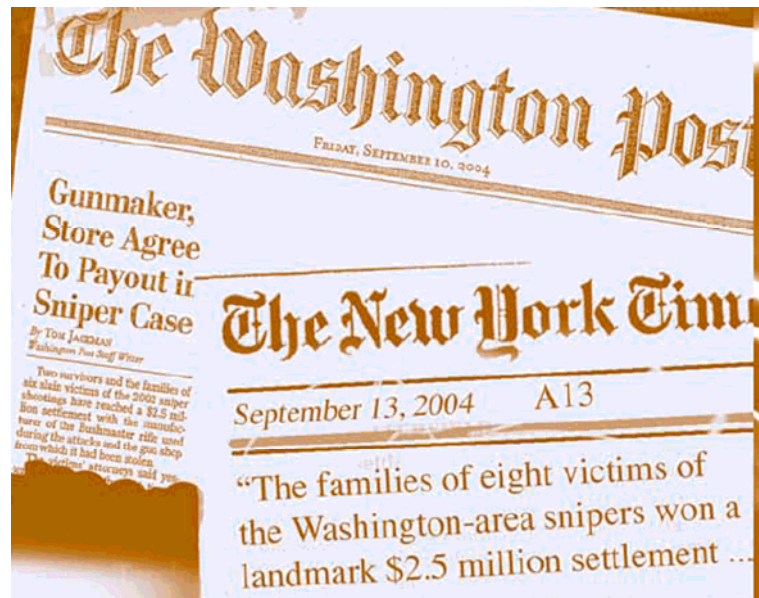


## **How to Bring a Successful Case Against Gun Manufacturers and Sellers and Avoid Dismissal Under the Federal Gun Industry Legal Shield Law**

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In recent years, courts have recognized that under longstanding common law principles, civil liability should be imposed on gun manufacturers and dealers whose negligence arms criminals with firearms. Some of these cases resulted in landmark settlements, such as a \$2.5 million settlement in a lawsuit brought by Brady Center attorneys on behalf of Washington, D.C. sniper victims. These legal victories struck fear into the firearms industry and its gun lobby allies that the threat of liability for reckless practices might force the industry – that had been profiting from its gun sales headed for criminal hands – to also take responsibility for its distribution systems that funnel a continuous stream of firearms into the criminal market.



Following Republican victories in the 2004 elections, the gun lobby succeeded in enacting into law sweeping legal protections that some feared (and the gun industry hoped) would wipe out most tort liability for gun dealers and manufacturers. Yet reports of the demise of gun liability cases were premature. While this new

federal law, the Protection of Lawful Commerce in Arms Act,<sup>1</sup> is an ill-advised and unwarranted attempt to discriminate against the civil rights of gun violence victims, it has failed to shut the courthouse doors to all legitimate claims. Well-pleaded, carefully crafted cases can still proceed against irresponsible gun companies. This paper explains how to plead and litigate successful cases to hold gun dealers and manufacturers accountable for reckless conduct that arms dangerous criminals with deadly weapons.

### Overview of Liability Theories Against Gun Manufacturers and Dealers

Lawsuits against gun manufacturers and dealers have generally focused on two theories of liability – irresponsible (although, due to weak gun laws, frequently not illegal) distribution of firearms that arms criminals, and unsafe design of firearms. This paper focuses on gun manufacturer and dealer liability relating to gun distribution.<sup>2</sup> Gun distribution cases are generally based on two causes of action – negligence and public nuisance. About two dozen courts in recent years have allowed these types of cases to go forward against gun manufacturers and dealers.<sup>3</sup>

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<sup>1</sup> 15 U.S.C. §§ 7901-03.

<sup>2</sup> For information about lawsuits relating to unsafe firearms design, see, e.g., Allen Rostron, *Gunning for Justice*, TRIAL (Nov. 2001); Brian J. Siebel, *The Case Against the Gun Industry*, PUB. HEALTH REP. (Sept./Oct. 2000); Jonathan E. Lowy, *Litigating Against Gun Manufacturers*, TRIAL (Nov. 2000); all of which are available at <http://www.gunlawsuits.org/features/articles/>. The Protection of Lawful Commerce in Arms Act permits certain product liability cases under 15 U.S.C. § 7903(5)(A)(v), the scope of which is presently being considered by the Illinois Supreme Court. See *Adames v. Sheahan*, 378 Ill.App.3d 502, 880 N.E.2d 559 (Ill. App. Ct. 2007), *appeal allowed*, 227 Ill.2d 577, 888 N.E.2d 1182 (Ill. Mar 26, 2008).

