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## Suing Guns Out of Existence?

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# Suing Guns Out of Existence?

Scott R. Thomas & Mystica M. Alexander\*

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### I. Introduction

On the morning of December 14, 2012, L<sup>1</sup> began his assault on the Sandy Hook Elementary School.<sup>2</sup> Wearing black fatigues and a military vest, L armed himself with a Bushmaster XM15-E2S, Remington's version of the AR-15 assault rifle.<sup>3</sup> Using that weapon, L entered the school by shooting a hole through a locked entrance, and then killed twenty children and six adults before killing himself.<sup>4</sup> In response to this shooting and the loss of their loved ones, the families of the Sandy Hook Elementary School victims sought judicial relief from a gun manufacturer and two other defendants in the chain of distribution.

When the plaintiffs' claims failed to survive a motion to strike in the Connecticut Superior Court, they appealed to the Connecticut Supreme Court. On March 15, 2019, a 4-3 decision of the Connecticut Supreme Court fired its own shot across the bow of the often impenetrable shield of the Protection of Lawful Commerce in Arms Act (PLCAA).<sup>5</sup> With certain limited exceptions, the PLCAA shields gun manufacturers, dealers, and sellers of firearms and ammunition from any civil actions when a third party commits a crime or misuses the product.<sup>6</sup> In *Soto v. Bushmaster Firearms International, LLC*,<sup>7</sup> the Connecticut Supreme Court ruled that the PLCAA did not bar a lawsuit filed under the Connecticut Unfair Trade Practices Act (CUTPA).<sup>8</sup> The majority's opinion, in the face of a strong dissent, seemingly misunderstood the clear legislative intent of the statute. The decision also opened the courtroom door for families of the victims of the tragic Sandy Hook Elementary School shooting and may spawn litigation using a similar theory in other jurisdictions. This essay explores the

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1. The authors have intentionally omitted the shooter's name.
  2. *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 276 (Conn. 2019).
  3. *Id.* at 275.
  4. *Id.* at 276.
  5. *Id.* at 273; *see also* Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (2012).
  6. 15 U.S.C. §§ 7901–7903.
  7. 202 A.3d 262 (Conn. 2019).
  8. *Id.* at 325; *see also* Connecticut Unfair Trade Practices Act, CONN. GEN. STAT. §§ 42-110a–42-110q (2019).

PLCAA and concludes that the court's activism supplants its own policy preferences for bipartisan legislation.

## *II. The PLCAA Provides Broad Protection for Manufacturers, Distributors, and Retailers*

In 2005, Congress enacted the PLCAA in response to an increase in the number of lawsuits brought against the firearms industry for harm caused by the criminal use of firearms.<sup>9</sup> Prior to the passage of the PLCAA, the gun industry found itself repeatedly defending against negligence and product liability claims.<sup>10</sup> While the firearms industry often prevailed in such litigation, the firearms industry faced new obstacles with the passage of state and local laws clarifying liability.<sup>11</sup> For example, some laws limited the liability of the industry and others held the industry liable, regardless of any defect in the product.<sup>12</sup> Congress enacted the PLCAA, in part, due to its concern about “the possibility of imposing liability on an entire industry for harm that is solely caused by others” which it viewed as “an abuse of the legal system” that would undermine both a constitutional right and civil liberty.<sup>13</sup>

### *A. The General Rule*

One of the stated purposes of the PLCAA is “[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by

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9. Ross Sorenson, *The Ninth Circuit Forecloses a Bullet Sized Hole in the PLCAA in Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009), 35 S. ILL. U. L.J. 573, 573 (2011).

10. *Id.* at 574.

11. *Id.* at 575.

12. *See id.* (“Virginia limited the liability of the firearms industry, while the District of Columbia’s statute essentially held gun manufacturers absolutely liable, regardless of product defect.”).

13. 15 U.S.C. § 7901(a)(6).

others when the product functioned as designed and intended.”<sup>14</sup> The protections of this statute are not absolute. Although the statute prohibits commencing a “qualified civil liability action” in a state or federal court,<sup>15</sup> the PLCAA has six exceptions to this blanket prohibition.<sup>16</sup> The authors have limited their discussion to the exception principally relied upon by the plaintiffs in this case, the predicate exception.

### *B. The Predicate Exception*

The predicate exception applies to “an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . .”<sup>17</sup> The proper scope and interpretation of the predicate exception has been the subject of judicial scrutiny with courts often focused on how the word “applicable” should be

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14. *Id.* § 7901(b)(1).

15. *Id.* § 7902(a).

16. 15 U.S.C. § 7903(5) details six exceptions to this rule. These exceptions include:

(i) an action brought against a transferor convicted under section 924(h) of Title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; (ii) an action brought against a seller for negligent entrustment or negligence per se; (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . ; (iv) an action for breach of contract or warranty in connection with the purchase of the product; (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or (vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 . . . or chapter 53 of Title 26, United States Code . . . .

*Id.* § 7903(5).

