalism in PLCAA).

Previous scholarship has generally focused on specific cases, other exceptions to PLCAA, and other theories of liability. *See generally* 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 (2021) (discussing predicate exception litigation in light of recent success using a trade practices statute); George A. Nation III, *Respondeat Manufacturer: Imposing Vicarious Liability on Manufacturers of Criminal Products*, 60 BAYLOR L. REV. 155 (2008) (discussing how vicarious liability could be applied to the firearms industry); Kate E. Britt, *Negligent Entrustment in Gun Industry Litigation: A Primer*, 97 MICH.

background of this litigation, including the behavior targeted by litigation and the need for litigation to hold the firearms industry accountable. Part II will analyze the range of jurisprudence on the predicate exception and set out a framework for understanding judicial interpretations of the predicate exception. The case law reveals the areas where the current regulatory framework fails plaintiffs as well as the distinguishing characteristics of cases that have been successful in using the predicate exception. Part III will discuss the recent state legislation in light of this analysis, identify gaps in the legislation, discuss areas for improvement, and forecast challenges to the legislation.

I. BACKGROUND

Every day, 327 people are shot in the United States.[27] Preventing these shootings requires a multifaceted approach because the problem of gun violence in the United States is pervasive, complex, and highly politicized. But the firearms industry, as the source of the firearms used in these shootings, plays a unique and sometimes forgotten role in causing and perpetuating gun violence. This Part will provide an industry-specific overview of dangerous practices, oversight and law enforcement mechanisms, the role of litigation, and how Congress has blocked this litigation through PLCAA.

A. The Distribution of Firearms

The Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") reports that "[v]irtually every crime gun in the United States starts off as a legal firearm."[28] Crime guns are firearms used in a crime

BAR J. 66, June 2018 (discussing the negligent entrustment exception); Daniel P. Rosner, Note, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 421 (2018) (discussing the negligent entrustment exception).

27. *Key Statistics*, BRADY (2019), https://www.bradyunited.org/key-statistics [https://perma.cc/M4RJ-8SG8].

28. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, FOLLOWING THE GUNS: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS, at iii (June 2000). Despite being published in 2000, this is the most recently available data because in 2003, Congress passed the Tiahrt Amendment. This prohibited the ATF from releasing firearm trace data, which details how a firearm used in a crime moved through commerce, even for litigants and researchers. Because of this amendment, the most recent information that can begin to paint a full picture of systemic issues in firearms distribution is over twenty years old. For more information, see generally Colin Miller, *Lawyers, Guns, and Money: Why the Tiahrt Amendment's Ban on the Admissibility of ATF Trace Data in State Court Actions Violates the Commerce Clause and the Tenth Amendment*, 2010

or ultimately possessed illegally—but the distribution of all firearms, including crime guns, begins with the manufacturer.[29] Manufacturers distribute to downstream gun retailers that hold a federal firearms license, also known as gun dealers, and then individuals purchase the gun.[30] Firearms enter the illegal secondary market in a variety of ways, including thefts from gun dealers, resales of inexpensive firearms, straw purchases,[31] or purposefully off-the-books sales by dealers.[32]

Because the dealer stage is when many firearms enter the illegal market, dealers can prevent many of these illegal transactions. And according to the most recent data, many of them do: nearly 90 percent of dealers sold no firearms traced to crimes in a given year.[33] However, ATF data also reveals that 90 percent of crime guns are traced back to only 5 percent of licensed retailers.[34] This disparity indicates that a small group of dealers are the problem, likely sending guns into the illegal market through negligent business practices or even illegal conduct, while most retailers successfully keep their guns in the legal market.[35]

UTAH L. REV. 665 (2010) (discussing the Tiahrt Amendment and its repercussions for firearms litigation). Additionally, a 1996 law prohibited the U.S. Centers for Disease Control and Prevention from using funds "to advocate or promote gun control," further limiting research and data available to the public. Department of Health and Human Services Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-242-44 (1996); Rosner, *supra* note 26, at 448–49.

29. BRADY, CRIME GUNS IN IMPACTED COMMUNITIES 4.

30. *Id.*

31. Straw purchases are purchases where a person who can pass a background check purchases a firearm for another person who cannot legally purchase a firearm. Anthony A. Braga, Garen J. Wintemute, Glenn L. Pierce, Philip J. Cook & Greg Ridgeway, *Interpreting the Empirical Evidence on Illegal Gun Market Dynamics*, 89 J. URB. HEALTH 779, 784 (2012) (providing an example of a straw purchase).

32. BRADY, *supra* note 29, at 4. For more information on gun trafficking, see *Frequently Asked Questions About Gun Trafficking*, CTR. FOR AM. PROGRESS (Aug. 20, 2021), https://www.americanprogress.org/article/frequently-asked-questions-gun-trafficking [https://perma.cc/AF4Y-ZHDM] (answering basic questions on gun trafficking).

33. Jennifer Kim & Christa Nicols, *America's Gun Violence Epidemic: A Colossal, but Correctable, System Failure*, 77 N.Y.U. ANN. SURV. AM. L. 199, 204 (2022).

34. *Id.* Information on the market share of each of these dealers is not publicly available. However, for additional context, the denominator (total number of active dealers) used in these calculations is 83,502. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, COMMERCE IN FIREARMS IN THE UNITED STATES 24 (2000). Each dealer in that number refers to an individual licensee, and licenses are granted to individual stores. For example, in a city with three Walmarts selling firearms, each store has its own license.

35. *See* Kim & Nicols, *supra* note 33, at 204 (explaining that "[m]any of the dealers who supply the bulk of crime guns either willfully engage in illegal or corrupt behavior—selling guns

When a gun is used in a crime and recovered by law enforcement, the local law enforcement agency submits a tracing request to the National Tracing Center, a subdivision of the ATF.[36] Trace requests attempt to track the gun's distribution chain from the manufacturer to its use in a crime.[37] While this information is not available to the public, firearms dealers and manufacturers are notified through these trace requests when a weapon from their distribution chain is used in a crime.[38] Therefore, these dealers are aware that their firearms are being used in crimes, and manufacturers are aware that some of their dealers are disproportionately selling crime guns.[39]

Straw purchases in particular contribute to the illegal market in preventable ways. Roughly 40 percent of illegal firearms are straw purchases, which occur when an individual who can pass a background check, often a girlfriend, purchases a firearm for another person who cannot legally purchase a firearm.[40] There are clear red flags of straw purchases, such as customers mentioning that they have been convicted of a crime or that they are purchasing the gun for someone else.[41] Often, employees are either not trained to recognize these red flags, or they purposely ignore them.[42]

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that they know will soon be trafficked—or have such lax business practices that their guns are regularly obtained by illegal traffickers").

36. Miller, *supra* note 28, at 668–69.

37. *See id*. (describing the process).

38. This information is not publicly available because the "Tiahrt Amendment," as it is known, bars public release of this information by the ATF or in litigation. *Id.* at 666.

39. Robert Lockett, who was the 1993 Firearms Dealer of the Year, observed, "If you do not know where and how your products are ultimately being sold—you should have known or anticipated that they would be illegally sold and subsequently misused." First Amended Complaint ¶ 46, Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 431 (Ind. Ct. App. 2007).

40. Braga, *supra* note 31, at 782 tbl.1. The most recent ATF data, accounting for ATF investigations from 1979 to 1999, showed 41 percent of investigations involved straw purchases. *Id.*

41. First Amended Complaint ¶ 39, Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422 (Ind. Ct. App. 2007) (listing examples from a series of 1999 sting operations by law enforcement in Gary, Indiana, in which retailers ignored clear red flags of straw purchases). For studies indicating a high willingness on the part of dealers to facilitate straw purchases, see Garen Wintemute, *Firearm Retailers' Willingness To Participate in an Illegal Gun Purchase*, 87 J. PUB. HEALTH 865, 868–69 (2010) (finding that 26.1 percent of retailers in the sample indicated willingness); S B Sorenson & K A Vittes, *Buying a Handgun for Someone Else: Firearm Dealer Willingness To Sell*, 2003 INJ. PREVENTION 147, 149 (finding that 52.5 percent of dealers indicated willingness).

42. *See* Wintemute, *supra* note 41, at 870 (observing that 20 percent of gun sellers surveyed responded positively to a test subject's interest in making a straw purchase).

This illegal market is not inevitable. Many of these straw purchases are detectable and even knowingly allowed by dealers.[43] Manufacturers could stop distributing to problematic dealers or require training, inspections, and better security.[44] Firearms are highly dangerous. But the firearms industry fails to take precautions that could prevent deaths and violence. As a former ATF inspector explained, "We're not selling ice cream here . . . . You're selling something here that if you screw up, somebody can be killed."[45]

B. Enforcement of Firearms Laws

Though the ATF is the principal enforcer of federal firearms law, it fails to fully enforce them, in large part due to underfunding and leniency in investigations.[46] As of its most recent report, the ATF employs only one investigator for every 135 licensees, meaning that it would take almost four years to inspect every licensee.[47] ATF's goal is to inspect dealers once every three years, but most dealers are only visited once every seven years.[48] Furthermore, despite the increase in the sales and manufacturing of firearms, between 2010 and 2020, the ATF budget only increased 6 percent adjusted for inflation.[49] And even though the ATF is the only federal agency that can regulate or oversee the firearms industry, less than 27 percent of its budget was spent on trafficking and "diversion of firearms from legal commerce," tasks for which it is uniquely equipped.[50]

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43. *Id.*

44. In one notable case, the defendant manufacturers, which included Bushmaster Firearms and Glock, Inc., did not require their retailers to be trained to spot signs of straw purchases, had no mechanisms for monitoring retailers for safe business practices, and did not draft contracts to include dangerous sales practices as grounds for terminating the business relationship. Ileto v. Glock, Inc., 194 F. Supp. 2d 1040, 1047–48 (C.D. Cal. 2002), *rev'd*, 565 F.3d 1126 (9th Cir. 2009).

45. Watkins, *supra* note 1.

46. Brian Freskos, Daniel Nass, Alain Stephens & Nick Penzenstadler, *The ATF Catches Thousands of Lawbreaking Gun Dealers Every Year. It Shuts Down Very Few.*, THE TRACE (May 26, 2021) https://www.thetrace.org/2021/05/atf-inspection-report-gun-store-ffl-violation [https://perma.cc/8RST-94C3].

47. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT: FIREARMS IN COMMERCE 162 (2022).

48. Freskos et al., *supra* note 46.

49. Chelsea Parsons, Eugenio Weigend Vargas & Rukmani Bhatia, *Rethinking ATF's Budget To Prioritize Effective Gun Violence Prevention*, CTR. FOR AM. PROGRESS (Sep. 17, 2020), https://www.americanprogress.org/article/rethinking-atfs-budget-prioritize-effective-gun-violence-prevention [https://perma.cc/2NRH-9EUR].