<sup>3</sup> **Appellate Victories:** *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (appellate reversal of lower court dismissal); *Ileto v. Glock*, 349 F.3d 1191 (9th Cir. 2003) (appellate reinstatement of case); *James v. Arms Tech*, 820 A.2d 27 (N.J. Super Ct. App. Div. 2003) (trial and appellate denials of motion to dismiss; case later voluntarily dismissed without prejudice to refile); *Hicks v. T&M Jewelry, Inc.*, No. 97-Ci 2617 (Fayette County Circuit Ct., Lexington, Kentucky), *dismissal reversed on appeal* 2003 WL 21771968 (Ky. Ct. App. 2003); *City of Cincinnati v. Beretta*, 768 N.E.2d 1136 (Ohio 2002) (appellate reversal of lower court dismissal; case later voluntarily dismissed without prejudice to re-file); *Smith v. Bryco Arms*, 33 P.3d 638 (N.M. Ct. App. 2001), *cert. denied*, 34 P.3d 610 (N.M. 2001); *Morial v. Smith &*

In each case, Brady Center attorneys served as *pro bono* co-counsel with local trial lawyers or assisted the plaintiffs' attorneys in litigating their cases against gun industry defendants.<sup>4</sup> The Brady Center report *Smoking Guns* highlights some of the evidence uncovered in this litigation against the gun industry – including previously secret gun industry documents, statements from industry whistle-blowers, and sworn testimony from industry executives – showing how the gun industry has knowingly funneled guns into the illegal market.<sup>5</sup>

In cases concerning irresponsible gun distribution, a dealer or manufacturer could have acted to prevent a firearm from getting into the hands of an irresponsible person. These cases typically involve either a direct sale to a dangerous person or an

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*Wesson*, 785 So.2d 1 (La. 2001), *cert. denied*, 534 U.S. 951 (2001) (dismissal based on state immunity law); *Kitchen v. K-Mart Corp.*, 697 So.2d 1200 (Fla. S. Ct. 1997) (appellate reinstatement of jury award). **Trial Court Victories:** *NAACP v. AccuSport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003) (gun industry held to have created public nuisance after trial; case was dismissed due to lack of organizational standing); *People of the State of California v. Arcadia Machine & Tool*, No. 4095, 2003 WL 21184117 (Cal. Super. Ct. Apr. 10, 2003) (denying summary judgment to gun dealers and distributors, each of whom settled before trial) (case brought by 12 cities and counties); *Lemongello v. Will Co., Inc.*, 2003 WL 21488208 (Cir. Ct. W.Va. June 19, 2003) (denying motions to dismiss gun dealer and manufacturer; settlement for \$1 million); *Johnson v. Bulls Eye Shooter Supply*, 2003 WL 21639244 (Wash. Super. June 27, 2003), *reconsideration denied*, *interlocutory appeal denied* (commissioner ruling) (denying motions to dismiss gun dealer and gun manufacturer; settlement for \$2.5 million); *White v. Smith & Wesson* 97 F. Supp. 2d 816 (N.D. Ohio 2000) (Cleveland, OH) (motion to dismiss denied); *Maxfield v. Bryco Arms, et al*, No. 841636-4 (Super. Ct. Cal., Alameda County 2003) (jury verdict - trial victory); *Hernandez v. Kahr Arms, Inc.*, Civil No. WOCV2002-01747 (Mass. Super. Ct. Apr. 4, 2003) (denying motion to dismiss gun manufacturer); *Anderson v. Bryco Arms Corp.*, No. 00-L-007476 (Circuit Ct., Cook County, Ill., April, 10, 2002) (denial of motion to dismiss); *Jefferson v. Rossi*, No. 02218 (Pa. Ct. Com. Pleas, Aug. 2, 2002) (denying motions to dismiss gun dealer and distributor; settlement for \$850,000); *Isaac v. Southern Ohio Guns International, Inc.*, C.A. No. 98-4618 (Mass. Super. Ct.) (denial of motion for summary judgment; confidential settlement); *Boston v. Smith & Wesson*, 2000 WL 1473568 (Mass. Super. July 13, 2000) (motion to dismiss denied; settled in 2001); *Mathieu v. Fabbrica D'Armi Pietro Beretta SPA and Beretta U.S.A.*, No. 97-CV-12818-NG (D. Mass.) (motion to dismiss denied, case settled in 2000); *McNamara v. Arms Tech. Inc.*, 71 F. Supp. 2d 720 (E.D. Mich. 1999) (dismissal based on state immunity law).

