Nigh-Impenetrable: Firearm Manufacturer Liability Under the Protection of Lawful Commerce in Arms Act in a Post-*Heller* World

*Kyle Armstrong**

Introduction

Daniel Williams, a high school athlete, plays basketball with some friends near his home in Buffalo, New York.[1] As they play, Daniel hears the screech of a swiftly braking car.[2] As the car comes to a halt, Cornell Caldwell rolls down the rear window to expose the barrel of a semiautomatic pistol.[3] Flashes burst forth from the end of the pistol's barrel, and Daniel feels a searing pain as a bullet penetrates his abdomen before the pistol's resounding crack pounds his eardrums.[4] Daniel was the victim of mistaken identity; Cornell believed he was a rival gang member.[5] Cornell was able to acquire the semiautomatic pistol from a private seller who acquired several firearms through an unlawful straw purchase.[6] Although the firearm was acquired unlawfully and functioned as intended, Daniel elected to bring suit against the semiautomatic pistol's manufacturer.[7]

---

* Antonin Scalia Law School, George Mason University; J.D. Expected 2018; Binghamton University, B.A. Sociology, 2014.

1 *See* Carolyn Thompson, *NY Appeal Court: Shooting Victim May Sue Gun Maker*, The San Diego Union-Tribune (Oct. 8, 2012), http://www.sandiegouniontribune.com/sdut-ny-appeal-court-shooting-victim-may-sue-gun-maker-2012oct08-story.html.

2 *See id.*

3 *See id.*

4 *See id.*

5 *Id.* at 145.

6 *See id.* A straw purchase is the purchase of a weapon for an individual by a friend, relative, or accomplice acting as the purchaser. *See* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1059-60 (N.Y. 2001).

7 *See* Williams v. Beemiller, Inc., 100 A.D.3d 143, 145 (N.Y. App. Div. 2012).

Unfortunately, Daniel's experience is shared by others. Gun violence is all too common in the United States.[8] Criminal responsibility for the type of violence Daniel suffered is placed on those pulling the trigger.[9] However, the question of civil liability is more difficult. Victims deserve compensation for both the physical and mental injuries they have suffered at the hands of their firearm-wielding assailant. But, the assailant's pockets are often far too shallow to properly compensate their victim.[10] The question, then, is who is also responsible for the victim's injuries? In answering this question, many have turned to the firearm manufacturer and others involved in firearm sales and marketing.[11] Firearm manufacturers, sellers, and marketers often have deeper pockets than the criminals using their products.[12] Courts, however, have been unwilling to extend liability for criminals' actions using their products onto firearm manufacturers, sellers, and marketers.[13] Congress recognized courts' unwillingness to extend general tort liability to firearm manufacturers when their products are unlawfully used by third parties and enacted the Protection of Lawful Commerce in Arms Act in 2005.[14] The Protection of Lawful Commerce in Arms Act preempts qualified civil liability actions brought against firearm manufacturers, and prohibits them from being brought in state and federal courts in the future.[15] However, the Protection of Lawful Commerce in Arms Act recognizes six exemptions to its general prohibition which allow traditional tort liability suits to stand

---

[8] Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 3 (2000).

[9] *See, e.g.*, VA. CODE ANN. § 18.2-32 (2017).

[10] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § D18 cmt. c (AM. LAW INST. 2000).

[11] *See infra* Part I.A.

[12] SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 1-2 (Timothy D. Lytton ed., 2005); *see also* City of New York v. Mickalis Pawn Shop, 645 F.3d 114, 118-19 (2d Cir. 2011) (discussing a situation where both defendants defaulted).

[13] *See, e.g.*, City of Philadelphia v. Beretta U.S.A. Corp, 277 F.3d 415, 422 (3d Cir. 2002); *but see* Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1159 (Md. 1985) (holding the assembler and seller of "Saturday Night Specials" strictly liable for the criminal use of their product).

[14] *See* 15 U.S.C. § 7901(a)(1)-(8) (2005).