50. *Id.*

Even when it conducts inspections of retailers, the ATF does not fully enforce gun laws because of restrictions from Congress, general leniency, and decisions by leadership.[51] First, to revoke a license, Congress requires that the ATF must prove that the store intended to violate the law.[52] In other words, when a retailer or manufacturer is negligent—or negligently responsible for deaths—there is no accountability. Additionally, in a recent study of released ATF letters, the ATF revoked a dealer's license in only 3 percent of cases involving licensee misconduct.[53] Although 138 of these letters revealed violations severe enough to warrant revoking licenses, 60 percent were allowed to keep their license.[54] A third of inspected licensees were cited for violations, but only 19 percent of them received a penalty or written warning.[55] Furthermore, a *New York Times* investigation found that "[s]enior officials at the Bureau of Alcohol, Tobacco, Firearms and Explosives regularly overrule their own inspectors" to allow retailers who have numerous violations to stay in business.[56]

This underenforcement has real consequences. One dealer in Indiana was inspected four times between 2000 and 2009 for facilitating illegal sales, but was only issued warnings, not shut down or even penalized.[57] Between 2013 and 2016, 130 guns recovered in crimes in Chicago were traced to this same dealer.[58] A retailer in Pennsylvania had forty-five violations and received eight warnings from the ATF, but it was allowed to keep its license.[59] The retailer then sold a shotgun used to kill four people, including a seven-year-old child.[60]

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51. Freskos et al., *supra* note 46.

52. Watkins, *supra* note 1.

53. Freskos et al., *supra* note 46.

54. *Id.* To revoke a license, the ATF must prove that the store intended to violate the law. Watkins, *supra* note 1; *Revocation of Firearms Licenses*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (June 23, 2021), https://www.atf.gov/firearms/revocation-firearms-licenses [https://perma.cc/73NR-W78F]; 27 C.F.R. § 478.73 (2023) (requiring a licensee to "willfully violate[] any provision of the Act or this part" before a license may be revoked).

55. Freskos et al., *supra* note 46.

56. Watkins, *supra* note 1.

57. Lindsay Nichols, *ATF: Captured by the Gun Lobby*, GIFFORDS L. CTR. (July 22, 2022), https://giffords.org/lawcenter/report/atf-captured-by-the-gun-lobby [https://perma.cc/P4KG-T5F7]. Specifically, the ATF found that the dealer made sales to underage customers and convicted felons; failed to properly record multiple sales, reports, and firearm transfers; and facilitated false statements for straw purchasers. *Id.*

58. *Id.*

59. Freskos et al., *supra* note 46.

60. *Id.*

C. The Role of Litigation in Enforcement

Because the ATF is unable to conduct inspections effectively, litigation could play a key role in ensuring that actors in the firearms industry follow existing laws, whether statutory requirements or general duties under tort law. While supplementing ATF enforcement is a worthy goal of litigation, litigation has also played a key role in improving the safety of other consumer products.[61]

In theory, mass-tort litigation could be a powerful tool for holding the firearms industry accountable. First, firearms create huge costs and negative externalities.[62] Second, a product designed to kill has easily foreseeable costs that could fall to those most able to spread and limit them—the firearms industry.[63] Finally, the very notion of tort liability, and a concept fundamental to our legal system, is that for every wrong there is a remedy.[64] These characteristics should make tort liability well-suited to regulate firearms dealers and manufacturers. For victims of gun violence, however, this right has been limited by a liability shield to protect the firearms industry, as discussed in the following Section.

D. The Enactment of PLCAA

In the late 1990s, more than thirty cities filed lawsuits against the firearms industry for their role in facilitating gun violence in their cities,

61. The full history and merits of mass tort litigation is outside the scope of this paper, but see, for example, Heidi L. Feldman, *From Liability Shields to Democratic Theory: What We Need from Tort Theory Now*, 14 J. TORT L. 373 (2021) (discussing the history and future of mass tort litigation); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 378 (finding that tort law does provide deterrence); Carson, *supra* note 26, at 190 (describing studies finding that liability "led to a 35% improvement in the safety of particular products and a 47% improvement in product usage and warnings").

62. Externalities are the costs that are not borne by either the seller or purchaser of a product, and negative externalities in the firearms context are the costs of deaths and injuries borne by third parties to the transaction. Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1585–86 (2014). For a general discussion of litigation as a regulatory measure for firearms and the argument for forcing the firearms industry to internalize the negative externalities of firearms, see generally *id.* For a discussion of loss spreading in the context of the firearms industry, see Carson, *supra* note 26, at 187.

63. Nation, *supra* note 26, at 163.

64. *See* Dru Stevenson & Jenn R. Shorter, *Revisiting Gun Control and Tort Liability*, 54 IND. L. REV. 365, 396 (2021) ("From a basic torts and public policy standpoint, liability arises when a person causes harm to another because everyone has the right to protect their person and property.").

known as the "city cases."[65] These cases evaluated several different liability arguments, including that manufacturers purposefully oversupply dealers in states with lenient firearms laws, expecting those guns to spill over into neighboring states, and that dealers conducted negligent and unlawful sales.[66] By and large, these cases were unsuccessful, but there were a few notable exceptions.

Plaintiffs had a few early successes that led to the lobbying effort for PLCAA. First, Maryland held that inexpensive firearms, known as "Saturday Night Specials," were unreasonably dangerous in *Kelley v. R.G. Industries*.[67] Second, in a New York case, Judge Jack Weinstein affirmed a verdict holding manufacturers responsible for negligent distribution, although the verdict was later overturned.[68] Then, in 2000, President Bill Clinton threatened the firearms industry with a class action lawsuit, prompting Smith & Wesson to agree to settle all claims against them.[69] In the settlement, Smith & Wesson agreed to implement new safety features, invest resources into research and development for safer weapons, and create a code of conduct for its distribution.[70] But Smith & Wesson faced backlash and a boycott led by the National Rifle Association following the agreement, and President George W. Bush declined to enforce the agreement when he took office.[71] While plaintiffs actually had very few successes, these events concerned the firearms industry enough to push for the passage of PLCAA.

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65. *See generally City Cases*, BRADY: RESOURCES, https://www.bradyunited.org/legal-case/city-cases [https://perma.cc/2DAK-A8QL] ("In the late 1990s, lawsuits spearheaded by Brady on behalf of over 30 major cities nationwide exposed the role of the gun industry in supplying the criminal gun market, won several landmark court decisions, and led to a groundbreaking settlement.").

66. Rosner, *supra* note 26, at 429.

67. Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1153–54, 1159 (Md. 1985) ("[I]t is entirely consistent with public policy to hold the manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products.").

68. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 827, 846 (E.D.N.Y. 1999), *vacated sub nom.* Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21 (2d Cir. 2001).

69. Rosner, *supra* note 26, at 438–40; Press Release, U.S. Dep't of the Treasury, Clinton Administration and State and Local Governments Reach Breakthrough Gun Safety Agreement with Smith & Wesson (Mar. 17, 2000), https://home.treasury.gov/news/press-releases/ls474 [https://perma.cc/97NA-3SPK].

70. *Id.*

71. *Id.*

Effective since October 26, 2005, PLCAA provides the gun industry with uniquely broad immunity from civil liability and applies retroactively to pending lawsuits at the time of passage.[72] The law is purportedly meant to protect members of the firearm industry from "liab[ility] for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended."[73] Lawmakers were particularly concerned by actions "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States."[74] Yet the law bars almost all civil actions against members of the firearms industry arising out of "the criminal or unlawful misuse" of firearms.[75] This means that when victims of a shooting or a victim's surviving relatives believe that a member of the firearms industry bears some responsibility for the harm, they are generally barred from suing that industry member.

Aside from this general bar, the statute allows plaintiffs to pursue their claim if their claims fall into one of six possible exceptions to PLCAA. While six types of claims are permitted, the second, third, and fifth exceptions are the most frequently used.[76] The second exception allows for actions against sellers for negligent entrustment or negligence per se.[77] The fifth exception allows for actions based on

72. While some other industries receive protection from liability, those laws are accompanied by other avenues for compensation for potential plaintiffs or are protection from lawsuits based on specific industry behavior—not the type of blanket immunity given to the firearms industry. *Frequently Asked Questions About Gun Industry Immunity*, CTR. FOR AM. PROGRESS (May 4, 2021), https://www.americanprogress.org/article/frequently-asked-questions-gun-industry-immunity [https://perma.cc/M3Y4-UBQQ]; KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10461, FEDERAL LEGISLATION SHIELDING BUSINESSES AND INDIVIDUALS FROM TORT LIABILITY: A LEGAL AND HISTORICAL OVERVIEW 4 (2020). For example, the vaccine industry has immunity but also has a federally mandated compensation system to allow a remedy for potential plaintiffs. Van der Horst & Castellanos-Jankiewicz, *supra* note 16.

73. 15 U.S.C. § 7901(a)(5).

74. *Id.* § 7901(a)(7).

75. *Id.* § 7903(5)(A).

76. The first, fourth, and sixth exceptions are rarely used and allow for actions against transferors who have been convicted under 18 U.S.C. § 924(h), actions based on breach of contract, and actions by the attorney general to enforce particular statutes. 15 U.S.C. §§ 7903(5)(A)(i), (iv), (v).

77. Negligent entrustment is defined by the statute to mean a seller giving a firearm to someone "the seller knows, or reasonably should know, the person to whom the product is supplied is likely to and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B). Very few of these claims are successful.

design or manufacturing defects but does not allow them if the discharge was "caused by a volitional act that constituted a criminal offense," which has been construed broadly.[78] The focus of this Note is the third exception: the predicate exception.

The predicate exception allows for "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which the relief is sought."[79] The statute provides two examples, listing cases involving false entries in required records and when the manufacturer or seller "[knew], or [had] reasonable cause to believe, that the actual buyer . . . was prohibited from possessing . . . a firearm or ammunition."[80] This exception is called the predicate exception because plaintiffs must claim a violation of some underlying, or predicate, statute.[81] If plaintiffs can find a statute that is "applicable to the sale or marketing of" firearms and can prove that the defendant "knowingly violated" that statute, then their claim is not barred.[82] Few cases have used this exception successfully to overcome PLCAA, and courts vary in their interpretation of the provision. This Note's next Part will provide an overview of this tangled legal landscape.

II. A SURVEY OF PREDICATE EXCEPTION CASES

Relatively few cases have considered the predicate exception in any depth, and fewer have seen success for the plaintiffs. Out of just twenty-four cases, plaintiffs have been successful in eleven and only on the district court level.[83] Although there are some consistent themes across cases, claims have failed for a wide range of reasons. In federal

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Britt, *supra* note 26, at 66. For a discussion of the negligent entrustment exception and an argument for its broader interpretation, see generally Rosner, *supra* note 26.

78. 15 U.S.C. § 7903(5)(A)(v). For example, the Supreme Court of Illinois held that a product defect action was barred when a thirteen-year-old boy accidentally shot his friend, because that was a volitional act constituting a criminal offense. *See* Adames v. Sheahan, 909 N.E.2d 742, 763 (Ill. 2009) (holding that "the discharge of the Beretta in this case was caused by a volitional act that constituted a criminal offense" such that "plaintiffs' failure to warn claims [were] barred by the PLCAA").

79. 15 U.S.C. § 7903(5)(A)(iii).

80. *Id.*

81. VIVIAN S. CHU, CONG. RSCH. SERV., R42871, THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY FOR GUN MANUFACTURERS 4–5 (2012).

82. *Id.* at 4, 7.

83. *See* Appendix.

appeals courts, plaintiffs have been unable to find a sufficiently "applicable" statute. But most of the unsuccessful cases failed because of some other infirmity in the claim, largely because the Gun Control Act and similar regulations do not create duties or rights that clearly give rise to causes of action. Put simply, it is not that plaintiffs lack "applicable" laws but that current regulation does not require much at all. This reveals that plaintiffs not only need laws that would be explicitly "applicable" to the firearms industry, but they also need laws that confer obligations on the firearms industry and rights on plaintiffs.

