

OUTGUNNED NO MORE?: REVIVING A FIREARMS INDUSTRY MASS TORT LITIGATION

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ABSTRACT

In November 2019, the United States Supreme Court denied certiorari in *Remington Arms Co. v. Soto*, on appeal from the Supreme Court of Connecticut. In so doing, the U.S. Supreme Court let stand the Connecticut court's determination that plaintiffs in gun litigation arising out of the 2019 Sandy Hook elementary school massacre could litigate wrongful death claims under Connecticut consumer protection and unfair trade practice statutes. In making that determination, the Connecticut Supreme Court held that the federal Protection of Lawful Commerce in Arms Act (PLCAA) did not preempt the plaintiffs' claims under state law. The Connecticut court decided that the plaintiffs' claims came within PLCAA's third exception to immunity, the so-called "predicate statute" exception. The Remington Arms litigation is important because it may signal a pathway for further firearms litigation against gun defendants in other states pursuant to state consumer and unfair trade practice statutes. This article assesses whether the Remington Arms precedent provides a possibility for reviving a firearms mass tort litigation, which possibility receded in the decade after congressional enactment of PLCAA. Evaluated in the context of well-known hallmarks of developing mass tort litigation, a firearms mass tort remains in a very nascent stage in the life cycle of mass tort litigation. It remains to be seen whether litigation against the gun industry will gain

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renewed traction as a consequence of the Connecticut Remington Arms litigation.

INTRODUCTION

In a news story that quickly cycled off media attention, the Supreme Court on November 12, 2019, issued an order denying certiorari in *Remington Arms Co. v. Soto*.¹ The *Remington Arms*' petition appealed from a Connecticut Supreme Court decision that allowed the relatives and survivors of the Sandy Hook Elementary School shooting to sue the maker of the Bushmaster XM15-E2S semiautomatic rifle used in the massacre.² The original Connecticut state court litigation, *Soto v. Bushmaster Firearms International, LLC*, was a lawsuit brought by relatives of nine of the twenty first-graders and six educators killed in the shooting.³

The Court's denial of certiorari to hear an appeal from the Connecticut Supreme Court is significant for at least three reasons. First, the Court's certiorari denial signaled that at least four Justices could not be marshaled who were willing to hear an appeal—for whatever reasons—that would entangle the Court further in the Second Amendment gun rights debate.⁴ Second, the Court's certiorari denial, in allowing the Connecticut state court litigation to proceed, exposed a narrow ground upon which victims of gun violence might pursue relief against gun manufacturers.⁵ Third, and perhaps

1. 140 S. Ct. 513 (2019) (mem). As is usual in denial of certiorari petitions, the Court gave no reasons for its denial of the appeal. See Kristin Hussey & Elizabeth Williamson, *Suit Against Gun Maker Is Allowed to Continue*, N.Y. TIMES, Nov. 13, 2019, at A15; see also Kristin Hussey & Elizabeth Williamson, *Supreme Court Considers Hearing Case Tied to Gun Industry and Sandy Hook*, N.Y. TIMES, Nov. 6, 2019, at A19.

2. Petition for Writ of Certiorari at 12, *Remington Arms Co. v. Soto*, 140 S. Ct. 513 (2019) (No. 19-168) (cert. denied); see also *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 325 (Conn. 2019).

3. No. FBTCV156048103S, 2016 Conn. Super. LEXIS 796 (Conn. Super. Ct. April 14, 2016).

4. See *District of Columbia v. Heller*, 554 U.S. 570, 575, 635-36 (2008) (finding District of Columbia's handgun ban and requirement that lawfully owned rifles and shotguns be kept "unloaded and disassembled or bound by a trigger lock" violated Second Amendment guarantee). The U.S. Supreme Court previously denied certiorari to hear appeals relating to application of the third exception to immunity conferred by the Protection of Lawful Commerce in Arms Act (PLCAA). See generally *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 389-90 (2d Cir. 2008), cert. denied, 556 U.S. 1104 (2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 168 (D.C. 2008), cert. denied sub nom. *Lawson v. Beretta U.S.A. Corp.*, 556 U.S. 1104 (2009).

5. See The Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7903 (5)(A)(iii) (2018) (providing exception that allows gun manufacturers to be sued); Connecticut Unfair Trade Practices Act, (CUTPA), CONN. GEN. STAT. ANN. § 42-110b(a) (West 2012) (forbidding unfair or deceptive acts or practices in the conduct of any trade or commerce).

Commenting in the *New York Times*, Kristin Hussey and Elizabeth Williamson observed: "The Supreme Court's announcement that it would not take up the case effectively confirmed that there

most significantly, the Court's certiorari denial resuscitated the possibility of mass tort litigation against the gun industry for responsibility for the consequences of gun violence.⁶

Unlike any number of other industry-wide inspired mass tort litigation—most notably against asbestos manufacturers, medical devices companies, tobacco companies, and pharmaceutical businesses—gun manufacturers conspicuously avoided being drawn into mass tort litigation. In the early part of the twenty-first century, enamored by the example of the states' attorneys general's victory against the Big Tobacco industry,⁷ attorneys and academic scholars hypothesized the next big mass torts for litigators and the judicial system.⁸ These included mass tort litigation involving lead paint, fast food, and the gun industry.⁹ Notably, none of these mass tort litigations ensued.

This article explores the possibility of a revival of mass tort litigation against the gun industry as a consequence of the Connecticut *Remington Arms* litigation. Part I sets forth the underlying Connecticut litigation against Bushmaster Firearms International, LLC and Remington Arms Co., and the relatively narrow grounds that has allowed that litigation to proceed.

Part II canvasses the history of attempts to sue the gun industry, culminating with congressional enactment of The Protection of Lawful Commerce in Arms Act (PLCAA)¹⁰ that effectively immunized the gun

is a path to challenging a federal law enacted in 2005 that shields gun makers, dealers and distributors from lawsuits and gun-related crimes." *Suit Against Gun Maker Is Allowed to Continue*, *supra* note 1.

6. See generally John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, POLITICO (March 18, 2019), <https://www.politico.com/magazine/story/2019/03/18/lawsuit-mass-shootings-225812>; Heidi Li Feldman, *Why the Latest Ruling in the Sandy Hook Shooting Litigation Matters*, HARV. L. REV. BLOG (March 18, 2019), <https://blog.harvardlawreview.org/why-the-latest-ruling-in-the-sandy-hook-shooting-litigation-matters/>; Timothy D. Lytton, *Sandy Hook Lawsuit Court Victory Opens Crack in Gun Maker Immunity Shield*, THE CONVERSATION (March 15, 2019, 6:41 AM), <https://theconversation.com/sandy-hook-lawsuit-court-victory-opens-crack-in-gun-maker-immunity-shield-113636>.

7. *November 15-21; A New Tobacco Deal*, N.Y. TIMES, Nov. 22, 1998, at 2, §4 (forty-six state settlement with tobacco companies for \$206 billion).

8. See generally Andrew M. Dansicker, *The Next Big Thing for Litigators*, 37 MD. B.J., no. 4, July-Aug. 2004, at 12-17 (predicting mass tort litigation involving lead paint, fast food, cell phone industry, and gun industry); Molly McDonough, *Lawyers, Guns and Lead*, 89 A.B.A.J., no. 2, Feb. 2003, at 22-23 (hypothesizing new mass tort litigation involving lead paint and the gun industry); Allan Rostron, *Shooting Stories: The Creation of Narrative and Melodrama in Real and Fictional Litigation Against the Gun Industry*, 73 U.M.K.C. L. REV. 1047 (2005) (discussing the prospect of litigation against gun industry); John J. Zefutic, Jr., *From Butts to Big Macs: Can the Big Tobacco and Nation-wide Settlement with States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 SETON HALL L. REV. 1383 (2004) (modeling possible mass tort litigation against the fast food industry).

9. See sources *supra* note 8.

10. See Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 (2018).

industry from liability for suit resulting from gun violence. The Connecticut *Remington* lawsuit raises the question whether this litigation finally represents a crack in the gun immunity dam that will encourage the development of mass litigation for firearms-related harms.

Part III broadly sets forth certain hallmarks in the life cycle of an evolving mass tort litigation. It explores the possible reasons for the failure of certain mass torts to gain litigation traction, while others do. This section analyzes the conditions or triggers that enable successful prosecution and resolution of mass tort litigation.

Part IV assesses the extent to which contemporary litigation against the firearms industry might evolve into a mature mass tort, evaluated in the context of the recognized benchmarks of evolving mass tort litigation. In particular, this section analyzes the reasons why litigation against gun manufacturers has proven difficult as a matter of individual and aggregate litigation. This section speculates whether the factors that enabled the plaintiffs' mass tort victories against Big Tobacco and other corporate defendants—after decades of litigation—might provide a model towards resuscitating an emerging mass tort litigation against the gun industry.

I. THE CONNECTICUT LITIGATION: SOTO V. BUSHMASTER FIREARMS INTERNATIONAL, LLC

A. *Factual Background and Legal Theories*

The Connecticut litigation arose out of the mass shooting at the Sandy Hook Elementary School on December 14, 2012. Adam Lanza fatally shot twenty first-grade children and six staff members; two other staff members were wounded. Lanza used a Bushmaster XM15-E2S semiautomatic rifle that was manufactured, distributed and sold to Lanza's mother.¹¹

The administrators of nine decedents' estates brought an action in 2014 against a collection of *Bushmaster* defendants,¹² seeking damages and injunctive relief. The defendants included the rifle's manufacturers (Bushmaster and Remington), the distributors, and the retailers who sold the rifle to Lanza's mother.¹³

11. *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 275-76 (Conn. 2019).

12. The defendants included Bushmaster Firearms; Bushmaster Firearms, Inc.; Bushmaster Firearms International, LLC; Remington Outdoor Company Inc.; Remington Arms Company, LLC; Bushmaster Holdings, LLC; and Freedom Group, Inc. *Id.* at 273 n.3.

13. *Id.* at 273.

The plaintiffs asserted claims under Connecticut's wrongful death statute.¹⁴ The plaintiffs broadly argued that "by selling semi-automatic rifles . . . to the civilian population, the defendants became responsible for any crimes committed with those weapons."¹⁵ Furthermore, the plaintiffs claimed that two exceptions to the federal PLCAA statute vitiated the defendants' immunity from suit under PLCAA. The first exception involved a claim of negligent entrustment that the defendants "negligently entrusted to civilian consumers an AR-15 style assault rifle that is suitable for use only by military and law enforcement personnel."¹⁶ The second exception involved the knowing violation of a predicate statute, in this case, the Connecticut Unfair Trade Practices Act (CUTPA) "through the sale or wrongful marketing of the rifle."¹⁷ The plaintiffs narrowly argued that under Connecticut law, the *Remington* defendants "knowingly marketed, advertised, and promoted the XM15-E2S for civilians" to carry out military-style actions against perceived enemies.¹⁸ They characterized the offending marketing materials as "unethical, oppressive, immoral, and unscrupulous."¹⁹

The Sandy Hook plaintiffs supplied the trial court with numerous examples of these Remington advertisements that connected the rifles to the military. One pictured a soldier against the backdrop of an American flag; another featured the slogan "[w]hen you need to perform under pressure, Bushmaster delivers."²⁰ Other advertisements described the Bushmaster as "the ultimate combat weapons system," using the phrase "[f]orces of opposition, bow down."²¹ The plaintiffs also pointed to Remington firearms catalogues that promoted "the XM-15 as a 'combat weapon' by designating a 30-round magazine . . . as a 'standard' accessory."²²

In response, the defendants moved to strike the plaintiffs' allegations. The defendants argued that the plaintiffs' legal theories were barred under Connecticut law.²³ More importantly, the defendants argued that the

14. *Id.*; see CONN. GEN. STAT. ANN. § 52-555 (West 2013).

15. *Soto*, 202 A.3d at 272, 277.

16. *Id.* at 273-74.

17. *Id.* at 274.

18. *Id.* at 272.

19. Petition for Writ of Certiorari at 10, *Remington Arms Co. v. Soto*, 140 S. Ct. 513 (2019) (No. 19-168) (cert. denied) (quoting *Soto*, 202 A.3d at 277).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 274 (Conn. 2019). Among many objections, the defendants asserted that (1) the plaintiffs lacked standing to bring a CUPTA violation, (2) statutes of limitations bars, (3) personal injury and death were not cognizable CUPTA damages, (4) plaintiffs' claims were simply veiled products liability claims, and an exclusivity provision of the Connecticut Product Liability Act. *Id.*

Protection of Lawful Commerce in Arms Act precluded the plaintiffs' action.²⁴ In particular, the defendants relied on PLCAA, which "immunizes firearms manufacturers, distributors, and dealers from civil liability for crimes committed by third parties using their weapons."²⁵

B. Procedural History: Trial Court Victory for Gun Defendants

The trial court, in which the *Soto* litigation was originally filed, granted the defendants' motion to strike the plaintiffs' allegations based on three separate grounds.²⁶ First, the court found that the plaintiffs' allegations did not fit within the common-law theory of negligent entrustment. Second, the court held that "PLCAA [barred] the plaintiffs' claims insofar as those claims sound[ed] in negligent entrustment."²⁷ And third, the court held that the "plaintiffs lack[ed] standing to bring wrongful death claims predicated on CUPTA violations because they [had] never entered into a business relationship with the defendants."²⁸

C. Connecticut Supreme Court Decision: Narrow Win for the Sandy Hook Plaintiffs

In an eighty-eight page opinion, the Connecticut Supreme Court by a 4-3 vote affirmed in part and reversed in part the trial court's victory for the gun defendants.²⁹ In favor of the defendants, the court rejected the plaintiffs' broad theory that by merely selling semi-automatic rifles "the defendants became responsible for any crimes committed with those weapons."³⁰ The court rejected any of the plaintiffs' theories that rested on negligent entrustment.³¹ The court further concluded that the plaintiffs' legal claims

The Connecticut Supreme Court agreed that the relevant statute of limitations barred the plaintiffs' first CUPTA theory of liability, but did not bar the plaintiffs' claims under its second theory of liability narrowly drawn. *Id.* at 291-95 (analyzing the statute of limitations defenses).

