IN GUNS WE ENTRUST: TARGETING NEGLIGENT FIREARMS DISTRIBUTION

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ABSTRACT

On October 26, 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA), an immunity statute that broadly shields gun manufacturers, distributors, and dealers from civil lawsuits arising out of gun violence injuries. PLCAA was passed with overwhelming support in Congress after decades of litigation against the gun industry. After tracking that history of litigation, this Note criticizes Congress's reasons for passing PLCAA and argues for a broader interpretation of the negligent entrustment exception. In particular, courts should construe the negligent entrustment exception broadly to allow investigation of claims against gun dealers who allegedly store and transfer guns in ways that enable criminals to obtain access to them. In the same vein, PLCAA should not provide wholesale immunity to manufacturers who continually purvey weapons to these corrupt gun dealers solely because they do not directly transfer guns to consumers. The implications of this reading of negligent entrustment would concededly impact the gun industry in momentous ways. However, acceptance of this view would not open a Pandora's box of litigation, unconstitutionally violate Second Amendment rights, or disturb the gun industry's qualified immunity. Rather, imposing a duty on the gun industry to monitor the distribution of firearms merely reflects the risk of distributing lethal instrumentalities to unscrupulous commercial actors and dangerous individuals.

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INTRODUCTION

At 2:19 p.m. on February 14, 2018, Nikolas Cruz arrived at his Uber destination: his alma mater, Marjory Stoneman Douglas High School.[1] Moments later, armed with an AR-15 rifle and smoke grenades, Cruz walked through the school

1. Stephen Hobbs et al., *New Details: How the Stoneman Douglas High School Shooting Unfolded*, SUN SENTINEL (Apr. 24, 2018), http://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/sfl-florida-school-shooting-timeline-20180223-htmlstory.html.

doors, pulled the fire alarm to Building 12, and indiscriminately shot at students and faculty members in the hallways and classrooms on three different floors.[2] Within a matter of minutes, a football coach, an athletic director, a geography teacher, and fifteen high schoolers were killed.[3] Fifteen more were wounded.[4] But as shocking and tragic as it was, the massacre at Stoneman Douglas High was hardly a departure from the mass shootings that American society has grown numb to.[5]

To be sure, mass shootings represent only the tip of the iceberg when examining the plight of gun violence in the United States.[6] Each year, well over 30,000 Americans are killed (and substantially more incur non-fatal wounds) in homicides, suicides, gang wars, accidental misfires,[7] and domestic violence disputes.[8] Reasonable minds can differ as to the root cause of gun violence in America, particularly given the scarcity of research into this public health concern.[9] However, the fact that most mass shooters obtain their weapons legally reflects the failure of the existing regulatory

2. *Id.*

3. *See* Eric Levenson, *These Are the Victims of the Florida School Shooting*, CNN (Feb. 21, 2018, 11:56 AM), https://www.cnn.com/2018/02/15/us/florida-shooting-victims-school/index.html.

4. Hobbs et al., *supra* note 1.

5. Only a few months before the mass shooting at Marjory Stoneman Douglas High, a shooter mowed down fifty-eight concertgoers at a music festival on the Las Vegas strip from the thirty-second floor of the Mandalay Bay Hotel with an arsenal of weapons obtained legally. *See* Russell Berman, *The Political World Reacts to the Las Vegas Massacre*, ATLANTIC (Oct. 2, 2017, 11:00 AM), https://www.theatlantic.com/politics/archive/2017/10/the-political-world-reacts-to-the-las-vegas-massacre/541707/; Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html; *see also* Kolbe v. Hogan, 849 F.3d 114, 120 (4th Cir. 2017) (documenting mass shootings carried out in public places like Sandy Hook Elementary School, an Aurora, Colorado movie theater, a San Bernardino community center, and Pulse nightclub in Orlando, Florida, among others).

6. *See* Maggie Koerth-Baker, *Mass Shootings Are a Bad Way to Understand Gun Violence*, FIVETHIRTYEIGHT (Oct. 3. 2017, 5:56 AM), https://fivethirtyeight.com/features/mass-shootings-are-a-bad-way-to-understand-gun-violence/ (stating that "mass shootings just aren't a good proxy for the diversity of gun violence").

7. *See* Andrew Jay McClurg, *The Second Amendment Right to Be Negligent*, 68 FLA. L. REV. 1, 7 n.22 (2016) (summarizing a tragic accidental shooting involving a child and the alarming prevalence of accidental gun deaths among children and young adults).

8. *Id.*

9. *See infra* Section III.B.2 (discussing the dearth of research into gun violence).

regime to keep guns out of the wrong hands.[10] Moreover, the failure of Congress to pass gun control legislation is perhaps best illustrated by politicians' predictable responses to tragedies like Marjory Stoneman Douglas High, Mandalay Bay, and Sandy Hook Elementary: issuing public condolences, promising to reevaluate regulations, but ultimately punting the issue for another day.[11]

In 2005, however, Congress legislated in the area of firearms, albeit largely for the benefit of the gun industry.[12] During a time when gun violence was at the fore of public attention,[13] Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA),[14] which the National Rifle Association (NRA) lauded as "the most significant piece of pro-gun legislation in

10. *See* Anthony A. Braga et al., *Interpreting the Empirical Evidence on Illegal Gun Market Dynamics*, 89 J. URB. HEALTH 779, 779 (2012) (referring to research showing that five of every six guns used in crime was obtained unlawfully). *See generally* Buchanan et al., *supra* note 5 (describing how various mass shooters procured their weapons legally).

11. *See, e.g.*, Brannon P. Denning, *In Defense of a "Thin" Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALB. GOV'T L. REV. 419, 427 (2008) (noting how Congress failed to pass "extensive federal gun control legislation since the late 1960s, and permitted the 1994 Assault Weapons Ban to expire, even in the wake of much-publicized shootings in schools like Columbine and Virginia Tech"); German Lopez, *Students Are Rising Up Against Gun Violence in the Aftermath of the Florida Shooting*, VOX, https://www.vox.com/policy-and-politics/2018/2/19/17027250/march-protests-guns-florida-shooting (last updated Feb. 21, 2018, 11:55 AM) ("[T]he demands [for congressional action] eventually subside and the public and lawmakers by and large move on."); Michael D. Shear & Sheryl Gay Stolberg, *Conceding to N.R.A., Trump Abandons Brief Gun Control Promise*, N.Y. TIMES (Mar. 12, 2018), https://www.nytimes.com/2018/03/12/us/politics/trump-gun-control-national-rifle-association.html (explaining how "Republican lawmakers fear the N.R.A.'s ability to stir up opposition in their districts," particularly during an election year). *But see* Patricia Mazzei, *Florida Governor Signs Gun Limits into Law, Breaking with the N.R.A.*, N.Y. TIMES (Mar. 9, 2018), https://www.nytimes.com/2018/03/09/us/florida-governor-gun-limits.html (describing new Florida law passed in the wake of the mass shooting at Marjory Stoneman Douglas High).

12. When used in this Note, the term "gun industry" refers globally to licensed gun manufacturers, distributors, and dealers.

13. Numerous incidents of gun violence in the 1990s, such as the Waco raid and the Columbine High School shooting, informed the public's awareness of the issue and led to the growth of a coalition of gun control proponents. *See* Charles S. Sipos, Note, *The Disappearing Settlement: The Contractual Regulation of Smith & Wesson Firearms*, 55 VAND. L. REV. 1297, 1306–07 (2002); *see also infra* notes 116–17 and accompanying text (recounting the Washington, D.C. sniper attacks that occurred in 2002 when Congress first considered PLCAA).

14. 15 U.S.C. §§ 7901–03 (2018). For readability purposes, the acronym "PLCAA" is phonetically pronounced "plak-uh."

twenty years."[15] Signed into law by President George W. Bush, PLCAA broadly immunizes gun manufacturers, distributors, and dealers from civil lawsuits arising out of the criminal or unlawful misuse of guns, ammunition, and other firearms products.[16] Unless a plaintiff can trigger one of PLCAA's enumerated exceptions,[17] courts dismiss lawsuits brought against the gun industry to recover damages related to gun violence.[18]

The focus of this Note is on PLCAA's second exception for negligent entrustment.[19] Negligent entrustment occurs when one person (the entrustor) passes control of an item (a chattel) to another person (the entrustee) despite having some knowledge that the entrustee is reasonably likely to cause harm with it.[20] At common law, the precise identity of the entrustor is of little importance—instead, courts focus on the circumstances known by the entrustor suggesting that the

15. *President Bush Signs "Protection of Lawful Commerce in Arms Act" Landmark NRA Victory Now Law*, NAT'L RIFLE ASS'N POL. VICTORY FUND (Oct. 26, 2005), https://www.nrapvf.org/articles/20051026/president-bush-signs-protection-of-lawful-commerce-in-arms-act-landmark-nra-victory-now-law.

16. *See* Alden Crow, *Shooting Blanks: The Ineffectiveness of the Protection of Lawful Commerce in Arms Act*, 59 SMU L. REV. 1813, 1814 (2006).

17. *See, e.g.*, Delana v. CED Sales, Inc., 486 S.W.3d 316, 327 (Mo. 2016) (reversing summary judgment because gun dealer's sale to severely mentally ill woman satisfied negligent entrustment exception); Williams v. Beemiller, 952 N.Y.S.2d 333, 338–39 (N.Y. App. Div. 2012), *amended by* 962 N.Y.S.2d 834, 835–36 (N.Y. App. Div. 2013) (reversing dismissal of lawsuit against gun manufacturer and distributor-dealer where illegal sale of guns to black market satisfied statutory exceptions).

18. *See generally, e.g.*, Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009) (dismissing claims against firearms manufacturers); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008) (reversing and remanding with instructions to dismiss); Soto v. Bushmaster Firearms Int'l, LLC, No. FBTCV156048103S, 2016 Conn. Super. LEXIS 2626 (Conn. Super. Ct. Oct. 14, 2016) (dismissing lawsuit arising out of the Sandy Hook shooting); Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216 (D. Colo. 2015) (dismissing claims arising out of the Aurora, Colorado movie theater shooting); Gilland v. Sportmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011) (dismissing lawsuit against gun dealer after thief stole gun and used it to murder wife); Adames v. Sheahan, 233 Ill. 2d 276 (2009) (dismissing lawsuit arising out of a child mistakenly firing father's handgun and killing friend).

19. *See* 15 U.S.C. § 7903(5)(A)(ii); *see also id.* § 7903(5)(B) (defining negligent entrustment). Negligence per se is also in PLCAA's second exception, but will not be discussed in detail for the purposes of this Note.

20. *See* RESTATEMENT (SECOND) OF TORTS § 390 (AM. LAW INST. 1965).

entrustee cannot handle the chattel competently or safely.[21] In the context of firearms, the following illustrations would raise the negligent entrustment doctrine:

> A lends his shotgun and ammunition to his neighbor, B, even though B has a reputation for being mentally ill and a violent criminal.
>
> A sells a rifle and bullets to an eighteen-year-old customer, B, even after B stumbles into the store, smells like alcohol, and slurs his words at the counter.

Unlike any other statutory exception to the gun industry's immunity, PLCAA specifically defines negligent entrustment and this definition is consistent with the common law.[22]

This Note contends that courts should apply PLCAA's negligent entrustment exception more broadly given the fact-intensive nature of this tort. At a bare minimum, courts should permit plaintiffs to conduct discovery and gather evidence of the conduct in question. Parts I and II describe the outcomes of tort litigation against the gun industry over the past few decades to demonstrate how gun violence shifted from a private issue to a matter of public concern. In particular, this Note emphasizes the importance of the *Hamilton v. Accu-Tek* case where, for the first time, a court imposed a duty on gun manufacturers to monitor the distribution of their firearms. Parts III and IV summarize PLCAA's key provisions and its legislative history and argue that Congress mischaracterized tort litigation against the gun industry to justify far-reaching tort immunity. Part V proceeds by exploring the negligent

21. *See id.* (stating that the rule applies broadly and showing the tort's flexibility through hypothetical illustrations).

22. Bryant-Bush v. Shawnee Gun Shop, Inc., No. 09-00397-CV-W-REL, 2011 U.S. Dist. LEXIS 162333, at *9 n.1 (W.D. Mo. Mar. 29, 2011) (noting the similarities between the definitions of negligent entrustment in the Restatement and PLCAA).

entrustment exception and detailing why it should be interpreted broadly.

The gun industry is the last line of defense to assure that firearms do not end up in the wrong hands. Under appropriate factual circumstances, the negligent entrustment doctrine should be extended to gun dealers who entrust weapons to individuals through manifestly negligent storage practices or sales procedures. By the same token, gun manufacturers and distributors should not be insulated from liability merely because they do not participate in the consumer sale—they should be deemed liable if they distribute firearms to gun dealers despite having actual or constructive knowledge of a dealer's corrupt sales or storage practices. This view will not open a Pandora's box of litigation, diminish access to firearms, or disturb the gun industry's qualified immunity. Instead, this interpretation reflects the risk of distributing weapons to reckless individuals or entities, incentivizes safer gun industry practices, and provides redress to blameless victims of avoidable gun violence.

