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Alden Crow

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SHOOTING BLANKS: THE INEFFECTIVENESS OF THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

Alden Crow*

I. INTRODUCTION

THE devastating effects of gun violence in America are no secret. We are constantly bombarded by news stories of murders and shootouts. Gun related injuries kill approximately 30,000 people annually and injure another 60,000 to 84,000.1 The financial burden of this violence, approximately $20 billion per year,2 falls largely upon two groups: individuals who must care for their injured family members and cities that spend millions every year in an attempt to combat this violence.3 Those who perpetrate these crimes, however, are often penniless.4 Thus, both individuals and municipalities have begun to turn to another source to redress their financial woes—the Gun Industry.5

The increased volume and success of lawsuits against the Gun Industry prompted firearms sellers and manufacturers to lobby Congress for a law protecting them from this onslaught of litigation.6 To reward these efforts, Congress drafted and enacted the Protection of Lawful Commerce in Arms Act ("PLCAA"),7 which seeks to achieve two major goals: (1) to prevent activist judges' ability to hold the Gun Industry liable for third party acts; and (2) to curb the financial impact of the litigation crisis faced by the Gun Industry.8 PLCAA's enactment has spurred arguments from those on both sides of the gun debate concerning the Act's necessity, impact, constitutionality and merit.

* J.D. Candidate, Dedman School of Law at Southern Methodist University, 2007.
2. Id. (citing Rachana Bhowmik, Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry, 11 J.L. & POL'Y 67, 72 (2002)).
4. See id.
5. See id. at 122-23.
6. See Daniels, supra note 1, at 963-64.
8. Id. § 2(b), 119 Stat. at 2096.
In hope of providing some clarity to the debate surrounding this hotly contested piece of legislation, Part II of this Comment will begin by simply summarizing the Act’s provisions. Part III will suggest that proposed safety provisions left out of PLCAA’s enacted version provide grounds for suspicion as to the Act’s true purposes. Part IV will then assess the statistics offered in support of PLCAA’s practical and legal necessity, finding that such figures are fueled less by fact and more by one’s feelings about guns in general. Part V of this Comment will argue that, despite the expected sweeping impact of PLCAA, the Act will have little real force, given judges’ ability to broadly interpret its exceptions. Finally, Part VI will address arguments in favor of PLCAA’s constitutionality, thereby coming to two conclusions: (1) the Act is likely constitutional, but (2) inherent constitutional limits on Congress’ power to combat judicial activism render PLCAA ineffective.

Analyzing these arguments in conjunction, this Comment will conclude that the flimsy factual findings used to justify PLCAA’s necessity, the Act’s questionable constitutionality, and even its drafters’ inexplicable refusal to include life-saving amendments amongst its provisions, do not alone render PLCAA a bad act. Rather, PLCAA is a bad act because it is, and will continue to be, wholly ineffective in serving its two main purposes of combating judicial activism and curtailing the gun litigation crisis. This ineffectiveness reveals that PLCAA is not a bona fide piece of legislation, but a political stunt meant to please those on both sides of the gun debate.

II. SUMMARY OF THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

On October 26, 2005 President Bush signed PLCAA into effect, thereby prohibiting any person from maintaining a “qualified civil liability action” against a seller or manufacturer of firearms for harm arising out of the unlawful misuse of that firearm. More specifically, PLCAA provides that no court, state or federal, may hear a civil or administrative proceeding brought by any individual, group, or government entity against a manufacturer or seller of firearms or ammunition. PLCAA prohibits “qualified civil liability action[s]” brought by “any person” and defines “person” as “any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.” PLCAA defines “manufacturer” to include “a person who is engaged in the business of manufacturing [firearms or ammunition] in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer. . . .” PLCAA defines “seller” to include importers, dealers, and sellers who are engaged “in interstate or foreign commerce at the wholesale or retail level.”

10. Id. § 7902(a).
11. Id. § 7903(5)(A).
12. Id. § 7903(3). PLCAA prohibits “qualified civil liability action[s]” brought by “any person” and defines “person” as “any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.”
13. Id. § 7903(5)(A). PLCAA defines “manufacturer” to include “a person who is engaged in the business of manufacturing [firearms or ammunition] in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer. . . .”
14. Id. § 7903(5)(A). PLCAA defines “seller” to include importers, dealers, and sellers who are engaged “in interstate or foreign commerce at the wholesale or retail level.”
tion,\textsuperscript{15} or a trade association,\textsuperscript{16} for damages or equitable relief\textsuperscript{17} arising out of the use of such firearms or ammunition in violation of any statute, ordinance, or regulation.\textsuperscript{18} PLCAA also calls for the dismissal of any such “qualified civil liability action[s]” pending at the time of the Act’s signing.\textsuperscript{19}

There are, however, six enumerated exceptions to PLCAA’s ban on “qualified civil liability action[s].”\textsuperscript{20} To begin with, PLCAA’s prohibition does not cover an action by a plaintiff who was directly harmed by a violent crime against a defendant who transferred a firearm to a third party with knowledge that such firearm would be used in that violent crime.\textsuperscript{21} Similarly exempt from PLCAA is any action against a firearm’s seller for “negligent entrustment or negligence per se.”\textsuperscript{22} A third exception to PLCAA allows a person to maintain an action for harm proximately caused by a manufacturer or seller’s knowing violation of a state or federal law “applicable to the sale or marketing” of firearms or ammunition.\textsuperscript{23} Also excluded is any “action for breach of contract or warranty in connection with the purchase of” a firearm or ammunition.\textsuperscript{24} Additionally outside of PLCAA’s ambit is any “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 and non-criminal manner.”\textsuperscript{25} PLCAA’s final exception allows the continued institution of actions by the Attorney General under Chapter 53 of Title 26 (the section of the Internal Revenue Code pertaining to taxes).\textsuperscript{19}

\textsuperscript{15} Id. § 7903(4), (5)(A). PLCAA pertains to the sale or manufacture of “qualified product[s],” which include firearms (new or antique), ammunition, “or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.” Id. § 7903(4).

\textsuperscript{16} Id. § 7903(5)(A). A “trade association” is defined as either a “corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual,” or an “organization described in section 501(c)(6) of the [Internal Revenue Code]; and “[two] or more members of which are manufacturers or sellers of a qualified product.” Id. § 7903(8).

\textsuperscript{17} Id. § 7903(5)(A) (prohibiting any “qualified civil liability action” for “damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief”).

\textsuperscript{18} Id. § 7903(9).

\textsuperscript{19} Id. § 7902(b).

\textsuperscript{20} Id. § 7903(5)(A)(i)-(vi).

\textsuperscript{21} Id. § 7903(5)(A)(i). Section 924(b) of Title 18 provides that “[w]hoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence . . . or drug trafficking crime . . . shall be imprisoned not more than 10 years, fined in accordance with this title, or both.” 18 U.S.C.A. § 924(h) (West 2006).

\textsuperscript{22} 15 U.S.C.A. § 7903(5)(A)(ii). PLCAA defines “negligent entrustment” as “the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.” Id. § 7903(5)(B).

\textsuperscript{23} Id. § 7903(5)(A)(iii).

\textsuperscript{24} Id. § 7903(5)(A)(iv).

