

## Mass Shootings and Mass Torts: New Directions in Gun Manufacturer Liability

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*Mass shootings are a particularly gutting form of American gun violence. The statistics are staggering to the point of numbing, with the issue's intensity and timeliness enforced day after day, round after round. Gun manufacturers occupy a vital role in the chain of events ending with mass shooting headlines, yet they face little liability for their involvement because of a 2005 protective federal statute. This Note argues that there may be opportunity for change. Specifically, this Note offers evidence that once-strong statutory protections may be weakening and presents strategies for creating previously unimaginable mass tort claims against gun manufacturers.*

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## Introduction

Gun violence and mass shootings are uniquely American phenomena. Gun violence itself refers to several component tragedies—each with its own cruel relevance to American consciousness. Gun-involved injuries and deaths are a serious public health problem in the United States<sup>1</sup>—indeed, no other advanced economy has as many gun violence deaths as the United States does.<sup>2</sup> And perhaps no subcategory of gun violence is more notorious than that of “mass shootings.” The term is as bureaucratic as it is emotive. On the one hand, the term “mass shooting,” while contested,<sup>3</sup> generally refers to shootings with four or more victims. This is the definition commonly used in statistics, like the statistic that the United States has five times as many mass shooters as recorded in the next-highest country.<sup>4</sup> However, mass shootings aren’t merely a legalistic category. We understand the meaning of “mass shooting” from reflections on our lived experiences in America and from the names we so frequently see in headlines. Names like Columbine, Virginia Tech, Sandy Hook, Aurora, Parkland, Sutherland Springs, Charlottesville, Uvalde, and Buffalo—the schools, cities, and suburbs bloodily anchored into collective memory as emblematic of mass shootings.

While one could debate the precise causal explanation for every mass shooting *ad nauseam* (in good faith or otherwise), one must acknowledge that mass shootings necessarily involve guns. And the United States has a lot of guns. At 120.5 guns per 100 residents, the United States has more guns per capita than any other country.<sup>5</sup> And gun ownership has increased in recent years—an estimated 2.9% of U.S. adults (7.5 million) became new gun owners from January 2019 to April 2021.<sup>6</sup> Considering that most

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1. See *Fast Facts: Firearm Violence Prevention*, CTNS. FOR DISEASE CONTROL & PREVENTION (Sept. 19, 2023) [hereinafter *Fast Facts*, CDC], <https://www.cdc.gov/violenceprevention/firearms/fastfact.html> [https://perma.cc/MMJ4-7ZWT].

2. Cedric Sam & Lindsey Rupp, *Gun Violence in the US Far Exceeds Levels in Other Rich Nations*, BLOOMBERG (May 26, 2022, 8:00 PM), <https://www.bloomberg.com/graphics/2022-us-gun-violence-world-comparison> [https://perma.cc/P8A8-5C2W].

3. There is not a single definition of “mass shooting,” a reality which can result in significant debate among those interested in preventing gun violence. For example, estimates differ on factors such as whether the perpetrator is counted among fatalities or injuries, whether only fatalities count, or numerical cutoffs for meeting the definition of a “mass shooting.” See Marisa Booty et al., *Describing a “Mass Shooting”: The Role of Databases in Understanding Burden*, 6 *INJ. EPIDEMIOLOGY* 1, 2-4 (2019) <https://injepijournal.biomedcentral.com/articles/10.1186/s40621-019-0226-7> [https://perma.cc/AS4L-KVXH] (describing different examples of calculation methods for mass shootings and resulting differences in records).

4. Max Fisher & Josh Keller, *Why Does the U.S. Have so Many Mass Shootings? Research is Clear: Guns*, N. Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/world/americas/mass-shootings-us-international.html> [https://perma.cc/9Y29-KVEV].

5. *How Many U.S. Mass Shootings Have There Been in 2023?*, BBC NEWS (Aug. 27, 2022), <https://www.bbc.com/news/world-us-canada-41488081> [https://perma.cc/7RJ7-6H3M].

6. Matthew Miller et al., *Firearm Purchasing During the COVID-19 Pandemic: Results from the 2021 National Firearms Survey*, 175 *ANNALS INTERNAL MED.* 219, 219 (2021), <https://www.acpjournals.org/doi/10.7326/M21-3423> [https://perma.cc/3RAN-9P6F].

of these new gun owners lived in homes that did not previously have guns,<sup>7</sup> these new purchases not only exposed the new gun owners to potential gun violence, but also exposed the many millions more people they lived with to the same. In addition to this recent uptick in (already high) gun ownership, mass shootings have also been on the rise. The Marshall Project reports that there were more mass shootings in the years 2017-2021 than in any other five-year time frame since 1966.<sup>8</sup> Recent trends in gun ownership and gun-related violence indicate that mass shootings are likely to continue to increase. And, importantly for lawyers thinking about accountability for gun violence, credible theories link increased gun ownership with increased gun violence.<sup>9</sup>

This raises a natural question about accountability, and, specifically, legal liability: who, if anyone, can the law hold to account for people hurt and killed in mass shootings? The process of designing, making, getting, and (wrongfully) using a gun is a long one. Legally, the long chain of events that leads to a mass shooting implicates a wide array of legal issues and potential legal liability. The ability (or right)<sup>10</sup> of an individual to own a gun in the first place raises constitutional concerns. Criminal and tort law feature where individuals violate the law through their gun use. Middlemen also abound; individuals involved in any procurement or poor storage of a gun ultimately used in wrongful acts may also face forms of liability. There are licensing and administrative questions about the adequacy of gun sales. And, lastly, there are tort claims leveled at manufacturers who supply the guns in the first place. This Note focuses on the final category.

There is a long history of plaintiffs bringing gun manufacturers to court. Litigators acting on behalf of individual plaintiffs and public entities alike long levied tort claims against gun manufacturers whose products enabled shootings. Mass torts claims, in particular, were common in the 1990s, but, since 2005, many such challenges have been blocked by the federal instrument known as the PLCAA—the federal Protection of Lawful Commerce in Arms Act. In brief, the PLCAA limited the civil liability of gun manufacturers as long as they complied with the state and federal law in operating their businesses. The PLCAA put a damper on a

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7. *Id.*

8. Anastasia Valeeva, Wendy Ruderman & Katie Park, *What You Need to Know About the Rise in U.S. Mass Shootings*, THE MARSHALL PROJECT (July 6, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/07/06/what-you-need-to-know-about-the-rise-in-u-s-mass-shootings> [https://perma.cc/95FD-SNYM] (“There were more mass shootings in the past five years than in any other half-decade going back to 1966.”).

9. See Fischer & Keller, *supra* note 4, (offering one such linkage between gun ownership and gun violence by pointing to correlations between the two).

10. While the Second Amendment protects the right to bear arms, the interpretation of gun ownership as an individual right (as opposed to a collective right in the form of a militia) crystallized in 2008 in *District of Columbia v. Heller*, where the Supreme Court interpreted the Second Amendment to confer an individual right to gun ownership. 554 U.S. 570, 592 (2008).

then-rising tide of tort litigation pursued by public plaintiffs against gun manufacturers. After the legislation, courts generally interpreted the PLCAA in favor of gun manufacturers.

However, recent developments may be weakening gun manufacturers' seeming invincibility. In the last five years, high-profile mass shootings have led to equally high-profile legal challenges. It can be argued that courts in these cases, by offering more favorable postures to plaintiffs, are recognizing gun manufacturers as part of the chain of events leading to mass shootings rather than deferring to the idea of near-complete immunity for manufacturers. Legally, these cases live in the narrow carveout of the PLCAA known as the predicate exception,<sup>11</sup> which allows for the imposition of tort liability on gun manufacturers when they knowingly violate applicable federal or state laws. The statute allows (at least in theory) state law "applicable to" gun manufacturers to impose tort liability that the PLCAA may otherwise prohibit.<sup>12</sup> Recently, pro-plaintiff outcomes begun to arise in a more serious way (with corresponding attention in literature), raising questions about whether the gun-protective era is over.<sup>13</sup>

Practitioners looking to take advantage of the moment and formulate mass tort claims against gun manufacturers will find few options for guidance in existing legal scholarship. This may largely be a factor of timing. Scholarship around gun manufacturer liability focuses extensively on the time period around the PLCAA's enactment. More recent

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11. Note that while literature refers both to the "predicate exception" and the "predicate exemption," this Note uses the term "predicate exception" for consistency and in alignment with major nonprofits working on gun violence (e.g., Giffords).

12. 15 U.S.C. § 7903. Specifically, the Act, through the predicate exception, exempts from its general prohibition on civil liability suits "(iii) an[y] action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including— (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18." *Id.* As for guidance on what might fit within the exception, the PLCAA's text offers two example scenarios: where a manufacturer fails to keep appropriate records or falsifies records around firearms that are required by state law, and where a manufacturer sells a firearm to a buyer whom they know or reasonably should know is prohibited from possessing it. *Id.*; see also Bret Matthew, *Responsible Gunmakers: How A New Theory of Firearm Industry Liability Could Offer Justice for Mass Shooting Victims*, 54 SUFFOLK U. L. REV. 401, 418 (2021). However, note that there are still significant debates about the statutory interpretation of the PLCAA. See Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 FLA. L. REV. 833, 833 (discussing controversies in interpretation).

13. See generally John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, POLITICO (Mar. 18, 2019), <https://www.politico.com/magazine/story/2019/03/18/lawsuit-mass-shootings-225812> [<https://perma.cc/PCA9-MHT4>].

scholarship around the PLCAA does exist, but tends to examine wins against gun manufacturers on a case-by-case basis, rather than offer combined overviews of trends or address issues such as Second Amendment jurisprudential development.<sup>14</sup> Recent literature (especially within the last five years) does not offer significant updated and expanded discussions of mass torts in the general gun violence or specific mass shooting contexts.

This Note seeks to address the gap by providing an updated account of the current position of mass tort claims against gun manufacturers as informed by the last few years of litigation movement, and by offering practical suggestions for building mass tort claims in this new landscape.<sup>15</sup> The Note approaches the task three parts. In Part I, this Note briefly describes the constraints of the existing litigation landscape for gun manufacturers' tort liability, focusing on the PLCAA. Part I explicitly builds on existing scholarship to provide a solid grounding in the field of PLCAA litigation. In Part II, this Note uses a gun tort expert's framework as a guide to describe the last five years of manufacturer-targeted legal claims. Part II then analyzes developments that support the viability<sup>16</sup> of mass tort claims against gun manufacturers and related challenges that might arise in future litigation efforts. This Part provides a novel contribution to current legal scholarship by taking a view of litigation efforts through November 2023 a potential new era of gun manufacturer liability.

In summary, this Note fills a literature gap by providing an account of the current legal landscape for gun manufacturers' tort liability and by making a novel argument that recent developments in mass tort and gun manufacturer litigation indicate a widening space for mass tort claims against gun manufacturers. Most importantly, this Note advances the theory and practice of legal advocacy against gun manufacturers. It is an urgent task. Efforts to map and extend litigation against product manufacturer's holds special urgency in the gun context—where inaction means death.

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14. See, e.g., Linda S. Mullenix, *Outgunned No More?: Reviving A Firearms Industry Mass Tort Litigation*, 49 SW. L. REV. 390, 390 (2021) (offering an example of strong scholarship focusing on the implications of a single case, *Remington Arms Co. v. Soto*). To be clear, however, robust scholarship has existed in the post-PLCAA space, especially with respect to constitutional Second Amendment literature. See generally Levin & Lytton, *supra* note 12 (offering recent case citations).

15. This Note proceeds from the normative position that gun manufacturers should be able to face liability for harms their products create via mass shootings. This Note aims to serve as a theoretical and practical stepping stone to future litigation efforts taking that approach.

16. This outlook analysis will draw most heavily from the evolving mass tort factors described by Mullenix, *supra* note 14, at 410.

## I. The Existing Framework: Constrained Manufacturer Liability, Limited Mass Tort Potential

Tort cases against gun manufacturers are not a recent phenomenon. Rather, they played a significant role in mass torts' history, especially in shaping debates surrounding mass torts' regulatory function and in backlash from powerful lobbying groups. Understanding the present landscape of gun manufacturer lawsuits therefore requires an understanding of previous attempts to hold gun manufacturers accountable and how they sparked industry backlash. This Part summarizes the development of litigation against gun manufacturers and the primary legal theories featured in the early mass tort cases of the 1980s to early 2000s, including abnormally dangerous activities claims, product liability claims, marketing claims, claims of deceptive trade practices and public nuisance, and negligent entrustment.<sup>17</sup> The Part next describes how the Protection of Lawful Commerce in Arms Act (PLCAA) arose from backlash to early litigation attempts, and that this backlash created the status quo of gun manufacturer liability we now know today.

### A. Early Tort Theories Aimed at the Gun Industry

Understanding the current, relatively constrained legal landscape for tort claims against gun manufacturers requires a grounding in pre-PLCAA litigation. Summarizing the work of preeminent tort scholars such as Timothy Lytton,<sup>18</sup> this Section provides the background necessary for more contemporary arguments for mass tort liability by discussing early conceptions of gun violence litigation; describing developments in public health and theory that destabilized those conceptions; tracing the rise of pre-PLCAA lawsuits against gun manufacturers; and describing the most common claims relied on by pre-PLCAA plaintiffs.

Gun manufacturers became a target of tort litigation as a result of changing perceptions of gun violence, including its public health framing. Since the nation's founding, gun violence litigation occurred in the criminal realm focused on the interaction between the victim and the immediate perpetrator, and by the mid-twentieth century came to be synonymous with urban crime.<sup>19</sup> However, a combination of new theoretical lenses

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17. The first five of these theories were chosen to track firearm litigation expert Timothy Lytton's approach to classifying claims. See Timothy D. Lytton, *Tort Claims against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 5 (2000) [hereinafter Lytton, *Tort Claims*] (listing the "five principal doctrinal approaches to holding manufacturers liable for gun violence").

18. See, e.g., *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Timothy D. Lytton ed., 2005) (offering an example of Lytton's writing and editing work on the subject).

19. See Julie Samia Mair et al., *A Public Health Perspective on Gun Violence Prevention*, in *SUING THE GUN INDUSTRY*, *supra* note 18.

shifted the focus on individual harms towards community harms and their potential upstream causes. First, public health professionals began focusing on gun violence as something to be prevented.<sup>20</sup> Second, a spate of suburban school shootings shook the (often racist) assumption that gun violence was purely a matter for criminal law constrained to a few bad urban actors, opening up instead the idea that gun violence was a suburban safety and public health problem.<sup>21</sup> A health framing allows gun violence to be considered preventable,<sup>22</sup> and therefore provides a framework for looking upstream to sources or actors enabling later gun violence. Looking this direction naturally leads to gun manufacturers.<sup>23</sup>

Lawsuits against gun manufacturers arose in response to this shift. Gun manufacturer lawsuits began in earnest during the 1980s, reaching their zenith in the early 2000s.<sup>24</sup> In line with the older view of a singular dyad of victim-perpetrator described above, lawsuits against gun manufacturers were initially the domain of personal injury law as individuals sought compensation for specific harms.<sup>25</sup> These claims drew, in turn, on conventional tort theories such as negligence (that manufacturers knowingly supported illegal gun markets) or strict product liability (that guns posed an unreasonable risk of harm).<sup>26</sup> But starting in 1998, cities such as New Orleans, Chicago, and Bridgeport began to bring

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20. *Id.* at 41-42 (discussing the emergence of prevention-focused reasoning).

21. See Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1263-64 (2000) [hereinafter Lytton, *Lawsuits*]; see also Joseph Blocher & Reva B. Siegel, *Race And Guns, Courts And Democracy*, 135 HARV. L. REV. F. 449, 454 (2022) (describing how gun violence's racialized harms could be construed as a failure of the Equal Protection Clause). Gun violence generally disproportionately affects Black Americans due to structural injustices. See *Gun Violence is a Racial Justice Issue*, BRADY, <https://www.bradyunited.org/issue/gun-violence-is-a-racial-justice-issue> [https://perma.cc/EJB7-5QMW] (“Black Americans are twice as likely as white Americans to die from gun violence and 14 times more likely than white Americans to be wounded.”); see also Jennifer Carlson, *Police Warriors and Police Guardians: Race, Masculinity, and the Construction of Gun Violence*, 67 SOC. PROBLEMS 399, 399 (2019) (finding that police chiefs in three states view their roles differently depending on whether gun violence occurs in “urban” communities with primarily Black and Brown perpetrators or in suburban settings with primarily white perpetrators and victims).

22. See Julie Samia Mair et al., *supra* note 19, at 41-42; see also *Public Health Approach to Gun Violence Prevention*, EDUC. FUND TO STOP GUN VIOLENCE, <https://efsgv.org/learn/learn-more-about-gun-violence/public-health-approach-to-gun-violence-prevention> [https://perma.cc/TL7N-5QT2] (describing a public health approach to gun violence, including prevention).

