

NOTE

IMPERFECT IMMUNITY: HOW STATE ATTORNEYS GENERAL COULD SUE FIREARM MANUFACTURERS UNDER THE PREDICATE EXEMPTION TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

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INTRODUCTION	798
I. STATUTORY IMMUNITY FOR GUN MANUFACTURERS: STATE AND FEDERAL	802
A. <i>Federal Statutes: The Protection of Lawful Commerce in Arms Act</i>	803
B. <i>State Statutes: Civil Immunity for Gun Manufacturers Under State Law</i>	804
II. THE ROLE OF STATE ATTORNEYS GENERAL IN PAST LAWSUITS AGAINST FIREARM MANUFACTURERS	807
A. <i>Lawsuits Brought by Attorneys General Against Firearm Manufacturers</i>	807
1. Attorneys General's Pre-PLCAA Suits Against Firearm Manufacturers	807
2. Attorneys General's Post-PLCAA Suits Against Firearm Manufacturers	808
B. <i>Attorneys General's Supporting Role in Suits Against Firearm Manufacturers</i>	810
III. LOOKING TOWARD THE FUTURE: HOW STATE ATTORNEYS GENERAL COULD USE THE PLCAA'S PREDICATE EXCEPTION TO SUE FIREARM MANUFACTURERS	812
A. <i>Statutory Interpretation: The PLCAA</i>	813

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<i>B. Suing Gun Manufacturers Under State Law: Gun Industry Immunity & Finding a Viable Predicate Statute</i>	813
1. Gun Industry Immunity Under State Law (Illustrated by New York Law)	814
2. Predicate Statutes Under State Law (Illustrated by New York Law)	814
CONCLUSION	817

INTRODUCTION

Around the mid-1990s, exasperated gun-control activists turned to a theretofore unutilized means of reducing gun violence: the civil suit.¹ The theory was quite novel: sue firearm manufacturers for injuries caused by a criminal third-party using the manufacturers' non-defective products.² Municipalities and private plaintiffs led the charge, achieving a few promising results.³ Soon, State Attorneys General entered the fray.⁴ New York Attorney General Eliot Spitzer made history as the first State AG to file suit against firearm manufacturers when he sued several notable gun companies including Glock, Colt, Sturm-Ruger, and Beretta.⁵ A new age of private and state-sponsored suits against gunmakers seemed to be dawning.

But in less than a decade, gun-control activists' dreams of litigiousness all crashed back down to Earth. Appellate courts set aside hard-won jury verdicts against gun manufacturers.⁶ Attorney General Spitzer's suit could not even make it past a New York trial judge, and the Appellate Division's First Department quickly affirmed the dismissal of Spitzer's

¹ See Peter H. Schuck, *Why Regulating Guns through Litigation Won't Work*, in *SUING THE GUN INDUSTRY* 225–27 (Timothy Lytton, ed. 2005).

² See Scott R. Thomas & Mystica M. Alexander, *Suing Guns Out of Existence?*, 75 *WASH. & LEE L. REV. ONLINE* 175, 177 (2019); Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901(a)(3)–(8) (2012).

³ See Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, *N. Y. TIMES* (June 24, 1999), <https://www.nytimes.com/1999/06/24/us/lawsuits-lead-gun-maker-to-file-for-bankruptcy.html>; Robert M. Morgenthau, *Let Shooting Victims Sue*, *N. Y. TIMES* (June 23, 2013), <https://www.nytimes.com/2013/06/24/opinion/let-shooting-victims-sue.html>.

⁴ See Joe Mathews, *New York, Connecticut Consider Suits Against Gun Manufacturers; 'We Are on the Verge,' Says Spokesman for One Attorney General*, *BALTIMORE SUN* (Feb. 24, 1999), <https://www.baltimoresun.com/news/bs-xpm-1999-02-24-9902240256-story.html>.

⁵ N.Y. STATE OFFICE OF THE ATTORNEY GEN., *New York Becomes First State to Sue Gun Companies*, (June 25, 2000), <https://ag.ny.gov/press-release/2000/new-york-becomes-first-state-sue-gun-companies>.

⁶ See, e.g., *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 31–32 (2nd Cir. 2001).

claims.⁷ And in 2005, George W. Bush signed into law the Protection of Lawful Commerce in Arms Act (PLCAA).⁸

The PLCAA was a collaborative effort between Republican lawmakers and the deep-pocketed National Rifle Association (NRA).⁹ Broadly stated, the PLCAA provides gun manufacturers with civil immunity from claims arising out of injuries “resulting from the criminal or unlawful misuse of a [firearm] by . . . a third party.”¹⁰ As expected, the statute brought most suits against gun manufacturers to a screeching halt.¹¹

Of course, Attorneys General can still sue firearm manufacturers who clearly violate state laws. In recent years, New Jersey Attorney General Gurbir Grewal brought several lawsuits against manufacturers of guns and related paraphernalia.¹² But the law has precluded private plaintiffs—that is, victims of gun violence—from seeking recovery from gunmakers.¹³

But in 2019, a crack appeared in the gun industry’s statutory tort immunity.¹⁴ The Connecticut Supreme Court held that the Sandy Hook shooting victims could sue Bushmaster, which manufactured the AR-15 style rifle Adam Lanza used in his horrendous Newtown massacre.¹⁵ According to the Connecticut Court, the PLCAA did not bar *Soto v. Bushmaster* because the PLCAA’s “predicate exception” covered the plaintiffs’ claims.¹⁶ A lawsuit against a gun manufacturer may proceed under the predicate exception if the gun manufacturer “knowingly vio-

⁷ See *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 93–94 (1st Dep’t 2003).

⁸ Jim Dwyer, *A Law That Keeps Gun Makers Smiling*, N. Y. TIMES (May 28, 2013), <https://www.nytimes.com/2013/05/29/nyregion/a-law-that-keeps-gun-makers-smiling.html>; 15 U.S.C. §§ 7901 *et seq.* (2012).

⁹ See Dennis A. Henigan, *Sandy Hook Families Just Proved Congress Lied to Pass One of the NRA’s Favorite Bills*, SLATE (Mar. 28, 2019, 1:41 PM), <https://slate.com/news-and-politics/2019/03/sandy-hook-lawsuit-nra-plcaa-bushmaster-immunity.html>.

¹⁰ 15 U.S.C. § 7903(5)(A) (2012); see also Henigan, *supra* note 9.

¹¹ See Dwyer, *supra* note 8.

¹² See *Attorney General Files First State Lawsuit Against “Ghost Gun” Company*, TAPINTO (Mar. 26, 2019), <https://www.tapinto.net/towns/paterson/articles/attorney-general-files-first-state-lawsuit-against-ghost-gun-company-9>; see also Julie Shaw, *N.J. Attorney General Sues 2 Fla. Companies that Sell Large-capacity Firearm Magazines*, PHILA. INQUIRER (Dec. 20, 2019), <https://www.inquirer.com/news/new-jersey-attorney-general-gurbir-grewal-lawsuits-large-capacity-magazines-20191220.html>; see also Justine McDaniel, *N.J. Sues Gun Company Over Online Sales that Violate New Law*, PHILA. INQUIRER (June 19, 2019), <https://www.inquirer.com/news/guns-new-jersey-pennsylvania-las-vegas-sandy-hook-large-capacity-magazines-20190619.html>.