This Note examines all of the cases considering the predicate exception available on Westlaw and Lexis. A chart summarizing this research can be found in the Appendix. Cases have been collected by searching "adv: 'PLCAA' AND 'predicate exception'" in both Westlaw and Lexis. This search term is designed to be overinclusive in order to find any case where the plaintiff alleged any claims under the predicate exception as of January 16, 2024. This was verified by additional searches for "predicate" within results for "PLCAA," which returned no additional cases. This search returned fifty-one cases, from which repeated cases and cases where the predicate exception was mentioned only in passing were eliminated. Recent cases challenging state access-to-justice laws were also excluded from the Appendix, resulting in twenty-four relevant cases.

This Note's research thus expands beyond focusing on the highest profile cases, revealing that claims under the predicate exception are dismissed for a variety of reasons and informing efforts to provide plaintiffs with a predicate statute. The individual contours of these cases vary, but a full survey of this litigation divides the morass of cases into two categories based on whether the claimed predicate statute explicitly mentions firearms. The first category, cases where the predicate statute does not explicitly mention firearms, contains the landmark cases in this area that defined the scope of the predicate exception and provided the framework for most of the other litigation. The second category, cases where the predicate statute does explicitly mention firearms, contains cases with mixed results: some successful, but others that failed because PLCAA blocked the claim or because courts found an infirmity in a claim that otherwise would have overcome PLCAA. This Part will consider each of these categories and the insights this survey provides on the predicate exception.

A. Considering General Statutes

In cases with predicate statutes that do not explicitly mention firearms, plaintiffs have either alleged violations of statutes that do not explicitly mention firearms or have not alleged specific violations of a statute. These cases have defined the scope of the predicate exception and thus necessarily inform attempts to create predicate statutes, as considered in Part III. This Section will outline the analysis followed by the majority of courts, which was set forth by the Second and Ninth Circuits; discuss cases involving trade practices statutes; and consider notable departures from the majority's analysis.

1. *The Second and Ninth Circuits*. Because these general statutes do not explicitly mention firearms, courts must determine whether the statute could still be "applicable to the sale and marketing of firearms" for the claim to proceed under the predicate exception. The two landmark cases in this category are from the Second[84] and Ninth[85] Circuits, which follow similar, but not identical, reasonings. In City of New York v. Beretta,[86] the City of New York brought a nuisance claim in the Second Circuit against members of the firearms industry.[87] In *Ileto v. Glock, Inc.*,[88] in the Ninth Circuit, shooting victims brought similar claims under California's nuisance statute against Glock, which manufactured the gun used in the shooting.[89] Both circuits held that state nuisance statutes, criminal in the Second and civil in Ninth, were not applicable to firearms and that the claim was thus barred by PLCAA.[90] Although only three cases in total have dismissed a claim because the statute was not "applicable," these cases have had the greatest precedential impact. Furthermore, each courts' reasoning in

84. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008). This case has a lengthy history and was finally dismissed by the Second Circuit Court of Appeals in 2008. *Id.* at 404.

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

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

87. *Beretta*, 524 F.3d at 389. A related New York statute declared unlawfully used weapons a nuisance, which presumably would be explicitly applicable, but the Second Circuit did not consider this. *See* City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256, 277 (E.D.N.Y. 2004), *rev'd*, 524 F.3d 384 (2d Cir. 2008).

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

89. *Id.* at 1130.

90. *Beretta*, 524 F.3d at 400; *Ileto*, 565 F.3d at 1134.

its dismissal forecasts how and why firearm industry plaintiffs challenging new state codes of conduct for firearms may be successful.[91]

In both cases, the court began with textual arguments and considered whether state nuisance statutes were "applicable to the sale and marketing of [firearms],"[92] which would allow plaintiffs to overcome PLCAA and proceed with their case. Beginning with the ordinary meaning, the courts considered two possible definitions for "applicable": "capable of being applied"[93] and "relevant."[94] Both circuits held that the meaning is ambiguous.[95] In the context of the statute, the Ninth Circuit reasoned that "applicable" statutes need not explicitly pertain to firearms but that—based on examples of predicate statutes listed in PLCAA—applicable statutes would most often have "a direct connection with sales or manufacturing."[96] In *Beretta*, the Second Circuit essentially followed the same reasoning, but it focused on ensuring that the predicate exception was not read to "swallow the statute."[97] The panel stopped its analysis there, holding that the predicate exception only included statutes that "clearly [could] be said

91. *See infra* Part III.B (discussing recent challenges to state laws creating predicate statutes).

92. 15 U.S.C. § 7903(5)(A)(iii).

93. *E.g.*, *Ileto*, 565 F.3d at 1133 (citing *Applicable*, BLACK'S LAW DICTIONARY 98 (6th ed. 1990) to define "applicable" as "capable of being applied"). Discussed in greater detail below, the Indiana Court of Appeals held that the word is unambiguous and means "[c]apable of being applied." Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 431 (Ind. Ct. App. 2007) (alteration in original) (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 63 (1981)); *see infra* notes 117–18 and accompanying text.

94. *Ileto*, 565 F.3d at 1134. Some courts consider "fit" or "suitable" as the second, narrower definition, but these small variations in definition do not affect the outcome of the case. Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 302 (Conn. 2019).

95. *See id.* at 333 (finding that there is "a spectrum of meanings," including these "two poles"); *Beretta*, 524 F.3d at 401 (finding that the universe of statutes "applicable" to firearms is "undefined").

96. *Ileto*, 565 F.3d at 1134. PLCAA lists two examples of types of predicate statutes: those barring false entries in required records and those barring sales to prohibited buyer. *Id.* The court considered the meaning of "applicable" in light of those examples. *Id.* Courts following this reasoning later articulated this as using the canon of ejusdem generis, which dictates that "when the scope of the general category is unclear, a presumption, albeit a rebuttable one, may arise that the general category encompasses only things similar in nature to the specific examples that follow." *Soto*, 202 A.3d 262, 314. However, the court in *Soto* gave a unique analysis of the meaning of these examples, attributing their inclusion to a congressional reaction to the D.C. sniper attacks and consequently holding that the canon did not apply here. *Id.* at 315.

97. *Beretta*, 524 F.3d at 403 ("Such a result would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets.").

to implicate the purchase and sale of firearms" as well as statutes that explicitly mentioned firearms or had previously been applied to firearms.[98] Since a statute like New York's criminal nuisance statute was one of "general applicability," it could not be a predicate statute.[99]

However, in *Ileto*, the Ninth Circuit went on to consider congressional intent and reasoned that the text was inconclusive.[100] The Ninth Circuit concluded that Congress clearly intended to preempt common law claims, particularly novel tort "theories without foundation in hundreds of years of the common law and jurisprudence of the United States."[101] Even though the nuisance law was statutory, the court reasoned that it was simply a codification of the common law and thus could not serve as a predicate statute.[102]

Despite differences in the nuance of their reasoning, lower courts have treated the precedent of the Ninth and Second Circuits as essentially the same.[103] Still, these differences in interpretation could affect future cases, as considered in Part III, because the congressional intent behind PLCAA may provide support for arguments to preempt new causes of action.

2. *Trade Practices Statutes*. Both the Second and Ninth Circuits conceded that there could be statutes that do not explicitly mention firearms but could be used as predicate statutes. To date, only trade practices statutes have been successfully used in this way.[104] Trade

98. *Id.* at 404.

99. *Id.* at 400. The court held this even though a related statute declared unlawfully used firearms a nuisance, which would seem to undercut the holding that criminal nuisance is not applicable to firearms. City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256, 277 (E.D.N.Y. 2004), *rev'd*, 524 F.3d 384 (2d Cir. 2008).

100. *Ileto*, 565 F.3d at 1134. A recently decided New York case interpreted the Second Circuit's precedent to include considering congressional intent, but that consideration still has far less depth than the Ninth Circuit's reasoning. *See* Nat'l Shooting Sports Found., Inc. v. James, No. 121CV1348MADCFH, 2022 WL 1659192, at *3 (N.D.N.Y. May 25, 2022); *see infra* notes 183–87 and accompanying text.

101. *Ileto*, 565 F.3d at 1135.

102. *Id.* at 1136. Additionally, the preemption of common law tort claims is a key premise in the recent Pennsylvania ruling that PLCAA is unconstitutional. Gustafson v. Springfield, 282 A.3d 739, 757 (Pa. Super. Ct. 2022).

103. *See* Prescott v. Slide Fire Sols., LP, 410 F. Supp. 3d 1123, 1137 (D. Nev. 2019). In *Prescott*, which took place in the Ninth Circuit, the court held that 18 U.S.C. § 1001(a)(2), a general prohibition on false statements to government officials, is too general to be a predicate statute for PLCAA, thus using essentially the same reasoning as the Second Circuit. *Id.*

104. *See* Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 302–03 (Conn. 2019) ("[T]here is little doubt that state consumer protection statutes such as [the Connecticut Unfair

practices statutes generally bar unfair or deceptive trade practices, like false advertising, and every state has a trade practices statute in some form.[105] Their specificity and pervasiveness, along with recent cases allowing trade practices claims, make these statutes a narrow but promising option for plaintiffs.

On March 19, 2019, in *Soto v. Bushmaster Firearms International, LLC*,[106] a case brought by the Sandy Hook plaintiffs, the Connecticut Supreme Court held that the Connecticut Unfair Trade Practices Act was an applicable predicate statute.[107] The court's analysis was consistent with previous interpretations of PLCAA, reasoning that Congress chose a term that is "susceptible to a broad reading" and that statutes should not be read to "supersede[] the historic police powers of the states unless that was the clearly expressed . . . purpose of Congress."[108] Six months later, in *Prescott v. Slide Fire Solutions*,[109] a Nevada district court held that the Nevada Deceptive Trade Practices Act could serve as a predicate statute, relying on the Ninth Circuit's reasoning in *Ileto* and the Connecticut Supreme Court in *Soto*.[110]

This represents a major breakthrough for litigants, particularly as the 2022 Uvalde shooting highlighted disturbing marketing by firearms

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Trade Practices Act] would qualify as predicate statutes."); *Prescott*, 410 F. Supp. 3d at 1138 (holding that while the federal statute claim failed, the claim based on Nevada's trade practices statute could proceed).

105. *See* Katie Feierabend, Comment, *A Potential Bullet Hole in the Protection of Lawful Commerce in Arms Act: A Comparison of the CUPTA and the MMPA*, 89 UMKC L. REV. 161, 162, 169 (2020) (discussing differences in statutes that could change plaintiffs' outcomes); Sharon Driscoll, *Stanford Law Professors on the Lawsuit Against Gun Manufacturers in the Wake of the Sandy Hook Massacre*, STAN. L. SCH. BLOGS (Mar. 14, 2019), https://law.stanford.edu/2019/03/14/stanford-law-professors-on-sandy-hook-victims-relatives-lawsuit-against-gun-manufacturers [https://perma.cc/8UJA-PBJG].

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

107. *Id.* at 308.

