

JUSTICE DENIED:

THE CASE AGAINST GUN INDUSTRY IMMUNITY



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ACKNOWLEDGEMENT

A message from Joshua Horwitz, Executive Director of the Educational Fund to Stop Gun Violence

The Educational Fund was founded in 1978 as a 501(c)(3) affiliate organization of the Coalition to Stop Gun Violence. From the beginning the Educational Fund has produced and disseminated high quality research as a catalyst for policy change. It is my hope that with the release of this report we will continue that tradition.

I would like to acknowledge the Educational Fund staffers who worked on this project, especially Kelly Ward and Christopher Brown for organizing, researching and writing the report. I would also like to thank the following individuals for sharing their knowledge and experience with us:

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Jon Vernick
Sayre Weaver

A handwritten signature in black ink, appearing to read "Josh Horwitz". The signature is fluid and cursive, with a long horizontal stroke at the end.

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INTRODUCTION

On August 10, 1999, white supremacist Buford W. Furrow Jr. killed one person and wounded five others in a shooting spree that began in a Jewish Community Center (JCC) in the Los Angeles area. Using an assault weapon manufactured by the Chinese company China North, Furrow fired approximately 70 rounds in the center. As many as 250 children were present, although many were outside when the shooting occurred.

After leaving the center, Furrow called out to Joseph Iletto, a Postal Service employee, under the pretext of asking him to put a letter in the mail. As Iletto agreed to do so, Furrow pulled out a Glock model 26 semiautomatic handgun and shot him to death.

Furrow would later call his rampage “a wake-up call to America to kill Jews.”¹

Furrow bought the Glock handgun through a private sale. The private individual who sold Furrow the Glock was not legally required to conduct a background check, or to maintain any record of the sale. At the time of the shooting, Furrow was prohibited from possessing a firearm because he been involuntarily committed to a psychiatric hospital and had a felony conviction for assault.

“After my brother Joseph was killed by a neo-Nazi who shot him nine times, Congress added insult to this tragedy by making sure that the courthouse door was slammed in our family’s face. We were denied the basic right to pursue justice because Congress decided to protect profits over people.”

– Ismael Iletto, brother of Joseph Iletto

After the shooting, victims of the tragedy and their families sued both China North and Glock Inc., the manufacturers’ American subsidiary, which imported the weapons and distributed them within the United States. The cases against Glock and China North turned out very differently. In 2005, the Protection of Lawful Commerce in Arms Act (PLCAA) was enacted to shield gun manufacturers, distributors and retailers with federal firearms licenses from lawsuits arising out of third party misuse of a firearm, which resulted in Glock, Inc. being dismissed from the suit. China North was not granted protection under the Act, however, because it did not have a federal firearms license and the company ultimately agreed to settle their case.²

Although PLCAA allowed Glock, Inc. to escape accountability their actions appeared to be very troubling. Plaintiffs alleged that Glock’s marketing and distribution practices made it far more likely that criminals would obtain their weapons.³ These practices included: a) Not training dealers to avoid straw sales



– Joseph Iletto

and other illegal transactions; b) Refusing to terminate contracts with distributors who sold to dealers with disproportionately high volumes of guns traced to crime scenes; c) Marketing that emphasizes firearm characteristics such as their high capacity and ease of concealment, that appeal to prospective purchasers with criminal intent; d) Purposely supplying more firearms than the legitimate market could bear in order to induce sales in the secondary market.

According to the complaint, Glock Gmbh (among other companies) introduced firearms nicknamed “pocket rockets” in 1995.⁴ Models 26 and 27, both only 4 inches in height, had firepower in the 9mm to .40 caliber range.⁵ The pocket rockets were attractive to criminals, such as Furrow, because of their caliber, capacity and concealability.⁶ Between 1995 and 1997, the Bureau of Alcohol, Tobacco and Firearms traced at least 13,000 of these firearms to crime scenes nationally.⁷ The complaint also alleged that Glock marketed the pocket rockets “to police as a back-up lightweight side-arm with the intention of profiting both from the first-time purchase to police and the after-sales on the civilian and or secondary market.”⁸ Founder and president of Glock Gmbh, Gaston Glock, confirmed this, stating, **“It was a conscious decision to go after the law enforcement market first. In marketing terms, we assumed that by pursuing the law enforcement market, we would receive the benefit of ‘after sales’ in the commercial market.”**⁹

The Glock 26 that Furrow used to kill Joseph Iletto was originally purchased in 1996 by the Cosmopolis Police Department in Grays Harbor County, Washington.¹⁰ Police Chief Gary Eisenhower explained, “It turned out to be too small for our needs.”¹¹ A week after purchasing the gun, the police department contacted former Cosmopolis reserve officer Don Dineen, who owned a gun store and was a federally licensed firearms dealer, to perform an exchange for another Glock model.¹² Dineen contacted a Glock distributor, RSR Seattle, and obtained the new model for the police department at no cost to them.^{13 14} He then sold the model 26 to “gun collector” David Wright.¹⁵ Wright, in turn gave the model 26 to Andrew Palmer to sell for him at a gun show. Shortly thereafter, Furrow purchased the Glock through a private sale.¹⁶ Neither Wright nor Palmer had a federal firearms license, meaning they were not legally required to conduct background checks on prospective purchasers.¹⁷



Additionally, through the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Glock was aware of how many crime guns were being traced back to its distributors. The Iletto family alleged in their complaint that Glock ignored this data and continued to supply distributors regardless of how many criminals they were arming. Glock also targeted states, including Washington, where weak gun laws allowed them to maximize sales.