¹³ Dwyer, *supra* note 8; 15 U.S.C. §§ 7901 *et seq.* (2012).

¹⁴ See *Soto v. Bushmaster Firearms Int’l, LLC*, 331 Conn. 53, 98–100 (Sup. Ct. Conn. 2019).

¹⁵ See *id.*; see generally Nathan D. Harp, *Extralegal Influences on Juror Decision Making in Suits Against Firearm Manufacturers*, 54 CREIGHTON L. REV. 297 (Mar. 2021).

¹⁶ See *id.*; 15 U.S.C. § 7903(5)(A)(iii) (2012).

lated a State or Federal statute applicable to the sale or marketing” of firearms, and that violation was “a proximate cause of the harm for which relief is sought.”¹⁷ The *Soto* plaintiffs claim Bushmaster (and its owner, Remington) violated the Connecticut Unfair Trade Practices Act (CUTPA) by negligently marketing AR-15 style rifles.¹⁸ Thus, at trial, the plaintiffs must show that Bushmaster and Remington’s marketing violated CUTPA and proximately caused the Sandy Hook shooting.¹⁹ As of this writing, the *Soto* trial is slated to begin in September 2021.²⁰

While private plaintiffs acting as “private attorneys general” pursue the *Soto* case,²¹ a role remains for Attorneys-General-proper in the uncertain future of lawsuits against gun manufacturers. In fact, Connecticut’s then-Attorney General, George Jepson, filed an *amicus* brief with the Connecticut Supreme Court in support of the plaintiffs’ right to sue Bushmaster.²² More recently, New York Attorney General Letitia James made headline news when she sued to dissolve the NRA for years of financial impropriety among the organization’s executives.²³ While the NRA does not manufacture guns, the organization played a key role in securing civil immunity for gunmakers across the country.²⁴ Clearly, State Attorneys General are pursuing a range of attack-plans against gunmakers—but what more could they do? This Note will examine how States’ Attorneys General could use *Soto v. Bushmaster*’s legal break-

¹⁷ 15 U.S.C. § 7903(5)(A)(iii) (2012).

¹⁸ See *Soto*, 331 Conn. at 68.

¹⁹ See *id.* at 94.

²⁰ *Sandy Hook Lawsuit Against Gun-Maker Set for Trial in 2021*, U.S. NEWS (Dec. 11, 2019, 5:40 PM) <https://www.usnews.com/news/best-states/connecticut/articles/2019-12-11/sandy-hook-lawsuit-against-gun-maker-set-for-trial-in-2021>.

²¹ *Thames River Recycling, Inc. v. Gallo*, 50 Conn. App. 767, 794–95 (1998) (“The public policy underlying CUTPA is to encourage litigants to act as private attorneys general and to engage in bringing actions that have as their basis unfair or deceptive trade practices.”).

²² Brief for State of Connecticut and Department of Consumer Protection as Amici Curiae Supporting Appellants, *Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53 (2019) (S.C. 19832).

²³ See N.Y. State Office of the Attorney Gen., *Attorney General James Files Lawsuit to Dissolve NRA*, (Aug. 6, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-files-lawsuit-dissolve-nra>; Danny Hakim, *New York Attorney General Sues N.R.A. and Seeks Its Closure*, N.Y. TIMES (Aug 6, 2020) <https://www.nytimes.com/2020/08/06/us/ny-nra-lawsuit-letitia-james.html>; Erik Ortiz, *New York Attorney General Letitia James Sues to Dissolve NRA for ‘Fraud and Abuse’*, NBC NEWS (Aug 6, 2020), <https://www.nbcnews.com/politics/politics-news/new-york-attorney-general-letitia-james-files-lawsuit-dissolve-nra-n1236009>; Carol D. Leonnig & Tom Hamburger, *New York Attorney General Seeks to Dissolve NRA in Suit Accusing Gun Rights Group of Wide-ranging Fraud and Self-dealing*, WASH. POST (Aug 6, 2020), https://www.washingtonpost.com/politics/nra-lapierre-ny-attorney-general/2020/08/06/8e389794-d794-11ea-930e-d88518c57dcc_story.html.

²⁴ See Brad S. Karp & H. Christopher Boehning, *Stop Shielding Gun Makers*, N.Y. TIMES (Mar. 24, 2018), <https://www.nytimes.com/2018/03/24/opinion/sunday/stop-shielding-gun-makers.html>.

through to sue gun manufacturers under the PLCAA's predicate exception.

In developing this argument, this Note will first examine the existing legislative framework regarding suits against gun manufacturers. As described above, the PLCAA places severe Federal restrictions on such suits. Yet, many states have enacted their own immunity statutes to shield the gun industry.²⁵ Understanding the restrictions that State and Federal statutes place on Attorneys General is critical for assessing AGs' potential role in suits against gun manufacturers.

Second, this Note will examine past instances when State Attorneys General have been involved in suits against gun manufacturers. I begin this analysis by exploring lawsuits that Attorneys General directly spearheaded. This discussion must be further bifurcated into pre- and post-PLCAA cases, as Attorneys-General led cases underwent fundamental changes after the PLCAA's enactment. After considering direct suits against gun manufacturers, I discuss the supporting roles Attorneys General can play in suits *other* parties spearhead. Namely, State Attorneys General have filed *amici* briefs in suits filed by municipalities²⁶ as well as by private parties.²⁷

Third, this Note will consider whether State Attorneys General could bring direct actions against gun manufacturers under the PLCAA's predicate exception. In states that do not afford gunmakers any additional civil protections, Attorneys General may have the opportunity to prosecute actions against gun manufacturers based on unfair or deceptive trade practices.²⁸ For instance, New York law does not afford civil immunity to gun manufacturers,²⁹ and the State's Attorney General can prosecute violations of New York's unfair trade law.³⁰ Further, FTC rules or regulations on firearm marketing could potentially overcome gunmakers' potential defenses under New York law.

²⁵ See *Gun Industry Immunity: State Law Immunity Statutes*, GIFFORDS L. CTR, <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/> (last visited Apr. 21, 2020). In fact, many states reserve the power the sue gun manufacturers *exclusively* to the state's Attorney General.

²⁶ See *METRO NEWS BRIEFS: CONNECTICUT; Attorney General Backs Suit Against Gun Makers*, N.Y. TIMES (Sept. 8, 1999), <https://www.nytimes.com/1999/09/08/nyregion/metro-news-briefs-connecticut-attorney-general-backs-suit-against-gun-makers.html>.

²⁷ See Rob Ryser, *Attorney General Seeks Revival of Sandy Hook Lawsuit*, NEWS TIMES (May 13, 2017), <https://www.newstimes.com/local/article/Attorney-general-seeks-revival-of-Sandy-Hook-11142751.php>.

²⁸ Thomas & Alexander, *supra* note 2, 190–93.

²⁹ GIFFORDS L. CTR, *supra* note 25.

³⁰ N.Y. Gen. Bus. Law § 349(b) (McKinney).