\textsuperscript{25} Id. § 7903(5)(A)(v) (stating 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”).
ing to "Machine Guns, Destructive Devices, and other Certain Firearms")\textsuperscript{26} or Chapter 44 of Title 18 (pertaining to the regulation of firearms use)\textsuperscript{27} of the United States Code.\textsuperscript{28}

Also included in PLCAA are two gun safety provisions,\textsuperscript{29} added to the Act as congressional amendments, to be effective 180 days after the Act's passage.\textsuperscript{30} The first of these provisions, known as the Child Safety Lock Act of 2005\textsuperscript{31} ("CSLA"), mandates that a licensed manufacturer, importer, or dealer provide a "secure gun storage or safety device"\textsuperscript{32} with the transfer of any handgun,\textsuperscript{33} unless the gun is being transferred to a government entity or has been defined by the Attorney General as a "curio or relic."\textsuperscript{34} A violation of this requirement may result in a six-month license suspension, a $2,500 fine, or an administrative action by the Attorney General.\textsuperscript{35} The CLSA also provides that a person using such a "secure gun storage or safety device" is immune from suit for damages arising out of a third party's unlawful misuse of a handgun if that third party lacked permission to use the gun and the gun had been rendered inoperable by the use of the safety device.\textsuperscript{36} This immunity, however, does not extend to actions "brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se."\textsuperscript{37}

PLCAA's second safety provision is an amendment to section 922(a) of Title 18 (pertaining to "unlawful acts" concerning the use of firearms)\textsuperscript{38} prohibiting the manufacture, import, or sale of "armor piercing ammunition" for purposes other than exportation, testing (as authorized by the Attorney General), or transfer to a government agency.\textsuperscript{39} As a result, any person using such ammunition in furtherance of drug trafficking or other violent crime may now be subject to an additional penalty, ranging from a minimum fifteen years imprisonment to death in cases where the crime results in murder.\textsuperscript{40} This provision also mandates a study by the Attorney General to "determine whether a uniform standard for the test-

\begin{itemize}
  \item 27. See 18 U.S.C.A. §§ 921-931 (West 2006).
  \item 29. See 18 U.S.C.A. §§ 921-924.
  \item 30. Id. § 922(d) note.
  \item 31. Id. § 921(a) note.
  \item 32. Id. § 921(a)(34) (defining a "secure gun safety or storage device" as a device that is "designed to prevent the firearm from being operated without first deactivating the device" or from being operated "by anyone not having access to the device," or a "safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.").
  \item 33. Id. § 922(z)(1).
  \item 34. Id. § 922(z)(2)(c).
  \item 35. Id. § 924(p).
  \item 36. Id. § 922(z)(3)(A).
  \item 37. Id. § 922(z)(3)(C)(ii).
  \item 38. Id. § 922(a).
  \item 39. Id. § 922(a)(7), (8).
  \item 40. Id. § 924(c)(3).
\end{itemize}
ing of projectiles against Body Armor is feasible."

III. THE CUTTING ROOM FLOOR

During Senate floor debates concerning PLCAA, Senator Larry Craig, one of the main sponsors of the Act, was compelled to emphasize what the Act does not do, stating the following: "This is not a gun industry immunity bill . . . . This bill does not create a legal shield for anybody who manufactures or sells a firearm." While this may be true, Senator Craig failed to mention many other things that PLCAA does not do—namely, PLCAA does not include safety provisions submitted by gun-control advocates but rejected by the Act’s sponsors—that call PLCAA's motives into question.

One such provision, Kennedy Amendment No. 2619, called for an all-out ban on ammunition capable of piercing body armor meeting "the minimum standard for protection of law enforcement officers." Although this amendment was offered in response to the murder of seventeen law enforcement officers by armor-piercing bullets, it was rejected because the amendment would effectively ban rifle ammunition that, while commonly used for hunting, was capable of piercing certain types of armor. Instead, the Senate adopted Amendment No. 2625, requiring the Department of Justice to develop a standard by which to evaluate what ammunition is in fact "armor-piercing."

Another seemingly common-sense gun-control amendment left out of the enacted version of PLCAA was McCain Amendment No. 2636, which would have closed a loophole allowing unlicensed dealers to sell firearms at gun shows without conducting the federally-mandated background check required of licensed dealers. In support of this amendment, Senators presented evidence from both the National Rifle Association ("NRA") and the Bureau of Alcohol Tobacco and Firearms ("ATF") suggesting that the "gun show loophole" was a major source of weapons

41. Id. § 924(c).
43. Charlene Carter & Seth Stern, S397—Protection of Lawful Commerce in Arms Act, CONG. Q. BILL ANALYSIS, Oct. 28, 2005, available at 2005 WLNR 17714782 [hereinafter PLCAA Bill Analysis] (stating that the original bill was headed toward Senate passage until gun control advocates succeeded in adding a trio of amendments that would have required the sale of child safety locks or a storage box with every handgun, criminal background checks before any firearms sale at most gun shows and a [ten]-year extension of the ban on semi-automatic assault weapons.).
45. Id. at S1974 (statement of Sen. Kennedy).
46. See id. at S1973 (statement of Sen. Craig.) (stating that the Amendment, No. 2361 is "nothing more than a smokescreen to ban about [thirty] percent of ammunition that is currently in the market for the purpose of hunting").
47. Id. at S1974.
48. Id. at S1973 (statement of Sen. Craig).
used in terrorism and drug trafficking operations. Although this amendment was adopted as part of an early version of PLCAA, it was erased prior to enactment over concerns that lengthy background checks would prevent legitimate “mom and pop” arms collectors from trading their guns at shows.

Similarly absent from PLCAA’s enacted version is Feinstein Amendment No. 2637, which would have allowed for a ten-year extension of the assault weapon ban under the Public Safety Act, an act that banned the manufacture and sale of semiautomatic weapons and clips of more than ten bullets, but expired in 2004. Many senators offered evidence illuminating the ban’s overwhelming public support and its effectiveness in curbing crime, resulting in its initial adoption. However, the provision was left out of PLCAA’s final version based on an argument that the ban’s effectiveness in decreasing assault weapons crimes was merely the result of a correlation with an overall decreasing in the crime rate.

A final gun-control amendment initially adopted but left out of PLCAA was Levin Amendment No. 2631, which qualified the Act’s “civil liability action ban” by allowing gun companies to continue to be sued if their reckless or grossly negligent conduct was “a proximate cause of death or injury.” According to Senator Levin, nothing in the Amendment obscured PLCAA’s goal of preventing suits against gun manufacturers and dealers for the crimes of third parties; rather, the Amendment was simply a statement to the Gun Industry that “if your actions are reck-

50. See id. (stating that “according to the NRA, ‘hundreds of thousands’ of unlicensed firearms sales occur at gun shows each year” and that “ATF has identified gun shows as the second leading source of firearms recovered from illegal gun trafficking investigations”); id. at S1950 (statement of Sen. Kennedy) (offering evidence that “[g]un shows accounted for nearly [thirty-one] percent of the 84,000 guns illegally diverted during one [thirty]-month period”).

51. Id. at S1971 (showing that McCain Amendment No. 2636 was adopted by a vote of 53-46).

52. See id. at S1960 (statement of Sen. Hatch) (stating that “[g]un collectors who occasionally attend guns shows for a day or two on a weekend will be shut down because they will not be able to . . . run the required check on a prospective buyer and make such a transaction in that day”). But see id. (statement of Sen. Reed) (presenting evidence that “[n]inety-one percent of these checks are accomplished in less than [five] minutes; [ninety-five] percent in less than [two] hours”).

53. Id. at S1951 (statement of Sen. Feinstein).

54. Id. (stating that “[t]he legislation has the support of [seventy-seven] percent of the American people, and [sixty-six] percent of gun owners”).

55. Id. (stating that the ban “has reduced traces of assault weapons crimes by two-thirds in the last [ten] years”); id. at S1952 (statement of Sen. Schumer) (offering evidence that as a result of the ban “[t]he number of guns, assault weapons, [nineteen] banned weapons, used in crimes has dramatically declined—by 300%”); id. at S1953 (statement of Sen. Dodd) (stating that since the enactment of the ban the percent of assault weapons used in crimes has declined from 3.6% to 1.2%).

