

A SHOT IN THE DARK: HOW THE SANDY HOOK PLAINTIFFS ESTABLISHED LEGAL STANDING AGAINST THE GUN INDUSTRY

*By: Zachary Possess**

I. INTRODUCTION

Here's a consumer product being marketed to men, of all ages, and the imagery being used in the advertising is all militaristic, from the choice of the typeface down to the images . . . Now, if you're a disaffected young man . . . who sees violence as an answer to his problems, I don't think it's too much of a stretch to see how that might appeal to a person like that.¹

On December 14, 2012, a twenty-year-old man with a history of mental illness entered Sandy Hook Elementary School armed with a cache of weapons designed for military combat.² He clutched an AR-15 semiautomatic rifle in his hands, with two semiautomatic pistols and hundreds of rounds of ammunition clinging to his body.³ The guns and bullets he carried were all legally purchased.⁴ Within four and a half minutes, the shooter hunted down and murdered twenty first-graders and six staff members in a building dedicated to public education.⁵ Law enforcement discovered eighty shell casings littered on the floor of a

*J.D. Candidate at Seton Hall University Law School.

¹ *The Daily: Can Gun Makers Be Held Accountable for Mass Shootings?*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/podcasts/the-daily/sandy-hook-gun-lawsuit-nra.html> (quoting David Wheeler, father of Ben Wheeler, a six-year old boy killed at Sandy Hook Elementary School).

² *Sandy Hook School Shooting Fast Facts*, CNN (last updated Nov. 22, 2019), <https://www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts/index.html>. Out of respect for the twenty-six lives lost, and to avoid magnifying the mass murderer's profile, this Comment will not address the shooter by name.

³ Michael Ray, *Sandy Hook Elementary School Shooting*, ENCYCLOPEDIA BRITANNICA (Jan. 13, 2013), <https://www.britannica.com/event/Newtown-shootings-of-2012>.

⁴ Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html>. The weapons and ammunition were purchased by the shooter's mother. *Id.*

⁵ Mary Ellen Clark & Noreen O'Donnell, *Newtown School Gunman Fired 154 Rounds in Less Than 5 Minutes*, REUTERS (Mar. 28, 2013), <https://www.reuters.com/article/us-usa-shooting-connecticut/newtown-school-gunman-fired-154-rounds-in-less-than-5-minutes-idUSBRE92R0EM20130328>.

single classroom,⁶ reflecting both the shooter's mania and the lethality of the weapons he carried.⁷ Investigations later revealed that the shooter had intentionally chosen high-capacity magazines, leaving less dangerous weapons at home.⁸ Overall, he fired at least 154 rounds of high-capacity ammunition.⁹

Gun violence has remained a persistent public health crisis in the United States, with eighty-five gun-related deaths occurring each day.¹⁰ The problem has only grown more imminent in the last ten years; between 2014 and 2017, the number of gun-related deaths increased by thirty-two percent.¹¹ By contrast, the rest of the developed world has largely avoided the scourge of gun violence.¹² In the wake of the massacre at Sandy Hook Elementary, the nation collectively mourned the senseless murder of innocent children. The heinous events captured the attention of the media and public to an unprecedented degree and, to many, felt like a tipping point in the national discourse surrounding gun control.¹³ Nevertheless, in the eight years since Sandy Hook, the U.S. Congress has failed to pass any laws limiting access to high-capacity assault rifles. Faced with legislative inaction, the families of the Sandy Hook victims have sought relief through the American judicial system, filing suit in Connecticut state court against the manufacturer and seller of the guns used in the shooting. In March of 2019, the Connecticut Supreme Court struck a major blow against the gun industry by denying the defendants' motion to dismiss a claim filed under the state's unfair trade practices law.¹⁴

This Comment considers the implications of the Connecticut Supreme Court's recent decision in *Soto v. Bushmaster Firearms Int'l, LLC*, where the Sandy Hook plaintiffs stunned the legal world and successfully circumvented a federal statute that precludes nearly all

⁶ *Can Gun Makers Be Held Accountable for Mass Shootings?*, *supra* note 1.

⁷ *Id.*

⁸ Clark & O'Donnell, *supra* note 5.

⁹ Clark & O'Donnell, *supra* note 5.

¹⁰ See generally James M. Schulz et al. *The Sandy Hook Elementary School Shooting as Tipping Point: "This Time Is Different"*, 1 DISASTER HEALTH 65-73 (2013) (evaluating the congruence of several factors that made the shooting at Sandy Hook). Notably, mass shootings only comprise a small portion of overall gun-related deaths. In 2017, six-in-ten gun-related deaths were the result of suicides. See John Gramlich, *What the Data Says about Gun Deaths in the U.S.*, PEW RESEARCH CTR. (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s>.

¹¹ Gramlich, *supra* note 10.

¹² *Id.*

¹³ See Schulz et al., *supra* note 10.

¹⁴ *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 325 (Conn. 2019).

civil claims against the gun industry.¹⁵ Specifically, this Comment will explore the majority's reasoning in *Soto* and whether it can serve as a guide for future tort claims against gun sellers and manufacturers. Part II of this Comment provides historical context for the decision in *Soto*, discussing the statutory landscape for gun-related litigation and prior civil suits against gun manufacturers. Next, Part III analyzes the majority's decision in *Soto*, emphasizing those areas in which the Connecticut Supreme Court disagreed with the lower courts. Finally, Part IV argues that the use of certain images and themes in gun advertising may provide a cognizable cause of action in other states with robust unfair trade practice laws. This Comment concludes with recommendations for the future of litigation against the gun industry in a post-*Soto* world.

II. LITIGATION AGAINST THE GUN INDUSTRY PRIOR TO *SOTO*

This Part will begin by providing a broad overview of the gun violence epidemic currently plaguing the nation, followed by a discussion of litigation against the gun industry before and after the enactment of a federal immunity law.

A. *Gun Violence in the United States*

It is often said that gun violence is a uniquely *American* problem.¹⁶ Statistics prove that such sentiments are alarmingly true. The United States boasts the highest rate of gun-related homicides in the developed world, with roughly four times more deaths per capita than the second-ranking country, Switzerland.¹⁷ Between 1965 and 2004, aside from motor vehicle accidents, firearms were the most common cause of injury-related death nationally, killing 1,250,803 people.¹⁸ Mass shootings, defined by the Congressional Research Service as events in which an individual shoots four or more victims that were selected

¹⁵ *Id.*

¹⁶ See, e.g., Tim Ball, *A Very American Epidemic*, POLITICO (Nov. 5, 2019), <https://www.politico.eu/interactive/gun-violence-gun-crime-a-very-american-epidemic-las-vegas-columbine-sandy-hook-parkland-2020-presidential-campaign>; German Lopez, *America's Unique Gun Violence Problem, Explained in 16 Maps and Charts*, Vox (Aug. 31, 2019), <https://www.vox.com/policy-and-politics/2017/10/2/16399418/us-gun-violence-statistics-maps-charts>; Brian Klaas, *The World Thinks America's Gun Laws Are Crazy—and They're Right*, WASH. POST (Aug. 5, 2019).

¹⁷ Lopez, *supra* note 16.

¹⁸ Violence Policy Center, *Number and Rates of Firearm Mortality-United States, 1965 to 2004*, at 2 (2004), http://www.vpc.org/fact_sht/fadeathwithrates65-04.pdf.

somewhat indiscriminately, have rapidly increased in the past decade.¹⁹ As of April 28, 2020, 2,437 mass shootings have occurred in the United States since the killings at Sandy Hook Elementary.²⁰ News reports of mass shootings have become chillingly commonplace; since 2012, there has only been one full calendar week that a mass shooting did not occur.²¹

Social scientists and political commentators have put forth various theories to explain the epidemic of gun violence in the United States: untreated mental health disorders,²² poverty and inequality,²³ and America's "frontier" culture.²⁴ The most logical explanation, however, is the most obvious one: American consumers enjoy relatively unregulated access to guns and ammunition. A 2017 survey revealed that roughly thirty percent of Americans admit to owning a gun, and another eleven percent say they have access to a gun in their

¹⁹ Jerome P. Bjelopera et al., *Public Mass Shootings in the United States: Selected Implications for Federal Public Health and Safety Policy*, CONGRESSIONAL RESEARCH SERVICE (Mar. 18, 2013), <https://fas.org/sgp/crs/misc/R43004.pdf>.

²⁰ See German Lopez and Kavya Sukumar, *After Sandy Hook, We Said Never Again*, VOX (last updated Sep. 19, 2019), <https://www.vox.com/a/mass-shootings-america-sandy-hook-gun-violence>.