I. STATUTORY IMMUNITY FOR GUN MANUFACTURERS: STATE AND FEDERAL

Over the past several decades, the United States has suffered more than its fair share of mass shootings.³¹ Mass shooting events are more frequent and enjoy greater levels of media coverage than ever before.³² Since Columbine, the American school shooting has become an independent phenomenon.³³ But even as mass shootings have proliferated, violent crime has sharply declined.³⁴ Gun violence in the United States peaked around 1993.³⁵ No surprise, then, that gun-control activists were scrambling to find ways to prevent gun violence even before the mass-shooting era.³⁶

Eventually, gun-violence victims and gun-control activists concluded that civil lawsuits against gun manufacturers could serve as valuable regulatory tools. From a policy perspective, some argued that litigation can play an important role in preventing gun violence in the United States.³⁷ Large damage awards could shift gun manufacturers' incentives and encourage the industry to self-regulate.³⁸ Of course, gun-

³¹ See *Mass Shootings in the US Fast Facts*, CNN LIBRARY, <https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts/index.html> (last updated May 3, 2020, 8:39 AM). An in-exhaustive list of notable recent mass shootings would include: Las Vegas (58 killed), Orlando (49 killed), Virginia Tech (32 killed), Sandy Hook (27 killed), Sutherland Springs (25 killed), El Paso (22 killed), Parkland (17 killed), Fort Hood (13 killed), Binghamton (13 killed), Virginia Beach (12 killed), Thousand Oaks (12 killed), Aurora (12 killed), Pittsburgh (11 killed), Santa Fe (10 killed), and of course, Columbine (13 killed). While the death tolls are stunning, most mass shooters actually injure more people than they kill. See also Harp, *supra* note 15, at 301 n. 34.

³² *Id.* at 301–02.

³³ See Luis Melgar, *Are School Shootings Becoming More Frequent? We Ran the Numbers*, KUNC (May 17, 2019), <https://www.kunc.org/post/are-school-shootings-becoming-more-frequent-we-ran-numbers#stream/0>.

³⁴ Neil Howe, *What's Behind the Decline in Crime?*, FORBES (May 28, 2015, 5:04 PM) <https://www.forbes.com/sites/neilhowe/2015/05/28/whats-behind-the-decline-in-crime/>.

³⁵ *Id.*

³⁶ See Sarah Gray, *Here's a Timeline of the Major Gun Control Laws in America*, TIME (Apr. 30, 2019, 11:13 AM), <https://time.com/5169210/us-gun-control-laws-history-timeline/>. The Federal Government pursued a number of high-profile gun reforms in the late eighties and early nineties. In 1986, the Congress passed the Firearm Owners Protection Act, which prohibited civilian ownership or transfer of machine guns. 1993 saw the passage of the famous Brady Handgun Violence Prevention Act, which requires handgun purchasers to undergo background checks. And in 1994, the Public Safety and Recreational Firearms Use Protection Act effectively banned assault weapons in the United States for a period of 10 years.

³⁷ See generally 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, 1843–49 (2008).

³⁸ C.f. Jon S. Vernick, Lainie Rutkow & Daniel A. Salmon, *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 AM. J. PUB. HEALTH 1991, 1992 (2007) (suggesting tort litigation will incentivize firearm manufacturers to voluntarily find ways to reduce risks associated with their products).

control activists were not the only ones who realized the potential of litigation against gun manufacturers. The ongoing civil suits against manufacturers galvanized gun-rights activists, gun manufacturers, and the well-connected gun lobby into action.³⁹

A. *Federal Statutes: The Protection of Lawful Commerce in Arms Act*

In 2005, NRA-led lobbying efforts brought the PLCAA to George W. Bush's desk in the Oval Office.⁴⁰ President Bush and a cadre of gun-industry representatives smiled and shook hands for the cameras, even while the ink from Bush's signature was still wet.⁴¹ The PLCAA was a direct response to the spate of lawsuits across the nation seeking to hold gun manufacturers and sellers accountable for the criminal actions of third parties who wielded the defendants' non-defective products.⁴²

At minimum, any suit against a gun manufacturer must survive the protections and immunities the PLCAA affords manufacturers.⁴³ State law may present additional obstacles, but the PLCAA represents the Federal floor.

The PLCAA bars plaintiffs from bringing a "qualified civil liability action" in any State or Federal court.⁴⁴ The Act goes on to define a "qualified civil liability action" as:

[A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product [defined within The Act as a firearm, component of firearm, or part of firearm], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party[.]⁴⁵

Next, the PLCAA creates several exceptions whereby suits against gun manufacturers or sellers may proceed.⁴⁶ Plaintiffs may pursue negligent entrustment claims,⁴⁷ breach of contract or warranty claims,⁴⁸ and

³⁹ Schuck, *supra* note 1, at 226.

⁴⁰ Dwyer, *supra* note 8.

⁴¹ *See id.*; *see also* Harp, *supra* note 15, at 298.

⁴² *See* 15 U.S.C. § 7901 (2012).

⁴³ *See generally* 15 U.S.C. §§701–03 (2012).

⁴⁴ 15 U.S.C. § 7902(a) (2012).

⁴⁵ 15 U.S.C. § 7903(5)(A) (2012).

⁴⁶ *See* 15 U.S.C. §§ 7903(5)(A)(i)–(vi) (2012).

⁴⁷ 15 U.S.C. § 7903(5)(A)(ii) (2012).

⁴⁸ 15 U.S.C. § 7903(5)(A)(iv) (2012).

product defect claims.⁴⁹ Finally, the PLCAA's predicate exception allows suits against gun manufacturers who knowingly violate a State or Federal statute applicable to the sale or marketing of firearms, and by that violation, proximately cause a gun victim's harm.⁵⁰ Note a few requirements of the predicate exception: (1) the predicate statute must be "applicable" to the sale or marketing of firearms;⁵¹ (2) the predicate statute must be violable;⁵² and (3) the predicate statute must outlaw acts that proximately cause mass shootings.⁵³

Courts have varied in their interpretations of the applicability requirement,⁵⁴ but the Supreme Court's denial of *certiorari* in *Soto v. Bushmaster* signaled to state high courts that states may adopt an expansive definition of "applicable."⁵⁵ The upshot is that state courts are now free to find general unfair trade statutes applicable to the sale or marketing of firearms, meaning such statutes can function as predicate statutes for PLCAA purposes.

B. State Statutes: Civil Immunity for Gun Manufacturers Under State Law

A full-fledged fifty-state survey of gun industry immunity laws is beyond this Note's scope. However, we can group state laws into helpful categories.

Some states afford no special protections to the gun industry.⁵⁶ These states include Hawaii, Massachusetts, Minnesota, New Jersey, New York, Iowa, and California.⁵⁷ (The District of Columbia similarly has no gun industry immunity law.)⁵⁸ These states provide the most fertile grounds for suits against firearm manufacturers, as plaintiffs and Attorneys General need only to navigate the PLCAA's strictures.

⁴⁹ 15 U.S.C. § 7903(5)(A)(v) (2012).

⁵⁰ 15 U.S.C. § 7903(5)(A)(iii) (2012).

⁵¹ VIVIAN S. CHU, CONG. RSCH. SERV., R42871, THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY OF GUN MANUFACTURERS 2 (2012).

⁵² Strict liability statutes cannot function as predicate statutes for PLCAA purposes. *See* *Charlot v. Bushmaster Firearms, Inc.*, 628 F.Supp.2d 174, 180–81 (D.C. 2009).

⁵³ CHU, *supra* note 51, at 4.

⁵⁴ *See, e.g.*, *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1159–60 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 399–401 (2d Cir. 2008).