[15] 15 U.S.C. § 7901(b)(1); R. Clay Larkin, *The "Protection of Lawful Commerce in Arms Act": Immunity for the Firearm Industry is a (Constitutional) Bulls-Eye*, 95 KY. L.J. 187, 191-93 (2007).

against firearm manufacturers.[16] Unfortunately, these exceptions are not entirely clear.[17]

Three years after Congress passed the Protection of Lawful Commerce in Arms Act, the Supreme Court heard the case of *District of Columbia v. Heller*.[18] The Court in *Heller* was concerned with whether a District of Columbia statute violated the Second Amendment.[19] Ultimately determining the statute did violate the Second Amendment, the Supreme Court held that the right to keep and bear arms was not limited to those in the service of a militia.[20] Rather, the Court found the right to keep and bear arms belonged to the individual.[21] Justice Scalia, writing for the majority, then went on to describe the limitations placed on the Second Amendment, as it could not be completely unlimited.[22] Within the Second Amendment's limitations, one finds the types of firearm control statutes that pass muster after *Heller*.[23]

This Comment will examine the *District of Columbia v. Heller* decision and the effect it will have on suits brought against firearm manufacturers.[24] Part I of this Comment will show the development of firearm manufacturer liability and the Protection of Lawful Commerce in Arms Act. First, it will show the way in which courts decided cases brought against firearm manufactures under general tort theories of liability and the state of firearm manufacturer liability prior to 2005. It will then delve into Congress's findings regarding firearm manufacturer liability and the purposes for which Congress passed the

16 15 U.S.C. § 7903(5)(a)(i)-(vi); Larkin, *supra* note 15, at 192.

17 *See* 15 U.S.C. § 7903(5)(a)(i)-(vi). *Compare* Ileto v. Glock, Inc., 565 F.3d 1126, 1138 (9th Cir. 2009) (holding that the codification of general tort law in the California Civil Code could not overcome Congress's purpose of preempting those types of suits against firearm manufacturers) *and* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 400 (2d Cir. 2008) (holding that a New York criminal nuisance statute was of general applicability and did not fit into PLCAA's third exception) *with* Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 434 (Ind. Ct. App. 2007) (holding that Indiana public nuisance law has been applied to the sale and manufacture of firearms and fell within the PLCAA's third exception).

18 *See* 15 U.S.C. §§ 7901-03; *see generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

19 *Heller*, 554 U.S. at 573.

20 *Id.* at 580-81.

21 *Id.*

22 *Heller*, 554 U.S. at 595; Benjamin H. Weissman, Note, *Regulating the Militia Well: Evaluating Choices for State and Municipal Regulators Post-Heller*, 82 FORDHAM L. REV. 3481, 3496 (2014).

23 *Heller*, 554 U.S. at 627.

24 District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

Protection of Lawful Commerce in Arms Act in 2005.[25] Part I will also show how courts determined the scope of the Protection of Lawful Commerce in Arms Act's exceptions to dismissal, as well as, which cases would be barred and which would be allowed to go forward under the Act. Part I of this Comment will then shift focus to the Supreme Court's decision in *District of Columbia v. Heller*,[26] describing the District of Columbia statute under which Dick Anthony Heller brought suit, analyzing the case's holding, and how it effects the types of statutes that may be enacted following this decision. Part II of this Comment will analyze how possible legislation following the decision in *Heller* will affect suits brought against firearm manufacturers and whether they fall within the Protection of Lawful Commerce in Arms Act's exceptions.[27]

I. BACKGROUND

A. *Firearm Manufacturer Liability*

Throughout the early 1980s, violent crime victims injured by firearms and seeking compensation for their losses turned to tort litigation.[28] Although tort claims brought against assailants found success, the assailants' pockets were not deep enough.[29] By suing gun manufacturers, gun violence victims had a greater chance of receiving adequate compensation for their losses.[30] Those suing firearm manufacturers brought their suits under three theories of tort liability: strict liability, products liability, and negligence.[31]

1. Tort Theories of Liability: Strict Liability

The strict liability theory states that an individual who engages in an activity considered abnormally dangerous is liable to another for harm resulting from that activity to their person, land, or chattel.[32]

---

[25] 15 U.S.C. § 7901(a)-(b) (2005).

[26] *Heller*, 554 U.S. at 570.

[27] 15 U.S.C. § 7903(5)(A)(i)-(vi); *Heller*, 554 U.S. at 570.