I. LITIGATION AGAINST THE GUN INDUSTRY: FROM CITIZENS TO MUNICIPALITIES

Congress passed PLCAA after years of litigation against the gun industry. Understanding the basic liability theories advanced by plaintiffs is critical to appreciating the scope of PLCAA immunity.

A. *Private Litigation*

In the 1980s and 1990s, a trend developed: private citizens stepped into court to sue gun manufacturers and dealers under various liability theories. In one species of lawsuit, plaintiffs asserted strict liability actions premised on the notion that the manufacturing and distributing of guns

constitutes an "ultrahazardous activity."[23] The ultrahazardous activity doctrine recognizes that certain activities are simply so dangerous that the amount of care an actor takes is immaterial; liability is automatically imposed once a plaintiff shows that the tortfeasor caused his or her injuries.[24] While *discharging or firing guns* represent an inherent danger to the public, courts refused to classify *manufacturing, marketing, or distributing* guns as ultrahazardous activities.[25]

Plaintiffs also brought claims based on well-established products liability doctrines.[26] Under the consumer expectation test, for example, courts assessed the viability of a products liability case by asking whether the gun performed as a buyer would anticipate.[27] But unless a gun malfunctioned or some other defect caused harm, the fact that a person suffered an injury only confirmed that the gun worked precisely as the manufacturer intended (and as a consumer would ordinarily expect).[28]

Courts more commonly applied a risk-utility approach to products liability claims.[29] The relevant inquiry under the risk-utility model is whether the utility of the particular gun's characteristics outweighs its risks.[30] For instance, plaintiffs

23. Copier *ex rel.* Lindsey v. Smith & Wesson Corp., 138 F.3d 833, 834–35 (10th Cir. 1998); Perkins v. F.I.E. Corp., 762 F.2d 1250, 1253–54 (5th Cir. 1985); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1202–03 (7th Cir. 1984).

24. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (AM. LAW INST. 1965).

25. *See, e.g.*, *Copier ex rel. Lindsey*, 138 F.3d at 838 (holding that manufacturing guns is not ultrahazardous activity); *Perkins*, 762 F.2d at 1268–69 (affirming summary judgment in favor of defendants because handguns functioned as intended, marketing small handguns does not constitute ultrahazardous activity, and third-party misuse precludes liability); *Martin*, 743 F.2d at 1204–05 (affirming dismissal of strict liability action because the sale of handguns is not ultrahazardous and criminal misuse of handgun qualifies as an intervening act).

26. Moore v. R.G. Indus., 789 F.2d 1326, 1328 (9th Cir. 1986) (affirming grant of summary judgment because defective design claims failed both the consumer expectation and risk-utility tests).

27. Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912, 1917 (1984).

28. *See id.* at 1916 ("[A] handgun is one of those products that by its very nature must be dangerous; if a handgun does not have the capacity to kill, it is not a handgun."); *see also Perkins*, 762 F.2d at 1272–75.

29. Note, *supra* note 27, at 1916 (explaining at length why courts prefer the risk-utility test over the consumer expectation model).

30. *Id.* at 1913.

argued that the benefits of "Saturday Night Special" handguns—they are cheap, small-caliber and easily concealable—did not outweigh their primary social cost: criminals like to use them precisely because of these attributes.[31] Most courts flatly rejected this basis for imposing liability, though, because the utility of guns for self-protection and recreation[32] outweighed the danger that a third party—over whom manufacturers had no control[33]—would misuse the gun.

Alternatively, plaintiffs pursued litigation against gun manufacturers under three negligent marketing theories. One theory asserted that gun manufacturers oversupplied dealers in states with lenient regulations despite knowing that this surplus of weapons would spill over into the black market.[34] Another theory claimed that manufacturers promoted and distributed military-grade weapons that they knew or should have known were unreasonably dangerous for use by a citizen in the general public.[35] Finally, plaintiffs asserted tort theories that gun dealers conducted negligent or unlawful sales by virtue of their inadequate training or sales procedures for employees.[36] Like the products liability line of cases, the vast majority of these negligent marketing and distribution suits against the gun industry were doomed to fail: courts refrained

31. Only one court gave credence to this application of the risk-utility test to handguns. *See* Kelley v. R.G. Indus., 497 A.2d 1143, 1153–54 (Md. 1985) (noting that Saturday Night Specials present difficulties for law enforcement and are virtually only used by criminals). However, the Maryland legislature subsequently abrogated this extension of liability consistent with other jurisdictions. *See* Copier *ex rel.* Lindsey v. Smith & Wesson Corp., 138 F.3d 833, 836 & n.3 (10th Cir. 1998).

32. Moore v. R.G. Indus., 789 F.2d 1326, 1327 (9th Cir. 1986).

33. *See* Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1205 (7th Cir. 1984).

34. *See* Jonathan E. Selkowitz, *Guns, Public Nuisance, and the PLCAA: A Public Health-Inspired Legal Analysis of the Predicate Exception*, 83 TEMP. L. REV. 793, 805 (2011). This issue of interstate trafficking is known as "convenience trafficking." *See infra* note 58 and accompanying text.

35. *See* Selkowitz, *supra* note 34, at 805. A version of this liability theory is currently at play in the Sandy Hook litigation. *See infra* note 130 and accompanying text.

36. *See* Selkowitz, *supra* note 34, at 805.

from extending a duty on the gun industry to guard against third-party gun violence.[37]

Despite the emotional and tragic nature of some cases,[38] courts framed the judiciary's regulatory role narrowly and deferred to the legislature to address the reasonableness of the gun industry's conduct.[39] Public health advocates called for regulations that would incentivize safer design and marketing practices, but to no avail.[40] As most individuals were unable to hold the gun industry responsible,[41] their local governments stepped into court.

B. *Public Entity Litigation*

Contemporaneous with private citizens' efforts to hold the gun industry liable for firearms injuries, state attorneys general nationwide finally succeeded in litigation against Big Tobacco.[42] After years of futile attempts to hold the industry accountable for concealing the truth about the consequences of smoking, these lawsuits precipitated a Master Settlement Agreement with the tobacco industry in excess of $200 billion to be paid over a twenty-five-year period.[43]

37. *See* Stephen P. Halbrook, *Suing the Firearms Industry: A Case for Federal Reform?*, 7 CHAP. L. REV. 11, 11 nn.1–2 (2004) (compiling pre-PLCAA cases dismissed on the grounds that absent a special relationship, no duty can fairly be imposed on gun manufacturers or dealers).

38. Merrill v. Navegar, Inc., 28 P.3d 116, 134 (Cal. 2001) ("Whatever personal emotions and personal views members of this court may have in this tragic case, those feelings must be put aside in resolving the narrow legal question decided here." (Kennard, J., concurring)).

39. *See, e.g.*, Keene v. Sturm, Ruger & Co., 121 F. Supp. 2d 1063, 1068 (E.D. Tx. 2000) ("The Court empathizes with Plaintiff's grief and frustration over the senseless death of her son. But it has the power to interpret the law, not to legislate.").

40. *See* Selkowitz, *supra* note 34, at 804.

41. *See, e.g.*, Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 808 (E.D.N.Y 1999), *rev'd sub nom.* Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 30 (2d Cir. 2001) (reversing jury verdict against fifteen gun manufacturers); Howard Bros. of Phenix City, Inc. v. Penley, 492 So.2d 965, 968–69 (Miss. 1986) (affirming jury verdict against gun dealer but directing a remittitur of $100,000 damages award).

42. *See* Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 555–58 (2000) (discussing how the attorneys general lawsuits sought reimbursement of Medicaid disbursement to cover the public health costs of nicotine addiction).

43. Settlement negotiations between the tobacco industry and the states began after a black sheep tobacco company became the first to settle litigation; two years later, Big Tobacco caved and the Master Settlement Agreement was agreed upon. *See id.* at 553–54.

Recognizing the legal and political triumph of the Big Tobacco settlement negotiated by their state counterparts, cities and counties across the country instituted lawsuits against the gun industry under similar products liability, public nuisance, and negligent marketing and distribution theories.[44] In addition to seeking damages for recovery of Medicaid dollars and public health costs of gun violence,[45] municipalities pursued recovery of government funds spent on crime prevention and response.[46] Cities also requested injunctive relief to change or put an end to dangerous firearms design and marketing practices.[47]

Although public entity litigation pressured Big Tobacco into a massive long-term settlement,[48] Big Gun stood its ground. Most courts dismissed the municipal lawsuits against the gun industry during the pleadings stage on standing grounds, or more commonly, based on duty and causation:[49] the same obstacles that plagued private citizens' earlier efforts to hold the gun industry accountable.[50] While a smaller faction of courts allowed public entities to engage in discovery,

44. New Orleans and Chicago spawned public entity litigation against Big Gun manufacturers like Smith & Wesson and Beretta, followed by over thirty other cities, counties, and states. *Id.* at 579 n.136 (listing the first wave of governmental lawsuits against the gun industry).

45. A 1994 study of the secondary effects of gun violence concluded that gunshot injuries produced well over $2 billion in lifetime medical costs, nearly half of which was covered by taxpayers. Selkowitz, *supra* note 34, at 802.

46. *See, e.g.*, City of Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882, 894 (E.D. Pa. 2000) (noting the various public expenditures that the city sought reimbursement for); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1140, 1150 (Ohio 2002) (stating that the city was seeking reimbursement of police, emergency, health, and corrections costs, as well as changes to manufacturing, marketing, and distribution practices).

47. *See, e.g.*, *City of Cincinnati*, 768 N.E.2d at 1150 (stating that the city sought changes to manufacturing, marketing, and distribution practices); City of Boston v. Smith & Wesson Corp., No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *58 (July 13, 2000) (summarizing the city's request to enjoin the manufacture, distribution, or sale of firearms without safety devices and warnings).

48. *See* Patterson & Philpott, *supra* note 42, at 597.

49. *See, e.g.*, *City of Philadelphia*, 126 F. Supp. 2d at 886–87 (dismissing lawsuit for lack of standing and failure to establish causation); Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 541 (3d Cir. 2001) (dismissing public nuisance lawsuit because "[t]o connect the manufacture of handguns with municipal crime-fighting costs requires, as noted above, a chain of seven links").

50. *See supra* Section I.A.

ultimately, plaintiff-cities voluntarily dismissed their lawsuits due to insufficient proof connecting the specific industry business practices to the alleged harm and damages.[51] But while Big Gun fended off most suits, not all pre-PLCAA litigation against the gun industry failed.

II. THE SILVER BULLETS THAT PROMPTED PLCAA

Two outcomes at the turn of the century prompted Congress's consideration and passage of PLCAA. First, in *Hamilton v. Accu-Tek*, Judge Jack Weinstein bucked the trend of judicial deference by affirming a jury verdict against a small group of gun manufacturers.[52] Although ultimately reversed, Judge Weinstein's decision signaled a possible sea change in jurisprudence regarding the gun industry's tort liability. Second, the Clinton Administration pressured Smith & Wesson, one of the largest global gun manufacturers, into a settlement where the company agreed to implement safer manufacturing and distribution practices.[53] While *Hamilton* and the Smith & Wesson Agreement provided a glimmer of hope for plaintiffs and gun control advocates, this sense of optimism proved to be short-lived.

A. Hamilton v. Accu-Tek*: Judge Weinstein the Maverick*

The most noteworthy plaintiff-friendly decision in gun litigation came out of the Eastern District of New York: Senior District Judge Jack Weinstein's groundbreaking opinion in *Hamilton v. Accu-Tek*.[54] Although subsequently reversed on appeal, the *Hamilton* decision changed the landscape of gun litigation by scrutinizing firearms distribution practices and compelling gun dealers and manufacturers to reconsider their

51. *See* Halbrook, *supra* note 37, at 16–17 (explaining why municipal lawsuits in Boston and Cincinnati were voluntarily dismissed).

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

53. *Id.*

54. *Id.*

business practices, even if only for a short while.[55] In affirming a verdict against three gun manufacturer-distributors, Judge Weinstein's *Hamilton* opinion marked the first time a court imposed a duty on gun manufacturers under a negligent distribution liability theory.[56]

In *Hamilton*, seven plaintiffs—on behalf of family members who were either killed or permanently disabled in separate shootings—sued twenty-five handgun manufacturers for negligent marketing and distribution.[57] The plaintiffs alleged that a group of gun manufacturers purposefully oversupplied firearms to dealers in states with relatively weak gun regulations, despite knowing that this surplus of weapons would likely spill over into states with harsher gun regulations via illegal interstate trafficking channels.[58] A jury returned a verdict finding that fifteen of the twenty-five defendants negligently distributed weapons in this manner, but found that only one plaintiff, Stephen Fox, had proven causation and demonstrated cognizable damages.[59] The jury awarded him and his mother $4 million to be paid by just three of the twenty-five defendants.[60] However, after apportioning liability based on the relative market share of each of the three manufacturers, the jury's award was reduced to only

55. *See infra* note 101 and accompanying text.

56. Sipos, *supra* note 13, at 1314–15.

57. *See Hamilton I*, 62 F. Supp. 2d at 808–10.