⁵⁵ The Connecticut Supreme Court has adopted the view that a statute "applicable" to the sale or marketing of firearms is a statute that is *capable of being applied* to the sale or marketing of firearms. *See* *Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53, 129 (Sup. Ct. Conn. 2019); Harp, *supra* note 15.

⁵⁶ GIFFORDS L. CTR., *supra* note 25.

⁵⁷ *Id.* Note that California previously gave special legal protections to the gun industry, but repealed that law in 2002, before the PLCAA had passed through Congress.

⁵⁸ *Id.*

In contrast, many states prohibit all civil lawsuits against firearm manufacturers. For example, Alaska bars all suits brought against gun manufacturers on the basis of the “lawful sale, manufacture, or design of firearms or ammunition.”⁵⁹ However, the Alaska statute retains some exceptions, including claims for negligent design, manufacturing defect, breach of contract, or breach of warranty.⁶⁰ Similarly, Arizona specifically disallows suits against gun manufacturers brought by “a political subdivision of [the] state.”⁶¹ Other states that broadly bar suits against gun manufacturers include Colorado,⁶² Florida,⁶³ Indiana,⁶⁴ Missouri,⁶⁵ North Dakota,⁶⁶ Ohio,⁶⁷ and more.⁶⁸ Attorneys General in these states generally cannot sue gun manufacturers on the basis of injury caused by criminal misuse of the manufacturers’ non-defective products.

A third category of states exclusively reserves the power to sue gun manufacturers to the state, often specifically to the Attorney General.⁶⁹ However, even within this third category, the structure and implementation of this power varies considerably between states. For instance, Alabama requires Gubernatorial consent before the Attorney General may sue gun manufacturers.⁷⁰ Idaho gives the Attorney General authority to sue gun manufacturers at their discretion,⁷¹ but requires any other state-subdivision to obtain legislative approval before bringing such a suit.⁷² Some states, like Arkansas, use generalized language indicating the power to sue gun manufacturers is “reserved exclusively to the State.”⁷³

⁵⁹ Alaska Stat. § 09.65.155 (2019); GIFFORDS L. CTR., *supra* note 25.

⁶⁰ Alaska Stat. § 09.65.155 (2019); GIFFORDS L. CTR., *supra* note 25.

⁶¹ Ariz. Rev. Stat. § 12-714(A) (2020); GIFFORDS L. CTR., *supra* note 25.

⁶² Colo. Rev. Stat. § 13-21-504.5(1) (2016). But note that Colorado has a provision very similar to the PLCAA’s predicate exception. Colo. Rev. Stat. § 13-21-504.5(4); GIFFORDS L. CTR., *supra* note 25.

⁶³ GIFFORDS L. CTR., *supra* note 25. Note that Florida only permits breach of contract, breach of warranty, and product defect suits against gun manufacturers. Fla. Stat. § 790.331(2) (2020).

⁶⁴ Ind. Code Ann. § 34-12-3-3 (2019).

⁶⁵ “No county, city, town, village or any other political subdivision *nor the state* shall bring suit or have any right to recover against any firearms or ammunition manufacturer, trade association or dealer for damages, abatement or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, distribution, or sale of firearms or ammunition to the public.” Mo. Rev. Stat. § 21.750.5 (2014) (emphasis added); GIFFORDS L. CTR., *supra* note 25.

⁶⁶ N.D. Cent. Code § 32-03-54(2) (2019); GIFFORDS L. CTR., *supra* note 25.

⁶⁷ Ohio Rev. Code § 2305.401(B) (2019); GIFFORDS L. CTR., *supra* note 25.

⁶⁸ *See generally* GIFFORDS L. CTR., *supra* note 25.

⁶⁹ *See generally id.*

⁷⁰ Ala. Code § 11-80-11.

⁷¹ Idaho Code § 5-247(5) (2020).

⁷² Idaho Code § 5-247(3) (2020).

⁷³ Ark. Code Ann. § 14-16-504(b)(2)(B).

Texas⁷⁴ and Virginia⁷⁵ use language indicating that power is reserved to the State Attorney General, rather than the state broadly.

Finally, Wyoming's unique statute merits individual treatment. The full text of Wyoming's Second Amendment Defense law reads as follows:

The attorney general may seek to intervene or file an amicus curiae brief in any lawsuit filed in any state or federal court in Wyoming, or filed against any Wyoming citizen or firm in any other jurisdiction for damages for injuries as a result of the use of fire arms that are not defective, if in his judgment, the action endangers the constitutional right of citizens of Wyoming to keep and bear arms. The attorney general is directed to advance arguments that protect the constitutional right to bear arms. Before intervening in any lawsuit pursuant to this section, the attorney general shall obtain the approval of the governor.⁷⁶

So, the Wyoming Attorney General may intervene in a suit against a gun manufacturer, but only with the Governor's blessing.⁷⁷ Further, the Attorney General may only adopt arguments that advance the legislature's specified policy goals.⁷⁸ One can see how this could set the stage for an interesting battle: other states' supreme courts have rejected legislative attempts to direct Attorneys General to take a particular stance in litigation.⁷⁹

This wide variety of state laws helps us understand the stage upon which any Attorney General-driven suit against a gun manufacturer must take place. In states like Florida and Ohio, for instance, suits against gun manufacturers for harm caused by criminal misuse of the manufacturers' products will be dead-on-arrival—be they spearheaded by the Attorney General or by some private party. In states that reserve the power to sue to the state or the Attorney General, the law only bars private suits. However, in states that afford gunmakers no civil immunity, both the Attorney General and private plaintiffs (perhaps with the AG's assistance) can sue gun manufacturers.

⁷⁴ Tex. Civ. Prac. & Rem. Code § 128.001(e) (2019).

⁷⁵ Va. Code Ann. § 15.2-915.1.

⁷⁶ Wyo. Stat. § 9-14-101 (2020).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See, e.g., Kathy McCormack, *Court: NH XGR Can't Order AG to Join Health Suit*, FOSTERS (last updated June 15, 2011, 12:33 PM), <https://www.fosters.com/article/20110615/NEWS0201/110619738?template=ampart>.

II. THE ROLE OF STATE ATTORNEYS GENERAL IN PAST LAWSUITS AGAINST FIREARM MANUFACTURERS

Before examining whether Attorneys General may directly sue Firearm Manufacturers under the PLCAA's predicate exception, this Note considers the role Attorneys General have played in such suits in the past. First, we will look to examples of lawsuits Attorneys General brought directly against gun manufacturers. And second, we will consider the supporting role Attorneys General have played in private plaintiffs' suits against gun manufacturers.

A. *Lawsuits Brought by Attorneys General Against Firearm Manufacturers*

The PLCAA effectively ended civil suits against gun manufacturers based on criminal misuse of the manufacturers' products.⁸⁰ Therefore, we will first discuss Attorneys General's pre-PLCAA lawsuits against gun manufacturers, and then we will proceed to examine a few very different post-PLCAA lawsuits.