<sup>4</sup> For descriptions of other cases brought by Brady Center attorneys see <http://www.gunlawsuits.org>. See also Brian J. Siebel, *Gun Industry Immunity: Why the Gun Industry's "Dirty Little Secret" Does Not Deserve Congressional Protection*, 73 U.M.K.C. L. Rev. 911 (2005).

<sup>5</sup> Brady Center to Prevent Gun Violence, *Smoking Guns: Exposing the Gun Industry's Complicity in the Illegal Gun Market* (2003), available at <http://www.bradycenter.org/reports/index.php#sg>.

irresponsible sale that allows a gun to enter the criminal market and ultimately cause harm to the plaintiff. Examples of these types of transactions are:

- **Sales to an irresponsible person.** The sale of a firearm to a dangerous person or irresponsible buyer can be evidence of negligent entrustment or negligent distribution. A dealer that sells a gun to someone who is mentally unstable, underage, intoxicated, or demonstrates other signs of dangerousness may be liable for negligence.<sup>6</sup>
- **Straw sales.** Straw sales are sales to otherwise legal buyers who buy guns on behalf of a prohibited purchaser. Gun traffickers use straw purchasers to obtain guns from irresponsible dealers. Properly trained dealers could identify and prevent straw purchases. Manufacturers and distributors could require dealers who sell their guns to properly train salespeople to detect and prevent straw sales.<sup>7</sup>
- **Multiple sales or repeat sales.** Under federal law, multiple sales are sales of more than one handgun to an individual within five business days. 18 U.S.C. § 923(g)(3)(A). The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has characterized multiple sales as high-risk sales that may indicate gun trafficking.<sup>8</sup> Likewise, repeat sales of multiple handguns to the same buyer may be a sign of gun trafficking.<sup>9</sup>
- **“Missing” guns.** Gun dealers frequently claim that guns that were illegally sold “off the books” were lost or stolen to explain a lack of legally mandated records or Brady background checks. Large numbers of missing guns can demonstrate irresponsible business practices and provide evidence that a dealer and its suppliers have created a public nuisance.<sup>10</sup>

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<sup>6</sup> See, e.g., *Kitchen v. K-Mart*, 697 So. 2d 1200 (Fla. 1997) (K-Mart liable for selling a rifle to an intoxicated buyer); *Angell v. F. Avanzini Lumber Co.*, 363 So.2d 571 (Fla. Dist. Ct. App. 1978) (dealer could have reasonably foreseen that injury could have resulted from sale due to purchaser’s erratic behavior); *Diggles v. Horwitz*, 765 S.W.2d 839 (Tex. Ct. App. 1989) (finding triable issue of fact as to whether selling gun and giving ammunition to person with mental problems was negligent).

<sup>7</sup> See, e.g., *Lemongello v. Will Co., Inc.*, 2003 WL 21488208 (W.Va. Cir. Ct. 2003) (pawnshop settled lawsuit for \$1 million in case brought by police officers injured by a gun sold to a straw buyer); *Hoosier v. Lander*, 17 Cal. Rptr. 2d 518 (Cal. Ct. App. 1993) (“strawman” sale constitutes a breach of the gun seller’s duty of care and can form the basis for a negligence action against the dealer).

<sup>8</sup> Dep’t of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Commerce in Firearms in the United States* 22 (Feb. 2000).