108. *Id.* at 303, 312. This reasoning is not inconsistent with the Second and Ninth Circuits but raises concerns regarding federalism and reserved powers not addressed by those courts. *See id.* at 312. Furthermore, the court reasoned that at the time PLCAA was enacted, "no federal statutes directly or specifically regulated the marketing or advertising of firearms," so the only types of laws Congress could have had in mind were those that generally regulate marketing and advertising. *Id.* at 304.

109. Prescott v. Slide Fire Sols., LP, 410 F. Supp. 3d 1123, 1137 (D. Nev. 2019).

110. *Prescott*, 410 F. Supp. 3d at 1138–39. This allowed the case to proceed, despite the Court also holding that federal law prohibiting false statements to government officials could not serve as a predicate statute. *Id.*

companies.[111] As a fairly new predicate statute, courts could certainly still reject this interpretation. But because the Supreme Court denied certiorari for *Soto*, this remains a promising new development for the time being. Outside of trade practices statutes, however, no other statute that does not explicitly mention firearms has been used successfully as a predicate statute by a court applying the reasoning of the Second and Ninth Circuits.[112]

3. *Departures from the Majority's Interpretation*. While the majority's reasoning has generally proved to be persuasive for courts,[113] two notable cases, *Smith & Wesson Corp. v. City of Gary*[114] and *Williams v. Beemiller, Inc.*,[115] have rejected this analysis of PLCAA, demonstrating other possibilities for interpreting the predicate exception. *Smith & Wesson Corp. v. City of Gary* is an exceptional case for several reasons, most importantly in that the court adopted an expansive view of the predicate exception. In *Gary*, the city of Gary, Indiana brought a public nuisance claim against multiple members of the firearms industry, alleging negligent conduct contributing to high levels of violence in the city.[116] *Gary* first held that "applicable" clearly means "[c]apable of being applied."[117] It then looked beyond the nuisance statute and reasoned that, to allege nuisance, there must have been unlawful conduct that "presumably violates . . . regulatory statutes."[118] This approach to finding an "applicable" predicate statute shifted the court's analysis from parsing the specific statute to considering all the unlawful conduct the claim entailed, making the

111. *See generally* Amir Vera & Tom Foreman, *The Maker of a Gun Used in the Texas Shooting Has a History of Controversial Weapons Ads*, CNN (May 30, 2022, 11:49 PM), https://www.cnn.com/2022/05/30/us/daniel-defense-uvalde-gun-maker-ads/index.html [https://perma.cc/FR4D-U7D4] (providing several examples of Daniel Defense's controversial advertisements).

112. *See* Appendix.

113. *See, e.g.*, District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 171–72 (D.C. 2008); Phillips v. Lucky Gunner, LLC, 84 F. Supp.3d 1216, 1224 (D. Colo. 2015).

114. Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 431 (Ind. App. 2007). Recently, the District of Minnesota adopted similar reasoning to allow a claim to proceed, holding that negligence and public nuisance claims significantly relied on the GCA. Minnesota v. Fleet Farm LLC, No. CV 22-2694, 2023 WL 4203088, at *10 (D. Minn. June 27, 2023).

115. Williams v. Beemiller, Inc., 952 N.Y.S.2d 333, 339 (N.Y. App. Div. 2012).

116. *Gary*, 875 N.E.2d at 425.

117. *Id.* at 431 (alteration in original) (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 63 (1981)).

118. *Id.* at 426 (citing the 2003 case).

"applicability" of the nuisance statute itself basically irrelevant. This case is an anomaly, but it could open the door to more courts adopting this perspective.

Comparing *Gary* and *Williams* with *Beretta* and *Ileto* demonstrates the range of PLCAA interpretations that courts could adopt, particularly because the claims in each case bear striking similarities. *Gary* is the only city case still in active litigation, but *Beretta* was also a city case, so they each allege the nuisance claims typical of city cases.[119] *Williams* and *Ileto* feature slightly different claims. The plaintiffs were the victims of specific crimes, but they alleged that their harms were caused by firearms manufacturers through the same conduct alleged in the city cases.[120] The *Williams* court reasoned that the facts alleged "support[ed] a finding that defendants knowingly violated federal gun laws," and did not focus on whether specific laws qualified as predicate statutes, similarly to *Gary*.[121] *Williams* and *Gary* demonstrate that there are other reasonable and more expansive interpretations of the predicate exception that could have been adopted rather than that of the Ninth and Second Circuits.

The cases that have considered statutes that do not explicitly mention firearms have defined the scope of available "applicable" statutes and forecast possible challenges to recently passed state codes of conduct. While some isolated cases showcase other approaches to the predicate exception that would allow for more claims to proceed, the general trend has been that only a trade practices statute will be considered applicable without mentioning firearms.[122]

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119. *Compare* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 391 (2d Cir. 2008) ("The City alleges that the Firearms Suppliers know that firearms distributed to legitimate retailers are diverted into illegal markets and that the Firearms Suppliers 'could, but do not, monitor, supervise or regulate' . . . downstream distributors."), *with Gary*, 875 N.E.2d at 425 ("The City alleges that the manufacturers know of these illegal retail sales of handguns . . . . [and] have the ability to change the distribution system to prevent these unlawful sales but have intentionally failed to do so.").

120. *Compare* Ileto v. Glock, Inc., 565 F.3d 1126, 1130 (9th Cir. 2009) ("[T]he shooting victims . . . . alleged that Defendants intentionally produce, market, distribute, and sell more firearms that the legitimate market demands in order to take advantage of re-sales to distributors that they know or should know will, in turn, sell to illegal buyers."), *with Williams*, 952 N.Y.S.2d at 336 (noting plaintiffs' allegations that "Beemiller and MKS intentionally supplied handguns to irresponsible dealers . . . because they profited from sales to the criminal gun market").

121. *Williams*, 952 N.Y.S.2d at 338.

122. *See supra* notes 104–11 and accompanying text.

B. Statutes That Explicitly Mention Firearms

The second category of cases are those where the plaintiff alleged violations of statutes that specifically mention firearms. Most of these lawsuits alleged violations of federal laws that explicitly regulate firearms,[123] so the holdings did not turn on the meaning of the word "applicable." These cases make up the majority of unsuccessful predicate exception cases and reveal that finding an "applicable" statute is only half the battle for plaintiffs. Rather, plaintiffs consistently face challenges in court because firearms laws do not confer duties on the firearms industry or rights on any potential plaintiffs.

The major source of firearms law in the United States is the Gun Control Act of 1968 ("GCA"), which regulates most types of modern firearms.[124] The GCA details restrictions on selling, purchasing, and possessing firearms, including record-keeping and background-check requirements.[125] The GCA does provide a predicate statute for some claims. But because the GCA predates PLCAA, it was written with a focus on regulation, not with the predicate statute requirements in mind. Therefore, it can be difficult for plaintiffs to fit the factual nuances of their claim into the GCA because it is not framed in terms of obligations that can be violated. For example, the GCA does not directly prohibit straw purchases, but gun purchasers must complete an ATF Form 4473 that includes a signed statement that the purchaser is the actual purchaser of the firearm.[126] Additionally, the GCA is not necessarily comprehensive—it does not place obligations on the firearms industry to require training or security measures in stores, for instance. This generally limits the usefulness of federal firearms law for tort plaintiffs, and among the cases in this category, roughly half were dismissed.[127]

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123. *See* Appendix.

124. MICHAEL A. FOSTER, CONG. RSCH. SERV., R46958, FEDERAL FIREARMS LAW: SELECTED DEVELOPMENT IN THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES 2, 4 (2021).

125. *Id.* at 5.

126. *Id.* at 7–8. The firearms law passed in 2022 strengthens law against straw purchasing and could provide a better statute for plaintiffs. Emily Cochrane & Zolan Kanno-Youngs, *Biden Signs Gun Bill into Law, Ending Years of Stalemate*, N.Y. TIMES (July 25, 2022), https://www.nytimes.com/2022/06/25/us/politics/gun-control-bill-biden.html [https://perma.cc/ZH9S-MGET].

127. *See* Appendix.

Despite the significant gaps in firearms statutes and the obstacles facing plaintiffs, these cases also demonstrate where plaintiffs can see some success. Claims that were allowed to proceed were largely those where retailers allegedly missed clear signs of straw purchases.[128] The claims that were dismissed, however, reveal gaps in firearms regulations that limit the ability of individual plaintiffs to hold industry accountable. These cases represent the types of claims that PLCAA blocks because there is no specific statutory bar on this conduct, even if there would be a cognizable claim without PLCAA.

Of the half of claims that were dismissed, the reason for dismissal ranged from language in PLCAA itself to holdings that the predicate statute was not violated as a matter of law. For example, a pair of cases was dismissed because the court held that language in PLCAA other than "applicable" barred the plaintiff's claims, language emphasized here: "knowingly *violated* a . . . statute applicable to the *sale or marketing* of a product."[129] In *District of Columbia v. Beretta*,[130] the D.C. Court of Appeals held that a statute placing strict liability on manufacturers and retailers for the results of the "discharge of the assault weapon or machine gun in the District of Columbia" is not applicable under PLCAA.[131] The court reasoned that a strict liability statute cannot actually be "violated," as it "imposes no duty on firearms manufacturers or sellers to operate in any particular manner," and PLCAA requires "the law in question to contain a prohibition against, or standards of, conduct that are being violated."[132] The other case, *Phillips v. Lucky Gunner*,[133] involved an internet retailer with few safeguards to prevent unlawful purchases.[134] The claim was dismissed

128. *See infra* note 144 and accompanying text.

129. 15 USC § 7903(5)(A)(iii) (emphasis added).

130. District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (D.C. 2008).

131. *Id.* at 167 n.1, 171 (D.C. 2008). *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174 (D.D.C. 2009), was essentially the same case and was thus quickly also dismissed following *Beretta*. *Id.*

132. *District of Columbia*, 940 A.2d at 170. A Maryland case departed somewhat from this and held that the predicate statute need not explicitly penalize an action. The court reasoned that Md. Code Ann. Pub. Safety § 5-205(b)(6), which "prohibit[ed] the possession of a rifle or shotgun by a person that 'suffers from a mental disorder . . . and has a history of violent behavior'" was an applicable statute because the word applicable does not require that the "statute explicitly penalize the sale of a firearm." Brady v. Walmart Inc., No. 8:21-CV-1412-AAQ, 2022 WL 2987078, at *8 (D. Md. July 28, 2022).

133. Phillips v. Lucky Gunner, LLC, 84 F. Supp.3d 1216, 1225 (D. Colo. 2015).

134. *Id.* at 1225.

in part because PLCAA requires the retailer to knowingly violate the statute. The plaintiffs only alleged that the defendants contributed to violations and did not allege any facts demonstrating knowledge.[135] These two cases exemplify limits that PLCAA places on claims besides the "applicable" requirement.

Four cases relied on provisions of the Gun Control Act and were dismissed because the facts of the cases did not neatly fit the provisions of the GCA.[136] In two of these cases, the firearms in question were stolen, or may have been, and the plaintiffs alleged that the firearms retailers were liable because they had left individuals alone with unsecured firearms, allowing them to easily be stolen.[137] Each of these claims were dismissed, however, because the GCA regulates sales of firearms,[138] and theft does not constitute a sale.[139] In other words, these allegations were dismissed because legislatures did not predict that locking up dangerous weapons needed to be statutorily required. In another case, the court held that a high-capacity magazine packaged with a firearm did not qualify as a firearm for the purposes of the GCA.[140] Finally, one court found that the allegations would violate the GCA, but dismissed the case because the GCA does not create a cause of action.[141] These cases show how the current statutory framework was not built to provide a predicate statute and thus fails plaintiffs even when the law was likely violated.