58. *See id.* at 844 (summarizing the theory that "[i]t is the underground market itself, created and stocked by the defendants' negligence—rather than any one manufacturer's product—which the plaintiffs regard as the cause of their injuries"). The plaintiffs' experts characterized this problem of an interstate black market as "convenience trafficking" because it made acquisition of guns by felons and juveniles more opportune. *Id.* at 829–32. The problem of convenience trafficking is a serious one that still exists. *See* BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, THE TRUTH ABOUT GUN DEALERS IN AMERICA: STOPPING THE SMALL NUMBER OF "BAD APPLES" THAT SUPPLY VIRTUALLY EVERY CRIME GUN IN THE U.S. 4 (2016) [hereinafter BAD APPLE GUN DEALERS] (describing how many illegally-trafficked guns originate from dealers hundreds of miles away).

59. *Hamilton I*, 62 F. Supp. 2d at 811.

60. *Id.* at 808–11.

$500,000,[61] a modest sum given Stephen Fox's brain damage and permanent disability.[62]

Although New York tort law does not impose a duty on gun manufacturers to guard against the risk of third-party violence, Judge Weinstein concluded that "[n]either the inability of defendants to prevent the plaintiffs' injuries nor the potential for crushing liability" should control the analysis.[63] Instead, the duty inquiry would be informed by the close relationship between gun manufacturers and their dealers, the dangerous nature of handguns, and the opportunity for the gun industry to limit firearms access to responsible merchants and consumers.[64] Imposing a duty to mitigate third-party misuse of firearms would not expose the gun industry to enormous liability because manufacturers could avoid liability simply by implementing more prudent distribution practices.[65] In other words, the sale or manufacturing of dangerous weapons was not in and of itself negligent, but the way in which the gun industry effectuated those sales might be,[66] particularly because a manufacturer has exclusive discretion in deciding how and to whom it distributes guns.[67]

In Judge Weinstein's view, gun manufacturers were best-positioned to mitigate the risk that firearms would end up in the wrong hands.[68] For example, gun manufacturers could

61. *Id.* at 848. This verdict does not account for whatever fees the Fox plaintiffs would have owed their attorneys.

62. *Id.* at 808.

63. *Id.* at 820.

64. *Id.* at 821–22.

65. *See id.* at 820. Judge Weinstein reasoned that unlike a strict liability scheme, a negligence regime allows the gun industry to avoid liability "by marketing and distributing [its] product responsibly." *Id.*

66. *Id.* at 829 ("Technical compliance with all relevant laws and regulations is not dispositive . . . [t]he exercise of due care mandates additional preventive measures where a reasonably prudent person would have taken them."); *see also* City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222, 1232–33 (Ind. 2003) ("[G]un regulatory laws leave room for the defendants to be in compliance with those regulations while still acting unreasonably.").

67. *Hamilton I*, 62 F. Supp. 2d at 825.

68. *See id.* at 820 (reasoning that gun manufacturers can mitigate the risk of third-party harm "by ensuring that the first sale was by a responsible merchant to a responsible buyer.").

curb the likelihood of a straw purchase or the falsification of a firearms transaction record by implementing policies that would monitor the retailers in its distribution chain, or by restricting sales at unregulated gun shows.[69] Witnesses at the *Hamilton* trial suggested other economically feasible precautions: gun manufacturers could require wholesale distributors to sell exclusively to brick-and-mortar retailers, or manufacturers themselves could use the federal crime gun trace repository to identify dealers whose weapons frequently turned up at crime scenes.[70] Especially damaging was the testimony of executives from two of the largest gun manufacturers in the world, who suggested that gun manufacturers could do more to promote lawful sales and safety, or worse, that the industry as a whole turned a blind eye and deaf ear to unreasonably harmful dealer practices.[71] Manufacturers could offset any costs linked to the implementation of these business practices by "raising prices

Judge Weinstein mentioned several ways in which criminals obtain weapons. Chief among them include straw purchases, the falsification of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Firearm Transaction Records, convenience trafficking, corrupt dealer practices, and stolen guns. *See id.* at 826, 829.

69. *See id.* at 826. For example, an executive from Sturm, Ruger & Co., a major player in the gun industry, testified about a company policy that required its downstream distributors to sell only to stocking gun dealers. *Id.* at 832. The jury did not find Sturm Ruger negligent. *Id.*

70. *Id.* at 831. "Crime gun" data is a valuable tool that allows law enforcement to investigate firearms-related crimes by tracing a gun to its original source. The ATF has stated that the crime gun trace system should not be used as a statistical sample to draw conclusions about the connection between crimes and guns because it only documents guns that police know or suspect are illegally possessed or used in a crime. *See* WILLIAM J. KRAUSE, CONG. RESEARCH SERV., GUN CONTROL: STATUTORY DISCLOSURE LIMITATIONS ON ATF FIREARMS TRACE DATA AND MULTIPLE HANDGUN SALES REPORTS 3 (2009); *see also* Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379, 1400 n.101 (2000) (pointing out the flaws associated with relying on crime gun trace data). However, because the ATF uses crime gun traces to investigate gun violence by starting at the point-of-sale, trace information can be reliable in identifying corrupt firearms dealers. *See* DEP'T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS, at iii (2000) [hereinafter FOLLOWING THE GUN].

71. *See Hamilton I*, 62 F. Supp. 2d at 832 (restating testimony of former Smith & Wesson executive: "The manufacturers could do more and their hands aren't clean [just because] they ship totally legally to distributors. There's more that could be done.").

to more accurately reflect the true costs of negligently marketing and distributing handguns."[72]

Although his opinion could have vastly expanded the gun industry's tort liability, Judge Weinstein circumscribed the potentially crippling financial liability by apportioning the damages award through a market share liability scheme.[73] In sum, Judge Weinstein gave four reasons for imposing a duty on gun manufacturers:

> (1) the superior ability of defendants to bear the costs foreseeably associated with the manufacture and widespread distribution of handguns; (2) the fairness of requiring them to do so since they can reduce the risks by their ability to choose merchandising techniques; (3) the deterrent potential of placing the burden on manufacturers careless of their responsibilities to the public; and (4) the fact that injured plaintiffs, unlike the users of products which later turn out to be defective, did not choose their connection with handguns. Under such circumstances the law will not leave the injured unrequited.[74]

On appeal, the Second Circuit certified questions to the New York Court of Appeals pertaining to duty and market share liability in the gun manufacturer-distributor context.[75] Judge Weinstein's reasoning did not persuade the New York Court

72. *Id.* at 827.

73. The market share scheme holds a defendant liable only for the portion of the judgment that reflects its percentage share of the relevant market. Judge Weinstein's apportionment of damages through a market share liability scheme did not result in exposure to limitless liability—in fact, the result was just the opposite. Fifteen of the twenty-five manufacturers were negligent, but only nine proximately caused the alleged harm, and only three were on the hook for what turned out to be a modest verdict given the plaintiff's extensive injuries. *See supra* notes 60–62 and accompanying text.

74. *Hamilton I*, 62 F. Supp. 2d at 843–44.

75. Hamilton v. Beretta U.S.A. Corp. (*Hamilton II*), 750 N.E.2d 1055, 1058–59 (N.Y. 2001).

of Appeals,[76] and the Second Circuit, adopting the same view, vacated the jury verdict.[77]

As an initial matter, the court found that Judge Weinstein overstated the relationship between the gun manufacturers, wholesale dealers, and retailers within the chain of distribution, particularly because "[t]he chain most often includes numerous subsequent legal purchasers or even a thief."[78] Thus, mere participation in a lawful chain of distribution did not necessarily place manufacturers in a position to prevent gun violence, and Judge Weinstein's nebulous conception of duty would create an immeasurable class of litigants.[79] Absent evidence demonstrating that the named defendants' alleged distribution model factually caused the injuries suffered, the court refused to expand negligence in this manner.[80] Finally, the court rejected the plaintiffs' products liability theory because the "products are concededly not defective—if anything the problem is that they work too well."[81]

The court did, however, reserve in dicta the possibility of imposing a duty on manufacturers in a future case.[82] Indeed,

76. *Id.* at 1059.

77. Hamilton v. Beretta U.S.A. Corp. (*Hamilton III*), 264 F.3d 21, 29–32 (2d Cir. 2001) (adopting the New York Court of Appeals' analysis and dismissing the case).

78. *Hamilton II*, 750 N.E.2d at 1062.

79. *See id.* at 1061–64 (noting the concern about "potentially limitless liability" and a "very large" pool of possible plaintiffs).

80. *Id.* at 1062 ("Without a showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert.").

81. *See id.* at 1062–63; *see also supra* notes 26–33 (explaining why courts rejected products liability claims in the 1980s and 1990s).

82. *See Hamilton II*, 750 N.E.2d at 1068 (rejecting imposition of a duty on the facts and stating "[w]hether, in a different case, a duty may arise remains a question for the future"); *see also id.* at 1064 (stating that liability may be appropriate under the negligent entrustment doctrine if a manufacturer "knows or has reason to know" that its downstream distributors sell guns to gun traffickers). The Second Circuit's reversal of *Hamilton* was not because Judge Weinstein distorted common law tort principles, but rather because of the lack of smoking gun evidence connecting the particular manufacturers to illegal distribution operations. *See Hamilton III*, 264 F.3d at 30 (stating that the "sufficiency of the evidence of causation" was a basis for the opinion of the New York Court of Appeals); *see also Hamilton II*, 750 N.E.2d at 1066 (stating that, "*given the evidence presented here*," defendants did not owe plaintiffs a duty (emphasis added)).

the court acknowledged that "a core group of corrupt [gun dealers could] emerge at some future time," which would "alter the duty equation."[83] Thus, despite the Second Circuit's reversal, other courts increasingly adopted Judge Weinstein's reasoning in *Hamilton* to assess negligent marketing and distribution claims against Big Gun.[84] But in addition to influencing some plaintiff-friendly tort decisions by other courts, the reasoning from the *Hamilton* case armed the Clinton administration with ammunition to pressure an industry giant to change the way it conducted business.

B. *The Smith & Wesson Agreement: A Failed Compromise*

Before Judge Weinstein's *Hamilton* opinion was reversed,[85] President Bill Clinton publically threatened the gun industry with a class action lawsuit.[86] The potential class representative, the Department of Housing and Urban Development (HUD), would sue the gun industry on behalf of public housing authorities across the nation to recover the costs of securing their premises against gun violence.[87] Some perceived Clinton's threat as another attempt to circumvent the legislative process and reform gun regulations through coercive litigation.[88] But days after his threat, President Clinton defended the potential lawsuit's merits.[89] Within a few months, a group of governmental entities agreed to settle all pending and future claims against Smith & Wesson.[90] In

83. *Hamilton II*, 750 N.E.2d at 1064 n.5.

84. *See, e.g.*, Ileto v. Glock, 349 F.3d 1194, 1217 (9th Cir. 2003) (reversing dismissal of negligence, public nuisance, survival, and wrongful death claims); City of Gary v. Smith & Wesson, 801 N.E. 2d 1222, 1249 (Ind. 2002) (reversing dismissal of public nuisance and negligence claims).

85. *Hamilton I* was still good law at the time of the agreement. Sipos, *supra* note 13, at 1313 n.105.

86. Patterson & Philpott, *supra* note 42, at 580–81.

87. *Id.*

88. *Id.* at 602–03.

89. *See id.* at 603 (quoting President Clinton and his spokesperson at a press conference regarding the President's agenda for the year).

90. *See generally Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States*, U.S. DEP'T HOUSING & URB. DEV.

exchange, the company agreed to adopt new manufacturing and sales policies and procedures that would address the substance of most products liability and negligent distribution lawsuits.[91]

With respect to manufacturing, Smith & Wesson agreed to implement safety features—such as child proof handguns, locking devices, and chamber load indicators—that would mitigate the risk of accidental shootings.[92] Other measures included promises to invest resources into researching and developing smart gun technology that would enhance firearm safety.[93] Regarding sales and distribution, Smith & Wesson would implement a code of conduct applicable not only to its own business practices, but also to the wholesale distributors and brick-and-mortar dealers down the supply chain.[94] The Agreement also established an Oversight Commission—whose membership included one representative from Smith & Wesson, two from city-county parties, one from the state parties, and one from the ATF—to periodically review compliance with the Agreement.[95] The Commission would also have the authority to compel Smith & Wesson to terminate or suspend business relationships with non-compliant distributors or dealers.[96]

Theoretically, the Smith & Wesson Agreement signified a radical development in gun control;[97] practically, however, it was destined to fail.[98] First and foremost, by the time it took

(Dec. 13, 2009), https://archives.hud.gov/news/2000/gunagree.html (setting forth the agreement's terms).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See generally* Edward Walsh & David A. Vise, *U.S., Gunmaker Strike a Deal*, WASH. POST (March 18, 2000), http://www.washingtonpost.com/wp-srv/WPcap/2000-03/18/030r-031800-idx.html (quoting public officials praising the agreement).

