



Assessing and Mitigating Legal Risk: Emerging Trends and Challenges to the PLCAA

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Recent developments may cause firearms manufacturers to reevaluate their business and marketing practices to lessen their legal exposure. As we wrote previously, the Protection of Lawful Commerce in Arms Act (PLCAA) provides only limited immunity to firearms manufacturers. Claims that the PLCAA provides blanket immunity, unique to the firearms industry, are both factually and legally inaccurate as found by multiple fact checkers, including the Associated Press and CNN.

The PLCAA does include several important exceptions, some of which are the subject of recent litigation with additional lawsuits imminent. The PLCAA negates any protection in the following circumstances:

When the transferor of a firearm or ammunition is convicted of knowingly transferring a gun or ammunition to a person who will use it in a crime. 15 U.S.C. § 7903(5)(A)(i).

When a seller negligently entrusts a gun or ammunition to someone, as was at issue in the Badger Guns case. 15 U.S.C. § 7903(5)(A)(ii). This is a crucial exception, because "straw purchases" that are not identified by sellers can subject sellers to liability.

When an industry member knowingly violates State or Federal law and the violation of law caused a person's injury. 15 U.S.C. § 7903(5)(A)(iii).

When a buyer sues for breach of warranty, such as when the product does not operate as promised or as intended. 15 U.S.C. § 7903(5)(A)(iv).

When someone is injured from the negligent design or manufacture of a product. 15 U.S.C. § 7903(5)(A)(v).

The last three exceptions are the subject of several forward-leaning lawsuits. These lawsuits seek to fit

certain fact patterns within one or more exceptions to immunity and thereby to provide private parties and municipalities with viable legal claims. Such claims are, no doubt, intended to create liability for industry participants when firearms are used by third parties to commit crimes.

As recently reported by Bloomberg Law, Jonathan Lowy recently left his post with the Brady Campaign to Prevent Gun Violence and started his own organization, Global Action on Gun Violence, where he seeks "to stop the gun industry's negligent business practices. . ." Lowy is reportedly serving as foreign legal counsel for a group of plaintiffs injured in a 2019 shooting in Toronto, Canada as well as for the Mexican government in a case alleging certain licensed firearms dealers participated in weapons trafficking.

These cases, along with recent changes to state laws and with investigations brought by state Attorneys General, presage a new set of legal battles. Such challenges often hinge on alleged violations of a state's consumer protection laws or recently-passed statutes like those in New York, Delaware, California or New Jersey. These statutes purport to expand the ability of public or private plaintiffs to bring a civil lawsuit against a manufacturer by creating a "predicate exception" under the PLCAA. Simply put, states are passing laws intended to facilitate citizens and elected officials in bringing lawsuits against firearms industry participants.

To that end, New York, Delaware, California, and New Jersey have all enacted versions of "reasonable controls" strict liability regimes pinpointing how the manufacturing, marketing, advertising, and distribution of guns may constitute a "public nuisance," codifying the very legal theories that enactment of the PLCAA was intended to negate. These state statutes largely contain the same provisions, requiring gun industry members—which includes those who manufacture, market, import or offer for wholesale or retail sale any qualified product in the state—to establish and use "reasonable controls" and procedures to prevent its products from being possessed, used, marketed, or sold unlawfully in the state. (See N.Y. Gen. Bus. Law §§ 898-----a *et seq.*) These mandated "reasonable controls and procedures" must include, but are not limited to, policies instituting screening, security, inventory, and other business practices to prevent theft of firearms as well as the sale to straw purchasers, traffickers, prohibited persons, or persons at risk of injuring themselves or others; and preventing deceptive acts and practices and false advertising in accordance with the state's unfair and deceptive trade practices laws. (N.Y. Gen. Bus. Law. § 898-a(2)). The New York statute has already survived its most recent constitutional challenge in federal court, although that case is currently on appeal in the Second Circuit Court of Appeals. *National Shooting Sports Foundation, Inc. v. James*, Case No. 1:21-cv-1348 (MAD/CFH), 2022 WL 1659192 (N.D.N.Y. May 25, 2022). The New Jersey, Delaware, and California "reasonable control" laws all have similar, if not identical, provisions. The New Jersey statute specifically states that a "gun industry member shall not, by conduct either unlawful in itself or unreasonable under all the circumstances, knowingly or recklessly create, maintain, or contribute to a public nuisance in this State through the sale, manufacturing, distribution, importing, or marketing of a gun-related product."

The California law includes provisions (1) expressly requiring firearm industry members to take reasonable precautions to ensure they do not sell, distribute, or provide a firearm-related product to a downstream distributor or retailer of firearm-related products who fails to comply with the firearm

industry standard of conduct, and (2) prohibiting firearm industry members from manufacturing, selling, or importing firearms and related products that are abnormally dangerous and likely to cause an unreasonable risk of harm to public health and safety. (Cal. Civ. Code § 3273.519) A firearm is deemed "abnormally dangerous" if:

(A) The firearm-related product's features render the product most suitable for assaultive purposes instead of lawful self-defense, hunting, or other legitimate sport and recreational activities.

(B) The firearm-related product is designed, sold, or marketed in a manner that foreseeably promotes conversion of legal firearm-related products into illegal firearm-related products.

(C) The firearm-related product is designed, sold, or marketed in a manner that is targeted at minors or other individuals who are legally prohibited from accessing firearms.

Cal. Civ. Code § 3273.519(c)(2)

Additionally, California enacted a separate statute aimed at members of the gun industry who may market to minors. The statute expressly makes it unlawful for any "firearm industry member" to "advertise, market, or arrange for placement of an advertising or marketing communication concerning any firearm-related product in a manner that is designed, intended, or reasonably appears to be attractive to minors." Cal. Bus. & Prof. Code § 22949.80(a)(1). The law goes into effect on July 1, 2023. In determining whether a firearm-related product is "attractive to minors," the statute requires the court to consider the "totality of circumstances," including but not limited to whether the marketing and advertising (1) uses caricatures or cartoon characters to promote firearm related products; (2) offers brand name merchandise for minors (i.e., stuffed animals, toys, games, etc.); (3) offers firearm-related products in sizes and colors that are specifically designed to appeal to minors; (4) uses images of minors in advertising and marketing materials; and (5) places advertising in publications created for the purpose of reaching a predominantly minor audience. On July 8, 2022, Junior Sports Magazines Inc. and others filed a lawsuit in federal court in Los Angeles arguing that the law violates their free speech rights under the First Amendment. Plaintiffs contend that California's law wrongly prohibits the promotion of lawful firearm-related events and programs and impermissibly restricts pro-gun organizations from promoting membership in their groups in ways deemed "attractive to minors." The court recently ruled against the Plaintiffs' motion for a preliminary injunction, which is expected to be appealed to the Ninth Circuit.

Clearly, the firearms industry—from the most iconic names in firearms down to the level of small retailers and distributors—faces new legal challenges from very talented, well-funded and motivated litigators, elected officials and gun control advocates. Although some of the most iconic names in firearms have been sued, risk exists for even the smallest retailers, manufacturers, distributors and others. Combining years of litigation experience with a deep knowledge of the firearms industry, mass torts and products liability, Williams Mullen seeks to prepare our clients to face these challenges. Mitigating risk, developing policies and employing best practices in marketing are integral to avoiding products liability litigation in this area.

In the coming weeks we will have more, including a webinar on mitigating risk as well as preparing for

and defending lawsuits in courts across the country. We will also announce new legal training sessions for the 2023 Firearms Industry Conference (FIC), to be held April 27-May 3, 2023, both virtually and in Atlanta. Early Bird savings of 25% end December 31, 2022.

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