When plaintiffs were able to make specific allegations, usually of a clear straw purchase or sale to someone otherwise barred from purchasing the product, courts allowed their cases to proceed, using firearms statutes as predicates.[142] The reasoning of these cases is

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135. *Id.* The significance of the word "knowingly" will be discussed in greater depth in Part IV.

136. *In re* Acad., Ltd., 625 S.W.3d 19, 29 (Tex. 2021); Bannerman v. Mountain State Pawn, Inc., No. 3:10-CV-46, 2010 WL 9103469, at *9 (N.D. W. Va. Nov. 5, 2010), *aff'd*, Bannerman v. Mountain State Pawn, Inc., 436 F.App'x. 151 (4th Cir. 2011); Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 394 (Alaska 2013); Gilland v. Sportsmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693, at *6 (Conn. Super. Ct. May 26, 2011).

137. *Estate of Kim*, 295 P.3d at 385; *Gilland*, 2011 WL 2479693, at *6.

138. *Estate of Kim*, 295 P.3d at 394.

139. *Gilland*, 2011 WL 2479693, at *7.

140. *In re* Acad., Ltd., 625 S.W.3d 19, 29 (Tex. 2021).

141. Bannerman v. Mountain State Pawn, Inc., No. 3:10-CV-46, 2010 WL 9103469, at *9 (N.D. W. Va. Nov. 5, 2010), *aff'd*, 436 F.App'x. 151 (4th Cir. 2011).

142. Corporan v. Wal-Mart Stores E., LP, No. 16-2305-JWL, 2016 WL 3881341, at *2 (D. Kan. July 18, 2016); King v. Klocek, No. 133 N.Y.S.3d 356, 358–59 (N.Y. App. Div. 2020); Chiapperini

consistent with the reasoning of courts barring claims.[143] These successes provide hope for some plaintiffs, as they demonstrate that plaintiffs are sometimes successful on claims using the predicate exception. But these cases also largely contain unusually obvious violations of firearms laws,[144] which is not the case for all plaintiffs.

C. Gaps in Firearms Statutes

Looking at the full landscape of this litigation, two types of claims emerge as almost completely barred by PLCAA. The first are claims based in nuisance theories, like the claims the Ninth Circuit considered in *Ileto* and the Second Circuit considered in *Beretta*.[145] The second are claims arising from basic negligence, like those in *Estate of Kim* and *Gilland*.[146] These claims are traditionally under the common law, which is uniquely able to adapt to the factual details of different harms as they

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v. Gander Mountain Co., 13 N.Y.S.3d 777, 787 (N.Y. Sup. Ct. 2014); Brady v. Walmart Inc., No. 8:21-CV-1412-AAQ, 2022 WL 2987078, at *6, *17 (D. Md. July 28, 2022).

Two city cases also fall into this category, *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 308 (E.D.N.Y. 2007), and *City of New York v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237, 241 (E.D.N.Y. 2008). These cases were allowed to proceed but quickly settled. They relied on a case that was later overruled but settled before that overruling, so these cases likely would have been overruled had they continued. Press Release, Michael A. Cardozo, N.Y.C. L. Dep't, Off. of the Corp. Couns., Gun Dealer Adventure Outdoors Default in Prominent Gun Case (June 2, 2008), https://www.nyc.gov/html/law/downloads/pdf/pr6208.pdf [https://perma.cc/MM5L-996Z].

143. *See supra* Part II.A. *Pawn*, 247 F.R.D. at 308, is an exception, but as discussed in the previous footnote, would likely have been overruled if it had not settled.

144. These cases have clear fact patterns, and thus clear examples of wrongdoing:

In *Chiapperini*, Nguyen filled out the forms stating that she was the true purchaser while Spengler, a convicted felon, spoke to the salesperson, paid for the weapons in cash, and took the guns off the counter after the purchase. *Chiapperini*, 13 N.Y.S.3d at 781. Nguyen never possessed the guns again, and Spengler used them shoot five people. *Id.* at 781–82.

In *Corporan*, Miller selected the shotgun and then said he did not have identification with him so Reidle would complete the purchase. *Corporan*, No. 16-2305-JWL, 2016 WL 3881341, at *1. Reidle completed the purchase forms then gave the gun to Miller, a convicted felon. *Id.* Four days later, Miller killed two people. *Id.*

In *Brady*, a Walmart employee, Jacob Mace, was clearly experiencing a mental health crisis such that his supervisor said he would add him to a blacklist barring him from purchasing firearms at the store. *Brady*, No. 8:21-CV-1412-AAQ, 2022 WL 2987078, at *1–2. Six days later, however, Mace purchased a firearm at the store and used it to commit suicide. *Id.*

In *King*, Klocek, who was twenty years old, was allowed to purchase handgun ammunition, which is restricted to purchasers over the age of twenty-one. *King*, 133 N.Y.S.3d at 358.

145. *See supra* note 90 and accompanying text.

146. *See supra* note 137 and accompanying text.

arise. Embedded in these arguments, however, are tangible expectations for members of the firearms industry, which can be articulated concretely in legislation. As discussed in Part I, plaintiffs have alleged that the firearms industry fails to prevent straw purchases, illegal sales, and thefts through training and security[147]; and fails to monitor for negligent and corrupt downstream distributors, among other allegations.[148] That standard of care could be statutorily required.

Giving a statutory basis to these types of claims and codifying these expectations, then, should be the goal of legislation in this area. Recent legislation in New York, New Jersey, Delaware, Hawaii, Colorado, Washington, and California has varying levels of success in achieving this goal, which this Note will discuss in the following Part.

III. STATE LEGISLATION

New York, New Jersey, Delaware, Hawaii, Washington, Colorado, and California have all recently enacted statutes creating a code of conduct for members of the firearms industry, generally called access-to-justice laws.[149] These laws lay out expectations for the level of care the firearms industry will take in creating, distributing, and selling these products, and they create a civil cause of action for failing to meet those expectations. Perhaps most importantly, the statutes provide a clearly "applicable" predicate statute for plaintiffs pursuing litigation against the firearms industry. However, while these laws make great strides in providing relief to plaintiffs, they have significant weaknesses, particularly in light of jurisprudence on the predicate exception.

First, the jurisprudence on the predicate exception reveals that simply creating an applicable predicate statute is not enough. Rather, the laws must provide a better foundation for their claims, so these statutes will likely vary in their success. Second, these laws will, and have already begun to, face significant challenges to their legitimacy and any resulting claims. While avoiding these challenges entirely would have been impossible, the language in some of the statutes makes them more susceptible to the same attacks that have blocked claims before.

147. *See supra* notes 40–42 and accompanying text.

148. *Id.*

149. N.Y. GEN. BUS. LAW ch. 20, art. 39-DDDD (McKinney 2021); DEL. CODE ANN. tit. 10, pt. III (2022); N.J. STAT. ANN. § 2C:58–35 (West 2022); CAL. CIV. CODE div. 3, pt. 4, tit. 20 (West 2023); Haw. Act 028 (2023); COLO. REV. STAT. ANN. § 6-27-104 (2023); 2023 Wash. Sub. S.B. 5078.

This Part will discuss the different iterations of these codes of conduct and their likely success in providing relief for plaintiffs in light of predicate-exception jurisprudence. Additionally, this Part will examine potential challenges to these laws and the claims made under them. Finally, this Part will discuss recommendations for state legislation in light of this analysis.

A. Substance of State Legislation

Generally, access-to-justice laws seek to create both a code of conduct for the firearms industry and a cause of action for plaintiffs. In these two dimensions, states vary in the details of the code of conduct and in the kinds of plaintiffs allowed to bring a claim. These two decisions will have significant effect on the types of cases that courts will likely allow under these statutes.

As a preliminary matter, these statutes explicitly regulate the sale and marketing of firearms, so they are clearly applicable statutes and create a standard that can be violated.[150] This would presumably allow claims that had previously been dismissed because the statute did not mention firearms, such as those in *City of New York v. Beretta* and *Ileto v. Glock*.[151]

1. *Codes of Conduct.* These conduct laws generally lay out the expectations of the firearms industry that underlay negligence and nuisance claim. For example, they require that industry members institute "reasonable controls" to prevent thefts of firearms[152] and prevent sales to "straw purchasers, traffickers, person prohibited from

150. PLCAA "require[s] the law in question to contain a prohibition against, or standards of, conduct that are being violated." District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 170 (D.C. 2008).

151. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 400 (2d Cir. 2008); Ileto v. Glock, Inc., 565 F.3d 1126, 1134 (9th Cir. 2009).

152. N.Y. GEN. BUS. LAW ch. 20, art. 39-DDDD, § 898-b(2); *see also* DEL. CODE ANN. tit. 10, pt. III, § 3930; N.J. STAT. ANN. § 2C:58–35; CAL. CIV. CODE div. 3, pt. 4, tit. 20; Haw. Act 028; COLO. REV. STAT. ANN. § 6-27-104; 2023 Wash. Sub. S.B. 5078.

Each state also incorporates significant portions of their consumer protection statutes into these codes of conduct. N.Y. GEN. BUS. LAW ch. 20, art. 39-DDDD; DEL. CODE ANN. tit. 10 pt. III; N.J. STAT. ANN. § 2C:58–35; CAL. CIV. CODE div. 3, pt. 4, tit. 20; Haw. Act 028; COLO. REV. STAT. ANN. § 6-27-104; 2023 Wash. Sub. S.B. 5078.

Colorado is a notable exception to the discussion in this subsection, as their recently passed law simply incorporates their consumer protection act and criminal code regarding firearms and does not lay out any other standard of care. COLO. REV. STAT. ANN. § 6-27-104.

possessing firearms under state or federal law, or persons at risk of injuring themselves or others."[153] These statutorily defined expectations essentially codify the duties that plaintiffs in a negligence suit would assert. Thus, plaintiffs like those in *Estate of Kim*, where the defendants allegedly failed to prevent the theft of a firearm, could successfully allege a claim that the store failed to institute controls that would prevent thefts.[154] New York provides even more support for these claims by requiring "screening, security, inventory and other business practices" to prevent thefts or illegal sales.[155] These laws would provide a right of action to plaintiffs like those in *Bannerman v. Mountain State Pawn, Inc.*,[156] where a convicted felon was somehow able to purchase a firearm from a pawn shop, but the court held that the Gun Control Act did not create a right of action.[157]

However, while all states with these laws except Colorado include the "reasonable controls" provision, state codes have diverged in their level of flexibility. On the more flexible end of the spectrum, New York, New Jersey, Washington, and Delaware all frame their statutes as public nuisance statutes.[158] Nuisance doctrine provides flexibility for plaintiffs with unusual fact patterns or innovative arguments, and this framing may allow ongoing incorporation of evolving doctrine.[159] For

153. N.Y. GEN. BUS. LAW ch. 20, art. 39-DDDD, § 898-a(2).

154. Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 385 (Alaska 2013).

155. N.Y. GEN. BUS. LAW ch. 20, art. 39-DDDD, § 898-a(2).

156. Bannerman v. Mountain State Pawn, Inc., No. 3:10-CV-46, 2010 WL 9103469 (N.D. W. Va. Nov. 5, 2010), *aff'd*, 436 F. App'x 151 (4th Cir. 2011) (per curiam) (unpublished opinion).