56. Id. at S1971 (showing that Feinstein Amendment No. 2637 was adopted by a vote of 52-47).

57. Id. at S1958 (statement of Sen. Hatch) (arguing that “[t]he number of murders committed with different weapons has decreased in all areas, proportionally, over the last [ten] years”).

less or grossly negligent, then you are not going to be immunized.”59 As with the gun control amendments before it, Levin Amendment No. 2631 was left out of PLCAA over fears that it was no more than “a require-
ment for manufacturers to defend themselves in court even though there is no legitimate cause of action against them.”60 According to PLCAA supporters, a manufacturer or dealer’s gross negligence should be irrele-
vant if a plaintiff’s injury was solely caused by a criminal’s unlawful use.61

As stated above, all of these amendments (except Kennedy Amend-
ment No. 2619) were initially adopted as part of an earlier version of
PLCAA. However, both the NRA and PLCAA’s initial sponsors felt
that these additions altered the bill to such an extent that it should not be
passed.62 Also disliked by PLCAA’s sponsors was the Child Safety Lock
Act63 which did, in fact, become part of the enacted version of PLCAA.64
The disfavor of such provisions by PLCAA’s supporters detracts from the
sincerity of PLCAA’s stated purposes of “prohibit[ing] causes of action
against manufacturers . . . for the harm solely caused by the criminal or
unlawful misuse,” and “preserv[ing] a citizen’s access to a supply of fire-
arms and ammunition for all lawful purposes.”65 It is hard to imagine
how a ban on assault weapons and armor piercing bullets, child safety
lock requirements, mandatory background checks for sellers at guns
shows, and manufacturer liability for reckless actions do anything more
than promote public safety. PLCAA supporters’ extreme distaste for
these amendments provides grounds for suspicion and bolsters the argu-
ments of those like Senator Dianne Feinstein, who argued that “[t]he bill
is about just one thing, the power and clout of the National Rifle
Association.”66

IV. THE NECESSITY OF PLCAA
A. PRACTICAL NECESSITY

Amongst PLCAA’s enumerated purposes is ensuring an adequate sup-
ply of legal firearms and ammunition by protecting the Gun Industry
from the high costs incurred in defending unfounded lawsuits.67 In sup-
port of this proposition, PLCAA’s backers offered evidence of the bur-

59. Id.
60. Id. at S1974 (statement of Sen. Kyl).
61. See id.
62. Id. at S1975-76 (statement of Sen. Craig) (stating that “we have added a great deal
to this bill that makes it much less than clean” and that “[I now believe [the bill] is so
dramatically wounded that it should not pass.”); PLCAA Bill Analysis, supra note 43 (re-
porting that once the amendments were adopted the NRA—“with Craig, an NRA board
member—directed its allies in the Senate to turn against the measure”).
63. 150 CONG. REC. at S1975 (statement of Sen. Craig) (stating that “[w]e have added
trigger locks. . . . I don’t think we can go there, nor do I believe we should go there”).
64. 18 U.S.C.A. § 921(a)(34) (West 2006).
67. See 15 U.S.C.A. § 7901(b)(2) (stating that a purpose of PLCAA is “[t]o preserve a
citizen’s access to a supply of firearms and ammunition for all lawful purposes, including
hunting, self-defense, collecting, and competitive or recreational shooting”); id.
den imposed by such lawsuits upon the Gun Industry, law-abiding citizens, and the military, along with the potential "crisis" that could result if such suits were successful. According to them, frivolous lawsuits, even if unsuccessful, cost the Gun Industry hundreds of millions of dollars per year, thereby causing slumping stock prices, increased liability insurance costs, and lost jobs. Even worse, PLCAA advocates contend, if such suits are successful they could bankrupt the entire Gun Industry, resulting in a greatly diminished (or possibly extinguished) supply of American firearms and ammunition for both private and military use. The enumerated congressional findings underlying PLCAA's enactment envision the "crate of horribles" that would follow from such a successful suit as follows:

The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a

§ 7901(b)(4) (stating that the enactment of PLCAA is meant to "[p]revent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce").

68. See infra notes 70-73 and accompanying text.


70. See Beretta, 401 F. Supp. 2d at 281 (citing 151 CONG. REC. at S8912 (statement of Sen. Sessions) (arguing that "even a single verdict . . . could bankrupt or in effect regulate an entire segment of our economy . . . and put it out of business"); id. at 268 (citing 151 CONG. REC. at S9107 (statement of Sen. Baucus) (stating that "nuisance suits . . . [threaten] to put dealers and manufacturers out of business"); Protection, supra note 69 (quoting President Bush in stating that "frivolous lawsuits . . . harm America's small business, and benefit a handful of lawyers at the expense of victims and consumers"); Sherly Gay Stolberg, CONGRESS PASSES NEW LEGAL SHIELD FOR GUN INDUSTRY, N.Y. TIMES, Oct. 20, 2005, at A1 (quoting NRA Executive Vice President Wayne LaPierre in stating that if such lawsuits are allowed to continue, "American [gun] companies will cease to make products," and that "[h]istory will show that this law helped save the American firearms industry from collapse").

71. See Beretta, 401 F. Supp. 2d at 281 (citing 151 CONG. REC. at S8912 (statement of Sen. Sessions) (discussing the dangers of bankruptcy of the Gun Industry); Press Release, Nat'l Rifle Ass'n, Historic Victory for the N.R.A., U.S. House of Representatives Passes the "Protection of Lawful Commerce in Arms Act" (Oct. 20, 2005), http://www.nraila.org/News/Read/Releases.aspx?ID=6682 [hereinafter NRA Press Release] (quoting the Department of Defense in stating "that passage of [PLCAA] would help safeguard our national security by limiting unnecessary lawsuits against an industry that plays a critical role in meeting the procurement needs of our men and women in uniform"); id. (quoting NRA Chief Lobbyist Chris W. Cox in arguing that "[o]ur men and women in uniform abroad and at home now will not have to rely on France, China or Germany to supply their firearms").
basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.\(^\text{72}\)

Relying on these arguments, numerous sportsmen and business groups, as well as the Department of Defense, support PLCAA as an imperative means of maintaining the integrity of the American gun business as we know it.\(^\text{73}\)

PLCAA opponents, on the other hand, argue that the so-called “tidal wave of litigation”\(^\text{74}\) used to justify PLCAA’s passage is exaggerated in terms of both scale and cost.\(^\text{75}\) To bolster this argument, they point to Congressional debates examining the SEC filings of gun giants like Smith & Wesson and Ruger.\(^\text{76}\) Rather than revealing the hundreds of millions of dollars in litigation costs purported to exist by PLCAA supporters,\(^\text{77}\) they expose multi-million dollar sales figures, but only \textit{de minimus} legal expenses.\(^\text{78}\) Also \textit{de minimus}, according to such opponents, are the number of suits faced by the gun industry, accounting for only fifty-seven out of the ten million torts suits filed between 1993 and 2003.\(^\text{79}\) In fact, even when such suits are brought, many seek injunctive relief only and therefore could not possibly have the economically crippling effects which PLCAA backers fear.\(^\text{80}\) Given such evidence, PLCAA opponents argue that the Act is not a necessary means of avoiding a devastating litigation crisis, but merely a “political payoff for industry special interests.”\(^\text{81}\)


\(^{73}\) See House Passes Protection of Lawful Commerce in Arms Act, 52 GUNS MAG., 69, 69 ((stating that “America’s business community weighed in strongly in favor for the bill, with letters of support coming from the National Association of Manufacturers, U.S. Chamber of Commerce, National Federation of Independent Businesses”); NRA Press Release, supra note 71 (stating that “[t]he Department of Defense stated that it ‘strongly supports’” PLCAA).


\(^{75}\) See Beretta, 401 F. Supp. 2d at 280 (stating that “no crippling recoveries have taken place, and no hearings have provided empirical support...”); id. at 282 (citing 151 CONG. REC. at S8913-14 (statement of Sen. Reed) (arguing that “[t]he gun lobby says it needs protection because it is faced with a litigation crisis. The facts tell precisely the opposite story. There is no crisis.”)).

\(^{76}\) Id.

\(^{77}\) See supra notes 69-70 and accompanying text.

\(^{78}\) See Beretta, 401 F. Supp. 2d at 282-83 (citing 151 CONG. REC. at S8913-14 (statement of Sen. Reed) (examining Smith & Wesson’s SEC statement and showing that the company reported $117.9 million in sales in 2004, and “they incurred [only] $4,535 in out-of-pocket costs to defend product liability and municipal litigation claims and suits.”)); id. (stating that “Ruger told the SEC in a March 11, 2005 filing: It is not probable and is unlikely that litigation, including punitive damages claims, will have a material adverse effect on the financial position of the Company [gun manufacturer Strum]”).