24. *Id.* at 272.

25. *Id.* (citing 15 U.S.C. §§ 7902(a), 7903(5) (2018)).

26. *Id.* at 274.

27. *Id.*

28. *Id.*

29. *Id.* at 325.

30. *Id.* at 272. The court noted that the selling of this model of rifle was legal at the time Lanza's mother purchased the gun. *Id.* Following the Sandy Hook massacre, Connecticut added this model rifle and other assault rifles to the list of firearms prohibited for sale or transfer in Connecticut. CONN. GEN. STAT. ANN. § 53-202 (a)(1)(B)(xxi) (West 2012).

31. *Soto*, 202 A.3d at 275, 279-83 (reviewing jurisprudential history of the tort of negligent entrustment; rejecting application of this theory to the plaintiffs' claims).

and theories were generally precluded by established Connecticut law, or by PLCAA.³²

However, the court afforded the plaintiffs a victory—albeit a narrow victory to proceed with their litigation. Thus, the court concluded that the plaintiffs had standing to prosecute their CUPTA claims under Connecticut law.³³ The court rejected the defendants' contention that the plaintiffs' claims were nothing more than a products liability claim “dressed in the robes of CUPTA.”³⁴ The court explained that the plaintiffs had established a legal claim under one narrow theory, and consequently reversed the trial court's ruling on the defendants' motion to strike the plaintiffs' allegations.³⁵

The Connecticut Supreme Court ruled that established Connecticut law prohibited the use of any weapon (including the XM15-E2S) to carry out an offensive, military style mission because Connecticut law did “not permit advertisements that promote or encourage violent, criminal behavior.”³⁶ Turning to the text and legislative history of CUPTA, the court concluded that the legislature did not intend to bar plaintiffs from recovering damages for personal injuries resulting from unfair trade practices, especially under such circumstances as presented in this case.³⁷

D. *The Connecticut Supreme Court's Interpretation of PLCAA*

With regard to federal preemption of Connecticut law by PLCAA, the court determined that PLCAA did not bar the plaintiffs' wrongful death claims, because the plaintiffs' claims under CUPTA fell within one of PLCAA's exceptions.³⁸ Examining the text and legislative history of PLCAA, the court concluded that Congress did not manifest a clear intent to extinguish the traditional authority of the Connecticut legislature or its courts.³⁹ A core exercise of state police power embraced the regulation of advertising that “threatens the public's health, safety, and morals.”⁴⁰

32. *Id.* at 272.

33. *Id.* at 284-91 (analysis of standing under CUPTA; concluding plaintiffs had standing to sue under this statute).

34. *Id.* at 295-96. The defendants had argued that as a products liability claim, the plaintiffs' exclusive remedy was under the Connecticut Products Liability Act. *Id.* The court rejected this argument, noting that the defendants had failed to offer any explanation why the plaintiffs' wrongful marketing claim amounted to a products defect claim. *Id.*

35. *Id.* at 272-73.

36. *Id.* at 272.

37. *Id.* at 297-300.

38. *Id.* at 300.

39. *Id.* at 301-02.

40. *Id.* at 272-73.

The dispositive issue before the Connecticut Supreme Court was whether CUPTA qualified as a predicate statute that would vitiate the defendants' immunity from suit.⁴¹ The fundamental question centered on whether the predicate exception encompassed only those statutes that specifically governed the sale and marketing of firearms and ammunition, as opposed to generalized unfair trade practices statutes like CUTPA.

The resolution of this issue turned on the court's interpretation of PLCAA's statutory language that required a "statute *applicable* to the sale or marketing of [firearms]" within the meaning of PLCAA.⁴² The court's majority held that CUTPA was a general unfair trade practices statute of broad scope and qualified as a PLCAA predicate statute.⁴³ The court held that "the principal definition of 'applicable' is simply '[c]apable of being applied.'"⁴⁴ The court found support for its statutory interpretation in a Second Circuit's similar interpretation of PLCAA's predicate exception language.⁴⁵

E. Implications of the Connecticut Remington Arms Decision

The Connecticut Supreme Court's determination to green-light the Sandy Hook plaintiffs' lawsuit, rejecting federal pre-emption of Connecticut's unfair consumer and unfair trade practices laws under PLCAA's predicate statute exception, represented a significant inroad on the ability of gun violence victims to seek remediation from gun industry defendants. In appealing for certiorari to the U.S. Supreme Court, the *Remington Arms* defendant—and its numerous amici supporters⁴⁶—

41. *Id.* at 283-84.

42. *Id.* at 301 (citing 15 U.S.C. § 7903(5)(A)(iii) (2018)) (emphasis in the original).

43. *Id.* at 308-09.

44. *Id.* at 302 (citing *Applicable*, Black's Law Dictionary (10th ed. 2014)).

45. *Id.* at 305-06 (citing *New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008)).

46. See generally Brief Amicus Curiae of Gun Owners of American, Inc., Gun Owners Foundation, The Heller Foundation, Tennessee Firearms Association, Conservative Legal and Defense Education Fund, California Constitutional Rights Foundation, Policy Analysis Center, and Restoring Liberty Action Committee in Support of Petitioners, *Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019) (No. 19-168); Brief of Amici Curiae National Rifle Association of America, Inc. and Connecticut Citizens Defense League, Inc. in Support of Petitioners, *Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019) (No. 19-168); Brief of the National Shooting Sports Foundation as Amicus Curiae in Support of Petitioners, *Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019) (No. 19-168); Brief of Amici Curiae Professors of Second Amendment Law, Cato Institute, Firearms Policy Coalition, Firearms Policy Foundation, California Gun Rights Foundation, Madison Society Foundation, and Independence Institute in Support of Petitioners, *Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019) (No. 19-168); Brief of Twenty-Two Members of the United States House of Representatives as Amici Curiae in Support of Petitioners, *Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019) (No. 19-168).

recognized the litigation threat inherent in the Connecticut Supreme Court's decision because it opened the door to the application of broad consumer protection and unfair trade practice statutes as a source of remediation.⁴⁷

Thus, in appealing for Supreme Court review, Remington Arms argued that PLCAA's text and legislative history "all point[ed] to one conclusion: [g]eneral unfair trade practice laws like [Connecticut's] CUPTA [were] not encompassed by the statute's predicate exception."⁴⁸ Expanding on the perceived dire implications of the Connecticut Supreme Court's decision, Remington Arms in its certiorari petition asserted: "Because all states have analogous unfair trade practices laws, the decision below threatens to unleash a flood of lawsuits nationwide that would subject lawful business practices to crippling litigation burdens."⁴⁹

II. THE FIRST WAVE OF GUN LITIGATION AND IMMUNIZING THE GUN INDUSTRY FROM LAWSUITS: THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT (PLCAA)

A. *Suing the Gun Industry: The First Wave of Lawsuits*

In the late 1990s and early twenty-first century, various victims of crime and gun violence attempted to sue gun industry defendants for harms that were allegedly caused by the misuse of firearms by third parties (including criminals).⁵⁰ One cluster of such lawsuits were pursued by individuals.⁵¹ Other gun violence litigation was pursued by municipalities, government officials, or other entities.⁵² Plaintiffs' attorneys pursued these lawsuits based on a variety of legal theories: chiefly "negligent distribution or marketing,

47. Petition for Writ of Certiorari at 3, *Remington Arms Co. v. Soto*, 140 S. Ct. 513 (2019) (No. 19-168) (cert. denied).

48. *Id.* at 4.

49. *Id.*

50. See generally Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1 (2000) [hereinafter Lytton, *Tort Claims*] (comprehensive review of litigation against gun defendants and legal theories pursued by plaintiffs).

51. See, e.g., *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009) (PLCAA preempts general tort theories of liability, regardless of whether such theories are codified); *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 25 (2d Cir. 2001); *McCarthy v. Olin Corp.*, 119 F.3d 148, 151 (2d Cir. 1997); *Merrill v. Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001).

52. See generally *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008); *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (2d Cir. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *City of Chicago v. Beretta U.S.A. Corp.*, 785 N.E.2d 16 (Ill. App. Ct. 2002), *rev'd*, 821 N.E.2d 1099 (Ill. 2004); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001).

making and selling defective firearms, deceptive advertising, and contributing to a public nuisance.”⁵³

These lawsuits largely either were dismissed before trial or were unsuccessful on the merits.⁵⁴ Commenting on the firearms lawsuits during this first wave of gun litigation, one commentator noted that “[t]he great majority [of such lawsuits] have been dismissed or abandoned prior to trial, and of the few favorable jury verdicts obtained by plaintiffs, all but one have been overturned on appeal.”⁵⁵ Moreover, gun litigation that was based on theories of negligent marketing claims under state consumer statutes were particularly vulnerable to dismissal.⁵⁶

Although the firearms defendants could take some comfort in their continued deflection or defeat of gun litigation, these defendants nonetheless had legitimate concerns about their continued vulnerability to litigation. The gun industry had growing concerns about its own exposure to mass liability against a backdrop of other evolving, successful mass tort litigation, as well as the increasing state and federal receptivity to entertain aggregate litigation pursuant to a variety of legal theories. Moreover, the states’ attorney generals’ massive 1998 settlement with the tobacco defendants signaled that even powerful industries that had long pursued “no settlement” strategies, coupled with a record of litigation victories, could be vulnerable to continued, extensive litigation.

B. Legislative Reaction, the Enactment of PLCAA, and the Denouncement of Gun Litigation

In response to the gun industry’s growing concerns of exposure to liability for harms resulting from gun use, the firearms industry lobbied Congress to enact legislation to immunize manufacturers, distributors, and retailers from liability to suit.⁵⁷ Congress enacted the Protection of Lawful

53. See Gary Kleck, *Gun Control After Heller and McDonald: What Cannot Be Done and What Ought to Be Done*, 39 *FORDHAM URB. L.J.* 1383, 1391 (2012) (setting forth primary legal theories against gun manufacturers post 1989).

54. See Bryce A. Jensen, *From Tobacco to Health Care and Beyond: A Critique of Lawsuits Targeting Unpopular Industries*, 86 *CORNELL L. REV.* 1334, 1371-77 (2001) (describing the various legal theories pursued against firearms defendants and the failure of these lawsuits).

55. TIMOTHY D. LYTTON, *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 5 (Timothy D. Lytton ed., 2005).

56. See Timothy D. Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 *BROOK. L. REV.* 681, 681 (1998) (noting lack of success of these lawsuits).

57. The statute states:

The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, . . . threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and

Commerce in Arms Act in 2005.⁵⁸ The statute broadly protects firearms manufacturers and dealers from liability to suit when crimes have been committed with their products.⁵⁹ Gun industry advocates further lobbied state and local legislators for immunity statutes, and in the aftermath of PLCAA's enactment, thirty-four states enacted statutes providing "blanket immunity to the gun industry," in ways similar to PLCAA.⁶⁰

Notwithstanding this broad immunity from suit, under certain circumstances gun manufacturers, distributors, and retailers can still be held liable for damages resulting from defective products, breach of contract, and criminal misconduct. Firearm defendants may be held responsible for actions for which they are directly responsible, similar to any U.S.-based manufacturer of consumer products.⁶¹ Finally, if a firearms defendant has reason to know that a gun is intended for use in a crime, they may also be

economic sectors lawfully competing in the free enterprise system . . . , and constitutes an unreasonable burden on interstate and foreign commerce.

15 U.S.C. § 7901 (a)(6) (2018).

58. The act was passed by the U.S. Senate on July 29, 2005, by a vote of 65–31. The House of Representatives passed the legislation on October 20, 2005 with 283 in favor and 144 opposed. See Ryan VanGrack, Recent Development, *The Protection of Lawful Commerce in Arms Act*, 41 HARV. J. ON LEGIS. 541, 541, 545–46 (2004) (reviewing the legislative history of PLCAA's enactment through 2004 and critiquing the proposed legislation).

59. See generally Recent Legislation, *Tort Law Civil Immunity Congress Passes Prohibition of Qualified Civil Claims Against Gun Manufacturers and Distributors*, 119 HARV. L. REV. 1939 (2006). The statute provides:

[A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm or ammunition] product . . . for damages . . . or other relief, resulting from the criminal or unlawful misuse of [the] qualified product by the person or a third party' ['may not be brought in any Federal or State court'].

15 U.S.C. §§ 7902(a), 7903(5)(A) (2018). Any action pending on the date of PLCAA's enactment was subject to immediate dismissal.

60. *Gun Industry Immunity*, GIFFORDS LAW CENTER, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/#state> (last visited on January 25, 2020). "Those states are: 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." *Id.*

According to the Giffords Law Center, these state immunity laws are primarily directed to inhibit the ability of state and local governments to sue gun industry defendants. *Id.*

California repealed its gun immunity state in 2002, following the California Supreme Court's decision in *Merrill v. Navegar*, 28 P.3d 116, 133 (Cal. 2001), which upheld the immunization of an assault weapons manufacturer from a negligence action brought by the victims of a California gun massacre.

61. See *id.*

held liable for negligent entrustment—a theory unsuccessfully asserted by the Sandy Hook plaintiffs as well as plaintiffs in other cases.⁶²

In PLCAA, Congress set forth six exceptions to firearm defendants' broad immunity from civil liability arising from the criminal or unlawful use of their products by third parties.⁶³ PLCAA's third exception, known as the "predicate statute exception" provided the Sandy Hook plaintiffs' ground for relief from PLCAA's broad immunity.⁶⁴

PLCAA's third exception from broad immunity to suit permits "action[s] in which 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."⁶⁵ In order to invoke this exception, a plaintiff must present a cognizable claim along with a knowing violation of a predicate statute—that is, a statute that is applicable to the sale or marketing of firearms.⁶⁶

Two types of claims come within PLCAA's predicate exception. First, a manufacturer or seller may be subject to suit if the manufacturer or seller knowingly falsifies or fails to keep records that are required to be kept under federal or state law with respect to the firearm or ammunition.⁶⁷ A

62. *See Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 275, 279-83 (Conn. 2019).