98. *See* Christina Austin, *How Gun Maker Smith & Wesson Almost Went Out of Business When It Accepted Gun Control*, BUS. INSIDER (Jan. 21, 2013, 8:15 AM), https://www.businessinsider.com/smith-and-wesson-almost-went-out-of-business-trying-to-do-the-right-thing-2013-1 (discussing the boycotts the NRA called for, the views of gun enthusiasts that saw Smith &

effect almost a year later, George W. Bush assumed the presidency, and his administration branded the agreement as "a memorandum of understanding" that would not be enforced.[99] Second, the gun lobby disowned Smith & Wesson as a traitor to the industry, relegating the conglomerate to an industry pariah. In fact, after the agreement was executed and made public, the NRA publicly encouraged consumers and other gun manufacturers and dealers to boycott Smith & Wesson for acting out of "craven self-interest."[100] Ousted by the NRA and the industry-at-large, Smith & Wesson experienced a massive plummet in sales in the fiscal year following the agreement and merged with another gun manufacturer.[101] Finally, beyond its political and economic ramifications for the gun industry, the Agreement drew criticism from commentators who dreaded that it would prevent, or at the very least discourage, Congress from tackling gun control.[102]

Despite the general success of gun dealers and manufacturers in defending the reasonableness of their business practices over multiple decades, *Hamilton* and the Smith & Wesson Agreement represented a confluence of events that typified shifting attitudes toward guns in

Wesson as traitors, and the nearly 40% decline in sales the year after the Agreement was signed).

99. Sipos, *supra* note 13, at 1303 ("Although it once appeared the Agreement might die of abuse, it appears to have died instead of neglect.").

100. *See id.* at 1302–03 & n.33 ("Gun control lobbying without the influence of the NRA is like Corn Flakes without the milk.").

101. Austin, *supra* note 98. Years later, the NRA got a taste of its own medicine in the aftermath of the shooting at Marjory Stoneman Douglas High School, as a plethora of companies boycotted the lobbying group by reneging discounts offered to its members. Amy Held, *One by One, Companies Cut Ties with the NRA*, NPR (Feb. 23, 2018, 3:24 PM), https://www.npr.org/sections/thetwo-way/2018/02/23/588233273/one-by-one-companies-cut-ties-with-nra. Other companies, like Dick's Sporting Goods, demonstrated their commitment to gun safety by removing assault-style rifles and high-capacity magazines from their shelves and refusing to sell any gun to an individual under twenty-one years of age. DICK'S Sporting Goods (@DICKS), TWITTER (Feb. 28, 2018, 4:51 AM), https://twitter.com/DICKS/status/968830988246765568 (announcing new policies for gun sales).

102. Sipos, *supra* note 13, at 1303 (criticizing the Smith & Wesson Agreement for "creat[ing] a private solution to a decidedly public problem").

America.[103] But Judge Weinstein's *Hamilton* opinion is no longer good law, and the Smith & Wesson Agreement was rendered moot by "executive whim."[104] Indeed, the Smith & Wesson Agreement likely reminded Big Gun of the massive, industry-wide settlement that resolved the tobacco litigation.[105] Over the next several years, the NRA and other interest groups spearheaded lobbying efforts for legislation to prevent Judge Weinstein's rationale from gaining traction. What better way to respond to the threat of litigation than lobby Congress into passing a federal immunity statute?[106]

III. THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act,[107] which broadly immunizes the gun industry from civil liability for criminal or unlawful misuse of a qualified product.[108] The definition of a "qualified product" covers a wide range of firearms, ammunition, or their component parts.[109] Congress intended to bar civil lawsuits against the gun industry "for the harm solely caused by the criminal or unlawful misuse of firearms products or ammunition products by others when the product functioned as designed and intended."[110] To accomplish this legislative endeavor, PLCAA dismisses all "qualified civil liability

103. *See id.* at 1306–07 (describing how events like the Waco raid, Oklahoma City bombing, and Columbine High School shooting gave rise to a political constituency opposing gun rights).

104. *Id.* at 1303.

105. *See supra* note 43 and accompanying text.

106. *See, e.g.*, National Shooting Sports Foundation, *The Protection of Lawful Commerce in Arms Act—10 Year Anniversary*, YOUTUBE (Oct. 26, 2015), https://www.youtube.com/watch?v=Nta6VPJfhVM.

107. *See* 15 U.S.C. §§ 7901–03 (2018).

108. *See* Crow, *supra* note 16, at 1814.

109. *See* 15 U.S.C. § 7903(4). *Compare* Sambrano v. Savage Arms, Inc., 338 P.3d 103, 104 (N.M. Ct. App. 2014) (holding that a gun cable lock is an accessory for a gun, but not a qualified product), *with* Prescott v. Slide Fire Sols., LP, No. 2:18-cv-00296-GMN-GWF, 2018 U.S. Dist. LEXIS 157764, at *21–29 (D. Nev. Sept. 17, 2018) (holding that a bump stock device is a qualified product under PLCAA).

110. 15 U.S.C. § 7901(b)(1).

actions."[111] The prohibition on these lawsuits even applied retroactively to dismiss pending litigation against the gun industry at the time of the Act's passage.[112] Where ambiguity exists, though, courts routinely look to PLCAA's legislative history to apply the statute to a case's facts.[113]

A. *Recalling PLCAA's Legislative History*

Congress first entertained PLCAA in 2002 in response to the uptick in firearms litigation. But in the wake of the Washington, D.C. sniper attacks later that year,[114] the proposed legislation never made it to President Bush's desk.[115] The publicity of the sniper attacks adversely impacted the prospect of passing a bill that would enhance gun industry protections and prevent victims from seeking relief in court.[116] Despite the obstacles of passing an immunity statute during this sensitive time, Idaho Senator Larry Craig remained steadfast in his efforts to translate the NRA's lobbying into substantive pro-gun legislation given the ongoing litigation

111. *Id.* § 7902(a) (barring all qualified civil liability actions); *see also id.* § 7903(5)(A) (defining a qualified civil liability action as any "civil action or proceeding or administrative proceeding brought by any person against a manufacturer or seller [of firearms or ammunition] . . . for damages . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party").

112. *Id.* § 7902(b).

113. *E.g.*, Ileto v. Glock, Inc., 565 F.3d 1126, 1136–37 (9th Cir. 2009); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 403–04 (2d Cir. 2008); Estate of Kim v. Coxe, 295 P.3d 380, 387–88 (Alaska 2013).

114. Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability Is Unconstitutional*, 72 U. CIN. L. REV. 1739, 1739 & nn.1–2 (2004) (describing the sniper attacks).

115. Jenny Miao Jiang, *Regulating Litigation Under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?*, 70 ALBANY L. REV. 537, 539 (2007).

116. *See also* H.R. Rep. No. 108-59 (2003) (describing an earlier version of PLCAA that did not pass because it would have "eviscerate[d] actions by survivors of victims of the Beltway sniper" for negligent distribution). The families of the sniper attack victims sued the gun manufacturer and the gun dealer for negligence after a three-foot rifle was stolen from a notoriously reckless Tacoma gun shop, resulting in a $2.5 million settlement. *See* Fox Butterfield, *Sniper Victims in Settlement with Gun Maker and Dealer*, N.Y. TIMES (Sept. 10, 2004), https://www.nytimes.com/2004/09/10/us/sniper-victims-in-settlement-with-gun-maker-and-dealer.html; Mike Carter et al., *Errant Gun Dealer, Wary Agents Paved Way for Beltway Sniper Tragedy*, SEATTLE TIMES (Apr. 29, 2003), http://community.seattletimes.nwsource.com/archive/?date=20030429&slug=gundealer29.

against the gun industry.[117] Senator Craig eventually introduced Senate Bill 397, the third and final version of PLCAA, and it passed with wide support.[118] Senator Craig repeatedly stated on the Senate floor that PLCAA would bar generalized claims of negligence against the gun industry, but would permit claims grounded in statutory and regulatory violations by manufacturers and dealers.[119] Specifically, he stated:

> Let me say, as I said, if in any way [gun manufacturers and dealers] violate [s]tate or [f]ederal law or alter or fail to keep records that are appropriate as it relates to their inventories, they are in violation of law. This bill does not shield them, as some would argue. Quite the contrary. If they have violated existing law, they violated the law, and I am referring to the [f]ederal firearms laws that govern a licensed firearm dealer and that govern our manufacturers today.[120]

Others echoed his sentiments.[121] For example, months before the statute's passage, Senator Jeff Sessions, an ardent supporter of the bill, said the following with respect to the proposed enumerated exceptions to gun industry immunity:

117. *Senator from the N.R.A.*, N.Y. TIMES (Mar. 8, 2004), http://www.nytimes.com/2004/03/08/opinion/senator-from-the-nra.html. Notably, Senator Craig was a board member of the NRA at the time of his legislative efforts to pass PLCAA. *Id.* The simultaneous special interest lobbying and legislative efforts by Senator Craig arguably presented a facial conflict of interest. *Id*.

118. *See* Jiang, *supra* note 115, at 540 (stating that the bill passed in the House and Senate by counts of 283 to 144 and 65 to 31, respectively).

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

120. *Id.* at 403.

121. *See, e.g.*, Ileto v. Glock, 421 F. Supp. 2d 1274, 1292–96 (C.D. Cal. 2006) (citing bipartisan statements that the bill would not bar all lawsuits against the gun industry); 151 Cong. Rec. S9226 (July 28, 2005) (statement of Sen. Graham) (expressing the belief that gun dealers and distributors "are on the hook, and . . . can be held accountable based on a simple negligence theory or a negligence per se theory, if you violate a specific statute during the sale of a gun").

> Manufacturers and sellers are still responsible for their own negligent or criminal conduct and must operate entirely within the complex [s]tate and [f]ederal laws. Therefore, plaintiffs are not prevented from having a day in court. Plaintiffs can go to court if the gun dealers do not follow the law, if they negligently sell the gun, if they produce a product that is improper or they sell to someone they know should not be sold to or did not follow steps to determine whether the individual was properly subject to buying a gun.[122]

The passage of PLCAA represented a federal manifestation of state efforts to immunize the gun industry: many states already had corollary immunity statutes on the books.[123] More importantly, though, PLCAA's preemptive effect on state law signified pushback against states and localities with strong gun control policies.[124] Even in the nation's capital, for instance, an assault weapons statute imposed strict liability on manufacturers for injuries sustained from assault weapons.[125]

122. 151 Cong. Rec. S8911 (July 26, 2005) (statement of Sen. Sessions).

123. *See* City of Philadelphia v. Beretta U.S.A., 126 F. Supp. 2d 882, 890 n.4 (E.D. Pa. 2000) (compiling numerous state immunity statutes for the gun industry); *see also* KS&E Sports v. Runnels, 72 N.E.3d 892, 899–900, 905 (Ind. 2017) (dismissing negligence claim because "[s]tates like Indiana remain free to provide immunity from actions not prohibited by the PLCAA").

124. 151 Cong. Rec. S8911 (July 26, 2005) (statement of Sen. Sessions) ("Thirty-three [s]tate legislatures have acted to block similar lawsuits, either by limiting the power of localities to file suit or by amending [s]tate product liability laws. However, one lawsuit in one [s]tate could bankrupt the industry, making all of those [s]tate laws inconsequential. That is why it is essential that we pass this law.").

125. R. Clay Larkin, Note, *The Protection of Lawful Commerce in Arms Act: Immunity for the Firearm Industry Is a (Constitutional) Bulls-Eye*, 95 KY. L.J. 187, 190–91 (2006). Like Washington, D.C., California also had its gun control agenda repressed by PLCAA. In 2002, Governor Gray Davis signed legislation that repealed a state statute and state Supreme Court decision immunizing gun manufacturers. Jenifer Warren & Dan Morain, *Davis Signs More Curbs on Gun Makers*, L.A. TIMES (Sept. 26, 2002), http://articles.latimes.com/2002/sep/26/local/me-bills26. This legislation proved to be moot, though, given PLCAA's preemptive effect on state tort claims falling outside of the statutory exceptions. *See* U.S. CONST. art. VI, cl. 2.

But an examination of PLCAA's findings and purposes section demonstrates that, in an attempt to eliminate the vestiges of tort litigation against the gun industry, Congress jumped the gun based on flawed reasoning.

B. *Shoot the Messenger (Congress): PLCAA's Flawed Findings*

In drafting PLCAA, Congress exaggerated the risk that litigation posed to the gun industry and failed to provide any empirical data to corroborate its statutory findings. These statutory defects are important because courts have looked to PLCAA's findings and purposes section to glean context about the statute's ambiguity where it exists. In turn, courts have read PLCAA too deferentially to advance Congress's principal goal: immunizing the gun industry.[126]

1. *Congress exaggerated the risk that litigation posed to the gun industry*

Congress found that lawsuits seeking to impose liability on the gun industry based solely on the acts of third parties amounted to "an abuse of the legal system"[127] grounded in legal "theories without foundation."[128] Admittedly, as with any category of lawsuit, many claims against gun manufacturers or dealers can be fairly characterized as frivolous.[129] Other claims employ novel, but nonetheless meritorious, approaches to hold manufacturers and dealers

126. *See, e.g.*, Ileto v. Glock, Inc., 565 F.3d 1126, 1135–38 (9th Cir. 2009) (relying on PLCAA's findings, purposes, and legislative history to interpret a provision); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 401–04 (2d Cir. 2008) (same); Estate of Kim v. Coxe, 295 P.3d 380, 387–88 (Alaska 2013) (same). *But see* Delana v. CED Sales, Inc., 486 S.W.3d 316, 322, 324–26 (Mo. 2016) (explaining that "[t]he general statement of the purpose of . . . PLCAA does not redefine the plain language of a statute," and holding that plaintiff's claim triggered the negligent entrustment exception).