17. *Id.* § 7903(5)(A)(iii).

understood.<sup>18</sup> Does this requirement mean the particular statute violated must specifically apply to the sale or marketing of firearms, or does it mean that the statute has to simply be capable of being applied to the sale or marketing of firearms?

### *III. The Connecticut Supreme Court Paves the Way for Gun Manufacturer Liability*

Before addressing the court's interpretation of the predicate exception, this Part addresses the plaintiffs' causes of action in *Soto*. Plaintiffs sued three defendants: the manufacturer, the distributor, and the retailer of the military assault style weapon used by the perpetrator in the Sandy Hook tragedy.<sup>19</sup> The plaintiffs argued that defendants were liable based on two alternative claims: (1) the negligent entrustment of a military style weapon to civilians and (2) a CUTPA violation due to the advertising and marketing practices associated with this weapon.<sup>20</sup> After deciding whether these claims could withstand the defendants' motion to strike, the court then had to determine whether the PLCAA barred such claims.

#### *A. Causes of Action*

Negligent entrustment, which has its origins in English common law,<sup>21</sup> holds those in possession of a dangerous instrument (such as a car or a gun) responsible for ensuring that such items are only entrusted to those fit to exercise possession.<sup>22</sup> Connecticut courts that have applied the doctrine of negligent entrustment

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18. Kyle Armstrong, *Nigh-Impenetrable: Firearm Manufacturer Liability Under the Protection of Lawful Commerce in Arms Act in a Post-Heller World*, 28 GEO. MASON U. C.R. L.J. 173, 185 (2018).

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

20. *Id.* at 274.

21. In *Dixon v. Bell*, 105 Eng. Rep. 1023 (K.B. 1816), the court found a defendant liable for harm caused by the accidental discharge of a firearm. In that case, defendant had asked a young girl to retrieve a loaded weapon for him, despite his knowledge that this young girl was unfit for this responsibility. See *Soto*, 202 A.3d at 280 (citing *Dixon v. Bell*, 105 Eng. Rep. 1023 (K.B. 1816)).

22. *Soto*, 202 A.3d at 279.

have generally required that “a person can be held liable for third-party injuries resulting from another’s use of a dangerous item only if the entrustment of that item was made with actual or constructive knowledge that misuse by the trustee was foreseeable.”<sup>23</sup> The plaintiffs in *Soto* did not allege that the defendants should have foreseen unsafe use of the particular purchased weapon.<sup>24</sup> Instead, the plaintiffs proposed that the defendants were negligent simply by virtue of selling a military assault style weapon in the civilian marketplace “because the defendants could each foresee the firearm ending up in the hands of members of an incompetent class in a dangerous environment.”<sup>25</sup> The Connecticut Supreme Court was unwilling to adopt the plaintiffs’ expansion of the negligent entrustment doctrine.<sup>26</sup>

Having resolved the negligent entrustment claim, the Court then turned its attention to the plaintiffs’ claim for relief under the provisions of CUTPA. This statute, enacted in 1973 and modeled after the Federal Trade Commission Act, provides that “[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>27</sup> The Act, general in nature, applies in a variety of circumstances.<sup>28</sup> To define an unfair or deceptive act, the courts in Connecticut generally rely on the “cigarette rule” of the Federal Trade Commission Act.<sup>29</sup> Under this rule, the court considers the following tests in a determination of unfairness or deception:

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23. *Id.* at 280.

24. *Id.* at 282–83.

25. *Soto v. Bushmaster Firearms Int’l, LLC*, No. FBTCV156048103S, 2016 WL 8115354, at \*10 (Conn. Super. Ct. Oct. 14, 2016).

26. *Soto*, 202 A.3d at 282.

27. CONN. GEN. STAT. § 42-110b(a) (2019).

28. *About the Connecticut Unfair Trade Practice Act*, CONN. ST. DEPT OF CONSUMER PROTECTION, <https://portal.ct.gov/DCP/Trade-Practices-Division/About-the-Connecticut-Unfair-Trade-Practices-Act-CUTPA> (last visited Sept. 2, 2019) (on file with the Washington and Lee Law Review).

29. *See Ulbrich v. Groth*, 78 A.3d 76, 100 (Conn. 2013) (explaining that the cigarette rule as a test for unfairness against consumers was adopted by the FTC in 1964); *see also* J. Howard Beales, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FED. TRADE COMMISSION (May 30, 2003), <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its->

1. [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; 2. whether it is immoral, unethical, oppressive, or unscrupulous; 3. whether it causes substantial injury to consumers, [competitors or other business persons.]<sup>30</sup>

Unfairness may result from breach of one of the above tests or some combination of a violation of all three tests.<sup>31</sup> In *Soto*, the plaintiffs alleged that the defendants marketed the AR-15 in an “unethical, oppressive, immoral and unscrupulous manner.”<sup>32</sup> That marketing, according to the plaintiffs, included advertisements and catalogs promoting use of the AR-15 for offensive, military style missions.<sup>33</sup> In their motion to strike the plaintiffs’ CUTPA claim, the defendants argued that “CUTPA does not provide protection for persons who do not have a consumer or commercial relationship with the alleged wrongdoer.”<sup>34</sup> The Connecticut Supreme Court rejected this argument and opted instead to broaden the reach of CUTPA by concluding that “[b]ecause the principal evils associated with unscrupulous and illegal advertising are not ones that necessarily arise from or infect the relationship between an advertiser and its customers, competitors, or business associates, we hold that a party directly injured by conduct resulting from such advertising can bring an action pursuant to CUTPA even in the absence of a business relationship . . . .”<sup>35</sup> The court likewise rejected the defendants’