1. Attorneys General's Pre-PLCAA Suits Against Firearm Manufacturers

Before the passage of the PLCAA, the only notable lawsuit an Attorney General brought against a gun manufacturer was Eliot Spitzer's suit against manufacturers including, *inter alia*, Glock, Colt, Sturm-Ruger, and Beretta.⁸¹ Spitzer sued several gun manufacturers in New York court, relying primarily on a public nuisance claim.⁸² New York Penal Law defined any unlawfully possessed or transported weapon as a "nuisance."⁸³ Spitzer's complaint alleged that "manufacturers . . . contribut[ed] to and maintain[ed] the public nuisance by engaging in design and distribution practices that place guns in the hands of criminals in New York State."⁸⁴ Therefore, manufacturers "[sought] to profit from that portion of the production and sale of handguns that they know become unlawfully possessed and are used to kill and injure New Yorkers."⁸⁵

Spitzer viewed his lawsuit as complementary to gun-control legislation.⁸⁶ He sought a number of injunctive remedies that he believed could

⁸⁰ See Harp, *supra* note 15, at 298.

⁸¹ N.Y. STATE OFFICE OF THE ATTORNEY GENERAL, *supra* note 5; Howard M. Erichson, *Private Lawyers, Public Lawsuits*, in *SUING THE GUN INDUSTRY* 139 (Timothy Lytton ed. 2005).

⁸² N.Y. STATE OFFICE OF THE ATTORNEY GENERAL, *supra* note 5.

⁸³ N.Y. PENAL LAW § 400.05(1) (2020).

⁸⁴ N.Y. STATE OFFICE OF THE ATTORNEY GENERAL, *supra* note 5.

⁸⁵ *Id.*

⁸⁶ *Id.*

have reduced gun violence, including: (1) banning crime-friendly gun models; (2) barring gunmakers from supplying retailers with a track record of selling guns to criminals; (3) appointing “monitors” to supervise gun distribution; and (4) court-mandated buybacks of illegally-obtained guns seized from criminals.⁸⁷

But Spitzer’s lawsuit achieved nothing. First, a trial court dismissed the case.⁸⁸ Then, the First Department of New York’s Appellate Division affirmed: “we believe it is legally inappropriate, impractical[,] and unrealistic to mandate that defendants undertake, and the courts enforce, unspecified measures urged by plaintiff in order to abate the conceded availability and criminal use of illegal handguns.”⁸⁹ Whatever the reason, New York courts were not at all amenable to Spitzer’s legal theories.

Notably, other Attorneys General during this period indicated they would follow New York’s example, but none followed through. For example, former Connecticut Attorney General Richard Blumenthal engaged in much saber-rattling, intimating to media outlets that Connecticut would soon sue gun manufacturers.⁹⁰ But, Blumenthal’s promised suit never came to pass.⁹¹

2. Attorneys General’s Post-PLCAA Suits Against Firearm Manufacturers

For years after the PLCAA’s passage, Attorneys General refrained from suing gunmakers.⁹² Of course, the PLCAA’s statutory immunity for gunmakers probably made an attempted lawsuit quite unattractive, but other factors were likely at play.⁹³ Attorney General Spitzer’s suit in New York couldn’t even get off the ground, and private plaintiffs nation-

⁸⁷ *Id.*

⁸⁸ *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 93 (1st Dep’t 2003).

⁸⁹ *Id.* at 106.

⁹⁰ See N.Y. TIMES, *supra* note 26; Mathews, *supra* note 4; Rachel Gottlieb & Trish Willingham, *Mayors See Verdict as Ammunition*, HARTFORD COURANT (Feb. 13, 1999), <https://www.courant.com/news/connecticut/hc-xpm-1999-02-13-9902130206-story.html>; *Holding Up the Gun Makers*, N.Y. TIMES (Oct. 13, 1999), <https://www.nytimes.com/1999/10/13/opinion/holding-up-the-gun-makers.html>.

Then-Attorney General of Maryland, J. Joseph Curran, also considered suing gun manufacturers. Daniel LeDuc, *Maryland Proposes Tougher Gun Laws*, WASH. POST (Oct. 20, 1999), <https://www.washingtonpost.com/wp-srv/local/daily/oct99/guns20.htm>.

⁹¹ Instead, Blumenthal negotiated agreements with various gun manufacturers to make firearms safer and to restrict their marketing. See Rinker Buck, *Blumenthal In Talks with Other Gun Makers*, HARTFORD COURANT (March 21, 2000), <https://www.courant.com/news/connecticut/hc-xpm-2000-03-21-0003211460-story.html>.

⁹² See generally Chris Haxel, *Are the Courts Open to More Lawsuits Against Gunmakers? Kansas City Will Soon Find Out*, GUNS & AMERICA (Jan. 10, 2020), <https://gunsandamerica.org/story/20/01/10/are-the-courts-open-to-more-lawsuits-against-gunmakers-kansas-city-will-soon-find-out/> (stating that the PLCAA “initially had a chilling effect on gun lawsuits”).

⁹³ See Schuck, *supra* note 1, 226.

wide had achieved little more than creating adverse legal precedent.⁹⁴ Thus, gun-control activists seemed to collectively agree that litigation against gunmakers may not be the regulatory ace they once suspected.

But lately, New Jersey Attorney General Gubir Grewal has effectively used enforcement suits against gun manufacturers.⁹⁵ The PLCAA does not bar the Attorney General Grewal's suits because he does not seek to hold gunmakers liable for any particular injuries to gun-violence victims; rather, he simply sues manufacturers that violate New Jersey law.⁹⁶ Throughout 2019, Grewal filed a number of suits against manufacturers of "ghost guns,"⁹⁷ along with manufacturers of high-capacity magazines—both of which violate New Jersey statutes.⁹⁸

In March of 2019, Grewal filed suit against U.S. Patriot Armory (Patriot), a Californian ghost gun manufacturer, for violating New Jersey laws prohibiting the manufacture of "untraceable" guns.⁹⁹ Grewal argued that Patriot violated New Jersey's Consumer Fraud Act by marketing and selling illegal products to New Jersey residents.¹⁰⁰ Grewal is seeking civil penalties and an order prohibiting Patriot from advertising or selling ghost guns to New Jersey residents.¹⁰¹ The case appears to still be in the discovery phase.¹⁰²

Later in 2019, Grewal sued companies in Nevada and Florida that sold high-capacity magazines to New Jersey residents in violation of New Jersey law.¹⁰³ Currently, New Jersey law only permits magazines with a maximum capacity of ten rounds or fewer.¹⁰⁴ Clearly, the PLCAA does not foreclose all lawsuits an Attorney General might bring against gun manufacturers.

⁹⁴ *Id.*

⁹⁵ See *Attorney General Files First State Lawsuit Against "Ghost Gun" Company*, *supra* note 12; Shaw, *supra* note 12; McDaniel, *supra* note 12.

⁹⁶ McDaniel, *supra* note 12.

⁹⁷ "Ghost guns are not registered, do not have serial numbers and are purchased over the internet without any type of background check of the purchaser. They are shipped 80 percent complete, with the remaining parts assembled using parts sold by the manufacturer and online instructions. The guns are difficult to trace and make it harder for law enforcement to solve gun crimes." *Attorney General Files First State Lawsuit Against "Ghost Gun" Company*, *supra* note 12.

⁹⁸ McDaniel, *supra* note 12.

⁹⁹ *Attorney General Files First State Lawsuit Against "Ghost Gun" Company*, *supra* note 12.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Current Litigation*, NRA CIVIL RIGHTS DEFENSE FUND, <https://www.nradefensefund.org/current-litigation.aspx> (last visited Nov. 4, 2020).

¹⁰³ Shaw, *supra* note 12; McDaniel, *supra* note 12.