\(^{79}\) Id. at 283 (citing 151 CONG. REC. at S8913-14 (statement of Sen. Reed)).

\(^{80}\) Id.

These advocates concede that the true problem in ascertaining the scope of these legal expenses is that most gun companies are privately owned and therefore need not provide transparency in their financial statements.\textsuperscript{82} They contend, however, that if the experience of private companies is similar to that of Smith & Wesson and Ruger, then the multi-million dollar litigation crisis urged by PLCAA supporters is highly inflated.\textsuperscript{83}

\section*{B. Legal Necessity}

Another justification offered for PLCAA’s passage is that lawsuits seeking to impose liability on the Gun Industry for third party use are “without foundation” but impose the risk that they might be sustained by a “maverick judicial officer or petit jury,” thereby “expand[ing] civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several states.”\textsuperscript{84} Underlying this theory is an assumption that courts and state legislatures had been doing an insufficient job of protecting against the success of such suits and that PLCAA’s enactment provided a necessary remedy.\textsuperscript{85} PLCAA’s opponents attack the proposition on multiple grounds.

To begin with, it may be argued that if such suits against the Gun Industry are truly “unmerited,” “frivolous” or “without foundation,” there are many preexisting outlets for expedient and economical dismissal. For example, an action that is “unmerited” or “without foundation” may be dismissed through a motion for summary judgment under Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim),\textsuperscript{86} a procedure which the Supreme Court has found to be “just, speedy, and inexpensive.”\textsuperscript{87} Likewise, Federal Rule of Civil Procedure 11 allows for the dismissal of frivolous lawsuits brought “for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,”\textsuperscript{88} and allows for the issuance of sanctions.\textsuperscript{89} These rules, along with similar procedures available at the state level,\textsuperscript{90} seem to directly address PLCAA supporters’ fear of “the anti-gun lobby’s shameless attempts to

\textsuperscript{82} Beretta, 401 F. Supp. 2d at 283 (citing 151 CONG. REC. at S8913-14 (statement of Sen. Reed)).
\textsuperscript{83} Id. at 282-83.
\textsuperscript{86} FED. R. CIV. P. 12(b)(6).
\textsuperscript{88} FED. R. CIV. P. 11(b)(1).
\textsuperscript{89} FED. R. CIV. P. 11(c).
\textsuperscript{90} See generally 73 AM. JUR. 2D Summary Judgment § 4 (2005).
bankrupt the American firearms industry through reckless lawsuits.”

Likewise, PLCAA opponents argue, fears of renegade judicial activism should already be sufficiently remedied by institutional guarantees in the appeals process (unless, of course, that activism is occurring at the Supreme Court level, which has not been the case thus far).

Also, where existing procedural elements have proved insufficient in barring costly lawsuits, the majority of state legislatures have already enacted legislation to ban them. One such example is section 1714.4 of the California Code, which reads as follows:

In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

Similarly, “North Carolina law. . . already prohibits frivolous lawsuits against the firearm industry,” and Texas law “forbids cities and county governments from taking any legal action to hold gun manufacturers accountable, even when they act irresponsibly in the way they design, market or distribute weapons.” While PLCAA opponents concede that some states have yet to pass such legislation, they argue that “different state approaches” allow society to “reach a better understanding of how to balance consumer interests in access to firearms with the public interest in deterring violent crime and compensating victims.”

Furthermore, PLCAA opponents argue that contrary to the allegations of “maverick” judicial activism, “courts have shown great respect for the separation of powers by dismissing those lawsuits that call on them to impose new restrictions on gun sales.” Of the numerous lawsuits attempting to hold the Gun Industry liable for third party actions, only a handful have been successful. Those that have been allowed to proceed are arguably the most egregious and could possibly remain viable under

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91. REVIEW, supra note 69.
92. PROTECTION, supra note 69 (stating that “[i]n recent years, [thirty-three] states passed similar legislation outlawing frivolous lawsuits intended to bankrupt the gun industry”).
96. McClellan & Rahdert, supra note 81, at 27. But see PROTECTION, supra note 69 (arguing that PLCAA is needed to create “judicial uniformity”).
98. Id. (stating that “[t]he courts have, in fact, already rejected all but a few of the suits, weeding out those that overreach from those that present legitimate claims under established doctrine”); Daniels, supra note 1, at 962 (stating that “thirty-two more cities and municipalities followed suit in a common attempt to recoup their financial losses and force the [gun] industry to adopt safer standards,” but were met with “little success”).
PLCAA's limited exceptions. One such case is *Hicks v. T&M Jewelry*, in which the Kentucky Court of Appeals allowed a trial to proceed on the issue of whether a federally-licensed gun dealer was negligent for selling a .22 caliber semi-automatic pistol to an underage buyer, who later accidentally shot a woman in the face.99 PLCAA opponents contend that this case and those like it are far from frivolous and would likely still be allowed under PLCAA's exception for negligent entrustment actions.100

C. CONCLUSION AS TO PLCAA'S NECESSITY

Based on the facts asserted above, PLCAA opponents argue that pre-existing procedural and institutional guarantees of the judicial process, coupled with current state legislative enactments and judicial restraint, show that the Act's passage was neither necessary nor warranted. PLCAA supporters, on the other hand, contend that there is substantial statistical evidence to demonstrate PLCAA's necessity. The figures offered by these opposing ideologues are so much in conflict that they provide minimal guidance in evaluating the wisdom of PLCAA's enactment. While the actual cost of gun lawsuits likely lies somewhere in between the hundreds of millions asserted by PLCAA supporters and the *de minimus* expenses urged by the Act's opponents, one's true opinion as to PLCAA's necessity seems almost wholly dependent upon one's feelings about guns in general. Those who like guns see the act as an imperative means of protecting a historically vital industry. On the other hand, those who dislike guns see PLCAA as unwarranted favor to the producers of inherently dangerous products. Congress, apparently, attempted to decide this debate in favor of gun lovers when it enacted PLCAA.

V. THE IMPACT OF PLCAA

A. EXPECTED IMPACT

Prior to PLCAA's enactment, many advocates from competing sides of the gun control debate feared (or eagerly anticipated) the new law's sweeping economic and legal impact. From the PLCAA supporters' point of view, the Act was expected to be the saving grace of an industry wriggling under the financial burden of unwarranted lawsuits. The NRA heralded PLCAA's passage as an "historic" and "monumental victory" and speculated that "[h]istory will show that this law helped save the American firearms industry"101 and "American icons like Remington, Ruger, Winchester, and Smith & Wesson from politically motivated lawsuits."102 Likewise, the Act's opponents speculated that PLCAA would "be a great boon to the gun industry, [but] it will do irreparable damage

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99. See T&M Jewelry, Inc. v. Hicks, 189 S.W.3d 526 (Ky. 2006).
100. See supra note 22 and accompanying text.
101. PROTECTION, supra note 69 (quoting NRA Executive Vice President Wayne LaPierre).
102. NRA Press Release, supra note 71 (quoting NRA Chief Lobbyist Chris Cox).
to the integrity of the civil justice system,"103 and argued that the Act would be "the best buddy the gun industry could ask for."104

Similarly feared and anticipated was PLCAA’s impact on both pending and future lawsuits. Prior to PLCAA’s enactment, the vast majority of gun suits arising out of third party misuse fell into two categories: individual and municipal.105 Individual lawsuits, for the most part, are brought by persons alleging that gun manufacturers negligently or recklessly supplied guns either to dealers with a history of loose sales practices or to buyers whom they should have known would use the guns illegally.106 As a result, when individuals are in fact injured by these buyers’ unlawful use, they argue that the manufacturers and dealers should be held partially liable.107 Municipal lawsuits, on the other hand, are brought by government entities and typically allege that “the gun industry causes a public nuisance by being negligent in gun sales practices, particularly by making them available to minors and others who are banned from owning guns.”108 These suits usually seek injunctive relief to correct such practices.109

The Act’s opponents feared that PLCAA would bar both types of lawsuits (municipal and individual), arguing that “[t]he law sets an impossibly high bar for pursuing actions against gun-makers, . . . prevent[ing] more than just the municipal lawsuits, even prohibiting legitimate lawsuits alleging negligence by gun manufacturers.”110 PLCAA supporters echoed this sentiment, anticipating that PLCAA would “provide the full protection sought by the firearms industry and nullify pending and prevent future lawsuits.”111 Some gun control advocates went even further, predicting that the Act would “block administrative proceedings that can lead to the revocation of a gun dealer’s federal firearms license,”112 and possibly even “open[ ] the door for some special favors in other industries.”113
B. IMPACT ON MUNICIPAL LAWSUITS


While it is certainly too early to assess the full impact of PLCAA (which is less than four months old at the time of the writing of this Comment), the one case addressing the Act thus far suggests that the fears of its sweeping effect are premature.