127. 15 U.S.C. § 7901(a)(6) (2018).

128. *Id.* § 7901(a)(7).

129. *See generally* Al-Salihi v. Gander Mountain, No. 3:11-CV-00384 (NAM/DEP), 2013 WL 5310214 (N.D.N.Y. Sept. 20, 2013) (detailing a gun dealer's extensive training of employees and diligence in completing sales to detect and prevent suspicious transactions or unlawful purchases).

liable.[130] And there are, of course, claims worthy of a verdict or settlement for the plaintiff.[131] But it was both incorrect and irrational for Congress to reduce all lawsuits against the gun industry to vexatious or abusive litigation.[132] Even worse, Congress's finding that a "maverick judicial officer or petit jury" would accept liability "theories without foundation in hundreds of years of the common law" is an indictment on the judiciary and undermines confidence in the law.[133] Perhaps Congress was making an oblique reference to the *Hamilton* jury or Judge Weinstein.[134] But Congress's fear that a rogue judge or jury would expand the gun industry's liability was unfounded: American courts have traditionally refused to hold the gun industry liable for third-party crimes or torts involving firearms.[135]

130. The public nuisance and negligent distribution lawsuits instituted by cities in the 1990s are one example of plaintiffs employing creative liability theories. *See supra* Section I.B. But these arguments to expand tort law were not frivolous in light of the Big Tobacco litigation and settlement. Another example of creative legal theory in action is on display in the Sandy Hook litigation. Those plaintiffs recently argued to the Connecticut Supreme Court that consecutive entrustments can form the basis of gun manufacturer liability for deliberately marketing military-grade weapons to "video-game playing, military-obsessed [eighteen]-year-olds like Adam Lanza," who they deem incompetent to possess semi-automatic rifles. *See* Soto v. Bushmaster Firearms Int'l, No. FBTCV156048103S, LLC, 2016 Conn. Super. LEXIS 2626, at *1–10 (Conn. Super. Ct. Oct. 14, 2016) (summarizing the facts and each side's argument); *see also* Jacob Gershman, *The Court Case Making Gun Makers Anxious*, WALL STREET J. (Mar. 16, 2018, 5:30 AM), https://www.wsj.com/articles/the-court-case-making-gun-makers-anxious-1521192601 (summarizing plaintiffs' legal theory to be argued on appeal). The Sandy Hook plaintiffs' negligent entrustment theory relies on the same negligent marketing claims rejected in the 1990s. *See supra* notes 35–37 and accompanying text. A more sensible application of negligent entrustment to manufacturers is grounded not on marketing behavior, but on the continuous distribution of firearms to unscrupulous dealers. *See infra* Section V.B (arguing when gun manufacturers and wholesalers should be liable under negligent entrustment); *see also supra* notes 82–83 and accompanying text.

131. *See infra* note 140 and accompanying text.

132. 151 Cong. Rec. S8914 (July 26, 2005) (statement of Sen. Reed) ("The results of [litigation against the gun industry] are what one would expect as suits against any industry: [s]ome cases are dismissed, some cases are won by plaintiffs, some are on appeal, others are the result of a settlement between the parties.").

133. 15 U.S.C. § 7901(7).

134. *See* Halbrook, *supra* note 37, at 17–19 (condemning Judge Weinstein for entertaining claims of gun industry liability despite reversals on appeal).

135. *See* 151 Cong. Rec. S8910 (July 26, 2005) (statement of Sen. Sessions) ("Many of them get dismissed by judges. Most of them do eventually."); *see also supra* Section I.A.

Congress's increased protections for the gun industry rested on the flawed premise that tort litigation posed a substantial threat of financial ruin to the gun industry.[136] However, only a very small portion of the millions of tort lawsuits filed annually were instituted against the gun industry before PLCAA.[137] Indeed, even in *Hamilton*, only a few manufacturers paid a small sum of damages.[138] Gun manufacturers and distributors are massively profitable,[139] and the notion that a single case could result in ruinous liability is belied by the value of publicly-known settlements.[140] Furthermore, the financial filings submitted by publicly-held gun manufacturers at the time of PLCAA's passage contradict the proposition that the gun industry absorbed "[h]uge costs aris[ing] from simply defending an unjust lawsuit."[141] In other words, Congress

136. 151 Cong. Rec. S8909 (July 26, 2005) (statement of Sen. Sessions) (voicing "a growing concern that our legal system is being abused in such a way that could actually take legitimate businesses and put them out of business").

137. 151 Cong. Rec. S8914 (July 26, 2005) (statement of Sen. Reed) (noting that there were only fifty-seven lawsuits filed against the gun industry between 1993 and 2003).

138. *See supra* notes 59–62 and accompanying text.

139. *See generally* Josh Harkinson, *Fully Loaded: Inside the Shadowy World of America's 10 Biggest Gunmakers*, MOTHER JONES (June 14, 2016, 10:00 AM), https://www.motherjones.com/politics/2016/06/fully-loaded-ten-biggest-gun-manufacturers-america/ (describing the recent profitability of the top gun manufacturers).

140. *See, e.g.*, Fox Butterfield, *Gun Dealer Settles Case over Sale to Straw Buyer*, N.Y. TIMES (June 23, 2004), https://www.nytimes.com/2004/06/23/us/gun-dealer-settles-case-over-sale-to-straw-buyer.html ($1 million settlement); Matt Campbell, *Missouri Gun Shop Agrees to Pay $2.2 Million After Selling Gun to Mentally Ill Woman*, KAN. CITY STAR (Nov. 22, 2016, 7:54 PM), http://www.kansascity.com/news/local/article116462698.html; John Diedrich, *Wounded Officers' Lawsuit Against Badger Guns Settles for $1 Million*, MILWAUKEE J. SENTINEL (Dec. 11, 2015), http://archive.jsonline.com/watchdog/watchdogreports/wounded-officers-lawsuit-against-badger-guns-settles-for-1-million-b99632780z1-361609031.html/; Stuart Ditzen, *Dealer Settles Suit over Gunplay*, PHILA. INQUIRER (Aug. 24, 2004), http://rayneslaw.com/dealer-settles-suit-over-gunplay/ ($850,000 settlement); Tom Jackman, *Gunmaker, Store Agree to Payout in Sniper Case*, WASH. POST (Sept. 10, 2004), http://www.washingtonpost.com/wp-dyn/articles/A8763-2004Sep9.html ($2.5 million settlement); Denise Lavoie, *Mass. Gun-Maker to Pay $600K in Gun-Death Lawsuit*, SAN DIEGO TRIBUNE (July 26, 2011, 7:38 AM), http://www.sandiegouniontribune.com/sdut-mass-gun-maker-to-pay-600k-in-gun-death-lawsuit-2011jul26-story.html; Frank Morris, *Kansas Lawsuit Settlement Sets Standard for Gun Seller Liability*, NPR (July 9, 2015, 5:02 AM), https://www.npr.org/2015/07/09/420576176/kansas-lawsuit-settlement-sets-standard-for-gun-seller-liability ($132,000 settlement).

141. 151 Cong. Rec. S8910 (July 26, 2005) (statement of Sen. Sessions). Senator Reed opined that "unless the privately held companies are woefully unmanaged or are unusually involved in this type of litigation," which did not appear to be the case, one would be hard-pressed to believe the gun lobby's claims that "litigation costs have risen in $25 million increments." 151

grossly overstated the risk that litigation posed to the gun industry's financial integrity.

2. *Congress's findings about gun litigation were made in the absence of empirical evidence*

In addition to embellishing the threat of litigation, Congress passed PLCAA without any recent government-funded research regarding the epidemiology of gun violence.[142] This lack of diligence severely undermines the legitimacy of the sweeping conclusions Congress made in the statutory findings and purposes section. For example, Congress intended "to prohibit [lawsuits] against manufacturers, distributors, [and] dealers . . . for the harm *solely* caused by the criminal or unlawful misuse of [firearms] when the product functioned as designed and intended."[143] Although Congress reduced the issue of gun violence to merely a matter of criminal wrongdoing, empirical evidence suggested the gun industry was itself responsible for funneling guns into the black market.[144]

The failure of Congress to understand how these issues inform the gun control debate is due, at least in part, to the congressionally-imposed constraints on firearms research and ATF funding. For example, the Dickey Amendment to the

Cong. Rec. S8914 (July 26, 2005) (statement of Sen. Reed) (referring to Smith & Wesson's filing with the Securities and Exchange Commission that for fiscal year 2005, net product sales increased by 11% to approximately $124 million, legal defense fees cost less than $5000, but its advertising costs were over $4 million).

142. Worse yet, PLCAA was never subjected to any serious congressional scrutiny before it was ultimately passed. *See* 151 Cong. Rec. S8913 (July 26, 2005) (statement of Sen. Reed) (opposing the bill because "[t]he NRA's pet project is again being granted a virtually direct, nonstop ticket to the Senate floor. The Senate Judiciary Committee has held no hearing on this legislation, and no committee markups were ever scheduled.").

143. 15 U.S.C. § 7901(b)(1) (2018) (emphasis added).

144. Although criminal misuse necessarily constitutes *a* cause of harm to gun violence victims, unlawful or unreasonable business practices by gun manufacturers, distributors, and dealers that facilitate criminal access to guns constitute *concurrent* causes of harm that justify civil lawsuits. *See, e.g.*, Gallara v. Koskovich, 836 A.2d 840, 850 (N.J. Super. Ct. 2003) (citing studies showing that anywhere between 65,000 and 1,800,000 guns are stolen per year); FOLLOWING THE GUN, *supra* note 70, at ix–x (concluding that over 40,000 guns were diverted into the black market from "corrupt" firearms licensees over a two-year period).

1996 Omnibus Spending Bill prohibits the U.S. Centers for Disease Control and Prevention (CDC) from using federal funds for injury prevention or "to advocate or promote gun control."[145] Researchers were unclear as to the Dickey Amendment's scope, but no scientist would risk her job or jeopardize federal grants by potentially violating it.[146] So while the CDC was free to continue studying injuries and deaths caused by drownings, falls, motor vehicle accidents, sepsis, and hernias without limitation, the Dickey Amendment "cast[] a pall over the research community"[147] with regard to gun violence research. The Dickey Amendment's de facto ban on gun violence research continues to serve as a barrier to improving the efficacy of state and federal gun laws.[148]

To further drive the point home, in 2003 Congress also passed the Tiahrt Amendment, which prohibits the ATF from releasing crime gun tracing data to the public and deems this information inadmissible in state and federal proceedings.[149] These congressionally-imposed prohibitions are particularly troubling in light of the New York Court of Appeals'

145. *See* Andrew Jay McClurg, *In Search of the Golden Mean in the Gun Debate*, 58 HOW. L.J. 779, 786 (2015). Similarly, Congress attached limits on research funds for the National Institutes of Health "to advocate or promote gun control." *Id.* at 786–87.

146. Marian E. Betz et al., *Frozen Funding on Firearm Research: "Doing Nothing Is No Longer an Acceptable Solution"*, 17 W. J. EMERGENCY MED. 91, 91 (2016).

147. David E. Stark & Nigam H. Shah, *Funding and Publication of Research on Gun Violence and Other Leading Causes of Death*, 317 J. AM. MED. ASS'N 84, 84 (2017) (finding that, although gun violence and sepsis had nearly identical death rates, "funding for gun violence research was about 0.7% of that for sepsis and publication volume about 45%"); *see also* Jon Greenberg, *Spending Bill's Gun Research Line: Does It Nullify Dickey Amendment?*, POLITIFACT (Mar. 27, 2018, 2:35 PM), http://www.politifact.com/truth-o-meter/article/2018/mar/27/spending-bills-gun-research-line-does-it-matter/ (quoting the former CDC director: "The CDC had never been in the business of lobbying . . . . But the Dickey amendment was a warning to the CDC. If you do research on guns, we can make your life miserable.").

148. While a new federal spending package for 2018 included language that apparently opened the door for the CDC to study gun violence, research is still underfunded given the magnitude of the problem. *See* Greenberg, *supra* note 147 (quoting director of Johns Hopkins Center for Gun Policy and Research as saying "[t]hat there was no new allocation or specification to spend money on gun violence research makes me pessimistic"); *see also* William A. Conway, *Guest Commentary: Where's the Funding to Support CDC Research into Gun Violence?*, MOD. HEALTHCARE (Mar. 28, 2018), http://www.modernhealthcare.com/article/20180328/NEWS/180329907 (commending the language of the new spending bill but calling for greater funding "to answer the basic questions that could inform meaningful solutions").