[28] Lytton, *supra* note 8, at 3; *see also* David G. Owen, *Inherent Product Hazards*, 93 KY. L.J. 377, 404 (2004).

[29] *See* Lytton, *supra* note 8, at 3.

[30] *See* Lytton, *supra* note 8, at 3.

[31] Lytton, *supra* note 8, at 6; Owen, *supra* note 28, at 406.

[32] RESTATEMENT (SECOND) OF TORTS § 519(1) (AM. LAW INST. 1997).

This remains true even if the individual has taken the utmost care to prevent the harm from occurring.[33] In actions against firearm manufacturers, plaintiffs have alleged that by manufacturing, distributing, and selling firearms, firearm manufacturers have engaged in an abnormally dangerous activity.[34] This approach has overwhelmingly failed.[35] Multiple courts in various jurisdictions held that the manufacturing, marketing, and sale of firearms did not constitute an abnormally dangerous activity.[36]

One exception arose in the stream of failures in strict liability tort suits brought against firearm manufacturers.[37] This exception occurred when an individual used a firearm to rob a grocery store which resulted in an employee being shot.[38] Under the strict liability theory, the grocery store employee brought suit against R.G. Industries, Inc., the assembler and seller of the Rohm Model RG-38S Revolver the robber used.[39] The employee asserted the revolver was "abnormally dangerous."[40] The court characterized the robber's revolver as a "Saturday Night Special," or a firearm "generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability."[41] The court in *Kelley v. R.G. Industries, Inc.*, concluded that, based on its characteristics, the "Saturday Night Special" was unemployable in any legitimate use.[42] Although the court acknowledged that no other court had made a distinction between "Saturday Night Specials" and other handguns when deciding a strict liability claim brought against a firearm manufacturer, it analogized a "Saturday Night Special" to a slingshot.[43] The court concluded that it was consistent with public policy to hold the manufacturers of "Saturday Night

---

33 *Id.*

34 Lytton, *supra* note 8, at 8.

35 Lytton, *supra* note 8, at 8-9; Owen, *supra* note 28, at 406.

36 *See* Indiana Harbor Belt R. Co. v. American Cyanamid Co., 916 F.2d 1174, 1183 (7th Cir. 1990); *see also* Perkins v. F.I.E. Corp. 762 F.2d 1250, 1264 (5th Cir. 1985); Lytton, *supra* note 8, at 9.

37 Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1160 (Md. 1985); Lytton, *supra* note 9, at 9-10.

38 *Kelley*, 497 A.2d at 1144; Lytton, *supra* note 8, at 9-10.

39 *Kelley*, 497 A.2d at 1145.

40 *Id.* at 1145.

41 *Id.* at 1153-54.

42 *Id.* at 1154.

43 *Id.* at 1159 (citing Moning v. Alfono, 254 N.W.2d 759, 769-70 (Mich. 1977) (holding a slingshot manufacturer liable for an injury that occurred when one child shot another child with their product). The *Kelley* Court reasoned that the marketing of a dangerous product, like sling-

Specials" strictly liable for the victims' injuries sustained at the hands of those criminals utilizing their products.[44]

Although the litigants hoped a potential suit against firearm manufacturers could be successful based on the *Kelley* decision, this hope was short lived.[45] Not long after the court decided *Kelley*, the Maryland legislature enacted a gun control measure for the purpose of overturning it.[46] No longer would the strict liability theory serve as an avenue for litigants seeking to bring tort suits against firearms manufacturers to gain compensation for their injuries sustained at the hands of criminals.[47]

The *Kelley* court's assertion that "Saturday Night Specials" are useless for self-defense and are particularly attractive for criminal misuse lacks empirical support.[48] A firearm with the characteristics of a "Saturday Night Special" is useful to a criminal threatening their victim, so logically a potential crime victim attempting to stave off their attacker could also find a similar firearm useful as well.[49] Few crimes have been committed utilizing weapons fitting the description of a "Saturday Night Special"; the majority of these firearms are utilized for non-criminal purposes.[50]

2. Theories of Tort Liability: Products Liability

Plaintiffs have also attempted to bring suit against firearm manufacturers based on the tort theory of products liability.[51] Under the products liability theory, a product's seller is liable to that product's

---

shots, to a purchaser who would foreseeably misuse it, specifically children, could be viewed as unreasonable.