63. 15 U.S.C. § 7903(5)(A)(i)-(vi) (2018). These exceptions provide blanket civil immunity for the following:

- (1) [A]n action brought against a transferor convicted under section 924(h) of Title 18 [of "knowingly transfer[ing] a firearm, knowing that such firearm will be used to commit a crime of violence"] or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;
- (2) an action brought against a seller for negligent entrustment or negligence per se;
- (3) 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 . . . ;
- (4) an action for breach of contract or warranty in connection with the purchase of the product;
- (5) 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
- (6) an action or proceeding commenced by the Attorney General to enforce the [Gun Control Act or the National Firearms Act].

Id.

64. *Soto*, 202 A.3d at 290-91.

65. 15 U.S.C. § 7903(5)(A)(iii).

66. *See Iletto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009).

67. 15 U.S.C. § 7903(5)(A)(iii)(I); 18 U.S.C. § 922(m) (2018).

manufacturer or seller may be subject to suit if they were involved in making a false statement with regard to the lawfulness of a firearms transfer.⁶⁸

Second, a manufacturer may be subject to suit where the manufacturer aided, abetted, or conspired to sell a firearm or ammunition that it knew or had reasonable cause to know that the actual buyer was prohibited from possessing a firearm under federal law.⁶⁹

C. Suing the Gun Industry Post-PLCAA: The Controversy Over Applicability of the Predicate Statute Exception

Although Congress intended to broadly immunize the gun industry from liability from harm arising from the manufacture, distribution, or sale of firearms or ammunition, notwithstanding this blanket immunity, plaintiffs have nonetheless continued to pursue litigation, primarily seeking to utilize PLCAA's predicate statute exception as the basis for pursuing relief.

Plaintiffs have taken both broad and narrow approaches to suing firearm defendants post-PLCAA. Thus, a handful of gun violence suits have broadly challenged the constitutionality of PLCAA, but none of these constitutional challenges have been successful.⁷⁰ Both state and federal courts have upheld the constitutionality of PLCAA as a legitimate exercise of congressional legislative power.⁷¹

Channeling a narrower approach, plaintiffs have attempted to invoke PLCAA's statutory exceptions to federal pre-emption. Relatively few courts have considered litigation against gun defendants pursuant to PLCAA's other

68. See 15 U.S.C. § 7903(5)(A)(iii)(I).

69. 15 U.S.C. § 7903(5)(iii)(II); 18 U.S.C. § 922(g), (n) (2018).

70. See, e.g., *Ileto*, 565 F.3d at 1138-44 (upholding constitutionality of PLCAA as against challenges based on violation of principles of separation of powers, violation of equal protection, violation of substantive and procedural due process, and violations of takings laws); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392-98 (2d Cir. 2008) (upholding the constitutionality of PLCAA against challenges that PLCAA was not a permissible exercise of Congress's power to regulate interstate commerce; that PLCAA violated basic principles of separation of powers by dictating the outcome of pending cases; that PLCAA violated the Tenth Amendment by dictating which branches of government might authoritatively pronounce state law; and that PLCAA violated First Amendment guarantees of the right to petition the government for redress of grievances through access to the courts); *Adames v. Sheahan*, 909 N.E.2d 742, 764-65 (Ill. 2009) (upholding PLCAA as against a constitutional challenge based on violation of Tenth Amendment; relying on Second Circuit conclusion in *Beretta U.S.A. Corp.* that PLCAA did not violate separation of powers or Tenth Amendment strictures).

71. See, e.g., *Ileto*, 565 F.3d at 1138-44; *Beretta U.S.A. Corp.*, 524 F.3d at 392-98; *Adames*, 909 N.E.2d at 764-65.

exceptions for negligent entrustment,⁷² negligence or negligence per se,⁷³ design defects,⁷⁴ failure to warn,⁷⁵ or breach of implied warranty of merchantability.⁷⁶ Plaintiffs have been unsuccessful in nearly all the cases advancing claims based on these PLCAA exceptions.⁷⁷

Only the Second and Ninth Circuits have considered the viability of gun litigation under PLCAA's third exception, the predicate statute exception.⁷⁸ These two divergent opinions have engendered a Circuit split concerning the interpretation and applicability of the scope of PLCAA's third exception.⁷⁹ In both decisions, the appellate courts agreed that PLCAA barred claims that plaintiffs pursued under generally applicable nuisance statutes.⁸⁰ Several state courts and one federal district court similarly have concluded that PLCAA does not permit litigation based on applicable nuisance statutes.⁸¹

72. *See, e.g., Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 275 (Conn. 2019) (no cause of action for negligent entrustment under Connecticut common law of negligent entrustment); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1225, 1227 (D. Colo. 2015) (PLCAA's negligent entrustment exception to immunity does not create a cause of action); *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476, 485 (Mo. Ct. App. 2013) (under Missouri law, sellers of chattels could not be held liable for negligent entrustment; claims preempted by PLCAA); *Estate of Kim v. Coxe*, 295 P.3d 380, 395 (Alaska 2013) (defendant could not be held liable under a theory of negligent entrustment if firearm was stolen; firearm theft precludes dealer's liability under PLCAA's negligent entrustment exception). *But cf. Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 338-39 (App. Div. 2012), *amended by* 103 A.D.3d 1191 (App. Div. 2013) (plaintiff's claims allowed to proceed based on common law negligence and public nuisance under New York law; no interpretation whether claims fell under PLCAA exceptions of negligent entrustment or negligence per se).

73. *See, e.g., Phillips*, 84 F. Supp. 3d at 1225, 1227 (general negligence actions preempted by PLCAA); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 180-81 (D.D.C. 2009) (District of Columbia's strict liability law not a predicate statute applicable to the sale or marketing of firearms); *Estate of Kim*, 295 P.3d at 394 (defendant could not be held liable under a theory of negligence per se if firearm was stolen).

74. *See, e.g., Adames*, 909 N.E.2d at 765 (PLCAA preempted claim based on theory of design defects).

75. *See, e.g., id.* (PLCAA preempted claim based on theory of failure to warn).

76. *See, e.g., id.* (PLCAA preempted claim based on theory of breach of the implied warranty of merchantability).

77. *See supra* notes 72-76.

78. *See Ileto v. Glock, Inc.* 565 F.3d 1126, 1133-35 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 389-90 (2d Cir. 2008).

79. *See infra* notes 83-121.

80. This Circuit split represents a conflict of statutory construction that the U.S. Supreme Court declined to consider when denying certiorari in the Sandy Hook appeal. *See Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019), *cert. denied*, 140 S. Ct. 513 (2019).

81. *See Estate of Kim v. Coxe*, 295 P.3d 380, 388 (Alaska 2013); *Adames*, 909 N.E.2d at 765; *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 177, 180, 186 (D.D.C. 2009).

However, two state courts permitted such lawsuits to proceed under this theory.⁸²

1. Interpreting the Predicate Statute Language Broadly: The Second Circuit *City of New York v. Beretta U.S.A. Corp.* Litigation

In *City of New York v. Beretta U.S.A. Corp.*,⁸³ the Second Circuit handed victories to both the firearms industry as well as gun violence victims. In a rambling and discursive opinion, the Second Circuit simultaneously upheld the constitutionality of PLCAA and reinforced the congressional intention to immunize the gun industry from lawsuits—ultimately dismissing litigation against the firearm defendants.⁸⁴ However, in the same opinion, the court offered a statutory interpretation of the meaning of PLCAA’s predicate exception,⁸⁵ which opened the door for the Connecticut Supreme Court to hold that its unfair trade practices statute fell within PLCAA’s predicate exception, thereby allowing the Sandy Hook plaintiffs’ litigation to proceed.

In the *Beretta U.S.A. Corp.* litigation, the City of New York filed a complaint against the firearms suppliers seeking injunctive relief and abatement of the alleged public nuisance caused by their distribution practices.⁸⁶ The City claimed that the firearm suppliers marketed guns to legitimate buyers with the knowledge that those guns would be diverted through various mechanisms into illegal markets. The City also claimed that the firearm suppliers failed to take reasonable steps to inhibit the flow of firearms into illegal markets.⁸⁷

The firearms defendants moved to dismiss based on immunity under PLCAA.⁸⁸ In response, the City argued that PLCAA “did not bar its causes of action because this case fell within an exception to the forbidden qualified civil liability actions”—the predicate statute exception.⁸⁹ The plaintiff invoked as the predicate statute the New York Penal Law section 240.45 (Criminal Nuisance in the Second Degree).⁹⁰

82. See *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 338, 339 (App. Div. 2010), amended by 103 A.D.3d 1191 (App. Div.2013); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434-35 (Ind. Ct. App. 2007) (allegations that gun manufacturers and distributors knowingly sold firearms to straw purchasers who, in turn, were selling firearms to criminals).

83. 524 F.3d 384 (2d Cir. 2008).

84. *Id.* at 389.

85. See *id.* at 400-03.

86. *Id.* at 390-91.

87. *Id.* at 391.

88. *Id.* at 390.

89. *Id.* at 389-90.

90. *Id.* at 390.

The defendants claimed that New York Penal Law section 240.45 could not serve as a predicate statute to remove its PLCAA immunity “because the predicate exception was meant to apply to statutes that were expressly and specifically applicable to the sale and marketing of firearms, and not to statutes of general applicability, such as section 240.45.”⁹¹ This was the same general argument the *Soto* defendants invoked concerning the Connecticut unfair trade practices statute in the Sandy Hook litigation.⁹²

On December 2, 2005, the United States District Court for the Eastern District of New York (Weinstein, J.) denied the defendants’ motion to dismiss, finding that the claim restriction provisions of the PLCAA did not require dismissal of the case.⁹³ The District Court held that, “[b]y its plain meaning, New York Penal Law § 240.45 satisfies the language of the predicate exception requiring a ‘statute applicable to the sale or marketing of [a firearm].’”⁹⁴ The district court certified its December 2, 2005 order for immediate appeal pursuant to 28 U.S.C. § 1292(b).⁹⁵

The Second Circuit concluded that the City’s claim—predicated on New York Penal Law section 240.45—did not fall within a PLCAA exception because that New York statute did not “fall within the contours of the Act’s predicate exception.”⁹⁶ The Second Circuit generally held that a statute upon which a case was brought was meant to apply to statutes that expressly and specifically were applicable to the sale and marketing of firearms, and not to statutes of general applicability, such as section 240.45.⁹⁷

The Second Circuit noted that the core issue was “what Congress meant by the phrase ‘applicable to the sale or marketing of [firearms],’” and “what Congress meant by the term ‘applicable.’”⁹⁸ The court concluded that “the meaning of the term ‘applicable’ must be determined in the context of the statute.”⁹⁹ However, the court found that “nothing in [PLCAA] require[d]

91. *Id.*

92. *See Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 272 (Conn. 2019).

93. *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 298 (E.D.N.Y. 2005) *aff’d in part, rev’d in part*, 524 F.3d 384 (2d Cir. 2008).

94. *Id.* at 261.

95. *Id.* at 298 (“There is a substantial ground for disagreement about a controlling issue of law—the applicability of the Act to the present litigation—and an immediate appeal may substantially advance the ultimate termination of the litigation.”).

96. *Beretta U.S.A. Corp.*, 524 F.3d at 390. The Second Circuit also held that the PLCAA was a valid exercise of Congressional power pursuant to the Commerce Clause and that the PLCAA did not violate the constitution.

97. *Id.* at 404.

98. *Id.* at 399.

99. *Id.*

any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception.”¹⁰⁰

Thus, the court decided:

[T]o foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complain[ed] of, in which case such a statute might qualify as a predicate statute. . . . Accordingly, while the mere absence in New York Penal Law § 240.45 of any express reference to firearms did not, in and of itself, preclude that statute’s eligibility to serve as a predicate statute under the PLCAA, New York Penal Law § 240.45 [was] a statute of general applicability that [did] not encompass the conduct of firearms manufacturers . . . It therefore [did] not fall within the predicate exception to the claim restricting provisions of the PLCAA.¹⁰¹

The Second Circuit opined that,

[T]he term “applicable” must be examined in context.” The PLCAA provides that predicate statutes are those that are “applicable to the sale or marketing of [firearms].” The universe of predicate statutes is further defined as “including” the examples set forth in subsections (I) and (II) . . . these examples refer to statutes that specifically regulate the firearms industry.¹⁰²

Yet, the court did not agree “that the PLCAA requires that a predicate statute expressly refer to the firearms industry. Thus the contours of the universe of predicate statutes—i.e., those statutes that are ‘applicable’ to sale or marketing of firearms—are undefined.”¹⁰³

2. Interpreting the Predicate Statute Language Narrowly: The Ninth Circuit *Ileto* Litigation

A year after the Second Circuit’s decision in the *Beretta U.S.A. Corp.* litigation, the Ninth Circuit upheld PLCAA against an array of constitutional challenges, including arguments that PLCAA violated the constitutional requirement for separation of powers;¹⁰⁴ violated equal protection principles; and violated substantive and procedural due process rights.¹⁰⁵ In addition, the

100. *Id.* at 399-400.

101. *Id.* at 400 (“We decline to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute.”).

102. *Id.*

103. *Id.*

104. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1138 (9th Cir. 2009).

105. *Id.* at 1140-41.