It was foreseeable that such a business practice would lead to illegal gun trafficking, the complaint alleged.

The injustice the Iletto family suffered is a typical result of PLCAA, which gives gun industry actors broad immunity from civil

litigation. The law not only denies victims of gun violence their day in court, but also encourages gun makers to continue business practices that will foreseeably lead to more violence. The protection provided by PLCAA is unprecedented and without justification. In fact, PLCAA's protection is so excessive that victims harmed by toys are afforded greater recourse than those harmed by guns.

THE IMPORTANCE OF LITIGATION IN BRINGING TRANSPARENCY TO THE GUN INDUSTRY

At first glance, the gun industry may appear to be well regulated, with manufacturers and sellers licensed and their customers required to undergo background checks. Upon closer inspection, gaping holes can be seen in the regulatory structure.

First, not all firearm sales require a background check. Federally licensed firearm dealers are required to conduct background checks, but private individuals who are “not engaged in the business” of dealing firearms have no such requirement. It is estimated that up to 40% of gun sales involve no background check. Second, the ATF is chronically underfunded, undermanned, and frequently without permanent leadership.¹⁸ Third, unlike almost “every other consumer product in the United States, no federal agency has the authority to regulate the safe design of firearms. In fact, the Consumer Product Safety Commission—the federal agency charged with overseeing the safety of most of the nation’s household products—is expressly forbidden from regulating firearms or ammunition.”¹⁹

Furthermore, the gun industry has long been reluctant to change. Robert Ricker, a former lawyer for the National Rifle Association, wrote in a 2003 affidavit on behalf of the City of San Diego, “Leaders in the industry have consistently resisted taking constructive voluntary action to prevent firearms from ending up in the illegal gun market and have sought to silence others within the industry who have advocated reform.”

Within this regulatory void, lawsuits had proven to be one of the most powerful methods for wronged individuals to hold the gun industry accountable, and for the broader public to learn about the harmful behavior of the industry. Unlike the criminal justice system, which has a punitive purpose, the primary purpose of the civil justice system is to compensate injured parties. A secondary purpose is to prevent future injuries. Exposure to liability causes manufacturers, distributors and retailers of consumer products to exercise greater care to ensure their products do not cause harm.²⁰

“Sunlight is said to be the best of disinfectants.”

**–Former Associate Justice of the Supreme Court Louis Brandeis
discussing the power of publicity to discourage negative behavior.**

The civil justice system does not depend on the criminal, illegal conduct of the manufacturer or seller. Instead, it asks fundamentally different questions, including: Was the behavior of the defendant reasonable in light of what he/she knew or should have known about the risks of making or distributing the product?

Unfortunately, the Protection of Lawful Commerce in Arms Act largely removes the gun industry from the salutary effects of the civil justice system, giving them unprecedented immunity from negligence-based lawsuits.

THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

The Protection of Lawful Commerce in Arms Act was conceived and written after several municipalities—Atlanta, Chicago, Gary, and New York City—filed lawsuits against firearms manufacturers and distributors alleging that their actions had undermined public health and caused those municipalities to incur substantial financial obligations. In contrast to this claim, PLCAA's supporters said the law was enacted to end "frivolous" and "politically motivated" lawsuits.

Former Senator Larry Craig (R-ID), the Act's sponsor, was a champion of the latter point of view, and claimed, "These outrageous lawsuits attempting to hold law-abiding industry responsible for the acts of criminals are a threat to jobs and the economy, jeopardize the exercise of constitutionally-protected freedoms, undermine national security, and circumvent Congress and state legislatures."²¹ Senator John Cornyn (R-TX) echoed these sentiments during a Motion to Proceed²² on PLCAA in 2003, stating, "This bill is simple: It provides that lawsuits may not be brought against lawful manufacturers and sellers of firearms or ammunition if the suits are based on criminal or unlawful use of the product by someone else—when a criminal, not the manufacturer, commits a crime." Craig attempted to assuage doubts about the Act by assuring Americans that the gun industry was not protected "from being sued for their own misconduct." The Act was aimed at an "extremely narrow category of lawsuits,"²³ he argued.

Opponents of the Act saw things quite differently, arguing that existing litigation against the gun industry was far from frivolous. Former Senator Mike DeWine (R-OH) stated during debate on PLCAA, "I oppose this bill because it denies certain victims in this country their day in court. It singles out one particular group of victims and treats them differently than all other victims in this country ... It denies them their access to court ... There are legitimate victims who when this legislation is passed will not be able to file their lawsuits."²⁴

During a March 15, 2005 hearing²⁵ about PLCAA before the House Subcommittee on Commercial and Administrative Law, Representative Melvin Watt (D-SC) stated, "I didn't find anything in last year's testimony or any of the things that I have found out about this bill that would suggest to me why it would be necessary to single out for unprecedented protection the entire gun industry." Even some in the gun industry appear to have shared this opinion. A public filing made by the major gun manufacturer Sturm, Ruger & Co. with the SEC on March 11, 2005, stated, "It is not probable and is unlikely that litigation, including punitive damage claims, will have a material adverse effect on the financial position of the Company."²⁶

Earlier versions of PLCAA died in Congress in the aftermath of the D.C. sniper attacks of 2002²⁷ and when Senate Democrats amended the legislation to include a renewal of the assault weapons ban in 2004.²⁸ Nonetheless, persistent lobbying by the National Rifle Association prevailed, and PLCAA was signed into law by President George W. Bush in 2005. This resulted in the immediate dismissal of many cases brought by cities and municipalities.