157. *Id.* at *9.

158. Delaware, New Jersey, and Washington state that members of the firearms industry "may not knowingly or recklessly create, maintain, or contribute to a public nuisance," which refers to "a condition which injures, endangers, or threatens to injure or endanger or contributes to the injury or endangerment of the health, safety, peace, comfort, or convenience of others." DEL. CODE ANN. tit. 10, pt. III (2022); N.J. STAT. ANN. § 2C:58–35 (West 2022); 2023 Wash. Sub. S.B. 5078. Stated slightly differently, New York states that "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" and a violation of the statute "that results in harm to the public shall hereby be declared a public nuisance." N.Y. GEN. BUS. LAW ch. 20, art. 39-DDDD, §§ 898-b(1), -c(1). These are largely the same statute, but one small difference seems to be that danger to public safety must actually have occurred, not been threatened, to constitute a public nuisance under the New York statute.

159. *See* Ileto v. Glock Inc., 349 F.3d 1191, 1211–12 (9th Cir. 2003) (For example, the Ninth Circuit held, before the passage of PLCAA, that plaintiffs stated a cognizable nuisance claim by alleging, using novel tort theories, that firearms distribution practices created a nuisance. Plaintiffs could similarly use more recent state legislation that has been framed as nuisance.). This,

example, plaintiffs have previously alleged that the firearms industry "intentionally produce[s], market[s], distribute[s], and sell[s] more firearms than the legitimate market demands" in particular communities.[160] This claim may find more success under a nuisance-like statute, as it would be highly fact-dependent. However, the use of "public nuisance" language may cause greater challenges to the laws' legitimacy because it could be seen as a codification of the common law that PLCAA was intended to preempt.[161] This framing, therefore, may not provide as many avenues of relief to plaintiffs.

In contrast, California, Hawaii, and Washington have created a more specific code of conduct.[162] These three states require that industry members "[t]ake reasonable precautions to ensure" that they do not provide firearms to "downstream distributor[s] or retailer[s] . . . who fail[] to establish, implement, and enforce reasonable controls"[163] and bar "abnormally dangerous [products] . . . likely to create an unreasonable risk of harm to public health and safety."[164] The specific language is better equipped to avoid the original objections to common law claims[165] and may ultimately serve plaintiffs better in proving their claims. For example, similar plaintiffs to those in *Estate of Kim* in New York would only have a claim that the dealer failed to institute reasonable controls to prevent theft, and suing the manufacturer would require a greater showing that they unreasonably endangered public safety.[166] But in California or Hawaii, these plaintiffs could also have a claim that the manufacturer of the firearm failed to ensure that its dealer took adequate precautions. Additionally, a plaintiff like those in *In re Academy, Ltd.*,[167] where the court held that a high-capacity

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combined with the broad prevention mandate, will likely allow for claims asserting that manufacturers failed to properly monitor their distribution chains for negligent and corrupt dealers and other elements of previous public nuisance claims.

160. Ileto v. Glock, Inc., 565 F.3d 1126, 1130 (9th Cir. 2009).

161. *See infra* notes 183–95 and accompanying text (discussing potential problems with framing these statutes in common law terms like nuisance).

162. 2023 Wash. Sub. S.B. 5078; CAL. CIV. CODE div. 3, pt. 4, tit. 20 (West 2023); Haw. Act 028 (2023).

163. CAL. CIV. CODE div. 3, pt. 4, tit. 20, § 3273.51(b)(2).

164. *Id.* § 3273.51(c).

165. *See supra* notes 100–01 and accompanying text.

166. *See* Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 385 (Alaska 2013). In *Estate of Kim*, the defendant dealer seemed to have negligently left a firearm on the counter; a plaintiff could likely bring similar claims under the New York statute. *Id.*

167. *In re* Acad., Ltd., 625 S.W.3d 19 (Tex. 2021).

magazine packaged with a firearm did not qualify as a firearm under the GCA,[168] may have more success by claiming that bundling the magazine and firearm created an "abnormally dangerous [product]."[169] Thus, the specificity of a law like those in California, Washington, and Hawaii could provide an advantage to plaintiffs over a more general law. Interestingly, Washington uses both the "public nuisance" language and the specific language of California and Hawaii.[170]

2. *Possible Plaintiffs*. The second policy choice reflected in these statutes is which plaintiffs will be allowed to bring a claim. In particular, New Jersey, Delaware, Hawaii, and Colorado significantly limit who may bring these cases. New Jersey only allows the state attorney general to bring claims under its statute.[171] This means that individuals who were harmed by gun violence resulting from industry failures still have no recourse, and individual cities have no opportunity to protect their communities. Delaware, Hawaii, and Colorado allow private individuals and the state attorney general to bring actions, which still leaves out individual cities.[172] Some cities face far greater impact from gun violence than others, and proving the elements of these claims would naturally be easier for cities than states. It would be easier to establish an element like proximate cause where a city faces increased violence due to certain dealers in city limits, while proving that causality on a state-wide level would be substantially more difficult. Only California, Washington, and New York give relief to the full spectrum of plaintiffs, allowing for actions brought by private individuals, local officials, and state attorneys general.[173] This legislation is most powerful and provides the greatest check on the firearms industry when all of these parties can bring actions.

168. *Id.* at 29.

169. CAL. CIV. CODE div. 3, pt. 4, tit. 20 (West 2023); Haw. Act 028 (2023).

170. 2023 Wash. Sub. S.B. 5078.

171. N.J. STAT. ANN. § 2C:58–35 (West 2022). This statute does give greater powers to the state attorney general. *Id.* Separate from their cause of action, the state attorney general may also conduct investigations of any member of the gun industry, including placing those members under oath. *Id.* § 2C:58–35(d).

172. COLO. REV. STAT. ANN. § 6-27-105 (West 2023); DEL. CODE ANN. tit. 10, pt. III (2022); Haw. Act 028.

173. N.Y. GEN. BUS. LAW ch. 20, art. 39-DDDD (McKinney 2021); CAL. CIV. CODE div. 3, pt. 4, tit. 20; 2023 Wash. Sub. S.B. 5078.

B. Predicting Challenges to these Statutes

Beyond the specific strengths and weakness of the statutes, the laws themselves face challenges to their legitimacy.[174] Previous litigation has forecasted the ways that prospective defendants will challenge, and already have challenged,[175] these laws. Specifically, these laws can be challenged on the grounds that they violate the purpose of PLCAA and are thus preempted. Statutes using the language of public nuisance face particular risks to these challenges. Additionally, PLCAA still imposes the requirement of a "knowing" violation, an issue that has been scarcely litigated but will surely become larger.[176]

1. *Public Nuisance Language and Preemption Challenges*. California and Hawaii's outlier status in refraining from using the language of nuisance is likely because the Ninth Circuit, more so than any other court, seemed concerned with the congressional intent behind PLCAA.[177] The Ninth Circuit did not stop their analysis of the predicate exception with the text but explicitly continued on to discussing legislative history and congressional intent.[178] The court concluded that Congress intended to bar common law claims, fearing liability based on "theories without foundation in hundreds of years of the common law."[179] The statute at issue in the case, while a statute, was a codification of the common law and was still subject to "judicial evolution."[180] Thus, it could not be used for the predicate exception.[181]

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174. While outside the scope of the Note, significant research has also recently been dedicated to the possibility of the U.S. Supreme Court protecting the Second Amendment by barring these types of tort claims, and doing so on a constitutional basis that could not be overcome by state legislation. Heidi Li Feldman, *Public Nuisance Liability and the Irrelevance of the Second Amendment*, DUKE CTR. FOR FIREARMS L. (Apr. 12, 2022), https://firearmslaw.duke.edu/2022/04/public-nuisance-liability-and-the-irrelevance-of-the-second-amendment [https://perma.cc/U9BC-3D7Y] (exploring "whether there is any threat to Second Amendment rights from litigation premised on the theory that manufacturers who create an overabundance of guns with excessive criminal appeal create a public nuisance").

175. *See, e.g.*, Nat'l Shooting Sports Found., Inc. v. James, 608 F. Supp.3d 48, 48 (N.D.N.Y. May 25, 2022); *infra* note 194 and accompanying text.

176. *See infra* notes 197–200 and accompanying text.

177. *See supra* note 100–02 and accompanying text.

178. Ileto v. Glock, Inc., 565 F.3d 1126, 1134–35 (9th Cir. 2009).

179. *Id.* at 1135.

180. *Id.* at 1136.

181. *Id.*

The Second Circuit considered this history as well, but in less detail than the Ninth Circuit.[182] This reasoning provides ample fodder for arguing that even a new public nuisance statute that explicitly mentions firearms is still common law and barred by PLCAA.

This claim is already being litigated. In the first case considering this issue, *National Shooting Sports Foundation, Inc. v. James*,[183] the Northern District of New York rejected the challenge. The court acknowledged that the text of the new New York statute and the "general public nuisance statute . . . are generally similar in content."[184] It reasoned, however, that the Second Circuit in *Beretta* was tasked specifically with the question of determining the meaning of "applicable," which warranted the consideration of congressional intent.[185] In contrast, because the statute in *National Shooting Sports Foundation* explicitly applied to firearms, determining applicability was not required.[186] Therefore, the court concluded, no consideration of congressional intent was required, and the statute clearly indicated that Congress did not intend to create a blanket preemption for state statutes regulating firearms.[187] This decision deferred to the state legislature and did not allow the legislative intent of PLCAA to be the determining factor in its reasoning.

The District of New Jersey granted a preliminary injunction blocking enforcement after hearing a similar challenge.[188] The plaintiff argued that New Jersey's law was impliedly preempted by PLCAA because the language surrounding the word "applicable" indicated that underlying statutes must confer "a concrete obligation or prohibition."[189] The statute only required members of the firearms industry to act "reasonably."[190] The court held that predicate statutes

182. *Compare* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 403 (2d Cir. 2008), *with Ileto*, 565 F.3d at 1134–35.

183. Nat'l Shooting Sports Found., Inc. v. James, 604 F. Supp. 3d 48, 48 (N.D.N.Y 2022).

184. *Id.* at 59.

185. *Id.*

186. *See id.* ("Only to resolve [the ambiguity of the term "applicable to"] did the [*Beretta*] court engage in difficult questions of statutory construction. Here, Plaintiffs employ the same tools as the *Beretta* court, but it is unclear for what job." (referencing *Beretta*, 524 F.3d 384 at 400–01)).

187. *Id.*

188. Nat'l Shooting Sports Found. v. Platkin, No. CV226646ZNQTJB, 2023 WL 1380388, at *1 (D.N.J. Jan. 31, 2023).

189. *Id.* at *4.