Ninth Circuit held that the victims of gun violence in California did not have a vested property right in their accrued state causes of action.¹⁰⁶

Perhaps most important for the firearms liability debate, the Ninth Circuit affirmatively ruled that PLCAA preempted California tort claims brought by shooting victims against federally-licensed manufacturers, distributors, and firearms dealers for firearms that an assailant possessed and used during an assault.¹⁰⁷ Construing PLCAA's third predicate statute exception, the court ruled that the exception did not apply to claims brought by shooting victims under California civil codes pertaining to nuisance, public nuisance, and negligence.¹⁰⁸

The *Ileto* litigation arose out of events on August 10, 1999 in which a gunman shot and injured three children, a teenager, and an adult at a Jewish Community Center summer camp in Granada Hills, California.¹⁰⁹ Later that day the gunman killed Joseph Ileto, a postal worker. The gunman carried at least seven firearms, which he possessed illegally. In 2001, the shooting victims and Ileto's surviving wife filed a lawsuit against the manufacturers, marketers, importers, distributors, and sellers of firearms.¹¹⁰

The “[p]laintiffs brought their claims . . . solely under California common law tort statutes for foreseeably and proximately causing injury, emotional distress, and death through knowing, intentional, reckless, and negligent conduct.”¹¹¹ They did not allege that the defendants “violated any statute prohibiting manufacturers or sellers from aiding, abetting, or conspiring with another person to sell or otherwise dispose of firearms to illegal buyers.”¹¹²

The court opined that the plaintiffs' negligence and public nuisance allegations stated cognizable claims under California law.¹¹³ However, the plaintiffs had failed to “point to an allegation of a knowing violation of any *separate* statute.”¹¹⁴ Instead, the plaintiffs had pointed out that, “unlike many other jurisdictions, California's general tort law [was] codified in its civil

106. *Id.*

107. *Id.* at 1145.

108. *See id.* at 1137-38.

109. *Id.* at 1130.

110. *Id.*

111. *Id.* The complaint alleged that the defendants intentionally produced, marketed, distributed, and sold more firearms than the legitimate market demanded in order to take advantage of resales to distributors that they knew or should have known would, in turn, sell to illegal buyers. In addition, the complaint alleged that the defendants' deliberate and reckless marketing and distribution strategies created an undue risk that their firearms would be obtained by illegal purchasers for criminal purposes. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1132.

code.”¹¹⁵ Citing these civil code provisions, the plaintiffs contended that the California Code sections satisfied PLCAA’s predicate statute exception.¹¹⁶ The defendants argued that only a separate statute regulating firearms explicitly or exclusively could be a predicate statute to satisfy PLCAA.¹¹⁷

Examining the text and legislative history of PLCAA, the court construed PLCAA’s “applicable” statute should be given a narrow construction, rather than the plaintiffs’ proposed all-encompassing meaning.¹¹⁸ Consequently, the court concluded that “Congress intended to preempt general tort theories of liability even in jurisdictions, like California, that [had] codified such causes of action.”¹¹⁹

3. The Connecticut Supreme Court Views of *Beretta U.S.A. Corp.* and *Ileto*

Against the backdrop of competing interpretations of PLCAA preemption, the Connecticut Supreme Court in *Soto* chose to rely on and follow the Second Circuit’s decision in *Beretta U.S.A. Corp.*¹²⁰ Citing the Second Circuit’s opinion, the Connecticut court concluded that “[r]eading the predicate exception to encompass actions brought to remedy illegal and unscrupulous marketing practices under state consumer protection laws is consistent with the approach followed by the United States Court of Appeals for the Second Circuit.”¹²¹

The Connecticut Supreme Court noted that the Second Circuit had concluded that “the predicate exception encompasses not only laws that expressly regulate commerce in firearms but also those that ‘clearly can be said to implicate the purchase and sale of firearms,’ as well as laws of general [application] that ‘courts have applied to the sale and marketing of firearms[.]’”¹²² Consequently, the court concluded that CUPTA “falls squarely into both of these categories.”¹²³

115. *Id.* at 1132-33 (citing Cal. Civ. Code § 1714(a) (negligence); § 3479 (nuisance); § 3480 (public nuisance)).

116. *Id.* at 1133.

117. *Id.* at 1132-33.

118. *Id.* at 1134. However, in construing the textual meaning of the term “applicable,” the court concluded that neither the plaintiffs’ nor the defendants’ asserted meaning was correct. Instead, the court agreed with the Second Circuit’s decision in *Beretta U.S.A. Corp.*, 524 F.3d at 401, that the text of a statute alone was inconclusive as to Congressional intent.

119. *Id.* at 1136.

120. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 308 (Conn. 2019).

121. *Id.* at 305 (noting that federal Second Circuit decisions “carry particularly persuasive weight in the interpretation of federal statutes by Connecticut state courts.”).

122. *Id.* at 306.

123. *Id.*

Looking to the legislative history undergirding federal and state consumer protection and unfair trade practices laws, the court noted that both the Federal Trade Commission Act and CUPTA were established mechanisms for regulating the marketing and advertising schemes of firearms vendors.¹²⁴ Thus, notwithstanding the absence of a specific firearms statute, the court concluded that the most reasonable reading of the statutory framework was that laws such as CUPTA qualified as predicate statutes, insofar as they applied to wrongful advertising claims.¹²⁵

Citing the contrary opinion in the Ninth Circuit's *Ileto* decision, the court acknowledged that "[o]ther courts that ha[d] construed the predicate exception [were] divided as to whether the exception unambiguously encompass[ed] laws, such as CUPTA, that [did] not expressly regulate firearms sales and marketing."¹²⁶ However, the court rejected the defendants' reliance on *Ileto* as therefore dispositive of the question presented in *Soto*. Instead, the Connecticut Supreme Court read the *Ileto* opinion as supporting its conclusion that CUPTA fell squarely within the predicate exception.¹²⁷

The court noted that although the Ninth Circuit had construed the predicate statute exception narrowly, that court also had rejected a reading of PLCAA that would limit predicate statutes only to those that "pertain[ed] exclusively to the sale or marketing of firearms."¹²⁸ Hence, the Ninth Circuit recognized that other statutes that regulate sale and manufacturing activities could qualify as a predicate statute. The Connecticut Supreme Court distinguished the *Ileto* decision by noting that the Ninth Circuit had reached its conclusions primarily because California had codified its common law of tort, and therefore the California statutes were "in a sense, merely general tort theories masquerading as statutes."¹²⁹

III. MODELING MASS TORT LITIGATION

The U.S. Supreme Court's denial of certiorari in the *Soto* appeal, which effectively allows the Sandy Hook gun litigation to proceed in Connecticut state court, presents the tantalizing prospect that the firearms industry may indeed be vulnerable to suit—if not in litigation involving a small number of claimants—perhaps eventually against the firearm industry in a mass tort

124. *Id.* at 307.

125. *Id.* at 308.

126. *Id.* at 312 (citing *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1133-35 (9th Cir. 2009) (holding the predicate exception is ambiguous) and *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390, 399 (2d Cir. 2007) (holding the same)).

127. *Id.* at 321.

128. *Id.* at 306 n.47.

129. *Id.*

litigation. The question, then, is whether the Connecticut Sandy Hook gun litigation represents the first volley in developing a full-blown firearms mass tort litigation—as was anticipated in the early 2000s before Congressional enactment of PLCAA.

A. *Sign-Posts of a Developing Mass Tort Litigation*

Many of the landmark, seminal mass tort litigations began as individual tort lawsuits.¹³⁰ Evaluating whether the *Soto* case will serve as a bellwether for mass tort litigation entails consideration of the convergence of factors that trigger a simple case to mature into a full-blown mass tort litigation. The history of numerous mass tort cases suggests various hallmark events in the development of a nascent mass tort litigation into a mature mass tort litigation.

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

1. Developments or Changes in the Law

The development of mass tort litigation depends, to an extent, on the degree to which the underlying jurisprudential framework permits or constrains a claimant's ability to pursue relief, if at all. Hence, whether a mass tort litigation will develop from individual lawsuits often is tethered to legal developments that enable claimants to pursue relief either individually or collectively.

130. See Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 406 (1999). Although today, many mass tort litigations appear full-blown on the litigation landscape, such as the massive opioid litigation now docketed in the Northern District of Ohio. See *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 536 (N.D. Ohio 2019).

The history of asbestos litigation provides perhaps the most famous example of a significant legal development that enabled the flourishing of a subsequent immense mass tort litigation. Prior to 1965, industrial workers suffering from asbestos-exposure injuries were relegated to administrative relief through state workmen's compensation schemes.¹³¹ In 1965, the American Law Institute published the second edition of its RESTATEMENT OF THE LAW OF TORTS, which set forth a new rule of strict liability in Section 402A that applied to the sellers of various products.¹³² The advent of Section 402A in the SECOND RESTATEMENT ushered in a raft of individual asbestos tort liability lawsuits, and the rest is mass tort history.¹³³

Other legal developments have similarly assisted plaintiffs in the prosecution of individual and collective mass tort claims. For a considerable time in cases involving multiple product manufacturers, plaintiffs were hindered in their pursuit of relief because of their inability to identify the particular defendant as the proximate cause of their injuries. The development and judicial approval of theories of market share and enterprise liability supported and enhanced the ability of plaintiffs to pursue multiple defendants on an industry-wide basis.¹³⁴

The creation of entirely novel legal theories also can help spur the institution of individual litigation, which may, in turn, evolve into mass tort litigation. For example, pleading novel requests for medical monitoring began to appear on the mass tort litigation landscape in the mid-1990s.¹³⁵ Medical monitoring—largely unknown before the era of mass tort litigation—became a fixture in the toolbox of mass tort relief.¹³⁶

2. Regulatory Alert, Notice, or Recall of a Defective or Harmful Product

It is well-known that a product alert, notice, or recall serves as a common trigger for individual and mass tort litigation. At least five federal regulatory agencies have the authority to issue product alerts, adverse event reports, or

131. See PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 18 (1985).

132. *Id.* at 27-28.

133. *Id.* at 41, 73.

134. See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924, 937-38 (Cal. 1980) (upholding the theory of market share liability in litigation involving DES injuries, thus assisting in enabling DES mass tort litigation to develop and proceed); *Hall v. E. I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353, 368-69 (E.D.N.Y. 1972) (applying enterprise liability to manufacturers of blasting caps).

135. See, e.g., *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 285, 295 (S.D. Ohio. 1997) (approving a medical monitoring class).

136. See *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 314 n.186 (N.D. Ohio 2007) (cataloging case law on successful medical monitoring class actions).

recalls of dangerous, hazardous, or defective products. These agencies include the Food & Drug Administration, the Federal Trade Commission, the National Highway Safety Commission, the Consumer Products Safety Commission, and the Department of Agriculture.¹³⁷

Collectively, the agencies' scope of authority embraces numerous products and services including food products, medical devices, transplantable tissue, blood, vaccines, cosmetics, tobacco products, alcohol, baby formula, biological products, pharmaceuticals, automobiles, and chemicals. Agencies may issue press releases on product alerts or recalls,¹³⁸ and plaintiffs' attorneys routinely review agency websites to track product alerts or recalls that provide a likely basis for mass tort litigation.¹³⁹

Consequently, numerous mass tort litigations have arisen from agency alerts, notices, or recalls, such as the breast implant litigation,¹⁴⁰ hazardous

137. See *Recall List*, U.S. CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/Recalls> (last visited Apr. 9, 2020); *Recalls, Market Withdrawals, and Safety Alerts*, F.D.A., <https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts> (last updated Apr. 7, 2020); *Recalls and Public Health Alerts*, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/fsis/topics/recalls-and-public-health-alerts> (last updated Apr. 2, 2020); *Safety Issues & Recalls*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/recalls> (last visited Apr. 9, 2020); *Scams*, F.T.C., <https://www.consumer.ftc.gov/features/scam-alerts> (last updated Jan. 7, 2021).

138. See, e.g., *Dell Announces Recall of Notebook Computer Batteries Due to Fire Hazard*, U.S. CONSUMER PROD. SAFETY COMM'N (Aug. 15, 2006), <https://www.cpsc.gov/Recalls/2006/dell-announces-recall-of-notebook-computer-batteries-due-to-fire-hazard> [<https://perma.cc/5A25-2KBJ>] (recognizing the potential danger of malfunctioning lithium-ion batteries). The press release announced that it was illegal to sell, resell, or attempt to sell or resell batteries listed in the document, requiring a recall of approximately 2.7 million batteries manufactured by Sony in China or Japan, and used in Sony or Dell products. *Id.* Additionally, the FDA posts recalls, withdrawals, and safety alerts online. See *Recalls, Market Withdrawals, & Safety Alerts*, FDA, <https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts> (last updated Jan. 6, 2021).

139. See generally Edward "Ned" Mulligan V, *Vetting Products Liability Cases*, TRIAL, Jan. 2015, at 48 (providing advice to prospective plaintiffs' attorneys on possible sources to discover and develop mass tort litigation).

There are a variety of resources that can help identify new litigations. Monitor news outlets and subscribe to services that report these events, such as the FDA's recalls, market withdrawals, and safety alerts, which are daily emails detailing product recalls, warning letters issued to manufacturers, and safety alerts regarding adverse event reports and updated product warnings. You can also subscribe to the daily AAJ News Brief, which provides a snapshot of newsworthy events. Certain websites can be another useful source. For example, www.recalls.gov offers information and subscription services about recalls for consumer products, motor vehicles, boats, food, medicine, and environmental products.

Id. at 49-50.

140. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1404-05 (1995) (describing the 1992 FDA ruling placing a moratorium on silicone breast implants, which induced creation of the subsequent mass tort litigation).

computer notebook batteries litigation,¹⁴¹ automotive-related litigation,¹⁴² various medical device recalls,¹⁴³ and pharmaceutical or drug alerts.¹⁴⁴

3. Establishment of a Winning Track Record of Litigation and Settlements

As indicated above, many mass tort litigations develop from the initial adjudication or settlement of individual lawsuits. Whether a particular litigation will evolve into a full-blown mass tort depends in part, then, on the track record of successive individual cases.¹⁴⁵ The Federal Judicial Center's MANUAL FOR COMPLEX LITIGATION (THIRD) counseled that litigants need to establish a favorable track record in individual cases prior to seeking judicial aggregation of claims.¹⁴⁶

If individual plaintiffs win at trial or negotiate settlements, such plaintiff victories provide a barometer of the litigation's viability and enhance the

141. See Harrison Lebov, *A Darker Shade of Green: Hazards Associated with Lithium-Ion Batteries*, 17 J. HIGH TECH. L. 78, 91-93 (2016) (describing the United States Consumer Product Safety Commission recall of lithium-ion batteries due to overheating and fire hazard, affecting millions of Sony, Apple, Toshiba, and Dell computers, resulting in class action litigation in the United States and Canada).

