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FROM (SOMEONE ELSE'S) COLD, DEAD HANDS:  
DISARMING THE PLCAA WITH THE SALES AND MARKETING  
PREDICATE EXCEPTION POST *SOTO* v. *BUSHMASTER*

*Emma Carson*



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FROM (SOMEONE ELSE’S) COLD, DEAD HANDS:  
DISARMING THE PLCAA WITH THE SALES AND MARKETING  
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*Emma Carson\**

*“The power of government to regulate and restrain the use of fireworks cannot be denied. Indeed, considering the nature of the product, that power is better described as a duty when we think of the destructive nature of explosives and the danger to life and property attendant upon its use.”<sup>1</sup>*

In October of 2005, the 109th Congress of the United States enacted 15 U.S.C. § 7901, popularly known as the Protection of Lawful Commerce in Arms Act (“PLCAA”).<sup>2</sup> The law was aimed at prohibiting “causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products . . . for 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.”<sup>3</sup> Since its enactment, the PLCAA has largely “remove[d] the gun industry from the salutary effects of the civil justice system,” effectively rendering manufacturers of the most inherently dangerous products on the market immune from lawsuits arising out of the negligent misuse of their products.<sup>4</sup>

In 1998, frustrated by Congress’s inability to enact more effective gun control legislation, Dennis Henigan, an attorney for Handgun Control Inc.,<sup>5</sup> roused a series of lawsuits against various handgun manufacturers intended to weaponize the financial burdens of litigation as a means of indirectly

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\* JD Candidate, University of Pittsburgh, 2020.

<sup>1</sup> *Ace Fireworks Co. v. City of Tacoma*, 455 P.2d 935, 937 (Wash. 1969).

<sup>2</sup> Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 (2005).

<sup>3</sup> *Id.* § 7901(b)(1).

<sup>4</sup> THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, *Justice Denied: The Case Against Gun Industry Immunity*, 7 (2013).

<sup>5</sup> Handgun Control Inc. is now known as The Brady Center to Prevent Gun Violence.

regulating the industry.<sup>6</sup> That year, New Orleans and Chicago became the first of nearly three dozen cities and counties in the U.S. to file suits against gun manufacturers and dealers.<sup>7</sup> The bases for the lawsuits ranged from products liability and public nuisance to negligent marketing and ultra-hazardous activity.<sup>8</sup>

In 1999, after one teacher and twelve students were killed in Littleton, Colorado, the litigation campaign gained momentum.<sup>9</sup> Dozens of cities, several states, and President Bill Clinton's White House sued and threatened to sue a number of large firearms manufacturers, accusing them of negligent business practices.<sup>10</sup> On March 17, 2000, Smith & Wesson reached a settlement agreement with the White House to avoid threatened lawsuits in what was believed to be a massive victory for gun reform advocates.<sup>11</sup> The manufacturer agreed to a number of voluntary reforms and committed to fundamentally changing the ways guns were manufactured, distributed, and sold.<sup>12</sup> "The agreement mark[ed] the first big concession by industry to the mounting public and political pressure for stronger gun controls" and "represent[ed] a crushing defeat for the National Rifle Association."<sup>13</sup> The NRA responded to the settlement by publicly denouncing Smith & Wesson as a "sellout" acting in "craven self-interest" and encouraged organizations to immediately boycott Smith & Wesson products.<sup>14</sup> Over the course of the

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<sup>6</sup> David Kopel, *The Protection of Lawful Commerce in Arms Act: Facts and Policy*, WASH. POST: THE VOLOKH CONSPIRACY (May 24, 2016, 7:52 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-act-facts-and-policy/>.

<sup>7</sup> Stephen P. Teret & Patti L. Culross, *Product-Oriented Approaches to Reducing Youth Gun Violence*, 12 CHILDREN, YOUTH, AND GUN VIOLENCE 118, 128 (2002).

<sup>8</sup> *Id.*; Danielle Kurtzleben, *Fact Check: Are Gun-Makers 'Totally Free of Liability for their Behavior'?*, NPR: IT'S ALL POLITICS (Oct. 6, 2015, 3:49 PM), <https://www.npr.org/sections/itsallpolitics/2015/10/06/446348616/fact-check-are-gun-makers-totally-free-of-liability-for-their-behavior>.

<sup>9</sup> Avi Selk, *A Gunmaker Once Tried to Reform Itself*, WASH. POST: RETROPOLIS (Feb. 27, 2018, 8:46 AM), <https://www.washingtonpost.com/news/retropolis/wp/2018/02/27/a-gunmaker-once-tried-to-reform-itself-the-nra-nearly-destroyed-it/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Christina Austin, *How Gun Maker Smith & Wesson Almost Went Out of Business When it Accepted Gun Control*, BUSINESS INSIDER (Jan. 21, 2013), <https://www.businessinsider.com/smith-and-wesson-almost-went-out-of-business-trying-to-do-the-right-thing-2013-1>.

<sup>13</sup> Selk, *supra* note 9.