¹⁰⁴ McDaniel, *supra* note 12.

B. Attorneys General's Supporting Role in Suits Against Firearm Manufacturers

Filing suit is not the only litigatory action an Attorney General can take against firearm manufacturers. Attorneys General have supported both private plaintiffs and municipalities in suits against manufacturers,¹⁰⁵ typically via an *amicus* brief filed in an appellate court.¹⁰⁶

Before Congress passed the PLCAA, throngs of private plaintiffs and municipalities across the nation sued gun manufacturers.¹⁰⁷ Bridgeport, Connecticut was one of the highest-profile municipal plaintiffs during this period.¹⁰⁸ Bridgeport sued Colt and Sturm Ruger, two well-known gunmakers headquartered in Connecticut.¹⁰⁹ Connecticut Attorney General Blumenthal jumped into the fray to support Bridgeport's lawsuit, filing an *amicus* brief.¹¹⁰ Legal bases of the suit included product liability, CUTPA violations, and public nuisance law.¹¹¹ Bridgeport sought \$100 million in damages for the cost of gun violence, police overtime, health care, lost business opportunities, and decreased property values.¹¹² Even with Blumenthal's help, the Court dismissed the Bridgeport suit for lack of standing.¹¹³

Chalk it up to fate, but nearly twenty years after the Bridgeport suit, the Connecticut Attorney General, George Jepsen, filed another *amicus* brief in a suit against a gun manufacturer.¹¹⁴ This time, the plaintiff was not a municipality, but a group of 2012-Sandy-Hook-shooting victims.¹¹⁵ A lower court judge dismissed the plaintiffs' suit, and soon enough, the plaintiffs appealed to the Connecticut Supreme Court.¹¹⁶ Attorney General Jepsen argued the Court should construe the CUTPA liberally to

¹⁰⁵ See, e.g., Carlton S. Chen, *Blumenthal, Ganim Scapegoat Gun Industry*, HARTFORD COURANT (Sept. 11, 1999) <https://www.courant.com/news/connecticut/hc-xpm-1999-09-11-9909110034-story.html>; *METRO NEWS BRIEFS: CONNECTICUT*; *Attorney General Backs Suit Against Gun Makers*, *supra* note 26.

¹⁰⁶ See, e.g., Chen, *supra* note 105; *METRO NEWS BRIEFS: CONNECTICUT*; *Attorney General Backs Suit Against Gun Makers*, *supra* note 26.

¹⁰⁷ See Gottlieb & Willingham, *supra* note 90.

¹⁰⁸ See *id.*

¹⁰⁹ *Id.*

¹¹⁰ Chen, *supra* note 105.

¹¹¹ *METRO NEWS BRIEFS: CONNECTICUT*; *Attorney General Backs Suit Against Gun Makers*, *supra* note 26.

¹¹² Don Pesci, *Don Pesci: Blumenthal applies judicial thumbscrews to gun manufacturers*, NEW HAVEN REGISTER (Feb. 25, 2016, 12:49 PM), <https://www.nhregister.com/connecticut/article/Don-Pesci-Blumenthal-applies-judicial-11332054.php>.

¹¹³ Ebong Udoma, *Remembering When Bridgeport Sued Gun Makers, Nearly Two Decades Ago*, WNPR (June 25, 2016, 12:18 PM), <https://www.wnpr.org/post/17-years-ago-bridgeport-sued-gun-makers-mayor-ganim-remembers>.

¹¹⁴ Ryser, *supra* note 27.

¹¹⁵ *Id.*

¹¹⁶ *Id.*; Harp, *supra* note 15.

promote Connecticut's public policy objectives.¹¹⁷ As in Blumenthal's earlier suit, the defendants attacked the plaintiffs' standing to sue.¹¹⁸ Within the *amicus* brief, Jepsen argued that CUTPA's "remoteness doctrine" sufficiently "limits the class of potential plaintiffs under CUTPA without contravening legislative intent regarding the reach or remedial nature of the statute[.]"¹¹⁹ Jepsen maintained that the remoteness doctrine's protections obviated the need for any business-relationship requirement for CUTPA standing.¹²⁰ Apparently, Attorney General Jepsen's efforts were not for naught; the *Soto v. Bushmaster* court held:

[b]ecause the principal evils associated with unscrupulous and illegal advertising are not ones that necessarily arise from or infect the relationship between an advertiser and its customers, competitors, or business associates, we hold that a party directly injured by conduct resulting from such advertising can bring an action pursuant to CUTPA even in the absence of a business relationship with the defendant. Accordingly, we agree with the plaintiffs that the trial court improperly struck their CUTPA based wrongful death claims.¹²¹

Thus, State Attorneys General can play a valuable role in other parties' litigation against gunmakers. Although, some Attorneys General might want to file *amicus* briefs on behalf of gun-manufacturer defendants. *Soto v. Bushmaster*'s history illustrates this—after the Connecticut Supreme Court's landmark ruling, Remington appealed to the United States Supreme Court.¹²² Several pro-gun groups filed *amicus* briefs to persuade the Court to grant *certiorari*.¹²³ Notably, a large number of State Attorneys General also submitted an *amicus* brief in support of the gun manufacturers.¹²⁴ The Texas Attorney General Ken Paxton spearheaded the coalition including the Attorneys General of Alabama,

¹¹⁷ Ryser, *supra* note 27.

¹¹⁸ Brief for State of Connecticut and Department of Consumer Protection as Amici Curiae Supporting Appellants, *supra* note 22.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53, 88 (Sup. Ct. Conn. 2019).

¹²² Robert Storace & Raychel Lean, *The Big Gun Rights Case SCOTUS Never Took: No Appeal for Remington Over Sandy Hook* (Nov. 12, 2019, 10:00 AM), <https://www.law.com/ctlawtribune/2019/11/12/the-biggest-gun-rights-case-scotus-never-took-no-appeal-for-remington-over-sandy-hook/?sreturn=20200002131744>.

¹²³ Briefs were filed by Gun Owners of America, Professors of Second Amendment Law, the National Shooting Sports Foundation, and the National Rifle Association. *Remington Arms Co. v. Soto*, SCOTUSBLOG <https://www.scotusblog.com/case-files/cases/remington-arms-co-v-soto/>.

¹²⁴ Brief for State of Texas et al. as Amici Curiae Supporting Petitioners at 14, *Remington Arms Co. v. Soto*, 140 S.Ct. 513 (2019) (No. 19-168).

Arkansas, Georgia, Louisiana, Oklahoma, South Dakota, Utah, and West Virginia.¹²⁵ Paxton’s brief argued that the Connecticut Supreme Court had interpreted the PLCAA’s predicate exception far too broadly: “[i]n forcing [Remington] to defend against claims flowing from a deranged killer’s mass murder, the Connecticut Supreme Court has foisted onto the firearms industry a burden that Congress explicitly sought to eliminate.”¹²⁶

III. LOOKING TOWARD THE FUTURE: HOW STATE ATTORNEYS GENERAL COULD USE THE PLCAA’S PREDICATE EXCEPTION TO SUE FIREARM MANUFACTURERS

Thus far, we have discussed the legislative difficulties (both state and federal) with suits against gunmakers,¹²⁷ and we have examined past instances where Attorneys General have either sued gunmakers or filed *amicus* briefs in suits against gunmakers.¹²⁸ Now, we will consider how State Attorneys General could use the PLCAA’s predicate exception—the exception that allowed the Sandy Hook plaintiffs to proceed with their jury trial against Remington and Bushmaster¹²⁹—to bring direct suits against firearm manufacturers. Because every state’s law would present unique challenges, no uniform analysis exists.