23. See Timothy D. Lytton, *Introduction*, in *SUING THE GUN INDUSTRY*, *supra* note 18, at 4 [hereinafter Lytton, *Introduction*] (“Increasing interest in firearm designs and marketing restrictions spurred by this public health approach has expanded the focus of attention from individual perpetrators of gun violence to include manufacturers and dealers. As a result, there has been less emphasis on criminal sanctions as a response to gun violence and more interest in industry regulation as a way to prevent it.”).

24. *Id.* at 3.

25. *Id.*

26. *Id.*; see also Shane Wagman, *No One Ever Died from Copyright Infringement: The Inducement Doctrine's Applicability to Firearms Manufacturer Liability*, 32 CARDOZO L. REV. 689, 692-93 (2010) (describing how courts consistently dismissed strict liability suits for injuries pre-PLCAA and how negligent marketing suits were also unsuccessful).

lawsuits.<sup>27</sup> These municipal-led challenges to gun manufacturers included broad claims against the gun industry, including seeking both money damages and injunctive relief—outcomes that would have regulatory effects.<sup>28</sup> While cities had regulated firearms since the early nineteenth century based on theories of public welfare,<sup>29</sup> these cases were still major developments. At the height of public-led lawsuits, more than thirty cities sued<sup>30</sup> and at least two state attorney generals investigated gun manufacturers.<sup>31</sup> By the beginning of the twenty-first century, public plaintiffs brought new weight to tort claims against gun manufacturers.

The legal theories pursued by such plaintiffs were also broad, covering a spectrum of tort claims (Table 1). Some of these claims were less controversial, with courts ruling consistently in one direction (whether in favor of either plaintiffs or industry defendants). These more-consistently-ruled claims included product liability malfunction claims<sup>32</sup> (gun manufacturers liable for malfunctioning firearms) and claims that gun manufacturing necessarily constituted abnormally dangerous activities<sup>33</sup> (gun manufacturers categorically liable for injuries because guns are inherently dangerous). Other claims, however, sparked more disagreement across court decisions. Specifically, the general category plaintiff theories of marketing (manufacturers sold guns despite knowing of problematic conditions) and public nuisance<sup>34</sup> (guns interfere with the public's rights) were particularly contested. It is also possible to speculate that courts could be skeptical of applying risk-utility balancing tests to examining the appropriateness of defendant manufacturers' conduct in relation to guns' societal benefit—perhaps due the squeamishness of assessing guns' societal role and Second Amendment protections.<sup>35</sup> More in the middle ground were claims resting on manufacturers' marketing and trade practices. For example, one prominent form of marketing claim was that manufacturers knew that their guns, sold through specific advertising methods, would be likely to fall into criminal use. Another widely discussed marketing claim arose from the misalignment between gun manufacturers' promotion of guns as effective for home protection and

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27. Lytton, *Lawsuits*, *supra* note 21, at 1260.

28. Lytton, *Introduction*, *supra* note 23, at 2-3 (describing the regulatory impacts of injunctive relief, and how cities began filing suit).

29. Jonathan E. Selkowitz, *Guns, Public Nuisance, and the PLCAA: A Public Health-Inspired Legal Analysis of the Predicate Exception*, 83 TEMP. L. REV. 793, 803 (2011).

30. *Id.* at 804.

31. Lytton, *Lawsuits*, *supra* note 21, at 1261 (noting New York and Connecticut's investigations). Note that individual plaintiffs continued to bring lawsuits during this period. *See* Lytton, *Introduction*, *supra* note 23, at 3.

32. *See* Lytton, *Introduction*, *supra* note 23, at 5. These claims were rejected almost everywhere except for Maryland.

33. *See id.* at 6.

34. *See id.* at 12.

35. *See* Lytton, *Lawsuits*, *supra* note 21, at 1248 (discussing the broader question in gun control debates about what role the courts and the tort system should play in gun control).

## Mass Shootings and Mass Torts

epidemiological evidence to the contrary (drawing on the new public health conception of gun violence).<sup>36</sup> These claims are typologized in Table 1, with example cases provided in Table 2.

Table 1. Theories of Pre-PLCAA Liability<sup>37</sup>

<i>Theory</i>	<i>Plaintiff Claim</i>	<i>Legal Standard</i>	<i>Reception by Pre-PLCAA Courts</i>
Abnormally Dangerous Activities	Manufacture of firearms is abnormally dangerous	Strict Liability	Largely rejected <sup>38</sup> under reasoning that gun manufacture and sale is common activity
Manufacturing Liability	Manufacturers liable for injurious gun malfunctions	Strict Liability	Largely accepted, uncontroversial. Courts generally followed Restatement (Third) § 2 cmt. d (1998)
Product Liability Defective Design	Risk associated with handguns outweigh utility	Risk-utility balancing	Largely rejected; Courts generally followed Restatement (Second) § 402A
	Harms foreseeably avoided with additional safety features	Reasonable alternative design	Mixed reception
Marketing	Oversupply	Negligence <sup>39</sup>	Rejected by appeals courts as overbroad
	Manufacturers knew <sup>40</sup> advertisement would result in criminal use	Negligence	Mixed reception (mostly rejected, but some refusal to dismiss) <sup>41</sup>
	Overpromotion: Firearms over-advertised and advertised to possibly dangerous groups	Negligence	Rejected, but with subsequent legislative reform <sup>42</sup>
Deceptive Trade Practices	Manufacturers' advertising claims about increased safety (despite evidence to the contrary)	False, deceptive, misleading	Mixed reception (mostly rejected, but some refusal to dismiss)
Public Nuisance	Manufacturer violation of local statute, Restatement (second) § 821B,	Substantial and unreasonable; statutory	Mixed reception (subject to broader public nuisance debates) <sup>43</sup>
Negligent Entrustment	Restatement (second) § 305 <sup>44</sup>	Negligence	Mixed reception (some states disallow), though cases primarily applied to sellers (not manufacturers) <sup>45</sup>

Table 2. Pre-PLCAA Case Examples

<i>Theory</i>	<i>Plaintiff Claim</i>	<i>Example Cases<sup>46</sup></i>
Abnormally Dangerous Activities	Manufacture of firearms is abnormally dangerous	Richman v. Charter Arms Corp., 571 F. Supp. 192, 197-98 (E.D. La. 1983) (holding that firearm manufacture marketing is not an "abnormally dangerous" activity, reversed on a more plaintiff-favorable interpretation of

		“ultrahazardous liability” <sup>47</sup> ; <i>Morial v. Smith &amp; Wesson Corp.</i> , 785 So. 2d 1, 1-2 (La. 2001) (offering an example of a challenge that included suit for manufacture of unreasonably dangerous firearms) <sup>48</sup>
Manufacturing Liability	Manufacturers liable for injurious gun malfunctions	<i>Coulson v. DeAngelo</i> , 493 So. 2d 98, 99 (Fla. 4th Dist. App. 1986) (articulating the settled doctrine when stating that “[t]he essence of the doctrine of strict liability for a defective condition is that the product reaches the consumer with something “wrong” with it”) <sup>49</sup>
Product Liability Defective Design	Risk associated with handguns outweigh utility	<i>Patterson v. Rohm Gesselshaft</i> , 608 F. Supp 1206, 1209-11 (N.D. Tex. 1987) (discussing standards when “basic design is unsafe” Texas’s related risk/utility balancing test)
	Harms foreseeably avoided with	<i>Dix v. Beretta No.75068:19</i> (Cal. Super Ct., Alameda County. Aug. 2., 2004) (rejecting an argument that not

36. See Selkowitz, *supra* note 29, at 803 n.105 (citing Julie Samia Mair et al., *supra* note 19, at 39-40) (drawing out the public health conception of gun violence and noting that the conception is recent); see also Susan P. Baker et al., *Firearms and the Public Health*, 1 J. PUB. HEALTH POL’Y 224, 225-27 (1980) (describing gun manufacturing as capable of public health intervention).

37. Tables 1 and 2 are adapted from Timothy Lytton’s work summarizing prominent theories and cases. See Lytton, *Tort Claims*, *supra* note 17 (describing five primary tort theories used against gun manufacturers, and listing example cases in footnote discussions); see also Lytton, *Introduction*, *supra* note 23, at 5-14 (describing theories of liability).

38. But see *Kelley v. R.G. Industries*, 497 A.2d 1143, 1159 (Md. 1985) (allowing some liability against gun manufacturers for sale and marketing of “Saturday Night Special” handguns that were created and marketed to be used easily for criminal activity). See also Matthew, *supra* note 12, at 405 (discussing the rare example of a court applying strict liability).

39. “Negligence” here includes a focus on foreseeability in the form of a special relationship.

40. One example of evidence suggesting knowledge comes from an admission from Smith & Wesson that the company was aware of “the extent of criminal misuse” of firearms but proceeded “in spite of their knowledge.” See Affidavit of Robert I. Hass at 20-21, *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996) (No. 95-CV-0049), cited in David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 7 (1998)).

41. Lytton, *Introduction*, *supra* note 23, at 14.

42. Specifically, the California legislature following *Merrill v. Navegar* revised its civil code to allow for future litigation of this kind. *Id.* at 11.

43. See, e.g., Lytton, *Tort Claims*, *supra* note 17, at 50 (discussing the proper institutional role of courts vis a vis regulation).

44. Restatement (Second) of Torts § 390 (Am. L. Inst. 1965); see also Andrew D. Holder, Comment, *Negligent Entrustment: The Wrong Solution to the Serious Problem of Illegal Gun Sales in Kansas* [Shirley v. Glass, 241 P.3d 134 (Kan. Ct. App. 2010)], 50 WASHBURN L.J. 743, 748 (2011) (generally describing negligent entrustment in the firearm context).

45. See Holder, *supra* note 44 at 748-49 nn.64-67 (discussing different states’ approaches to application of seller liability).

46. These cases are not exhaustive. Rather, they offer useful illustrations for each of the identified categories of cases brought against gun manufacturers.

47. See also Garrett Sanderson III, Comment, *Common Law Strict Liability against the Manufacturers and Sellers of Saturday Night Specials: Circumventing California Civil Code Section 1714.4*, 27 SANTA CLARA L. REV. 607, 608 n.8 (1987).

48. See Matthew, *supra* note 12, at 405 (2021) (discussing New Orleans’s suit for damages related to the marketing and sale of “unreasonably dangerous firearms”); Matthew Pontillo, *Suing Gun Manufacturers: A Shot in the Dark*, 74 ST. JOHNS. L. REV. 1168, 1169 n.8 (2000) (describing the same).

49. See Pontillo, *supra* note 48, at 1174 n.45 (citing cases that align with the general standard of defective design standard).

## Mass Shootings and Mass Torts

	additional safety features	having child locks made design defective) <sup>50</sup> ; <i>Morial v. Smith &amp; Wesson, Corp.</i> , No. 98-18578, 2000 WL 248364, at *11-12 (La. Civil D. Ct. Feb. 28, 2000) (allowing a cause of action for unreasonably dangerous design)
Marketing	Oversupply	<i>Hamilton v. Beretta U.S.A. Corp.</i> , 750 N.E.2d 1055, 1057, 1063 n.3 (N.Y. 2001) (discussing the oversupply of weapons and sale to minors though claims denied by appeals court for lack of duty of care in marketing)
	Manufacturers knew <sup>51</sup> advertisement would result in criminal use	<i>Hamilton v. Beretta U.S.A. Corp.</i> , 750 N.E.2d 1055, 1055 (N.Y. 2001) (retaining plaintiff's negligent marketing claim)
	Overpromotion: Firearms over-advertised and advertised to possibly dangerous groups	<i>Merrill v. Navegar, Inc.</i> , 89 Cal. Rptr. 2d 146, 155-57 (Ct. App. 1999) (offering an influential, though ultimately reversed, discussion regarding "inflammatory" advertising claims) <sup>52</sup>
Deceptive Trade Practices	Manufacturers' advertising claims about increased safety (despite evidence to the contrary)	<i>Ganim v. Smith and Wesson Corp.</i> , 780 A.2d 98, 112-13 (Conn. 2001) (discussing deceptive advertising claims, including claims of home safety); <i>In re Firearm Cases</i> , 24 Cal. Rptr. 3d 659, 667 (Cal. App. 1st Dist. 2005) (discussing similar claims rooted in California's consumer protection law)
Public Nuisance	Manufacturer violation of local statute, Restatement (second) § 821B	<i>Bubalo v. Navegar, Inc.</i> , No. 96 C 3664, 1998 WL 142359, at *1 (N.D. Ill. Mar. 20, 1998) (raising an unsuccessful public nuisance claim); ) <i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099, 1110 (Ill. 2004) (same)
Negligent Entrustment	Restatement (second) § 305 <sup>53</sup>	<i>Bernethy v. Walt Failor's, Inc.</i> , 653 P.2d 280, 283 (Wash. 1982) (allowing for application of the general restatement duty) <sup>54</sup>

### *B. Legislative Backlash: The PLCAA and Constrained Civil Liability*

The gun industry did not take the lawsuits of the 1980s to the early 2000s lying down. Firearm manufacturers swiftly moved to lobby state and national legislatures for limited liability against municipalities' tort claims, primarily in the form of the PLCAA. This Section outlines the general history and purpose of the PLCAA as backlash to tort suits leveled at gun manufacturers. This Section next describes the scope of the PLCAA and

50. See also *Dix v. Beretta U.S.A. Corp.*, No. A093082, 2002 WL 187397, at \*6 (Cal. App. 1st Dist. Feb. 6, 2002) (discussing and agreeing with the lower court's decision).

51. See Affidavit of Robert I. Hass, *supra* note 40, at 20-21.

52. Lytton, *Tort Claims*, *supra* note 17, at 26 (discussing this case in depth); see generally Anne G. Kimball & Sarah L. Olson, *When All Else Fails, Blame Madison Avenue: Negligent Marketing Claims in Firearm Litigation*, 36 TORT & INS. L.J. 981, 1002 (2001) (discussing the case within the broader context of marketing claims).

53. Restatement (Second) of Torts § 390 (Am. L. Inst. 1965); see also Holder, *supra* note 44, at 748 (describing negligent entrustment in the firearm context generally).

54. Holder, *supra* note 44, at 748-749 (2011) (listing cases).

its exceptions as set out in case law.<sup>55</sup> Together, this Section sets out the baseline against which more recent litigation efforts against gun manufacturers should be understood.

### 1. Legislative History and Purpose of the PLCAA

The backlash to early attempts at gun manufacturer litigation also relates to two larger trends: the tort reform movement and the growth of gun industry lobbying power. First, tort law has always faced a bit of a PR problem. Legal scholars call the skepticism felt around tort claims the “jaundiced” view of tort law. This view is a cynical idea of tort law that assumes people “su[e] each other indiscriminately about . . . frivolous matters,” that juries “award[] immense sums to undeserving claimants,” that the tort system is arbitrary and has spun out of control, and that a “litigation explosion” is unravelling America’s social fabric.<sup>56</sup> It’s a heavy charge. But wrapped up in this debate are separation of powers questions—namely, concerns that tort suits are a form of bypassing the legislature’s proper role in regulation or policy decision-making.<sup>57</sup> Pro-industry actors have joined the chorus of media and judicial commentators who claim that tort suits use the courts to force regulatory decision making best left to democratic legislative bodies.<sup>58</sup> Tort reform such as that experienced in the 1980s onward tended to restrict tort causes of action in general, with particularly harsh crackdowns aimed at the kinds of products liability claims popular in previous lawsuits against gun manufacturers.<sup>59</sup> There are many more examples and nuances to the debate over the proper

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55. To do this, this Section focuses on case law developments within the first five years of the PLCAA’s passage.

56. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717 (1998); see also Timothy D. Lytton, *Using Litigation To Make Public Health Policy: Theoretical And Empirical Challenges In Assessing Product Liability, Tobacco, And Gun Litigation*, 32 J. L. MED ETHICS 556, 556-64 (2004) (providing further context on debates within tort law).

57. See Lytton, *Introduction*, *supra* note 23, at 2 (discussing lawsuits as regulation and key debates). Courts have discussed the question directly in their opinions. See, e.g., *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 16 (La. 2001) (“The statute at issue is aimed at suits, such as the one filed by the City in the instant case, that attempt to indirectly regulate the firearms industry on the local level.”); see also Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837 (2008) (generally discussing the intersections and debates of different tort regulatory topics).

58. Some might critique this view by questioning whether legislative bodies are capable—due to gridlock or other barriers—of actually engaging in democratic deliberation and decision making. See, e.g., Joseph P. Tomain, *Gridlock, Lobbying, and Democracy*, 7 WAKE FOREST J.L. & POL’Y 87, 87 (2017) (describing how congressional gridlock can threaten to shut down democratic processes, and explaining that this gridlock is particularly fueled by lobbying law and practice).