²¹ *Id.* While this statistic remained true up until March of 2020, it remains unclear whether the COVID-19 pandemic and subsequent shutdowns lead to an increase or decrease in mass shootings. Some news sources have reported a decline in mass shootings as a result of statewide shutdowns, while others have reported the opposite. Compare Chris Dolmetsch, *One Good Thing From the Pandemic: Mass Shootings in U.S. Plunge*, BLOOMBERG (May 9, 2020), <https://www.bloomberg.com/news/articles/2020-05-09/one-good-thing-from-the-pandemic-mass-shootings-in-u-s-plunge>, with Heidi Przybyla, *Gun Violence Grows During Coronavirus Pandemic Group's Data Shows*, NBC NEWS: MEET THE PRESS BLOG (last updated Sept. 22, 2020, 6:48 PM). Although the data regarding mass shootings remains in dispute, the pandemic has led to increase overall gun-related deaths. *Gun Violence and COVID-19: Colliding Public Health Crises*, EVERYTOWN RESEARCH & POLICY (June 16, 2020), <https://everytownresearch.org/report/gun-violence-and-covid-19-colliding-public-health-crises>.

²² See Ann Coulter, *Guns Don't Kill People, the Mentally Ill Do*, ANNCOULTER.COM, (Jan. 16, 2013) <http://www.anncoulter.com/columns/2013-01-16.html> (arguing that the Sandy Hook shooting was the result of a failure in Connecticut's mental health system). But see Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240-49 (2015) (dismantling the specious argument that mental illness causes gun violence).

²³ See Bruce P. Kennedy et al., *Social Capital, Income Inequality, and Firearm Violent Crime*, 47 SOCIAL SCIENCE & MEDICINE 7, 7 (1998) (positing that increasing poverty and income inequality has led to higher rates of gun violence).

²⁴ See Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1, 21-22 (2002) (describing the American "frontier experience" as "a selectively identified immigrant population taking over vast territory and reflecting an adventurous, individualist spirit, which is supposed to have something to do with aggressive, lawless violence.").

2020]

COMMENT

567

household.²⁵ The rate of civilian gun ownership in the United States is 120.5 guns per 100 citizens, making Americans *by far* the most-armed civilian population in the world.²⁶ The second most-armed civilian population is in Yemen (52.8 guns per 100 citizens), a nation currently embroiled in a bitter civil war.²⁷ Overall, Americans comprise four and a half percent of the global population but own roughly forty-five percent of private firearms.²⁸ Consequently, the United States is the only country in the world where guns outnumber citizens.²⁹

Typically, a public health crisis like gun violence would yield a legislative response. Safety concerns surrounding consumer goods such as automobiles, lead paint, and unpasteurized milk have led to complex regulatory systems to minimize the risk of illness or death. And yet, despite the murder of dozens of schoolchildren, the gun industry has managed to evade serious regulation. This has not been for lack of trying. The public outcry regarding gun violence has been deafening, as activists led by the parents and students victimized by school shootings have fought tirelessly for legislative reform.³⁰ Although advocacy groups have found success in lobbying at the state level, Congress has been entirely flat-footed on the issue.³¹ In light of this federal inertia, many gun control advocates have moved the battle into the courtroom, using tort litigation as a way to regulate the gun industry's most troublesome practices.

²⁵ Kim Parker et al., *America's Complex Relationship with Guns: An In-Depth Look at the Attitudes and Experiences of U.S. Adults*, PEW RESEARCH CTR. (Jun. 22, 2017), <https://www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns>. Notably, this number only reflects those who self-identify as gun owners, but likely excludes many people who own guns (i.e., those purchased illegally or those who answer the survey dishonestly). Other estimates suggest that roughly forty percent of modern American households "probably have a gun or guns in them." See David Yamane et al., *The Rise of Self Defense in Gun Advertising: The American Rifleman, 1918-2017*, prepared for session on "Guns and Markets" University of Arizona Gun Studies Symposium, 6 (last updated Jul. 2, 2018), <https://osf.io/preprints/socarxiv/jt8qa>.

²⁶ Aaron Karp, *Estimating Civilian-Held Firearms Numbers*, SMALL ARMS SURVEY (June 2018), <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf>.

²⁷ Lopez, *supra* note 16.

²⁸ Karp, *supra* note 26.

²⁹ Lopez, *supra* note 16.

³⁰ See, e.g., Charlotte Alter, *The School Shooting Generation Has Had Enough*, TIME (Mar. 22, 2018), <https://time.com/longform/never-again-movement>.

³¹ See, e.g., Katie Zezima, *Gun Control Group Claims Victory at Ballot Box, in Statehouses*, WASH. POST (Dec. 12, 2018), <https://www.washingtonpost.com/nation/2018/12/12/gun-control-group-claims-victory-ballot-box-statehouses> (reporting on the successes of Everytown for Gun Safety Action, a gun violence prevention group, throughout state legislatures in the year 2018).

B. Litigation as a Regulatory Tool against the Gun Industry

The concept of “regulation-through-litigation” has been vigorously debated among legal scholars.³² The fundamental arguments against the practice of regulation-through-litigation are that such efforts are inefficient in enacting change and subvert the American democratic process.³³ By contrast, those in favor of litigation as a regulatory tool contend that civil judgments can help disincentivize unscrupulous business practices and regulate dangerous markets that legislatures are otherwise unwilling to check.³⁴ For example, in the past, mass tort litigation has been used to combat the epidemic of cigarette-related deaths in the United States. As a result of a series of class action lawsuits, tobacco companies were ordered to provide internal documents that revealed executives had long understood the health risks associated with smoking.³⁵ Ultimately, several tobacco companies agreed to a \$200 billion Master Settlement Agreement, to be allocated to the victims of tobacco-related diseases over twenty-five years.³⁶ Even today, opioid manufacturers and distributors are being held accountable for the public health crisis caused by their products under public nuisance liability.³⁷

For many years, the gun industry faced similar legal challenges. Beginning in the 1980s, an increasing number of private citizens filed civil claims against gun manufacturers, distributors, and sellers under

³² Compare Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation*, in REGULATION THROUGH LITIGATION 212, 232 (W. Kip Viscusi ed., 2002) (“Ideally, the threat of civil liability has a regulatory effect by promoting optimal deterrence—the taking of precautions and selection of activities that minimize the sum of accident costs and accident avoidance costs.”), with Robert Reich, *Don’t Democrats Believe in Democracy?*, WALL ST. J. (Jan 12, 2000), <https://www.wsj.com/articles/SB947635315729229622>.

³³ See Reich, *supra* note 32.

³⁴ See Edward T. Schroeder, *Tort by Any Other Name - In Search of the Distinction between Regulation through Litigation and Convention Tort Law*, 83 TEX. L. REV. 897 (2005) (“Whether imposing civil liability for unreasonably dangerous product design or for medical care below the standard of the applicable medical community, tort law acts as a significant regulatory device by filling the gap between criminal behavior and socially advantageous behavior. In this sense, all tort litigation can be considered ‘regulation through litigation.’”).

³⁵ Jon S. Vernick et al., *Public Benefits of Recent Litigation Against the Tobacco Industry*, 298 JAMA 86, 87 (Jul. 4, 2007).

³⁶ Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 555–58 (2000); see also Richard A. Daynard et al., *Implications for Tobacco Control of the Multistate Tobacco Settlement*, 91 AM. J. PUB. HEALTH 1967, 1968–69 (2001).

³⁷ See German Lopez, *The Thousands of Lawsuits against Opioid Companies, Explained*, VOX (Oct. 27, 2019), <https://www.vox.com/policy-and-politics/2017/6/7/15724054/opioid-epidemic-lawsuits-purdue-oxycontin>.

various theories of liability.³⁸ States and municipalities also brought separate actions against the gun industry during this time seeking injunctions and damages for financial losses associated with gun violence, including police and emergency services and loss of future investment.³⁹ The influx of litigation during this period caused gun-rights advocates to grow increasingly concerned about future legal exposure.⁴⁰ Thus, for the next several decades, the top legislative priority of the National Rifle Association (“NRA”) and other gun advocacy groups became the passage of federal legislation to insulate the gun industry against civil liability.

Litigation against the gun industry proved effective in some regards. Of course, monetary settlements and judgments provided victims and their families an opportunity to be rightfully compensated for medical expenses, pain and suffering, and loss of income. In addition, the financial risk and negative publicity associated with a drawn-out trial put pressure on gun manufacturers and sellers to self-regulate. In 2000, Smith & Wesson, the nation’s oldest gun manufacturer, agreed to implement a wide array of substantive safety measures as part of a settlement agreement entered with three cities.⁴¹ The settlement agreement included the production of “smart guns” (i.e., weapons that can only be fired by an authorized user) and required the manufacturer to place a second serial number on each gun to prevent criminals from anonymizing the weapon.⁴² The impact of these lawsuits on defending gun companies was undeniable. Smith & Wesson barely avoided declaring bankruptcy following the 2000 settlement.⁴³ Shortly

³⁸ See, e.g., *Moore v. R.G. Indus.*, 789 F.2d 1326, 1328 (9th Cir. 1986) (products liability theory); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1253–54 (5th Cir. 1985) (ultra-hazardous activity theory); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1202–03 (7th Cir. 1984) (ultra-hazardous activity theory).