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rise-fall-and-resurrection (last visited Sept. 2, 2019) (outlining “the important role the FTC’s unfairness authority can and should play in fashioning consumer protection policy”) (on file with the Washington and Lee Law Review). Although the FTC moved away from use of this rule in 1980, the Connecticut courts continue to apply these alternative tests. See Robert M. Langer & Benjamin M. Daniels, *Is It Time to Extinguish CUTPA’s “Cigarette Rule,”* CONN. LAW., Apr. 2016, at 14.

30. *Ulbrich*, 78 A.3d at 100.

31. *Id.*

32. *Soto*, 202 A.3d at 277.

33. *Id.* at 277–78.

34. *Soto v. Bushmaster Firearms Int’l, LLC*, 2016 WL 8115354 at \*17 (Conn. Super. Ct. Oct. 14, 2016).

35. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 285 (Conn. 2019).



argument that damages for personal injury were not available under CUTPA, holding instead that “at least with respect to wrongful advertising claims, personal injuries alleged to have resulted directly from such advertisements are cognizable under CUTPA.”<sup>36</sup>

*B. The Connecticut Supreme Court Interprets the Predicate Exception*

Having determined that the plaintiffs “pleaded legally cognizable CUTPA claims sounding in wrongful marketing,” the Connecticut Supreme Court considered whether the PLCAA bars the plaintiffs’ claim.<sup>37</sup> Plaintiffs could only maintain their claims if CUTPA fell within the PLCAA’s predicate exception. Stated differently, the court needed to determine whether “applicable to the sale or marketing of the product,”<sup>38</sup> limits the predicate exception to statutes regulating the sale or marketing of firearms specifically or whether a statute of general applicability, such as CUTPA, qualifies for the exception.

The court first set forth the principles it intended to apply in the construction of the PLCAA and its predicate exception.<sup>39</sup> Those principles demand that the court first look to the plain meaning of the statute.<sup>40</sup> Legislative history and other tools of statutory construction only become relevant when “the text of a statute is ambiguous.”<sup>41</sup> According to the Connecticut Supreme Court, upon a finding of ambiguity in the statute, the court must next look to canons of statutory construction and, failing that, it must review the statute’s legislative history.<sup>42</sup> In essence, the court intended to follow a specific roadmap in its statutory interpretation. Despite

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36. *Id.* at 300.

37. *Id.*

38. Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(A)(iii) (2012).

39. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 301 (Conn. 2019).

40. *Id.* (citing *CCT Commc’ns, Inc. v. Zone Telecom, Inc.*, 172 A.3d 1228 (Conn. 2017)).

41. *Id.*

42. *Id.* at 312.

this roadmap, the court veered from its purported route several times on the way to its destination.

### 1. Plain Meaning of the Statute

A common starting point in statutory interpretation by both state and federal judges is that, “the plain meaning of the statute controls,” with an exception for those instances in which that outcome would either yield an absurd result or be at odds with congressional intent.<sup>43</sup> In fact, “the Roberts Court has embraced a plain language approach to statutory interpretation.”<sup>44</sup> It is not surprising then, that faced with the task of interpreting the undefined term of a federal law, in this case the meaning of “applicable,” the Connecticut Supreme Court began with an eye toward the ordinary, dictionary meaning of the statutory language.<sup>45</sup> The dictionary definitions persuaded the court that “applicable” meant simply “[c]apable of being applied . . . .”<sup>46</sup> This reading supported the plaintiffs’ view that a statute need not deal specifically with firearms to be within the predicate exception. Despite adopting this broad reading of “applicable,” the court noted that there were secondary dictionary definitions of “applicable” that might support the defendants’ narrower reading of the predicate exception.<sup>47</sup> Webster’s Third New International Dictionary, for example, defines “applicable” as “fit, suitable, or right to be applied: appropriate . . . relevant . . . .”<sup>48</sup> The court acknowledged the reasonableness of both interpretations and then looked to the statutory framework of the PLCAA’s predicate

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43. Steven Witsotsky, *How to Interpret Statutes—Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 325 (2009).

44. David A. Strauss, *The Plain Language Court*, 38 CARDOZO L. REV. 651, 651 (2016).

45. *Soto*, 202 A.3d at 302 (citing *Maslenjak v. United States*, 37 S. Ct. 1918, 1924 (2017)).

46. *Id.* (citing *Applicable*, BLACK’S LAW DICTIONARY (10th ed. 2014)); *accord Applicable*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).