44 *Id.* at 1159.

45 *See* Monica Fennel, *Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiated a Model State Gun Control Law*, 13 HAMLINE J. OF PUB. L. & POL'Y 37, 43-47 (1992).

46 MD. CODE ANN., PUB. SAFETY §§ 5-401-5-406 (LexisNexis 1992) (§5-402(b)(1) states that: "[a] person is not strictly liable for damages for injuries to another that result from the criminal use of a firearm by a third person," and §5-405(a)(1) empowers the Handgun Roster Board to "compile and maintain a handgun roster of authorized handguns that are useful for legitimate sporting, self-protection, or law enforcement purposes . . . ."); Fennel, *supra* note 45, at 44.

47 *See* Lytton, *supra* note 8, at 10.

48 *See* Lytton, *supra* note 8, at 12.

49 Lytton, *supra* note 8, at 12.

50 *See* Lytton, *supra* note 8, at 12.

51 *See* GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 130-35 (1997); Lytton, *supra* note 8, at 10-11.

user for physical harm to his person or property caused by the product.[52] The seller is liable if the product is in a defective condition that is unreasonably dangerous.[53] Two conditions must also be met for the seller to be liable to the user: (1) the seller's business must be selling the defective product, and (2) the product's condition cannot be substantially altered prior to its sale to the user.[54] Violent crime victims bringing suits against firearm manufacturers have argued that, because the risks associated with firearms outweigh their utility, these firearms were sold in a defective condition that is unreasonably dangerous.[55] Courts have rejected these claims because the plaintiffs failed to allege a defect in the firearm itself.[56] In fact, plaintiffs have admitted that the firearm functioned as it was designed and intended.[57] Courts have also rejected these plaintiffs for failure to show the gun's defect partially caused the malfunction to occur.[58]

3. Theories of Tort Liability: Negligence

Under a negligence theory of tort liability, victims injured by criminals armed with firearms alleged that the firearm manufacturers neglected to take the reasonable precautions necessary to prevent their products from falling into criminals' hands.[59] The overwhelming majority of these cases have been dismissed before trial or by summary judgment in favor of the firearm manufacturer.[60] These judgments and dismissals are based on judicial insistence that firearm

---

52 RESTATEMENT (SECOND) OF TORTS § 402(A)(1) (AM. LAW INST. 1965).

53 *Id.*

54 *Id.* § 402(A)(1)(a)-(b).

55 Lytton, *supra* note 8, at 11.

56 *Id.* at 11 (citing *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1272 (5th Cir. 1985); Caveny v. Raven Arms, Co., 665 F. Supp. 530, 532-33 (S.D. Ohio 1987); Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985); Richardson v. Holland, 741 S.W.2d 751, 753-54 (Mo. Ct. App. 1987)).

57 Hamilton v. Beretta, U.S.A. Corp., 750 N.E.2d 1055, 1063 (N.Y. 2001); Lytton, *supra* note 8, at 11.

58 Lytton, *supra* note 8, at 11-12.

59 *See Hamilton*, 750 N.E.2d at 1058-59; Lytton, *supra* note 8, at 21.

60 *See* Lytton, *supra* note 8, at 21; *see also* Riordan v. International Armament Corp., 477 N.E.2d 1293, 1294 (Ill. App. Ct. 1985); *but see Hamilton*, 750 N.E.2d at 1055, 1060-61 (discussing where defendant firearm manufacturers unsuccessfully moved for judgment as a matter of law in the District Court which concluded that defendants had a special relationship with the potential victims of gun violence; however, the Court of Appeals of New York reversed the judgment of the District Court, finding that the plaintiffs had failed to present evidence that the firearm manufacturers knew or should have known that their distributors regularly sold firearms to unauthorized users or criminals).

manufacturers do not owe the public a duty of care in the marketing of their non-defective product.[61] Without the presence of a contractual obligation, for a manufacturer to be liable "[t]here must also be knowledge that in the usual course of events the danger will be shared by others than the buyer."[62] Generally, "manufacturers have a duty to exercise reasonable care to guard against foreseeable injuries to foreseeable victims."[63] Foreseeability is not definitive of the duty owed, but it is determinative of that duty's scope.[64] Courts have also been unwilling to place liability for the injuries sustained by violent crime victims on firearm manufacturers because of third party intervening actions.[65] There is also no special relationship, like the relationship parents have with their children, that would create liability between a firearm manufacturer and a criminal utilizing their firearm, or between a firearm manufacturer and a criminal's victim.[66] "[S]pecial relationships are characterized by the individual's unique capacity to control the risk of harm posed by third parties."[67]