PLCAA created immunity for federally licensed manufacturers, distributors and dealers of firearms and/or ammunition (and trade associations) from qualified civil liability in federal and state court "for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by [third parties] when the product functioned as designed and intended."²⁹

The Act was written with several exceptions that its supporters cynically argued would allow lawsuits to proceed against the gun industry. Since 2005, court rulings have suggested that these exceptions are very narrow in practice.³⁰ Far from targeting only “frivolous” lawsuits, PLCAA provides broad protection to members of the gun industry that make unsafe products and engage in distribution practices that result in easy access by criminals. As a result, the law has had a chilling effect, discouraging attorneys from taking cases involving legitimate causes of action against the gun industry.

DISAPPEARING EXCEPTIONS

As noted previously, PLCAA shields the gun industry from “the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by [third parties] when the product functioned as designed and intended.”³¹ The Supreme Court of Illinois noted in *Adames v. Sheahan*³² that “Congress did not intend criminal misuse to require proof of a criminal conviction.”³³ “Unlawful misuse” is defined in PLCAA as “conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.”³⁴

The Act also lists six types of claims which it specifically does *not* prohibit:

- 1) Lawsuits against a defendant who “knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence,” brought by a victim “directly harmed” by the transfer.³⁵
- 2) Lawsuits against sellers based on negligent entrustment or negligence per se.³⁶
- 3) Lawsuits against a defendant who “knowingly violated a state or federal law applicable to the sale or marketing of the product, and the violation was a proximate cause” of the victim’s harm.³⁷
- 4) Lawsuits against manufacturers and sellers for breach of contract or warranty in connection with the purchase of the product.³⁸
- 5) Lawsuits against manufacturers or sellers “for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.”³⁹
- 6) Proceedings brought by the U.S. Attorney General to enforce the Gun Control Act and National Firearms Act.⁴⁰

The six categories of permissible suits are generally referred to as “exclusions” or “exceptions.” In practice, however, it can be difficult for plaintiffs to meet their requirements. The first exception permits civil suit against an individual convicted under 18 U.S.C. § 924(h), which makes it unlawful for anyone to “knowingly transfer a firearm, knowing that such firearm will be used to commit a crime of violence ... or a drug trafficking crime,” or a comparable or identical state felony law, by a party directly harmed

by the conduct of which the transferee is convicted.⁴¹ Additionally, for the civil action to be permitted, the transferee of the firearm must have been convicted, though it is unclear what type of conviction is sufficient.⁴²

The second exception permits a civil suit against a seller for negligent entrustment or negligence per se.⁴³ Negligent entrustment is defined in PLCAA as “the supplying of a qualified product by a seller for use by another person when 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.”⁴⁴ The classic case of negligent entrustment involves a person who gives his car keys to a heavily intoxicated person. The driver causes a car accident. The victim of the car accident could sue the driver of the car for negligence and also the owner of the car for negligent entrustment.

The second exception also permits an action for “negligence per se,” a term undefined in the Act. Negligence per se typically arises when an individual fails to meet a statutorily prescribed standard of care. The second exception appears to be similar to, if not indistinguishable from, the third exception.

The third exception permits lawsuits against a manufacturer or seller who “knowingly violated a state or federal law applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought.”⁴⁵ This is also known as the “predicate exception” because it requires a plaintiff to allege a violation of an underlying—or predicate—statute.

Cases that proceed under the third exception often hinge on whether the underlying—or predicate—statute violated is “applicable to the sale or marketing of the product.” As the Congressional Research Service has reported, these cases are generally unsuccessful because courts find that the statute does not specifically address firearms.⁴⁶

In *City of New York v. Beretta Corp. U.S.A.*,⁴⁷ for example, the city alleged that Beretta violated New York City’s criminal nuisance law, which provides in pertinent part, “A person is guilty of criminal nuisance in the second degree when ... he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons.” The U.S. Court of Appeals for the Second Circuit held that PLCAA barred the action because the criminal nuisance law did not qualify as a predicate statute.⁴⁸ The court determined that the predicate exception applies to “statutes that expressly regulate firearms, or that have been declared by courts to apply to the sale and marketing of firearms; and ... statutes that do not expressly regulate firearms, but that clearly implicate the purchase and sale of firearms.”⁴⁹

The U.S. Court of Appeals for the Ninth Circuit in *Ileto v. Glock, Inc.*⁵⁰ (discussed previously) similarly rejected a claim that California’s public nuisance statutes can serve as predicate statutes pursuant to the third exception. The *Ileto* court remarked, “We find it more likely that Congress had in mind only these types of statutes—statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry—rather than general tort theories that happened to have been codified by a given jurisdiction.”⁵¹

Attempts to sue gun manufacturers and sellers in state court using a state’s public nuisance law to meet the exception have also generally been unsuccessful. The Montana District Court, in *Wood v. Steadman’s Hardware*,⁵² rejected a claim that Montana’s public nuisance law could constitute a predicate statute. The court held that “Montana’s nuisance statute is not related to the sale or

marketing of firearms and ammunition and is preempted by PLCAA.”⁵³

Only one state court, the Court of Appeals of Indiana in *Smith & Wesson Corp. v. City of Gary*,⁵⁴ has held that a public nuisance statute can serve as a predicate statute pursuant to the third exception to PLCAA. The Court noted that “applicable” is generally defined as “capable of being applied,” and stated, “on the face of the language, Indiana’s public nuisance statute appears applicable to the sale or marketing of firearms.”⁵⁵ Unfortunately, this Indiana case appears to be the exception rather than the rule.