³⁹ See, e.g., *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313 (2001); *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000); *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *58 (July 13, 2000).

⁴⁰ See Eric Gorovitz et al., *Preemption or Prevention? Lessons from Efforts to Control Firearms, Alcohol, and Tobacco*, 19 J. OF PUB. HEALTH. POL’Y (Mar. 1998). In this 1998 article, the authors warned that several industries, including the gun industry, were actively lobbying Congress to pass legislation preempting state and local governments from passing regulation to address public health risks. *Id.*

⁴¹ James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. TIMES (Mar. 18, 2000), <https://www.nytimes.com/2000/03/18/us/under-legal-siege-gun-maker-agrees-to-accept-curbs.html>.

⁴² *Id.* Smith & Wesson faced strong criticism from the rest of the gun industry for agreeing to the settlement. *Id.*

⁴³ Dao, *supra* note 41.

thereafter, eight victims of a mass shooter known as “the D.C. sniper”⁴⁴ received a \$2.55 million legal settlement from the gun dealer and manufacturer, Bushmaster Firearms.⁴⁵ In 2003, a California gun maker was forced to shutter its doors when a jury awarded a \$24 million verdict to the seven-year-old victim of a defective handgun.⁴⁶

During this time, gun advocates were acutely aware of the spread of litigation throughout the nation. In particular, media coverage of the D.C. sniper settlement made national headlines in 2004,⁴⁷ thereby affirming the NRA’s warnings of an existential threat to the gun industry. After years of intense lobbying, the gun industry received an unprecedented gift from the United States Congress.

C. *The Passage of PLCAA*

In October of 2005, a Republican-controlled Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA).⁴⁸ PLCAA provides blanket civil immunity to the gun industry, insulating manufacturers, distributors, and sellers from lawsuits filed by gun violence victims.⁴⁹ The stated purpose of PLCAA is to ensure that the gun industry cannot be held liable “for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.”⁵⁰ More specifically, PLCAA pre-empts qualified civil liability actions against the gun industry in any state or federal court unless the plaintiff’s claim falls within one of PLCAA’s six narrow exceptions.⁵¹ The two statutory exceptions that have been invoked most frequently are (1) the “negligent entrustment exception,” which permits a cause of action “brought against a [firearm

⁴⁴ In October of 2002, a mass shooter later referred to as the “D.C. sniper” killed ten people and injured three more throughout the Washington area during a twelve-day crime spree. CNN Editorial Research, *DC Sniper Fast Facts*, CNN (updated Feb. 27, 2020), <https://www.cnn.com/2013/11/04/us/dc-area-sniper-fast-facts/index.html>.

⁴⁵ Associated Press, *D.C. Sniper Case Settlement Said to Be Made*, NBC NEWS (Sep. 8, 2004), http://www.nbcnews.com/id/5946729/ns/us_news-crime_and_courts/t/dc-sniper-case-settlement-said-be-reached.

⁴⁶ Robin Abcarian, *One of the Few Attorneys to Force A Gun Maker Out of Business Reflects on His Case and the American Firearms Culture*, L.A. TIMES (Sept. 8, 2016, 2:05 PM), <https://www.latimes.com/local/abcarian/la-me-abcarian-gun-attorney-20160909-snap-story.html>.

⁴⁷ Associated Press, *supra* note 45.

⁴⁸ 15 U.S.C. § 7901–03 (2018).

⁴⁹ *Id.*

⁵⁰ § 7901(5).

⁵¹ § 7903(5)(A)(i–vi).

or ammunition] seller for negligent entrustment or negligence per se;⁵² and (2) the “predicate exception,” which permits a cause of action when “a manufacturer or seller of a [firearm or ammunition] 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.”⁵³

During congressional debates in the House and Senate, PLCAA’s advocates argued that the nation desperately needed tort reform to prevent citizens, municipalities, and states from filing bad-faith lawsuits to financially cripple the gun industry as a proxy for repealing the Second Amendment.⁵⁴ President George W. Bush also spoke glowingly of PLCAA, stating that he looked forward to signing the bill into law because he believed it would “further our [country’s] efforts to stem frivolous lawsuits, which cause a logjam in America’s courts, harm America’s small businesses, and benefit a handful of lawyers at the expense of victims and consumers.”⁵⁵ In hindsight, some have criticized Congress’ concerns over tort reform as a veiled effort to satisfy the political whims of gun lobbyists and the financial interests of the gun industry. The most direct mouthpiece of the NRA in Congress was Senator Larry Craig of Idaho, who was both the author and chief sponsor of PLCAA. Senator Craig also served as a board member for the NRA during his time in Congress, a role that undoubtedly colored his advocacy for PLCAA.⁵⁶

In practice, PLCAA is largely ineffective as a piece of tort reform because well-established rules of civil procedure *already* prohibit a plaintiff from filing a frivolous claim.⁵⁷ Further, the uniqueness of

⁵² § 7903(5)(A)(ii). For more analysis on the negligent entrustment exception and its potential use in future litigation, see generally Daniel P. Rosner, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 421 (2018).

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

⁵⁴ See generally 151 Cong. Rec. E2164, E2164 (daily ed. Oct. 25, 2005) (statement of Rep. John Sullivan [R-Okla.] that PLCAA provides an “opportunity to address unfounded lawsuits and guard a legal and law-abiding industry.”); Charlene Carter & Seth Stern, *S397—Protection of Lawful Commerce in Arms Act*, CONG. Q. BILL ANALYSIS (Oct. 28, 2005), available at 2005 WLNR 17714782 (Sen. Bill Frist [R-Tenn.] stating that “[t]his legislation [PLCAA] brings meaningful reform to an industry that needs protection from frivolous lawsuits.”).

⁵⁵ See 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>.

⁵⁶ *Senator from the N.R.A.*, N.Y. TIMES (Mar. 8, 2004), <http://www.nytimes.com/2004/03/08/opinion/senator-from-the-nra.html>.

⁵⁷ See Alden Crow, *Shooting Blanks: The Ineffectiveness of the Protection Against Commerce in Arms Act*, 59 S.M.U. L. REV. 1813, 1822 (citing FED. R. CIV. P. 12(b)(6), which permits a motion to dismiss and impose sanctions for a claim filed for “any improper

PLCAA strikes many as unfair favoritism for a certain industry. In passing the law, the federal government has given the manufacturers, distributors, and sellers of firearms invaluable legal protection that no other individuals or companies enjoy.⁵⁸ In effect, PLCAA “took away the possibility of compensation under state law, and replaced it with [. . .] nothing.”⁵⁹

The gun industry quickly recognized that PLCAA represented an unprecedented victory. The NRA released a statement proclaiming it as “the most significant piece of pro-gun legislation in twenty years.”⁶⁰ NRA Chief Executive Wayne LaPierre described it at the time as a “historic piece of legislation,” concluding that “[a]s of Oct. 20, [2005], the Second Amendment is probably in the best shape in this country that it’s been in decades.”⁶¹ Conversely, activists, legal scholars, and many Democratic politicians expressed outrage at the overwhelming influence that lobbyists played in drafting and enacting PLCAA.⁶² Over the next decade, PLCAA would prove to be a nearly insurmountable obstacle for gun violence victims seeking judicial relief.

D. *The Impact of PLCAA*

In the fourteen years between PLCAA’s passage and the Connecticut Supreme Court’s decision in *Soto*, plaintiffs suing the gun industry were effectively barred from moving beyond the initial pleading phase of litigation.⁶³ The statute required judges throughout

purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,” and FED. R. CIV. P. 11(b)(2), which requires attorneys to certify that “the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.”); *see also* William I. Weston, *The Threat of Sanctions for Frivolous Suits*, 6 *COMPLEAT LAW* 44 (1989).

⁵⁸ John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, *POLITICO MAGAZINE* (Mar. 18, 2019), <https://www.politico.com/magazine/story/2019/03/18/lawsuit-mass-shootings-225812>.

⁵⁹ *Id.*

⁶⁰ *President Bush Signs “Protection of Lawful Commerce in Arms Act” Landmark NRA Victory Now Law*, *NAT’L RIFLE ASS’N POL. VICTORY FUND* (Oct. 26, 2005), <https://www.nra.org/articles/20051026/president-bush-signs-protection-of-br>.