<sup>9</sup> See, e.g., *Lemongello*, 2003 WL 21488208 (pawnshop settled lawsuit for \$1 million in case involving 12 handguns sold to individual buyer); *Jefferson v. Rossi*, No. 02218 (Pa. Ct. Com. Pleas, Aug. 2, 2002) (gun dealer engaged in repeat sales of handguns to trafficker; settlement for \$850,000).

<sup>10</sup> See *Johnson v. Bull’s Eye Shooter Supply*, 2003 WL 21639244 (Wash. Super. Ct. June 27, 2003), *infra*.

- **Stolen guns.** Many thefts from gun dealers could be prevented if stores implemented a few simple, feasible security measures, many of which have been recommended by ATF for years. Guns are often stolen from gun stores as a result of the dealer's negligent security system.<sup>11</sup>

The successful lawsuit filed on behalf of Washington, D.C. sniper victims illustrates one successful gun distribution case, involving a high-risk dealer with large numbers of crime guns, multiple sales, and missing firearms. Following the fall 2002 sniper attacks in the Washington, D.C. area, victims of the shootings filed a lawsuit against the gun's manufacturer and dealer, alleging negligence and creation of a public nuisance that caused the snipers to obtain their Bushmaster gun. The federal Bureau of Alcohol, Tobacco, Firearms and Explosives had traced the snipers' Bushmaster XM-15 assault rifle (like the one pictured here) to dealer Bull's Eye Shooter Supply in Tacoma, Washington. The snipers were able to obtain their rifle even though federal law barred them from possessing a gun.<sup>12</sup>



When law enforcement contacted Bull's Eye to find out how the rifle got into the snipers' hands, the store claimed not to know that the prominently displayed three foot long assault rifle was even missing. Lee Malvo, the 17-year-old sniper, told police that he simply walked into the store and walked out with the gun, apparently with no one noticing. ATF audits showed that the "disappearance" of the rifle from Bull's Eye was not an isolated instance. Indeed, Bull's Eye had repeatedly failed to

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

<sup>12</sup> 18 U.S.C. § 922(g) (John Muhammad was barred from buying a gun because of a domestic violence restraining order and Lee Malvo was barred because he was under 18 years old).

secure or track its inventory, with 238 firearms missing from its shop in three years without any record of sale. Bull's Eye ranked in the top 1% nationwide in numbers of crime guns traced to the shop, with more than fifty traces including murders, kidnappings, and assaults.<sup>13</sup>

Federal ATF audits and Bull's Eye's gun records demonstrating its reckless practices were obtainable by gun manufacturer Bushmaster, such that Bushmaster had constructive notice that a dealer it picked as a top nationwide seller of its assault weapons was one of the most irresponsible in the country.<sup>14</sup> Bushmaster nonetheless supplied Bull's Eye without requiring even a minimum code of conduct to ensure that its products were being sold responsibly.

Armed with these facts, the plaintiffs' suit alleged that Bull's Eye negligently ran its store with irresponsible business practices that allowed the snipers to easily obtain their weapon. It is worth noting that there is reason to be skeptical about gun dealers' claims that guns from their inventory that were traced to crime were "missing" or "stolen." As any profit-seeking business would seek to prevent repeated thefts of its products, it is possible that a gun dealer who has a continual stream of "missing" guns actually illegally sold those guns "off the books," without a record or background check. Regardless of how the snipers obtained the gun from Bull's Eye, reasonable security, inventory control, and other business practices would prevent a prohibited purchaser from obtaining a gun, via theft or other means. As to Bushmaster, the suit alleged that it negligently entrusted and distributed firearms to

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<sup>13</sup> See Mike Carter et al., *Errant Tacoma, Wash., Gun Dealer, Wary Agents Paved Way for Sniper Tragedy*, SEATTLE TIMES, Apr. 29, 2003.