Individuals are not the only litigants bringing suits against firearm manufacturers.[68] Municipalities have also brought suits against firearm manufacturers, claiming the distribution of firearms within their communities constitutes a public nuisance.[69] "[A] public nuisance is 'an unreasonable interference with a right common to the general public.'"[70] For instance, in *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, Camden County alleged that firearm manufacturers "created and contributed to the widespread criminal use of handguns in the County" through their marketing and distribution

---

61 *Hamilton*, 750 N.E.2d at 1062-63 (citing McCarthy v. Olin Corp., 119 F.3d 148, 156-57 (2d Cir. 1997); *see also* Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1533-34 (11th Cir. 1986)).

62 MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

63 Lytton, *supra* note 8, at 22.

64 *See* Pulka v. Edelman, 358 N.E.2d 1019, 1022 (N.Y. 1976) ("One should not be held legally responsible for the conduct of others merely because they are within our sight or environs. Neither should one be answerable merely because there are others whose activities are such as to cause one to envision damages or injuries as a consequence of those activities.").

65 *See* Lytton, *supra* note 8, at 22-23; *Hamilton*, 750 N.E.2d at 1061.

66 *See Hamilton*, 750 N.E.2d at 1066; *see also* Lytton, *supra* note 8, at 23.

67 Lytton, *supra* note 8, at 23.

68 *See, e.g.*, Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 538 (3d Cir. 2001).

69 *See id.*

70 Phila. Elec. Co. v. Hercules, Inc., 762 F.2d 303, 315 (3d Cir. 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 821(B)(2) (AM. LAW INST. 1979)).

practices.[71] Firearm manufacturers had contributed to this by allowing criminals easy access to their products through a handgun distribution system that they facilitated and maintained.[72] For the County's unreasonable interference allegation to be actionable, the firearm manufacturers must exert a degree of control over the source of the unreasonable interference with the public right.[73] It is independent third parties, rather than the firearm manufacturer, who facilitate firearms distribution to criminals.[74] The firearm manufacturer exerts no control over these independent third parties.[75] The manufacture of lawful products and their placement into the stream of commerce in a lawful manner has never been allowed to expose a manufacturer to liability under the public nuisance doctrine by a New Jersey court.[76] A boundary has been erected between product liability and public nuisance law, without which public nuisance law would, like a black hole, engulf the entirety of tort law.[77] The court reasoned it would be an absurdity to say that although defective products were not, as a matter of law, a public nuisance, non-defective products could be.[78]

B. *Enactment of the Protection of Lawful Commerce in Arms Act*

Passed in 2005, the Protection of Lawful Commerce in Arms Act ("PLCAA") prohibits qualified civil liability actions from being brought against firearm manufacturers in state and federal courts.[79] Its supporters hailed the PLCAA's enactment as an important step towards completely eradicating lawsuits brought by victims of the criminal use of firearms.[80] The PLCAA opens with eight Congressional findings; these support not only the necessity of limiting the liability of firearm manufacturers, but also the constitutional authority for Congress to pass such legislation.[81] Congress's authority to enact

---

71 *Camden Cty*., 273 F.3d at 538.

72 *Id.* at 538.

73 *See id.* at 539.

74 Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 541 (3d Cir. 2001).

75 *Id.*

76 *Id.* at 540.

77 Camden Cty., 273 F.3d at 540.

78 *Id.* at 540.

79 15 U.S.C. § 7901(b) (2005); Larkin, *supra* note 15, at 187.