190. *Id.*

must "require proof that the actor *knowingly* violated the relevant statute," and "[t]he knowingly requirement of the predicate exception necessitates the actor to have a sufficiently concrete duty to have knowingly violated a relevant statute."[191] On a motion to stay pending appeal, the defendant argued that the injunction was overbroad because the statute allows actions that would not be blocked by PLCAA in the first place; that argument was denied because the issue was not raised before the trial court.[192] Unsurprisingly, a number of lawsuits challenging these laws in other states have been filed as well.[193]

Additionally, the Ninth Circuit's holding in *Ileto* was based entirely on the legislative intent behind PLCAA.[194] Thus, the Ninth Circuit's reasoning provides even more support for the argument that these state statutes are preempted by PLCAA, as demonstrated by the holding in New Jersey. This lends additional strength to the statutes in the Ninth Circuit's jurisdiction. California and Hawaii's specificity and lack of common law terms will likely provide greater support for courts holding that the law is not preempted by PLCAA. Unlike the statutes that use the terms of public nuisance, California and Hawaii's statutes are specific and relatively inflexible, limiting the judicial evolution that concerned the Ninth Circuit.[195]

2. *Challenges Based on PLCAA's Knowing Requirement*. In addition to the threat of preemption, PLCAA's requirement of a "knowing[] violat[ion]" looms over forthcoming litigation. [196] This element has received little judicial attention up to this point, but a few courts have briefly considered the question of what the "knowing" requirement entails. The Indiana Court of Appeals included in a

191. *Id.* at *6.

192. Nat'l Shooting Sports Found. v. Platkin, No. CV226646ZNQTJB, 2023 WL 2344635, at *2 (D.N.J. Mar. 3, 2023).

193. Nat'l. Shooting Sports Found., *NSSF Challenges Hawaii's Public Nuisance Law*, NSSF (July 13, 2023), https://www.nssf.org/articles/nssf-challenges-hawaiis-public-nuisance-law [https://perma.cc/CCV9-VV2V]; Nat'l. Shooting Sports Found., *NSSF Challenges Delaware, N.J., 'Public Nuisance' Laws Allowing Frivolous Claims Against Firearm Manufacturers*, NSSF (Nov. 17, 2022), https://www.nssf.org/articles/nssf-challenges-delaware-n-j-public-nuisance-laws-allowing-frivolous-claims-against-firearm-manufacturers [https://perma.cc/9U6A-V9QZ]; Nat'l. Shooting Sports Found., *NSSF Challenges California's Law Encouraging Frivolous Firearm Industry Lawsuits*, NSSF (May 23, 2023), https://www.nssf.org/articles/nssf-challenges-californias-law-encouraging-frivolous-firearm-industry-lawsuits [https://perma.cc/H5HJ-HGGC].

194. Ileto v. Glock, Inc., 565 F.3d 1126, 1135 (9th Cir. 2009).

195. *See supra* notes 100–02 and accompanying text.

196. 15 U.S.C. § 7903(5)(A)(iii) (emphasis added).

footnote that knowing conduct was sufficiently alleged, although the court seemed to interpret "knowingly" as including constructive knowledge.[197] In a case involving the lack of safeguards in internet purchases, the United States District Court for Colorado dismissed a nuisance claim in part because PLCAA requires a knowing violation, but the plaintiffs only alleged that the defendants contributed to violations and did not present any facts demonstrating knowledge.[198]

The most extensive consideration of the knowing requirement is in Judge Berzon's concurrence in *Ileto v. Glock*.[199] Judge Berzon argued for an entirely different interpretation of PLCAA. Rather than agreeing with the majority's holding that congressional intent determines the meaning of "applicable," Berzon took a broader view and saw the knowing requirement as the limiting principle on "applicable." In her formulation of PLCAA, the "actual knowledge requirement can quite reasonably be read to create a mental-state overlay, a heightened requirement that a plaintiff must meet if his lawsuit is to proceed under the new PLCAA regime, regardless of whether the underlying statute requires such a mens rea."[200] While Judge Berzon made this argument to dissent from her colleagues' interpretation of PLCAA, this formulation does not necessarily contradict the majority's interpretation and could be used in later cases to further restrict the predicate exception.

Plaintiffs already often allege that a defendant's conduct is knowing.[201] And courts could interpret the interaction between the knowing requirement and the codes of conduct in multiple ways, so the knowing requirement will not necessarily be fatal. However, this requirement has already proved to be a significant tool for parties challenging these statutes, as the court's reasoning in *Nat'l Shooting Sports Found. v. Platkin* relied on the knowingly requirement to hold that New Jersey's statute was preempted by PLCAA. It remains to be seen how other courts will interpret this argument, but it could be limited through additional statutory language.

197. Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 430 n.6 (Ind. Ct. App. 2007).

198. Phillips v. Lucky Gunner, 84 F. Supp.3d 1216, 1225 (D. Colo. 2015).

199. *Ileto*, 565 F.3d at 1155–58 (9th Cir. 2009) (Berzon, J., concurring in part and dissenting in part).

200. *Id.* at 1156.

201. *See, e.g.*, *id.* (noting that the plaintiffs in this case had already alleged knowing conduct).

C. Recommendations for State Legislation

Based on this analysis, state access-to-justice laws will likely have more success where they include more specific code-of-conduct language, provide causes of action to the full spectrum of plaintiffs, and refrain from using public nuisance language.[202] But even further, access-to-justice laws could provide more foundation for plaintiffs' claims by including more specific expectations for practices in the firearms industry.

First, California, Hawaii, and Washington's inclusion of specific duties throughout the distribution chain will be more helpful than their less specific counterparts when plaintiffs bring claims against those higher up in the distribution chain. For example, manufacturers often have ample notice of problems with their dealers and are less likely to be judgment-proof than a small dealer.[203] Second, statutes that provide causes of action to individuals, cities, and state officials would better account for the range of harms imposed by gun violence, which take place on an individual and community level. Third, legislation should avoid the language of nuisance and instead formulate a more specific code of conduct, like California's and Hawaii's.[204] This would better protect the statute from preemption challenges by avoiding even the resemblance of common law statutes that have previously been blocked.[205]

These statutes will help plaintiffs get a remedy for harms suffered from gun violence. Many claims that had previously been blocked because there was no predicate statute or no law specifically barring

202. As previously discussed, legislation should provide a cause of action to state attorneys general, local officials, and individuals in order to fully provide relief for plaintiffs. *See supra* notes 171–73 and accompanying text (comparing the causes of action provided in each state).

203. *See supra* notes 38–39 and accompanying text (discussing how manufacturers are made aware of problematic dealers through trace requests).

204. *See supra* notes 169–70 and accompanying text (discussing the relative specificity of California's code of conduct).

205. *See supra* notes 177–82 and accompanying text (discussing challenges to these laws based on the congressional intent behind PLCAA). At least at the preliminary stage of challenging litigation, though, courts appear somewhat unconcerned with public nuisance language. The courts in both the New Jersey and New York cases, although reaching opposite conclusions, did not consider the public nuisance language in any depth despite its apparent relevance to the preemption question. Nat'l Shooting Sports Found. v. Platkin, No. CV226646ZNQTJB, 2023 WL 1380388 (D.N.J. Jan. 31, 2023); Nat'l Shooting Sports Found. v. Platkin, No. CV226646ZNQTJB, 2023 WL 2344635 (D.N.J. Mar. 3, 2023). However, it seems likely that the public nuisance language will gain importance given the precedent for blocking nuisance claims.

the conduct at issue will have a chance for success. But these laws could still do more to provide a foundation for plaintiffs' claims.

An even more specific code of conduct would avoid the pitfalls of proving that defendants knew conduct was unreasonable or endangered public safety. With all of these statutes, even the more specific, plaintiffs would need to demonstrate that conduct was unreasonable or that defendants knew their actions would endanger public safety.[206] Although plaintiffs may now be more able to overcome motions to dismiss, the legal theories behind these claims still are not intuitive. And proving violations of specifics in a statute is easier than broadly proving that members of the firearm industry failed to protect the public.[207]

Specifically, states could outline how they expect members of the firearms industry to prevent thefts or straw purchases. H.R. 5678, a federal bill introduced in 2021, provides an example of specific drafting

206. *See supra* notes 177–82 and accompanying text.

207. California has also recently enacted additional firearms legislation beyond this law. On June 30, 2022, AB 2571 was enacted, which prohibits marketing targeted at minors and authorizes lawsuits on behalf of both private individuals and government actors. Press Release, Gavin Newsom, Governor, Governor Newsom Takes Action To Further Restrict Ghost Guns and Protect California Kids from Gun Violence (July 1, 2022), https://www.gov.ca.gov/2022/07/01/governor-newsom-takes-action-to-further-restrict-ghost-guns-and-protect-california-kids-from-gun-violence [https://perma.cc/QMA7-89CA]. This law provides an additional, specific predicate statute for plaintiffs. As was recently seen in the wake of the Uvalde, Texas shooting, firearms companies often implicitly target minors in their advertising. Aimee Picchi, *Maker of Gun Used in Uvalde Shooting, Daniel Defense, Accused of Targeting "At-Risk" Young Men*, CBS NEWS (July 20, 2022, 12:45 PM), https://www.cbsnews.com/news/daniel-defense-uvalde-ar-15-lawsuit-post-malone-pewpew [https://perma.cc/4785-GQ2U].

Additionally, California responded to Texas's abortion law, SB 8, and the Supreme Court's ruling in *Whole Women's Health v. Jackson*, 595 U.S. 30 (2021), with its own version of the law targeting firearms. This law, similar to the law in Texas, authorizes exclusively private individuals to sue defendants engaged in illegal conduct related to firearms. Press Release, Gavin Newsom, Governor, New California Law Holds Gun Makers Liable: "The Gun Industry Can No Longer Hide" (July 12, 2022), https://www.gov.ca.gov/2022/07/12/new-california-law-holds-gun-makers-liable-the-gun-industry-can-no-longer-hide [https://perma.cc/QSP9-TM33]. The purpose of this law appears to be primarily a political statement, a way for liberals to respond to conservatives weaponizing civil litigation to enact their agenda, and an attempt to encourage the Supreme Court to overturn California's law and overturn *Whole Women's Health* by doing so. Ian Millhiser, *Gavin Newsom's Plan To Save the Constitution by Trolling the Supreme Court*, VOX (July 25, 2022, 12:30 PM), https://www.vox.com/2022/7/25/23277211/supreme-court-gavin-newsom-sb-8-abortion-guns-california-assault-rifle-law [https://perma.cc/J4YF-D35X]. However, as some have observed, "California's law operates on the margins of the constitutional right" and is not actually as punitive as the Texas law. Andrew Willinger, *California's New 'Bounty-Hunter' Gun Law*, BLOOMBERG L. (Aug. 15, 2022, 4:00 AM), https://news.bloomberglaw.com/us-law-week/californias-new-bounty-hunter-gun-law [https://perma.cc/NBU3-5RVW].

that states could replicate.[208] It describes a training course that would cover recognizing straw purchases; preventing thefts; and indicators of illegal purchases, unlawful use, or that the firearm would be used for self-harm.[209] The bill then requires that all federal firearms licensees complete both the training and an examination.[210] Additionally, it details specific measures for preventing thefts, such as locked storage containers.[211] While federal legislation would be ideal, the bill demonstrates a specific model of a code of conduct for the firearms industry. Legislators could also include more expansive language like "reasonable controls" to account for claims that may fall outside these provisions.

Specific expectations like these would allow for a presumption that failure to take those measures endangers public safety or is unreasonable, making violations of the law easier to establish. This and other specifics could also aid plaintiffs in proving proximate cause, which is a significant obstacle.[212] Furthermore, this drafting may aid statutes against challenges based on the knowing requirement. Under a law like H.R. 5678, plaintiffs would only need to prove a knowing failure to have security cameras, rather than that the store was knowingly unreasonable. In short, specific laws remove an inferential step that plaintiffs would otherwise have to make at trial. Through specific requirements, legislatures can embed these theories of liability into the statutes themselves instead of leaving the entire task to plaintiffs.