<sup>14</sup> For example, Bushmaster could have required that Bull's Eye provide this information to Bushmaster as a condition of Bushmaster's sale of firearms to Bull's Eye.

one of the worst dealers in the country, and knew or should have known that entrusting these to Bull's Eye would foreseeably lead to injuries and death.<sup>15</sup>

The sniper victims' public nuisance claim was based on Bull's Eye's and Bushmaster's business practices that led to guns frequently "disappearing" from Bull's Eye and ending up in the hands of criminals, including the snipers' Bushmaster rifle. To prove a public nuisance, a plaintiff must show that the defendant created a condition that is an "unreasonable interference with a right common to the general public," and that the plaintiff suffered specific harm because of the nuisance.<sup>16</sup> This may be shown with proof that a defendant's conduct "generates injury or inconvenience to others that is both sufficiently grave and sufficiently foreseeable that it renders it unreasonable to proceed at least without compensation to those that are harmed."<sup>17</sup> Because a focus of public nuisance claims is on harm to the public, evidence of other similar acts may be admitted to prove the extent of the nuisance. Thus, it was relevant to the public nuisance claim that Bull's Eye "lost" scores of other weapons, had dozens of guns traced to crime, and sold hundreds of guns in suspect "multiple sales" (sales of multiple handguns to individual buyers).

In June 2003, the trial court denied motions to dismiss filed by Bull's Eye and Bushmaster. As to Bushmaster, the court held that based on the facts alleged, "Bushmaster Firearms, Inc., knew or should have known that Bull's Eye Shooter Supply was operating its store in a reckless or incompetent manner, creating an

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<sup>15</sup> Note that Plaintiffs did not claim that Bushmaster was liable simply for manufacturing the gun – the claim was based on Bushmaster's negligent conduct in its distribution of firearms.

<sup>16</sup> Restatement (Second) of Torts §§ 821B, 821C.

<sup>17</sup> *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231 (Ind. 2003) (allowing lawsuit against gun manufacturers and dealers for distribution practices that funnel guns to criminals and create a public nuisance).

unreasonable risk of harm.”<sup>18</sup> As to Bull’s Eye, the court ruled that gun dealers “owe a common law duty to third parties injured by weapons made available to an unfit person by a firearms dealer.”<sup>19</sup> Additionally, the court held:

The facts in the present case indicate that a high degree of risk of harm to plaintiffs was created by Bull’s Eye Shooter Supply’s allegedly reckless or incompetent conduct in distributing firearms. . . . Furthermore, intervening criminal acts, such as the sniper shootings in the case at bar, may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon.<sup>20</sup>

Bushmaster filed an interlocutory appeal to the Washington State Court of Appeals, which was likewise denied.<sup>21</sup> Shortly thereafter, Bull’s Eye and Bushmaster agreed to settle the case for \$2.5 million.

Another successful case involved the shooting of two New Jersey police officers with a gun trafficked from a West Virginia pawnshop that engaged in straw sales. *Lemongello v. Will Co., Inc.*, 2003 WL 21488208 (W.Va. Cir. Ct. 2003). In that case, a gun trafficker, James Gray, traveled to a West Virginia pawnshop, Will Jewelry and Loan, to purchase guns to be trafficked. Gray and a female companion, Tammi Lea Songer, visited the shop, with Songer acting as a “straw purchaser” and buying a gun for Gray. Gray and Songer then returned to the shop seventeen days later and purchased twelve more guns, which Songer bought and paid for with thousands of dollars in cash. Gray picked out guns for Songer in full view of the shop’s personnel – a clear sign that the purchase was an illegal straw purchase – and

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<sup>18</sup> *Johnson v. Bull’s Eye Shooter Supply*, 2003 WL 21639244, at \*5 (Wash. Super. Ct. June 27, 2003).

<sup>19</sup> *Id.* at \*2.

<sup>20</sup> *Id.* at \*4.

<sup>21</sup> *Johnson v. Bull’s Eye Shooter Supply*, No. 30641-7-II (Wash Ct. App. Oct. 2, 2003) (commissioner ruling).

one of the guns was trafficked to New Jersey and used in the shooting of the two officers.