59. Law and economics scholars were at the forefront of this movement with respect to products liability. See, e.g., Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2457 (2013) (describing how products liability law has encountered increased criticism from the law and economics perspective).

role of tort litigation in the United States, but the key point is simply that gun litigation fits squarely in that heated conversation.

The gun lobby is a second important variable for understanding gun manufacturer backlash. Led by the National Rifle Association (NRA) and various professional and sports organizations, pro-gun lobbyists are among the most powerful in both Washington<sup>60</sup> and at the state level,<sup>61</sup> leaving an expanse of pro-gun legislation in their wake. Before the PLCAA, thirty-three state legislatures had already passed legislation granting the gun industry immunity from tort suit, or prohibiting cities and local government entities from bringing lawsuits against gun industry defendants.<sup>62</sup> Lobbying for immunity legislation also continued at the federal level, with particular opprobrium levelled at to the pseudo-regulatory role of tort lawsuits brought by public plaintiffs.<sup>63</sup> These lobbying efforts culminated in President Bush's signing of the PLCAA in 2005.<sup>64</sup>

One articulation of the PLCAA's core purpose that it aims to decrease civil liability for gun manufacturers, and particularly "for injuries caused by third parties using nondefective firearms."<sup>65</sup> Congress expressly stated that businesses engaged in firearms and ammunition commerce, including manufacturing, should not be liable for the harm caused by those

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60. *U.S. Gun Control: What is the NRA and Why is it so Powerful?*, BBC NEWS, <https://www.bbc.com/news/world-us-canada-35261394> [<https://perma.cc/F2FJ-RQCT>].

61. See Lytton, *Introduction*, *supra* note 23, at 3 (describing lobbying aimed at state legislatures).

62. *Gun Industry Immunity*, GIFFORDS LAW CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity> [<https://perma.cc/ZZK8-GVRK>] ("[G]un industry immunity laws have now also been adopted in some form in 34 states."); see also Lytton, *Introduction*, *supra* note 23, at 3 (mentioning the causal connection between lobbying and legislation). Some states that originally had such laws later repealed them. For example, California led efforts to repeal state-level gun industry immunity laws in 2002, with more states following (especially starting in 2021). *Gun Industry Immunity*, *supra*; see also Mullenix, *supra* note 14, at 399 ("Gun industry advocates further lobbied state and local legislators for immunity statutes, and in the aftermath of PLCAA's enactment, thirty-four states enacted statutes providing 'blanket immunity to the gun industry,' in ways similar to PLCAA").

63. Kristine Cordier Karnezis, Annotation, *Validity, Construction, and Application of Protection of Lawful Commerce in Arms Act (PLCAA)*, 17 A.L.R. Fed. 2d 167 (Originally published in 2007); Sheryl Gay Stolberg, *Congress Passes New Legal Shield for Gun Industry*, N.Y. TIMES (Oct. 21, 2005), <https://www.nytimes.com/2005/10/21/politics/congress-passes-new-legal-shield-for-gun-industry.html> [<https://perma.cc/VY7Y-AUTP>] (describing lobbying efforts, stating that "[t]he gun liability bill has for years been the No. 1 legislative priority of the National Rifle Association, which has lobbied lawmakers intensely for it," and describing Wayne LePierre's statement that the bill was the most significant victory for the gun lobby since Congress rewrote the federal gun control law in 1986).

64. 15 U.S.C. § 7901 *et seq.*; *Gun Industry Immunity*, *supra* note 62 (describing lobbying efforts); Stolberg, *supra* note 63 (describing lobbying efforts and Bush signing).

65. Karnezis, *supra* note 63. However, note that this view is contested. See Levin & Lytton, *supra* note 12, at 833 ("[B]oth state and federal courts have fundamentally misread PLCAA when adjudicating cases involving the scope of gun industry immunity.").

who criminally or unlawfully misuse their products.<sup>66</sup> And reflecting the unique constitutional tinge on gun-related laws,<sup>67</sup> Congress's construction of the PLCAA explicitly relied on a variety of constitutional provisions to justify its actions, including the Second Amendment, Commerce Clause, separation of powers doctrine, and full faith and credit clause.<sup>68</sup> Courts have generally accepted the constitutionality of the PLCAA,<sup>69</sup> and the Biden administration has not acted to repeal the PLCAA,<sup>70</sup> indicating that the PLCAA will remain good law.

## 2. PLCAA Exceptions

Still, even the strongest sounding statutes have their exceptions, and the PLCAA is no different. The PLCAA has six statutory exceptions: (1) actions against transferors of firearms who knew the firearm would be used in drug trafficking or a violent crime by a party directly harmed by that conduct; (2) actions against firearms sellers for negligent entrustment or negligence per se; (3) actions against a firearms manufacturer or seller who knowingly violated a state or federal statute applicable to the sale or marketing of the product and the violation was a proximate result of the harm for which relief is sought; (4) actions for breach of warranty in the sale of the firearm; (5) actions alleging manufacturing or design defect; and (6) civil penalty enforcement actions by the Attorney General.<sup>71</sup> Each of these, on paper, provides a view of ongoing civil liability for gun manufacturers, even in the gun-protective landscape of the PLCAA.

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66. 15 U.S.C. § 7901 (“Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended. . . . The purposes of this Act are as follows: (1) to prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.”).

67. Guns are relatively unique among consumer “products” in that there is an extensive constitutional debate around their possession and use (compared to other applications of manufacturer civil liability, such as liability for cars or drug products).

68. See 15 U.S.C. § 7901.

69. Courts have found that the PLCAA did not amount to Congressional commandeering of state functions in violation of the Tenth Amendment, but rather established a federal standard for claims against gun industry. See Karnezis, *supra* note 63, at §11 (listing cases upholding the PLCAA under the Tenth Amendment); see also U.S. CONST. amend. X; 15 U.S.C. § 7901 *et seq.*

70. While President Biden has indicated interest in repealing the PLCAA, this has not yet come to fruition and so this Note assumes that the PLCAA will remain. See *Fact Sheet: Biden-Harris Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety*, WHITE HOUSE (June 23, 2021) [hereinafter *Fact Sheet*], <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety> [https://perma.cc/R645-M8H5].

71. 15 U.S.C. § 7903.

However, it is the third exception, known as the predicate exception, which can be argued the most influential in practice and generated the most scholarly debate.<sup>72</sup> Most post-PLCAA gun manufacturer liability claims rely on this predicate exception, which in turn means that there is more robust court guidance on the exception's scope.<sup>73</sup> This predicate exception therefore will serve as the focus of this Note's discussion.

Interpretation of the predicate exception's text hinges on several key phrases. In full, the predicate exception states that civil actions barred by the PLCAA shall not include "an action in which a manufacturer or seller of a qualified product *knowingly* violated a State or Federal statute *applicable to the sale or marketing* of the product, and the violation was a *proximate cause* of the harm for which relief is sought."<sup>74</sup> This plain text, and courts' interpretations of this plain text, have set out doctrinal guidelines for how litigants might allege a claim that fits under the exception.

First, the pleader must show any violation was knowing.<sup>75</sup> In practice, this standard can be met with an initial complaint and demonstrated evidence rather than inquiring about a previous conviction or court ruling showing scienter.<sup>76</sup> Practitioners should note that some forms of evidence may be limited given the PLCAA's statutory restrictions on Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) data,<sup>77</sup> such as

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72. See, e.g., *Gun Industry Immunity*, EDUC. FUND TO STOP GUN VIOLENCE, <https://efsgv.org/learn/policies/gun-industry-immunity> [<https://perma.cc/VMH2-2VS2>] (describing the exception as the "most examined" by courts). *But see* Daniel P. Rosner, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 421, 454-56 (2018) (arguing for the applicability of the second negligent entrustment exception, an alternative exception to the PLCAA).

73. Further, it is within this exception that the theories discussed in section I.A. would become relevant, making discussion of the exception a prerequisite for developing legal theories. For example, claims using a public nuisance statute as the basis for litigation against gun manufacturers must first assess whether the statute itself counts as a predicate exception before discussing the public nuisance claims in detail.

74. 15 U.S.C. § 7903 (emphasis added). The naming origins of the predicate exception are unclear, but it was generally developed in the post-PLCAA period on the strength of existing state laws that allowed the cause of action to be brought with existing legal tools.

75. For example, see the evidence of knowledge supplied by an affidavit from a former gun industry employee in *Hamilton v. Accu-Tek*. See Affidavit of Robert I. Hass, *supra* note 40, at 20-21; Lytton, *Lawsuits*, *supra* note 21, at 1264 (describing the affidavit); *see also* Abbe R. Gluck, Alexander Nabavi-Noori, & Susan Wang, *Gun Violence in Court*, 48 J.L. MED. & ETHICS 90, 97 (2020) (discussing the use of affidavit evidence).

76. Karnezis, *supra* note 63, at § 3 ("[T]he pleader need only allege a knowing violation of a predicate statute, and need not offer up evidence of a judgment or completed prosecution."); *see also* City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 270 (E.D.N.Y. 2005), *aff'd in part, rev'd in part*, 524 F.3d 384 (2d Cir. 2008) (acknowledging that petitioners had sufficiently alleged that defendants knowingly violated the state predicate statute to state an exception claim and denying defendants' motion to dismiss).

77. Note that the PLCAA limits what evidence can be used against gun manufacturers in civil proceedings. Subsequent to the passage of the PLCAA, Congress attached a rider to an appropriations bill limiting evidence by making firearms tracing data (kept by the ATF) inadmissible evidence for any purpose, save for a few limited criminal or licensing procedures.

Congressional limits on the use of ATF-maintained firearms tracing data in litigation. However, other forms of publicly available data coupled with statements of individual industry practitioners should often be sufficient to overcome this barrier.

Secondly, the predicate exception only applies to those statutes (usually state statutes) that are “applicable” to the sale or marketing of firearms. Despite the fact that the PLCAA offered model “predicate statutes,” to help illustrate the kinds of statutes that might meet this requirement remains among the most contested by the courts,<sup>78</sup> with plaintiffs and defendants seeking broad and narrow interpretation, respectively. Long-dominant case law on the issue illustrates a circuit split between the Second and Ninth Circuits as they sought to establish the breadth of the PLCAA’s interpretation, construing the exception broadly and narrowly, respectively.<sup>79</sup> As far as the content of state laws qualifying for the PLCAA’s predicate exception, courts typically find that statutes must regulate manufacturing, importing, selling, marketing, and use of firearms rather than simply serving a general tort law function.<sup>80</sup> And while

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William J. Krouse, *Gun Control: Statutory Disclosure Limitations on ATF Firearms Trace Data and Multiple Handgun Sales Reports*, CONG. RSCH. SERV. 2 (May 27, 2009) <https://sgp.fas.org/crs/misc/RS22458.pdf> [<https://perma.cc/Y3BE-9HLG>] (describing the rider and its effect). To avoid this impact, secondary sources recommend that counsel argue that the limit on evidence does not encompass trace data already in the plaintiff’s possession. See Karnezis, *supra* note 63, at § 3; see also *City of New York v. Beretta U.S.A. Corp.*, 429 F. Supp. 2d 517, 520 (E.D.N.Y. 2006) (holding that the 2006 appropriations rider did not render inadmissible trace data already in plaintiff’s possession prior to the rider’s passage).

78. Jacob S. Sonner, *A Crack in the Floodgates: New York’s Fourth Department, the PLCAA, and the Future of Gun Litigation After Williams v. Beemiller*, 61 BUFF. L. REV. 969, 977 n.5 (2013) (describing these model “predicate statutes,” which covered subjects such as defendant’s “aiding or abetting a fraudulent gun transfer or purchase and conveying or selling a gun to a person prohibited from owning a firearm”).

79. Mullenix, *supra* note 14, at 403-05; Selkowitz, *supra* note 29, at 811-12 (describing the cases, and noting that the Second Circuit held that “‘applicable’ statutes were those ‘that clearly can be said to regulate the firearms industry,’ and thereby dismissed the suit pursuant to the PLCAA”); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir. 2008) (“We accordingly conclude that construing the term ‘applicable to’ to mean statutes that clearly can be said to regulate the firearms industry more accurately reflects the intent of Congress.”); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1138, 1143 (9th Cir. 2009) (reading the PLCAA narrowly by reasoning that Congress passed the PLCAA with an intent to preempt tort law claims only from laws that specifically regulated the firearm industry); see also Matthew, *supra* note 12, at 414-15 (describing the Second and Ninth Circuits’ approaches, including nuances in the Second Circuit decision later used in *Soto*). These two cases in the Second and Ninth Circuits (and the uptake of some of that logic in the recent *Soto* case) represent the major movement in this lower-court battle over PLCAA interpretation. See *id.* at 417-19 (offering updated recent analysis of the circuit split).

80. See Karnezis, *supra* note 63, at §§ 19, 23 (discussing this standard and its application in California); see also *Ileto*, 565 F.3d at 1138 (refusing to consider a general civil code tort provision as a predicate exception); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 386-88 (Alaska 2013) (citing *Ileto* and disallowing a general negligence action); see also Mullenix, *supra* note 14, at 407-08 (describing the *Ileto* litigation). The *Beretta* court also noted that statutes that would be “applicable” and fit under the predicate exception include those that (1) expressly regulate firearms, (2) courts have applied to firearm sale/marketing, or (3) clearly implicate purchase or sale of firearms. *Beretta*, 524 F.3d at 402, 404 (finding that “applicable” statutes were those “that clearly can be said to regulate the firearms industry,” not merely law that was “capable of being applied,” and finding that Congress’s legislative history indicated it declined to extend the predicate exception).

state courts have more recently taken a broader definitional meaning to ‘predicate exception,’ courts also typically find that “applicable” cannot simply mean “capable of being applied”—potentially limiting plaintiffs’ arguments.<sup>81</sup>

Finally, formative PLCAA case law does not elaborate on the proximate causation requirement.<sup>82</sup> Proximate cause is a challenge in any torts context. As illustrated in the classic torts case of *Palsgraf v. Long Island Railroad Co.* by Cardozo’s and Andrews’ dueling opinions, determining proximate cause is complex, and largely driven by policy-based factors related to the scope of initial duty of care.<sup>83</sup> Proximate cause in the gun manufacturer context is no exception. It is therefore fair to assume that proximate cause requirements will vary strongly with antecedent inquiries into the applicability of certain statutes and thus manufacturers’ legal duties.<sup>84</sup>

This examination of the PLCAA’s exceptions, and specifically the predicate exception, shows that the PLCAA severely constrains but has not completely foreclosed gun manufacturers’ civil liability. While the wide-ranging legal theories once brought by plaintiffs are unlikely to be equally viable in the post-PLCAA landscape, there nonetheless remains flexibility for courts to rule against gun manufacturers—so long as the relevant PLCAA exception requirements are met. Historically, it has been difficult for plaintiffs to succeed on these claims. However, Part II shows that this status quo could be on the cusp of potential change amid what has thus far been a decidedly pro-gun-manufacture landscape under the PLCAA’s first decades.

## II. Indicators of a Shifting Status Quo

Part I described the general theories of civil liability against gun manufacturers, and how the PLCAA limited plaintiffs’ ability to pursue such theories. This Part applies the historical discussion to the present by analyzing the current litigation environment and recent policy and legal developments, with the goal of assessing whether mass tort claims against gun manufacturers might be viable. Drawing primarily from recent (post-

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81. See Selkowitz, *supra* note 29, at 812-14, 819; see also Levin & Lytton, *supra* note 12, at 850-71 (critiquing current misconceptions around the PLCAA’s interpretation).

82. The primary case identifying proximate cause is the recent case of *Prescott v. Slide Fire Solutions, LP*, 410 F. Supp. 3d 1123, 1134 (D. Nev. 2019) (holding mass shooting victims plausibly alleged a PLCAA violation when arguing a bump stock manufacturer violated Nevada’s deceptive trade practices statute); *c.f.* *Prescott v. Slide Fire Sols., LP*, 341 F. Supp. 3d 1175, 1179, 1191 (D. Nev. 2018) (finding that a bump stock manufacturer was not the proximate cause of a mass shooting victim’s harm and so the PLCAA did not apply); see generally Karnezis, *supra* note 63, at § 22 (discussing the 2019 *Prescott* case).

83. See *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 105 (1928) (Andrews, J., dissenting) (illustrating Andrews’s conception of proximate cause, which, compared to Cardozo’s approach in the majority opinion, is more likely to lead to a finding of proximate causation).

84. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 436 (1999).