<sup>14</sup> Austin, *supra* note 12; *The Smith & Wesson Sellout*, NRA-ILA (Mar. 20, 2000), <https://www.nraila.org/articles/20000320/the-smith-wesson-sellout>.

next year, Smith & Wesson sales revenue declined by nearly 40%.<sup>15</sup> “More than 100 employees—15 percent of the workforce.”<sup>16</sup> Ed Shultz stepped down as Smith & Wesson’s chief executive.<sup>17</sup> Smith & Wesson was eventually sold to an American start-up, and President George W. Bush’s administration made no attempt to enforce the settlement agreement reached between Smith & Wesson and the previous administration.<sup>18</sup> But, the NRA had made clear the power that it had over the industry. Glock, which had briefly considered accepting a similar deal with the federal government, quickly changed course after the NRA spoke out against Smith & Wesson.<sup>19</sup> A Glock executive told the Mercury News that the company would rather risk “bleeding to death with legal bills,” than face what Smith & Wesson was going through.<sup>20</sup> Soon, the NRA’s influence in Washington would make certain that gun manufacturers would no longer have to make such a choice.

In 2002, John Allen Muhammad and Lee Boyd Malvo killed seventeen people in a span of nine months in a string of attacks now widely known as the Beltway sniper shootings.<sup>21</sup> It was later discovered that the retailer who had sold Muhammad and Malvo the guns they used in the attacks, Bull’s Eye Shooter Supply, had failed to keep required records of gun sales and had lost over 238 guns in the three years leading up to the shootings.<sup>22</sup> “Victims’ families sued . . . Bull’s Eye, as well as the gun manufacturer, Bushmaster, arguing that the store was responsible for the shootings because of its negligent sales practices and Bushmaster was responsible because it continued to supply firearms to the store despite the store’s known negligence.”<sup>23</sup> In 2004, Bull’s Eye and Bushmaster were found liable in a \$2.5 million settlement.<sup>24</sup>

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<sup>15</sup> Austin, *supra* note 12.

<sup>16</sup> Selk, *supra* note 9.

<sup>17</sup> *Id.*

<sup>18</sup> Kopel, *supra* note 6.

<sup>19</sup> Selk, *supra* note 9.

<sup>20</sup> *Id.*

<sup>21</sup> *Immunizing the Gun Industry*, CENTER FOR AMERICAN PROGRESS (Jan. 15, 2016, 9:00 AM), <https://www.americanprogress.org/issues/guns-crime/reports/2016/01/15/128949/immunizing-the-gun-industry-the-harmful-effect-of-the-protection-of-lawful-commerce-in-arms-act/>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

The PLCAA was enacted one year later in direct response to the “[l]awsuits . . . commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.”<sup>25</sup> The PLCAA generally shields federally licensed manufacturers, dealers, and sellers of firearms or ammunition from any civil action resulting from criminal or unlawful misuse of their products.<sup>26</sup> The law contains six express exceptions to this prohibition,<sup>27</sup> one of which permits “action[s] 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>28</sup> This exception, known as the sales and marketing predicate exception to the PLCAA, served as the basis for the 2019 lawsuit in *Soto v. Bushmaster Firearms International*.<sup>29</sup>

Larry E. Craig, a Republican senator from Idaho who sponsored the bill and who, at the time of its enactment, was a sitting board member for the NRA,<sup>30</sup> avowed that the PLCAA would “put an end to [the] politically motivated lawsuits against the firearms industry” that he labeled “a threat to jobs and the economy.”<sup>31</sup> The statute itself maintained that the “possibility of imposing liability on an entire industry for harm that is solely caused by others” was an “abuse of the legal system,” that invited “the disassembly and destabilization of other industries and economic sectors lawfully competing

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<sup>25</sup> 15 U.S.C. § 7901(a)(3).

<sup>26</sup> The law specifically prohibits the bringing of qualified civil liability actions in any Federal or State courts. § 7903(5) defines “qualified civil liability actions” as “a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or 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.” 15 U.S.C. § 7903(5)(A). Under the statute, a “qualified product” means a firearm, any antique firearm, or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce. 15 U.S.C. § 7903(4).

<sup>27</sup> 15 U.S.C. § 7903(5)(A)(i)–(vi).

<sup>28</sup> 15 U.S.C. § 7903(A)(iii).

<sup>29</sup> *Soto v. Bushmaster Firearms Int’l, L.L.C.*, 202 A.3d 262 (Conn. 2019).

<sup>30</sup> Daniel P. Rosner, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 421, 443 n.117 (2018).