⁶¹ Stolberg, *supra* note 55.

⁶² *See* Stolberg, *supra* note 55. Dennis Henigan of the Brady Center to Prevent Gun Violence noted that PLCAA “is literally unprecedented in American history because it is 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.” Senator Edward M. Kennedy (D-Mass.) contended that PLCAA was “bought and paid for by the N.R.A.[.]” Rep. Chris Van Hollen (D-Md.) called the bill “a cruel hoax” on the victims of gun violence.

⁶³ *See* Tom Hamburger et al., *NRA-backed Federal Limits on Gun Lawsuits Frustrate Victims, Their Attorneys Say*, *WASH. POST* (Jan. 31, 2013) <https://www.washington>

the nation to dismiss negligence, negligent entrustment, and public nuisance claims filed by individuals and public entities as a matter of law.⁶⁴ The court's unexpected ruling in *Soto*, however, has reignited the debate over whether PLCAA is truly impenetrable.

III. AN ANALYSIS OF THE CONNECTICUT SUPREME COURT'S DECISION IN *SOTO*

Following the tragedy at Sandy Hook Elementary School, families representing nine of the deceased victims ("the Plaintiffs") filed a wrongful death action against the manufacturer, distributor, and retailer (collectively, "the Defendants") of the semiautomatic rifle that the shooter had used—a Bushmaster XM15-E2S.⁶⁵ As anticipated, the Defendants quickly moved to dismiss the suit in its entirety, arguing it was barred under PLCAA.⁶⁶ The Plaintiffs responded that their claims were permitted under two of PLCAA's enumerated exceptions.⁶⁷ First, the Plaintiffs contended that the Defendants' actions triggered the negligent entrustment exception because they provided civilian consumers with access to "an AR-15 style assault rifle that is suitable for use only by military and law enforcement personnel."⁶⁸ More specifically, the complaint alleged that (1) the AR-15 is "grossly ill-suited" for any legitimate civilian uses, such as recreation or self-defense; (2) the harms associated with mass shootings outweigh any

post.com/politics/nra-backed-federal-limits-on-gun-lawsuits-frustrate-victims-their-attorneys/2013/01/31/a4f101da-69b3-11e2-95b3-272d604a10a3_story.html.

⁶⁴ See, e.g., *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) (dismissing claims of tort negligence and public nuisance against a gun manufacturer because such claims were not applicable to the gun industry under PLCAA's predicate exception); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (same); *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476 (Mo. Ct. App. 2013) (dismissing a negligent entrustment claim against a gun shop); *Estate of Kim v. Coxe*, 295 P.3d 380 (Alaska 2013) (finding that a firearm dealer cannot be liable for negligence per se or knowingly violating an existing statute when the firearm is stolen); *Phillips v. Lucky Gunner, LLC*, 2015 US Dist. LEXIS 39284 (D. Colo. Mar. 27, 2015) (dismissing claims filed by the parents of a victim of the Aurora, Colorado movie theater against various online firearm retailers for negligence, negligent entrustment, and creating a public nuisance). The few cases where courts have permitted claims to proceed beyond a motion to dismiss involve straw purchases, where guns are sold to an intermediary buyer. See, e.g., *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333 (App. Div. 2012), amended by 962 N.Y.S.2d 834 (App. Div. 2013) (finding sufficient facts to support a claim that a gun seller knowingly violated the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*); *City of New York v. Bob Moates' Sport Shop, Inc.*, 253 F.R.D. 237 (E.D.N.Y. 2008) (concluding that a defendants' participation in straw purchases triggers PLCAA's predicate exception because it violates federal laws relating to the sale and marketing of firearms).

⁶⁵ *Soto v. Bushmaster Firearms Int'l*, 202 A.3d 262, 273 (Conn. 2019).

⁶⁶ *Id.* at 274.

⁶⁷ *Id.*

⁶⁸ *Id.* at 273–74.

potential benefits of selling the AR-15 to civilians; and (3) the Defendants had knowledge of (1) and (2) but continued to sell the AR-15 nonetheless.⁶⁹ Following the holdings of several other state courts, the majority in *Soto* dismissed the Plaintiffs' negligent entrustment claim.⁷⁰ The Plaintiffs could not prevail on a negligent entrustment claim, the court concluded, because there was no showing that the shooter's mother, who had legally purchased the rifle used in the shooting, was "incompetent" or "had a propensity to use the weapon in an unsafe manner[.]"⁷¹ The court also rejected the assertion that *any* sale of an assault rifle to a civilian is unreasonable and, therefore, constitutes negligent entrustment.⁷²

The Plaintiffs, however, proffered a second argument that presented Connecticut's Supreme Court with a novel legal theory—that the Defendants' marketing practices had violated the Connecticut Unfair Trade Practices Act (CUTPA) and thereby triggered PLCAA's predicate exception.⁷³ The argument was twofold. First, they argued that the sale of the XM15-E2S rifle to *any* civilian constitutes an unfair trade practice.⁷⁴ The majority ultimately agreed with the trial court that this claim was time-barred, but stated in a footnote that "we believe that that theory, if timely presented, would also be barred by PLCAA immunity and/or [Connecticut's Products Liability Act]."⁷⁵ Second, the Plaintiffs contended that "the defendants violated CUTPA by advertising and marketing the XM15-E2S in an unethical, oppressive, immoral, and unscrupulous manner that promoted illegal offensive use of the rifle."⁷⁶

The majority opinion in *Soto* describes the sheer power of semiautomatic assault rifles in graphic detail.⁷⁷ Connecticut law requires that an appellate court accept the facts alleged in the complaint as true when reviewing a trial court's grant of a motion to strike.⁷⁸ The majority in *Soto* made a point, however, to recount the most disturbing features of the AR-15 assault rifle used at the Sandy Hook, drawing comparisons to the M16, a similar rifle used by the U.S. Army:

⁶⁹ *Id.* at 277.

⁷⁰ *Id.* at 278–79.

⁷¹ *Soto*, 202 A.3d at 276, 278–79.

⁷² *Id.* at 283.

⁷³ *Id.* at 273–74.

⁷⁴ *Id.* at 274–75.

⁷⁵ *Id.* at 275 n.14.

⁷⁶ *Id.* at 284.

⁷⁷ *Soto*, 202 A.3d at 275–76.

⁷⁸ *Id.* at 275 n.15.

2020]

COMMENT

575

The AR-15 and M16 are highly lethal weapons that are engineered to deliver maximum carnage with extreme efficiency. . . . Rapid semiautomatic fire “unleashes a torrent of bullets in a matter of seconds.” The ability to accommodate large capacity magazines allows for prolonged assaults. Exceptional muzzle velocity makes each hit catastrophic [B]ullets fired from these rifles travel at such a high velocity that they cause a shockwave to pass through the body upon impact, resulting in catastrophic injuries even in areas remote to the direct wound. Finally, the fact that the AR-15 and M16 are lightweight, air-cooled, gas-operated, and magazine fed, enabling rapid fire with limited recoil, means that their lethality is not dependent on good aim “The net effect is more wounds, of greater severity, in more victims, in less time.”⁷⁹

The court noted that these deadly features, combined with the availability of such guns, have made the AR-15 the “weapon of choice for mass shootings, including school shootings.”⁸⁰ In fact, the seven deadliest mass shootings of the past decade have involved the use of some adaptation of the semiautomatic assault rifle.⁸¹

⁷⁹ *Id.* at 276.

⁸⁰ *Id.*

⁸¹ See *Mass Shootings in the US Fast Facts*, CNN, <https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts/index.html> (last visited Jan. 4, 2020) (compiling a list of the deadliest mass shootings since 1949); see also Ray, *supra* note 3 (Sandy Hook Elementary School in Newtown, twenty-eight people killed); Alex Horton, *The Las Vegas Shooter Modified a Dozen Rifles to Shoot Like Automatic Weapons*, WASH. POST (Oct. 3, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different/> (Mandalay Bay Hotel in Las Vegas, fifty-eight people killed); Ryan J. Foley, *Rifle Used in Orlando Shooting Was Designed for Military Use*, ASSOCIATED PRESS (June 16, 2016) <https://apnews.com/85e8ba2db6134aef97061f269262d07b> (Pulse Nightclub in Orlando, forty-nine people killed); Reuven Blau, *Texas Church Gunman Used the Same Rifle as Las Vegas, Newtown, Aurora, and San Bernardino Shooters*, N.Y. DAILY NEWS (Nov. 6, 2017), <https://www.nydailynews.com/news/national/texas-gunman-rifle-las-vegas-newtown-mass-shooters-article-1.3614966> (church in Sutherland Springs, twenty-six people killed); Steve Almasy, Kyung Lah, and Alberto Moya, *At Least 14 People Dead in Shooting in San Bernardino; Suspect Identified*, CNN (Dec. 13, 2015), <https://www.cnn.com/2015/12/02/us/san-bernardino-shooting/index.html> (San Bernardino, fourteen people killed); Jolie Mccullough, *El Paso Shooting Suspect Said He Ordered His AK-47 and Ammo from Overseas*, TEXAS TRIBUNE (Aug. 28, 2019), <https://www.texastribune.org/2019/08/28/el-paso-shooting-gun-romania/> (Walmart in El Paso, twenty-two people killed); Elizabeth Chuck et al., *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC NEWS (Feb. 15, 2018), <https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101> (Marjory Stoneman Douglas High School in Parkland, seventeen people killed).