47. *Id.* (citing *Applicable*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

48. *Applicable*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).

exception to add color to its plain meaning review.<sup>49</sup> Although the court began with an orderly approach to statutory interpretation, the court then seemed to combine the principles in a manner that moves away from a logical review of the PLCAA and its predicate exception. After finding the reasonableness of both statutory interpretations, the court's own stated roadmap indicated that the court should have moved to the canons of construction and then, if necessary, the legislative history. Instead, the court used legislative history to draw conclusions with respect to the plain meaning of the statute. The court stated, "[i]f Congress intended the predicate exception to encompass laws that prohibit the wrongful marketing of firearms, and if no laws expressly and directly do so, then the only logical reading of the statute is that Congress had some other type of law in mind."<sup>50</sup> The authors cannot determine if the muddled approach here constitutes a failure of organization, a lack of discipline, or merely the ordinary difficulties inherent in statutory interpretation.

## 2. *Canons of Construction*

After finding two reasonable interpretations of the predicate exception, the court moved on to address the canons of construction. The phrase "canons of construction" encompasses a set of background norms and conventions used by courts when interpreting statutes.<sup>51</sup> The U.S. Supreme Court recently referred to them as "simply rules of thumb which will sometimes help courts determine the meaning of legislation."<sup>52</sup> The U.S. Supreme Court has also acknowledged that "judges regularly exercise broad discretion in deciding when the canons should apply . . . and how to reconcile them with other contextual resources . . ."<sup>53</sup> In *Soto*, the court reviewed several canons of construction. This part focuses on three particular canons addressed: narrow

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49. *Soto*, 202 A.3d at 302.

50. *Id.* at 304 (emphasis added).

51. James Brudney & Corey Ditslear, *Canons of Construction and the Elusive Question for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005).

52. *Id.* (citing *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996)).

53. *Id.*

interpretation of exceptions, *ejusdem generis*, and *noscitur a sociis*, and interpreting statutes in a manner that avoids absurd results.

The defendants contended that the court must narrowly construe the predicate exception, like other statutory exceptions, in a manner that preserves the primary purpose of the PLCAA.<sup>54</sup> The court dismissed this argument finding that Congress did not enact the PLCAA in an effort to shield the firearms industry from liability for wrongful or illegal conduct.<sup>55</sup> In other words, the court dismissed the canon based solely on the legislative history of the PLCAA, and, for reasons which the court did not explain, ignored the canon of construction requiring a narrow reading of an exception.

The defendants also asserted the relevance of two related canons of construction: *noscitur a sociis* (the meaning of doubtful terms or phrases may be determined by reference to their relationship with other associated words or phrases) and *ejusdem generis* (when general words are accompanied by a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated).<sup>56</sup> Through the application of *noscitur a sociis* and *ejusdem generis* the defendants argued that “broader terms, when used together with more narrow terms, may have a more restricted meaning than if they stand alone.”<sup>57</sup> The defendants argued that the “specific examples of firearms laws that Congress provides in the predicate exception strongly suggest that it intended only those statutes that are specific to the firearms trade to be considered ‘applicable to the sale or marketing of the product . . .’”<sup>58</sup> The court, finding the defendants’ argument unpersuasive, held that the related doctrines do not apply when the legislative history demands a broader reading.<sup>59</sup> The court believed that Congress included these examples as a mere accommodation to certain

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54. *Soto*, 202 A.3d at 317 (citing *Comm’r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989)).

55. *Id.*

56. *Id.* at 330 (Robinson, C.J., dissenting) (defining *noscitur a sociis*); *see also id.* at 313 (majority opinion) (defining *ejusdem generis*).

57. *Id.* at 337 (Robinson, C.J., dissenting) (citation omitted).

58. *Id.*

59. *See id.*

legislative dissenters and did not intend to narrow the reach of the predicate exception.<sup>60</sup>

The court also addressed the defendants' argument "that construing a statute of general applicability such as CUTPA to be a predicate statute would lead to an absurd result."<sup>61</sup> In *Ileto v. Glock, Inc.*,<sup>62</sup> a public nuisance case brought by private plaintiffs, the Ninth Circuit addressed the meaning of the predicate exception.<sup>63</sup> Judge Berzon stated that "the predicate exception cannot possibly encompass every statute that might be 'capable of being applied' to the sale or manufacture of firearms; if it did, the exception would swallow the rule, and no civil lawsuits would ever be subject to dismissal under . . . PLCAA."<sup>64</sup> The Connecticut Supreme Court dismissed the logic of *Ileto v. Glock* and the defendants' argument with the following statement: "But we are confident that this sort of specific, narrowly framed wrongful marketing claim alleges precisely the sort of illegal conduct that *Congress did not intend to immunize.*"<sup>65</sup> Therefore, the court concluded that its reading of the predicate exception would not lead to an absurd result when defendants engage in wrongful marketing practices. The court, relying on its view of the legislative history, dismissed the defendants' argument and missed the true rationale for the PLCAA.

### 3. Legislative History

In its legislative history analysis, the court stated, "to the extent that any ambiguities remain unresolved, we consider the legislative history of PLCAA."<sup>66</sup> The court concluded, "[a]lthough the extensive history of the statute presents something of a mixed bag . . . Congress did not intend to limit the scope of the predicate exception to violations of firearms specific laws or to confer

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60. *Id.* at 316 (majority opinion).