The legal theory behind the suit was that the pawnshop acted negligently in failing to detect and prevent suspect sales, including straw purchases and multiple sales of handguns to individual buyers. The case alleged that gun maker Sturm Ruger acted negligently in not monitoring, training or preventing its distributors and dealers from engaging in straw purchases and multiple sales. These sales practices also created a public nuisance that endangered the public and caused the arming of a felon prohibited from possessing guns, and the shooting of Officers McGuire and Lemongello. The pawnshop and gun maker moved to dismiss, claiming that they owed no legal duty to support a negligence claim and did not create a public nuisance. The court denied the motion:

Given the inherent nature of firearms and that Defendants have an ability to guard against negligent distribution of firearms, this Court finds it is not unreasonable to place this duty on the manufacturer and/or seller of a firearm. Imposing this duty simply requires the Defendants to act reasonably given the nature of their business, and is the same duty that is required daily of other businesses.

*Lemongello*, 2003 WL 21488208 at \*2. Following the court's ruling, the plaintiffs agreed on a \$1 million settlement.<sup>22</sup>

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<sup>22</sup> Jonathan Casiano, *Former Orange officers get \$1M from W. Va. gun seller, Pawn shop sold weapon used in shooting that forced cops to retire*, THE (NEWARK, NJ) STAR LEDGER, June 24, 2004. After the settlement against the dealer, the court entered summary judgment for Sturm Ruger because the gun had changed hands a number of times – over a number of years – after Ruger sold the gun to a distributor and before the dealer sold the gun to the straw purchaser. However, the facts that supported summary judgment for Ruger do not exist in every case, and may not be deemed dispositive by every judge.

## The Protection of Lawful Commerce in Arms Act

Following settlement of the D.C. sniper case, *Lemongello*, and another similar case for a total of \$4.4 million, the gun lobby ratcheted up their efforts to shield the gun industry from liability for their negligent or reckless conduct. In 2005, Congress passed and President Bush signed into law the so-called Protection of Lawful Commerce in Arms Act (PLCAA). 15 U.S.C. §§ 7901-03. The PLCAA bars the filing of new cases and requires the immediate dismissal of pending cases against gun dealers or manufacturers unless certain exceptions apply.

The PLCAA bars cases against gun manufacturers and sellers for harm “resulting from the criminal or unlawful misuse of a [firearm].” 15 U.S.C. § 7903(5)(A). It contains several limitations, however, that allow cases to proceed, the most important of which are:

- 1) An action against a gun dealer (but not a manufacturer) for negligent entrustment or negligence per se,<sup>23</sup> and
- 2) An action against a gun manufacturer or dealer who “knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought....”<sup>24</sup>

The PLCAA also states that its purpose is to block lawsuits concerning “harm *solely* caused by the criminal or unlawful misuse of firearm[s],” 15 U.S.C. § 7901(b)(1) (emphasis added), allowing a plaintiff to argue that the PLCAA should not bar cases where the gun manufacturer or dealer is an independent cause of harm.

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<sup>23</sup> 15 U.S.C. § 7903(5)(A)(ii).

<sup>24</sup> 15 U.S.C. § 7903(5)(A)(iii). The other exceptions generally relate to civil causes of action based on transfers by gun dealers to criminals where the dealer knows that the criminal will use the gun in a crime, breach of contract or warrant claims, and certain product liability claims. *Id.* § 7903(5)(A).

Courts interpreting the PLCAA have reached differing conclusions about how the PLCAA affects pending lawsuits against the gun industry. In several cases, courts have held that the PLCAA's exceptions apply and thus have rejected attempts by gun industry defendants to dismiss cases pursuant to the PLCAA. The PLCAA's retroactive dismissal of pending cases also raises serious constitutional questions, leading one trial court to conclude that the law is unconstitutional.

One case examining the impact of the PLCAA on pending litigation was filed by the City of Gary, Indiana against handgun manufacturers and sellers for public nuisance and negligent distribution. Before enactment of the PLCAA, the Indiana Supreme Court had unanimously held:

[T]he City alleges that all defendants intentionally and willingly supply the demand for illegal purchase of handguns.... Taken as true, these allegations are sufficient to allege an unreasonable chain of distribution of handguns sufficient to give rise to a public nuisance generated by all defendants.

*City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1241 (Ind. 2003).