After emphasizing the lethality of the Defendants' product, the court turned to the two legal questions at hand: (1) whether the Plaintiffs had pled a cognizable CUTPA violation, and (2) whether a CUTPA violation qualifies as a predicate offense under PLCAA's predicate exception.⁸² The Plaintiffs' remaining CUTPA claim relied on the argument that the Defendants' marketing tactics were unlawful because they encouraged the use of the XM15-E2S for "offensive[] [and] assaultive purposes," rather than lawful uses, such as "self-defense, hunting, target practice, collection, or other legitimate civilian firearm use."⁸³

Before analyzing the sufficiency of the Plaintiffs' CUTPA claim, the *Soto* court addressed the threshold issue of whether the Plaintiffs had statutory standing.⁸⁴ The lower court concluded that the Plaintiffs could not bring an action under CUTPA because the deceased victims had no direct business relationship with the Defendants.⁸⁵ The Connecticut Supreme Court rejected this argument on textual and policy grounds.⁸⁶ First, the court noted that CUTPA's language broadly permits "[a]ny person" to bring a private action.⁸⁷ Second, it reasoned that the "evils associated with unscrupulous and illegal advertising are not ones that necessarily arise from or infect the relationship between an advertiser and its [direct] customers, competitors, or business associates[.]"⁸⁸ After all, the ultimate victims of the gun industry's misfeasance are often innocent third parties.⁸⁹

The *Soto* majority's interpretation of CUTPA frequently relies on Federal Trade Commission (FTC) decisions.⁹⁰ The FTC is charged with enforcing the FTC Act, a broad piece of federal legislation intended to protect consumers from dangerous products.⁹¹ Many states—including Connecticut—have modeled their own trade practice laws after the FTC Act.⁹² As a result, the FTC's decisions serve as the "lodestar" for interpreting CUTPA's language when Connecticut's own courts are

⁸² *Soto*, 202 A.3d at 283–84.

⁸³ *Id.* at 284.

⁸⁴ *Id.* at 285.

⁸⁵ *Id.* at 287–88.

⁸⁶ *Id.* 285–91.

⁸⁷ *Id.* at 285.

⁸⁸ *Soto*, 202 A.3d at 285.

⁸⁹ *Id.*

⁹⁰ *Id.* at 299–300, 304, 306.

⁹¹ *Id.* at 299.

⁹² William Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the FTC Act*, 76 ANTITRUST L.J. 929, 939–40 n. 54 (2010); Stephanie L. Kroeze, *The FTC Won't Let Me Be: The Need for a Private Right of Action Under Section 5 of the FTC Act*, 50 VALPARAISO U. L. REV. 227, 240–41 (2015).

silent on an issue.⁹³ After analyzing the FTC's treatment of similar unfair trade practices claims, the majority held that a company *could* violate the FTC Act by marketing its products in ways that are likely to result in physical injury.⁹⁴ The court concluded, "It is clear, then, that wrongful advertising that poses a genuine risk of physical harm falls under the broad purview of the FTC Act and, by incorporation, CUTPA."⁹⁵ Thus, the Plaintiffs surpassed their first major hurdle when the court concluded they had standing to assert a CUTPA claim.⁹⁶ Despite this initial victory, however, the Plaintiffs' battle was not yet won.

The court next addressed the question of whether a wrongful death claim could fall within PLCAA's predicate exception.⁹⁷ The court began its inquiry by applying the plain meaning rule: if a statute's language is clear and unambiguous, the court will adopt it as written;⁹⁸ if, however, the court is unable to reach a conclusion based on the statutory language, it may consider other factors, such as the statutory framework, statements of legislative findings and purpose, legislative history, or policy considerations, to resolve any ambiguities.⁹⁹ In the end, the *Soto* court held that both the plain language of the predicate exception and a broader, more contextual analysis of the statute would support a finding in favor of the Plaintiffs.¹⁰⁰ On its face, the text of the predicate exception permits suit against the manufacturer or retailer of a gun if the defendant has violated any state statute applicable to the sale or marketing of firearms.¹⁰¹ Thus, the court concluded that, in enacting PLCAA, Congress never intended "to preclude actions alleging that firearms companies violated state consumer protection laws by promoting their weapons for illegal, criminal purposes."¹⁰²

⁹³ *Soto*, 202 A.3d at 299.

⁹⁴ *Id.* at 299–300. *See, e.g.*, In re AMF, Inc., 95 F.T.C. 310, 313–14 (1980) (prohibiting advertising that depicted children using bicycles and tricycles in an unsafe or unlawful manner); In re Mego International, Inc., 92 F.T.C. 186, 189–90 (1978) (finding violations where an advertisement showed an electric hairdryers being used by children in near a bathroom sink); In re Uncle Ben's, Inc., 89 F.T.C. 131, 136 (1977) (advertising that depicts children attempting to cook food without close adult supervision; In re Philip Morris, Inc., 82 F.T.C. 16, 19 (1973) (requiring Philip Morris to discontinue a promotional practice that had the potential to expose young children to razor blades)).

⁹⁵ *Soto*, 202 A.3d at 300.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 300–01.

⁹⁹ *Id.* at 301.

¹⁰⁰ *Id.* 302.

¹⁰¹ *Soto*, 202 A.3d at 302–03; *see also* Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988) (concluding that Congress is presumed to have knowledge of federal and state law relevant to legislation it is considering).

¹⁰² *Soto*, 202 A.3d at 302.

The *Soto* opinion also cited heavily to congressional statements made during debates over PLCAA.¹⁰³ The majority directly quoted Senator Jeff Sessions (R-Ala.) and various other co-sponsors of the bill, who had “emphasized that [PLCAA] must be narrowly construed and that it protects only those firearms sellers who have not engaged in any illegal or irresponsible conduct.”¹⁰⁴ Even Senator Craig reiterated the limited purpose of the bill:

As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry. Well recognized causes of action are protected by the bill. Plaintiffs can still argue their cases for violations of law The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle.¹⁰⁵

The substance of Senator Craig’s assurances to other members of Congress proved instrumental in the court’s decision in *Soto*. The court found that these comments reflected that PLCAA was not intended to limit the offenses that may trigger the predicate exception to those that “are *directly, expressly, or exclusively* applicable to firearms.”¹⁰⁶ As such, under PLCAA’s predicate exception, a Connecticut plaintiff has standing to invoke *any* state or federal law that *could* be applied to the sale of a firearm.¹⁰⁷ The court reasoned: “If Congress intended to limit the scope of the predicate exception,” it would have explicitly stated so in the text of PLCAA, as Congress did in other sections of the law.¹⁰⁸ The court’s straightforward logic led to a historic conclusion: gun violence plaintiffs had standing to pursue a claim against the gun industry.¹⁰⁹

There are several lessons to be gleaned from the *Soto* opinion. First, it is important to note that *Soto* represents the beginning, not the end, of a protracted legal battle. While the Plaintiffs have established standing to pursue their claim, they still face the uphill battle of proving a CUTPA violation. In the same decision that the court handed the Plaintiffs a huge procedural victory, the *Soto* majority acknowledged that it would be a “herculean task” to demonstrate a causal link between

¹⁰³ See, e.g., *id.* at 315–16, 318–20, 323–24.

¹⁰⁴ *Id.* at 317 n.69 (citing 151 Cong. Rec. 17,371 (2005), remarks of Senator Jefferson Beauregard Sessions III, 151 Cong. Rec. 18,044, remarks of Senator Larry Craig; 151 Cong. Rec. 23,266 (2005), remarks of Representative Clifford Bundy Stearns).

¹⁰⁵ 151 Cong. Rec., 18,096 (2005), remarks of Senator Larry Craig.

¹⁰⁶ *Soto*, 202 A.3d at 302.

¹⁰⁷ *Id.* at 302–03.

¹⁰⁸ *Id.* at 303.

¹⁰⁹ *Id.* at 308.