149. McClurg, *supra* note 7, at 13.

reservation in *Hamilton* that the emergence of "a core group of corrupt [gun dealers]" in the future based on ATF investigations, studies, and data, would justify the extension of a duty to gun manufacturers under the negligent entrustment doctrine.[150] By prohibiting public access to crime trace statistics and precluding the admissibility of this information in courts, the Tiahrt Amendment makes it almost impossible for plaintiffs, or the public at-large, to uncover evidence that gun manufacturers play a role in diverting firearms from legal distribution chains to the black market.[151]

Congress passed the Dickey and Tiahrt Amendments to silence studies that employed a public-health perspective on firearms violence.[152] In doing so, policymakers discredited the implication that increased regulation of guns could reduce firearm deaths and injuries.[153] Without ongoing efforts to update the evidence, though, limitations imposed on research and data collection only buttress difficulties faced by

150. Hamilton v. Beretta U.S.A. Corp. (*Hamilton II*), 750 N.E.2d 1055, 1064 & n.5 (2001). Evidence suggests that a core group of gun dealers has emerged as a major supplier of the guns used in crimes. *See* BAD APPLE GUN DEALERS, *supra* note 58, at 29–30 (listing fifty gun dealers with anywhere from 200 to 2000 crime gun traces during the time period of 1996 through 2000).

151. *Id.*; *see also* MAYORS AGAINST ILLEGAL GUNS, ACCESS DENIED: HOW THE GUN LOBBY IS DEPRIVING POLICE, POLICY MAKERS, AND THE PUBLIC OF THE DATA WE NEED TO PREVENT GUN VIOLENCE 22–23 (Jan. 2013) [hereinafter ACCESS DENIED].

152. McClurg, *supra* note 145, at 785–86 (describing gun rights advocates' efforts to end research regarding the efficacy of firearms regulations and their objections to a public-health focus on firearms violence research); Sarah Zhang, *Why Can't the U.S. Treat Gun Violence as a Public-Health Problem?*, ATLANTIC (Feb. 15, 2018), https://www.theatlantic.com/health/archive/2018/02/gun-violence-public-health/553430/ (describing how the NRA accused scientists of conducting politically-motivated research); *see also* ACCESS DENIED, *supra* note 151, at 9–17 (documenting the suppression of gun violence research at the CDC and universities across the country).

153. *See, e.g.*, Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1084 (1993) (concluding that gun ownership in the home poses an increased risk of homicide to members of the household, specifically by a family member or another acquaintance); Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615, 1617, 1620 (1991) (concluding that Washington, D.C.'s Firearms Control Regulations Act reduced the average monthly rate of suicide and homicide with firearms by approximately 25%, resulting in nearly fifty fewer gun deaths each year); John H. Sloan et al., *Handgun Regulations, Crime, Assaults, and Homicide. A Tale of Two Cities*, 319 NEW ENG. J. MED. 1256, 1256 (1988) (concluding that a person was nearly five times as likely to be murdered with a handgun in Seattle than in Vancouver despite similar rates of overall criminal activity).

legislatures and law enforcement in understanding and addressing gun violence.[154]

IV. SHIELDING BIG GUN: THE INDUSTRY'S BROAD IMMUNITY AND NARROW EXCEPTIONS

While PLCAA confers broad immunity to the gun industry, the statute does not categorically extinguish all claims of gun industry liability, contrary to some characterizations.[155] Rather, Congress qualified the gun industry's immunity by carving out six exceptions.[156] This Note will not discuss the first, fourth, or sixth exceptions, which require very specific or rare circumstances that, as far as the author's research demonstrates, no plaintiff has ever invoked.[157] PLCAA's fifth exception allows some defective design claims,[158] but recognizing the extremely stringent requirements to trigger this exception is sufficient for the purposes of this Note.[159]

154. McClurg, *supra* note 145, at 788–89 ("The dearth of research into the causes and prevention of gun violence has left us in the dark about nearly every vital issue in the firearms policy debate."); *see also* Conway, *supra* note 148 (commending the language of the new spending bill but calling for greater funding "to answer the basic questions that could inform meaningful solutions").

155. Lauren Carroll, *Clinton: Gun Industry Is 'Wholly Protected' from All Lawsuits*, POLITIFACT (Oct. 16, 2015, 11:22 AM), http://www.politifact.com/truth-o-meter/statements/2015/oct/16/hillary-clinton/clinton-gun-industry-wholly-protected-all-lawsuits/ (quoting Hillary Clinton incorrectly stating that the gun industry is "wholly protected from any kind of liability. They can sell a gun to someone they know they shouldn't, and they won't be sued. There will be no consequences.").

156. 15 U.S.C. § 7903(5)(A)(i)–(vi) (2018).

157. *See generally* VIVIAN S. CHU, CONG. RESEARCH SERV., THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY OF GUN MANUFACTURERS 2 (2012) (summarizing the statute's scope and describing each exception).

158. *See* 15 U.S.C. § 7903(5)(A)(v) (barring claims "where the discharge of the product was caused by a volitional act that constituted a criminal offense").

159. *See generally* Adames v. Sheahan, 909 N.E.2d 742, 762 (Ill. 2009). In *Adames*, a thirteen-year-old boy accidentally shot and killed his friend with a gun taken from his father's bedroom while his parents were not home. *Id.* at 745–46. The court held that even if the gun was defectively designed, the lawsuit was not actionable because the teenager, although unaware that the gun could fire without a magazine attached, intentionally pointed the gun at his friend and pulled the trigger. *Id.* at 765. A juvenile court subsequently adjudicated him as delinquent, so his volitional act constituted a "criminal offense" preempting the application of the defective design exception. *Id.* at 763.

The third exception to PLCAA immunity, known as the predicate exception,[160] has, however, engendered extensive debate.[161] By its terms, the predicate exception requires the defendant to (1) knowingly violate (2) *a statute applicable to the sale or marketing of firearms products* and (3) proximately cause the plaintiff's injury.[162] The disagreement among courts and scholars largely revolves around what type of knowing statutory violation a claim must be predicated on. The majority of courts construe the exception narrowly, concluding that the underlying statute must explicitly regulate the sale or marketing of firearms products—otherwise the exception would swallow the industry's immunity.[163] An alleged violation of a general negligence or public nuisance statute, for example, would not trigger the application of the predicate exception merely because it was *capable* of being applied to the gun industry.[164] In other words, the statute in

160. The reason it is called the predicate exception is because a claim is only actionable if a plaintiff predicates it on a knowing violation of a state or federal statute governing firearms. Selkowitz, *supra* note 34, at 810 n.168.

161. *Compare* Ileto v. Glock, Inc., 565 F.3d 1126, 1135–38 (9th Cir. 2009) (concluding that the predicate exception unambiguously preempts general negligence claims even if brought under a state statute), *with* City of New York v. Beretta U.S.A Corp., 524 F.3d 384, 404-08 (2d Cir. 2008) (Katzmann, C.J., dissenting) (contending that the statute's plain meaning renders the predicate exception unambiguous), *and* Selkowitz, *supra* note 34, at 811–17 (arguing that statutory public nuisance claims should not be preempted by PLCAA's predicate exception for public health reasons).

162. *See* 15 U.S.C. § 7903(5)(A)(iii) (emphasis added).

163. *Compare City of New York*, 524 F.3d at 399–404 (dismissing statutory public nuisance claims predicated on a statute of general applicability), *and* Williams v. Beemiller, 952 N.Y.S.2d 333, 338–39 (N.Y. App. Div. 2012), *amended by* 962 N.Y.S.2d 834, 835–36 (N.Y. App. Div. 2013) (reinstating complaint based on alleged violations of the Gun Control Act).

164. In *Ileto*, a group of private citizens sued gun makers in connection with a 1999 shooting spree, claiming that the gun industry "knowingly created, facilitated, and maintained an oversaturated firearms market that makes firearms easily available to anyone intent on crime." Ileto v. Glock, Inc., 349 F.3d 1191, 1198 (9th Cir. 2003). Before PLCAA was passed, the Ninth Circuit held that the plaintiffs satisfied a *prima facie* claim under California's public nuisance statute. *Id.* at 1215. However, after PLCAA was passed the Ninth Circuit reversed that ruling and dismissed the lawsuit because Congress specifically intended to preempt general negligence claims and even explicitly referred to the *Ileto* case as an example of what PLCAA was designed to preclude. *Ileto*, 565 F.3d at 1134–37. By contrast, the Indiana Court of Appeals held that PLCAA did not preclude the City of Gary from suing gun manufacturers under a state nuisance statute after an undercover sting operation by the Gary Police Department revealed that firearms manufacturers and dealers sold guns to prohibited

question must make explicit reference to firearms under the majority approach.

In theory, PLCAA should create uniformity in assessing the viability of tort lawsuits against gun manufacturers, distributors, and dealers.[165] After all, PLCAA does generally prohibit lawsuits against the gun industry. However, because PLCAA does not create a federal cause of action,[166] plaintiffs must invoke state law[167] or a federal statute that expressly regulates guns[168] to trigger an exception to PLCAA immunity. But almost no two states have the same gun control regime as it relates to firearms sales.[169] The result? A hodgepodge of liability standards under PLCAA's predicate and negligence per se exceptions due to the differences in how guns are regulated both among the states[170] and between the states and

purchasers. *See* Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 424–25 (Ind. Ct. App. 2007).

165. 15 U.S.C. § 7901(a)(8) (stating that civil liability actions against the gun industry undermine "comity between the sister [s]tates").

166. PLCAA expressly states that "no provision of this Act shall be construed to create a public or private cause of action or remedy." *Id.* § 7903(5)(C).

167. *See, e.g.*, Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216, 1225 (D. Colo. 2015) (explaining that PLCAA's recognition of negligent entrustment, taken together with the absence of a federal tort claim, requires the claim to be brought under state law).

168. *See, e.g.*, *Williams*, 952 N.Y.S.2d at 338–39, *amended by* 962 N.Y.S.2d at 835–36 (reinstating complaint based on alleged violations of the Gun Control Act).

169. *See* Leslie Shapiro et al., *How Strictly Are Guns Regulated Where You Live?*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/graphics/2017/national/assault-weapons-laws/?utm_term=.a3945613e75e (concluding that "[o]f the five types of regulations we looked at, no single restriction has been enacted in every state. Instead, there are a patchwork of regulations across the U.S., with the exact restrictions varying across state lines.").

170. *See generally* JANE MCCLENATHAN ET AL., THE CHANGING LANDSCAPE OF U.S. GUN POLICY: STATE FIREARM LAWS, 1991-2016 (2017), https://www.statefirearmlaws.org/sites/default/files/2017-12/report_0.pdf (noting the differences in terms of the quantity and quality of gun laws among states). While there is a body of federal gun law that regulates licensing, qualified purchasers, and the background check system, the nuances of effectuating gun control are chiefly decided on a more localized level pursuant to the state's police power. A gun sale that is categorically unlawful in one state (thus triggering the negligence per se and predicate exceptions), may be entirely lawful in a neighboring state, making states with strict gun laws such as California, Illinois, and Maryland prone to illegal trafficking of guns across state lines from states with weak gun regulations. *See* Jeff Asher & Mai Nguyen, *Gun Laws Stop at State Lines, but Guns Don't*, FIVETHIRTYEIGHT (Oct. 26, 2017, 1:16 PM), https://fivethirtyeight.com/features/gun-laws-stop-at-state-lines-but-guns-dont/. This problem of "convenience trafficking" of firearms has existed for decades. *See supra* notes 34, 58 and accompanying text.

federal government.[171] Therefore, PLCAA exacerbates the supposed lack of uniformity that Congress found problematic with respect to litigation against the gun industry.[172]

V. THE NEGLIGENT ENTRUSTMENT EXCEPTION: A CONSTRUCTIVE APPROACH

PLCAA's second exception permits claims of negligent entrustment or negligence per se against a *seller* of firearms products.[173] Under the common law, negligent entrustment occurs when

> [o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.[174]

The paradigmatic example of negligent entrustment is when A lends his car to B, who is demonstrably intoxicated or otherwise known to be unfit to operate the vehicle safely.[175] But negligent entrustment is an extremely flexible tort that can

171. *See* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 406–07 (2d Cir. 2008) (Katzmann, C.J., dissenting) (arguing that PLCAA encourages forum shopping between federal and state courts).

172. Patterson & Philpott, *supra* note 42, at 555–58 (stating that "the claims [against the gun industry] are so broad and diffuse in nature that courts cannot adequately address them"). *Compare* Bannerman v. Mountain State Pawn, Inc., No. 3:10-CV-46, 2010 U.S. Dist. LEXIS 145292, at *14–24 (N.D. W.Va. Nov. 5, 2010) (holding that a violation of the Gun Control Act triggers liability under the predicate exception, but does not trigger the negligence per se exception), *with Williams*, 952 N.Y.S.2d at 338–39, *amended by* 962 N.Y.S.2d at 835–36 (finding that violations of the Gun Control Act unlock the predicate exception).

173. *See* 15 U.S.C. § 7903(5)(A)(ii) (2018).