Statutes holding firearms manufacturers strictly liable for harm arising from the discharge of their product will likely not constitute a predicate statute for the purpose of the third exception. Consider *Estate of Charlot v. Bushmaster Firearms, Inc.*,⁵⁶ in which the United States District Court for the District of Columbia rejected a claim that the District of Columbia’s Assault Weapons Manufacturing Strict Liability Act (“SLA”) could serve as a predicate statute. The SLA provides that 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” that “proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.”⁵⁷ The D.C. Court of Appeals upheld the District Court’s ruling that the SLA did not qualify as a predicate exception. The Court reasoned that allowing the SLA to function as a predicate statute would “stretch the meaning of a ‘violation’ beyond what the authors of PLCAA intended.”⁵⁸

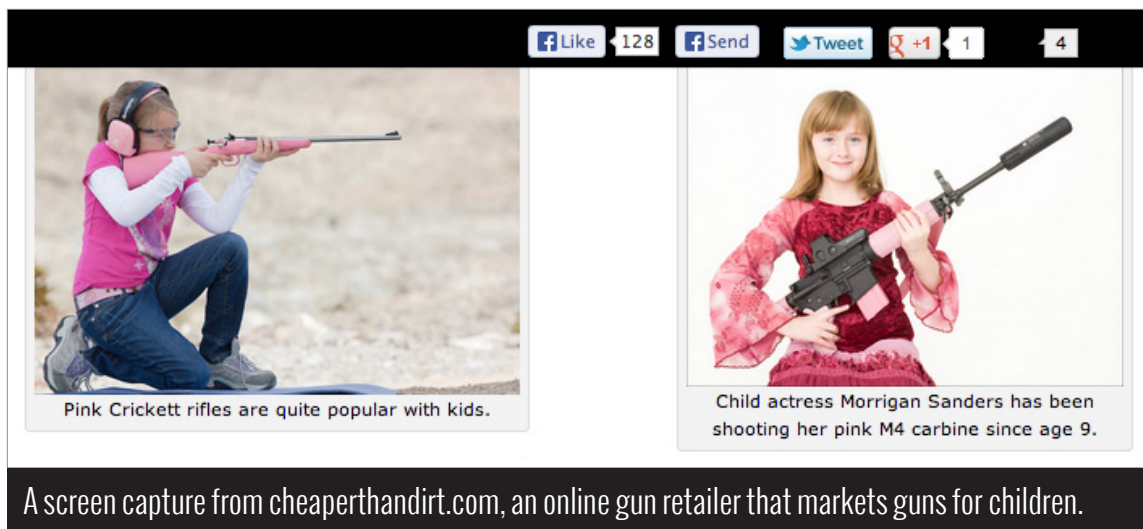
The Supreme Court of New York, Appellate Division in *Williams v. Beemiller, Inc.*,⁵⁹ however, allowed a case to proceed under the predicate exception and acknowledged that provisions of the Gun Control Act⁶⁰ are “applicable to the sale” of firearms and thus qualify as predicate statutes under the third exception.⁶¹

Once a plaintiff has satisfied the predicate statute requirement, he/she still must demonstrate that the defendant knowingly violated the statute and that the violation of the statute was the “proximate cause” of his or her injuries. “Knowingly” is undefined in PLCAA, however. Black’s Law Dictionary states that “knowledge” consists of “an awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact.”⁶²

Proving knowledge and proximate cause may be difficult, however, because of the Tiahrt Amendments: riders that have been attached to U.S. Department of Justice appropriations bills since 2003. The amendments restrict the admissibility of gun trace data from the ATF in state and federal court proceedings.⁶³ The Tiahrt Amendments provide in relevant part that ATF trace data “shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State (including the District of Columbia) or Federal court or in an administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives to enforce the provisions of chapter 44 of such title, or a review of such an action or proceeding.” A 2012 Congressional Research Service report on the effect of PLCAA noted that the Tiahrt Amendments may make bringing any claim difficult, stating, “Whether ... plaintiffs are able to prove their claims will likely depend on their success in the discovery process, in which case they may face ... procedural obstacles to obtaining information.”⁶⁴

The fourth exception permits lawsuits against a manufacturer or seller for “breach of contract or warranty in connection with the purchase of the product.”⁶⁵ For example, if a manufacturer expressly

warranted that a firearm would perform in a certain manner and the gun failed to do so, a plaintiff could sue for breach of warranty.



The fifth exception permits “an action for death, physical injuries or property damage resulting directly from” a manufacturing or design defect when the product was “used as intended or in a reasonably foreseeable manner.”⁶⁶ There is, however, a limitation to the fifth exception that precludes suit when the discharge of the gun “was caused by a volitional act that constituted a criminal offense” because such an act would be “considered the sole proximate cause of any resulting” injury.⁶⁷ Even where a firearm is, in fact, defectively designed in a way that contributes to the harm caused, manufacturers may still escape liability by showing that the act of pointing a gun at another individual and pulling the trigger constitutes a “volitional” and “criminal” act. This principle often is used in cases involving young children.