<sup>31</sup> VIVIAN S. CHU, CONG. RSCH. SERV., R42871, THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY OF GUN MANUFACTURERS I (2012).

in the free enterprise system of the United States,” and constituted an “unreasonable burden on interstate and foreign commerce of the United States.”<sup>32</sup>

In the eyes of the 109th Congress, the liability actions that had been commenced against gun manufacturers were based on theories without foundation in the common law and manifested an intent to expand civil liability “in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several states.”<sup>33</sup> However, the type of immunization enjoyed by gun manufacturers under the PLCAA is, in fact, one rarely enjoyed by products manufacturers in the United States.<sup>34</sup> Dennis Henigan, who fervently opposed enactment of the PLCAA, disputed the notion that actions brought against guns manufacturers prior to 2005 constituted an attempt to unlawfully expand civil liability, noting that it was, in fact, the PLCAA that was attempting to radically change the rules by “mak[ing] irresponsible gun dealers . . . the only business[es] in America exempt from longstanding principles of negligence, nuisance, and product liability.”<sup>35</sup> According to John Goldberg, a professor at Harvard Law School and a specialist in tort law, “Congress has rarely acted to bar the adoption by courts of particular theories of liability against a particular class of potential defendants.”<sup>36</sup>

While supporters of the PLCAA maintain that the law is necessary to prevent unwarranted lawsuits that would create major restrictions on interstate commerce in firearms and ammunition, including unwanted design changes, burdensome sale policies, and a higher cost for consumers,<sup>37</sup> civil litigation has often been utilized as a tool to indirectly regulate consumer products manufacturing industries.<sup>38</sup> Actions in products liability have provided a vital mechanism for the protection of public health and safety in some of the nation’s largest industries and have played a significant role in minimizing the outsourced harms of corporations dealing in rapidly

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<sup>32</sup> 15 U.S.C. § 7901(a)(6).

<sup>33</sup> *Id.* § 7901(a)(7).

<sup>34</sup> THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, *supra* note 4.

<sup>35</sup> CHU, *supra* note 31.

<sup>36</sup> Kurtzleben, *supra* note 8.

<sup>37</sup> *The Smith & Wesson Sellout*, *supra* note 14.

<sup>38</sup> Jon S. Vernick et al., *Role of Litigation in Preventing Product-related Injuries*, 25 EPIDEMIOLOGIC REV. 90, 90 (2003).

advancing goods and technology.<sup>39</sup> Real or threatened lawsuits in this area have widespread regulatory implications for multinational corporations “insofar as they discourage manufacturers from engaging in the types of conduct that [give] rise to the claims in the first place,”<sup>40</sup> and, as such, provide an essential apparatus for shifting power back into the hands of consumers. In 1944, in his *Escola v. Coca Cola Bottling Co.* concurrence, Justice Roger Traynor implored the courts to recognize the necessity of a strict products liability doctrine in light of advancements in commercial manufacturing and marketing, writing:

Even if there is no negligence, [ ] public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. . . . The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. . . . Against such a risk there should be

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<sup>39</sup> See, e.g., John Schwartz, *Dow Corning Accepts Implant Settlement Plan*, WASH. POST (July 9, 1998), <https://www.washingtonpost.com/archive/politics/1998/07/09/dow-corning-accepts-implant-settlement-plan/8627922a-0b93-49a3-9c98-bfef9e363d5a/> (“Dow Corning Corp. has agreed to pay \$3.2 billion to settle claims of about 170,000 women who say their silicone breast implants made them sick.”); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 467 (Cal. 1944) (“The consumer no longer has means or skill enough to investigate for himself the soundness of a product . . . and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.”); Wilson Morris, *Ford Agrees to Pay \$600,000 to Boy in Pinto Crash*, WASH. POST (Aug. 25, 1978), <https://www.washingtonpost.com/archive/politics/1978/08/25/ford-agrees-to-pay-600000-to-boy-in-pinto-crash/aefab05f-e8a2-4fb6-9bc8-44ed3b344423/> (“At least 59 persons have died in Pinto crashes that triggered fires since 1975 . . . and more than 20 lawsuits are pending.”); Barry Meier, *Cigarette Makers and States Draft a \$206 Billion Deal*, N.Y. TIMES (Nov. 14, 1998), <https://www.nytimes.com/1998/11/14/us/cigarette-makers-and-states-draft-a-206-billion-deal.html> (“The plan . . . would cost the tobacco companies \$206 billion over 25 years and . . . would eliminate the industry’s most significant financial and legal threat: state suits seeking to recover the Medicaid costs of treating people with smoking-related illnesses.”).

<sup>40</sup> TIMOTHY D. LYTTON, *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL & MASS TORTS 2* (2006).

general and constant protection and the manufacturer is best situated to afford such protection.<sup>41</sup>

Since the Court's formal adoption of strict liability,<sup>42</sup> eighteen years after Justice Traynor's *Escola* concurrence, public perception of the doctrine has fluctuated between hostility, apathy, and fervor and has become an increasingly politicized area of the law.<sup>43</sup> While the law of strict liability itself has seen significant changes since the mid-twentieth century, its central public policy justifications have remained constant. Since its inception, strict liability has generally been understood to provide a mechanism for loss shifting based on converging theories of safety, economics, and superior knowledge.<sup>44</sup> Loss shifting theory operates from the starting proposition that "the seller is ordinarily in a better position than the buyer to cover damages" because the seller has the ability to raise the price of goods and, in doing so, outsource the cost of damages to future consumers of the product.<sup>45</sup> Thus, "the seller is better able to bear the loss than the innocent consumer and, after a period of time, will be able to pass the loss on to consumers in the form of higher prices."<sup>46</sup> In theory, substantial settlements and verdicts against manufacturers of dangerous products will ultimately drive manufacturers to invest in prevention rather than pay the penalty for their neglect.<sup>47</sup> Products liability suits, then, become a catalyst for redesigns, recalls, implementations of new testing methods, differing design strategies, and rebranded marketing tactics that aim to avoid the financial burden of consumer injury and ultimately results in a safer product reaching the marketplace.<sup>48</sup> This model of harm prevention through enforcement of accountability ensures that "undesirable and harmful behaviors are costly to the actor"<sup>49</sup> and provides a

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<sup>41</sup> *Escola*, 150 P.2d 440–41.