PLCAA) scholarship such as Linda Mullinex's twelve signposts for identifying a viable mass tort against gun manufacturers,<sup>85</sup> this Part updates and expands on the existing academic literature. Specifically, Section II.A combines Mullinex's identified factors into three major categories: continued gun violence and increasing mass shootings,<sup>86</sup> plaintiff's bar and attorney general involvement in bringing manufacturer claims,<sup>87</sup> and case law developments.<sup>88</sup> Analysis of these categories—including Table 3's novel aggregation of current litigation efforts against gun manufacturers—supports a conclusion that mass torts against gun manufacturers may be viable for the first time post-PLCAA. But of course, protections around gun manufacturers are not easily abandoned. With this concern in mind, Section II.B describes challenges to recent positive trends to help nuance Section II.A's overall optimistic findings. Overall, this Part descriptively argues that requisite signposts for such a mass tort action exist and identifies barriers to developing mass torts further. This Part's discussion then sets up Part III's prescriptive recommendations for how plaintiff-side lawyers and advocates might proceed in developing these mass tort claims.

#### *A. Support for Viability of Mass Tort Gun Manufacturer Claims*

The most comprehensive framework in current literature for analyzing the viability of a mass tort for gun manufacturer claims comes from Linda Mullenix's 2019 article *Reviving A Firearms Industry Mass Tort Litigation*.<sup>89</sup> The work presents a series of factors that can be used to identify whether there is potential for a mass tort specifically aimed at gun

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85. See generally Mullenix, *supra* note 14 (describing twelve overall factors for consideration, including (1) developments or changes in the law; (2) regulatory recall, alert, or notice of a defective product; (3) establishment of a track record of litigation victories and settlements; (4) rise in the interest of the plaintiffs' bar in pursuing litigation; (5) emergence of a critical mass of similarly-situated claimants; (6) docket congestion; (7) judicial reception towards aggregating and managing multiple-claims litigation; (8) discovery of underlying facts and public dissemination of discovery materials; (9) development of underlying science or expert testimony in proof of claims; (10) the interest of states' attorneys general in pursuing relief on behalf of their citizenry; (11) agile, strategic lawyering in response to changing litigation developments; and (12) the willingness of putative defendants and their insurers to come to the negotiation table).

86. This category is composed of Mullenix's fifth and sixth factors (emergence of a critical mass of similarly situated claimants and [potential for] docket congestion). These two categories are grouped together because they concern the structure of the plaintiffs.

87. This category is composed of Mullenix's fourth, tenth, and eleventh factors (rise in the interest of the plaintiffs' bar in pursuing litigation; the interest of states' attorneys general in pursuing relief on behalf of their citizenry; and the agile, strategic lawyering in response to changing litigation developments). These factors are grouped together because they all address the role of lawyers in directing and gatekeeping mass tort claims.

88. This category is composed of Mullenix's first and third factors (developments or changes in the law; establishment of a track record of litigation victories and settlements).

89. See generally Mullenix, *supra* note 14. Factors relevant to this Note are listed where drawn on explicitly. Mullenix's work, while relatively recent in the scale of legal scholarship, was published prior to several key legal challenges outlined in Table 2. This temporal perspective provides the basis for this Note building on Mullenix's work.

manufacturers.<sup>90</sup> This Section explicitly draws on seven of these factors:<sup>91</sup> emergence of a critical mass of similarly situated claimants, rise in interest of the plaintiff's bar in pursuing litigation, agile lawyering by plaintiffs' lawyers in response to changing litigation developments, interest of states' attorneys general in pursuing litigation, establishing a track record of litigation victories, and developments or changes in the law. These Mullenix factors are regrouped below in the categories of (1) continued gun violence evidencing a large and growing potential plaintiff pool, (2) willingness of plaintiff bar and attorneys general to bring claims, and (3) case law developments. Together, analyses of these regrouped Mullenix factors indicate that mass tort claims against gun manufacturers are indeed viable.

### 1. Continued Gun Violence and Increased Mass Shootings

A critical factor described in Mullenix's article that is relevant to assessing the viability of mass tort claims aimed at gun manufacturers is the existence (or nonexistence) of a critical mass of similarly-situated plaintiffs.<sup>92</sup> Translated for the context of gun manufacturer liability, the relevant question is whether there is a sufficient number of gun violence victims to create a viable pool of plaintiffs for mass tort claims, whether through a class action, multidistrict litigation (MDL) or other forms of aggregate litigation. The answer to this is a strong "yes"—both in terms of absolute numbers of people affected by gun violence, and in terms of the large and growing subcategory of mass shooting victims. The high prevalence of gun violence and the specific wide-reaching harms of mass shootings clearly evidence a potentially viable group of mass tort plaintiffs.

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90. See TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE 202-04 (2008) (comparing the relative success of gun litigation and tort claims to the coverup of clergy sexual abuse).

91. This Part excises several of Mullenix's factors. First, I set aside Mullenix's regulatory recall, alert, or notice of a defective product factor, because (1) defective products claims have been relatively unsuccessful in suits against gun manufacturers, as established in Part I, and (2) unlike many consumer products listed in Mullenix's discussion of the category (e.g., automobiles or medical devices), firearms are not commonly subject to consumer recalls, even if they are common to mass tort claims generally. The factor of judicial reception toward aggregating and managing multiple-claims litigation is also set aside, as Mullenix's discussion depends on a judge's decision to certify a class as an indicator of mass torts' maturity, and (to the author's knowledge) there have been no such attempts to date. The factor of discovery of underlying facts and public dissemination of discovery materials is also set aside, because these efforts are underway (see discussion on case developments and parallels to the tobacco litigation) but have not yet come to sufficient fruition to create a feedback loop of gaining evidence, sparking new litigation, generating more evidence, and so on. Finally, the factor of development of science or expert testimony or proof of claims is set aside because of the relatively uncontroversial connection between guns and harm (compared to, for example, claimed connections between defective drugs and harm, which are often much more attenuated). The final Mullenix factor, the willingness of putative defendants and their insurers to come to the negotiating table, is discussed in Section II.B.

92. Mullenix, *supra* note 14, at 415.

### i. High Statistical Prevalence of Gun Violence and Mass Shootings

The high prevalence of gun violence in general, and mass shootings in particular, has grotesquely removed any concern about there being too few plaintiffs to bring claims against gun manufacturers. As described above, deadly and injurious gun violence continues to multiply its victims with no respite. Indeed, gun violence in the last few years especially has constantly increased from already high levels in the 2010s. From a litigation perspective, this crudely translates to mean many, many potential plaintiffs. In 2022 alone, there were more than 48,000 firearm-related deaths in the United States.<sup>93</sup> Certain subcategories of gun violence, such as gun homicides and suicides, have most notably been increasing in recent years.<sup>94</sup> Gun violence is now the leading cause of death for American children.<sup>95</sup> The increase in mass shootings has also been gut-wrenchingly high in recent years. Further, the Marshall Project reports that there were more mass shootings in the years 2017-2021 than in any other five year time frame since 1966.<sup>96</sup> Other sources identified 645 mass shootings in 2022,<sup>97</sup> with more mass shootings than days in 2023.<sup>98</sup> These bare statistics, and the vast communities of people implicated by each shooting and each victim, indicate that even through a narrow look at mass shootings, there is a large potential plaintiff pool to support mass tort action.<sup>99</sup>

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93. *Fast Facts*, CDC, *supra* note 1. Recent years have generally showed record-breaking increases in gun violence. See *New CDC Data Shows 2021 Was Record Year for Gun Violence*, BRADY (Jan. 27, 2023), <https://www.bradyunited.org/blog/cdc-data-record-year-gun-violence> [<https://perma.cc/Y9DC-HAV9>].

94. John Gramlich, *What the Data Says About Gun Deaths*, PEW RSCH. CTR. (Apr. 26, 2022), <https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s> [<https://perma.cc/DN47-BJSC>] (describing increases in both homicides and suicides).

95. German Lopez, *Gun Violence and Children*, N.Y. TIMES (Dec. 15, 2022), <https://www.nytimes.com/2022/12/15/briefing/gun-violence-kids.html> [<https://perma.cc/K4ZA-GA3M>].

96. See Valeeva, Ruderman & Park, *supra* note 8. To understand the scale in relation to other mass tort subjects, note that death figures have historically been comparable to the number of opioid overdose deaths in the same year. See Mullenix, *supra* note 14, at 430 (“An interesting statistical comparison is with the opioid crisis; reportedly 46,394 persons died of opioid overdoses in 2017, a number slightly larger than the number of gun-related fatalities.”); see also *Death Rate Maps; Graphs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 22, 2023), <https://www.cdc.gov/drugoverdose/deaths/index.html> (2020 overdose deaths involving opioids) [<https://perma.cc/E3Z4-4WPR>].

97. GUN VIOLENCE ARCHIVE (Sept. 28, 2023) <https://www.gunviolencearchive.org/past-tolls> [<https://perma.cc/6CV9-AU52>].

98. Ana Faguy, *U.S. Surpasses 600 Mass Shootings This Year—Nearing Record Levels*, FORBES, <https://www.forbes.com/sites/anafaguy/2023/11/14/us-surpasses-600-mass-shootings-this-year-nearing-record-levels/?sh=48573ede3328> (Nov. 14, 2023) [<https://perma.cc/7PGQ-4H9N>]; see also Chuck Todd, *More Mass Shootings than Days of the Year in 2023 So Far*, NBC NEWS (2023), <https://www.nbcnews.com/meet-the-press/video/chuck-todd-more-mass-shootings-than-days-of-the-year-in-2023-so-far-163512901748> [<https://perma.cc/88KQ-2HJ2>].

99. The specifics of how such plaintiffs might be constituted for aggregate litigation is discussed further in Part III. *Infra* Section III.B.2.

By this simple, deadly accounting, gun victims and their families alone would already serve as a large potential plaintiff pool. But proximity to guns and gun violence indicates not only that this morbid accounting will not abate, but also that more people are likely to be harmed by mass gun violence in the future—in litigation terms, more plaintiffs. As discussed throughout this Note, the United States has a high absolute and relative number of guns on the market, and gun ownership is only increasing.<sup>100</sup> These numbers themselves will likely be out of date by the time of this Note’s publication. The potential plaintiff class for mass tort claims for gun manufacturers is not only present, but ever-increasing.<sup>101</sup> Taken to its logical conclusion, this understanding of the numerosity of plaintiffs also raises the potential for docket congestions should all victims (broadly understood) seek to litigate their claims.

ii. Expanded Plaintiff Claims in the Mass Shooting Context

The specific frequency of mass shootings in the broader universe of American gun violence is represented in the above statistics. However, mass shooting plaintiffs need not be limited to those hit by bullets. While individuals harmed by gun violence make up a substantial number of potential plaintiffs (both as individuals, and in combinations discussed in Part III), the specific features of mass shootings allow public entities such as municipalities to be plaintiffs—just as public entities were plaintiffs before the PLCAA. The settings of mass shootings contribute to this factor. Shootings in public schools such as those in Newtown, Connecticut at Sandy Hook Elementary,<sup>102</sup> Uvalde, Texas at Robb Elementary,<sup>103</sup> and Nashville, Tennessee at the Covenant School<sup>104</sup> rose to national and political prominence for the tragedy of the massive death toll of their young victims and reignited conversations about accountability in the gun industry.<sup>105</sup> This is similar to the concerns about preventing suburban gun

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100. See Miller et al., *supra* note 6, and accompanying text.

101. The precise definition and size of the plaintiff class would differ depending on the legal theory the plaintiffs pursued. For example, a marketing-based theory could be pursued on behalf of mass shooting victims’ families (where the shooter was exposed to marketing), and deceptive trade practices could be pursued by a municipality on behalf of all owners of guns who were exposed to certain trade practices.

102. *Shootings in Newtown, Conn.*, Special Series, NPR, <https://www.npr.org/series/167276841/shootings-in-newtown-conn> [<https://perma.cc/LBN2-E9CA>].

103. *Uvalde School Shooting*, Series, TEX. TRIB., <https://www.texastribune.org/series/uvalde-texas-school-shooting> [<https://perma.cc/HXX7-TTXX>].

104. Dakin Andone, *Nashville School Shooter Fired 152 Rounds During the Attack, Which was Planned ‘Over a Period of Months,’ Police Say*, CNN (Apr. 3, 2023, 2:59 PM ET), <https://www.cnn.com/2023/04/03/us/covenant-school-shooting-nashville-tennessee-monday/index.html> [<https://perma.cc/FCT6-BFT9>].

105. Recent shootings at Michigan State University have similarly contributed to the growing clamor for accountability. See Joey Cappelletti, *Michigan State University Gunman’s Note Had Possible Motive*, AP NEWS (Feb. 16, 2023, 3:21 PM ET), <https://apnews.com/article/michigan-state-shooting-58d87c54210d30f9514f6b350e4f929d> [<https://perma.cc/85ZX-GH3X>].

violence in schools that originally fueled conversations of gun manufacturer liability.<sup>106</sup> For this narrow category alone, there is clear urgency and practical relevance in identifying those harmed by school shootings and offering new legal claims in the form of mass tort actions—there have been 366 school shootings since Columbine first sparked calls for gun manufacturer liability, and almost 340,000 students have experienced gun violence.<sup>107</sup> But of course, guns extend far beyond the schoolhouse gate. Shootings in other public settings, such as places of worship like Poway Synagogue in California,<sup>108</sup> and at events, such as the Fourth of July parade in Highland Park, Illinois,<sup>109</sup> Lunar New Year celebrations,<sup>110</sup> and other venues,<sup>111</sup> have also increased the salience of gun violence for many Americans beyond individual victims.<sup>112</sup> This fact of shootings in schools and prominent public places provides another strong basis to think about stewards of public places (such as states and municipalities) as plaintiffs,<sup>113</sup> as was the case in other mass tort contexts such as opioid litigation. The most gutting, urgent feature of American mass shooting violence—its many, many victims—supports survivors’ claim to legal action through mass torts.

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106. *Supra* Section I.A (discussing the public health focus on gun violence).

107. John Woodrow Cox et al., *There Have Been 366 School Shootings Since Columbine*, WASH. POST (2023), <https://www.washingtonpost.com/education/interactive/school-shootings-database> [<https://perma.cc/S5XQ-TGCG>].

108. Jill Cowan, *What to Know About the Poway Synagogue Shooting*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/synagogue-shooting.html> [<https://perma.cc/2ZWJ-BYPY>].

109. Christine Hauser & Livia Albeck-Ripka, *Victims of Highland Park Shooting Sue Gun Maker and Retailers*, N. Y. TIMES (Sept. 29, 2022), <https://www.nytimes.com/2022/09/29/us/highland-park-shooting-victims-lawsuit.html> [<https://perma.cc/6KQR-J8SH>].

110. Summer Lin et al., *Authorities Identify 72-Year-Old Man As Suspected Gunman in Lunar New Year Mass Shooting*, L.A. TIMES (Jan. 22, 2023, 7:28 PM PT), <https://www.latimes.com/california/story/2023-01-22/la-me-monterey-park-mass-shooting> [<https://perma.cc/BLG4-Y9KU>].

111. For example, in shopping centers. The Associated Press, *El Paso Prosecutor Resigns After Facing Accusations of Incompetence*, NPR (Nov. 28, 2022, 9:42 PM ET), <https://www.npr.org/2022/11/28/1139614778/el-paso-texas-prosecutor-resigns-walmart-shooting-case> [<https://perma.cc/3FQ8-Y8N9>]; Mark Morales, Eric Levenson & Kristina Sgueglia, *Buffalo Grocery Store Mass Shooter Pleads Guilty to Terrorism and Murder Charges in Racist Attack*, CNN (Nov. 28, 2022, 7:03 PM EST), <https://www.cnn.com/2022/11/28/us/buffalo-tops-grocery-shooting-payton-gendron-plea/index.html> [<https://perma.cc/7XHN-RMR6>]; 13News Now Staff, *City of Chesapeake Organizes Candlelight Vigil for Walmart Mass Shooting Victims*, 13NEWSNOW.COM (Nov. 28, 2022, 10:18 PM EST), <https://www.13newsnow.com/article/news/local/mycity/chesapeake/chesapeake-candlelight-vigil-walmart-mass-shooting-victims/291-44a5ee13-2781-4398-93df-a2656178645b> [<https://perma.cc/P7A4-5SG4>].

112. See Benjamin J. Newman & Todd K. Hartman, *Mass Shootings and Public Support for Gun Control*, 49 BRIT. J. POL. SCI. 1527 (2017) (discussing the impact of mass shootings on public sentiment towards gun regulation).

113. Further, untested combinations of plaintiffs could also be pursued. For example, recent patterns of mass shootings in particular settings (i.e., schools, entertainment venues, or grocery stores) could provide new formulations of plaintiff classes suitable for aggregate litigation.