The first requirement is that such a suit survive the federal immunity statute—the PLCAA. Under the PLCAA’s text, can a State Attorney General utilize the predicate statute? If so, what baseline requirements must the Attorney General’s case meet?

The second hurdle is identifying a statute that could serve as a predicate statute. The PLCAA’s predicate exception only works when the plaintiff accuses the gun manufacturer of violating a state or federal statute applicable to the sale or marketing of firearms.¹³⁰ Thus, the State Attorney General must find some statute under which they have the authority to sue. Fortunately for gun-control activists, the United States Supreme Court’s refusal to hear Remington’s appeal in *Soto v. Bushmaster* has permitted states to construe general unfair trade statutes as “applicable” for PLCAA purposes.¹³¹

¹²⁵ *Id.* Mississippi’s Governor also signed on to the brief.

¹²⁶ *Id.*

¹²⁷ *See supra* Part I.

¹²⁸ *See supra* Part II.

¹²⁹ *United States Supreme Court Denies Cert. in Remington Arms Co. LLC v. Soto*, PULLMAN & COMLEY (Nov. 13, 2019), <https://www.pullcom.com/newsroom-publications-remington-arms-co-v-soto>.

¹³⁰ 15 U.S.C. § 7903(a)(5)(A)(iii) (2012).

¹³¹ *See* Storace & Lean, *supra* note 122.

A. *Statutory Interpretation: The PLCAA*

Recall that the PLCAA prohibits “qualified civil liability actions” (QCLA) in any state or federal court.¹³² Recall further that a QCLA is an action brought by “any person” against a firearm manufacturer for damages resulting from a third party’s misuse of the defendant’s product.¹³³ Under the PLCAA, “‘person’ means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.”¹³⁴ So, Attorneys General’s civil actions clearly count as QCLAs. It follows that State Attorneys General’s suits qualify for the predicate exception when appropriate.¹³⁵

Further, the defendant need not harm the State for an Attorney General to sue. The QCLA definition simply encompasses suits against manufacturers when those suits seek to recover for damages resulting from criminal misuse of a third party.¹³⁶ Thus, the Attorney General only needs to seek recovery on behalf of the public or some class of victims.

Note that the PLCAA does not establish any cause of action.¹³⁷ Rather, the predicate exception simply cuts a hole in the gun industry’s immunity as the PLCAA grants.¹³⁸ The Attorney General still needs some predicate statute; the Attorney General must accuse the gun manufacturer of violating something that the state legislature or Congress has codified through legislation.¹³⁹

Thus, the PLCAA’s predicate exception does not bar a State Attorney General’s suit against a gunmaker. The discussion does not end here—each Attorney General must consider their own state’s law, both in terms of predicate statutes and additional gun-industry protections. So too, this Note will now consider potential approaches under state laws.

B. *Suing Gun Manufacturers Under State Law: Gun Industry Immunity & Finding a Viable Predicate Statute*

It would be a herculean task—far beyond this Note’s scope—to consider the potential of AG-led lawsuits in all fifty states. In order to keep this analysis relatively concise, this Note will proceed using New York as a model state. Although this Note will only analyze a single state, any Attorney General would have to complete the same two-step

¹³² See *supra* Part I(A).

¹³³ 15 U.S.C. § 7903(a)(5)(A) (2012).

¹³⁴ 15 U.S.C. § 7903(a)(3) (2012).

¹³⁵ 15 U.S.C. § 7903(a)(5)(A)(iii) (2012).

¹³⁶ 15 U.S.C. § 7903(a)(5)(A) (2012).

¹³⁷ 15 U.S.C. § 7903(a)(5)(C) (2012).

¹³⁸ 15 U.S.C. § 7903(a)(5)(A)(iii).

¹³⁹ 15 U.S.C. § 7903(a)(5)(C) (2012).

process. First, we must ask whether state law bars the suit. Second, if the suit is permissible, we must find a state predicate statute under which we may seek refuge from the PLCAA.

1. Gun Industry Immunity Under State Law (Illustrated by New York Law)

Again, states vary wildly in their approaches to gun industry immunity.¹⁴⁰ Regardless, an Attorney General must argue that state laws granting civil immunity to the gun industry do not preclude their lawsuit.¹⁴¹ The viability and success of such a position will vary by state. Two states with identical statutory language may reach different conclusions about the scope of immunity.

In New York, step one is simple: New York law affords no civil immunity to gun manufacturers.¹⁴² Thus, a New York Attorney General who sought to sue gunmakers under the predicate exception would have the luxury to disregard a potentially lethal defense.

2. Predicate Statutes Under State Law (Illustrated by New York Law)

In the wake of *Soto v. Bushmaster*, State Attorneys General have a considerable advantage in identifying state statutes which could function as predicate statutes for the PLCAA's predicate exception.¹⁴³ Recall that the *Soto* court held Connecticut's general unfair trade practices statute was applicable to the sale or marketing of firearms within the meaning of the PLCAA.¹⁴⁴ Specifically, the predicate statute used in *Soto* was CUTPA,¹⁴⁵ an Unfair and Deceptive Acts and Practices (UDAP) statute.¹⁴⁶ All 50 states (and the District of Columbia) have UDAPs on the books.¹⁴⁷ However, these statutes vary in terms of strength, scope, and remedies that they afford an Attorney General.¹⁴⁸ Each State Attorney

¹⁴⁰ "At present, 34 states provide either blanket immunity to the gun industry in a way similar to the PLCAA or prohibit cities or other local government entities from bringing lawsuits against certain gun industry defendants." GIFFORDS L. CTR., *supra* note 25; *see also supra* Part I(B).

¹⁴¹ *See* 15 U.S.C. § 7903(a)(5)(C).

¹⁴² *See* GIFFORDS L. CTR., *supra* note 25.

¹⁴³ *See Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53, 119 (Sup. Ct. Conn. 2019). *See also supra* Part I(A).

¹⁴⁴ *Id.*

¹⁴⁵ *See Harp, supra* note 15, at 299.

¹⁴⁶ Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT'L CONSUMER L. CTR., 24 (Feb. 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

¹⁴⁷ *Id.* at 5.

¹⁴⁸ *Id.*

General sought to sue a gunmaker under their state's law would need to consider whether the state's UDAP will be a viable means of attack.

New York's UDAP is § 349 of the General Business Law.¹⁴⁹ The statute reads: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."¹⁵⁰ Additionally, the statute allows the Attorney General to sue corporations suspected of violating the UDAP:

Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices.¹⁵¹

Thus, a New York Attorney General may sue a firearm manufacturer and may even seek to recover revenues the deceptive marketing tactics generate.

However, the New York UDAP has several deficiencies for such purposes. New York's UDAP is broad but rather weak.¹⁵² The UDAP provides defendants with a complete defense if:

[t]he act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts.¹⁵³

While most gunmakers probably do not currently violate existing federal rules and regulations, lawmakers may change those rules and regulations. Fred Guttenberg, the parent of a 2018 Parkland shooting victim, recently filed a complaint urging the FTC to declare Smith & Wesson's

¹⁴⁹ N.Y. GEN. BUS. LAW § 349 (McKinney, 2019).