142. See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); Kevin M. McDonald, *Separations, Blow-Outs, and Fallout: A Treadise on the Regulatory Aftermath of the Ford-Firestone Tire Recall*, 37 J. MARSHALL L. REV. 1073 (describing the NHTSA tire recall and resulting litigation consequences).

143. See, e.g., *FDA Public Health Notification: Serious Complications Associated with Transvaginal Placement of Surgical Mesh in Repair of Pelvic Organ Prolapse and Stress Urinary Incontinence*, FDA (Oct. 20, 2008), <http://www.amiform.com/web/documents-risques-op-coelio-vagi/fda-notification-about-vaginal-mesh.pdf>; see generally C. Gavin Shepherd, Comment, *Transvaginal Mesh Litigation: A New Opportunity to Resolve Mass Medical Device Failure Claims*, 80 TENN. L. REV. 477 (2013) (describing aftermath of the FDA notice of health complications due to transvaginal mesh, and resulting individual and mass tort litigation).

144. See, e.g., Cynthia L. Taub et al., *New Class Action Filings and FDA Warnings Highlight Increased Regulatory and Litigation Risk for CBD Products*, STEPTOE (Dec. 10, 2019), <https://www.steptoelaw.com/en/news-publications/new-class-action-filings-and-fda-warnings-highlight-increased-regulatory-and-litigation-risk-for-cbd-products.html> (describing FDA warning letters concerning cannabis additive and resulting class litigation).

145. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744-45, 747 (5th Cir. 1996) (discussing the theory of litigation track record and concept of immature or nascent mass tort); see also *In re Am. Med. Sys.*, 75 F.3d 1069, 1084-85 (6th Cir. 1996) (discussing the same); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-1300 (7th Cir. 1995) (discussing the same).

146. MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.26 (1995).

Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units—even single-plaintiff, single-defendant trials—until general causation, typical injuries, and levels of damages become established. Thus, “mature” mass torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort cases, such as those involving injuries arising from new products, chemical substances, or pharmaceuticals.

Id.

litigation's attractiveness for development and aggregation of similar claims.¹⁴⁷ This is especially true if plaintiffs win lucrative jury awards or negotiate lucrative settlements.¹⁴⁸

Correlatively, if defendants establish a successive track record of defeating plaintiffs' individual lawsuits, this will diminish the attractiveness of the litigation for other plaintiffs' attorneys and impede development of a mass tort litigation. In absence of a clear track record of plaintiffs prevailing in individual litigation, courts have been unwilling to convert individual cases into mature mass tort litigation.¹⁴⁹

4. Rise in Interest of the Plaintiffs' Bar in Pursuing Litigation

In order for a mass tort to develop and gain traction, a sufficient number of plaintiffs' attorneys must enter the fray to pursue mass litigation. The plaintiffs' bar will be enticed to pursue mass litigation based on a convergence of events, many described above. Hence, to the extent that individual plaintiffs have established viable cases and achieved either significant jury trial verdicts or substantial settlements—that is, a winning track record—this information will contribute to stimulating the interest of other attorneys to undertake large-scale representation.¹⁵⁰

Other factors influence the plaintiffs' bar interest in pursuing mass tort litigation. These include information about the number of potential claimants, the difficulty of the underlying cases, the state of discovery information, and the availability and probity of scientific and expert witness testimony. Plaintiffs' attorneys who are members of affiliating professional organizations such as the Association for American Justice (AAJ) encourage the pursuit of mass tort litigation by identifying and promoting newly emerging mass tort litigation through their conferences, websites, and educational materials.¹⁵¹

147. *Id.*

148. S. Gale Dick, *Can Implant Settlement Be Saved?*, 13 ALTERNATIVES TO HIGH COST LITIG. 109, 121 (1995) (describing rising number of plaintiffs' cases as a consequence of large value settlements).

149. Brent R. Austin, *Mass Torts Disguised as Commercial Class Actions: A Primer from the CCA-Treated-Wood Litigation*, ANDREWS AUTOMOTIVE LITIG. REP., Sept. 9, 2003, at 11 (discussing a court's decision not to certify a class involving chemically treated wood where no prior track record of plaintiffs' litigation supported turning nascent litigation into a mass tort).

150. Dick, *supra* note 148.

151. See, e.g., *Participant Agenda: Everything You Want to Know About Mass Torts (But Are Too Afraid to Ask)*, AMERICAN ASSOCIATION FOR JUSTICE, https://www.justice.org/sites/default/files/_Justice/CLE/Web%20Agenda%20-%20Mass%20Torts%207.12.19.pdf (last visited April 10, 2020) [hereinafter *Participant Agenda*].

5. Emergence of a Critical Mass of Similarly-Situated Claimants

The impetus for aggregation and creation of a mass tort litigation will be spurred on by the emergence of a critical mass of similarly-situated claimants with viable claims. The sheer increase in the number of persons affected by the same harmful product or toxic exposure places pressure on the judicial system's capacity to adjudicate claims one by one.¹⁵² In addition to the problem of docket congestion as a consequence of the filing of individual lawsuits, the prospect of lengthy trial delays raises the prospect of denial of justice and of a claimant's right to his or her day in court.¹⁵³

The seminal mass tort litigations involving asbestos, Agent Orange, the Dalkon Shield, and DES all illustrate the emergence of mass torts as a consequence of the courts becoming flooded with individual lawsuits.¹⁵⁴ Indeed, the various institutional bodies studying the problem of asbestos litigation woefully underestimated the number of potential claimants, and misestimated claimant projections into the future.¹⁵⁵

The advent of social media and the internet has accelerated the growth of mass tort litigation by providing easy platforms for identifying and aggregating potential claimants injured by harmful products or toxic exposures.¹⁵⁶ Any number of law firms retain websites for potential clients to log in and register to become part of publicized tort litigation.¹⁵⁷

152. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617-18 (1997) (stating “[i]n the decades since the 1966 revision of Rule 23, class-action practice has become ever more ‘adventuresome’ as a means of coping with claims too numerous to secure their ‘just, speedy, and inexpensive determination’ one by one.”) (quoting Fed. R. Civ. P. 1); see also *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 720 (E.D.N.Y. 1983).

153. *Owens-Illinois, Inc. v. Levin*, 792 F. Supp. 429, 431 (D. Md. 1992).

154. Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 406 (1999).

During the last thirty years, tort law has experienced unprecedented change in response to the challenges presented by the increasing complexity and volume of mass tort cases. What often begins as a trickle, soon swells to a river, then to a flood of litigation surrounding defective products such as the Dalkon Shield, Agent Orange, silicone breast implants, asbestos, and heart valves.

Id. See also *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617, 618-19 (3d Cir. 1996), *aff’d sub nom.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (describing flood of litigation arising from asbestos related injuries).

155. George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. TEX. L. REV. 981, 995, 1008 (2003) (citing statistic on ever-growing asbestos claims from 1977 through 2003).

156. See Stuart M. Feinblatt, Beth S. Rose & Gwen L. Coleman, *Use of Social Networking Sites in Mass Tort Litigation: A Defense Perspective*, N.J. LAW., Aug. 2011, at 43.

157. Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 738-40 (2008) (describing various internet websites publicizing mass tort litigations and mass tort resources); Patrick Lysaught, *Forces*

6. Docket Congestion

Another factor influencing the emergence of mass tort litigation—tied to the explosion of claimants—is docket congestion resulting from the filing of hundreds or thousands of individual cases.¹⁵⁸ In the era of developing mass tort cases, some courts and commentators noted a “crisis mentality” among judges concerning the capacity of any one judge or jurisdiction to handle massive litigation.¹⁵⁹ To the extent that state and federal courts experience overloaded dockets consisting of similar cases, the judicial system may seek procedural means to aggregate cases through consolidation, class litigation, or MDL procedure.

Due to relatively fewer litigation resources, state court systems may be particularly affected by the influx of thousands of cases. At some point, state and federal judicial systems may desire to coordinate the management and resolution of dockets of similar, parallel cases.¹⁶⁰ The recognition of a “crisis” mentality coupled with a shift towards aggregation and judicial case management present additional signposts of an emerging or developing mass tort litigation.

7. Judicial Receptivity Towards Aggregating and Managing Multiple Claims

Mature mass tort litigation will develop and evolve from a nascent state concomitant with the judicial system’s receptivity towards managing multiple claims in some form of aggregated procedure, either through the class action rule¹⁶¹ or MDL procedure.¹⁶² The history of mass tort litigation teaches that the development of mass tort litigation has been hindered in those cases where courts declined to grant or reversed class certification to proposed mass tort cases,¹⁶³ but mass tort litigation has gained traction where

Shaping Mass Tort Litigation: Strategies for Defense Counsel, DEF. COUNS. J., April 2000, at 165 (noting proliferation of mass tort websites).

158. Rice & Davis, *supra* note 154, at 406 (“State and federal dockets become clogged with an insurmountable backlog of mass tort cases. Repetitive litigation of the issues of causation, punitive damages, and common defenses marks the initial phases of mass tort litigation.”).

159. See John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 990 (1995) (noting the use of crisis mentality language in judicial decisions and academic commentary).

160. See Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1871, 1875 (2000).

161. Fed. R. Civ. P. 23.

162. 28 U.S.C. § 1407 (2012).

163. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (reversing class certification of nationwide class of persons addicted to nicotine products); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (reversing class certification of nationwide tainted

courts granted class status.¹⁶⁴ It is fairly well known that defense counsel seeking to thwart mass tort litigation vigorously oppose class certification or any form of consolidation or aggregated proceedings.¹⁶⁵

The federal judiciary has undergone a sea change in receptivity towards aggregating claims in MDL proceedings, thereby spurring the creation of mass tort litigation. Prior to creation of the asbestos MDL in 1991, the Judicial Panel on Multidistrict Litigation rarely granted MDL status to proposed mass tort litigations.¹⁶⁶ Since the Judicial Panel changed course in 1991, the Judicial Panel now routinely grants MDL status to emerging mass litigation.¹⁶⁷ The rapid proliferation of MDL proceedings is another hallmark of twenty-first century mass tort litigation.¹⁶⁸ The authorization of an MDL with the transfer of cases to one judicial district for coordinated proceedings provides another signal event in the creation of a mass tort litigation.

8. Discovery of Underlying Facts and Public Dissemination of Discovery Materials

Individual case developments can help to stimulate the development of mass tort litigation. Thus, the discovery of underlying facts and materials in individual litigation, and the extent to which this information becomes available to other attorneys or is disseminated to the public, will help to spur on mass tort litigation.

Perhaps the most famous example of public dissemination of discovery materials occurred in the litigation brought by states' attorneys general

blood products mass tort); *Mertens v. Abbott Labs.*, 99 F.R.D. 38, 43 (D.N.H. 1983) (denying class certification for proposed DES mass tort).

164. *See, e.g., In re Sch. Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir. 1986) (upholding nationwide class certification of class of school districts concerning remediation of asbestos in school buildings); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 470 (D. Wyo. 1995) (upholding class certification of a nationwide class action concerning pharmaceutical Albuterol).

165. *See Alfred J. Lechner, Jr. & Helena A. Lynch, New Defense Strategies for Class Certification Hearings: Start with Rule 1*, CLASS ACTION REP., July-Aug. 2009 (suggesting defendants move for early denial of class certification and other strategic approaches to defeating class certification motions).

166. *See generally In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 417-18 (J.P.M.L. 1991).

167. *See Judicial Panel on Multidistrict Litigation - Judicial Business 2017*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2017> (last visited April 10, 2020).

168. The JPML compiles some statistics about its activities and the federal MDL docket, and a handful of researchers have done valuable work on characteristics of MDL'd cases. *See id.*; *see also* Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1719-22 (2019); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 406 (2019) (stating MDL cases make up more than 40% of current civil docket).

against tobacco industry defendants.¹⁶⁹ The creation of an enormous online database of documents from the tobacco defendants—available to the public—assisted in resolving the state attorneys’ general claims in one of the largest mass tort settlements on record.¹⁷⁰ The computer database of documents further supplied evidentiary materials for litigants in other individual and aggregate actions against the tobacco defendants after the state attorney general settlement.¹⁷¹

9. Development of Probative Underlying Scientific or Expert Testimony in Support of Claims

Many mass tort litigations depend on evidentiary proof of underlying scientific contentions, or expert witness testimony relating to other complex causation or damage issues. A signpost of a developing mass tort depends, to great extent, on the developmental state of the underlying scientific or other expert evidence. To the extent that mature science exists in support of claims, this will assist in the successful development and prosecution of a mass tort litigation. Conversely, to the extent that the science underlying claims is either immature or non-supportive, this will inhibit the development of a mass tort litigation.¹⁷²

The breast implant litigation provides an object lesson of a mass tort litigation that got out ahead of the science linking breast implants to the various disease manifestations alleged by claimants. After a proposed class action was abandoned, subsequent scientific studies proffered in individual lawsuits refuted a causal link between breast implants and disease ideation.¹⁷³

169. See generally Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999); see also Mark Gottlieb, *Finding the Smoking Guns in Tobacco Litigation*, TRIAL, Nov. 1999, at 22 (describing the Minnesota document depository and the 35 million pages of discovery materials in this depository, as well as other discovery depositories).

170. See Michael V. Ciresi, *An Account of the Legal Strategies That Ended an Era of Tobacco Industry Immunity*, 25 WM. MITCHELL L. REV. 439, 440-41 (1999) (discussing the \$4.1 billion national tobacco settlement).