<sup>42</sup> See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

<sup>43</sup> PETER H. SCHUCK, TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE 27 (1991).

<sup>44</sup> See Vernick et al., *supra* note 38, at 91.

<sup>45</sup> FRANK J. VANDALL, A HISTORY OF CIVIL LITIGATION: POLITICAL AND ECONOMIC PERSPECTIVES 20 (2011).

<sup>46</sup> *Id.* at 21.

<sup>47</sup> TOM CHRISTOFFEL & STEPHEN P. TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 159 (1993).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 160.

strong financial incentive for manufacturers to take additional measures to ensure the safety of their products.<sup>50</sup>

In the decades since its adoption, strict products liability has repeatedly proven itself to be an effective means of enhancing public safety and reducing products-related injuries on a massive scale. One of the most significant examples of this trajectory has taken place in the automobile industry. “Prior to the late 1960’s, a generally accepted rule of law was that automobile manufacturers were not obligated to make their products ‘crashworthy.’”<sup>51</sup> However, in 1967, after the publication of a law review article written by Ralph Nader and Joseph Page that “urged the trial bar to exert pressure on the automobile industry through litigation to force the safety advances that had not been accomplished by self-regulation,” product liability in the automobile industry began to evolve in a way that forced car manufacturers to improve the safety of their vehicles.<sup>52</sup> In 2012, the National Highway Traffic Safety Administration (“NHTSA”) reported that the average vehicle on the road in that year had “an estimated 56% lower fatality risk for its occupants than the average vehicle on the road in the late 1950s.”<sup>53</sup> This vehicle safety development, estimated to have saved 27,621 lives in 2012 alone, was attributed by the NHTSA to “advanced engineering, in-depth research and analysis of crash data . . . [and] more safety features.”<sup>54</sup>

Strict products liability played a similar role in reshaping the tobacco industry beginning in the 1990s. In 1987, California Assembly Speaker Willie Brown, who from 1976 to 1996 received \$635,000 in campaign contributions from tobacco manufacturers, reached an agreement with tobacco lobbyists and insurance companies to enact tort reform legislation that exempted tobacco from strict products liability in California.<sup>55</sup> The legislation immunized tobacco manufacturers from tort liability in the state of California until 1997, after tobacco was removed from the strict liability exemption contained in the American Law Institute’s Third Restatement on

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<sup>50</sup> Vernick et al., *supra* note 38.

<sup>51</sup> CHRISTOFFEL & TERET, *supra* note 47, at 161.

<sup>52</sup> *Id.*

<sup>53</sup> *Newer Cars Are Safer Cars*, NHTSA, <https://www.nhtsa.gov/newer-cars-are-safer-cars> (last visited Feb. 14, 2020).

<sup>54</sup> *Id.*

<sup>55</sup> Elizabeth Laposata et al., *Tobacco Industry Influence on the American Law Institute’s Restatements of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1, 48 (2012).

Torts.<sup>56</sup> Just one year later, after settlements in smoking-related lawsuits brought by four states seeking to recover the Medicaid costs of treating people with smoking-related illnesses cost the tobacco industry \$40 billion,<sup>57</sup> tobacco manufacturers found themselves facing thirty-eight additional state lawsuits and a \$516 billion bill in Congress that would give the federal government regulatory authority over nicotine.<sup>58</sup>

In November 1998, to “eliminate the industry’s most significant financial and legal threat,” the nation’s four largest cigarette manufacturers, the Attorneys General of forty-six states, five U.S. territories, and the District of Columbia reached the largest civil litigation settlement in the history of the United States: the Master Settlement Agreement (“MSA”).<sup>59</sup> The MSA required participating manufacturers to make initial, annual, and strategic contribution payments totaling \$206 billion over twenty-five years.<sup>60</sup> In addition, the settlement imposed significant prohibitions and restrictions on tobacco advertising, marketing and promotional programs or activities, prohibited certain practices that sought to hide negative information about smoking, created a tobacco prevention foundation, and disbanded tobacco industry initiatives.<sup>61</sup> The MSA “effectively codif[ied] on a national level marketing and advertising concessions made by the industry over the past year” in settling the four smoking-related state lawsuits.<sup>62</sup> While the agreement resolved the thirty-eight state claims still pending against the manufacturers, it did not provide immunity from future lawsuits brought on behalf of individual smokers or trade unions.<sup>63</sup>

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<sup>56</sup> *Id.* at 45.