## 2. Plaintiff's Bar and Attorney General Involvement in Bringing Manufacturer Claims

### i. Plaintiff's Bar Involvement

Statistics illustrating potential plaintiff classes only go so far—potential plaintiffs' relevance to mass tort is also a function of the plaintiff's bar. Two additional factors identified by Mullenix as indicative of maturing mass tort claims against gun manufacturers relate to plaintiffs' claims actually being brought to court: agile and persistent lawyering by the plaintiff's bar, and interest in bringing suit against gun manufacturers.<sup>114</sup> These two factors can be grouped under a new category of “plaintiff's bar involvement.” Current evidence supports the conclusion that both literature-identified factors are met.

The first point of evidence is that attorneys seeking to pursue litigation against the firearms industry have been persistent almost two decades after PLCAA's passing.<sup>115</sup> This supports the feasibility of mass torts against gun manufacturers for two reasons. First, there is sufficient plaintiff-side interest to support the development of plaintiff classes without requiring starting from zero. Secondly, while perhaps frustrating for plaintiffs involved, the lack of major movement in liability against gun manufacturers is not dissimilar to the drawn-out timelines of other major mass torts actions such as asbestos and tobacco litigation, which also extended on for many years before achieving success in court.<sup>116</sup>

Another more recent factor indicating the viability of mass torts relates to the increasing willingness of the plaintiffs' bar to bring claims. As will be discussed further in the following Section, prominent plaintiff's firms such as Edelson PC<sup>117</sup> and Koskoff Koskoff and Bieder PC<sup>118</sup> have

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114. Mullenix, *supra* note 14, at 414, 420 (identifying these two factors).

115. *Id.* at 427. Note that persistence from some lawyers is not inconsistent with the broader trend of limited litigation success and subsequent decreased lawyering of gun manufacturing claims post-PLCAA. The relevant point here is merely that litigation has continued by advocates in the gun manufacturer liability space.

116. *Id.* at 421. One counterargument to the appropriateness of comparing gun manufacturer liability and asbestos/tobacco litigation is that the presence of the highly restrictive PLCAA federal statute distinguishes gun manufacturer liability from other nascent mass torts like tobacco and asbestos. However, as discussed previously, courts have offered flexibility in their historical applications. *See supra* Section 1.B.2 (discussing how there has been flexibility in courts' application of the exception so long as the core requirements of liability are met).

117. Zack Needles & Alaina Lancaster, *How Edelson Plans to Pave 'A Way Forward' for Holding Gun Makers Accountable*, LAW.COM (2022), <https://www.law.com/2022/11/13/how-edelson-plans-to-pave-a-way-forward-for-holding-gun-makers-accountable> [<https://perma.cc/K3HC-PRHS>].

118. *Sandy Hook Families Achieve Historic Victory Holding Gunmaker Accountable for Role in School Massacre*, KOSKOFF KOSKOFF & BIEDER PC, <https://www.koskoff.com/in-the-news/sandy-hook-families-achieve-historic-victory-holding-gunmaker-accountable-for-role-in-school-massacre> [<https://perma.cc/J8AX-T9XM>]; *see also* Michael Steinberger, *The Lawyer Trying to Hold Gunmakers Responsible for Mass Shootings*, N.Y. TIMES (Sept. 9, 2023)

become increasingly willing to bring tort suits against gun manufacturers,<sup>119</sup> with seven high-profile cases against gun manufacturers brought by such firms against gun manufacturers in the last several years alone (Table 2). City bar associations, such as the New York City bar,<sup>120</sup> also indicated recent support for gun control initiatives last year. Of course, attention from top plaintiffs' firms in the last two years is not dispositive. Other, albeit less concrete evidence, comes from a number of trade news publications discussing plaintiff-side gun manufacturer claims.<sup>121</sup> Taken together, these observations provide support for the conclusion that mass tort claims against gun manufacturers are potentially viable.

## ii. Attorney General Involvement

Another factor Mullenix identifies as relevant to establishing a mass tort is the engagement of state attorney generals.<sup>122</sup> This has historically been a weak spot of post-PLCAA gun manufacturer litigation, with no significant attorney general involvement in the nearly two decades since the statute's passage. However, this changed with the 2020 filing of *Grewal v. Smith & Wesson*. In that case, New Jersey's then-attorney general sought a subpoena for the gun manufacturer's advertising and marketing information.<sup>123</sup>

Another data point arises from the *Soto* litigation. Then-Connecticut Attorney General George Jepson filed an amicus brief on behalf of Sandy Hook shooting victims arguing for the plaintiff class's standing.<sup>124</sup> These

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<https://www.nytimes.com/2023/09/29/magazine/the-lawyer-trying-to-hold-gunmakers-responsible-for-mass-shootings.html> [<https://perma.cc/WSY6-RV2J>] (discussing Koskoff's work, as well as plaintiff-side efforts more generally).

119. Note that this represents an evolution even from 2021 (when Mullenix's article first described nascent tort claims from the plaintiffs' bar), marking further areas of this Note's expansion on existing literature.

120. *Having An Impact: City Bar Policy Successes in the 2022 NYS Legislative Session*, N.Y.C. BAR, <https://www.nycbar.org/media-listing/media/detail/new-york-state-bills-passed-legislative-session-2022> [<https://perma.cc/V4MA-X9YR>] (describing the state "package of gun control measures adopted by the Legislature, a number of which are in line with previous calls from the City Bar - and so many others - for further gun safety measures.").

121. See, e.g., Isha Marathe, "Gamification" of Firearm Ads May Bolster Plaintiff Bar's Product Liability Strategy, LEGALTECH NEWS (Oct. 21, 2022), <https://www.law.com/legaltechnews/2022/10/21/gamification-of-firearm-ads-may-bolster-plaintiff-bars-product-liability-strategy/?sreturn=20230826030256> [<https://perma.cc/KLF5-8NK3>] (discussing new plaintiffs' bar approaches); Brian Baxter, *Ex-Brady Attorney Debuts Group Targeting Gunmakers with Lawsuits*, BLOOMBERG LAW (Oct. 26, 2022), <https://news.bloomberglaw.com/business-and-practice/ex-brady-attorney-debuts-group-targeting-gunmakers-with-lawsuits> [<https://perma.cc/H37W-7JF8>] (discussing new international litigation approaches).

122. Mullenix, *supra* note 14, at 419.

123. *The Scope of State Attorney General Subpoenas: Smith & Wesson v. Grewal*, DUKE CTR. FIREARMS LAW (Dec. 24, 2020), <https://firearmslaw.duke.edu/2020/12/the-scope-of-state-attorney-general-subpoenas-smith-wesson-v-grewal> [<https://perma.cc/UD7G-M6ZR>].

124. See Zachary Possess, *A Shot in the Dark: How the Sandy Hook Plaintiffs Established Legal Standing Against the Gun Industry*, 51 SETON HALL L. REV. 563 (2020) (generally describing standing in the case); Nathan D. Harp, Note, *Imperfect Immunity: How State Attorneys General*

arguments apparently carried force, as Connecticut’s Supreme Court agreed with a more liberal reading of the state’s unfair and deceptive trade act (CUTPA) in favor of the petitioners.<sup>125</sup>

Though these two observations offer only limited data points, New Jersey’s and Connecticut’s AG involvement in recent efforts against gun manufacturers do provide indication of the way state AGs—at least in blue states—might consider building out tort claims against gun manufacturers. This is especially true in the context of related legislative action. State laws like CUTPA were the basis of pro-plaintiff AG interventions, and AGs play an important role in furthering interpretations of their state’s laws. Therefore, AGs’ potential ability to intervene in suits against gun manufacturers is even more optimistic in light of related legislative efforts in states such as California, Delaware, New York, and New Jersey over the past two years<sup>126</sup> to create tort liability against gun manufacturers by making clear that those pro-plaintiff statutes are “applicable” under the PLCAA. This, in turn, significantly contributes to a favorable environment for mass tort claims, especially if such involvement continues in the future.

### 3. Case Law Developments

Having outlined the trends in litigation backdrop in the forms of potential plaintiff classes and increased representation, analysis next moves to center stage—the cases themselves and their legal theories. Two of Mullenix’s key factors for identifying a successful or viable mass tort claim are (1) the establishment of a track record of litigation victories, and (2) developments or changes in case law. These factors are combined into this Note’s labeling of “case law developments.” Recent court successes have begun to build this track record of success, forming new litigation records in the process. Specifically, seven major gun manufacturer civil liabilities pursued in the past three years provide updated support for academic arguments that mass torts aimed at gun manufacturers are viable.

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*Could Sue Firearm Manufacturers Under the Predicate Exemption to the Protection of Lawful Commerce in Arms Act*, 30 CORNELL J.L. & PUB. POL’Y 797, 810-11 (2021) (describing attorney generals’ supporting roles). *But see id.* at 811-12 (describing that many—mostly conservative—state AGs filed amicus briefs in favor of Remington in the *Soto* litigation, indicating that AG involvement is not always pro-plaintiff).

125. *See* Mullenix, *supra* note 14, at 422 (“By aligning itself with the Second Circuit’s broad interpretation of PLCAA’s third exception, the Connecticut Supreme Court’s opinion provides a model for other litigants to pursue firearms litigation under various state consumer protection and unfair trade practices law.”). *See also Connecticut Supreme Court Vastly Expands the Scope of the Connecticut Unfair Trade Practices Act (“CUPTA”)*, PULLMAN & COMEY (Mar. 15, 2019) <https://www.pullcom.com/newsroom-publications-ALERT-Connecticut-Supreme-Court-vastly-expands-the-scope-of-the-Connecticut-Unfair-Trade-Practices-Act-CUTPA> [<https://perma.cc/KA2L-JYGW>].

126. *See* GIFFORDS, *supra* note 62.

The majority of these cases arose directly from recent mass shootings,<sup>127</sup> and each contribute toward a positive track record of tort suits against gun manufacturers. Table 3 offers a novel summary of these status-quo-disrupting cases, including their primary theory, history, and deciding court to better enable trend identification. The cases' implications for case law spelled out in further detail below.

Table 3. Summary of recent legal challenges to gun manufacturer liability<sup>128</sup>

<i>Case Name (year)</i> <sup>129</sup>	<i>Primary Theory</i>	<i>State of Origin / Deciding Court</i> <sup>130</sup>	<i>Key Facts</i>	<i>Outcome(s) or Status</i>
Soto v. Bushmaster Firearms (2019)	Predicate Exception; Marketing	Connecticut / Connecticut Supreme Court	Newtown, CT school (Sandy Hook) mass shooting victims' parents sued firearms manufacturer	Connecticut Supreme Court held that CT's unfair trade practices law (CUTPA) qualified as PLCAA predicate. Supreme Court denied cert. to Remington. <sup>131</sup> Sandy Hook families settled with Remington Arms over Bushmaster marketing. <sup>132</sup>
Goldstein v. Earnest (2020)	Predicate Exception;	California / San Diego	Poway, CA synagogue mass	Pending in San Diego

127. Families of victims of the Buffalo, New York, mass shooting publicly indicated their intent to file lawsuits against the manufacturer of the gun used, and subsequently did file a case in August 2023. See James Bikales, *Buffalo Supermarket Shooting Suspect To Plead Guilty, Victims' Lawyers Say*, WASH. POST (Nov. 17, 2022, 8:34 PM ET), <https://www.washingtonpost.com/nation/2022/11/17/buffalo-tops-guilty-plea> [<https://perma.cc/EE9V-RCH3>]; *Everytown Law and Civil Rights Attorneys Announce Two New Lawsuits in Buffalo Mass Shooting Case Against Magazine-Lock Manufacturer, Gun Seller, Body Armor Company, Social Media Companies And Shooter's Parents*; EVERYTOWN LAW (Aug. 16, 2023), <https://everytownlaw.org/press/everytown-law-and-civil-rights-attorneys-announce-two-new-lawsuits-in-buffalo-mass-shooting-case-against-magazine-lock-manufacturer-gun-seller-body-armor-company-social-media-companies-and-shooter> [<https://perma.cc/F79V-UCTL>]. This case was not included in Table 3 because it involves a magazine-lock (rather than gun) manufacturer, though a pro-plaintiff ruling may aid gun manufacturer claims.

128. No cases arguing gun manufacturer liability for gun-related suicides or accidental harms were identified. Case developments are current up to November 2023. It is possible that some additional cases may hold relevance to the legal theories discussed in this Note, despite not being included in Table 3. However, this does not necessarily cut against the Note's key arguments, given that displayed cases are meant to illustrate trends in the area, and that the diversity of courts involved in such cases generally limits binding precedent that could undo this Note's claims about the potential for mass tort litigation.

129. This refers to the date of decision, or, if pending, the most recent ruling.

130. Court of most recent substantive ruling.

131. Remington Arms Co., LLC, et al. v. Soto, 140 S. Ct. 513 (2019).

132. Dave Collins, *After \$73m Win, Sandy Hook Families Zero in on Gun Marketing*, AP NEWS (Feb. 19, 2022, 8:03 AM), <https://apnews.com/article/business-lifestyle-shootings-lawsuits-school-shootings-d1e501234ff52924d98a165ec33a3b51> [<https://perma.cc/JGA8-XY2C>]. Note that the case originally included negligent entrustment claims (another one of the PLCAA's exceptions), but this claim was ultimately dismissed. Possess, *supra* note 124, at 573-74 (2020).

## Mass Shootings and Mass Torts

	Marketing <sup>133</sup>	Superior Court	shooting victims and families of victims <sup>134</sup>	Superior Court <sup>135</sup> Court allowed marketing claim with California's UCL statute under the PLCAA (and citing <i>Soto</i> ) in court motions response <sup>136</sup>
Turnipseed v. Smith and Wesson (2022) <sup>137</sup>	Marketing <sup>138</sup>	Illinois / Circuit Court of Lake County, Illinois	Highland Park Independence Day parade shooting victim lawsuit against firearms manufacturer	Pending in Circuit Court of Lake County, Illinois <sup>139</sup>
Torres v. Daniel Defense (2022) <sup>140</sup>	Marketing <sup>141</sup>	Texas / United States District Court, Western District of Texas	Uvalde, TX mass school shooting victims' and parents' lawsuit against firearms manufacturer	Pending in United States District Court, Western District of Texas
Grewal v.	Predicate	New Jersey /	Former New Jersey	Pending. New Jersey AG

133. Second Amended Complaint, *Goldstein v. Earnest* (No. 37-2020-00016638-CU-PO-CTL) (2022) at 3, 4, 32 (complaint alleging marketing claims, public nuisance claims, products liability claims with only marketing claim seeming to have survived). Complaint accessible at <https://www.nssf.org/wp-content/uploads/2022/02/PlaintiffsSecondAmendedComplaint.pdf> [<https://perma.cc/SY6R-DQUC>].

134. *Goldstein v. Earnest*, BRADY, <https://www.bradyunited.org/legal-case/goldstein-earnest> [<https://perma.cc/WA75-27JL>].

135. *Id.*; *Goldstein vs Earnest*, UNICOURT, <https://unicourt.com/case/ca-sd-goldstein-vs-earnest-1048409> [<https://perma.cc/J67V-BUG8>]; Kelly Hessedal, *Parents of Poway Synagogue Shooter Reach Settlement With Victims*, CBS8.COM (2022), <https://www.cbs8.com/article/news/local/parents-poway-synagogue-shooter-settlement-victims/509-c86310db-12cc-4302-a260-3618893743dd> [<https://perma.cc/9AS5-9UZ3>].

136. Minute Order, *Goldstein v. Earnest* (No. 37-2020-00016638-CU-PO-CTL) (July 2, 2021). Accessible at <https://brady-static.s3.amazonaws.com/Minute-Order-7-2-21-S0499865.PDF> [<https://perma.cc/F72V-2KJJ>].

137. Complaint and Demand for Jury Trial, *Turnipseed v. Smith & Wesson* (No. 22LA00000497) (Sept. 28, 2022). Accessible at <https://brady-static.s3.amazonaws.com/Turnipseed-Smith-Wesson-Complaint-RFF4.pdf> [<https://perma.cc/H5FV-U6N4>].

138. Kelly Rissman, *A Highland Park Shooting Victim Is Suing the Company that Made the Gunman's Weapon*, VANITY FAIR (Sept. 28, 2022), <https://www.vanityfair.com/news/2022/09/highland-park-shooting-victim-suing-smith-and-wesson> [<https://perma.cc/V4AT-PEZ2>].

139. *Ill. Families Sue Smith & Wesson Over July 4 Shooting*, LAW360, <https://www.law360.com/articles/1534965/ill-families-sue-smith-wesson-over-july-4-shooting> [<https://perma.cc/5GL9-9PCH>]; see also Patrick Fazio, Lisa Capitanini & Katy Smyser, *Unlawful Marketing? Highland Park Lawsuit Targets Maker of Gun Used in Mass Shooting*, NBC (July 5, 2023) <https://www.nbcchicago.com/news/local/unlawful-marketing-highland-park-lawsuit-targets-maker-of-gun-used-in-mass-shooting/3180409> [<https://perma.cc/M4EE-MHGF>] (mentioning the ongoing litigation as of July 2023, with no later sources identified).