171. See Robert J. Ambrogi, *Shedding Light on the Tobacco Industry*, RES GESTAE, April 2002, at 20 (discussing the provision of the tobacco settlement providing for open access to the tobacco document database).

172. See generally MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996) (discussing the scientific studies underlying Bendectin litigation and why weak science defeated prosecution of a mass tort; discussing life cycle of mass tort litigation as tied to maturity of scientific support for claims); JOSEPH SANDERS, *BENDECTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION* (1998) (discussing the same).

173. See generally MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* (1996); David E. Bernstein, *Review Essay: The Breast Implant Fiasco*, 87 CALIF. L. REV. 457 (1999) (book review).

Similarly, attempts to resolve Bendectin claims foundered on a lack of supportive scientific evidence to prove up causation.¹⁷⁴

On the other hand, the history of asbestos litigation provides the best example of a mature mass tort litigation, supported by mature scientific evidence. By the mid-1980s, the science underlying the causal connection between asbestos-related diseases was well-established and largely incontrovertible.¹⁷⁵

10. Interest of State Attorneys General in Pursuing Relief on Behalf of Their Citizenry

The interest of state attorneys general in pursuing relief on behalf of their citizens, either through *parens patrie* actions or otherwise, provides another landmark event in identifying a maturing mass tort. After several unsuccessful attempts by a consortium of plaintiffs' attorneys to achieve class certification of a nationwide tobacco class litigation,¹⁷⁶ several state attorneys general allied to sue the tobacco industry for the costs imposed on state treasuries as a result of harms caused by tobacco products.¹⁷⁷ Uniting with plaintiffs' attorneys from the private bar,¹⁷⁸ the state attorneys general accomplished resolution of one of the most enormous mass tort settlements in history.

Piggybacking on emerging mass tort litigation in the courts, state attorney general litigation provides a public parallel universe in which mass tort litigation may be initiated and resolved. In addition to the tobacco mass tort litigation, state attorneys general have resolved other types of product cases through *parens patrie* actions.¹⁷⁹

174. See GREEN, *supra* note 172; see also SANDERS, *supra* note 172.

175. See Joseph Sanders, *The "Every Exposure" Cases and the Beginning of the Asbestos Endgame*, 88 TUL. L. REV. 1153, 1154-55 (2014).

There are several factors that help to account for the asbestos litigation's longevity. First, of course, is the clear causal connection between exposure and disease. In the absence of a strong causal relationship, asbestos would have long since gone the way of other "failed" mass torts. Not only is there a strong relationship between asbestos and lung cancer, but two other asbestos diseases, asbestosis and mesothelioma, are "signature diseases" that are almost uniquely associated with asbestos exposure.

Id.

176. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 738-40 (5th Cir. 1996).

177. Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 19 (2000).

178. *Id.* at 9-10 (commenting on the alliance of state attorneys general and private attorneys in prosecuting mass tort litigation).

179. See generally Thomas H. Koenig & Michael L. Rustad, *Reconceptualizing the BP Oil Spill as Parens Patrie Products Liability*, 49 HOUS. L. REV. 291 (2012); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

11. Agile Strategic Lawyering in Response to Changing Litigation Developments

Mass tort litigation will develop and evolve concomitant with the agility of plaintiffs' attorneys to regroup after litigation setbacks. Hence, a prospective mass tort will not materialize if the plaintiffs' attorneys abandon litigation after pre-trial dismissals, trial losses, or failure to accomplish class certification or aggregate settlement.¹⁸⁰ On the other hand, to the extent that plaintiffs' attorneys recover, reorganize, and re-strategize their litigation tactics, a mass tort may successfully evolve.

The best example of plaintiffs' attorneys re-strategizing their approach to prosecuting mass tort claims is provided by the shift from personal injury claims towards other tort, contract, statutory, and equitable theories. By the end of the twentieth century, it became manifestly clear that courts were resistant to certifying class actions pleaded with personal injury claims.¹⁸¹ In response to repeated setbacks and defeats, plaintiffs' attorneys instead determined to re-conceptualize their lawsuits. Hence, plaintiffs' attorneys turned to pleading theories sounding in fraud, misrepresentation, breach of express and implied warranties, and violations of consumer protection and unfair trade practices statutes.¹⁸²

In addition to pleading mass tort litigation under different legal theories, the plaintiffs' bar also advanced the relatively novel claim of medical monitoring, a strategy that enabled artful pleading around Rule 23(b)(3) predominance requirements.¹⁸³ In addition, plaintiffs' attorneys added in claims for injunctive relief, and new cy pres remedies.¹⁸⁴

180. See Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. PA. L. REV. 2225, 2255 (2000) (commenting on examples of failure of mass torts rejected by courts as immature for class or aggregate litigation).

181. Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 892-93 (2007) ("[I]ndeed, through most of the last half-century courts have held that class certification is generally not appropriate for mass personal injury claims in which individual differences among claimants arguably outweigh factual and legal commonalities.").

182. See, e.g., *Castano*, 84 F.3d at 738 (pleading eleven separate claims under theories of fraud, misrepresentation, breach of express and implied warranty, restitution, and redhibition under Louisiana law).

183. See, e.g., *In re Welding Fumes Prods. Liab. Litig.*, 526 F. Supp. 2d 775, 777 (N.D. Ohio 2007).

184. See, e.g., *In re Nat'l Football League Players Concussion Litig.*, 821 F.3d 410, 425, 447 (3d Cir. 2016) (approving class action settlement of NFL football players' concussive injuries claims, which included provision for \$10 million Educational Fund); see also Deborah H. Hensler, *Bringing Shutts Into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 U.M.K.C. L. REV. 585, 610-611(2006) (proposing that unpaid excess settlement funds for future claimants "can be contributed to a suitable charity, such as a research related to the diseases allegedly caused by the product that gave rise to the litigation.").

12. The Willingness of Putative Defendants and Insurers to Come to the Negotiation Table

Another significant benchmark of an evolved or mature mass tort litigation is the point at which the defendants and their insurers signal a willingness to come to the negotiation table and accomplish a settlement.¹⁸⁵ Although this rarely occurs early in a nascent mass tort, this often occurs as a result of outcomes in bellwether trials, individual non-aggregated cases, individual settlements, mediation, damaging discovery revelations, probative scientific and expert witness testimony, and the client's desire to cease further litigation proceedings.¹⁸⁶

Moreover, defendants may desire to come to the negotiation table as a consequence of direction from their insurers,¹⁸⁷ or liability limitations resulting from independent insurance coverage litigation.

IV. TAKING ON THE GUN INDUSTRY: REVIVING A PATHWAY TO AGGREGATE MASS TORT LITIGATION?

The outcome of the *Soto* lawsuit in Connecticut state court may provide some useful insight concerning the viability of firearms litigation and whether subsequent lawsuits by gun violence victims may be on a path towards mass tort litigation. It is well to remember that many of the seminal mass torts, such as asbestos and tobacco litigation, began as individual lawsuits and developed into full-blown mass torts only after decades of hard-fought litigation.¹⁸⁸ Furthermore, the experience of the asbestos and tobacco mass tort litigations illustrate that seemingly unlikely difficult-to-prosecute lawsuits may mature from a nascent stage into full-blown mass tort litigation.

It is difficult to prognosticate whether the *Soto* firearms litigation will evolve through the known life cycle of a mass tort litigation. However, the U.S. Supreme Court's denial of certiorari to review the Connecticut Supreme Court's decision in the underlying *Soto* litigation provides a provocative data

185. See, e.g., *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 151 (S.D. Ohio 1992) (discussing willingness of Defendant, Shiley-Pfizer, to negotiate settlement with Plaintiff's attorney Stanley Chesley after protracted litigation involving defective heart valves).

186. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 827 (1999).

187. See, e.g., *id.* at 822-24 (explaining how settlement negotiations were inspired by prompting from Defendant Fibreboard's insurer, including Continental Casualty Company and Pacific Indemnity Company).

188. See, e.g., Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 501-02 (2009) (denoting asbestos litigation as the U.S.'s "longest-running mass tort" litigation; tracing litigation history back three decades); Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 123, 123-24 (2001) (describing the decades of invincibility of tobacco defendants to plaintiff's lawsuits).

point from which to speculate about the possible revival of a full-scale assault on the firearms industry through mass tort litigation.

On the one hand, the *Soto* litigation involves some of the factors that point to the possible development of a firearms mass tort litigation. On the other hand, the individual *Soto* litigation has yet to attain many of the signal landmarks of developing mass torts. Moreover, a significant number of the triggers for developing mass torts either are not relevant or have yet to become relevant to litigating against the firearms industry. Whether a firearms mass tort litigation evolves remains uncertain. However, an examination of the known factors that inspire mass tort litigation suggests a very nascent mass tort, at best.

A. Factors Suggesting that the Soto Litigation Provides a Pathway Towards a Firearms Industry Mass Tort Litigation

1. Developments and Changes in the Law

Perhaps the most significant factor that suggests that the *Soto* litigation might trigger the evolution of a firearms mass tort litigation lies with the Connecticut Supreme Court's broad interpretation of PLCAA's predicate statute exception,¹⁸⁹ which provided the basis for the Sandy Hook plaintiffs to proceed with their litigation.¹⁹⁰ By aligning itself with the Second Circuit's broad interpretation of PLCAA's third exception, the Connecticut Supreme Court's opinion provides a model for other litigants to pursue firearms litigation under various state consumer protection and unfair trade practices law.

The Connecticut Supreme Court's interpretation of PLCAA has changed the jurisprudential landscape in which victims of gun violence may pursue relief. The Connecticut Supreme Court's decision may prove to be a sweeping precedent, insofar as virtually every state has some form of a consumer protection and unfair trade practices statute.¹⁹¹

Future plaintiffs may now be able to exploit theories based on state consumer protection and unfair trade practice laws, patterned on the successful allegations in the Sandy Hook complaint. Moreover, to the extent that state statutes are textually identical or largely similar, the fact of common statutes may open a pathway for multistate class action gun litigation.

189. *Soto v. Bushmaster Firearms Int'l*, 202 A.3d 262, 302-03 (Conn. 2017).

190. *Id.* at 325.

191. See generally Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT'L CONSUMER LAW CTR. (Feb. 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf (last visited April 10, 2020).

The Connecticut Supreme Court's decision also is important because it represents an incursion on the doctrine of federal preemption of state firearms litigation. A similar landmark turning point concerning federal preemption of state tobacco litigation occurred with the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*¹⁹² In this decision, the Court upheld federal preemption of some types of state-based claims under the Federal Cigarette Labeling and Advertising Act,¹⁹³ but opened the door for other types of state-based claims.¹⁹⁴

The *Cipollone* decision provided litigants with a blueprint for pursuing tobacco litigation under state legal theories not preempted by federal law. In the wake of the Court's *Cipollone* decision, attorneys filed thousands of tobacco lawsuits, providing more traction to a developing tobacco industry mass tort litigation.¹⁹⁵

2. Agile Strategic Lawyering in Response to Changing Litigation Developments

Similar to plaintiffs' attorneys in other developing mass torts, attorneys seeking to pursue litigation against the firearms industry have been persistent as well as agile in regrouping after litigation setbacks. Significantly, plaintiffs' attorneys have not yet abandoned the field of potential litigation against gun manufacturers, distributors, and sellers. Attempted litigation against firearms defendants is now well into its third decade, similar to the long-running asbestos and tobacco mass torts.

As discussed above, a hallmark of a successfully developing mass tort is correlated with the persistence and agility of plaintiffs' attorneys in pursuing litigation against intractable defendants, often for years if necessary.¹⁹⁶ Similar to tobacco litigation, a review of the history of firearms litigation suggests an ever-changing landscape of alternative theories for relief. Thus, plaintiffs have pursued claims sounding in personal injury, wrongful death,

192. 505 U.S. 504 (1992).

193. 15 U.S.C. §§ 1331-1340 (1997). The Federal Cigarette Labeling and Advertising Act was enacted in 1965. Pub. L. No. 89-92, 79 Stat. 282 (1965). The Labeling Act was amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 92-222, 84 Stat. 87.

194. *Cipollone*, 505 U.S. at 530-31.

195. See Michael D. Green, *Cipollone Revisited: A Not So Little Secret About the Scope of Cigarette Preemption*, 82 IOWA L. REV. 1257, 1257-58 (1997) (noting that scholars misinterpreted the pre-emptive effect of the Court's *Cipollone* decision, suggesting: "It is time to shine some light on the fact that there is *no federal preemption* of state tort claims which allege that the warnings contained in the labeling on cigarette packages are inadequate."); Jean Macchiaroli Eggen, *Sense of Sensibility?: Toxic Product Liability Under State Law After Cipollone and Medtronic*, 2 WIDENER L. SYMP. J. 1, 15-18 (1997) (discussing the scope of the *Cipollone* decision and its impact on state tobacco litigation).

196. See *supra* notes 184-89.

defective products, negligence, negligence per se, negligent entrustment, deceptive marketing and sales, public nuisance, and breach of express or implied warranties (among other possible claims).¹⁹⁷ As courts have rejected each theory as a matter of law or fact—giving litigation victories to the firearms defendants—plaintiffs’ attorneys have regrouped to pursue new avenues for relief.

And, since congressional enactment of PLCAA, plaintiffs’ attorneys who have continued to undertake litigation against the firearms litigation have shifted to exploiting PLCAA’s third exception from federal preemption, grounded in the predicate statute exception. While other attempts to base firearms litigation on the predicate statute exception have failed,¹⁹⁸ the Sandy Hook plaintiffs’ lawyers finally succeeded in convincing the Connecticut Supreme Court to allow litigation to proceed under state consumer and unfair trade practices law.¹⁹⁹

B. Factors Militating Against the Soto Litigation as a First Step on Pathway Towards a Firearms Industry Mass Tort Litigation

1. Absence of Regulatory Alerts, Notices, or Recalls of a Defective or Harmful Product

Clearly, individual litigation against the firearms industry will not catapult gun litigation into a mass tort as a consequence of federal or state regulatory product recalls or adverse event notices. The Violence Policy Center notes:

The gun industry is the only manufacturer of a consumer product that is exempt from federal health and safety regulation. As such, there is no federal agency that can require a gun manufacturer to recall defective guns or ammunition. Gun owners and the rest of the general public must rely entirely on gun manufacturers to take action when they determine that a gun or ammunition contains a dangerous defect.²⁰⁰

Hence, no well-publicized product recall or defect or adverse events reports will serve as a triggering event for a firearms mass tort litigation.