61. *Id.* at 311.

62. 565 F.3d 1126 (9th Cir. 2009).

63. *Id.* at 1155.

64. *Soto*, 202 A.3d at 311 (quoting *Ileto*, 565 F.3d at 1155 (Berzon, J., concurring in part and dissenting in part)).

65. *Id.* at 312 (emphasis added).

66. *Id.* at 318.

immunity from all claims alleging that firearms sellers violated unfair trade practice laws.”<sup>67</sup> The court relied on the following language in finding that Congress did not intend to shield CUTPA statutes with the PLCAA:

This bill is only intended to protect law-abiding members of the firearms industry from nuisance suits that have no basis in current law, that are only intended to regulate the industry or harass the industry or put it out of business . . . which are [not] appropriate purposes for a lawsuit.<sup>68</sup>

After quoting the above language, the majority interpreted the legislative history as limiting the applicability of the PLCAA to *blameless* defendants.<sup>69</sup> The court then concluded that CUTPA violators do not constitute blameless defendants and should not fall within the statutory shield of the PLCAA.<sup>70</sup> The court appears to rely on the language “law-abiding” to open the door to lawsuits for deceptive marketing. The more reasonable interpretation of the above statement interprets “law-abiding” as a general reference to an industry facing frivolous lawsuits. Thus, the phrase “law-abiding” describes the firearms industry frustrated by frivolous lawsuits and does not limit the reach of the predicate exception.

The court’s analysis also misses compelling language in the legislative history suggesting that Congress intended to close the courtroom to exactly the type of case litigated in *Soto*. Senator Hatch’s criticism of pending actions makes this point.

[L]awsuits, citing deceptive marketing or some other pretext, continue to be filed in a number of [s]tates, and they continue to be unsound. These lawsuits claim that sellers give the false impression that gun ownership enhances personal safety or that sellers should know that certain guns will be used illegally. That is pure bunk. Let’s look at the truth. The fact is that none of these lawsuits are aimed at the actual wrongdoer who kills

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67. *Id.*

68. *Id.* at 318–19 (citing 151 CONG. REC. 18,104 (2005) (remarks of Senator Max Baucus)).

69. *See id.* at 320.

70. *See id.*

or injures another with a gun—none. Instead, the lawsuits are focused on legitimate, law-abiding businesses.<sup>71</sup>

This statement leaves no doubt that Congress intended to shut down “deceptive marketing” lawsuits, such as CUTPA claims, intended to hold the firearms industry accountable for the acts of a “wrongdoer.”

Senator Graham also made a statement describing the overall intent of the PLCAA.

But *what this bill prevents*, and I think rightfully so, is *establishing a duty* along this line: That you have a *responsibility*, even if you do a lawful transaction or make a safe gun, *for an event that you can't control*, which is the intentional misuse of a weapon in a criminal fashion by another person. That is the heart of this bill. It doesn't relieve you of duties that the law imposes upon you to safely manufacture and to carefully sell. But we are not going to extend it to a concept where you are responsible, after you have done everything right, for what somebody else may do who bought your product and they did it wrong and it is their fault, not yours.<sup>72</sup>

Senator Graham's statement focuses on the crux of the issue, holding someone accountable for the illegal acts of another. The court also ignored a more specific statement related to the predicate exception that the dissent found compelling. For example, Senator Craig explained that the “bill does not shut the courthouse door,” in so far as

plaintiffs will have the opportunity to argue that their case falls under the exception, such as violations of [f]ederal and [s]tate law . . . that you have knowingly sold a firearm to a person who cannot legally have it or who you have reason to believe could use it for a purpose other than intended. That all comes under the current definition of [f]ederal law.<sup>73</sup>

The plain language used in this quotation identifies the types of items that should fall within the predicate exception and appears to indicate an intention to limit the exception to only those items.

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71. *Id.* at 341 (Robinson, C.J., dissenting) (citing 151 CONG. REC. 18,073 (2005) (remarks of Senator Orrin Hatch)).

72. *Id.* at 342–43 (emphasis added) (citing 151 CONG. REC. 18,920 (2005) (remarks of Senator Lindsay Graham)).

73. *Id.* at 340 (citing 151 CONG. REC. 18,057–58 (2005) (remarks of Senator Larry Craig)).

#### 4. Conclusion

Henry Hart and Albert Sacks famously summed up the inconsistent interpretation of statutes by remarking that “[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”<sup>74</sup> The court’s difficulties in *Soto* reflect the struggles with statutory interpretation described by Hart and Sacks. In *Soto*, the court’s majority and dissent differed in the application of the rules of statutory interpretation and the meaning of the legislative history. As described above, the majority seemed to begin with a belief that the PLCAA only protects blameless defendants. The court compounded this error by allowing it to infect its entire statutory interpretation analysis in every step. This belief tainted its view of the predicate exception under the plain meaning rule and ruled out an application of *ejusdem generis* in the canons of construction. For the reasons stated above, the weight of authority clearly supported the defendants. This decision may have lit a path to the courthouse for victims’ families and gun control activists. Part IV attempts to predict how future plaintiffs, encouraged by the court’s ruling, may respond in other jurisdictions.