140. Complaint, *Torres v. Daniel Defense* (No. 2022cv00059) (W.D. Tex. Nov. 28, 2022). Accessible at Justia Law, <https://dockets.justia.com/docket/texas/txwdce/2:2022cv00059/1197677> [<https://perma.cc/L7YP-5LVF>]. See also *Uvalde Victims Sue Gunmaker, Gun Store, and Law Enforcement*, EVERYTOWN L. (Nov. 28, 2022), <https://everytownlaw.org/case/uvalde-victims-sue-gunmaker-gun-store-and-law-enforcement> [<https://perma.cc/W6CX-ZUT3>].

141. Stella Chan & Alaa Elassar, *Uvalde Parents Have Filed a Federal Lawsuit Against Gun Manufacturers, the School District and Others*, CNN (Sept. 29, 2022, 11:04 PM EDT), <https://www.cnn.com/2022/09/29/us/uvalde-victims-lawsuit-gun-manufacturers-school-district> [<https://perma.cc/ZE4D-QH8C>].

Smith & Wesson (2022) <sup>142</sup>	Exception; Marketing	United States Court of Appeals of the Third Circuit	Attorney General sought documents regarding gun manufacturer advertising (including on home safety) under the New Jersey Consumer Fraud Act <sup>143</sup>	filed subpoena, in response Smith & Wesson sued the State of New Jersey in District Court seeking to enjoin the state court from enforcing the subpoena, <sup>144</sup> court dismissed, <sup>145</sup> Third Circuit later allowed additional challenges by Smith & Wesson on procedural grounds. <sup>146</sup>
City of Gary v. Smith & Wesson (2019) <sup>147</sup>	Predicate Exception; Public Nuisance; Deceptive Advertising	Indiana / Indiana Supreme Court	City of Gary lawsuit against firearms manufacturer for public safety risk of high gun-related crime rates	Indiana Supreme Court denied <sup>148</sup> manufacturers' dismissal challenges both pre-and post-PLCAA (including after retroactive immunity extended) <sup>149</sup> Most recently found that state immunity statute and PLCAA did not bar city's nuisance claims, <sup>150</sup>

142. Smith & Wesson Brands Inc v. Attorney General New Jersey (No. 21-2492) (3d Cir. 2022). Accessible at Justia Law, <https://law.justia.com/cases/federal/appellate-courts/ca3/21-2492/21-2492-2022-03-10.html> [<https://perma.cc/9ZC6-K2GG>].

143. Bernard Bell, *The Scope of State Attorney General Subpoenas: Smith & Wesson v. Grewal*, DUKE CTR. FIREARMS L. (Dec. 24, 2020), <https://firearmslaw.duke.edu/2020/12/the-scope-of-state-attorney-general-subpoenas-smith-wesson-v-grewal> [<https://perma.cc/PW5T-NTYH>].

144. Smith & Wesson v. Grewal (2:20-cv-19047, No. 1) (Dec. 15, 2020), <https://www.courthousenews.com/wp-content/uploads/2020/12/smith-wesson.pdf> [<https://perma.cc/4QRE-53PC>].

145. Opinion, Smith & Wesson v. Grewal, 2:20-cv-19047-JXN-ESK, No. 46 (Aug. 20, 2021). Accessible at <https://www.courthousenews.com/wp-content/uploads/2021/08/2021-03-8-10-31-28-NJ19047.pdf> [<https://perma.cc/G3DH-ZAHK>].

146. Smith & Wesson Brands, Inc. v. Att’y. Gen. N.J., 27 F.4th 886 (3d Cir. 2022); Miles Kohrman, *Smith & Wesson Gets Second Chance to Avoid Release of Internal Documents*, TRACE (Mar. 10, 2022), <https://www.thetrace.org/2022/03/smith-wesson-new-jersey-lawsuit-advertising-court> [<https://perma.cc/6UPS-WA86>].

147. City of Gary v. Smith & Wesson Corp., 126 N.E.3d 813 (Ind. Ct. App. 2019); Dru Stevenson, *New Decision in a (Very) Old Case: City of Gary v. Smith & Wesson Corp.*, SECOND THOUGHTS, DUKE CTR. FIREARMS L. (Dec. 13, 2019), <https://firearmslaw.duke.edu/2019/12/new-decision-in-a-very-old-case-city-of-gary-v-smith-wesson-corp/> [<https://perma.cc/84CE-C97N>].

148. Opinion, City of Gary v. Smith & Wesson (Ind. Ct. App. May 23, 2019), accessible at [https://brady-static.s3.amazonaws.com/Download/GaryCourtOfAppealsDecision\\_05-23-2019.pdf](https://brady-static.s3.amazonaws.com/Download/GaryCourtOfAppealsDecision_05-23-2019.pdf) [<https://perma.cc/MBS7-2EBF>]; *20 Years in the Making: Brady Applauds Indiana Supreme Court Decision Allowing Landmark City Lawsuit to Proceed Against Gun Industry*, BRADY (Nov. 26, 2019), <https://www.bradyunited.org/press-releases/20-years-in-the-making-brady-applauds-indiana-supreme-court-decision-allowing-landmark-city-lawsuit-to-proceed-against-gun-industry> [<https://perma.cc/E9SZ-JS4B>].

149. *City of Gary v. Smith & Wesson*, BRADY UNITED, <https://www.bradyunited.org/legal-case/city-of-gary-v-smith-and-wesson-indiana-supreme-court-gun-lawsuit> [<https://perma.cc/WFZ7-9TAJ>].

150. Denial Order at 3-4, City of Gary v. Smith & Wesson, No. 18A-CT-00181 (Ind., Nov. 26, 2019). Accessible at <https://publicaccess.courts.in.gov/Appellate/Document?id=2ac9df18-f90c->

## Mass Shootings and Mass Torts

				case now in discovery against manufacturer
National Shooting Sports Foundation v. James (2022) <sup>151</sup>	Predicate Exception <sup>152</sup> ; Public Nuisance	New York / United States District Court for the Northern District of New York	Challenge to New York public nuisance statute (§898-a-e of the New York General Business Law <sup>153</sup> ) which provides oversight to firearms manufacturers	Dismissed by United States District Court for the Northern District of New York <sup>154</sup>
City of Kansas City, Missouri v. Jimenez Arms, et. al., Case No. 2016-cv00829 (2022) <sup>155</sup>	Public Nuisance; Negligent Entrustment	Missouri / Jackson County court	City of Kansas City lawsuit against a firearm manufacturer and multiple local firearm dealers for contributing to local gun violence.	Summary judgement decision by Jackson County court <sup>156</sup> allowing public nuisance challenge to proceed (individual defendants have reached resolutions, including through conduct template agreements and settlements).

4f52-9694-8cb1a20c578d [https://perma.cc/V3DK-BXHK], also at https://brady-static.s3.amazonaws.com/Download/GaryCourtOfAppealsDecision\_05-23-2019.pdf [https://perma.cc/5XTH-SLFQ].

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

152. Y. Peter Kang, *NY Ruling Seen As Big Step Toward Gun Industry Reckoning*, LAW360 (May 26, 2022), https://www.law360.com/articles/1497527/ny-ruling-seen-as-big-step-toward-gun-industry-reckoning [https://perma.cc/35T2-GXK6].

153. N.Y. GEN. BUS. LAW § 898-E.

154. *Nat'l Shooting Sports Found.*, 604 F. Supp. 3d at 69 (granting motion to dismiss).

155. One additional petition by Kansas City, Missouri, against firearm manufacturer Jimenez Arms has been filed using a public nuisance argument, but the litigation has since devolved into bankruptcy proceedings and so is not covered in detail here. *See City of Kansas City, Missouri v. Jimenez Arms, Inc. et al.*, EVERYTOWN L. (2023), https://everytownlaw.org/case/city-of-kansas-city-missouri-v-jimenez-arms-inc-et-al [https://perma.cc/4LYZ-DJ7V] (describing the original lawsuit); *City of Kansas City and Everytown Law Announce Settlement Agreement with Kansas City Area Gun Store to Prevent Illegal Gun Purchases*, EVERYTOWN L. (Mar. 8, 2023), https://everytownlaw.org/press/city-of-kansas-city-and-everytown-law-announce-settlement-agreement-with-kansas-city-area-gun-store-to-prevent-illegal-gun-purchases [https://perma.cc/NS3D-39BW] (providing information on 2023 settlement); *see also* Matthew, *supra* note 12, at 417 (describing harm to the city and negligent entrustment as motivating the suit).

156. This allowance is perhaps especially significant, given that Missouri courts were described as hostile to negligent entrustment claims just over a decade ago. *See* Andrew D. Holder, Comment, *Negligent Entrustment: The Wrong Solution to the Serious Problem of Illegal Gun Sales in Kansas* [Shirley v. Glass, 241 P.3d 134 (Kan. Ct. App. 2010)], 50 WASHBURN L.J. 743, 749 (2011) (“Negligent entrustment claims against sellers are not accepted in every state. . . . Missouri courts have declined to impose liability on sellers once a transaction is completed because after a completed sale, the seller has no control over the instrument.”).

## i. Expansion of PLCAA's Predicate Exception

One development in case law is an expansion of PLCAA's predicate exception, opening up space for mass tort claims even under PLCAA's restrictive context. As discussed in Part I, pre-PLCAA case law theories used in gun manufacturer tort claims ranged from public nuisance to negligent marketing to deceptive trade practices. After PLCAA's passage, circuit courts took a split view of whether to interpret predicate statute exceptions broadly or narrowly, with no clear comment from the Supreme Court on how closely "applicable" to the gun industry a state statute must be to offer an avenue for litigation.

However, this bifurcated status quo may have begun to change, starting in 2019 following the aftermath of Sandy Hook. While it is too early to predict whether there will be total unification in the circuits, some recent challenges indicate that there may be space for more pro-plaintiff views. The primary example of this potential comes from *Soto v. Bushmaster Firearms*, where families of children killed in Newtown, Connecticut's Sandy Hook Elementary School mass shooting sued Bushmaster Firearms (the gun manufacturer of the semiautomatic rifle used in the murders) under the Connecticut Unfair Trade Practices Act (CUTPA). Connecticut's Supreme Court held that CUTPA counted as a predicate statute for purposes of PLCAA's predicate exception—adopting the broad reading of PLCAA exception championed by the Second Circuit. Further, the Supreme Court refused to grant cert to gun-maker Remington's challenge—which sparked at least some optimism that the Court was not inclined toward the perspective of gun manufacturers. Some have cautiously heralded the decisions as a de facto declaration that PLCAA's predicate exception should be broadly construed,<sup>157</sup> at least for marketing-based claims like the ones pursued under CUTPA. Since *Soto*, four additional cases challenging gun manufacturers have proceeded under broad predicate exception theories,<sup>158</sup> with two offering in-court victories to plaintiffs.<sup>159</sup> While there still might be challenges that make their way to the Supreme Court, there is more evidence now than ever that a broad

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157. Mullenix, *supra* note 14, at 404, 410, 421-22 (describing the broad interpretation potentially at issue, and how the recent Connecticut decision and subsequent cert denial could be "tantalizing," and that "perhaps the most significant factor that suggests that the *Soto* litigation might trigger the evolution of a firearms mass tort litigation lies with the Connecticut Supreme Court's broad interpretation of PLCAA's predicate statute exception"). However, this pro-plaintiff inference from the Court's denial is not universally held—especially given the Court's recent jurisprudence around the Second Amendment.

158. See *Goldstein v. Earnest*, No. 37-2020-00016638-CU-PO-CTL (Super. Ct. San Diego Cnty. 2020); *Smith & Wesson Brands, Inc. v. Grewal*, No. CV2019047JXNESK, WL 3287072 (D.N.J. Aug. 2, 2021); Denial Order, *City of Gary v. Smith & Wesson*, No. 18A-CT-00181, (Ind. Nov. 26, 2019); *Nat'l Shooting Sports Foundation Inc. v. James*, 604 F.Supp.3d 48 (N.D.N.Y. 2022).

159. See *Goldstein*, No. 37-2020-00016638-CU-PO-CTL; *City of Gary*, No. 18A-CT-00181.

PLCAA expansion might stand, which in turn expands the viability of mass tort claims against gun manufacturers.

ii. Development of Marketing and Public Nuisance Theories of Liability

In addition to the broad reading of the predicate exception, a second major case law development in recent years arose from the success of marketing-based tort liability claims. Starting with *Soto*, five of the seven recent cases pursued such claims, either through deceptive acts of trade of commerce or negligent marketing of non-civilian firearms toward individuals. Specifically, the marketing cases focused on gun manufacturers' marketing towards "militaristic" young men who knew or reasonably should have known would be particularly susceptible for using firearms for mass shootings. With respect to evidence, *Soto* and its progeny highlighted changes in manufacturers' advertising before and after PLCAA (indicating that manufacturers knew their marketing practices would cause them to be liable absent protective statutes), evidence of specific militaristic features of the firearms' design, and the content of the marketing messaging itself.<sup>160</sup> A second form of marketing liability, though present only in *Grewal*, centers on manufacturers' deceptive marketing of guns as a home protection device, despite evidence to the contrary.<sup>161</sup> In that case, the New Jersey Attorney General opened a fraud probe against Smith & Wesson as to whether its advertising around self-protection was accurate—a redux of pre-PLCAA advertising claims.<sup>162</sup> These two examples are not completely dispositive. For example, it is true that Remington ultimately settled the *Soto* litigation (limiting the precedential value of the case),<sup>163</sup> and other challenges are likely to have long shelf lives

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160. The *Soto* litigation in particular drew attention to the marketing used around the Bushmaster firearm used in Newtown. Bushmaster's marketing materials included violent messages such as "[f]orces of opposition, bow down. You are single-handedly outnumbered." Matthew, *supra* note 12, at 411; *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 277 (Conn. 2019) (considering families' contention of militaristic advertising); *see also* Editorial, *The Deadly Fantasy of Assault Weapons*, N.Y. TIMES (Dec. 28, 2012), <https://www.nytimes.com/2012/12/29/opinion/the-deadly-fantasy-of-assault-weapons.html> [<https://perma.cc/JR3J-ZT85>] (describing further examples of militaristic marketing); Posess, *supra* note 124, at 580-83 (describing examples of militaristic advertising).

161. The lack of deterrent protections from gun ownership has long been asserted in public health circles, and recent studies have upheld that basic finding. *See* David M. Studdert et al., *Homicide Deaths Among Adult Cohabitants of Handgun Owners in California, 2004 to 2016*, 175 ANNALS INTERNAL MED. 804, 804-811 (2022).

162. *See* Andrew Ross Sorkin, *The Most Important Gun Lawsuit You've Never Heard of*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/03/02/business/dealbook/gun-control-lawsuit-new-jersey.html> [<https://perma.cc/7534-EZDS>].

163. Compare with Smith & Wesson's infamous settlement that led to the manufacturer facing backlash from industry counterparts in the pre-PLCAA era. Lytton, *Lawsuits, supra* note 21, at 1261; Jennifer Kim & Christa Nicols, *America's Gun Violence Epidemic: A Colossal, But Correctable, System Failure*, 77 N.Y.U. ANN. SURV. AM. L. 199, 205 (2022) (describing the settlement between Smith & Wesson and public entities and noting that the company later reneged on the agreement).

in appeals courts even if they go to trial in the first instances. Still, even these small victories indicate the viability of marketing claims in the mass torts context per Mullenix's criteria.

Public nuisance theories have also shown potential promise in the recent spate of gun manufacturer cases. The record is thinner here, with only one case and one primary statute pointing to public nuisance as a viable cause of action. First, the decades-long standoff between the City of Gary, Indiana and the gun manufacturer shows evolution in the treatment of public nuisance statutes. The city, a public plaintiff has long argued that gun manufacturers are civilly liable for unusually high gun violence in the city. Now, for the first time since the case was first brought decades ago, appeals courts have permitted the city's case to move forward. The litigation is now in discovery. More cases may be in the pipeline—a New York public nuisance statute specifically aimed at gun manufacturers has withstood judicial challenge, setting up a future application of the public nuisance statute as an exception to PLCAA. These examples may not be as promising as marketing claims. Public nuisance claims have not yet been rigorously tested for their feasibility in court, and public nuisance tort claims of any kind must face cries of backdoor regulation—much less public nuisance claims for a subject as touchy as guns.<sup>164</sup> Still, recent case law shows a revival and viability of at least some of the post-PLCAA claims against manufacturers,<sup>165</sup> making the theory deserving of mention among key case law developments.