For example, in *Adames v. Sheahan*,⁶⁸ 13-year-old Billy Swan accidentally shot and killed his friend Joshua Adames while playing with his father’s Beretta handgun.⁶⁹ Billy had found the gun in his parents’ bedroom closet.⁷⁰ When Josh came to Billy’s house to play, Billy showed Josh the gun and the boys began to handle it.⁷¹ Billy removed the magazine from the Beretta. He knew it was loaded when the magazine was in the gun, but believed it to be unloaded when he removed the magazine.⁷² Billy, pretending to fire the gun, pulled the trigger, killing his friend.⁷³ Billy was found delinquent in juvenile court proceedings on a charge of involuntary manslaughter.⁷⁴ Joshua’s parents then filed suit against Beretta alleging design defect and failure to warn, among other claims.⁷⁵

The Supreme Court of Illinois found that the fifth exception does not require a conviction; rather, “the statute requires only that the volitional act constitute a criminal offense.”⁷⁶ Billy’s act of shooting his friend Joshua, though accidental, was criminal, the court determined. Additionally, the court determined that Billy’s decision to point the gun at Joshua and pull the trigger was a “volitional act.”⁷⁷

Had Joshua been harmed with a toy weapon rather than the Beretta, his case would likely have gone to court. In May 1999, John Tucker Mahoney was accidentally shot with a BB gun by his friend Ellsworth “Ty” Weathersby, who believed the toy to be empty.⁷⁸ Tucker, as he was known, was hit behind the left ear.⁷⁹ The pellet pierced Tucker’s skull and resulted in massive brain damage.⁸⁰ Mahoney’s parents filed suit against Daisy Manufacturing Co., Inc., the maker of the BB gun, alleging that the guns were defectively manufactured, specifically that pellets became stuck in the gun, making it appear empty.⁸¹

Private lawyers for the Mahoneys discovered that a Daisy engineer had testified in 1999 that pellets can get temporarily stuck in corners of the magazine. When that happens, the gun may seem empty, but then a BB can come unstuck, slip into the firing chamber, and be discharged. The Mahoney attorneys also uncovered Daisy documents indicating the company had made design changes to their magazines in 1998 and 1999 to prevent BBs from getting stuck inside the gun. The older models were not recalled; millions remained on retailers' shelves and were sold. Daisy's attorney stated that the changes were merely "precautionary" and did not suggest that older models posed a danger.



In 2001, Daisy Manufacturing settled with the Mahoneys, agreeing to pay them \$18 million without admitting any fault. In the fall of 2001, the Consumer Product Safety Commission sued Daisy. Daisy settled in 2003, agreeing to spend \$1.5 million on publicity and labeling to promote safe BB-gun use.

“We have more control over the toy industry or the car industry than we do over the gun industry.”

-Vicki Buchanan Snider, whose brother, James L. Buchanan, was shot to death in Maryland on Oct. 3, 2002 by John Lee Malvo and John Allen Muhammad⁸²

Prior to the enactment of PLCAA, a California court adjudicated a claim almost identical to *Adames*. In *Dix v. Beretta Corp. U.S.A.*, 14-year-old Michael Soe shot and killed his 15-year-old friend, Kenzo Dix with his father's Beretta 92 Compact L semiautomatic 9mm pistol, the same model with which Billy Swan accidentally shot his friend.⁸³ Michael thought he unloaded the gun by removing the magazine but did not check the firing chamber, where one round remained. Kenzo's parents sued Beretta, alleging design defect in that the pistol's loaded-chamber indicator (a red dot on the slide that rises 1mm when a round is chambered) was inadequate to alert users to the presence of a round of ammunition in the firing chamber. In 1998, Beretta filed a motion for summary judgment. A California trial judge denied the motion, ruling that a gun maker can be held strictly liable for failing to design guns with personalized safety features. After several years of protracted litigation, the case resulted in a verdict for Beretta.

Though the case did not result in a judgment against Beretta, the threat of liability from it and similar cases appeared to have an impact on the industry. After the Dix case was filed, several major gun makers began to market guns with combination locks or key-operated locks integral to the firearm.⁸⁴ Cases such as Dix also helped spur support for a 2006 California law that required all new models of handguns sold in California to have a chamber-loaded indicator, among other safety devices.⁸⁵

Even if a firearm was defectively designed, a victim may still be denied relief if his or her mere possession of the firearm was a “volitional act that constituted a criminal offense.” Consider *Ryan v. Hughes-Ortiz*.⁸⁶ In that case, Charles Milot, a felon released on probation, performed odd jobs at the home of Thomas Hughes and Patricia Hughes-Ortiz.⁸⁷ Milot stole several handguns from the Hughes home, including a Glock pistol.⁸⁸ While repairing a doorbell at the Hughes home, Milot was shot and killed when the Glock accidentally fired.⁸⁹ Police speculated that Milot was attempting to put the gun back in the container when the round was fired, striking him in the upper left leg.⁹⁰

Among other claims, the administrator of Milot’s estate sued Glock Inc. for design defect, alleging that the Glock and gun case were defective because the user was required to pull the trigger to put the gun in the case.⁹¹ Possession of a firearm by a felon is a criminal offense pursuant to 18 U.S.C. 922(g)(1). The court concluded that “the relevant volitional act that caused the gun’s discharge was Milot’s unlawful possession of the Glock pistol,” and ruled that the design defect exception was not applicable.⁹²

The sixth exception permits “an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26.” The provisions referred to are the Gun Control Act⁹³ and National Firearms Act.⁹⁴

BEFORE AND AFTER PLCAA

Prior to the enactment of the Protection of Lawful Commerce in Arms Act, civil litigation encouraged positive change in the gun industry and compensated victims of violence. Lawsuits against the gun industry were also a strong tool to pry free otherwise hidden information about marketing and distribution practices. One important finding revealed by lawsuits launched by municipalities, including Chicago and New York, was that a small number of gun dealers were the source of a vastly disproportionate number of crime guns.