#### IV. Factors Influencing Potential for Future Lawsuits in Other States

Buoyed by the *Soto* decision, victims’ families and gun control activists may look for other jurisdictions to pursue the firearms industry. The existing state gun immunity laws and the elements of each state’s Unfair or Deceptive Acts and Practices (UDAP) laws could influence that choice. As a preliminary matter, plaintiffs’ UDAP claims will likely fail in states with gun immunity laws. These states have either prohibited lawsuits by political subdivisions or granted immunity from lawsuits in some way.<sup>75</sup> In states without gun immunity laws, plaintiffs may take advantage

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74. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

75. See *infra* Part IV.A.



of UDAP laws that grant attorney's fees, authorize punitive damages, allow the attorney general to pursue claims on behalf of consumers, and permit class actions.

#### A. *Gun Immunity Laws in Other States*

As a preliminary matter, plaintiffs filing claims in states with their own gun immunity laws must survive a PLCAA challenge and a state statutory challenge before receiving a hearing on the merits of their claims. According to the Giffords Law Center to Prevent Gun Violence, thirty-four states currently have statutes similar to the PLCAA or prohibit their cities or local government entities from filing lawsuits.<sup>76</sup> Despite many similarities to the PLCAA, some of the states with gun immunity statutes deviate from the PLCAA with provisions that place additional obstacles in the path of plaintiffs and likely constitute the least favorable jurisdictions for lawsuits against the firearms industry. We describe below some of the inhospitable jurisdictions and their obstacles.

Colorado, for example, provides for an award of attorney's fees against plaintiffs who instigate lawsuits in violation of the Colorado gun immunity statute.<sup>77</sup> In 2015, the United States District Court for the District of Colorado awarded attorney's fees to Lucky Gunner, LLC upon a finding that the plaintiffs' claims could not overcome the statutory immunity granted gun manufacturers in Colorado and did not meet the predicate exception in the PLCAA.<sup>78</sup> Florida goes even further in its efforts to shut down lawsuits against the firearms industry. Florida

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76. See *Gun Industry Immunity*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/#state> (last visited Sept. 2, 2019) (listing Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia as states with statutes similar to PLCAA) (on file with the Washington & Lee Law Review).

77. See COLO. REV. STAT. § 13-21-504.5(3) (2018).

78. See *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1228 (D. Colo. 2015).

grants immunity to gun manufacturers, distributors, and retailers through a legislative finding that the manufacture, sale or distribution of firearms “is a lawful activity and is not unreasonably dangerous.”<sup>79</sup> The statute also contains a legislative finding that the unlawful use of the firearms rather than their manufacture, distribution or sales is the proximate cause of injuries.<sup>80</sup> Unsuccessful plaintiffs, on grounds of immunity, must reimburse the defendant for attorney’s fees, costs, compensation for loss of income, and other expenses.<sup>81</sup> Georgia has closed the courtroom to claims that gun sales constitute an unreasonably dangerous activity or a nuisance per se, which effectively shuts down the nuisance lawsuits facing the firearms industry and may close the courtroom to other similar claims.<sup>82</sup> Wyoming has not yet enacted an immunity statute. Instead, it has taken a different route to end gun manufacturer lawsuits. With the governor’s permission, Wyoming specifically empowers its attorney general to defend the Second Amendment against gun manufacturer lawsuits that do not involve a defective firearm.<sup>83</sup> As a result, gun manufacturers have an ally in the Wyoming attorney general.

When the state has a gun immunity statute, plaintiffs must surmount both the state statute and the PLCAA to maintain their lawsuits.<sup>84</sup> The states described above, which place additional obstacles in the path of plaintiffs, present an even more daunting challenge. However, in states lacking a gun immunity statute, plaintiffs need only hurdle the PLCAA to pursue lawsuits under general applicability statutes similar to CUTPA. As a result, *Soto* may have unleashed the extensive authority given attorneys general and private individuals pursuing consumer protection law claims in the manner described below.

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79. See FLA. STAT. ANN. § 790.331(1) (2019).

80. See *id.*

81. See *id.* § 790.331(6)(b).

82. See GA. CODE ANN. § 16-11-173(a)(2) (2018) (declaring through a legislative finding that gun sales do not constitute an unreasonably dangerous activity and do not constitute a nuisance per se).

83. See WYO. STAT. ANN. § 9-14-101 (2019).

84. See, e.g., *Phillips*, 84 F. Supp. 3d at 1228.

*B. Unfair and Deceptive Acts or Practices in Other States*

States initially passed UDAP laws, including CUTPA, with the intent to provide increased protection for deceptive and unfair trade practices above the remedies previously available through the Federal Trade Commission<sup>85</sup> and provide state governments with extensive authority to ensure that businesses operate fairly and honestly.<sup>86</sup> Encouraged by the result in *Soto*, plaintiffs may set their sights on lawsuits in states with favorable UDAP provisions and without gun immunity statutes. In selecting states with a favorable climate for future litigation of this kind, the following factors may contribute to the likelihood of emerging lawsuits.