### *B. Challenges to Developing Mass Tort Gun Manufacturer Claims*

Though recent movement around torts for gun manufacturer liability overall indicate that mass tort claims are viable, there are still several fields which raise concerns about whether tort claims against gun manufacturers can constitute a fully mature mass tort. Mullenix specifically articulates the factors of intransigence of corporate defendants, absence of clear judicial desire to aggregating and managing multiple claims litigation, and lack of current docket congestion as barriers. These factors are slightly revised below and recast in broader terms of (1) strength of the firearms industry and (2) need to establish aggregation. This Note then describes a third

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164. See Possess, *supra* note 124 at 568 (describing debates around “regulation-through-litigation”); see also Sonner, *supra* note 78, at 978 (“[M]ost courts refused to label nuisance laws ‘predicate statutes’ because the nuisance laws were not adequately applicable to the sale or marketing of firearms.”).

165. In addition to the development of legal theories of liability themselves, repeated lawsuits with similar theories inherently create the potential to improve discovery of underlying facts and public dissemination of discovery materials—a benefit to mass tort litigation based on similar claims. Mullenix, *supra* note 14, at 417. The history of tobacco litigation highlights this potential benefit. There, a key role of litigation against tobacco manufacturers was document discovery, a line of reasoning that has been explicitly compared to some of today's major gun manufacturer lawsuits. See, e.g., Sorkin, *supra* note 162 (noting that the outcome of the New Jersey Attorney General's suit “could have profound implications for the gun industry”).

barrier: (3) uneven state statutory treatment of gun manufacturer civil liability. Overall, this Section lays out these primary areas as challenging the idea that mass torts are a preferable strategy to pursue against gun manufacturers. This Section ultimately concludes that these challenges are not fatal to the development of mass tort claims and can be overcome in future litigation efforts.

### 1. Strength of the Firearms Industry

The first significant barrier to ongoing litigation is gun manufacturers' political strength. While the developments discussed in the previous Section have certainly improved the outlook for plaintiffs seeking to bring claims against gun manufacturers, the gun industry is still uniquely powerful. Take the PLCAA. Even the chinks in the armor displayed in recent litigation are just that—narrow gaps in an otherwise formidable legal scheme. Even the promising predicate exception route represents only a narrow sliver of the pre-PLCAA expanse of potential sources of manufacturer liability. Gun manufacturers are outliers compared to other manufacturers in that they are exempt from federal health and safety regulations,<sup>166</sup> which limits the accountability available. Both of these features are symptoms of a larger challenge—the gun lobby is organized, well-funded,<sup>167</sup> and operational across multiple levels of government.<sup>168</sup> This not only explains the current state of restrictive, pro-defendant legislation, but also raises the specter of lobbying succeeding in creating more restrictive legislation in the future even if some tort claims are able to temporarily proceed. More narrowly, the profitability of gun manufacturers<sup>169</sup> (including, as a result of the pandemic buying push that increased gun ownership in America)<sup>170</sup> could endanger manufacturers'

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166. VIOLENCE POLICY CENTER, MISFIRE: THE GUN INDUSTRY'S LACK OF ACCOUNTABILITY FOR DEFECTIVE FIREARMS 1 (2021), <https://vpc.org/wp-content/uploads/2021/03/Misfire.pdf> [<https://perma.cc/S5MS-9QJV>].

167. *National Rifle Assn: Summary*, OPENSECRETS, <https://www.opensecrets.org/orgs/national-rifle-assn/summary?id=d000000082> [<https://perma.cc/4LGF-VRLW>] (showing high spending by industry actors).

168. See Virginia Chamlee & Aaron Parsley, *The U.S. Lawmakers Who Have Received the Most Funding from the NRA*, PEOPLE MAG. (May 27, 2022, 11:17 AM EDT), <https://people.com/politics/the-lawmakers-who-receive-the-most-funding-from-nra> [<https://perma.cc/Q2DU-APST>]; Lauren McGaughy, *See How Much the NRA has Donated to Texas Elected Officials: The Actual Number Might Surprise You*, DALLAS NEWS (Sept. 19, 2019, 1:44 PM), <https://www.dallasnews.com/news/politics/2019/09/19/see-how-much-the-nra-has-donated-to-texas-elected-officials-the-actual-number-might-surprise-you> [<https://perma.cc/3KYH-Z96R>] (showing gun industry involvement at different levels of government).

169. Mary Louise Kelly, Taylor Hutchison & Courtney Dorning, *Gun Companies Have Made Billions of Dollars Since the Pandemic Began, Report Says*, NPR (June 3, 2022, 4:27 PM), <https://www.npr.org/2022/06/03/1102989967/gun-companies-have-made-billions-of-dollars-since-the-pandemic-began-report-says> [<https://perma.cc/FF4R-88WW>].

170. See Miller et al., *supra* note 6 and accompanying text.

willingness to come to the bargaining table<sup>171</sup>—a potentially important limitation.<sup>172</sup>

Still, these barriers are not reason to abandon viable mass tort claims. First and most obviously, the increased number of cases and especially the achievement of a settlement in the case of *Soto* indicate that the gun industry is not invincible. Additionally, the financially plagued NRA<sup>173</sup> faces diminished stature that could greatly limit its lobbying power. Finally, political winds may have begun to turn, with states like New York introducing legislation specifically targeting gun manufacturers, and even President Biden making public pronouncements that PLCAA might soon be in congressional crosshairs.<sup>174</sup> The gun lobby certainly has a head start and good reasons to avoid the negotiating table—this may mean that any promising changes will be a long time coming. However, that is no reason to declare mass torts unviable as a litigation strategy.

## 2. Establishing Aggregation

Another, less explicit barrier comes from the relative novelty of aggregate litigation against the gun industry. The underlying criminal nature of gun violence raises the pro-defendant objection that liability should be contained to only the immediate perpetrator who fires the gun. This assumption, and the inherent political touchiness surrounding gun-related claims perhaps represent a historical barrier to aggregation which mass tort claims against manufacturers could struggle to overcome. But as scholars such as Abbe Gluck have pointed out, there are reasons to be optimistic about the potential of aggregation related to gun claims even given such limitations.<sup>175</sup> First, aggregation is not entirely novel to gun litigation. Defective design claims have already given rise to classes of

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171. Contrast this with the mechanics of the opioid litigation, where AGs were able to offer a worn-down Sackler family attractive settlement deals. *See, e.g.*, Press Release, Office of the Attorney General, Attorney General Tong Compels Purdue Pharma and Sackler Family to Pay \$6 Billion to Victims, Survivors and States, OFF. OF THE ATT'Y GEN. (Mar. 3, 2022), <https://portal.ct.gov/ag/press-releases/2022-press-releases/ag-tong-compels-purdue-and-sacklers-to-pay-six-billion-to-victims-survivors-and-states> [<https://perma.cc/3J6C-UY4R>].

172. Mullenix, *supra* note 14, at 426-27 (“The intransigence of corporate defendants and their insurers to come to the negotiation table is indicative of an immature mass tort, wherein defendants have few incentives to settle claims. Defendants’ strategic litigation posture affects the development of mass tort litigation. Hence, to the degree that a defendant adopts a ‘no settlement’ strategy, the evolution of a mass tort will be impeded by the necessity of plaintiffs to continually sue intransigent defendants.”).

173. Tim Mak, *Judge Dismisses NRA Bankruptcy Case, Heightening Risk for Dissolution of Group*, NPR (May 11, 2021, 6:43 PM), <https://www.npr.org/2021/05/11/995934682/judge-dismisses-nra-bankruptcy-case-heightening-risk-for-dissolution-of-group> [<https://perma.cc/YQ4M-SE4X>].

174. *Fact Sheet*, *supra* note 70.

175. Gluck, Nabavi-Noori & Wang, *supra* note 75, at 90, 96 (noting the potential of mass tort litigation and that “[a]ggregation and aggressive claims remain live possibilities for innovative lawsuits against the firearm industry”).

plaintiffs.<sup>176</sup> However, public opinion has generally become receptive to gun controls,<sup>177</sup> eliminating at least one political barrier for elected AGs sensitive to political sensitivities of their citizenries. And finally, the increasing nature of gun violence and specifically mass shootings—and commonalities between the kinds of perpetrators, victims, mass shooting locations, and weapons used—translates to similarities among plaintiffs that could similarly lower barriers to aggregating claims.<sup>178</sup> Other public health mass torts provide helpful precedent. Asbestos and lead paint claims—“toxic torts” that displayed the power of class-based mass tort suits<sup>179</sup>—indicate how gun victims could form as a class, such as the class of victims of a particular shooting (a single incident), or who experienced a general type of shooting incident (multiple similar incidents, such as school shootings). Opioid litigation and products liability cases aggregated into multidistrict litigation indicate the feasibility of taking on multiple actors with nationwide presence (for example, major gun manufacturers or all gun manufacturers making and advertising semi-automatic rifles). Recent successes of the opioid litigation may pave the way for aggregating litigation against gun manufacturers.<sup>180</sup>

### 3. Uneven State Protections for Gun Manufacturers

Finally, uneven state statutory environments could complicate the development of gun industry mass torts. As described above, states had differing levels of civil protections for gun manufacturers even before PLCAA, and those statutes will still pose a barrier even if the current Congress were to pull a political miracle and punt the PLCAA. Thirty-four states have some form of gun immunity statute<sup>181</sup> which might all but foreclose action in those states. In the opposite camp are states that have public nuisance or other statutes targeting gun manufacturers specifically,

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176. See, e.g., *Sig Sauer Settlement Announcement*, SIG SAUER, <https://www.sigsauer.com/pub/media/sigsauer/resources/Short-Form-Agreement-Notice.pdf> [<https://perma.cc/X96E-725X>] (describing faulty trigger design as part of a settlement notification); *Pollard v. Remington Arms Co.*, 896 F.3d 900 (8th Cir. 2018) (complaining in a class action lawsuit of rifles that discharged unexpectedly).

177. Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2023), <https://www.pewresearch.org/short-reads/2023/09/13/key-facts-about-americans-and-guns> [<https://perma.cc/S7BU-D9J4>].

178. Gluck, Nabavi-Noori & Wang, *supra* note 75, at 96-97.

179. See, e.g., BRENT A. OLSON, CALIFORNIA BUSINESS LAW DESKBOOK § 45:8 (2022), Westlaw CABUSLAWD (discussing the large classes involved in toxic torts, which includes subjects like asbestos).

180. And while there has not been massive docket congestion against gun manufacturers to date, the exponential rise of such suits in the past few years alone indicates that the current trickle of cases may quickly become a flood.

181. *Gun Industry Immunity*, *supra* note 62 (“At the state level, gun industry immunity laws have now also been adopted in some form in 34 states”). In contrast, eighteen states specifically allow gun manufacturer liability, creating opportunity for aggregation at least among those states. *Repeal Gun Industry Immunity*, EVERYTOWN (Feb. 13, 2023), <https://www.everytown.org/solutions/industry-reform> [<https://perma.cc/BG49-6JBS>].

or that might consider such legislation. However, these two groups have very little overlap and illustrate the controversy surrounding gun litigation, a controversy which would make it difficult to gain the kind of bipartisan consensus on a mass tort action that made previous public-health-based mass torts successful.<sup>182</sup> Gun statutes could appear as radioactive subjects for many politically minded state AGs. Even for AGs in blue states that may ostensibly be more friendly to mass tort efforts, the recent instability<sup>183</sup> of the National Association of Attorneys General may cause AGs to shy away from such controversial litigation.

While certainly a limitation for mass tort developments, uneven state statutes should not preclude the development of mass torts against gun manufacturers given (1) the ability to focus on less-problematic consumer protection claims and (2) the potential role of political subdivisions below the state. The kinds of tort claims in *Soto*, the most successful recent litigation, relied not on any specific anti-gun statute but on a fairly generic consumer protection statute available in many states—including statutes on unfair and deceptive acts.<sup>184</sup> The consumer protection angle is not only widely available and recently successful in court (as exhibited in *Soto*)<sup>185</sup> but also may be more politically palatable than public nuisance statutes that have historically caused controversy. Uneven state statutes and wary state AGs does not eliminate the role of state subdivisions. Recent opioid litigation shows how important cities' involvement can be, with non-state public plaintiffs bringing many important bellwether cases.<sup>186</sup> And pre-PLCAA gun industry litigation frequently featured cities and municipalities' actions,<sup>187</sup> a legacy upheld by current manufacturer lawsuits such as that brought by the City of Gary. State subdivisions may have their own laws and causes of action that avoid much of the statutory and political

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182. For example, opioid, tobacco, and lead paint cases. *But see* Sonner, *supra* note 78, at 974 (describing tobacco lawsuits proceeding through class action).

183. Emma Wulfhorst, *Knudsen, 2 Other Attorneys General Leave National Organization*, KECI (May 9, 2022, 5:43 PM ET), <https://nbcmontana.com/news/local/knudsen-3-other-attorneys-general-leave-national-organization> [<https://perma.cc/9NCM-UTEL>].

184. CAROLYN CARTER, NCLC CONSUMER PROTECTION CONSUMER IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICE LAWS 9 (Mar. 2018) [https://www.nclc.org/wp-content/uploads/2022/09/UDAP\\_rpt.pdf](https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf) [<https://perma.cc/8K2A-GKVP>] (describing and comparing different consumer protection laws and noting that the laws are common); *see also* Matthew, *supra* note 12, at 402 (discussing the success of CUTPA in the *Soto* litigation and noting that most states have enacted unfair trade practice statutes with protections similar to Connecticut's); Possess, *supra* note 124, at 583 (analyzing similarities between CUTPA and other states' unfair trade practices statutes).

185. *See* Harp, *supra* note 124, at 811 (discussing CUTPA, Connecticut's unfair trade practices law).

186. *See, e.g.,* City & Cnty. S.F. v. Purdue Pharma L.P., 491 F. Supp. 3d 610 (N.D. Cal. 2020) (offering an example of one such bellwether case by a city attorney general office); *see also* San Francisco City Attorney Announces \$230 Million Settlement with Walgreens After Victory in Opioid Litigation, CITY ATT'Y OF S.F. (May 17, 2023), <https://www.sfcityattorney.org/2023/05/17/san-francisco-city-attorney-announces-230-million-settlement-with-walgreens-after-victory-in-opioid-litigation> [<https://perma.cc/43SF-RENX>] (discussing the significance of the case).

187. *See supra* Section I.B.

quagmire in existence at the state level. And because PLCAA's predicate exception counts city and county laws as "state" laws for purposes of the exception,<sup>188</sup> cities' diverse statutory environments are equally important "hooks" for developing claims against gun manufacturers that could quickly develop into a mass tort.<sup>189</sup>

### III. Future Directions: Legal Theories and Legislative Learning

So far, this Note has described the historical and statutory context for gun manufacturer liability and laid out an argument that mass tort claims have a viable path forward, albeit not without challenge. This Part now looks to the future to suggest concrete strategies to bring about mass tort actions against gun manufacturers. Specifically, this Part recommends that those developing mass tort claims against gun manufacturers (1) focus on the context of mass shootings, (2) bring marketing-based and public nuisance causes of action, and (3) continue to push for new "applicable" state legislation and repeals of unfavorable state statutes as part of litigation strategy under the PLCAA. These suggestions are not meant to be a comprehensive how-to guide for litigation. However, these macro-level suggestions provide insight into future directions based on the history of litigation against gun manufacturers, adjusted for the recent spate of cases which make up the current exciting moment of litigation. These recommendations therefore situate themselves in both cutting edge legal scholarship and practice.

#### A. Focus on Mass Shooting Victims as a Plaintiff Group

A first recommendation for attorneys seeking to contribute to mass tort litigation is to focus plaintiff groupings on those affected by mass shootings, rather than other forms of gun violence like homicide or suicide. There are both political and strategic legal reasons for doing so.

Beyond the general justification of focusing on mass shooting victims, there is the question of how exactly plaintiffs might be defined in a mass torts context. First, "plaintiff" could be defined broadly. Mass shooting victims include not only the large number of individuals physically killed

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188. *Gun Industry Immunity*, *supra* note 62 (noting that for purposes of assessing knowing violations of law "[s]tate" laws are defined . . . to also include the laws of any U.S. territory as well as the laws of local political subdivisions, such as cities and counties").