<sup>57</sup> Barry Meier, *Cigarette Makers and States Draft a \$206 Billion Deal*, N.Y. TIMES (Nov. 14, 1998), <https://www.nytimes.com/1998/11/14/us/cigarette-makers-and-states-draft-a-206-billion-deal.html>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *The Master Settlement Agreement: An Overview*, PUBLIC HEALTH LAW CENTER 5 (Jan. 2019), <https://publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2019.pdf> (agreement prohibits or restricts: “direct and indirect targeting of youth,” “billboards, transit ads, and other outdoor advertising not in direct proximity to a retail establishment that sells tobacco products,” “product placements in entertainment media,” branded merchandise, brand name sponsorships, “lobbying against particular kinds of tobacco control legislation and administrative rules, agreements to suppress health-related research,” and “material misrepresentations about health consequences of using tobacco”).

<sup>62</sup> Meier, *supra* note 57.

<sup>63</sup> *Id.*

Contrary to concerns that such a sweeping regulatory agreement would have detrimental effects on the tobacco industry, participating manufacturers actually “maintained or improved performance in terms of investor stock returns and profit from domestic tobacco sales.”<sup>64</sup> While “overall domestic consumption of cigarettes decreased, the cigarette price increases more than offset such declines.”<sup>65</sup> The success of the MSA—and, by extension products liability litigation—as a mechanism for ensuring greater public safety is evidenced by the continued profitability of tobacco manufacturers post-MSA while rates of cigarette consumption have continued to decrease.<sup>66</sup> According to CDC reports analyzed by the American Lung Association, cigarette smoking rates in adults continued their pre-MSA trajectory after the agreement, falling from 24.7% in 1997 to 14% in 2017.<sup>67</sup> While cigarette smoking rates in youths had continued to climb prior to the MSA, reaching their peak in 1997 at 36.4%, these rates began to decline significantly in 1999 and, as of 2017, had dropped as low as 8.8%.<sup>68</sup>

There is a significant body of empirical evidence supporting the conclusion that product liability litigation has a positive effect on consumer safety. In 1976, the Federal Interagency Task Force on Product Liability was created to examine the effects of products liability litigation on U.S. businesses.<sup>69</sup> The Task Force, after surveying large product manufacturers via telephone and determining that 51.3% of responding firms had instituted programs to reduce the risk of product liability, concluded that the tort system and rising product liability premiums had a positive impact on product liability loss prevention.<sup>70</sup> A 1988 study by the Conference Board concluded that firms’ actual liability experiences led to a 35% improvement in the safety of particular products and a 47% improvement in product usage and warnings, while expected liability costs led to a 19% improvement in product

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<sup>64</sup> Frank A. Sloan et al., *Impacts of the Master Settlement Agreement on the Tobacco Industry*, 13 *TOBACCO CONTROL* 356, 358–59 (2004).

<sup>65</sup> *Id.* at 359.

<sup>66</sup> *Id.* at 360 (“The MSA was never intended nor expected to destroy the tobacco industry.”).

<sup>67</sup> *Overall Tobacco Trends*, AMERICAN LUNG ASSOCIATION, <https://www.lung.org/our-initiatives/research/monitoring-trends-in-lung-disease/tobacco-trend-brief/overall-tobacco-trends.html> (last visited Feb. 25, 2020).

<sup>68</sup> *Id.*

<sup>69</sup> Vernick et al., *supra* note 38, at 91.

<sup>70</sup> *Id.*

safety and a 21% improvement in product usage and warnings.<sup>71</sup> In 1992, an extensive analysis of punitive damages in products liability litigation concluded that 82% of defendants ordered to pay punitive damages took some safety step to remedy the dangerous situation, with 43% taking remedial steps prior to litigation.<sup>72</sup> A 1983 study published by the Rand Corporation “conclude[d] that, for most companies, liability was the single greatest factor influencing product design.”<sup>73</sup>

According to Professor Jon Vernick:

Although it is sometimes difficult to attribute specific changes to specific cases, the weight of the anecdotal and empirical evidence suggests that litigation has made some products safer. Prevention occurs through the imposition of monetary damages, media attention, information gathering, and litigation’s ability to foster subsequent legislative or regulator change.<sup>74</sup>

And while some scholars argue that products liability imposes potentially harmful costs to products manufacturers and interferes with industrial innovation and competition,<sup>75</sup> others maintain that, “[c]ontrary to the dire warnings of the tort revisionists, ethical businesses benefit from the awarding of tort damages against irresponsible or unscrupulous competitors, foreign or domestic.”<sup>76</sup> In some circumstances, litigation may even “achieve more optimal or at least equally effective public health protection” than traditional forms of regulation because concern for the financial and political implications of tort liability may lead industries to engage in safer behavior that they would not be spurred to engage in by a regulation.<sup>77</sup> Additionally, some scholars assert that it “is far more likely [for a company] to be bankrupted by the loss of public trust in its products than by a sizable punitive damages award.”<sup>78</sup> Most importantly, the decision of whether the economic

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<sup>71</sup> SCHUCK, *supra* note 43, at 114–15.

<sup>72</sup> Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 79 (1992).

<sup>73</sup> Vernick et al., *supra* note 38, at 91.

<sup>74</sup> *Id.* at 96.