UDAP statutes, intentionally open-ended, allow for “the meanings of unfairness and deception . . . to be developed over time, so that UDAP law can adapt to future business practices.”<sup>87</sup> These open-ended statutes give substantial powers to state attorneys general in their interpretation and enforcement of UDAP laws.<sup>88</sup> Recent exercises of these powers has led to growing concern that the states have strayed far from the intended purposes of the UDAP statutes.<sup>89</sup> Should state attorneys general and private plaintiffs attempt to expand the meanings of “unfair” and “deceptive” as the court did in *Soto*, the firearms industry could face numerous lawsuits.

Contrary to the awarding of attorney’s fees to defendants described above in Part IV.A, the awarding of plaintiffs’ attorney’s fees could promote increased firearms litigation. Generally, American courts do not award attorney’s fees to prevailing parties in the absence of a statutory or equitable exception.<sup>90</sup> With respect

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85. See Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 915 (2017).

86. Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer*, 17 YALE J. ON REG. 253, 278 (2000).

87. *Id.* at 276.

88. Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. KAN. L. REV. 209, 209 (2016).

89. See *id.*

90. See, e.g., Samuel R. Berger, *Court Awarded Attorneys’ Fees: What is Reasonable*, 126 U. PA. L. REV. 281, 281 (1977).

to UDAP laws, research from the National Consumer Law Center identifies only five states that do not permit the award of attorney's fees in a successful UDAP claim: Arizona, Delaware, Mississippi, South Dakota, and Wyoming.<sup>91</sup> Arizona, Delaware, Mississippi, and South Dakota have gun immunity statutes and Wyoming authorizes the attorney general's representation of defendants in its gun immunity legislation. As these five states already represent inhospitable venues for litigation of this kind, the remaining states without gun immunity statutes encourage further litigation through the award of attorney's fees to prevailing plaintiffs.

In addition to the award of attorney's fees, many states permit multiple damages allowing consumers two or three times their actual damages.<sup>92</sup> Other states permit the recovery of punitive damages where the businesses acted intentionally.<sup>93</sup> These states may encourage additional UDAP lawsuits against gun manufacturers, distributors, and retailers.

When private plaintiffs receive the assistance of state attorneys general in firearms litigation, they gain a powerful ally and the firearms industry has a formidable adversary. State attorneys general, under a *parens patriae* theory, often seek recovery on behalf of an entire class of consumers<sup>94</sup> and their authority may include powerful investigative tools such as civil investigative demands (CIDs).<sup>95</sup> These CIDs allow attorneys general to demand information early in the investigative process.<sup>96</sup> When not preempted by other laws, such as gun immunity statutes, UDAP laws generally permit state attorneys general or other consumer protection officers to seek a wide range of remedies

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91. NAT'L CONSUMER L. CTR., *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws 2* (2018), <http://www.nclc.org/images/pdf/udap/udap-report.pdf>.

92. *See id.* at 43.

93. *See id.*

94. *See* Edward D. Burbach, *2018 Consumer Protection Priorities of State Attorneys General*, FOLEY & LARDNER LLP (July 6, 2018), <https://www.foley.com/en/insights/publications/2018/07/2018-consumer-protection-priorities-of-state-attor> (last visited Sept. 2, 2019) (on file with the Washington and Lee Law Review).

95. *See id.*

96. *See id.*

including injunctive relief, restitution, and civil penalties.<sup>97</sup> According to the National Consumer Law Center, every state but Rhode Island allows the State to ask a court to impose a monetary penalty on a business that has engaged in an unfair or deceptive practice.<sup>98</sup> Among the other forty-nine states and the District of Columbia, the amounts of the penalties vary widely.<sup>99</sup> For example, Maryland imposes a civil penalty of not more than \$10,000 per initial violation<sup>100</sup> and \$25,000 for each subsequent violation.<sup>101</sup> In contrast, Iowa can impose a penalty up to \$40,000 per violation.<sup>102</sup>

Class actions allow plaintiffs to litigate a claim on behalf of both themselves—that is, the named plaintiffs—and class members who do not join as plaintiffs.<sup>103</sup> Class actions facilitate the sharing of litigation costs among the named plaintiffs and other class members.<sup>104</sup> This cost sharing creates claims where claims may not have arisen in the absence of the availability of a class action. With respect to UDAP, most states permit class actions.<sup>105</sup> However, the UDAP statutes of eight states deny class actions: Alabama, Arkansas, Colorado, Georgia, Louisiana, Montana, South Carolina, and Tennessee.<sup>106</sup> Since all eight states also have gun immunity statutes, class actions remain available in states that already have a favorable climate for successful lawsuits.<sup>107</sup>

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97. Silverman & Wilson, *supra* note 88, at 214.

98. NAT'L CONSUMER L. CTR., *supra* note 91, at 30.

99. *See id.* at 5–8.

100. *See* MD. CODE ANN., COM. LAW § 13-410(a) (2019).