CONCLUSION

Fundamental to our legal system is the idea that for every wrong there is a remedy. When a shooting occurs, there have often been failings before the shooting that allowed the shooter to have a gun at all. Victims and survivors have experienced a deep wrong, but they often have no remedy because of the unique protections given to the firearms industry. PLCAA does allow some potential recourse,

208. H.R. 5678, 117th Cong. § 2 (2021). This bill was first introduced in 2020. H.R. 7977, 116th Cong. (2020).

209. *Id.*

210. *Id.*

211. *Id.*

212. *See* Gilland v. Sportsmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693, at *24 (Conn. Super. Ct. May 26, 2011) (unpublished opinion) (dismissing plaintiff's claim for failure to sufficiently allege proximate cause).

however. Courts could adopt more expansive understandings of the predicate exception, and plaintiffs may have success using trade practices statutes. States can also create explicit expectations for the firearms industry, providing plaintiffs with an avenue to get relief and hold the industry accountable, as New York, New Jersey, Delaware, Colorado, California, and Washington have sought to do.

However, these laws are only helpful if they respond to the litigation that has taken place in the nineteen years of PLCAA. High profile cases in the Second and Ninth Circuits demonstrated a clear need for statutes that specifically apply to the firearms industry, imposing duties to prevent foreseeable harm on others, while others demonstrated a need for a statute defendants had violated. Recent state legislation largely meets these needs and will likely allow a far greater number of plaintiffs to receive a remedy. But getting past the jaws of PLCAA is not enough. Claims failed for a variety of reasons and were only beginning to succeed when Congress enacted PLCAA. These claims are still difficult to litigate, and these laws are prime targets for challenges. Legislators should look beyond simply providing an avenue through PLCAA and instead do more to help plaintiffs and prevent these challenges.

PLCAA prevents the legal system from holding members of the firearms industry accountable for failing to conform to our laws and basic social contract. Therefore, state legislatures must provide effective relief for plaintiffs. While recent legislation takes enormous strides towards providing this relief, more extensive codes of conduct are needed to truly provide a remedy and to prevent violence in the first place.

APPENDIX

Firearms Explicitly Mentioned in Statute		
PLCAA Blocks Plaintiffs' Claim		
Case	Holding	Predicate Statute
District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 171–72 (D.C. 2008). Estate of Charlot v. Bushmaster Firearms, Inc., 628 F. Supp. 2d 174, 181, 185–86 (D.D.C. 2009), had essentially the same claims and followed the same holding and reasoning.	Held that a strict liability statute cannot be "violat[ed]" and Congress intended to prevent lawsuits under laws like this.	District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. CODE § 7–2551.02: "Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia."
Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216, 1224–25 (D. Colo. 2015)	Held that plaintiffs did not allege sufficient facts that this was a knowing violation, as required by PLCAA (the defendants in this ran an internet business and the alleged violation was that the buyer was an unlawful user) and the nuisance prohibitions do not authorize private party actions or allow liability for anyone other than the offending actor.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923; Aurora Municipal Code's public nuisance regulation
Claim Based on Predicate Exception But Dismissed on Other Grounds		
In re Acad., Ltd., 625 S.W.3d 19, 29 (Tex. 2021)	Held that the Gun Control Act was not violated as a matter of law because a high-capacity magazine packaged with the firearm did not qualify as a firearm for the purposes of the act.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923

Bannerman v. Mountain State Pawn, Inc., No. 3:10-CV-46, 2010 WL 9103469, at *9 (N.D.W. Va. Nov. 5, 2010), *aff'd*, 436 F. App'x 151 (4th Cir. 2011)	Held that § 922 does not create a civil cause of action, even though they have sufficiently alleged a violation to overcome PLCAA.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923
Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 394 (Alaska 2013)	Held that claims could not proceed under the defendant's version of events, that the firearm was stolen, because a firearm being stolen is not a "transfer" for the purposes of the Gun Control Act.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923
Gilland v. Sportsmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011)	Held that firearms statutes were not violated as a matter of law because the firearm was stolen and plaintiffs did not allege sufficient facts to demonstrate proximate cause.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923
Claim Overcomes PLCAA and Can Proceed		
Corporan v. Wal-Mart Stores E., LP, No. 16-2305-JWL, 2016 WL 3881341, at *2 (D. Kan. July 18, 2016)	Held that complaint (once plaintiffs amend) supports claims that defendants violated laws regarding Form 4473 because a salesperson would or should have known that the purchase was a straw purchase.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923
City of New York v. A-1 Jewelry & Pawn, Inc., 247 F.R.D. 296, 308, 350–52 (E.D.N.Y. 2007). *City of New York v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237, 241 (E.D.N.Y. 2008), was part of the same original case and followed the same holding and reasoning.	Held that these statutes specifically relate to firearms and "that the unlawful possession, transport or disposal of a gun refers to, and is related to, the manner in which a firearm is or was sold, purchased, or marketed," so applies to these claims based on straw purchases. This case relies on the reasoning of a case that was later overruled, but this case was settled and was never appealed on those grounds.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923; N.Y. PENAL LAW § 400.05

Englund v. World Pawn Exch., No. 16CV00590, LEXIS 3, at *15–16 (Ore. Cir. June 30, 2017)	Held that plaintiffs sufficiently alleged violations of the GCA and Oregon gun laws, and that proximate cause was sufficiently alleged, because harm to third parties is a foreseeable result of violating gun safety laws.	Provisions of the Gun Control Act, 18 U.S.C. § 922
King v. Klocek, 133 N.Y.S.3d 356, 357 (2020)	Held that if the allegations of sales of ammunition to an underage plaintiff are true, plaintiffs have established a predicate offense, falling under the predicate exception.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923; N.Y. PENAL LAW § 270.00 (5) (McKinney 2018) (prohibiting sale of ammunition, other than for a shotgun or rifle, to anyone under twenty-one years old)
Chiapperini v. Gander Mountain Co., 13 N.Y.S.3d 777, 784 (N.Y. Sup. Ct. 2014)	Held that this statute, which specifically applies to firearms, can be violated when a seller has reason to believe that the information entered on ATF Form 4473 is false, and having found an applicable predicate exception, the entire complaint may proceed.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923
Brady v. Walmart Inc., No. 8:21-CV-1412-AAQ, 2022 WL 2987078, at *8, *17 (D. Md. July 28, 2022)	Held that predicate exception does not require that the statute explicitly penalize the sale to be "applicable".	MD. CODE ANN. PUB. SAFETY § 5-205(b)(6) (prohibiting the possession of a rifle or shotgun by a person that "suffers from a mental disorder as defined in § 10–101(i)(2) of the Health—General Article and has a history of violent behavior against the person or another")

Minnesota v. Fleet Farm LLC, No. CV 22-2694, 2023 WL 4203088, at *10 (D. Minn. June 27, 2023)	Held that negligence and public nuisance claims were at least partially predicated on the Gun Control Act, among other statutes, and thus are allowed under the predicate exception. Additionally held that "only one claim must survive the preemption analysis for the entire action to move forward" and that proximate cause is plausibly alleged because a criminal act could be reasonably foreseeable.	Provisions of the Gun Control Act, 18 U.S.C. §§ 921, 922, 923

Statute Does Not Explicitly Mention Firearms		
PLCAA Blocks Plaintiffs' Claim		
Case	Holding	Predicate Statute
City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 400, 404 (2d Cir. 2008)	Held that plain meaning of "applicable" is ambiguous, so in the context of the statutory language, "applicable" statutes are those that expressly regulate firearms, that courts have applied to firearms, or that "clearly can be said to implicate the purchase and sale of firearms."	N.Y. PENAL LAW § 240.45 (criminal nuisance)
Ileto v. Glock, Inc., 565 F.3d 1126, 1133, 1134 (9th Cir. 2009)	Held that there are multiple plain meanings and the meaning is ambiguous, but the purpose of PLCAA is to preempt common law tort claims that are subject to "judicial evolution."	CAL. CIV. CODE § 1714(a) (negligence); *id.* § 3479 (nuisance); *id.* § 3480 (public nuisance)

Prescott v. Slide Fire Sols., LP, 410 F. Supp. 3d 1123, 1138–39 (D. Nev. 2019).	Held that § 1001(a)(2) is too broad and not specific to the firearms industry because it prohibits false statements irrespective of the statutory record-keeping requirements like those listed in PLCAA, alleged false statements were by the manufacturer to the ATF. But held that the Nevada Deceptive Trade Practices Act is applicable to firearms because it specifically regulates the sale and marketing of goods, relying on *Ileto*.	18 U.S.C. § 1001(a)(2) (broadly prohibiting false statements to the government) (blocked); Nevada Deceptive Trade Practices Act (allowed, as suggested in *Ileto*)
Claim Overcomes PLCAA and Can Proceed		
Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 431 (Ind. Ct. App. 2007)	Held that the plain meaning of "applicable" is unambiguous and means capable of being applied.	Not specifically alleged, but held that sufficient unlawful conduct was alleged, which presumably violates firearms regulatory statutes
Williams v. Beemiller, Inc., 952 N.Y.S.2d 333, 338 (2012), *opinion amended on reargument*, 962 N.Y.S.2d 834 (2013)	Held that, based on *A-1 Jewelry & Pawn*, this action falls under the predicate exception and sufficient facts are alleged.	Not specifically alleged, but presumably Gun Control Act

Trade Practices Statutes		
Claim Overcomes PLCAA and Can Proceed		
Case	Holding	Predicate Statute
Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 302–03 (Conn. 2019)	Relying on *Beretta*, held that "applicable" did not mean exclusively applicable, based on analysis of the statutory text and the legislative history of PLCAA.	Connecticut Unfair Trade Practices Act
Prescott v. Slide Fire Solutions, LP, 410 F. Supp. 3d 1123, 1138–39 (D. Nev. 2019) (also listed above)	Held that the Nevada Deceptive Trade Practices Act is applicable to firearms because it specifically regulates the sale and marketing of goods, relying on *Ileto*.	Nevada Deceptive Trade Practices Act (allowed, as suggested in *Ileto*)

Doyle v. Combined Sys., Inc., No. 3:22-CV-01536-K, 2023 WL 5945857, at *10 (N.D. Tex. Sept. 11, 2023)	Held that this claim met the requirements of the predicate exception because the claim relied on provisions "that specifically regulate the marketing and sale of goods" and that were enacted over thirty years before PLCAA. The court specifically notes that not "every statutory violation that relates to the sale or marketing of a qualified product" would be allowed, limiting the applicability of this holding.	Texas Deceptive Trade Practices Act
PLCAA Blocks Plaintiffs' Claim		
Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., No. CV 21-11269-FDS, 2022 WL 4597526, at *14 (D. Mass. Sept. 30, 2022)	Relying on *Beretta*, held that common law claims are barred by PLCAA, then held that even assuming the state statutes could be predicate statutes, those claims fail to state a claim upon which relief can be granted. This case does notably differ from *Soto* in its holding that the advertisements do not violate these consumer protection laws. This is a unique and groundbreaking case because the country of Mexico is suing the firearms industry and means that comparisons with other cases are largely inapt.	Common law claims; Connecticut Unfair Trade Practices Act; MASS. GEN. LAWS ch. 93A (consumer protection statute)