174. RESTATEMENT (SECOND) OF TORTS § 390 (AM. LAW INST. 1965).

175. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 438–39 (1999).

be implicated by just about any chattel.[176] By no surprise, pre-PLCAA courts extended this tort to the most dangerous product on the consumer market: guns.[177]

Congress specifically carved out a PLCAA exception for negligent entrustment; in fact, PLCAA's definition of negligent entrustment mirrors the common law definition:

> 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.[178]

There are two notable differences, though, between the common law and PLCAA definitions for negligent entrustment.[179] First, PLCAA's negligent entrustment carve-out only explicitly refers to sellers; however, courts interpreting PLCAA's negligent entrustment exception have held that manufacturers qualify as sellers pursuant to PLCAA's definitions section.[180]

176. *See, e.g.*, Douglass v. Hartford Ins. Co., 602 F.2d 934, 935 (10th Cir. 1979) (involving negligent entrustment of a minibike); Adeyinka v. Yankee Fiber Control, Inc., 564 F. Supp. 2d 265, 268 (S.D.N.Y. 2008) (involving a pressurized water jet system); Hardsaw v. Courtney, 665 N.E.2d 603, 608 (Ind. Ct. App. 1996) (involving a dog); Moning v. Alfono, 254 N.W.2d 759, 762 (Mich. 1977) (involving a slingshot); Tharp v. Monsees, 327 S.W.2d 889, 891–93 (Mo. 1959) (en banc) (involving gasoline); Bosserman v. Smith, 226 S.W. 608, 608–09 (Mo. Ct. App. 1920) (involving fireworks); Barsness v. Gen. Diesel & Equip. Co., 383 N.W.2d 840, 842 (N.D. 1986) (involving a crane); Hudson-Connor v. Putney, 86 P.3d 106, 107 (Ore. Ct. App. 2004) (involving a golf cart); Dee v. Parish, 327 S.W.2d 449, 451–52 (Tx. 1959) (involving a horse).

177. *See, e.g.*, Morin v. Moore, 309 F.3d 316, 324 (5th Cir. 2002); Kitchen v. K-Mart Corp., 697 So. 2d 1200, 1201 (Fla. 1997); Knight v. Wal-Mart Stores, Inc., 889 F. Supp. 1532, 1534–35 (S.D. Ga. 1995); Gallara v. Koskovich, 836 A.2d 840, 855–56 (N.J. Super. Ct. 2003).

178. 15 U.S.C. § 7903(5)(B).

179. *See* RESTATEMENT (SECOND) OF TORTS § 390 (AM. LAW INST. 1965) (defining negligent entrustment under the common law).

180. *See* 15 U.S.C. § 7903(6) (defining a seller as an importer, dealer, or individual—as defined under the Gun Control Act—who sells firearms products); *see also, e.g.*, Soto v. Bushmaster Firearms Int'l, LLC, No. FBTCV156048103S, 2016 Conn. Super. LEXIS 2626, at *41–47 (Conn. Super. Ct. 2016) (holding that a manufacturer can qualify as a seller under PLCAA); Noble v. Shawnee Gun Shop, Inc., 409 S.W.3d 476, 481–83 (Mo. App. 2013) (holding that a seller of chattels, such as a gun dealer, cannot be liable for negligent entrustment under

Second and more importantly, Congress replaced the words "directly or through a third party" with "supplying for use by another" in PLCAA's negligent entrustment exception.[181] This distinction in statutory language of negligent entrustment is noteworthy: the elimination of "directly" from PLCAA's negligent entrustment exception demonstrates that the gun industry's tort liability should not necessarily depend on how many steps removed the initial entrustment is from the weapon's end use. Instead, the critical inquiries should be whether (1) the entrustor possessed actual or constructive knowledge about (2) how the entrustee's foreseeable use would involve unreasonable risk of harm to third parties. Courts should construe an entrustor's knowledge and an entrustee's "use" liberally to capture conduct that technically does not violate the law, but is wholly unreasonable under the circumstances.[182]

A. *Constructive Entrustments by Gun Dealers*

The tragic murder of Jennifer Magnano, and the subsequent civil lawsuit in *Gilland v. Sportsmen's Outpost, Inc.*,[183] demonstrates why courts should adopt a broad reading of the negligent entrustment exception.

On August 23, 2007, Scott Magnano assaulted, shot, and killed his wife Jennifer in front of their fifteen-year-old son

Missouri law), *overruled by* Delana v. CED Sales, Inc., 486 S.W.3d 316, 325 (Mo. 2016) (concluding that a seller is subject to negligent entrustment pursuant to PLCAA and Missouri law).

181. *Compare* RESTATEMENT (SECOND) OF TORTS § 390 (AM. LAW INST. 1965) (defining negligent entrustment under the common law), *with* 15 U.S.C. § 7903(5)(B) (defining negligent entrustment under PLCAA).

182. *See, e.g.*, Ramos v. Walmart, 202 F. Supp. 3d 457, 468 (E.D. Pa. 2016) ("Proving that the sale of ammunition violated [the Gun Control Act] is not essential to either the negligence or the negligent entrustment claims because Plaintiffs' theory is that it was negligent for Defendants to provide an intoxicated twenty-year-old with handgun ammunition at three o'clock in the morning regardless of whether that was also a violation of federal law."). I would like to acknowledge that my involvement conducting research and helping brief the *Ramos* case as a legal assistant before law school inspired the topic of this Note.

183. No. X04CV0950327655, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011).

before committing suicide after fleeing the scene.[184] In the months prior to her murder, Jennifer and her children sought to escape her husband's abuse by going into hiding for a week at a Connecticut motel, and then fleeing the state for a California battered women's shelter.[185] Jennifer returned to Connecticut for a fight in court after Scott fraudulently won custody over their two children.[186] Within a few weeks, the court ordered Scott to leave the family home, and Jennifer moved back in with the kids.[187]

On the day after being ordered to leave his home, Scott walked into a small Connecticut gun shop, asked several questions about the handguns available for sale, but did not complete a purchase.[188] Two days later, Magnano returned to the store to examine three Glock handguns and ammunition.[189] For no apparent reason, the gun shop's clerk walked to the back of the store, leaving Magnano alone and unattended in the store with the Glocks and the ammunition on the display case.[190] The clerk never requested state-issued identification and did not perform a background check before allowing Magnano to examine the handguns; the law did not require him to do so.[191] Magnano stole the gun, and neither the store clerk nor the store owner reported the theft to police for three days,[192] even though they had previously identified Magnano

184. *See* MICHELLE S. CRUZ, ESQ., STATE OF CONN. OFFICE OF THE VICTIM ADVOCATE, MURDER OF JENNIFER GAUTHIER MAGNANO INVESTIGATIVE REPORT 3, 13 (2009) [hereinafter MAGNANO INVESTIGATION].

185. *Id.* at 6–8; *see also id.* at 42 (noting how the attorneys involved recognized the physical, sexual, and emotional abuse in the Magnano case as "one of the worst [sic] cases of abuse they had seen in their careers regarding domestic violence").

186. *Id.* at 8–9 (describing how Jennifer defaulted in custody proceedings because Scott Magnano arranged for service of his custody pleadings at the family home even though he knew she fled the home).

187. *Id.* at 10.

188. *See Gilland*, 2011 WL 2479693, at *1; MAGNANO INVESTIGATION, *supra* note 184, at 25.

189. *Gilland*, 2011 WL 2479693, at *1; MAGNANO INVESTIGATION, *supra* note 184, at 25.

190. *See Gilland*, 2011 WL 2479693, at *1–2; MAGNANO INVESTIGATION, *supra* note 184, at 25.

191. *See Gilland*, 2011 WL 2479693, at *14 ("The federal regulatory scheme requires a firearms seller to conduct a background check on a person *after* he or she decides to purchase a firearm." (emphasis added)).

192. MAGNANO INVESTIGATION, *supra* note 184, at 25.

as a "suspicious customer."[193] Five weeks later, Magnano shot and killed his wife in front of their children and then turned the gun on himself.[194]

Jennifer Magnano's estate sued the gun store and its owner under negligent entrustment and negligence per se theories, and the court granted the defendants' motion to dismiss with respect to both claims.[195] The court's analysis was flawed in more than one respect. First, the court dismissed the negligent entrustment claim because the gun shop did not "supply" the gun and ammunition for Mr. Magnano to "use," but rather temporarily allowed Magnano to inspect them.[196] His subsequent theft was therefore "the opposite of being provided a handgun for use" because it involved "a taking without permission."[197] In other words, because Magnano stole the firearm, no entrustment occurred, and without an entrustment, the gun store could not be liable under PLCAA's negligent entrustment exception.

If carried to its logical extension, the *Gilland* rationale allows a gun dealer to avoid liability for negligent entrustment as long as there is no commercial transaction. The absurdity of this proposition becomes clear by changing the facts of *Gilland.* Suppose that the store clerk was drunk on the job when he walked to the back of the store. Or imagine that Mr. Magnano himself was drunk, but the clerk left him alone with the guns and ammunition on the counter. Or suppose that the gun store hired the store clerk despite the fact that he had a criminal history littered with gun charges. Under the *Gilland* rationale, liability would not attach in any of these situations because PLCAA does not include exceptions for "negligent sales," "negligent training," or "negligent hiring," and a theft would always preclude application of the negligent entrustment doctrine. But PLCAA defines negligent entrustment

193. *Gilland*, 2011 WL 2479693, at *1.

194. MAGNANO INVESTIGATION, *supra* note 184, at 12–13.

195. *See Gilland*, 2011 WL 2479693, at *1, *24.

196. *See id.* at *12–13.

197. *Id.* at *13.

consistently with the common law, and courts should read the exception broadly to allow a constructive entrustment—a symbolic transfer of possession that materializes not through a physical transaction but through enabling conduct.

Before PLCAA was passed, courts recognized that a constructive entrustment could occur by handing someone a gun, placing a gun within a person's reach, or otherwise enabling a person to find and misuse a firearm.[198] For example, the Supreme Courts of Washington[199] and Mississippi[200] recognized negligent entrustment theories in cases where an allegedly drunk customer stole a gun and ammunition while the cashier was in the process of preparing paperwork for checkout. Despite the thefts, each court acknowledged that a theft does not automatically dispose a gun dealer of liability because dealers still have a duty to exercise care in selling or storing guns.[201] Whether the chain of causation was broken by a superseding cause (i.e., a criminal or tortious third-party act) would depend on whether the subsequent shootings were reasonably foreseeable—a factual question reserved for the jury.[202]

More recently, the Fifth Circuit Court of Appeals held that negligent entrustment does not require a positive act of entrustment.[203] In *Morin v. Moore*, a police officer stored an AK-47 in his son's bedroom despite the fact that his son abused drugs, venerated Nazism, and exhibited other signs of being psychologically unstable.[204] Although the police officer

198. *See, e.g.*, Herland v. Izatt, 345 P.3d 661, 674 (Utah 2015); Foster v. Arthur, 519 So. 2d 1092, 1095 (Fla. Dist. Ct. App. 1988).

199. Bernethy v. Walt Failor's, Inc., 653 P.2d 280, 282–84 (Wash. 1982).

200. Howard Bros. of Phenix City, Inc. v. Penley, 492 So. 2d 965, 965–66 (Miss. 1986).

201. *See id.* at 968 ("Inattentive, thoughtless conduct in the sale of pistols can cause or set in motion an infinite variety of dangerous situations. We can have little sympathy with such careless dealer's defense that he had no reason to anticipate what occurred in his particular situation."); *Bernethy*, 653 P.2d at 283 (explaining that although the gun was stolen before being sold, the gun store owner "had already agreed to sell the gun to [the criminal] and the transaction was practically completed. In addition, [the owner] left the gun and ammunition on the counter within [the criminal's] direct reach.").

202. *See Penley*, 492 So. 2d at 968–69; *Bernethy*, 653 P.2d at 283.

203. Morin v. Moore, 309 F.3d 316, 324–25 (5th Cir. 2002).

204. *Id.* at 318.

did not literally hand the weapon over to his son, much less tell his son about its location, the father constructively passed control of the assault rifle to his son by storing it in his son's bedroom. Gun dealers should be subjected to an even higher standard than private civilians when it comes to storing and selling guns.[205]

The constructive entrustment approach flows logically from the principle that a person should be deemed negligent when he "pave[s] the way for a truly reckless individual" to inflict "serious risks of injury on the public at large."[206] Had the *Gilland* court recognized that an entrustment occurred when Magnano was left alone with a gun and a box of bullets within arm's reach, causation could have been established under a basic foreseeability inquiry:[207]

> the foreseeability question is not narrowly tailored to whether the actor could foresee *this happening, then that, then this, then that*, etc. It is basic "hornbook law" that "if the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. The relevant foreseeability question is whether the harm that resulted was within the scope of the original risk."[208]

205. Gallara v. Koskovich, 836 A.2d 840, 851 (N.J. Super. Ct. 2003) ("Firearms are no less deadly when owned by commercial dealers . . . [i]n fact, it can be argued that there are stronger reasons to impose a duty on commercial sellers of guns because their business activities enhance the risk of theft and subsequent misuse.").

206. Rabin, *supra* note 175, at 439.

207. The foreseeability and negligent entrustment doctrines require a fact-intensive analysis that, in my opinion, justifies allowing plaintiffs to proceed to discovery in cases where plaintiffs satisfy minimal pleadings requirements.

208. McClurg, *supra* note 7, at 26 (footnote omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 435(1) (AM. LAW INST. 1965)).