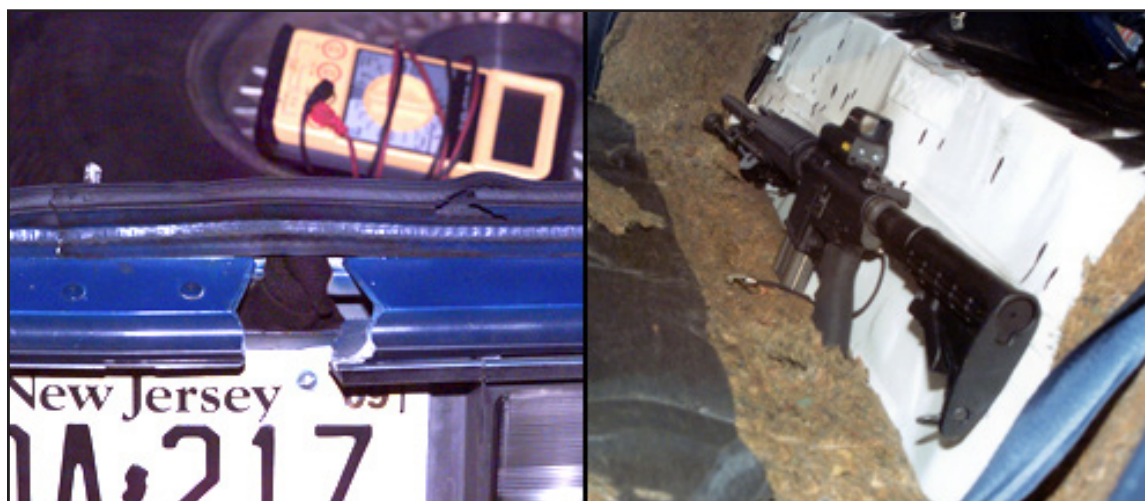
Additionally, heads of major gun companies were forced to answer basic questions under oath that they had long avoided:

In a deposition, under questioning from the Brady Center to Prevent Gun Violence, Ugo Gussalli Beretta, head of the Italian firearms company Beretta, said he believed American gun dealers had a policy to require people buying large quantities of guns to establish a legitimate reason for the purchase, saying it was “common sense.” In the United States, of course, there is no such requirement.⁹⁵

Finally, product liability lawsuits against manufacturers were responsible for some of the most important safety improvements in the gun industry, including basic changes like making guns that don’t accidentally fire when dropped.⁹⁶

One high profile example of successful litigation occurred when victims of the 2002 D.C. sniper shootings successfully sued gun distributor Bull's Eye Shooter Supply and manufacturer Bushmaster Firearms, Inc. for actions that created an unnecessary risk that their products would fall into criminal hands.

For 20 days, the Washington metropolitan area struggled to respond to the random and often lethal shootings. When the Bushmaster AR-15-style rifle used by the killers was eventually traced across the country to Bull's Eye Shooter Supply in Tacoma, Washington, the store said they were not even aware they were no longer in possession of the weapon. It simply had disappeared from their inventory, they claimed. ATF investigators found that 238 firearms had also inexplicably "disappeared" from Bull's Eye over the preceding three years.⁹⁷ Under a September 2004 settlement agreement, the victims and their families eventually received \$2.5 million dollars for this negligence, \$500,000 of which came from Bushmaster.⁹⁸



The Bushmaster AR-15 used in the D.C. sniper shootings and the vehicle alteration used to allow Malvo to see outside of the car while minimizing the chances he would be seen. FBI photo.

According to attorneys David Boies and Lloyd N. Cutler, this settlement would likely have been prevented by PLCAA despite the overwhelming evidence of misdeeds by Bushmaster and Bull's Eye Shooter Supply.⁹⁹ A widow of one of the sniper victims worried openly in 2004 that should PLCAA become law, "the courthouse door will be slammed in my face."¹⁰⁰ She was able to avoid such a fate, but today many victims are less fortunate.

Between 2004 and 2011, the ATF discovered nearly 175,000 guns were missing from the inventories of federally licensed firearm dealers (FFLs). Lacking resources, the ATF is only able to inspect the inventories of approximately 19% of FFLs each year. Without a doubt, tens of thousands of additional guns went missing during that seven-year period.

The Center for American Progress collected information on several stores that lost track of a significant amount of their inventory. From a June 2013 report:¹⁰¹

VALLEY GUN, BALTIMORE, MARYLAND

ATF conducted a compliance inspection of Valley Gun in 2003 and discovered that 422 guns were missing—more than a quarter of the store's entire inventory. Additionally, this store was connected with more than 483 guns found at crime scenes, including 41 assaults and 11 homicides. For these and other violations, ATF eventually revoked the owner's federal firearms license, although he was permitted to continue selling the guns in the store's inventory as a private seller.