In City of New York v. Beretta U.S.A. Corp., the City of New York brought a municipal action against a multitude of major firearms suppliers “seeking injunctive relief and abatement of an alleged public nuisance caused by the Gun Industry’s negligent and reckless merchandising.”114 Specifically, the city alleged the following: (1) the defendant suppliers marketed and distributed arms knowing that they would be “diverted into an illegal gun market catering to juveniles, criminals and other persons prohibited from owning guns”115 through methods such as multiple purchases,116 straw sales117 and illegal sales at gun shows;118 (2) that defendants could have easily amended their marketing and distribution practices to prevent or reduce such diversion, but chose not to do so;119 and (3) as a result “[d]efendants’ sales and distribution practices accordingly cause, contribute to and maintain a public nuisance consisting of a large and ready supply of guns purchased by criminals and used in the commission of crimes.”120 In response, the City sought an injunction “requiring defendants to adopt reasonable measures that [would] reduce the movement of their products into the illegal secondary market, thereby abating the public nuisance.”121

Prior to Beretta’s scheduled trial date of November 28, 2005, President Bush signed PLCAA into effect, prompting defendants to file for dismissal, arguing that the case fell within the statute’s immediate dismissal of pending “qualified civil liability action[s].”122 In response, the City argued that the action should be allowed to proceed either because PLCAA was unconstitutional, or in the alternative, because the instant case fit into an exception to the definition of “qualified civil liability action.”123

115. Id. at 252.
116. Id. at 255 (stating that a “multiple sale” occurs when a “purchaser buys more than one gun . . . from a licensed dealer with the intention of later transferring the guns to persons unqualified to purchase under federal and state gun laws”).
117. Id. (defining a “straw purchase” as a scenario “wherein the purchaser buys the gun from a licensed dealer for a person who is not qualified to purchase the firearm”).
118. Id. at 254 (stating that sales at gun shows create “a loophole for guns to be supplied to criminals, and defendants are aware of this loophole”). See also supra notes 49-52 and accompanying text.
120. Id. at 253.
121. Id. at 252.
122. Id. at 251.
123. Id.
In assessing these arguments, the United States Court of Appeals for the Eastern District of New York held that PLCAA was, in fact, constitutional (which will be discussed later in this Comment). However, the court also found that the City's public nuisance claim fell within PLCAA's third exception to the definition of "qualified civil liability action," which exempts from coverage:

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . .

Relying on two examples of exempted claims provided in PLCAA's text, defendants argued that this exception applied only to claims alleging "violations of statutes specifically—and explicitly—regulating the manner in which firearms are sold or marketed." The city's claim, which was brought under a general nuisance statute not specifically mentioning firearms, was therefore outside of the exception's purview. The court, analyzing the text of the exception, found this argument unpersuasive. According to the court, the exception spoke of statutes "applicable to the sale and marketing of firearms" and therefore covered any claim brought under a law "capable of being applied" to the marketing or sale of arms. Had Congress meant for the exception to apply exclusively to statutes "directly" or "specifically" covering firearms sales, they could have easily said so. Since they did not, however, the court refused to dismiss the city's claim because the public nuisance statute under which it was brought, while not explicitly mentioning the marketing or sale of firearms, was certainly capable of being applied to such activities. A stay was then granted to the defendants allowing them to appeal the decision.

2. Projected Impact of and Reaction to Beretta

Given the initial hype concerning the expected impact of PLCAA, the Beretta decision is both shocking and telling. As stated above, many advocates from both sides of the table speculated that PLCAA's ban on "civil liability actions" would bring about the death of the municipal law-

124. Id. at 271-97. See also infra Pt. VI.
128. Id. (The statute under which the claim was brought provides the following: "A person is guilty of criminal nuisance in the second degree when: By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons. . . ."). Id. at 261 (citing N.Y. PENAL LAW § 240.45 (McKinney 2005)).
129. Id. at 261-64.
130. Id. at 261, 262 (emphasis added).
131. Id. at 264.
132. Id. at 262.
133. Id. at 298.
Thus, the Eastern District of New York’s refusal to dismiss a classic municipal lawsuit in *Beretta* came as a shock to those who predicted PLCAA’s sweeping regime. According to PLCAA supporters, *Beretta* “was exactly the type of lawsuit the new law was devised to stop,” and was one of the “very municipal lawsuits that spurred [PLCAA’s] passage.”

New York City’s success in *Beretta* caused some, like attorney John Renzulli, attorney for the gun manufacturer Glock, to dismiss the opinion as a flat-out misapplication of PLCAA, exclaiming “I don’t think [the city’s suit] even remotely fits into the exception . . . .” Others, however, saw *Beretta* as a sign of hope and a reason to temper their speculation about PLCAA’s wrath. For example, Eric Proshansky, Assistant Corporate Counsel for New York City in the suit, found that the “ruling was a ‘straightforward’ interpretation of a statute that was not intended to give absolute immunity to the gun industry.”

Correct or not, the *Beretta* ruling suggests that the future vitality of the municipal lawsuit now centers upon a solution to the “fundamental disagreement as to the scope of [the] exception” addressed in the case. It is important to note that this solution lies not with the legislature that enacted PLCAA, but with the courts whose power the Act sought to anesthetize.

Take for example *City of Gary v. Smith & Wesson*, a case which, prior to *Beretta*, many thought would be dismissed by PLCAA. In *Smith & Wesson*, the City of Gary, Indiana brought a public nuisance action against numerous gun sellers and manufacturers for “affirmatively relying upon the reasonably foreseeable laxness of dealers, and employees, and the ingenuity of criminals to ensure that thousands of handguns find their way into their expected place in the illegal secondary market.” The state nuisance statute under which the city’s claim was asserted reads as follows:

Whatever is (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.

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134. *See supra* notes 110-13 and accompanying text.
138. *Id.*
139. *Id.* (quoting Michael Rice, attorney for Colt).
140. 801 N.E.2d 1222 (Ind. 2003).
141. *See generally House Passes Protection of Lawful Commerce in Arms Act*, *supra* note 73, at 69.
142. *Smith & Wesson*, 801 N.E.2d at 1231.
143. *Id.* at 1229.
Despite the Court of Appeal's dismissal of this claim, the Supreme Court of Indiana found that the City had provided arguments "sufficient to allege an unreasonable chain of distribution of handguns sufficient to give rise to a public nuisance" claim and therefore reversed and remanded the case. Before the case could be re-heard, the defendant manufacturers filed a motion to dismiss "on the ground that the Protection of Lawful Commerce in Arms Act . . . requires the immediate dismissal of [the] case." The success of this motion, like those in many other pending cases, rests on the Indiana courts' assessment of Beretta's core argument.

If the court chooses to read PLCAA's exceptions narrowly, as advocated by the defendants in Beretta, then it is clear that the nuisance statute at issue in Smith & Wesson does not "specifically or explicitly" apply to firearms, and the action should be dismissed. On the other hand, if the Indiana court applies the reading endorsed by Beretta, then it is equally obvious that the statute at issue, while never directly mentioning firearms, is "capable of being applied" to firearms sales. Whatever route is chosen, it is a judicial choice of interpretation that will dictate the outcome in this and almost every other municipal lawsuit. The ability of courts to make such outcome determinative decisions seems to nullify PLCAA's attempt to prevent judicial activism.