<sup>75</sup> See George L. Priest, *Products Liability Law and the Accident Rate*, in LIABILITY PERSPECTIVES AND POLICY 184 (Robert E. Litan & Clifford Winston eds., 1988).

<sup>76</sup> MICHAEL RUSTAD & THOMAS KOENIG, IN DEFENSE OF TORT LAW 86 (2001).

<sup>77</sup> W.E. Parmet & R.A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437, 448 (2000).

<sup>78</sup> RUSTAD & KOENIG, *supra* note 76, at 205.

loss, if there will be any, is worth the social benefit of inherently safer consumer products should be one that remains vested in the consumer.

Strict products liability acts as a mechanism for fostering this consumer decision making process. Consumers have two central interests in a system of consumer protection: that the products and services they receive be safe and that they be inexpensive.<sup>79</sup> According to tort liability scholar Peter Schuck, these interests “coexist in an inevitable tension” and are weighted differently by each consumer based on their “valuations of safety” and how much safety they can afford.<sup>80</sup> The current system of products liability actually fosters the free market economic system by supplementing naturally-occurring market forces and allowing consumer preferences to manifest in the marketplace, resulting in a fusion of products and levels of safety that reflect *consumers’* risk valuation and associated safety benefits.<sup>81</sup> Thus, “if safer products are desirable, consumers will be willing to pay more for these products and companies will produce them.”<sup>82</sup> Conversely, if consumers determine that the benefit imputed by the product is no longer worth its increased cost as a result of the manufacturer’s absorption of unsafe products litigation expenses, then the manufacturer and the product will be forced out of the market by consumers who have deemed the product to have a net cost, rather than benefit, to society.

Legislation like the PLCAA that immunizes manufacturers from this natural free market process, then, are inherently anti-capitalist and serve to artificially preserve sectors of industry that consumers would otherwise be unwilling to pay for. According to many, the enactment of the PLCAA in 2005 was historic—marking “the first time that the federal government will be stepping in and retroactively depriving injured people of their vested legal rights under state law, without providing them any alternative.”<sup>83</sup> But while it is exceedingly rare for Congress to immunize an entire class of defendants from a particular theory of liability through legislation,<sup>84</sup> the Bill’s success in

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<sup>79</sup> SCHUCK, *supra* note 43, at 36.

<sup>80</sup> *Id.*

<sup>81</sup> W. Kip Viscusi, *Does Product Liability Make Us Safer?*, 35 REG. 24, 25 (2012).

<sup>82</sup> *Id.*

<sup>83</sup> 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>.

<sup>84</sup> Kurtzleben, *supra* note 8.

the 109th Congress comes as no surprise given the deep pockets and lobbying efforts of the National Rifle Association. By constructing and proliferating an empirically baseless narrative that the Act was a necessary piece of tort reform to push back against “reckless” gun industry lawsuits aimed at holding manufacturers and dealers liable for harm “totally beyond their control,”<sup>85</sup> the NRA effectively bought immunity for the guns manufacturing industry in America.

The PLCAA has had a significant chilling effect on products liability litigation against guns manufacturers since its enactment, leading to the dismissal of many lawsuits before courts have any opportunity to consider liability on the part of gun makers.<sup>86</sup> And despite significant criticism from lawyers, scholars, and members of the public, legal challenges based on the constitutionality of the Act have been unsuccessful.<sup>87</sup> As a result, victims of gun violence seeking to bring civil action against the manufacturer or dealer of the weapon that caused their injury must, in order to avoid dismissal under the PLCAA, establish that their claim falls within one of the six exceptions to the Act.<sup>88</sup>

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<sup>85</sup> NRA-ILA, *Protection of Lawful Commerce in Arms Act*, NRA-ILA.ORG (Apr. 10, 2010), <https://www.nra-ila.org/articles/20100401/protection-of-lawful-commerce-in-arms>.

<sup>86</sup> See *Immunizing the Gun Industry*, *supra* note 21 (describing a lawsuit brought by parents of a child killed in the 2012 Aurora, Colorado movie theatre shooting against Lucky Gunner, alleging that the online retailer did not provide reasonable safeguards to prevent potentially dangerous individuals from obtaining weapons, that was dismissed under the PLCAA where the parents were ultimately ordered to pay Lucky Gunner more than \$200,000 in legal fees; describing the dismissal of a lawsuit brought by the father of a child accidentally shot and killed by his 11-year-old friend playing with his father's handgun against Beretta, alleging that the manufacturer failed to include an inexpensive device on the weapon that would prevent it from firing without a magazine and failed to include a warning that the weapon could be used without a magazine, under the PLCAA; describing the dismissal of a lawsuit brought by family members of an individual who was shot and killed by a known gang member against the guns dealer, alleging that the dealer failed to take appropriate steps to prevent the illegal sale of guns, under the PLCAA).

<sup>87</sup> See *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *City of New York v. Beretta U.S.A., Corp.*, 524 F.3d 384 (2d Cir. 2008); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174 (D.D.C. 2009); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009).