TAYLOR'S TRADING POST, BIGLERVILLE, PENNSYLVANIA

ATF conducted its first compliance inspection of Taylor's Trading Post in more than 30 years in January 2010 and discovered that the store's owner could not properly account for more than 3,000 guns that had been bought or sold during the previous three years. After an extended investigation, ATF concluded that 168 firearms were missing from the store's inventory. ATF revoked the store's federal firearms license, although it remains open pending various appeals.

ELLIOT'S GUN SHOP, OLD JEFFERSON, LOUISIANA

Elliot's Gun Shop caught the attention of federal law enforcement in 2007, when guns sold by the store began appearing at crime scenes in the New Orleans region in large numbers. Between 2002 and 2007, 2,300 crime guns were traced to the store, which included guns linked to 127 homicide investigations and 517 drug-related crimes. The owners of Elliot's were charged with various crimes relating to their management of the gun store, including falsifying sales records to enable sales to prohibited purchasers.

One such victim was Jennifer Gauthier Magnano. In April 2007, she had been married to Scott Magnano for 14 years and was in the process of trying to end what had long since become an abusive relationship. Jennifer had left her husband and a judge had issued a protective restraining order.

Because of the protective order, Scott was prohibited from purchasing a gun. Nonetheless, he went to a gun store and asked to see two handguns. He was handed the weapons and matching ammunition for each. Despite being the only customer in the store, Scott was then left completely alone by the store's staff. Scott exited the store, taking the Glock 21 and corresponding 14-cartridge magazine with him.¹⁰²

The store's manager stated later he thought Magnano was a "suspicious customer."¹⁰³ But store employees never asked him to produce identification or submit to a background check that would have confirmed the manager's suspicions. Furthermore, the store didn't report the gun stolen for three days, limiting the amount of time the police had to investigate the crime.

On August 23, 2007, Scott Magnano came to Jennifer Gauthier Magnano's home, struck her on the head with the Glock, abducted her at gunpoint in front of her children and shot and killed her.¹⁰⁴ He took his own life later that evening.

When the administrator of Jennifer's estate filed a civil lawsuit in Connecticut Superior Court, the gun shop's lawyers moved to have the case dismissed, telling a judge, "PLCAA goes directly to the heart of the jurisdiction here. Congress was clear, these cases must be dismissed."¹⁰⁵ Sadly, the court agreed.¹⁰⁶

Common sense would suggest leaving a "suspicious" person alone with guns and ammunition would constitute actionable negligence, but under PLCAA this truth was denied.

PRODUCT IMMUNITY FOR FIREARMS: UNPRECEDENTED AND UNNECESSARY

The gun industry's singular protection from legal accountability for its actions is unparalleled in the United States. While at least two other industries—vaccine manufacturers and general aviation manufacturers—enjoy immunity from civil lawsuits like the gun industry, their protection is limited in scope or accompanied by an alternative form of recovery for individuals harmed by their products. Moreover, the limited immunity offered to them serves rational goals and the public interest.

THE NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986

Vaccines serve an important public purpose. They "have contributed to a significant reduction in many childhood infectious diseases ... Some infectious diseases, such as polio and smallpox, have been eliminated in the United States due to effective vaccines."¹⁰⁷ Vaccines, however, can also have harmful side effects.

In the early 1980s, such side effects from the administration of the Diphtheria, Tetanus, whole-cell Pertussis (DTwP) Vaccine were reported.¹⁰⁸ Thereafter, a number of lawsuits were filed against vaccine manufacturers causing concern about the "continued viability of the U.S. vaccine industry."¹⁰⁹ In response, Congress enacted the National Childhood Vaccine Injury Act of 1986 ("NCVIA").¹¹⁰ The NCVIA, through the National Childhood Vaccine Compensation Program, created a no-fault compensation system for individuals injured by vaccines.¹¹¹ Claimants file their petitions with the United States Court of Federal Claims.¹¹² The Secretary of the Department of Health and Human Services is the named respondent in the petition, rather than the manufacturer of the vaccine alleged to have caused the injury.¹¹³ The claims are heard initially by a special master, who decides whether and to what extent compensation should be awarded.¹¹⁴ Compensatory awards are paid from the Vaccine Injury Compensation Trust Fund, which is funded by an excise tax charged on all childhood vaccines.¹¹⁵ Therefore, consumers of childhood vaccines contribute to the compensation of those harmed by these products. Parties have the right to have the decision of the special master reviewed by the Court of Federal Claims, and may obtain further review of the claims court's judgment by the Federal Circuit Court of Appeals.¹¹⁶

Claimants under the program may seek compensation for expenses that have been or will be incurred for diagnosis and medical or other remedial care, "rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related

travel expenses, and facilities determined to be reasonably necessary.”¹¹⁷ Claimants may even recover actual and anticipated loss of earnings, and reasonable attorney’s fees and other costs.¹¹⁸ If a claimant is dissatisfied with an administrative award from the program, he or she may still file a civil tort action against the manufacturer.¹¹⁹

Furthermore, the Food and Drug Administration (FDA) Center for Biologics Evaluation and Research is responsible for regulating vaccines in the U.S. According to the FDA website, “vaccine clinical development follows the same general pathway as for drugs and other biologics,” and “the FDA continues to oversee the production of vaccines after the vaccine and the manufacturing processes are approved, in order to ensure continuing safety.”¹²⁰