C. IMPACT ON INDIVIDUAL LAWSUITS

1. Projected Impact

While no individual lawsuit has been tried under PLCAA's regime thus far, both the Beretta decision and the language of PLCAA itself provide hope to plaintiffs and gun control advocates that the Act was "drafted in ways that should permit [individual lawsuits] to move forward." As with municipal lawsuits, the fate of these individual lawsuits is largely contingent upon the judicial construction of PLCAA's exceptions. Take for example Hernandez v. Kahr, Inc., an example of a classic individual lawsuit.

In Kahr, the plaintiff's decedent son Danny Guzman was shot to death

144. Id. at 1222.
145. Id. at 1222, 1241.
147. See supra notes 127-28 and accompanying text.
148. See supra notes 130-32 and accompanying text.
with a handgun produced by defendant Kahr Arms. The gun was stolen from Kahr Arms by an employee named Mark Cronin, who then sold it to Robert Jachimczyk for "2 half grams of powder cocaine." Jachimczyk in turn sold the gun to Edwin Novas for "2 bundles of heroin," who eventually used the gun to murder Danny Guzman.

It was later discovered during a police investigation that Cronin, along with other employees, "had stolen guns from Kahr even before the weapons had serial numbers stamped on them, and resold them to criminals in exchange for money and drugs." It was also determined that Cronin "had a history of drug addiction" as well as "a criminal history [that] could have been easily uncovered from public court records," but that Kahr Arms never conducted any background check or drug test. Finally, it was found that Kahr Arms' lack of security cameras, inventory tracking system, or even metal detectors made security at the facility "so shoddy that it was possible to remove weapons without detection."

Given this, the plaintiffs now seek to hold Kahr Arms liable on the theory that the manufacturer's negligent hiring practices and security measures allowed for the theft of the gun used to kill their son. Defendants, however, filed a motion to dismiss the plaintiff's action on the ground that the "case falls squarely within the language of a 'qualified civil liability action' barred by PLCAA," and because none of the Act's narrow exceptions apply in this case.

One of the main exceptions at issue in Kahr is the exemption for negligent entrustment claims, which are defined as follows:

"[N]egligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

Defendants argue that under a narrow reading of this exception, plaintiffs cannot maintain a negligent entrustment action. Under their interpretation, the exception is inapplicable because Kahr Arms did not

153. Id.
154. Brady Center, supra note 151.
155. Id.
156. Id.
157. See id.
158. Kahr Motion to Dismiss, supra note 152, at 4-5.
160. Id. § 7903(5)(B).
161. Kahr Motion to Dismiss, supra note 152, at 6, 7.
entrust, or even supply, the gun to Novas (the ultimate shooter).\textsuperscript{162} Rather, the gun was stolen by Cronin, who "entrusted the firearm to Jachimczyk, who in turn entrusted it Novas."\textsuperscript{163} Under a broader reading of the exception, however, a negligent entrustment action might be maintained. For example, it may be argued that the instant exception does not require the sale of a firearm, but speaks only of "supplying a qualified product." Therefore, plaintiffs might maintain that (1) Kahr Arms essentially "supplied" Cronin with a large supply of readily available guns by allowing him to work in a facility with such relaxed security measures; (2) Kahr Arms reasonably should have known that Cronin would steal these arms and use them illegally, given his sordid record; and (3) Cronin, by selling the guns to drug dealers and other criminals, did in fact use the guns "in a manner involving unreasonable risk of physical injury"\textsuperscript{164} to people like Danny Guzman. Thus, as with municipal lawsuits, it appears once again that the success of \textit{Kahr} (and many other individual lawsuits) is conditioned upon a court’s willingness to read PLCAA’s exceptions broadly.

\textbf{D. Conclusion as to PLCAA’s Effectiveness}

As stated above, PLCAA’s impact on pending lawsuits is greatly contingent upon judicial interpretation of the Act’s exceptions. Given this, it appears that (at least for the time being) PLCAA will fail as to one of its essential purposes: preventing judicial activism. Allowing judges to construe the scope of PLCAA’s exceptions invites outcome determinative approaches and after-the-fact rationalizations. A “maverick judicial officer” who, prior to PLCAA, was able to “expand civil liability in a manner never contemplated by the framers of the Constitution,”\textsuperscript{165} will certainly not be deterred by a law that allows him to define the scope of its coverage. This fact was made plainly evident by \textit{Beretta}, in which many felt that Judge Jack B. Weinstein was able to inject his “blatant bias” into PLCAA’s exceptions by crafting an interpretation that allowed for the success of an action that “was exactly the type of lawsuit the new law was devised to stop.”\textsuperscript{166} This is not to say that Judge Weinstein’s opinion was necessarily incorrect; rather, it suggests that \textit{Beretta} is a testament to PLCAA’s ineffectiveness. While not all judges will interpret PLCAA as liberally as Judge Weinstein, the force of the Act will continue to be determined by judicial discretion rather than legislative wishes.

\textsuperscript{162} Id. at 6.
\textsuperscript{163} Id.
\textsuperscript{165} Id. § 7901(a)(7).
\textsuperscript{166} Rashbaum, \textit{supra} note 135, at B3 (quoting Lawrence G. Keane, attorney for the National Shooting Sports Foundation).
VI. CONSTITUTIONALITY OF PLCAA

As stated above, thus far Beretta has been the only case to address the constitutionality of PLCAA. While Beretta found that PLCAA passed constitutional scrutiny, the court's ultimate decision fell upon PLCAA's enumerated exceptions, and therefore any statements concerning the Act's constitutionality are mere dicta. Despite this, Beretta provides a useful tool in highlighting the major constitutional arguments surrounding PLCAA. The following is a summary of those arguments.

A. ANALYSIS OF PRECEDENT

In Beretta, the Eastern District of New York found that PLCAA was constitutional based on the established principle that "Congress may, in appropriate circumstances, out of concern for an industry, take steps to limit liability against that industry." In support of this contention the court cited many previously enacted statutes that limited liability with respect to certain industries. The first statute cited by the court was the General Aviation Revitalization Act of 1994 ("GARA"), which "created a statute of repose for one segment of the aviation industry." Prior to GARA's enactment, the airline industry was held liable for accidents involving aircrafts that were over twenty years old. This "long tail of liability" caused the industry's litigation costs to increase from "twenty-four million dollars in 1978 to more than [two hundred] million dollars in 1992," with companies like Cessna spending "almost twenty-five million dollars per year defending lawsuits, at least one of which involved a forty-seven year old plane." Thus, GARA barred lawsuits relating to such ancient airplanes in an attempt to "revitalize the industry and create jobs." Also cited in Beretta were the National Vaccine Injury Compensation Program ("protect[ing] the child vaccine industry against tort liability"), the Air Transportation Safety and System Stabilization Act ("ATSSSA") ("limit[ing] airlines' liability" for injury claims arising out of the September 11th terrorist attacks "to the extent of their liability insurance coverage"), and the Class Action Fairness Act of 2005 ("provid[ing] for the removal of state class actions to federal courts where national interests are involved" in order to "avoid abuses by some state

168. See id. at 278-80.
169. Id. at 278 (citing James F. Rodriguez, Tort Reform & GARA: Is Repose Incompatible with Safety?, 47 Ariz. L. Rev. 577, 577-81 (2005)).
170. Id.
171. Id. (citing Rodriguez, supra note 169, at 577-81).
172. Id. at 279 (citing Rodriguez, supra note 169, at 577-81).
173. Id. (citing 42 U.S.C. §§ 300aa-10 to 300aa-34 (2005)).
courts affecting industries throughout the United States”). According to the court, PLCAA, like these other statutes, was merely another example of Congress using its power to modify “state tort and nuisance jurisprudence” to protect the vitality of a nationally important industry.

The statutes cited by the Beretta court, however, are distinguishable from PLCAA on two grounds. First, many of these statutes were enacted in response to an actual, undisputed crisis. The ATSSSA, for example, was passed in response to the insurance crisis following the September 11th terrorist attacks. Similarly, GARA was passed only after the airline industry incurred an over 700% increase in liability costs and “100,000 jobs were lost in aviation manufacturing, services, and sales.” The “crisis” faced by the Gun Industry is far more tenuous, for the $4,535 in yearly litigation costs incurred by companies like Smith & Wesson are exponentially smaller than the $25 million incurred by Cessna prior to GARA’s enactment.