80 Larkin, *supra* note 15, at 187.

81 15 U.S.C. § 7901(a)(1)-(8) ("Congress finds the following: (1) [t]he Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms

the PLCAA rests on the Second Amendment and the Commerce Clause.[82] The Second Amendment states: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[83] Because businesses engaged in the "lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products" have shipped their products in interstate or foreign commerce, it is within Congress's authority to regulate those firearms or ammunition products based on the Commerce Clause.[84] Congress was motivated

shall not be infringed. (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms. (3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for harm caused by the misuse of firearms by third parties, including criminals. (4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, 26 USCS §§ 5801 et seq., and the Arms Export Control Act, 22 USCS §§ 2751 et seq. (5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended. (6) 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 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. (7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution. (8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States"); Larkin, *supra* note 15, at 191.

[82] *See* U.S. CONST. art. 1, § 8, cl. 3; U.S. CONST. amend. II; Larkin, *supra* note 15, at 191.

[83] U.S. CONST. amend. II.

[84] U.S. CONST. art. 1, § 8, cl. 3; 15 U.S.C. § 7901(a)(5); *see also* United States v. Lopez, 514 U.S. 549, 558-59 (1995).

to enact the PLCAA because of the fear that unlimited liability could result from holding firearm manufacturers liable for criminals who misused their products.[85] With this in mind, Congress immunized firearm manufacturers from lawsuits brought against them "for the harm solely caused by the criminal or unlawful misuse of firearm products . . . when the product functioned as designed and intended."[86] However, as discussed below, the PLCAA acknowledged six exceptions not excusing firearm manufacturers "from liability for negligent or criminal conduct or from traditional products liability claims."[87]

C. *Firearm Manufacturer Liability Following the PLCAA*

The PLCAA calls for the immediate dismissal of "qualified civil liability actions" currently pending in federal and state courts and a general prohibition on them being brought in the future against firearm manufacturers.[88] The definition of "qualified civil liability

---

[85] 15 U.S.C. § 7901(a)(6).

[86] *Id.* § 7901(b)(1).

[87] *Id.* § 7903(5)(a)(i)-(vi) ("The term 'qualified civil liability action' . . . shall not include—(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; (ii) an action brought against a seller for negligent entrustment or negligence per se; (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18; (iv) an action for breach of contract or warranty in connection with the purchase of the product; (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or (vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18, 18 USCS §§ 921 et seq., or chapter 53 of Title 26, United States Code, 26 USCS §§ 5801 et seq."); Larkin, *supra* note 15, at 193; *see also* discussion *infra* Part I.C.

[88] *See* 15 U.S.C. § 7902.

actions" specifically excluded certain actions.[89] An action brought against a firearm's transferor, who knew the firearm would be used in a violent crime, is not a "qualified civil liability action."[90] If a seller negligently entrusted a firearm to an individual, or is negligent per se (negligent in violation of a statute), then a suit against that seller would not be dismissed under the PLCAA.[91] "An action for breach of contract or warranty in connection with the purchase of" a firearm would also not be barred by the PLCAA.[92] The PLCAA does not bar all products liability claims against firearm manufacturers; so long as the firearm was lawfully used as intended or in a way that the manufacturer could have foreseen the products liability claim may proceed.[93] If the injury occurred in a criminal act involving a firearm, then any products liability suit brought against the firearm manufacturer would be barred, even if its design or manufacture was defective.[94] The PLCAA's final exception allows the Attorney General to bring suit for the unlicensed importation, manufacture, or dealing in firearms.[95]

Following the PLCAA's enactment, the courts were left to determine the scope of its six listed exceptions.[96] There has been a great discrepancy among the courts as to which actions the PLCAA bars, and which are exceptions.[97] Among the PLCAA's six exceptions, the third has received the most judicial attention.[98] According to the PLCAA's third exception, referred to as the predicate exception, "the term 'qualified civil liability' action . . . shall not include 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."[99] The violation of that applicable statute must have

---

89 *Id.* § 7903(5)(a)(i)-(vi).

90 *Id.* § 7903(5)(a)(i).

91 *Id.* § 7903(5)(a)(ii).

92 *Id.* § 7903(5)(a)(iv).

93 *Id.* § 7903(5)(a)(v).

94 Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(a)(v) (2005).

95 *Id.* § 7903(5)(a)(vi).

96 Larkin, *supra* note 15, at 192.

97 *See supra* note 17 .

98 *See, e.g.*, *Beretta U.S.A. Corp.*, 524 F.3d 384; *Ileto*, 565 F.3d 1126; *Smith & Wesson Corp.*, 875 N.E.2d 422.