2. Lack of a Winning Track Record of Firearms Litigation and

197. *See supra* notes 52-53.

198. *Supra* notes 72-76.

199. *Soto v. Bushmaster Firearms Int’l*, 202 A.3d 262, 324-25 (Conn. 2017).

200. *Gun Product Safety Notices*, VIOLENCE POL’Y CTR., <http://vpc.org/regulating-the-gun-industry/gun-product-safety-notices/> (last visited April 10, 2020). The website lists voluntary gun safety alerts and recalls. *Id.* Manufacturers also may conduct voluntary recalls for defective product issues in response to individual lawsuits. *Id.*

Settlements

To date, litigation against the firearms industry has largely been unsuccessful.²⁰¹ Although some litigation against gun defendants survived motions to dismiss in the first wave of firearms litigation in the 1990s, by the early 2000s litigation against the firearms industry was stopped in its tracks by federal, state, and municipality immunity statutes enacted to preempt or immunize against such litigation.²⁰² Since PLCAA's enactment, plaintiffs' attorneys have been largely unsuccessful in withstanding motions to dismiss gun litigation under PLCAA's various exceptions.²⁰³

Until such time as plaintiffs or state attorneys general can effectively prosecute gun litigation to a successful end, the lack of a plaintiff-side winning track record will not help to promote the development of a firearms mass tort. However, it is worth noting that the asbestos and tobacco mass torts compiled negative track records throughout decades of litigation before experiencing a tidal change in favor of plaintiffs' victories.²⁰⁴

3. Absence of Docket Congestion

Another hallmark of a developing mass tort is when courts experience a flood of similar lawsuits that contribute to docket congestion.²⁰⁵ Clearly, since congressional enactment of PLCAA, state and federal courts have not been inundated with lawsuits against firearms defendants. However, the history of litigation against the firearms industry suggests that the judicial system is not immune to an influx of gun-related lawsuits under conditions that make litigation against the gun industry viable. Indeed, in the late 1990s courts were flooded with lawsuits against gun manufacturers brought by

201. See Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J. L. REFORM 581, 590 (2019) (describing attempts to sue the gun industry from the 1990s and early 2000s, with mixed record; explaining that litigation "stopped in its tracks" by enactment of governmental immunity statutes).

202. *Id.*; see also *State Firearm Preemption Laws*, EVERYTOWN FOR GUN SAFETY (Feb. 20, 2018), <https://everytownresearch.org/fact-sheet-preemption-laws/> (last visited April 10, 2020).

203. *Supra* notes 72-76.

204. See *Floyd v. Thompson*, 227 F.3d 1029, 1032 (7th Cir. 2000) (noting the poor track record of individual lawsuits against tobacco defendants); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 126-27 (2013) (noting the twenty-year negative history of aggregating or consolidating asbestos cases).

205. See *supra* notes 162-64.

various municipalities.²⁰⁶ These lawsuits abated after enactment of PLCAA and similar immunity statutes enacted by state and local governments.²⁰⁷

In the absence of docket congestion as a consequence of multiple firearms lawsuits filed concurrently in state and federal courts, the judicial system will not experience a crisis mentality that might precipitate progress towards aggregation or consolidation into a mass litigation.

4. Absence of Judicial Interest in Aggregating and Managing Multiple Gun Litigation Claims

With the abatement of gun litigation post-PLCAA, and the lack of a crisis in the courts in absence of a flood of such lawsuits, state and federal judicial systems have not felt the need to consider consolidation, aggregation, or MDL transfer of such cases. Aggregation of cases—especially the creation of a litigation-specific MDL—signals the development of a mass tort.

However, the current lack of aggregation initiatives does not portend the impossibility of future aggregation events, should the situation arise that would encourage such procedural measures. To date, there have been no firearms MDL. However, at least one state court has shown receptivity towards permitting class litigation against gun defendants—a litigation that resulted in a positive outcome for the class litigants.²⁰⁸

Consistent with the patterns that encourage aggregation, until such time as courts become inundated with gun litigation, the development of a firearms mass tort seems in its infancy.

5. Unwillingness of Putative Defendants and Insurers to Come to the Negotiation Table

The intransigence of corporate defendants and their insurers to come to the negotiation table is indicative of an immature mass tort, wherein defendants have few incentives to settle claims. Defendants' strategic litigation posture affects the development of mass tort litigation. Hence, to the degree that a defendant adopts a "no settlement" strategy, the evolution of a mass tort will be impeded by the necessity of plaintiffs to continually sue

206. See Philip C. Patterson & Jennifer M. Philpott, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK. L. REV. 549, 579-80 n.135-36 (2000) (citing large numbers of municipal lawsuits against gun defendants). The authors note that "[t]he success of the tobacco litigation has played an important role in the local governments' decisions to file lawsuits against the gun industry." *Id.* at 580.

207. See *supra* notes 72-76.

208. *Garza v. Sporting Goods Props., Inc.*, No. CIV. A. SA-93-CA-108, 1996 WL 56247, at *9 (W.D. Tex. Feb. 6, 1996) (discussing \$31 million settlement against gun manufacturer Remington).

intransigent defendants.²⁰⁹ The tobacco industry famously forestalled a tobacco products mass tort litigation with just such a “no settlement” strategy, coupled with an insistence on trying cases one-by-one.²¹⁰

Similar to the tobacco defendants, firearms manufacturers have aggressively defended against plaintiffs’ lawsuits seeking compensation as a consequence of gun-related violence or injury.²¹¹ In addition to defending litigation brought by individuals or municipalities—rather than settling lawsuits—the firearms defendants adopted a strategy of lobbying for federal, state, and local governmental laws to immunize the industry from litigation.²¹²

C. *Factors Not Relevant or Not Yet Relevant*

1. Questionable Interest of the Plaintiffs’ Bar in Pursuing Gun Litigation

While the attorneys pursuing litigation against firearms defendants have been persistent and agile in the face of repeated litigation defeats, the number of attorneys undertaking this litigation has remained relatively few in recent years. Perhaps one indicia of the plaintiff’s quiescent interest in taking on the gun industry is the lack of a robust firearms affinity group in the most prominent plaintiffs’ association, the American Association for Justice (“AAJ”). The AAJ provides a large number of affinity groups for its members and other interested persons, tied to specific types of litigation.²¹³

Thus, the AAJ has educational subgroups for an array of current mass tort and products litigation, including acetaminophen injury, asbestos, automated external defibrillators, benicar/azor/tribenzor pharmaceuticals, benzene, metal hip implants, complex regional pain syndrome, dialysis equipment and products, e-cigarette, ED drugs, fluoroquinolone, fosomax

209. See *supra* notes 191-93.

210. See Paul Caminiti, *An Industry Perspective and the Unique Role of the Liggett Group*, 25 WM. MITCHELL L. REV. 447, 448-49 (1999) (“Since 1954, Liggett and the other major tobacco companies were united in defending these lawsuits. For years, Liggett, as the smallest company, played along with the other companies and participated in what was really considered a scorched-earth litigation strategy, which was: win every lawsuit; defend every case as vehemently as you can; do not give an inch or they will take a mile.”); Ciresi et al., *supra* note 169, at 480-87 (detailing the tobacco industry’s litigation strategy for four decades).

211. See *supra* notes 72-76.

212. Ryan VanGrack, *The Protection of Lawful Commerce in Arms Act*, 41 HARV. J. LEGIS. 541, 545 (2004) (discussing the reaction of the firearms industry to litigation in seeking immunity legislation at federal and state governmental levels).

213. *Litigation Groups*, AM. ASS’N FOR JUSTICE, <https://www.justice.org/membership/litigation-groups> (last visited April 10, 2020).

and other bisphosphonate drugs, fungal meningitis, herbicides, pesticides, hernia mesh, insulin pumps, Just for Men hair dye, Lipitor, Medtronic SynchronMed II implantable drug infusion injury, Mirena IUDs, opioids, orthopedic implants, PFC water contamination, Pradaxa, proton pump inhibitors, rispedal, silicone contaminated eye injections, SSRI antidepressant birth defect cases, Stryker medical devices, Takata airbag defects, talcum powder, taxotere, testosterone therapy, transvaginal mesh, vaccines, Xarelto, Zimmer medical devices, Zofran, and Zostavax.²¹⁴

In the context of this vast array of AAJ mass tort litigation affinity groups, interest in pursuing the firearms industry has been a relatively latecomer to the AAJ organization of affinity groups.²¹⁵ This is perhaps explained by the preemption barriers to litigation because of federal, state, and local immunity statutes inhibiting much gun litigation. The AAJ's firearms litigation group was formed in July 2017, manifesting a fairly recent attention to possible firearms litigation. Nonetheless, the scope of interest in potential gun litigation is cabined to defective design and defect cases.²¹⁶

If the Sandy Hook plaintiffs establish a viable cause of action under state consumer protection and unfair trade practices laws, this might encourage further interest by plaintiffs' mass tort lawyers to pursue such litigation, which interest has been relatively dormant. If so, the scope of the AAJ's firearms affinity group should expand beyond product design and defect claims. A sure sign of a developing mass tort will occur when the AAJ firearms litigation subgroup shows a robust interest in taking on the gun industry, and the AAJ firearms group becomes an active forum for pursuing gun defendants in mass litigation.

2. Absence of a Critical Mass of Similarly-Situated Claimants

One signpost of an emerging mass tort litigation is the filing of large numbers of individual and aggregate lawsuits. But another signpost—beyond the sheer number of cases—concerns the existence of a critical mass of similarly-situated claimants who may not have yet filed litigation, or who comprise individuals in an aggregate litigation.²¹⁷ Stated differently, this concern looks to the potential universe of claimants based on exposure to an

214. *Id.*

215. *Id.*

216. *Id.* (“The Firearms Litigation Group provides a forum for plaintiff attorneys litigating defective design and defect cases against firearm manufacturers. Many gun defect cases in the past have been subject to confidentiality agreements, creating a lack of available information. The Litigation Group will work to solve this problem by coordinating all available information and sharing resources with members.”).

217. *See supra* notes 156-61.

alleged toxic substance, use of an alleged defective product, pharmaceutical, medical device, or victim of fraudulent or misleading advertising (among other products and claims).

It is well known that a critical mass of asbestos claimants emerged by the mid-1980s, when estimates of asbestos claimants jumped from the thousands to the hundreds-of-thousands.²¹⁸ Similarly, when the *Castano* consortia plaintiffs filed a nationwide class action in 1995 seeking certification of a nationwide class of persons addicted to nicotine products, observers estimated that the class was composed of at least 50 million persons.²¹⁹

The growing number of victims of gun accidents or gun violence in the United States suggests a universe of potential claimants similar to the experience of asbestos and tobacco litigation, as well as other mass torts. According to data collected by the Center for Disease Control, in 2017—the most recent year for which data has been collected—39,773 people died from gun-related injuries in the U.S.²²⁰

According to the CDC, the 39,773 total gun deaths in 2017 were the most since at least 1968, which is the earliest year for which the CDC has online data. Gun deaths in 2017 were “slightly more than the 39,595 gun deaths recorded in the prior peak year of 1993.”²²¹ Moreover, the numbers of victims of gun violence are on an upward trend. Gun murders rose 32% between 2014 and 2017 and gun suicides rose each year between 2006 and 2017, for a 41% increase overall. Gun suicides reached their highest recorded level in 2017.²²²

Both the Federal Bureau of Investigation and the Gun Violence Archive keep data bases of mass shooting victims. According to the FBI’s definition of an active shooter event, eighty-five people—excluding the shooters—died

218. See Andrew P. Morriss & Susan E. Dudley, *Defining What to Regulate: Silica and the Problem of Regulatory Categorization*, 58 ADMIN. L. REV. 269, 344-346 (2006) (noting the expanse of asbestos claims from the 1980s through the early 2000s, and citing authorities).

219. Robert T. Krebs, Note, *Castano v. American Tobacco Co.: Class Treatment of Mass Torts Is Going Up in Smoke*, 24 N. KY. L. REV. 673, 675-76 (1997) (noting statistics on cigarette use and nicotine addicted persons as of the filing of the *Castano* litigation).

220. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RESEARCH CENTER: FACT TANK (Aug. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s/> (last visited on April 10, 2020) (finding “[t]his figure includes gun murders and gun suicides, along with three other, less common types of gun-related deaths tracked by the CDC: those that were unintentional, involved law enforcement or whose circumstances could not be determined. It excludes deaths in which gunshot injuries played a contributing, but not principal, role.”).

221. *Id.*

222. *Id.*

in 2018.²²³ According to the Gun Violence Archive, 373 people died in mass shooting incidents in 2018.²²⁴ In addition to gun fatalities, more than 100,000 Americans are shot and injured each year.²²⁵

Although the sheer numbers of gun-related incidents and victims seems of a magnitude to inspire mass tort litigation, this has not yet happened. An interesting statistical comparison is with the opioid crisis; reportedly 46,394 persons died of opioid overdoses in 2017, a number slightly larger than the number of gun-related fatalities.²²⁶ While the opioid crisis has reached a statistical critical mass, encouraging the Judicial Panel on Multidistrict Litigation to create an opioid MDL,²²⁷ the sheer numbers of gun violence victims has not yet inspired a mass tort litigation.