Second, some of the statutes cited in Beretta limit certain claims but provide alternative relief. For example, ATSSSA limited airlines’ liability but “established the 9/11 Victim Compensation Fund, which provided victims of the attack with a remedy.” Similarly, the Class Action Fairness Act removed certain state court claims but allowed them to be brought in federal courts. PLCAA, on the other hand, removes all “qualified civil liability action[s]” from state and federal court, but provides no alternate remedy. Thus, it seems that the statutes cited in Beretta do not, independently, provide adequate grounds for PLCAA’s constitutionality.

B. DUE PROCESS ANALYSIS

Section One of the Fourteenth Amendment provides that no State shall “deprive any person of their life, liberty, or property without due process of law.” In subjecting PLCAA to a Due Process analysis, the court in Beretta began with the presumption that there is “no vested interest in injunctive relief” because such relief is “subject to the continuing supervisory jurisdiction of the courts, and therefore may be altered according to subsequent changes in the law.” Thus, since the Beretta plaintiffs had no property interest in the injunctive relief they sought, a

176. See id. at 280-81.
177. Id. at 279.
178. Id. at 278-79 (citing Rodriguez, supra note 169, at 577-81).
179. See supra note 78 and accompanying text.
180. See supra notes 169-72 and accompanying text.
182. Id.
186. Id. (quoting Miller v. French, 530 U.S. 327, 347 (2000)).
claim for deprivation of property without due process of law could not possibly exist.\textsuperscript{187}

This analysis, while correct, is incomplete for two reasons. First, it ignores the \textit{Beretta} plaintiffs’ argument that the Supreme Court previously suggested that “the government might not, ‘without violence to the constitutional guaranty of ‘due process of law,’ suddenly set aside all common-law rules respecting liability . . . , without providing a reasonably just substitute.’”\textsuperscript{188} This, however, seems to be exactly what PLCAA does by eliminating all redress against the Gun Industry in “qualified civil liability actions,” without providing a substitute remedy. As discussed above, it is this complete lack of remedy that separates PLCAA from other constitutional limitations on liability.\textsuperscript{189} Thus, if a court chooses to adopt the aforementioned principle into law, PLCAA might be found to offend due process requirements.

Second, the \textit{Beretta} court’s due process analysis is incomplete because it ignores the Supreme Court’s previous concession that “[a]rguably, the cause of action for wrongful death . . . is a species of ‘property’ protected by the Due Process Clause.”\textsuperscript{190} While no wrongful death cause of action was asserted in \textit{Beretta}, it is central to many of the “individual lawsuits” filed against the Gun Industry.\textsuperscript{191} Therefore, the possibility remains open, although unlikely, that a court might find PLCAA unconstitutional in a wrongful death suit, or at least subject the Act to a more in-depth Due Process analysis than applied in \textit{Beretta}.

\textbf{C. Commerce Clause Analysis}

The Constitution’s Commerce Clause provides Congress with the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”\textsuperscript{192} In determining that the Commerce Clause gave Congress the authority to pass PLCAA, the \textit{Beretta} court distinguished the instant act from two recent statutes found unconstitutional by the Supreme Court.\textsuperscript{193}

In \textit{United States v. Lopez}, the Supreme Court found that the Gun Free School Zones Act of 1990 (“GFSA”), which “made it a federal crime to knowingly possess a firearm in a school zone,” was unconstitutional because it “exceeded Congress’ authority under the Commerce Clause.”\textsuperscript{194} Similarly, the Court found a provision of the Violence Against Women

\begin{footnotesize}
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\item[\textsuperscript{187} See \textit{id.} (stating that “[c]ontrary to the city’s assertion, there is no denial of due process in the Act as applied to its case”).
\item[\textsuperscript{188} Plaintiffs’ Motion in Opposition at 21-22, \textit{Beretta}, 401 F. Supp. 2d 244 (No. 00 CV 3641) (citing N.Y. Cent. R.R. v. White, 243 U.S. 188, 201 (1917)).
\item[\textsuperscript{189} See supra notes 181-83 and accompanying text.
\item[\textsuperscript{190} Martinez v. California, 444 U.S. 277, 281-82 (1980).
\item[\textsuperscript{191} See generally Gunlawsuits.org, supra note 105.
\item[\textsuperscript{192} U.S. CONST. art. I, § 8, cl. 3.
\item[\textsuperscript{194} Id. at 284 (citing United States v. Lopez, 514 U.S. 549, 552 (1995) (outlawing 18 U.S.C. § 922(q)(1)(A))).
\end{itemize}
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Act ("VAWA") unconstitutional for lack of Commerce Clause authority in United States v. Morrison.\textsuperscript{195} The Court's "dim view" of Commerce Clause authority in these cases caused some to believe that PLCAA would also be found unconstitutional.\textsuperscript{196} The court in Beretta, however, distinguished PLCAA from GFSA and VAWA based on the four following factors for Commerce Clause analysis established in Lopez and Morrison: (1) "the nature of the activity regulated; (2) the presence or absence of an express jurisdictional element; (3) the presence or absence of congressional findings; and (4) the link between the activity regulated and interstate commerce."\textsuperscript{197}

First, the court found that unlike VAWA, which regulated gender-motivated violence, and GFSA, which regulated guns in school zones, the lawsuits regulated by PLCAA were "economic in nature," given their financial effect on the Gun Industry.\textsuperscript{198} Second, unlike GFSA, which "did not contain any requirement that the possession of a gun have any connection to past interstate activity,"\textsuperscript{199} PLCAA contains a concrete jurisdictional element, banning only suits concerning firearms that are "shipped or transported in interstate or foreign commerce."\textsuperscript{200} Third, as opposed to GFSA, PLCAA enumerates a wealth of congressional findings supporting the necessity of its passage.\textsuperscript{201} Finally, unlike the statutes at issue in Lopez and Morrison, the congressional findings underlying PLCAA provide a sufficient "link between the activity regulated and interstate commerce."\textsuperscript{202} by establishing a "rational basis for Congress' determination that the Act was necessary to protect [the Gun industry]."\textsuperscript{203}

In making this final determination, the court in Beretta showed great deference to Congress by finding that it had provided a rational basis for believing that "[s]uccessful lawsuits against the Gun Industry would arguably affect the manner in which national and international manufacturers and wholesalers of handguns do business."\textsuperscript{204} The court made this conclusion despite conceding that "no crippling recoveries have taken place, and no hearings have provided empirical support . . . to congressional findings regarding the possible effect of litigation upon the gun industry."\textsuperscript{205} This high level of deference ignores Morrison's finding that whether "particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ulti-

\textsuperscript{195} Id. at 285-86 (citing United States v. Morrison, 529 U.S. 598 (2000)).
\textsuperscript{196} Peter Grier, Critics: Gun Bill Won't Hold Up in Battle: Courts Said Likely to Shoot Down New Immunity Legislation, CONN. L. TRIB., Nov. 7, 2005, at 6 (quoting Sayre Weaver, Legal Director of the Educational Fund to Stop Gun Violence of Washington).
\textsuperscript{197} Beretta, 401 F. Supp. 2d at 286.
\textsuperscript{198} See id. at 287-88.
\textsuperscript{199} Id. at 287 (citing Gonzales v. Raich, 545 U.S. 1, 23 (2005)).
\textsuperscript{201} See Beretta, 401 F. Supp. 2d at 287 (referring to 15 U.S.C.A. § 7901(a)).
\textsuperscript{202} Id. at 286.
\textsuperscript{203} Id. at 287 (citing Gonzales, 545 U.S. at 10).
\textsuperscript{204} Id. at 287-88.
\textsuperscript{205} Id. at 280.
mately a judicial rather than a legislative question," along with Lopez's finding that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." While these statements are not dispositive of PLCAA's constitutionality, they suggest that the Congressional findings underlying the Act's effect on interstate commerce should be subject to a more searching review than conducted in Beretta.