On a subsequent motion to dismiss filed by the gun industry defendants based on the PLCAA, an Indiana trial court ruled that the PLCAA is unconstitutional in part because it purports to “direct[] the outcome of this pending case.” *City of Gary v. Smith & Wesson Corp.*, No. 45D05-0005-CT-00243 (Lake Super. Ct. Oct. 23, 2006). On appeal, the Indiana Court of Appeals held that the case could proceed because the PLCAA did not apply, and so it did not reach the constitutional question. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), *petition for transfer filed* (Feb. 7, 2008). The Court of Appeals held that because public nuisance in Indiana is a statutory claim, and the public nuisance statute is “applicable to the sale

or marketing of firearms" in a manner that creates a nuisance, the PLCAA's exception for conduct that violates a statute applied and the case was not barred by the PLCAA. *Id.* at 430.

Likewise, in two cases filed in Philadelphia on behalf of individual victims of gun violence, the trial court rejected motions by gun industry defendants to have the cases dismissed pursuant to the PLCAA. One case, *Oliver v. Lou's Loans*, No. 1836 (Ct. Common Pleas Phila. Cty., July 20, 2005), involved the shooting death of Anthony Oliver, Jr., a 14 year-old boy who was unintentionally shot and killed by a friend with a .25 caliber Phoenix Arms semiautomatic handgun. His friend mistakenly thought the safety was on and pulled the trigger, shooting Anthony in the stomach. The suit alleged that Lou's Loan of Upper Darby, Pennsylvania, the top supplier of crime guns in Pennsylvania, negligently sold guns to a gun trafficker, one of which made its way into the hands of the shooter. Phoenix Arms, the maker of the "Saturday Night Special" handgun used to kill Oliver, was charged with negligently enabling a gun trafficker to obtain the gun. Phoenix Arms continued to supply Lou's Loan even after repeated public disclosures of Lou's record of supplying crime guns. The suit also alleged that the defendants helped to create a public nuisance in Philadelphia through their reckless sales practices.<sup>25</sup>

The other case, *Arnold v. American Security*, No. 3118 (Ct. Common Pleas Phila. Cty., July 28, 2005), concerned the shooting death of 10-year-old Faheem Thomas-Childs, who was shot and killed as he walked through the gates of his elementary school in Philadelphia. The suit alleged that gun dealer American Gun

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<sup>25</sup> More information on this case is at the Brady Center to Prevent Gun Violence website docket at <http://www.gunlawsuits.org/docket/currentdocket.pdf#page=16>.

and Lock negligently sold the weapon in a “straw sale” to gang members. A criminal, who was not permitted to buy guns, accompanied the straw purchaser to the store, picked out the gun, and supplied the money to the straw purchaser who completed the transaction. The store's clerk even charged a "handling fee" for the straw purchase, which the criminal paid. American Gun had sold guns to several other gun traffickers over the years. The suit charged that American Gun negligently sold the handgun to a straw purchaser, and that the dealer created a public nuisance in Philadelphia through its reckless sales practices. The lawsuit also included claims against Sturm Ruger, the manufacturer of the gun who continued to supply American Gun without any reasonable conditions, even after the store had supplied other traffickers. Sturm Ruger did not require its dealers to follow industry guidelines for preventing straw sales.<sup>26</sup>

After a consolidated hearing on a motion to dismiss by the gun industry defendants in *Oliver* and *Arnold*, the trial court ruled that both cases could proceed.<sup>27</sup> The court held that the plaintiffs were entitled to factual discovery to determine the applicability of any exceptions to the PLCAA. Following the denial of the gun industry defendants' motions to dismiss, the defendants reached confidential settlements with the plaintiffs in each case.

Other courts have given the PLCAA an overly broad reading and required the dismissal of pending cases against gun industry defendants. These cases, however, are all currently on appeal or may soon be appealed. In one such case, *District of*

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<sup>26</sup> More information on this case is at the Brady Center to Prevent Gun Violence website docket at <http://www.gunlawsuits.org/docket/currentdocket.pdf#page=15>.

<sup>27</sup> *Oliver* (Ct. Common Pleas June 22, 2006); *Arnold* (Ct. Common Pleas June 22, 2006).