<sup>88</sup> The PLCAA excludes from the scope of its definition of “qualified civil liability action” six causes of action. For purposes of this Note, we will be focusing solely on the third exception, referred to as the “predicate exception,” which permits “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 the proximate cause of the harm for which relief is sought.” 15 U.S.C.A. § 7903(5)(A)(i–vi) (2005).

In 2019, six years after Adam Lanza shot and killed twenty first graders and six staff members at Sandy Hook Elementary School, administrators of decedents' estates and faculty successfully sued Bushmaster, the manufacturer of the XM15-E2S semiautomatic rifle used by Lanza, under Connecticut state law and the predicate exception to the PLCAA.<sup>89</sup> The *Soto* plaintiffs argued that Bushmaster had violated Connecticut's unfair trade practice law (CUTPA) by advertising and marketing the XM15-E2S in an unethical, oppressive, immoral, and unscrupulous manner that promoted illegal offensive use of the rifle and, as such, could be sued under the predicate exception to the PLCAA due to the promotional tactics' causal relationship to all or some of the injuries inflicted during the Sandy Hook massacre.<sup>90</sup> Justice Richard N. Palmer, writing for the majority, rejected Bushmaster's argument that the term "applicable" contained in the text of the predicate exception limited its scope to violations of statutes that are directly, expressly, or exclusively applicable to firearms.<sup>91</sup> In determining that the exception was not so limited, Justice Palmer concluded that "Congress was aware, when it enacted [the] PLCAA, that both the FTC Act and state analogues such as CUTPA have long been among the primary vehicles for litigating claims that sellers of potentially dangerous products such as firearms have marketed those products in an unsafe and unscrupulous manner,"<sup>92</sup> and, thus, could not have intended the reading proposed by the defendant.

The *Soto* court also noted that many of the legislators who sponsored the PLCAA had either expressly stated or clearly implied that "the only actions that would be barred by the PLCAA would be ones in which a defendant bore *absolutely no responsibility or blame* for a plaintiff's injuries."<sup>93</sup> In holding that the PLCAA did not bar the plaintiffs' wrongful

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<sup>89</sup> *Soto v. Bushmaster Firearms Int'l, L.L.C.*, 202 A.3d 262 (Conn. 2019).

<sup>90</sup> Plaintiffs alleged that the defendants "promoted use of the XM15-E2s for offensive, assaultive purposes—specifically for 'waging war and killing human beings'—and not solely for self-defense, hunting, target practice, collection, or other legitimate civilian firearm uses; extolled the militaristic qualities of the XM15-E2s; advertised the XM15-E2s as a weapon that allows a single individual to force his multiple opponents to 'bow down'; marketed and promoted the sale of the XM15-E2S with the expectation and intent that it would be transferred to family members and other unscreened, unsafe users after its purpose." *Id.* at 284.

<sup>91</sup> *Id.* at 302.

<sup>92</sup> *Id.* at 304.

<sup>93</sup> *Id.* at 319.

marketing claims because CUTPA qualified as a predicate statute under the Act's third exception, the court noted:

We are confident [ ] that, if there were credible allegations that a firearms seller had run explicit advertisements depicting and glorifying school shootings, and promoted its products in video games, such as "School Shooting," that glorify and reward such unlawful conduct, and if a troubled young man who watched those advertisements and played those games were inspired thereby to commit a terrible crime like the ones involved in the Sandy Hook massacre, then even the most ardent sponsors of the PLCAA would not have wanted to bar a consumer protection lawsuit seeking to hold the supplier accountable for the injuries wrought by such unscrupulous marketing practices.<sup>94</sup>

The *Soto* court's decision made clear that allowing the plaintiffs to proceed in their action against Bushmaster under the PLCAA's predicate exception did not do violence to the Act because the alleged violation of CUTPA constituted illegal conduct on the part of the defendant and, as such, was not an attempt to hold firearms sellers strictly liable for gun violence—the type of lawsuits the PLCAA was clearly aimed at prohibiting.<sup>95</sup> The court "interpreted the legislative history as limiting the applicability of the PLCAA to *blameless* defendants . . . [and] concluded that CUTPA violators do not constitute blameless defendants and should not fall within the statutory shield of the PLCAA."<sup>96</sup> Importantly, the *Soto* plaintiffs' theory of liability did not sound in tort—and it was likely for this reason alone that the action was permitted. But while the PLCAA may remain impenetrable to strict products liability claims in tort law, the *Soto* decision has the potential to provide a method of access to the courts for victims of gun violence through a theory of wrongfulness based in similar consumer protection laws—those aimed at "immoral, unethical, oppressive, or unscrupulous"<sup>97</sup> marketing practices that can be shown to bear a causal relationship to instances of gun violence. According to law professor John Culhane, the case, which "offers a blueprint

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<sup>94</sup> *Id.* at 324.

<sup>95</sup> *Id.* at 309 ("In the present case, the plaintiffs allege that the defendants' *illegally* marketed the XM15-E2s by promoting its criminal use for civilian assaults, and that this wrongful advertising was a direct cause of the Sandy Hook massacre. At no time and in no way does the congressional statement indicate that firearm sellers should evade liability for the injuries that result if they promote the illegal use of their products.").