Thus, the applicability of PLCAA's negligent entrustment exception should not turn on rigid understandings of what it means for a seller to "supply" a gun or a consumer to "use" a gun, especially since neither term is defined in the statute.[209] Instead, courts should focus on the touchstone of the negligent entrustment doctrine: the reasonableness of the seller's actions in light of his knowledge about the buyer and the surrounding circumstances.[210] Simply put, the question of liability for negligent entrustment should not turn on whether a theft *occurred*, but instead, on whether a theft was *reasonably foreseeable* to the seller under the circumstances.

This approach incorporates the touchstone of negligent entrustment: the entrustor's knowledge of the entrustee's propensity to misuse the chattel.[211] If a seller can reasonably foresee that a gun will be stolen, then the seller should also be charged with knowledge of a thief's incompetence to use the gun safely after stealing it.[212] Thus, the *Gilland* court should have asked whether a murder with a stolen gun falls within the scope of risk of leaving three guns and ammunition on a store counter within arms' length of an unattended patron in a

209. RESTATEMENT (SECOND) OF TORTS § 390 cmt. a (AM. LAW INST. 1965) (explaining that negligent entrustment should form the basis of liability "irrespective of whether the chattel is to be used for the purposes of the supplier's business or for purposes which are otherwise to the supplier's advantage").

210. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. d (AM. LAW INST. 2010) (stating that the "foreseeable likelihood of improper conduct," "severity of the injury," and "burden of precautions available to the defendant" guide the negligent entrustment analysis).

211. *See* McClurg, *supra* note 7, at 30 (discussing a court's dismissal of a lawsuit because the gun owner did not know that his daughter's close friend had a criminal record).

212. The foreseeability of injury by a stolen gun is obvious, and one of the main sources of stolen or otherwise illegally diverted firearms are lawful sellers. *See, e.g.*, Valentine v. On Target, Inc., 727 A.2d 947, 956 (Raker, J., concurring) ("The notion that it is not foreseeable that a stolen handgun will be used in violent crime is simply nonsense."); *see also* Braga et al., *supra* note 10, at 782 (identifying the various pathways by which guns reach the hands of people using them to commit crimes); MAGNANO INVESTIGATION, *supra* note 184, at 25 (arguing that if the store clerk did not leave Magnano alone with the gun and bullets on the counter, "he most likely would not have been able to take possession of the firearm, and, subsequently, murder Jennifer Gauthier Magnano").

store without a burglar alarm.[213] However, the court wholly avoided this question.[214]

Instead of allowing the plaintiff to conduct discovery and adduce evidence about the moments leading up to the theft, the *Gilland* court pronounced that it would be inappropriate to "permit a plaintiff to amend the complaint to conform [the cause of action] with proof which is later offered" because doing so would permit the plaintiffs to change their legal theory.[215] But Jennifer Magnano's estate provided adequate notice of its negligent entrustment claim at the outset of litigation.[216] In a case with remarkably similar facts, the Supreme Court of Alaska permitted the plaintiff to engage in discovery to determine whether a theft, constructive entrustment, or "off the books" sale occurred.[217] At trial, a jury found that the store owner was not liable,[218] but at least the court did not hijack the fact-intensive questions necessarily raised by any negligent entrustment claim.

213. McClurg, *supra* note 7, at 28; *see also id.* at 33 (stating that "shoplifting is highly foreseeable" for any merchant that maintains a large inventory of guns); MAGNANO INVESTIGATION, *supra* note 184, at 25 (arguing that if the store clerk did not leave Magnano alone, "he most likely would not have been able to take possession of the firearm, and, subsequently, murder Jennifer Gauthier Magnano").

214. Gilland v. Sportmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693, at *12–14 (Conn. Super. Ct. May 26, 2011).

215. *Id.* at *13.

216. *See id.* at *12 (referring to plaintiff's request to engage in discovery to marshal evidence regarding the transfer of the gun); *see also* Corporan v. Walmart, No. 16-2305-JWL, 2016 U.S. Dist. LEXIS, at *19 (D. Kan. July 18, 2016) (permitting plaintiff to amend complaint where plaintiff alleged a negligent entrustment but did not allege the facts demonstrating that the entrustee was incompetent).

217. Estate of Kim v. Coxe, 295 P.3d 380, 395 (Alaska 2013) (vacating summary judgment because questions of fact existed as to "whether [the third party] stole the rifle, or whether [the gun dealer] (1) sold or otherwise knowingly transferred the rifle to [the third party] and (2) knew or should have known [the third party] intended or was likely to use the rifle in a manner to create an unreasonable risk of harm to others"). The *Gilland* court cited the Alaska Superior Court's decision in *Kim* as a basis for rejecting the argument that no transfer occurred. *Gilland*, 2011 WL 2479693, at *7, *13–14. But notably, that decision was subsequently vacated and remanded by the Alaska Supreme Court. *See Kim*, 295 P.3d at 384.

218. Kate E. Britt, *Negligent Entrustment in Gun Industry Litigation: A Primer*, 97 MICH. B.J. 66, 66 (2018).

B. *Constructive Entrustments by Gun Manufacturers and Wholesalers*

Gun manufacturer liability under the negligent entrustment doctrine is not, and should not be, coextensive with the liability of gun dealers. After all, the gun manufacturer almost never actually sells firearms directly to consumers. However, the doctrine of negligent entrustment should extend a duty to manufacturers if they supply weapons to distributors who they know, or should know, are behaving unreasonably.[219] Manufacturers should not be insulated from liability merely because they are at least one step removed from the end sale. Rather, whether the negligent entrustment exception applies to manufacturers should depend on the foreseeability that certain distributors and dealers in the supply chain will facilitate unlawful sales or employ unreasonably dangerous storage practices.[220]

Although a gun manufacturer has never been held liable for negligent entrustment since PLCAA's passage, the New York Appellate Division's decision in *Williams v. Beemiller* is instructive of what the analysis should look like.[221] In *Beemiller*, an Ohio manufacturer sold its Hi-Point semiautomatic pistols exclusively to MKS Supply, a wholesale distributor wholly owned and operated by Charles Brown. [222] Brown routinely sold guns to James Bostic, a convicted felon, through obvious straw purchases.[223] For instance, at one gun show, Brown sold eighty-seven pistols to Bostic in a sale characteristic of a straw purchase: Bostic picked out and paid for the guns in cash

219. *See, e.g.*, Johnson v. Bryco Arms, 304 F. Supp. 2d 383, 394–95, 399–400 (E.D.N.Y. 2004) (allowing plaintiff's lawsuit to proceed under a negligence theory involving successive entrustments to a gun dealer identified by ATF as having 909 gun traces with indications of illegal trafficking over a four-year period).

220. 57A AM. JUR. 2d NEGLIGENCE § 320 (2018) ("The fact that a case involves two entrustments is not a bar to recovery under the negligent-entrustment theory . . . . [T]he duty of an owner or possessor of a dangerous instrument to entrust the instrument to a responsible person may extend through successive, reasonably anticipated, entrustees.").

221. 952 N.Y.S.2d 333, 338–39 (N.Y. App. Div. 2012), *amended by* 962 N.Y.S.2d 834, 835–36 (N.Y. App. Div. 2013).

222. *Id.* at 339, 341.

223. *Id.* at 339.

while his partner-in-crime filled out the requisite paperwork.[224] One of those guns ended up in the hands of a gang member who shot and killed Daniel Williams, a high school basketball player mistakenly identified as a gang rival.[225]

Daniel Williams's mother sued Brown, MKS, and Beemiller for various claims of negligence predicated on the defendants' unlawful distribution practices.[226] The court reversed the dismissal of the case because Brown and MKS engaged in firearms trafficking by deliberately facilitating straw purchases.[227] Critical to the court's analysis was evidence that ATF informed MKS and Beemiller that over 13,000 of their guns were traced to crimes.[228] Given the exclusive distribution relationship maintained by the two entities, the court imputed knowledge of the illegal firearms trafficking activity to the manufacturer, Beemiller, and the wholesale distributor, Charles Brown and MKS Supply.[229]

Gun manufacturers have engaged in this practice for decades. Among other industry insiders, Robert Ricker, a former gun lobbyist, attested to some of these practices in an affidavit submitted in litigation shortly before PLCAA's passage.[230] In his affidavit, Mr. Ricker, a lawyer who worked in the gun industry for two decades, described how the industry as a whole "has long known that the diversion of firearms from legal channels of commerce to the illegal black market in California and elsewhere, occurs principally at the distributor-

224. *Id.*

225. *Id.* at 335–36.

226. *Id.* at 336 (listing the plaintiffs' six causes of action).

227. *Id.* at 339. Although the court only considered the plaintiffs' claims under the predicate exception, it is clear that by distinguishing the evidence from the record in *Hamilton*, the *Williams* court would have accepted a negligent entrustment claim had it gone through the analysis. *See id.* at 340.

228. *Id.*

229. *Id*.

230. *See In re* Firearms Cases, 24 Cal. Rptr. 3d 659, 670 (Cal. Ct. App. 2005).

dealer level."[231] He went on to explain the precise method of diversion that occurred in the *Williams* case, and how manufacturers, wholesalers, and distributors do not question or monitor their dealers even though they know that straw purchases are facilitated by reckless gun dealers and serve as a major conduit for illegal firearms trafficking.[232] In fact, ATF provided manufacturers with crime trace information,[233] but the NRA and other prominent members of the industry were "bitterly opposed" to industry-wide concessions on reform.[234] If all of this is true, it only supports the extension of negligent entrustment to dealers who have knowledge of misconduct within their distribution chain. Once an entity within the supply chain has some degree of knowledge that inventories of weapons are being diverted to illegal traffickers, it becomes not only foreseeable, but almost a certainty that those guns will be used in a subsequent crime. To the extent that gun manufacturers can prevent this from happening by monitoring their distributors, tort law should impose this obligation on them.

CONCLUSION

In 2005, Congress passed PLCAA, and in doing so, selectively immunized a massively profitable industry that makes uniquely dangerous products. Courts should read PLCAA's negligent entrustment exception broadly to capture

231. Declaration of Robert A. Ricker in Support of Plaintiffs' Opposition to Defendant Manufacturers' Motion for Summary Judgment at ¶8, *In re* Firearms Cases, 24 Cal. Rptr. 3d 659 (Cal. Ct. App. 2005) (No. JCCP4095) [hereinafter Ricker Declaration].

232. *Id.* at 4–12.

233. *Id.* Congress should repeal the Tiahrt Amendment not only so the public has access to crime trace information, but also so plaintiffs can actually use this evidence to support claims that manufacturers were on notice of the illegal diversion of firearms from the supply chains. *See* James V. Grimaldi & Sari Horwitz, *Industry Pressure Hides Gun Traces, Protects Dealers from Public Scrutiny*, WASH. POST (Oct. 24, 2010, 6:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/23/AR2010102302996.html (noting how crime trace information used to be publicly available); *see also* BAD APPLE GUN DEALERS, *supra* note 58, at 24 (explaining how "[t]he Tiahrt Amendment prevents the ATF from publicly releasing certain data on crime gun traces" and, in turn, "allows the gun industry to keep the public in the dark about which dealers are responsible for supplying the majority of crime guns").

234. *See* Ricker Declaration, *supra* note 231, at 13–14.

conduct that does not technically break the law, but is wholly unreasonable and results in preventable injuries. This reading of negligent entrustment would result in negligible and indirect constitutional harm (if any at all),[235] while providing members of the gun industry a powerful incentive to control their inventories of firearms.[236] This would not open the floodgates to litigation, nor would it threaten the economic viability of the gun industry.[237] At the very least, plaintiffs should be afforded an opportunity to conduct discovery and develop a record for this fact-intensive tort. Through this process, a court can fairly and reliably determine whether a gun manufacturer or dealer was on constructive notice of an individual's capacity to cause harm. Through this process, the gun industry can absorb some of the financial burden caused by its products, and maybe even engage in some self-policing. Through this process, lives can be saved.[238]

235. *See* City of New York v. Bob Moates' Sport Shop Inc., 253 F.R.D. 237, 242 (E.D.N.Y. 2008) ("[T]o transmutate *Heller* into an inhibition on long standing ancient nuisance powers of the state . . . is almost inconceivable."). Since *Heller*—the first Supreme Court decision recognizing an individual right to bear arms—was decided in 2008, over 900 lawsuits challenging gun regulations have been filed with trivial success. McClurg, *supra* note 145, at 784–85.

236. Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 827 (E.D.N.Y. 1999) ("Holding defendants liable when injuries result from their failure to exercise due care is likely to encourage more prudent manufacturing and distribution practices. This potential deterrent effect is of particular importance, where, as here, the legitimate market is saturated.").

237. *See* 151 Cong. Rec. S8914 (July 26, 2005) (statement of Sen. Reed) (noting that there were only fifty-seven lawsuits filed against the gun industry between 1993 and 2003); *see also infra* Section III.B.1 (arguing that Congress overstated the prevalence and threat of litigation).

238. *See* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 391 (1994) (describing studies that concluded hundreds, if not thousands, of lives are saved annually due to the deterrent effect of dram shop liability and summarizing a study that attributed 32,000 lives saved over a seven-year period to the Federal Employers' Liability Act).