¹⁵⁰ *Id.* § 349(a).

¹⁵¹ *Id.* § 349(b).

¹⁵² Carter, *supra* note 146 at 27.

¹⁵³ N.Y. GEN. BUS. LAW § 349(d).

AR-15 marketing practices “deceptive and unfair.”¹⁵⁴ Guttenberg’s complaint argues Smith & Wesson gave its M&P15 .223 AR-15 style rifle “a ‘halo’ of credibility” by propagating ads that associated the rifle with police and military.¹⁵⁵ The complaint further accused Smith & Wesson of targeting young people with slogans like “experience more adrenaline” and “experience real-life first person shooting.”¹⁵⁶ Unsurprisingly, Guttenberg’s theories are similar to those the Sandy Hook plaintiffs espoused.¹⁵⁷

If the FTC were to adopt Guttenberg’s proposed rules, public and private plaintiffs in many states would gain fresh opportunities to sue gun manufacturers notwithstanding state immunity laws. For example, Florida’s gun industry immunity statute says that a “political subdivision or agency of the state may not sue for or recover from a firearms or ammunition manufacturer . . . in any case that arises out of or results from the lawful design, marketing, distribution, or sale of firearms or ammunition to the public.”¹⁵⁸ The FTC could potentially alter the range of gun-marketing conduct that Florida courts may recognize as “lawful” by creating new rules *à la* Guttenberg. Thus, the rules would permit Florida municipalities—or even the Attorney General—from suing gunmakers for marketing practices the FTC prohibits.

New FTC regulations would not only defeat state immunity laws: such regulations could also increase plaintiffs’ ranges of potential predicate statutes. While the plain text of the PLCAA clarifies that only statutes (not regulations) qualify for the predicate exception,¹⁵⁹ federal regulation indirectly impacts many state statutes. For a salient example, we return to New York’s UDAP. Defendants have a complete defense when they have fully complied with FTC rules and regulations; new reg-

¹⁵⁴ Tiffany Hsu, *Father of School Shooting Victim Takes on Smith & Wesson*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/business/media/smith-wesson-marketing-lawsuit.html>. Indeed, Guttenberg filed his complaint after facing “insurmountable” obstacles to suing Smith & Wesson in Florida court. Activists have long lobbied the FTC to take action against gunmaker’s marketing tactics. In 1996, the group now known as “Brady: United Against Gun Violence” asked the FTC to declare handgun marketing campaigns that advertised safety, security, and peace of mind “unfair and deceptive” because handgun owners were “far more likely to be killed, or kill themselves, with a gun in the house than people who don’t own a firearm.” Paul Farhi, *Group Seeks FTC Ban of Gun Ads It Calls Deceptive*, WASH. POST (Feb. 14, 1996), <https://www.washingtonpost.com/archive/business/1996/02/14/group-seeks-ftc-ban-of-gun-ads-it-calls-deceptive/96d66951-46b0-4a3b-ba2b-37331b2bc6be/>.

¹⁵⁵ Hsu, *supra* note 154.

¹⁵⁶ *Id.*

¹⁵⁷ See generally *Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53, 65–66 (Sup Ct. Conn. 2019).

¹⁵⁸ FLA. STAT. § 790.331(3) (2020).

¹⁵⁹ 15 U.S.C. § 7903(5)(A)(iii) (2018).

ulations could therefore eliminate that complete defense and make the Attorney General's suit easier.¹⁶⁰

Of course, the FTC is a political animal. Pending Senatorial confirmation, the President nominates five Commissioners to head the agency.¹⁶¹ Notably, however, no more than three of the five Commissioners may belong to the same political party.¹⁶² Thus, if President Trump had won reelection in 2020, the FTC would likely have retained its three-Republican-majority and refused to budge.¹⁶³ Democrat Joe Biden will almost certainly seek to replace Commissioners at the end of their seven-year term with Democratic appointees, potentially up to the maximum of three Democratic Commissioners.¹⁶⁴ Indeed, Biden has already indicated his support for suing gun manufacturers to reduce gun violence.¹⁶⁵ Perhaps if Biden is serious about letting plaintiffs sue gunmakers, he should focus his efforts not on repealing the PLCAA—a process which would surely prove cumbersome and controversial—and instead push his FTC to adopt new regulations about firearm marketing practices.

Thus, in considering New York as an example, we see that state law presents many obstacles for Attorneys General across the nation who wish to sue gun manufacturers. Even where state law does not afford gunmakers immunity, the state's UDAP may present complications. At present, then, many States' Attorneys General likely cannot sue gun manufacturers.

CONCLUSION

The stage may be set for State Attorneys General to begin suing gunmakers *en masse*. But under current law, many states' Attorneys General cannot file such a suit. Public and private plaintiffs alike face myriad obstacles to recovery, including the PLCAA, state immunity laws, and the difficulties of finding an appropriate predicate statute. While *Soto v. Bushmaster* expanded the potential field of predicate statutes that Attorneys General can utilize, some UDAPs—like New

¹⁶⁰ See N.Y. GEN. BUS. LAW § 349(d) (McKinney, 2019).

¹⁶¹ *About the FTC: Commissioners*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/commissioners> (last visited Nov. 8, 2020).

¹⁶² *Id.*

¹⁶³ See generally Aamer Madhani, *Trump Campaigns as a 2nd Amendment Warrior*, ASSOC. PRESS (Feb. 11, 2020), <https://apnews.com/a2a8cdf5e01e5c3541f450318082652a>.

¹⁶⁴ See generally FED. TRADE COMM'N, *supra* note 161.

¹⁶⁵ "In 2005, then-Senator Biden voted against the Protection of Lawful Commerce in Arms Act, but gun manufacturers successfully lobbied Congress to secure its passage. This law protects these manufacturers from being held civilly liable for their products – a protection granted to no other industry. Biden will prioritize repealing this protection." *The Biden Plan to End Our Gun Violence Epidemic*, BIDEN HARRIS, <https://joebiden.com/gunsafety/> (last visited Nov. 8, 2020).

York's—may contain “complete defense” provisions that plaintiffs will have difficulty overcoming without new FTC rules or regulations.

The late 1990s saw a spate of lawsuits against gun manufacturers, but very few involved State Attorneys General. In the years since, shooting deaths have arguably reached epidemiological proportions.¹⁶⁶ While the playing field is very different now—thanks primarily to the PLCAA—the modern American public may well be more amenable to lawsuits against the companies that manufacture lethal weapons for civilian use. More critically, the decision in *Soto v. Bushmaster* suggests certain states' courts may be coming around on the issue.¹⁶⁷

But any plaintiff who finally succeeds in taking a gunmaker to trial still must convince jurors to accept the novel and often unintuitive legal theories that would hold long-respected American companies financially responsible for the criminal acts of murderers.¹⁶⁸ Herein, perhaps, lies the real challenge.

¹⁶⁶ See generally Garen J. Wintemute, *The Epidemiology of Firearm Violence in the Twenty-First Century United States*, 36 ANN. REV. PUB. HEALTH 5 (2015).

¹⁶⁷ See *Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53, 119 (Sup. Ct. Conn. 2019); see also *supra* Part I(A).

¹⁶⁸ See generally Harp, *supra* note 15.