3. Absence of Public Dissemination of Discovery Materials

Document discovery and the creation of a public document depository proved to be a critical event in encouraging the eventual settlements between state attorneys general and the tobacco industry.²²⁸ The millions of pages of documents unearthed in the state attorney litigation provided “smoking guns” by which plaintiffs’ attorneys could continue to litigate against tobacco defendants.

By comparison, gun litigation to date has not produced a wealth of discovery materials useful in subsequent litigation, or of limited value at best.²²⁹ Reviewing gun-related litigation, one scholar concluded that gun

223. FEDERAL BUREAU OF INVESTIGATION, ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2018, at 5, <https://www.fbi.gov/file-repository/active-shooter-incidents-in-the-us-2018-041019.pdf/view> (last visited on April 10, 2020).

224. *Mass Shootings in 2018*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/reports/mass-shooting?year=2018> (last visited April 10, 2020).

225. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, FACTS ABOUT GUN VIOLENCE, <https://lawcenter.giffords.org/wp-content/uploads/2019/05/Giffords-Law-Center-Facts-about-Gun-Violence.pdf> (last visited April 10, 2020).

226. *Opioid Addiction, Deaths, and Treatment: The Latest Analysis of the Data*, USA FACTS (May 20, 2019), https://usafacts.org/reports/opioid-addiction-deaths-treatment-data?gclid=Cj0KCQiAyKrxBRDHARIsAKCzn8zim7XGS9_c1wLs9EORjJWgZIYmjkykxhegJ4xIBoMkzbDEKW7-T0aAgeGEALw_wcB. According to this report, “[i]n 2017, 2.1 million people reported using heroin or abusing painkillers and 680,000 sought treatment at reporting treatment facilities, resulting in roughly 32% of people seeking treatment.” *Id.*

227. *See In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 541 (N.D. Ohio 2019).

228. *See supra* notes 169-71.

229. *See Allen Rostron, Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46 SANTA CLARA L. REV. 481, 490 (2006) (book review) (describing the nature of discovery materials in gun litigation and the extent to which these materials advanced proof of claims, or not); Wendy E. Wagner, *Stubborn Information Problems & the Regulatory*

lawsuits produced little new privately held information of any significance; instead, the cases uncovered only evidence of “corporate inattention to the harms that might flow from careless design and distribution practices.”²³⁰ Thus, firearms litigation has produced only “modest informational progress.”²³¹ Other scholars, however, have contended that discovery in gun-related litigation has proven useful in exposing flaws in the gun manufacturers’ distributions systems.²³² Very little of this prior discovery, however, addresses or entails the core legal theories in *Soto*: that is, the deceptive marketing advertising of the assault weapon purchased by Adam Lanza’s mother and used in the Sandy Hook attack.

If the Sandy Hook *Soto* litigation is to revive litigation against the gun industry based on consumer protection and unfair trade practices laws,²³³ discovery will no doubt have to pivot towards enhanced discovery of information concerning gun advertising and other unfair trade practices.²³⁴

Benefits of Gun Litigation, in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS at 284-286 (Timothy D. Lytton ed., 2005).

Prof. Rostron comments that Prof. Wagner unfairly reached her negative conclusions about gun industry discovery by comparing it to tobacco litigation:

Wagner arrives at her negative conclusions about the evidentiary achievements of the litigation by starting with extraordinarily high expectations inspired by the tobacco cases. She observes that gun companies produced nothing akin to “the secret industry memos uncovered in the tobacco litigation that revealed, for example, the industry’s manipulation of the addictive properties of cigarettes.” No plaintiff found “smoking gun memoranda and meeting notes that reveal a strategic effort to saturate the criminal gun market to increase profits.”

The information generated by gun litigation is relatively modest by the standards of tobacco litigation’s successes, but these are extreme standards. No one should have expected documents of that sort to be found in the gun litigation.

Id. at 285.

230. Wagner, *supra* note 229, at 285.

231. *Id.*

232. Rostron, *supra* note 229, at 492-93; Peter Harry Brown & Daniel G. Abel, OUTGUNNED UP AGAINST THE NRA: THE FIRST COMPLETE INSIDER ACCOUNT OF THE BATTLE OVER GUN CONTROL 25, 277-278 (2003) (describing how discovery in gun litigation had turned up evidence that the gun industry was aware of illegal trafficking by dealers and may have purposefully designed guns and utilized corrupt vendors to sell more guns on the black market).

233. Lawsuits against firearms defendants have been pursued under deceptive advertising and marketing theories. Deceptive advertising claims are usually based on alleged violations of state and consumer protection laws, not on common law public nuisance. *See, e.g.,* People v. Arcadia Mach. & Tool, Inc., No. 4095, 2003 WL 21184117, at *26, *31-32 (Cal. Super. Ct. Apr. 10, 2003) (denying defendant gun trade associations, manufacturers, distributors, and dealers’ motions to dismiss for claims based on California’s unlawful trade practices statute); Lytton, *Tort Claims*, *supra* note 50 (listing deceptive-trade-practices suits against the gun industry as a separate theory from suits based on public nuisance); Jon S. Vernick et al., *Regulating Firearm Advertisements That Promise Home Protection: A Public Health Intervention*, 277 JAMA 1391, 1391 (1997) (questioning whether handgun advertisements promising safety, in spite of epidemiologic evidence demonstrating the risks of having a gun in the home, constitute unfair and deceptive advertising).

234. *See* Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247, 285-289 (1999) (describing municipal efforts at challenging gun industry deceptive marketing and advertising).

4. Lack of Development of Probative Scientific or Expert Testimony in Support of Claims

In addition to the development of a body of accessible discovery materials, a corollary indicia of an evolving mass tort litigation is the maturation of scientific or expert evidence in support of claims.²³⁵ To the extent that successful litigants generate such expert material in litigation, information sharing among plaintiffs' attorneys will assist in encouraging further litigation. Indeed, plaintiffs' organizations such as the AAJ often function as clearinghouses for discovery and expert witness testimony in the prosecution of similar lawsuits.²³⁶

In gun litigation to date, plaintiffs have introduced various social science expert witness testimony concerning statistical analyses of gun ownership, defensive use of firearms, and gun-related events causing injury or death.²³⁷ In litigation based on design defect theories, plaintiffs have relied on expert witness testimony to prove up the defect.²³⁸ In assault weapon litigation based on a negligent marketing theory, plaintiffs in a California action introduced expert witness testimony to demonstrate how the military style assault weapon used in the shooting incident differed from a handgun.²³⁹ In another deceptive marketing case tried before Judge Jack Weinstein in the Eastern District of New York, plaintiffs used complex statistical evidence to link marketing practices to gun violence.²⁴⁰

A leading scholar of firearms litigation has questioned the reliance on complex statistical or expert testimony in gun cases.²⁴¹ It is difficult to say whether scientific or expert testimony has "matured" in gun cases, similar to the ways in which scientific evidence matured in asbestos and tobacco litigation. This is especially difficult where the basis for gun violence claims resides in deceptive marketing theories. Despite the use of social science research or traditional tort product liability expert testimony, gun litigation

235. See *supra* notes 173-74.

236. See *Participant Agenda*, *supra* note 151.

237. See Lytton, *Tort Claims*, *supra* note 50 at 32-42.

238. See *id.*

239. *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 154 (Cal. Ct. App. 1999).

240. See generally *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); see also Lytton, *Tort Claims*, *supra* note 50, at 32-42 (discussing use of social science data statistics in support of deceptive marketing claim).

241. Lytton, *Tort Claims*, *supra* note 50, at 72 ("In order to avoid the problems that arise out of forcing judges to determine the reliability of expert testimony and allowing juries to evaluate scientific findings, courts should encourage plaintiffs in gun cases to avoid relying on expert evaluation of complex social science data. Claims like that of the *Hamilton* plaintiffs, which rely on a great deal of expert testimony and complex statistical data concerning oversupply, threaten to focus gun litigation on the same type of evidentiary problems prevalent in toxic tort litigation.").

has yet to yield a core body of repetitive, probative expert testimony that may be reliably used from one case to the next.

If the Sandy Hook *Soto* litigation is to provide the basis for an emerging mass tort litigation based on deceptive marketing and unfair trade practices, attorneys will now have to mine the previous cases that successfully proceeded and were resolved based on those legal theories.

5. Lack of Interest of States' Attorneys General in Pursuing Relief on Behalf of Their Citizenry

In spite of the hugely successful settlement between state attorneys general and the tobacco industry, there has been no groundswell of enthusiasm for state attorneys general to pursue coordinated litigation and settlement with the firearms defendants.²⁴² The reasons for this remain unknown, but the political vulnerability of elected state attorneys general may form part of the reluctance of these elected officials to take on the gun industry. Nonetheless, history teaches that state attorneys general were willing to take on the tobacco industry.

Notwithstanding the current lack of initiatives from states attorneys general, cities and municipalities showed a willingness to take on the firearms industry during the first wave of gun litigation. Indeed, based on the example of the state attorneys general who achieved the tobacco settlement, the mayors of approximately thirty cities through the cities' attorneys filed suits against gun manufacturers, relying chiefly on traditional tort theories such as public nuisance and negligence.²⁴³

Most of these municipal litigations were dismissed or failed on the merits; the lawsuits instead precipitated a gun lobby backlash to seek legislative initiatives to immunize the firearms industry from suit.²⁴⁴ In the aftermath of this first wave of municipal gun litigation, more than thirty states and local governments passed legislation preventing firearms defendants from suits.²⁴⁵

The first wave of gun litigation, then, suggests that municipal entities are willing to step up to take on the firearms industry if circumstances favor

242. See, e.g., William H. Pryor, Jr., Comment, 31 SETON HALL L. REV. 604, 604 (2001) (stating that as the Alabama state attorney general, he was a critic of both tobacco and gun litigation).

243. Jill R. Baniewicz, *Is Hamilton v. Accu-Tek a Good Predictor of What the Future Holds for Gun Manufacturers?*, 34 IND. L. REV. 419, 437 (2001).

244. Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1843 (2008).

245. *Id.*

pursuit of such litigation. Two events may be worth watching: (1) the development, trial, and outcome of the *Soto* state court litigation under the Connecticut consumer protection and unfair trade practices statute, and (2) the ability of municipalities to negotiate a fair settlement in the national opioid MDL litigation.²⁴⁶ The opioid MDL may provide an interesting and successful model for municipalities to renew claims against the firearms industry, or to press for a negotiation for recompense for the costs of gun violence to society. The municipalities did it once; they may now have a revitalized opportunity to take on the gun industry, again.

CONCLUSION

The 1998 settlement of the state attorneys general and the Big Tobacco defendants energized the plaintiffs' mass tort bar to speculate about the next big mass tort that was ripe for litigation and perhaps similar global settlement. At that time, attorneys identified three prime targets: the fast food industry, lead paint manufacturers, and the firearms industry. None of these hypothesized mass torts subsequently developed, and litigation related to these products largely receded or disappeared from the complex litigation landscape.

In the early 2000s, individual litigants and a significant number of municipalities attempted large-scale litigation against various firearms manufacturers, distributors, and retailers. These lawsuits advanced various common law tort and statutory claims, sounding in negligence, deceptive marketing and advertising, product defect, public nuisance, unfair trade practices, and breach of warranties, among other legal theories.

The first wave of gun litigation produced two results. First, with few exceptions, the gun defendants successfully defended virtually all the lawsuits brought against them, either through pre-trial dismissal, or on the merits at trial. Second, the onslaught of gun-related lawsuits provoked the firearms industry to adopt a legislative strategy to achieve relief from liability for the manufacture, distribution, or sale of firearms. The gun industry successfully achieved immunity from suit through the federal Protection of Lawful Commerce in Arms Act in 2005, followed by an array of similar state and local immunity statutes.

The federal and local gun immunity statutes proved effective in containing gun litigation, and firearms lawsuits dwindled as the viability of such litigation became uncertain. Consequently, the larger effect of the federal and local immunity statutes virtually ensured that a firearms industry mass tort would not develop. Nonetheless, some few litigants continued to

246. See *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 536 (N.D. Ohio 2019).

pursue litigation against the gun industry, invoking the various exceptions to immunity set forth in PLCAA and other local statutes.

During this second wave of gun litigation—similar to the first wave of lawsuits—firearms lawsuits were fraught with technical legal issues and were largely unsuccessful. Notwithstanding the negative litigation track record, persistent plaintiffs’ attorneys continued to pursue litigation arising out of gun-related violence invoking statutory exceptions and based on theories of negligence, negligence per se, product defect, negligent entrustment, and deceptive marketing and advertising.

Against this grim track record of gun-related litigation, the Connecticut Supreme Court’s 2016 decision in *Soto v. Bushmaster Firearms International, LLC* opened a pathway towards reviving litigation against the firearms industry. The U.S. Supreme Court’s refusal to review the *Soto* decision allowed the Sandy Hook litigation to proceed in state court. In concluding that PLCAA did not preempt the state litigation because the statute’s third exception applied, the Connecticut court’s broad interpretation of PLCAA’s predicate statute exception opened the door to other state gun litigation based on state consumer protection and deceptive trade practice statutes.

By providing a blueprint for gun litigation under PLCAA’s predicate statute exception, the Sandy Hook case may signal the beginning of a litigation renaissance against the firearms industry. However, those who favor holding the firearms industry accountable for gun injuries and deaths should curb their enthusiasm; one successful inroad on industry-wide immunity is a long way off from inspiring a firearms mass tort litigation.

It is uncertain whether the Sandy Hook victory signals the beginning of a nascent firearms mass tort. If a firearms mass tort is to develop, it is worth watching the fate of the Sandy Hook lawsuit to ascertain whether the Connecticut litigation triggers pursuit of similar cases under other states’ laws. In addition, it is worth recalling that a large number of municipalities pursued the first wave of gun litigation. If state attorneys general do not pick up the mantle of gun litigation, then perhaps municipalities will. The pending opioid MDL, populated with plaintiff counties and municipalities, may provide another model for creating a firearms mass tort, ripe for settlement.