2020]

COMMENT

579

the shooter's actions and the Defendant's advertisements.¹¹⁰ In other words, the *Soto* decision does not evaluate the merits of the underlying cause of action under CUTPA.¹¹¹ Rather, it merely acknowledged that PLCAA did not categorically bar the Plaintiffs' unfair trade practices claim.¹¹²

Nonetheless, the decision in *Soto* was the first since PLCAA to hold that a state's unfair trade practices laws can be used against the gun industry. The court's reasoning is instructive because several states have adopted the relevant provisions of the FTC Act. Thus, *Soto* can serve as a model case for other plaintiffs seeking to overcome PLCAA. The *Soto* majority concluded that "[s]tatutes such as the FTC Act and state analogues that prohibit the wrongful marketing of dangerous consumer products such as firearms represent precisely the types of statutes that implicate and have been applied to the sale and marketing of firearms."¹¹³ Moreover, *Soto* reveals the types of gun industry marketing tactics that a court may find offensive. In particular, the court zeroed in on advertisements for Bushmaster's AR-15 that used language referencing the gun's military-style capabilities and a shooter's masculinity.¹¹⁴

While the *Soto* ruling is a far cry from gun reform advocates' ultimate goal of repealing PLCAA, plaintiffs would be wise to apply the court's interpretation of PLCAA in other states. Justice Richard Palmer, writing for the majority, succinctly encapsulated the argument that PLCAA does not eliminate a state's broad authority to protect its citizens from dangerous advertising:

Following a scrupulous review of the text and legislative history of PLCAA, we also conclude that Congress has not clearly manifested an intent to extinguish the traditional authority of our legislature and our courts to protect the people of Connecticut from the pernicious practices alleged in the present case. The regulation of advertising that threatens the public's health, safety, and morals has long been considered a core exercise of the states' police powers.¹¹⁵

Armed with the *Soto* decision, plaintiffs across the country will surely begin to search for ways to include unfair trade practices claims in suits

¹¹⁰ *Id.* at 290

¹¹¹ *Id.* at 290-91.

¹¹² *Soto*, 202 A.3d at 291.

¹¹³ *Id.* at 306.

¹¹⁴ *Id.* at 284.

¹¹⁵ *Id.* at 272-73.

against the gun industry. Nonetheless, the question of whether the *Soto* decision is a trendsetter or an outlier remains largely unanswered.

IV. ADVERTISEMENTS FOR SEMIAUTOMATIC RIFLES AND OTHER QUASI-MILITARY FIREARMS AS A POTENTIAL SOURCE OF FUTURE LITIGATION

The gun industry, like any profit-driven enterprise, invests resources in commercial advertising to reach its target demographic and sell more products. Unlike most products, however, firearms (particularly high-capacity guns) can injure or kill dozens of people in mere minutes. This Part will first provide a brief overview of the marketing tactics employed by the gun industry. It will then discuss whether the victims of recent mass shootings in Florida and Ohio may have a cognizable claim if those states adopted the reasoning in *Soto*.

A. *The Gun Industry's Use of Militaristic Advertising*

When facing economic peril, gun manufacturers and sellers have historically launched massive marketing campaigns to broaden their customer base.¹¹⁶ Recall that in *Soto*, the court permitted the plaintiffs' unfair trade practices claim to proceed based on the theory the Bushmaster defendant's use of unscrupulous advertisements increased the number of fatalities in the Sandy Hook shooting.¹¹⁷ Specifically, the complaint alleged that "the [D]efendants have sought to grow the AR-15 market by extolling the militaristic and assaultive qualities of the AR-15 rifles, and, specifically, the weapon's suitability for offensive combat missions."¹¹⁸

It is neither novel nor uncommon for gun advertisements to include references to war, combat, or the U.S. Armed Forces.¹¹⁹ A 2004 study of firearm advertisements in twenty-seven gun-related subscription magazines found that 15% of the ads referenced "patriotism," and 7.1% discussed the weapons "combat/military" attributes.¹²⁰ Advertisements fell into the latter classification if the images or language on the page were "associated with aggression, evoking a fantasy of tactical shooting in a combat situation" or made

¹¹⁶ See Debra Doray & Arthur J. Waldrop, *Regulating Handgun Advertising Directed at Women*, 12 WHITTIER L. REV. 113 (1991) (noting that, facing thirty percent drops in gun sales in the 1980s, three leading gun manufacturers had chosen to "aggressively market guns to certain demographic groups such as women.").

¹¹⁷ *Soto*, 202 A.3d. at 277.

¹¹⁸ *Id.*

¹¹⁹ See generally Yamane, *supra* note 25, at 11-12.

¹²⁰ Elizabeth A. Saylor, Katherine A. Vittes, & Susan B. Sorenson, *Firearm Advertising: Product Depiction in Consumer Gun Magazines*, 28 EVALUATION REV. 5, 426 (October 2004).

“reference[s] to military or survival use.”¹²¹ The specific messages in gun advertisements paint a clearer picture. A recent promotion for a semiautomatic assault rifle in popular gun publication *Guns & Ammo* read, “Never a victim. Always the victor.”¹²² The surrounding images showed soldiers in full military uniforms using the weapon.¹²³ *Guns & Ammo* is one of the nation’s most well-known gun magazines in the country, with 378,000 print subscribers, more than half the number of weekday print subscribers of the *New York Times*.¹²⁴

As other media companies have struggled to maintain print subscriptions in the Internet era, gun magazines have managed to increase readership in recent years.¹²⁵ *Ad Week* has called gun magazines a “beacon of hope for the American publishing industry.”¹²⁶ Moreover, while the majority of gun advertisements are limited to materials distributed to avid firearm enthusiasts in specialized trade publications, the gun industry markets in mainstream media sources.¹²⁷ The ubiquity of gun advertisements is even more ominous in the age of social media. Gun manufacturers can reach younger audiences through Instagram, Twitter, and Facebook sponsorships, paying attractive influencers thousands of dollars to post pictures of themselves holding assault rifles.¹²⁸

The overall decline in the sale of less dangerous guns, such as pistols, shotguns, and handguns, has only further exacerbated the problem of mass shootings.¹²⁹ Facing such an existential crisis, the gun industry has begun prioritizing the sale of military-style weapons, sometimes referred to as “tactical weapons,” as a way to acquire new customers.¹³⁰ This marketing strategy was laid bare in a 2013 edition

¹²¹ *Id.* at 424.

¹²² Chris Woodyard, *AR-15 Advertising Speaks to ‘Macho Hyper-Masculinity,’ Gun Control Advocates Say*, USA TODAY (Mar. 27, 2019, 6:00 AM), <https://www.usatoday.com/story/news/nation/2019/03/27/gun-control-advocates-aim-ar-15-advertising/3272949002>.

¹²³ *Id.*

¹²⁴ Adrienne LaFrance, *Guns & Ammo, Not Just Another Tech Magazine*, ATLANTIC (Feb. 1, 2016), <https://www.theatlantic.com/technology/archive/2016/02/guns-ammo-media/434013>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Jon S. Vernick & Stephen P. Teret, *A Public Health Approach to Regulating Firearms as Consumer Products*, 148 U. PENN L. REV. 1193, 1193 (2000).

¹²⁸ Kaitlyn Tiffany, “*The Hired Guns of Instagram*,” VOX (Jun. 19, 2019), <https://www.vox.com/features/2019/6/19/18644129/instagram-gun-influencers-second-amendment-tactical-community>.

¹²⁹ Violence Policy Center, *The Militarization of the U.S. Civilian Firearms Market*, 7 (June 2011), <http://www.vpc.org/studies/militarization.pdf>.

¹³⁰ *Id.*

of the trade magazine *Shooting Sports Retailer* 2013.¹³¹ The issue was aptly named the “Annual How to Sell Issue,” as it provided detailed guidance to gun retailers seeking to increase sales of tactical weapons.¹³² In a chilling excerpt, the article’s author bluntly explains how retailers should market their most dangerous weapons to young, first-time gun owners:

Hunters, quite frequently, will not be impressed by the “tactical coolness factor” that has drawn many shooters into the shop looking for a new gun. In fact, some of them will likely be put off by the military-esque attitude and marketing that is so common in the tactical firearms market [. . .] The tactical coolness factor does, on the other hand, attract a lot of first-time gun buyers. Many of them are younger and unfamiliar with firearms, making them prime candidates to be unsure of what to look for or even what they want. Unlike many of the hunting demographic, these potential buyers will likely be interested only in tactical guns, and the military-ish looks and features will be big a [sic] selling point with them.¹³³

Such unscrupulous marketing tactics are not dissimilar to those identified in *Soto*. Josh Koskoff, counsel for the plaintiffs, argued that Remington, Bushmaster’s parent company, had intentionally marketed military-style weapons toward unstable, dangerous individuals as a way to sell more products.¹³⁴ Koskoff specifically pointed to advertisements that encouraged young men to buy semiautomatic assault rifles in order to have their “man card reissued.”¹³⁵ Another Remington advertisement

¹³¹ Violence Policy Center, *The Militarized Marketing of Bushmaster Assault Rifles*, (April 2018), <https://vpc.org/wp-content/uploads/2018/04/Bushmaster2018.pdf>.