<sup>96</sup> Scott R. Thomas & Mystica M. Alexander, *Suing Guns Out of Existence*, 75 WASH. & LEE L. REV. 175, 187 (2019).

<sup>97</sup> *Soto*, 202 A.3d at 305.

for overcoming [the PLCAA]” has “monumental implications not only for the surviving families, but potentially the entire gun industry.”<sup>98</sup> Because every state has consumer protection statutes similar to Connecticut’s CUTPA, pursuant of this type of legal framework, if accepted by other state supreme courts, “may create a substantial opening in the immunity firearm manufacturers enjoy.”<sup>99</sup> By holding that the PLCAA does not preclude a state from enforcing “regulation[s] of advertising that threatens the public’s health, safety, and morals,”<sup>100</sup> the Connecticut Supreme Court sent a strong message to guns manufacturers: that no one is above the law.

On November 12, 2019, the United States Supreme Court denied defendant Bushmaster’s petition for a writ of certiorari.<sup>101</sup> While an order denying a petition for a writ of certiorari “is not designed to reflect the Court’s views either as to the merits of the case or as to its jurisdiction,”<sup>102</sup> former Supreme Court Justice Robert Jackson acknowledged that “lower courts do attach importance to denials and to the presence of absence of dissent from denials, as judicial opinions and lawyers’ arguments show.”<sup>103</sup>

The United States is facing a gun epidemic. Nearly 40,000 people in the United States died from gun-related injuries in 2017.<sup>104</sup> On August 3, 2019, Patrick Crusius entered a Walmart in El Paso, Texas and began shooting. Early the next morning, Connor Betts opened fire in an entertainment district in Dayton, Ohio.<sup>105</sup> Combined, the rampages left thirty-one people dead in a

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<sup>98</sup> John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, POLITICO MAG. (Mar. 18, 2019), <https://www.politico.com/magazine/story/2019/03/18/lawsuit-mass-shootings-225812>.

<sup>99</sup> Nora Freeman Engstrom & David M. Studdert, *Sandford Law Professors on the Lawsuit Against Gun Manufacturers in the Wake of the Sandy Hook Massacre*, STANFORD LAW SCHOOL (Mar. 14, 2019), <https://law.stanford.edu/2019/03/14/stanford-law-professors-on-sandy-hook-victims-relatives-lawsuit-against-gun-manufacturers/>.

<sup>100</sup> *Soto*, 202 A.3d at 273.

<sup>101</sup> *Remington Arms Co., LLC v. Soto*, 202 A.3d 262 (Conn. 2019), *cert. denied*, 140 S. Ct. 513 (2019).

<sup>102</sup> Garrett Epps, *The Curious Incident of the Court That Denied Cert*, THE ATLANTIC (May 30, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/the-curious-incident-of-the-court-that-denied-cert/561554/>.

<sup>103</sup> *Id.*

<sup>104</sup> John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RESEARCH CENTER (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/>.

<sup>105</sup> Campbell Robertson et al., *Back-to-Back Outbreaks of Gun Violence in El Paso and Dayton Stun Country*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/mass-shootings-dayton-el-paso.html>.

span of twenty-four hours. And the cost of gun violence goes beyond the lives lost. In 1994, the medical cost of treating gunshot injuries reached \$2.3 billion.<sup>106</sup> By 2019, gun violence was estimated to cost the U.S. \$229 billion every year.<sup>107</sup> Immunity legislation, like the PLCAA, forces taxpayers and victims of gun violence to absorb this cost instead of manufacturers and dealers who place inherently dangerous weapons into the stream of commerce. The Act constituted a rejection of 160 years of products liability and “flies in the face of concerns over continuing widespread gun violence.”<sup>108</sup> Corporations who lobbied for the Act through organizations like the NRA have adopted calculated and profit-driven strategies to expand the market of their weapons and court “high-risk users” through targeted media campaigns and promotional tactics.<sup>109</sup> And while the PLCAA has remained a seemingly impenetrable barrier to lawsuits based in deeply rooted products liability doctrines, *Soto* may be representative of a growing fracture in the legislation’s armor. By adopting the approach taken by the majority in *Soto*, state courts may be able to hold gun manufacturers responsible for the harms caused by their products if it can be shown that the manufacturer’s illegal marketing strategies were causally related to the injury. In so doing, Americans may once again have the ability to decide for themselves whether the benefit of the country’s gun industry, as it now stands, is worth its ever-rising cost.

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<sup>106</sup> VANDALL, *supra* note 45, at 194.

<sup>107</sup> Sunny Kim, *Gun Violence Costs the US \$229 Billion Annually: Report*, CNBC, <https://www.cnbc.com/2019/09/18/gun-violence-costs-the-us-229-billion-annually-report.html> (last updated Sept. 18, 2019).

<sup>108</sup> VANDALL, *supra* note 45, at 197.

<sup>109</sup> Tina Bellon, *Families Can Sue Gun Maker for Sandy Hook School Massacre*, REUTERS (Mar. 14, 2019), <https://www.reuters.com/article/us-usa-sandy-hook-remington/families-can-sue-gun-maker-for-sandy-hook-school-massacre-court-idUSKCN1QV2CY>.