*Columbia v. Beretta*, 940 A.2d 163 (D.C. 2008), the court ruled that claims filed under the District's unique strict liability act for assault weapon manufacturers had to be dismissed pursuant to the PLCAA. The court held that a strict liability statute could not be "violated" for purposes of the PLCAA's statutory violation provision because the District's statute imposed no "duty on firearms manufacturers or sellers to operate in any particular manner or according to any standards of care or reasonableness." *District of Columbia*, at 170. The court, however, distinguished cases which "claim that gun manufacturers engaged in *unreasonable* distribution practices." *Id.* Because most cases against gun manufacturers or dealers concern negligent distribution or the creation of a public nuisance, rather than statutory strict liability claims, the District ruling is not likely to be relevant in other gun litigation.<sup>28</sup>

#### Bringing a Case That Will Not Be Blocked By the PLCAA

Notwithstanding the limitations of the Act, gun companies can be expected to attempt to use the PLCAA to win dismissals of virtually any gun lawsuit. Therefore, it is important to prepare for that likelihood. In several cases filed since enactment of the PLCAA, Brady Center attorneys have worked with local trial counsel to craft complaints so that they highlight the facts and claims necessary to survive motions to dismiss based on the PLCAA.

One case, *Kim v. Coxe*, No. 1-JU-08-761 (Alaska Super. Ct., July 31, 2008), stems from the death on August 4, 2006 of Simone Young Kim, a 26-year-old painter working in Juneau, Alaska. He was shot and killed by Jason Coday, a felon, methamphetamine user, and fugitive from justice, who was prohibited by federal law

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<sup>28</sup> Other cases dismissed by courts pursuant to the PLCAA are *Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274 (C.D. Cal. 2006) (on appeal) and *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2nd Cir. 2008) (pending possible appeal).

from purchasing or possessing a firearm. Nonetheless, on August 2, 2006, he was able to walk into Rayco Sales, a gun shop in Juneau, Alaska owned by Ray Coxe, and walk out with a Ruger .22 rifle without submitting himself to a background check. According to Coxe's statements, Coxe left Coday alone on the sales floor, surrounded by unlocked firearms. Coday then simply left the store with the firearm of his choosing. The plaintiff alleges that Rayco Sales is liable for Kim's death for negligently and potentially illegally providing the rifle to Coday. In light of the negligent entrustment by the gun dealer to the shooter, and the potentially unlawful sale of a firearm without a background check, the case should not be subject to dismissal under the PLCAA.<sup>29</sup>

Similarly, the case of *Tuft v. Rocky Mountain Enterprises, Inc.*, No. 080902325 (Utah Judicial Dist. Ct., Feb. 8, 2008), concerns negligent entrustment and creation of a public nuisance by a gun dealer. On February 12, 2007, five people were killed and four were wounded by a gun-wielding 18-year-old, Sulejman Talovic, at the popular Trolley Square shopping mall in Salt Lake City, Utah. Among his victims were 15-year-old Kirsten Hinckley, who was killed, and her mother, Carolyn Tuft, who survived. Talovic was armed with a Mossberg 12-gauge pump action pistol grip shotgun (like the one pictured here), which he used to shoot Kirsten, Carolyn, and all but one of his victims. After shooting his



victims, he fought a gun battle with police in the mall's hallways and was killed by

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<sup>29</sup> More information on this case is at the Brady Center to Prevent Gun Violence website docket at <http://www.gunlawsuits.org/docket/currentdocket.pdf#page=4>.

police. The lawsuit alleges that because Talovic was 18, the gun dealer violated federal law that prohibits the sale of pistol grip shotguns to anyone under 21. The negligent entrustment and illegal sale of a firearm to Talovic should exempt this case from the PLCAA.<sup>30</sup>

### Conclusion

Although the gun industry hoped that enactment of the PLCAA would end its liability for supplying criminals with firearms, the courts have shown a willingness to allow cases to proceed under the PLCAA. Specific pleading of the facts that bring a case within limitations to the PLCAA should allow many cases to proceed to trial without being hindered by the PLCAA. As these cases illustrate, the gun industry should not and cannot evade all liability for its conduct in arming criminals with dangerous firearms.

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<sup>30</sup> More information on this case is at the Brady Center to Prevent Gun Violence website docket at <http://www.gunlawsuits.org/docket/currentdocket.pdf#page=6>.