189. *See Harp*, *supra* note 124, at 813 (discussing the need for a statute for public suits to proceed). A final state-focused factor includes the choice of venue between state and federal courts under the Class Action Fairness Act (CAFA), a tort reform statute that provided federal jurisdiction for mass torts over of more than 100 claimants. *See Class Action Fairness Act of 2005*, 28 U.S.C. §§ 1332(d), 1453, 1711-15. While most mass shootings thankfully have fewer than 100 directly shot victims, for the reasons enumerated above (namely the wider expanse of survivors that could include family and non-injured survivors with mental health impacts, and the potential to aggregate between shooting events), the choice of venue is not elaborated in text here. *See supra* Section II.A.

or injured from bullets in a mass shooting incident, but also their loved ones, affected bystanders (e.g., those attending the same concert, school, party, or parade at the time of the shooting), and the public entities (cities or states) left picking up the pieces of such a massive breach of public trust. With more than 500 mass shootings in 2022 alone, and similar numbers of mass shootings repeated in multiple years, there are many potential plaintiffs who could qualify for bringing mass tort claims against gun manufacturers.<sup>190</sup>

Then there is the matter of organizing the plaintiffs into mass torts litigation. First, the large number of potentially implicated plaintiffs points to the potential for a massive number of individual claims against gun manufacturers that could be aggregated through MDLs in the model of opioid litigation. This version of mass torts would provide a direct extension of the current, rapidly proliferating claims by family members and estates of mass shooting victims. If pursued on a larger scale, these claims could soon threaten docket congestion.

Another option would be to treat plaintiffs as classes for purposes of class action aggregation. This could be pursued either by forming a class of a specific mass shooting incident, or across incidents based on factual similarities. Victims, survivors, cities, and other plaintiffs could aggregate by mass shooting incident and focus their arguments on the specific linkage between the particular perpetrator and gun manufacturers' actions in a specific incident. This form of aggregation may be especially helpful for including a wide array of plaintiffs. A class could also be built by looking across mass shooting incidents based on the tragic similarities between many mass shootings. High-profile mass shootings often follow a familiar script: a young man uses a assault-style and high-capacity<sup>191</sup> rifle (rifles sold in part with appeals to militaristic machismo)<sup>192</sup> to commit a mass shooting in a public place. This similarity opens up the potential of aggregating

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190. Between 1999 and 2020, more than 2,000 people were injured or killed in mass shooting events, with many more witnessing the violence firsthand. Chris Canipe, *A Timeline of Mass Shootings in the U.S.*, REUTERS (May 31, 2021), <https://www.reuters.com/graphics/USA-GUNS/MASS-SHOOTING/nmovardgrpa> [<https://perma.cc/QA63-LSCM>]. If each of those 2,000 individuals has the average of about 3.13 total people per household, then a total calculation of victims plus their affected family members means, there could be a total of more than 6,000 direct victims alone who would have strong legal theories to pursue under current case law. See *Average number of people per family in the United States from 1960 to 2022*, STATISTA (2022), <https://www.statista.com/statistics/183657/average-size-of-a-family-in-the-us> [<https://perma.cc/5TKE-TW5Z>] (offering one plausible value for estimating household size at 3.13). Cities, counties, and states also have strong basis under even the most restrictive existing legal theories for engaging in such suits, increasing the baseline number of plaintiffs.

191. See *Mass Shootings in America*, EVERYTOWN RSCH. & POL'Y (Mar. 2023), <https://everytownresearch.org/maps/mass-shootings-in-america> [<https://perma.cc/866S-SXPF>] (describing the prevalence of assault rifles and high-capacity magazines and describing how men who engage with misogynistic and white supremacist ideologies were involved in the deadliest mass shootings).

192. Associated Press, *Gun-Makers Made Millions Marketing AR-15-style Guns as a Sign of Manhood*, NPR (July 28, 2022), <https://www.npr.org/2022/07/28/1114211674/gun-makers-made-millions-marketing-ar-15-style-guns-as-a-sign-of-manhood> [<https://perma.cc/4GPA-9QV7>].

litigation or building plaintiff classes across incidents. Semiautomatic rifles are a particularly close fit to the militaristic and deceptive marketing favored by recent case law. Semiautomatic rifles themselves are less popular than handguns,<sup>193</sup> and a large share are manufactured by only a few companies in the already highly concentrated gun industry.<sup>194</sup> Therefore, a wide swath of the over 600 mass shooting incidents could be linked to just a few defendants and their specific product and marketing of that product, creating the potential for aggregating plaintiffs across mass shooting instances.<sup>195</sup> Mass shootings’ tragic similarities make related claims particularly suited to aggregated litigation.

*B. Continue Pursuing Dominant Legal Theories: Marketing and Public Nuisance*

With a plaintiff strategy in place, the next point is the development of the legal theory. This Note’s second recommendation for structuring mass tort claims is focusing on relatively solid ground of marketing-based legal theories, while continuing to lay the groundwork for public nuisance actions. As discussed at length in Section II.A, legal theories based on wrongful marketing of rifles towards young, militaristic men have found measured success in courts in recent years, including in *Soto*.<sup>196</sup> As authors such as Mullenix have noted, *Soto*’s success is further contextualized by how common CUPTA-like consumer protection laws are across states.<sup>197</sup> Further, marketing theory has particularly strong roots in pre-PLCAA litigation in the category marketing-overpromotion litigation described in Table 1.<sup>198</sup> This theory also aligns with the overpromotion claims featured in what is perhaps the most successful mass tort litigation of the era—opioid MDLs.<sup>199</sup> Concentration of efforts in this way has important knock-

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193. Travis Mitchell, *The Demographics of Gun Ownership*, PEW RSCH. CTR. (2022), <https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership> [<https://perma.cc/BH26-FCJE>] (“Among those who own a single gun, most (62%) say that gun is a handgun or pistol, while far fewer say they own a rifle (22%) or a shotgun (16%)”).

194. Madia Coleman et al., *The Gun Industry in America*, CTR. AM. PROGRESS (2022), <https://www.americanprogress.org/article/gun-industry-america> [<https://perma.cc/7JVE-Y9WV>] (“While there are a significant number of gun manufacturers in the United States, total gun production is largely concentrated among a few large companies”).

195. This similarity makes it more plausible to develop a plaintiff class than, for example, seeking to aggregate more diffuse handgun-based homicide and suicide cases—at least at this stage of gun industry liability.

196. See *supra* Section II.A.

197. See Mullenix, *supra* note 14, at 422 (“The Connecticut Supreme Court’s decision may prove to be a sweeping precedent, insofar as virtually every state has some form of a consumer protection and unfair trade practices statute.”); CARTER, *supra* note 184 (describing and comparing state consumer protection laws).

198. See *supra* Section I.A.

199. Deceptive marketing claims such as those cited by New Jersey’s former attorney general in attempts to gather documents on gun manufacturers’ advertising and marketing practices are also related to marketing-overpromotion claims. However, because such deceptive

on effects in that once key documents are obtained in discovery in a few marketing-based cases (such as those currently being pursued in *Grewal* and *City of Gary*), this evidence could be used to better develop future claims. Considering the high concentration of gun manufacturers, even a single successful spate of discovery that puts gun manufacturers' marketing practices in the public eye could be pivotal for building mass tort claims.

While more dependent on exogenous statutory factors discussed in the next section, public nuisance theories should continue to hold sway. From pre-PLCAA victories to the current *City of Gary* litigation (featuring a public nuisance claim from a city with high gun violence levels),<sup>200</sup> public nuisance claims can play an important role in gun manufacturer suits.<sup>201</sup> Public nuisance claims are particularly well-suited for mass shooting contexts where shootings take place in public places<sup>202</sup> (or at least publicly operated places like public schools) and interfere with entire cities' functioning. One need only review accounts of small towns like Uvalde<sup>203</sup> after a mass shooting to understand how disruptive and deeply felt mass shootings are within a town. Public nuisance claims' renewed relevance in popular conversations and legal strategies (such as the use of public nuisance claims in opioid and climate change tort litigation) also points to their potential importance for the gun manufacturer context. Gun violence, like climate change and opioid deaths, are highly salient to the public conscience. There has also been public awareness of victories in the opioid space.<sup>204</sup> Now that opioids have made public nuisance look possible as a strategy to hold companies responsible for their harms, gun litigants may be better placed to act.<sup>205</sup> Still, the controversial nature of public

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marketing claims generally focus on misrepresentations in relation to the home-defense benefits of gun ownership, and because majority of the cases summarized in Table 2 focus on theories related to knowing marketing to customers which include individuals with a high likelihood of becoming mass shooters, deceptive marketing claims are not focused on here as a primary legal theory. Instead, their relevance belongs primarily in the following section on legislative strategies. As for the opioid MDLs, that effort's maturation may offer a view of a counterfactual world where PLCAA protections were not imposed and instead were able to mature. *See also* Levin & Lytton, *supra* note 12, at 845 (noting that "[l]itigation phenomena sometimes develop and mature over time," including with opioids).

200. *City of Gary*, 126 N.E.3d at 819.

201. *See, e.g.*, Gregory Heinen, *How New Public Nuisance Claims are Targeting Gun Cos.*, LAW360 (Sept. 16, 2022), <https://www.foley.com/en/insights/publications/2022/09/public-nuisance-claims-targeting-gun> [<https://perma.cc/QU3E-XG9E>] (indicating potential future importance for such suits).

202. *See* Restatement (Second) of Torts § 821B (Am. L. Inst. 1965).

203. Jinitzail Hernandez, *Grief Shattered Uvalde; It Has United It, Too*, TEX. TRIB. (May 27, 2022, 2:00 PM CT), <https://www.texastribune.org/2022/05/27/uvalde-school-shooting-community-video> [<https://perma.cc/EKR9-VN2K>].

204. *See, e.g.*, *Dopesick* (Hulu broadcast Oct. 13, 2021); THIS MIGHT HURT (broadcast Feb. 21, 2020); *Do No Harm: The Opioid Epidemic* (2019) (providing examples of just some of the many pop cultural depictions of the fight against the Sacklers and opioid companies).

205. Of course, there are important tradeoffs involved with large, class-based litigation that might not be responsive to individual gun violence victims' needs. The discussion of class-based litigation raises an opportunity to caution practitioners to build plaintiff classes not only

nuisance suits in tort law<sup>206</sup> may caution against using public nuisance theories as the primary legal strategy.

*C. Building State Legislative Basis for PLCAA Exceptions*

Finally, any serious consideration of mass torts against gun manufacturers necessitates an embrace of state legislative strategy. The role of the PLCAA’s predicate exception and state statutes in recent cases drive home the importance of state statutes for linking harms to gun manufacturers. A broadly interpreted predicate exception is one of the most promising ways for victims to pursue tort claims against gun manufacturers,<sup>207</sup> especially for public plaintiffs like state Attorney Generals seeking a state hook to their claims.<sup>208</sup> However, this requires positive legislation to exist in the first place. For this reason, this Note echoes existing literature recommendations to pursue even modest legislative proposals to improve the likelihood of successful litigation against firearm manufacturers under the PLCAA’s predicate exception.<sup>209</sup> Recent movements to create gun manufacturer liability in New York, New Jersey, Delaware, and California<sup>210</sup> offer an important starting point for a more litigation-supportive statutory environment. New York’s public nuisance law offers a specific example of gun-related legislation that could expand the capability for mass tort claims under the PLCAA. The statute, recently upheld in federal district court<sup>211</sup> counts as “applicable” to gun manufacturers for the purposes of the PLCAA, enabling litigation. The elimination of manufacturer-protective statutes is equally important, and states should follow the lead of California<sup>212</sup> to seek to repeal statutes that

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based on legal strategy, but also based on the needs of the communities affected, in line with movement lawyering principles. *See, e.g.*, Cici Yongshi Yu, *Opioid Victims Struggle with Purdue Pharma Settlement’s High Bar*, BLOOMBERG LAW (Aug. 8, 2023, 5:00 AM ET), <https://news.bloomberglaw.com/health-law-and-business/opioid-victims-struggle-with-purdue-pharma-settlements-high-bar> [<https://perma.cc/ULC2-8XFW>] (offering insight into the complications surrounding individual victims’ interactions with large, class-based litigation). *See generally* Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (offering a founding perspective on the potential harms of class-based litigation unresponsive to plaintiffs’ actual needs).

206. *See* Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism*, 9 EUR. J. RISK REGUL. 48-65 (2018) (describing similar debates).

207. *See, e.g.*, *Nat’l Shooting Sports Found., Inc.*, 604 F.Supp.3d at 55-56.

208. *See* Harp, *supra* note 124, at 813 (describing the need for predicate statutes within the state).

209. *See* Gluck, Nabavi-Noori & Wang, *supra* note 75, at 97.

210. *Gun Industry Immunity*, *supra* note 62. It is possible that other legislative efforts exist, but have not yet been made public.

211. Theodore Wells, *Gun Manufacturers Unsuccessfully Challenge Constitutionality of New York Law*, N.D.N.Y. FED. CT. BAR ASS’N (Sept. 11, 2022), <https://www.ndnyfcb.org/gun-manufacturers-unsuccessfully-challenge-constitutionality-of-new-york-law> [<https://perma.cc/BJT7-QXQ5>].

212. *See* Press Release, Adam Schiff, House of Representatives, Schiff Bill to Repeal Gun Industry Liability Shield Passed Out of Committee (July 21, 2022), <https://schiff.house.gov/>

provide additional mass tort immunity to gun manufactures. Overall, legislative movements should be supported as key components of mass torts litigation strategy. Finally, it should be noted that while the NAAG may not be a primary forum for proliferating these statutes, state Attorney General offices can play an important role in shaping gun legislation at the state and local<sup>213</sup> levels, and vice versa.<sup>214</sup> State and local policymakers, as well as state Attorney General offices, may yet play a transformative role in defining a new scope of gun manufacturer civil liability. Legislative action can serve as a vital partner to litigation in gun manufacturer cases.

#### IV. Conclusion

Mass shootings have become a tragic reality of American life. Civil claims against gun manufacturers have held a historic role in answering gun violence, but the future of such litigation post-PLCAA has long remained uncertain. This Note lays out how suing the gun industry has been a fraught practice for decades and how the PLCAA's strong federal protections have made it difficult to make headway in civil suits against gun manufacturers of any kind, much less the development of a more coordinated mass tort. However, this Note also analyzes recent updates for viability in the mass tort context and finds some potential for optimism for the development of a mass tort. Specifically, the wide availability of a plaintiff class, increased interest from the plaintiffs' bar, and a growing number of similar legal challenges have secured important milestones. The future path toward mass tort litigation against gun manufacturers is not without challenges. The continued strength of the firearms industry, the need to build momentum around case aggregation, and the uneven landscape of underlying state statutes could complicate efforts to develop a robust mass tort against gun manufacturers. However, this Note offers several prescriptive recommendations to help overcome these barriers. Focusing on mass shooting victims allows the creation of a clearly defined and politically robust plaintiff class. Among viable legal theories, litigators should continue the current emphasis on marketing-based claims that have

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news/press-releases/schiff-bill-to-repeal-gun-industry-liability-shield-passed-out-of-committee [https://perma.cc/BJT7-QXQ5]; *Nat'l Shooting Sports Found., Inc.*, 604 F.Supp.3d at 55.

213. See, e.g., Letter from Mark R. Herring, Va. Att'y Gen., to Jerrauld C. Jones, Member, Va. House of Delegates (Dec. 20, 2019), <https://www.oag.state.va.us/files/Opinions/2019/19-059-Jones-issued.pdf> [https://perma.cc/ST6Z-3ULL] (reinforcing that local resolutions are trumped by potential legislative efforts by the Virginia state legislature's gun violence prevention statutes); Press Release, S.C. Att'y Gen., SC Attorney General Wilson sues City of Columbia over unconstitutional city gun laws, (Jan. 29, 2020), <https://www.scag.gov/about-the-office/news/sc-attorney-general-wilson-sues-city-of-columbia-over-unconstitutional-city-gun-laws> [https://perma.cc/5VDZ-D3AV] (doing the same in the context of South Carolina).

214. See *Columbus and Dayton Sue Ohio Attorney General to Force Fix of Gun Background Checks*, CBS PITTSBURGH, (Nov. 9, 2020, 3:28 PM EST), <https://www.cbsnews.com/pittsburgh/news/ohio-cities-sue-to-force-fix-of-gun-background-checks> [https://perma.cc/9X9L-S5QC] (offering an example of locally led legal action directed at changing the state regulatory environment).

found success in courts and explore the role of the more-contested category of public nuisance claims. And finally, plaintiff-side advocates should continue to push for state laws that create or confirm civil liability for gun manufacturers and thus meet the PLCAA's predicate exception.

Lawsuits alone will not solve gun violence. The steadily climbing death tolls of gun violence will not be reversed even with the most successful claims against gun manufacturers. But tort claims, at their core, are an opportunity for remedy, to acknowledge a harm, to be recompensed for it. And gun violence in the United States has created a lot of harm. For decades, gun manufacturers have escaped accountability for their part in the bloodshed. Recent victories are only the start of a longer path towards holding manufacturers to account using mass tort. However, this future may not be as far off as it seems. The currently shifting landscape coupled with strategic litigation choices could mark the most important step forward in achieving a measure of accountability from gun manufacturers that the United States has seen in decades. This Note seeks to provide a stepping stone toward that future.