¹³² *Id.*

¹³³ *Id.* at 6. Notably, some courts have expressed hesitation over the ballooning of Second Amendment rights to protect a civilian’s right to quasi-military, semiautomatic assault rifles. See *Soto v. Bushmaster Firearms Int’l*, 202 A.3d 262, 310 (Conn. 2019) (“It is not at all clear, however, that the second amendment’s protections even extend to the types of quasi-military, semiautomatic assault rifles at issue in the present case.”); see also *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (finding that constitutional protections do not extend to “dangerous and unusual weapons” and, therefore, that certain military-style rifles may be banned); *Kolbe v. Hogan*, 849 F.3d 114, 143 (4th Cir.) *cert. denied*, U.S. , 138 S. Ct. 469, 199 L. Ed. 2d 374 (2017) (interpreting the famous decision in *District of Columbia v. Heller* to mean that Second Amendment does not protect right to possess assault weapons featuring high capacity magazines, such as the AR-15); *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015) (upholding outright prohibitions against civilian ownership of semiautomatic assault weapons).

¹³⁴ Esha Ray and Larry McShane, *Gunmaker’s Ads Influenced Adam Lanza to Buy AR-15 Assault Rifle for Sandy Hook Massacre, Lawyer Says*, N.Y. DAILY NEWS (Nov. 14, 2017), <https://www.nydailynews.com/news/national/lawyer-gun-maker-not-blame-sandy-hook-ar-15-ads-article-1.3632565>.

¹³⁵ *Id.*

2020]

COMMENT

583

referenced in the *Soto* decision read, “Forces of opposition, bow down.”¹³⁶ The sentiments that these advertisements evoke are all too familiar: hyper-masculine language and images; references to the military, wartime, and the battlefield; and encouragement of offensive acts of violence, rather than self-defense.

B. Replicating the Reasoning in Soto in Other States

In light of the gun industry’s past behavior, plaintiffs bringing unfair trade practices claims will not need to look far to find evidence of unscrupulous marketing tactics. Courts in other states may echo the majority’s conclusion in *Soto*—that unfair trade practices claims fall under PLCAA’s predicate exception.

The first step in identifying which states may be most ripe for a legal challenge to PLCAA is to find those with unfair trade practices laws comparable to Connecticut. The language of CUTPA states, “No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹³⁷ While several states have analogous laws, this Section will look at two states in particular: Florida and Ohio. Florida and Ohio provide an especially useful case-study for three reasons. First, both states have strong, broad consumer protection laws. Second, courts in both states have liberally construed those laws to impose liability for unfair and deceptive trade practices.¹³⁸ Finally, Parkland and Orlando, Florida, and Dayton, Ohio, are the sites of recent news-making mass shootings. Thus, the families of the victims in those shootings may circumvent PLCAA using the same reasoning as the Sandy Hook plaintiffs.

1. Florida

In Florida, the unfair trade practice law that serves as the counterpart to CUTPA states, in part, that “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”¹³⁹ The statutory language prohibiting “unconscionable acts or practices” is especially important because it permits a court to consider the moral implications of a defendant’s marketing tactics. As such, a gun company could theoretically be held liable for encouraging acts of offensive violence in its advertisements.

¹³⁶ *Id.*

¹³⁷ CONN. GEN. STAT. ANN. § 42-110(b).

¹³⁸ See *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practice Laws*, NATIONAL CONSUMER LAW CENTER (March 2018).

¹³⁹ FLA. STAT. ANN. § 501.204.

In February of 2018, a young shooter entered Marjory Stoneman Douglas High School in Parkland, Florida.¹⁴⁰ In less than ten minutes, seventeen students and school employees were killed, and seventeen more were injured.¹⁴¹ The weapon used to commit the heinous crime—an AR-15 semiautomatic rifle—was strikingly-similar to the gun used in the shooting at Sandy Hook Elementary.¹⁴² Parents representing two of the Parkland victims have already filed suit against the manufacturer of the gun used in the shooting, American Outdoor Brands (formerly Smith & Wesson), and the retailer, Sunrise Tactical Supply.¹⁴³ That suit, however, does not set forth any unfair trade practice claims, nor does it address PLCAA specifically.¹⁴⁴ Rather, it argues that a Florida state law passed in 2001 does not bar suits against gun manufacturers and sellers, and should be overturned.¹⁴⁵ Nevertheless, the Parkland plaintiffs have been closely following the events surrounding the *Soto* case and thus may employ the same tactics to circumvent PLCAA.¹⁴⁶

Similarly, the victims of the 2016 shooting at Pulse Nightclub in Orlando, Florida may have a cognizable claim against the manufacturer of the gun used to kill forty-nine people in the second-deadliest massacre in American history.¹⁴⁷ Fortunately, the Violence Policy Center (VPC), a non-profit gun control advocacy group, has already done the work of investigating the impact of militaristic advertisements in the context of the Pulse shooting. VPC concluded that advertisements for the semiautomatic rifle used at the Pulse shooting included “military

¹⁴⁰ Michelle Mark et al., *This Timeline Shows Exactly How the Parkland Shooting Unfolded*, BUSINESS INSIDER (Feb. 14, 2019), <https://www.businessinsider.com/timeline-shows-how-the-parkland-florida-school-shooting-unfolded-2018-2>.

¹⁴¹ *Id.*

¹⁴² Will Drabold & Alex Fitzpatrick, *The Florida School Shooter Used an AR-15 Rifle. Here's What to Know About the Gun*, TIME (Feb. 15, 2018), <https://time.com/5160267/gun-used-florida-school-shooting-ar-15>.

¹⁴³ Matthew Vann, *Parkland Families Sue Gun Manufacturer and Dealer, Citing Complicity*, NBC NEWS (May 24, 2018), <https://www.nbcnews.com/news/us-news/parkland-families-sue-gun-manufacturer-dealer-citing-complicity-n877146>.

¹⁴⁴ Rafael Olmeda, *Parkland Victims Sue, Calling Gun Maker and Seller Complicit in Massacre*, SOUTH FLORIDA SUN SENTINEL (May 23, 2018), <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-reg-florida-school-shooting-smith-wesson-lawsuit-20180523-story.html>.

¹⁴⁵ *Id.*

¹⁴⁶ Rafael Olmeda, *Parkland Parents See Hope in Supreme Court Decision on Suing Gun-makers*, SOUTH FLORIDA SUN SENTINEL (Nov. 13, 2019), <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-supreme-court-parkland-guns-20191114-kk6gucgo3jgyvez57nerihx3sa-story.html>.

¹⁴⁷ See Foley, *supra* note 81.

2020]

COMMENT

585

imagery and language.”¹⁴⁸ For example, a 2015 catalog advertisement described the rifle’s manufacturer, Sig Sauer, as having “battle-tested experience to engineer the world’s toughest, most devastatingly accurate pistols and rifles.”¹⁴⁹ The advertisement further claimed that Sig Sauer’s mission was to “provide elite shooters with the complete weapon systems they need to prevail under any circumstance.”¹⁵⁰ The use of language such as “battle-tested” provides ripe ground for a legal challenge in *Soto*’s wake. Like the Sandy Hook plaintiffs, Pulse plaintiffs filing suit in the future could identify Sig Sauer’s use of bombastic, hyper-masculine language in its commercial advertisements as a violation of unfair trade practice laws.

2. Ohio

Under Ohio’s Consumer Sales Practices Act (“CSPA”), “[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.”¹⁵¹ CSPA also sets forth the same prohibition against unconscionable acts or practices by suppliers.¹⁵² Importantly, Ohio’s state courts have endorsed a liberal interpretation of CSPA¹⁵³ and rely heavily on decisions interpreting the FTC Act.¹⁵⁴ Furthermore, Ohio law permits a plaintiff to recover treble damages for acts that violate CSPA or that were declared deceptive or unconscionable in a published court decision, exposing the gun industry to potentially significant liability in the state.¹⁵⁵

¹⁴⁸ Violence Policy Center, *Understanding the Sig Sauer MCX Assault Rifle Used in the Orlando Mass Shooting*, 1–2 (June 2016), <http://www.vpc.org/studies/Sig%20Sauer%20Backgrounder.pdf>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ OHIO REV. CODE ANN. § 1345.02(A).