D. SEPARATION OF POWERS ANALYSIS

As stated previously, PLCAA's passage was predicated in part based upon a belief that judges holding the Gun Industry liable for third party conduct were "expand[ing] civil liability in a manner never contemplated by . . . Congress," and were therefore encroaching upon an area delegated to legislative authority. According to PLCAA supporters, this was a clear violation of the separation of powers envisioned by the Constitution. PLCAA's opponents, on the other hand, argued that PLCAA itself was a violation of the separation of powers, for "[i]f judicial law-making violates this principle, so too does legislative adjudication" of pending lawsuits.

Expanding upon this argument, the Beretta plaintiffs argued that PLCAA presented an unconstitutional separation of powers violation under the Supreme Court's decision in United State v. Kline. In Kline, "the administrator of the estate of a confederate sympathizer whose property had been sold by federal agents during the Civil War . . . [brought suit] to recover the proceeds of the sale under a federal law allowing . . . for such a recovery upon proof of loyalty to the Union." Since the administrator's decedent received a presidential pardon (which the Supreme Court previously held to be evidence of loyalty), the Court of Claims found for the administrator. While the case was pending, however, Congress passed a contrary statute providing that a pardon was in fact evidence of disloyalty and ordered "the Supreme Court to dismiss for lack of jurisdiction any suit in which the claimant had established loyalty on the basis of a pardon." On appeal, the Supreme Court found that the law unconstitutionally usurped judicial power by commanding the "federal courts to reach a particular outcome in a defined set of cases." Based on this

208. See supra Pt. IV, B.
210. Memorandum of Law of Plaintiff of the City of New York in Opposition to Defendants' Motions Under the Commerce in Arms Act to Dismiss, Vacate the Trial Date and Stay Proceedings at 21, Beretta, 401 F. Supp. 2d. 244 (No. 00-CV-3641) [hereinafter Beretta Plaintiffs' Motion in Opposition] (citing United States v. Kline, 80 U.S. 128, 146 (1871)).
211. Beretta, 401 F. Supp. 2d at 290 (citing Kline, 80 U.S. at 146).
212. Id.
213. Id. at 290-91.
214. Id. at 291 (citing Kline, 80 U.S. at 146).
holding, the Beretta plaintiffs argued that PLCAA, like the statute at issue in Kline, "violate[d] separation of powers by 'prescrib[ing] rules of decision to the Judicial Department of the government in cases pending for it.'"\textsuperscript{215}

The court, however, rejected Plaintiffs' argument, suggesting that it only presented half of Kline's holding.\textsuperscript{216} Kline, according to the court, stood not simply for the principle that "Congress cannot through legislation direct the outcome of a pending case," but only that they cannot do so "without changing the substantive law underlying the suit."\textsuperscript{217} Applying this principal, the Beretta court distinguished PLCAA from the statute in Kline, for it does not simply order courts to dismiss "qualified civil liability action[s]."\textsuperscript{218} Rather, PLCAA changed the substantive law applicable to third party gun litigation, while leaving to the courts "the task of determining whether a claim falls within the ambit of the statute."\textsuperscript{219}

This argument concerning Kline reveals the inherent limitation that the separation of powers doctrine places on Congress's ability to counter judicial activism. Kline holds that while a congressional attempt to direct court decisions is certainly effective in combating activist adjudication, it would present an unconstitutional separation of powers violation. Rather, in order to adhere to Kline's mandate, Congress must allow courts the ability to apply the law as governed by the statute and to determine the statute's scope, thereby inviting judicial activism. Thus, it seems that it is this compliance with Kline and the doctrine of separation of powers which renders PLCAA ineffective in curbing activism.

E. **Conclusion as to Constitutionality**

While the constitutional analysis of PLCAA conducted in Beretta is neither binding nor complete, it is likely both correct and indicative of the route future courts will take. While PLCAA supporters may see this as a victory, in reality it suggests entirely the opposite. The fact that a judge like Jack B. Weinstein, whose arguably "evident bias against gun manufacturers," led some to call for his impeachment even prior to the Beretta case, was willing to uphold PLCAA's constitutionality, once again highlights the Act's ineffectiveness in combating judicial activism.\textsuperscript{220} Judge Weinstein himself, although not explicitly, seemingly acknowledged that arguments concerning PLCAA's constitutionality are of little substance, for the law still "leaves to the courts 'the task of determining whether a

\textsuperscript{215} Beretta Plaintiffs' Motion in Opposition, supra note 210, at 21 (citing Kline, 80 U.S. at 146).
\textsuperscript{216} Beretta, 401 F. Supp. 2d at 291-93.
\textsuperscript{217} Id. at 290 (emphasis added).
\textsuperscript{218} See id. at 293.
\textsuperscript{219} Id. (citing Axel Johnson, Inc. v. Arthur Andersen & Co., 6 F.3d 78, 82 (2d Cir. 1993)).
claim falls within the ambit of the statute,"' as required by Kline. Weinstein's opinion in Beretta suggests that despite Congress's intention, PLCAA presents the best of both worlds for judicial activists: it allows them to avoid tough separation of powers issues by finding the Act constitutional, while interpreting its exceptions in a manner that allows continued redress against the Gun Industry in almost all third party liability claims.

VII. CONCLUSION

While this Comment is skeptical of the evidence offered in support of PLCAA and the Act's animosity towards proposed safety measures, it does not purport to determine the statute's true necessity. The figures offered by those on opposing sides of the gun debate are too extremely disparate to shed any real light on this issue. Rather, the merit of Gun Industry liability immunity is a matter of opinion, contingent less upon statistics concerning the cost of gun litigation and more upon one's fundamental belief whether guns, and the right to sell and carry them, are good or bad for society. Whatever this opinion may be, however, it appears that PLCAA is likely constitutional, and therefore here to stay.

Despite being here to stay, however, PLCAA will be largely ineffective in serving its two enumerated purposes: limiting judicial activism and preventing a litigation crisis for the gun industry. This impotence is the result of the judiciary's role in interpreting PLCAA's exceptions, thereby defining the Act's scope in an outcome-determinative manner. "Maverick judicial officer[s]," whom PLCAA supporters believed were expanding the common law in an unwarranted fashion, are unlikely to be deterred by a statute whose coverage they can define. When such judges are able to foster the success of the very lawsuits that PLCAA was designed to prevent, then the Act will also be ineffective in saving the Gun Industry from a litigation crisis (assuming that such a crisis exists). It is PLCAA's failure to serve these two enumerated purposes that renders it a bad act.

Congress, however, might argue that PLCAA's lack of bite is not a result of poor drafting but is instead the manifestation of an inherent limit on Congress's ability to combat activist adjudicating. Drafting an "activist-proof" statute would result in an endless stream of legislation and constant one-upsmanship by the judiciary. On the other hand, any attempt by Congress to simply dictate verdicts and rob the judiciary of its interpretative functions would certainly violate the Separation of Powers Doctrine as defined by Kline.

This argument, while true, reveals two problems at the core of PLCAA. First, PLCAA represents an attempt by Congress to do something that it is simply unable to do: prohibit judicial discretion. The fact that the Constitution and the separation of powers inherently bind Congress's

hands in combating judicial activism is no excuse. Were Congress to enact a law prohibiting Presidential veto, we would surely not spare them from criticism simply because the act’s ineffectiveness was the result of an inherent Constitutional limitation. Why should PLCAA’s failed attempt to prevent judicial activism be any different?

Second, PLCAA’s ineffectiveness reveals the Act for what it really is: a political stunt meant to assuage the concerns of those on both sides of the gun debate without actually doing anything of substance. By drafting PLCAA, Congress appeased gun manufacturers and owners by loading its legislative barrel and taking aim at maverick adjudicating and the gun litigation crisis. However, the PLCAA also provides a pleasant surprise for municipalities and gun control advocates, who have now come to realize that the congressional bullets used to attack judicial activism were merely blanks. Such hollow political compromises are not the province of Congress, whose time would be better spent on legitimate legislation.