101. *See id.* § 13-410(b).

102. *See* IOWA CODE § 714.16(7) (2019).

103. *See* ROBERT M. LANGER ET AL., CONN. PRAC. SERIES, UNFAIR TRADE PRACTICES § 8.4 (2018) (stating that “[t]he class action is a procedural mechanism enabling representative parties to litigate on behalf of a class of unnamed persons who are not joined in the action”).

104. *See* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:87 (5th ed. 2013) (stating that class actions “enable the litigation of claims that would otherwise be infeasible to litigate because the value of the claim is dwarfed by the costs of adjudicating it”).

105. *See* NAT'L CONSUMER L. CTR., *supra* note 91, at 36.

106. *See id.*

107. *See supra* note 76 (listing the states with gun immunity laws).

## V. Conclusion

News reports depict our country as a nation gripped in an unending loop of gun violence, senseless school shootings, and inexplicable congressional silence. For example, one news outlet reports that for the one-year period ending in February of 2019, our nation experienced a school shooting, on average, every 11.8 days.<sup>108</sup> Admittedly, the explanations for this alarming statistic are complex. To begin to address these concerns, some call for increased restrictions on the right to purchase certain types of weapons while others see any proposed restrictions as an infringement of Second Amendment rights. When we seek to diminish gun ownership rights, “[w]e look first to Congress, then to the State Legislatures as the arbiters of such matters, subject to the oversight of the courts.”<sup>109</sup> In the absence of congressional action, plaintiffs understandably seek other avenues to redress the harm caused by acts of gun violence.

The tragic events that occurred in the morning hours at the Sandy Hook Elementary School unfolded as they did, in part, due to the sheer firepower of the weapon used by the perpetrator. Our society permits the lawful ownership of these powerful weapons, but wrestles with the assignment of fault when third parties use the weapons in a heinous criminal act. Such was the crux of the issue in *Soto*. Plaintiffs sought relief under CUTPA for the defendants’ alleged “unethical, oppressive, immoral, and unscrupulous” marketing of a lawful firearm.<sup>110</sup> The primary stumbling block for plaintiffs, such as those in *Soto*, is the fact that in passing the PLCAA, Congress has seemingly prevented the ability of those in the firearms industry to be sued for harms that result from a third party’s wrongful use of a lawfully owned weapon.

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108. See Brandon Griggs & Christina Walker, *In the Year Since Parkland There’s Been a School Shooting, on Average, Every 12 Days*, CNN, <https://www.cnn.com/2019/02/14/us/school-shootings-since-parkland-trnd/index.html> (last updated Feb. 14, 2019) (last visited Sept. 2, 2019) (on file with the Washington and Lee Law Review).

109. Mystica M. Alexander & Scott R. Thomas, *Rogue Retailers or Agents of Necessary Change? Using Corporate Policy as a Tool to Reshape Gun Ownership*, 166 U. PA. L. REV. ONLINE 283, 295 (2018).

110. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 277 (Conn. 2019).

In deciding that the PLCAA did not bar the plaintiffs' CUTPA claims, the majority of the Connecticut Supreme Court stepped into policymaking that contradicted the congressional intent in passing the PLCAA. The *Soto* dissent correctly understood the proper role of the courts in these matters and the restraint needed to play that role. The dissent believed that Congress had made its intent very clear. Congress intended to "absolve defendants like these . . . from liability for criminal use of firearms by third parties except in the most limited and narrow circumstances . . ." <sup>111</sup> The dissenting opinion, authored by Chief Justice Robinson, went further and admonished the majority by stating that the court should act merely as "surrogates for another policy maker" and should not, "under the guise of statutory interpretation," legislate a particular policy. <sup>112</sup> Unfortunately, the majority played the role of legislator or regulator of the firearms industry, supplanting its own policy for the policy set out by Congress.

The Connecticut Superior Court has not yet heard plaintiffs' argument on the merits and we are waiting to see whether the U.S. Supreme Court will grant the defendant's petition for certiorari filed with the Court on August 1, 2019. Despite this uncertainty, *Soto* could prompt additional filings and further policymaking by the courts resulting from the favorable UDAP platform built for plaintiffs in several states. The open-ended UDAP laws, the powerful tools given state attorneys general, and the potential for attorney's fees and enhanced damage awards increase the likelihood of further UDAP enforcement actions against gun manufacturers, distributors, and retailers in states without gun immunity statutes. Although the lack of solutions for gun violence may frustrate gun control activists and victims' families, overturning bipartisan legislation <sup>113</sup> and "suing guns out of existence" does not properly reflect our democratic principles.

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111. *Id.* at 346 (Robinson, C.J., dissenting).

112. *Id.*

113. See David Kopel, *The Protection of Lawful Commerce in Arms Act: Facts and Policy*, WASH. POST (May 24, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-act-facts-and-policy/> (last visited Sept. 2, 2019) (stating the PLCAA passed in the U.S. House of Representatives by a bipartisan vote of 283 to 144 in October 2005 after it passed the Senate in July by a vote of 65 to 31) (on file with the Washington and Lee Law Review).