¹⁵² *See* OHIO REV. CODE ANN. § 1345.03(A).

¹⁵³ *See generally* *Einhorn v. Ford Motor Co.*, 548 N.E.2d 933, 935 (1990) (“The Consumer Sales Practices Act is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed.”); *see also* *Marrone v. Philip Morris USA, Inc.*, 850 N.E.2d 31, 34 (Ohio 2006) (finding that consumers only qualify for class actions under CSPA if the defendant had prior notice that its conduct was deceptive or unconscionable, in the form of either a rule adopted by the Attorney General or a published court decision).

¹⁵⁴ *See* OHIO REV. CODE ANN. § 1345.02 (“[T]he court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts’ interpretations of subsection 45 (a)(1) of the ‘Federal Trade Commission Act.’”).

¹⁵⁵ *See* OHIO REV. CODE ANN. § 1345.09(B).

Unfortunately, one need not look far into history for a mass shooting in Ohio with similar relevant facts to those in the Sandy Hook litigation. Shortly before this Comment was written, nine people were killed and twenty-seven others wounded after a shooting on a busy downtown street in Dayton, Ohio.¹⁵⁶ The shooter managed to inflict this massive amount of damage in just thirty-two seconds because he was using an AR-15 equipped with a catastrophic 100-round drum magazine.¹⁵⁷ But for the swift reaction time of police officers, the gunman undoubtedly would have killed or injured dozens, if not hundreds, more.¹⁵⁸ The weapon used in the attack, like the one used in Sandy Hook, was effectively a weapon of war being employed against innocent Americans. Consequently, the victims of the shooting could use the plaintiffs' strategy in *Soto* to circumvent PLCAA, either to obtain relevant discovery or reach a financial settlement.

V. CONCLUSION

The *Soto* plaintiffs have continued to defy the odds in their battle against the gun industry. In November of 2019, the United States Supreme Court issued a denial of certiorari on Bushmaster's appeal of the decision in *Soto*.¹⁵⁹ Therefore, for the time being, the ruling remains binding precedent in Connecticut. Although it is always difficult to interpret the nation's highest court's decision not to hear a case, its denial of review is the "first battle-ground on the merits" and can indicate that the Justices are not dissatisfied with the decision of the lower court.¹⁶⁰ Additionally, in the most recent turn of events, the plaintiffs won another victory when the court granted their request for a trial in September of 2021, which the defendants strongly opposed.¹⁶¹

¹⁵⁶ Alejandro De La Garza & Michael Zennie, *Dayton Shooting Lasted Just 32 Seconds and Left 9 Dead. Here's the Latest on the Tragedy*, TIME (Aug. 4, 2019), <https://time.com/5643405/what-to-know-shooting-dayton-ohio>.

¹⁵⁷ *Id.* In comparison, recall that the Sandy Hook shooter was using a 30-round magazine.

¹⁵⁸ *Id.*

¹⁵⁹ Bill Chappell, *Supreme Court Allows Sandy Hook Families' Case Against Remington Arms to Proceed*, NPR (Nov. 12, 2019), <https://www.npr.org/2019/11/12/778487920/supreme-court-allows-sandy-hook-families-case-against-remington-to-proceed>.

¹⁶⁰ Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1127 (Nov. 1979) (analyzing the implications of denials of certiorari throughout the history of the U.S. Supreme Court).

¹⁶¹ Dave Altimari, *After Long Delay, Lawsuit by Sandy Hook Families Against Gun Maker Remington Arms Will Go to Trial in 2021*, HARTFORD COURANT (Dec. 11, 2019), <https://www.courant.com/news/connecticut/hc-news-sandy-hook-gun-case-restart-20191211-datpilmvmbfgrniveeshbzt5hq-story.html>.

The overall impact that *Soto* and its progeny will have on the gun industry remains to be seen. The *Soto* case now continues at the trial level, but the court has yet to decide whether internal documents—including marketing and sales strategies, statistical information on gun sales, or firearm design drawings and engineering specifications—will be sealed, as the Defendants have adamantly requested.¹⁶² If the court permits public discovery of such documents, gun manufacturers and sellers may enter settlements rather than risk public embarrassment.

It is clear, however, that the judiciary has taken notice of the *Soto* case. Soon after the opinion was published, an Indiana appeals court cited *Soto* in its decision permitting a suit to move forward against a gun manufacturer.¹⁶³ In *City of Gary v. Smith & Wesson Corp.*, a panel of Indiana appellate judges found Connecticut’s statutory interpretation to be compelling and persuasive.¹⁶⁴ Specifically, the majority quoted the portion of *Soto* concluding that Congress did not intend PLCAA to apply only to “violations of statutes that are *directly, expressly, or exclusively* applicable to firearms.”¹⁶⁵ The court’s adoption of *Soto*’s reasoning is especially remarkable in Indiana,¹⁶⁶ a conservative state and one where appellate judges face re-election.¹⁶⁷ The ruling in *Gary*, therefore, provides hope that PLCAA’s predicate exception may be more broadly interpreted, even in pro-gun states. Meanwhile, efforts to overturn PLCAA persist. In June of 2019, House and Senate Democrats introduced the Equal Access to Justice for Victims of Gun Violence Act, which aims to dismantle PLCAA once and for all.¹⁶⁸ Gun control activists have praised the bill and hope that it will pass through the House of Representatives.¹⁶⁹ For the time being, however, the legislation is largely symbolic, as the current Republican-controlled Senate has expressed a refusal to vote on even the most meager of gun control proposals.¹⁷⁰

¹⁶² *Id.*

¹⁶³ *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 833 (Ind. Ct. App. 2019).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *Political Ideology by State*, PEW RESEARCH CTR. (2014), <https://www.pewforum.org/religious-landscape-study/compare/political-ideology/by/state>.

¹⁶⁷ Indiana Judicial Branch, *Judicial Selections* (2019), <https://www.in.gov/judiciary/5245.htm>.

¹⁶⁸ Brakkton Booker, *Democrats Introduce Bill Allowing Shooting Victims to Sue Gun Industry*, NPR (June 11, 2019) <https://www.npr.org/2019/06/11/731650947/democrats-introduce-bill-allowing-shooting-victims-to-sue-gun-industry>.

¹⁶⁹ *Id.*

¹⁷⁰ Igor Derysh, *Gun Bill “Dead”: White House Says Impeachment Killed “Chances of Legislative Progress”*, SALON (Sept. 26, 2019), <https://www.salon.com/2019/09/26/gun-bill-dead-white-house-says-impeachment-killed-chances-of-legislative-progress>.

Ultimately, activists cannot rely on state courts to bring an end to gun violence. While the decision in *Soto* provides a new legal theory that may be viable in certain jurisdictions, there are still enormous barriers to recovery in suits against the gun industry for most plaintiffs. For example, even if Congress repealed PLCAA, some states have enacted their own versions of PLCAA, many of which are even stricter than their federal analog.¹⁷¹ Consequently, plaintiffs in future gun violence lawsuits may be unable to survive motions to dismiss irrespective of PLCAA.¹⁷² Furthermore, if the history of PLCAA has revealed anything, it is that the gun industry wields immense political power and will likely expend massive resources in the face of impending regulation.

This is not to say that the Sandy Hook plaintiffs' accomplishment was short of spectacular. The relevance of *Soto* extends beyond the text of the decision. In challenging the gun industry, the plaintiffs stood in the place of many Americans who remain frustrated by Congress' abject failure to pass meaningful gun reforms. As one reporter observed, "[m]ore than two decades of federal inaction on gun-control measures have understandably conditioned the public to expect little from Congress after mass shootings, no matter the death toll."¹⁷³ This cynical view of our democratic system is only reinforced when our representative body ignores the massacre of young children.¹⁷⁴ The Sandy Hook plaintiffs, however, have chosen to reject this defeatist attitude, and through tireless advocacy, have chiseled a small crack in the impenetrable wall of PLCAA. In doing so, they have provided a small ray of hope that the victims of gun violence will finally have their day in court.

¹⁷¹ See Stephen D. Sugarman, *Torts and Guns*, 10 J. TORT L. 3, 5 (2017).

¹⁷² *Id.* at 26.

¹⁷³ Russell Berman, *A Rare Gun-Proposal That Could Unite Congress*, ATLANTIC (Aug. 6, 2019), <https://www.theatlantic.com/politics/archive/2019/08/congress-pass-gun-laws/595534>.

¹⁷⁴ See Sabrina Siddiqui, *'Shameful Day in Washington': Five Years After Gun Reform Failed, is Change Coming?*, GUARDIAN (Apr. 17, 2018), <https://www.theguardian.com/us-news/2018/apr/17/us-gun-control-sandy-hook-five-years-later>.