THE GENERAL AVIATION REVITALIZATION ACT OF 1994

In the 1980s, the general aviation industry became economically troubled, in part because of the increasing cost of product liability and civil liability insurance.¹²¹ High products liability costs were due to so-called “long tail” liability—liability exposure from planes sold in the 1940s, 1950s, 1960s, and 1970s. In response, Congress enacted the General Aviation Revitalization Act of 1994 (GARA), which established an 18-year statute of repose shielding manufacturers of general aviation and component parts from civil liability.¹²² General aviation includes all aviation other than commercial and military.¹²³

The GARA is a “classic statute of repose.” Under the Act, an individual may sue the manufacturer of a general aviation aircraft for injuries that occur any time within 18 years after the aircraft has been placed into the stream of commerce.¹²⁴ The repose period begins on “the date of delivery of the aircraft to its first purchaser or lessee if it comes directly from the manufacturer; or on the date of first delivery to a person engaged in the business of selling or leasing such aircraft.”¹²⁵ Congress determined as a matter of policy, that an “aircraft is considered to be not defective or not negligently designed as a matter of law if it has been in successful use for almost two decades before the accident.”¹²⁶ The Act also includes an 18-year “rolling statute of repose” for replacement parts: “The repose period for claims based on injuries relating to the new parts begins running on the date the replacement or addition is completed, while claims for injuries based on the rest of the aircraft are subject to the original statute of repose.”¹²⁷

GARA also includes four exceptions: (1) Fraud exception; (2) Medical emergency exception; (3) Not-aboard-the-aircraft exception, and; (4) Written warranty exception.¹²⁸

Though the GARA shields general aviation manufacturers from civil liability, it covers only a part of the aviation industry and allows causes of action to proceed if the injury occurs within the 18-year repose period. Such a scheme still incentivizes general aviation manufacturers to build safer aircraft and does not disallow recovery wholesale for individuals injured by aircraft. Furthermore, airplanes must be certified by the FAA, with no exceptions.

Victims of gun violence are not compensated from a fund created by taxes on firearms purchases, like victims harmed by childhood vaccines. Nor do they have 18 years from the time a firearm is put on the market to sue, as purchasers of general aviation aircraft do. Furthermore, the broad immunity which the firearms industry enjoys is not necessary to keep gun makers in business. As noted previously, a major firearms manufacturer, Sturm, Ruger & Co., was confident that potential litigation prior to PLCAA would not have had a significant financial impact on the company.

RESTORING JUSTICE TO VICTIMS OF GUN VIOLENCE

The best way to give victims and survivors of gun violence their rights back is to repeal the Protection of Lawful Commerce in Arms Act in its entirety. Another approach would be to amend PLCAA to allow lawsuits based on state law to go forward.

In January 2013, Representative Adam Schiff (D-CA) introduced the Equal Access to Justice for Victims of Gun Violence Act, which prohibits a court from dismissing “an action against a manufacturer, seller, or trade association for damages or relief resulting from an alleged defect or alleged negligence with respect to a product, or conduct that would be actionable under State common or statutory law in the absence of the Protection of Lawful Commerce in Arms Act on the basis that the action is for damages resulting from, or for relief from, the criminal, unlawful, or volitional use of a qualified product.”¹²⁹ Essentially, the bill continues to protect the gun industry against suits involving the criminal acts of third parties, the purported purpose of PLCAA; but allows suits alleging industry misconduct to go forward.

“Good gun companies don’t need special protection from the law, and bad gun companies don’t deserve it ... No industry deserves the right to act with reckless disregard for the public safety.”

- Representative Adam Schiff

Another partial remedy worth investigating would be to have states amend their negligence and public nuisance laws to explicitly mention gun commerce, thereby making it easier for courts to find that state law creates a predicate exception by being “applicable to the sale or marketing of the product.” Highly tailored efforts to reform state laws are a promising but speculative path to removing some of the negative impacts of PLCAA.

CONCLUSION

America’s civil justice system exists to help compensate victims and create the possibility of a safer future. When businesses are held to account for their irresponsible practices, they are given a compelling reason to avoid mistakes and prevent their products from causing harm. Given the importance of keeping guns out of the hands of criminals, the civil justice system holds the potential to create a powerful check against actions that enable gun violence.

The Protection of Lawful Commerce in Arms Act (PLCAA) denies justice to gun violence victims and increases the chance that preventable gun violence will continue to occur. The enactment of PLCAA has prevented victims’ families and survivors from holding gun sellers accountable for their unreasonable behavior, including the arming of hardened criminals and domestic abusers. “Some courts have broadly construed PLCAA to give negligent gun dealers immunity from suit that even the sponsors of the law did not intend,” said Jonathan Lowy, Director of the Brady Center to Prevent Gun Violence’s Legal Action Project, who represented victims of the DC-area snipers, the family of Kenzo Dix, and continues to represent gun violence victims across the country. “There is no good reason to treat victims of gun violence as second class citizens without the civil rights of victims of all other industries’ negligence.”¹³⁰

Moreover, PLCAA has removed incentives for the gun industry to make safer products and design guns that are harder for children to access.

Unlike other industries, which are granted similar immunity from civil suit, there exists no compensation fund for harm caused by firearms, nor statute of repose to allow victims the opportunity to be compensated for their unimaginable loss. In addition, there is no federal agency with the authority to regulate the safe design of firearms. The Consumer Product Safety Commission is, in fact, expressly forbidden from regulating firearms or ammunition.

Having seen the negative results of giving the gun industry unprecedented and unnecessary protection, it is now time to put people over gun industry profits once again. The best available remedies are to reform PLCAA at the national level and pursue state-level laws that can help victims seek justice through the civil system. Gun violence victims deserve no less.

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