99 15 U.S.C. § 7903(5)(a)(iii); *See Beretta U.S.A. Corp.*, 524 F.3d at 390; *Ileto*, 565 F.3d at 1132; *Smith & Wesson Corp.*, 875 N.E.2d at 429-30.

proximately caused the harm complained of in the suit.[100] The principle point of contention in the predicate exception is the scope of the term "applicable."[101]

1. *Smith & Wesson Corp. v. City of Gary*

In 1999, the city of Gary, Indiana brought claims of public nuisance, negligent distribution, and negligent design against various firearm manufacturers, distributors, and dealers.[102] The city alleged that (1) the named dealers had knowingly sold firearms to straw purchasers;[103] (2) the manufacturers knew about these illegal firearm sales; (3) these practices resulted in substantial cost to the public; and (4) the manufacturers negligently designed firearms.[104] The Indiana Supreme Court allowed the city's claims to proceed, reversing both the trial court and the Indiana Court of Appeals dismissals.[105] Following the PLCAA's 2005 enactment, the manufacturers again moved for dismissal.[106] The city argued its public nuisance claim, which the Indiana Supreme Court determined was the dispositive issue, fit within the PLCAA's third exception.[107] Because the Indiana Supreme Court applied Indiana's public nuisance law to the defendants' sales practices, the city argued Indiana public nuisance law had been applied to the sale and manufacture of firearms and thus fell within the third exception.[108] The defendants countered, arguing the predicate exception is only applicable to statutes regulating the marketing or sale of firearms.[109] Ultimately, the court determined the PLCAA did not bar the city's claim because the city's complaint alleged the defendants had violated a state statute applicable to the manufacture or sale of firearms in accordance with the exception.[110]

---

100 15 U.S.C. § 7903(5)(a)(iii); *See Beretta U.S.A. Corp.*, 524 F.3d at 390; *Ileto*, 565 F.3d at 1132; *Smith & Wesson Corp.*, 875 N.E.2d at 429-30.

101 *Ileto*, 565 F.3d at 1133; *Smith & Wesson Corp.*, 875 N.E.2d at 430.

102 *Smith & Wesson Corp.*, 875 N.E.2d at 424-25.

103 *Id.* at 424; *see also* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1059-60 (N.Y. 2001). A straw purchase is the purchase of a weapon for an individual by a friend, relative, or accomplice acting as the purchaser.

104 Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 425 (Ind. Ct. App. 2007).

105 *Id.* at 425-26.

106 *Id.* at 428-29.

107 *Id.* at 429.

108 *Id.* at 430.

109 *Id.* at 431.

110 Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 434 (Ind. Ct. App. 2007).

2. *City of New York v. Beretta U.S.A. Corp.*

The next year, the Second Circuit held New York's criminal nuisance statute was not "applicable to the sale or marketing of" firearms.[111] The City of New York alleged the defendant firearm suppliers created a public nuisance, because they knowingly distributed firearms into the illegal market.[112] On the same day the PLCAA was enacted, the defendant firearms suppliers moved to dismiss the complaint against them.[113] In response, the plaintiffs argued their suit should not be dismissed because it fell into the PLCAA's third exception.[114] According to the plaintiffs, New York's criminal nuisance statute is specifically applicable to the sale and marketing of firearms, and thus satisfies the third exception's requirements.[115] The Second Circuit disagreed with the plaintiffs.[116] Although it was unimportant to the Second Circuit that New York's criminal nuisance statute did not contain any express reference to firearms, the Second Circuit still found the statute to be of general applicability not encompassing the conduct complained of by the City.[117] Because the plaintiff's complaint could not fit into the PLCAA's third exception, the lawsuit was dismissed.[118]

3. *Ileto v. Glock, Inc.*

Two years after the decision in *Smith & Wesson Corp.*, the Ninth Circuit held in the same manner as the Second Circuit.[119] In 2001, shooting victims brought suit against firearm manufacturers, market-

111 *See* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 404 (2d Cir. 2008).

112 *Id.* at 389.

113 *Id.* at 389. The city's action had been stayed, because of the terrorist attacks which took place on September 11, 2001.

114 *Id.*

115 N.Y. PENAL LAW § 240.45 (Consol. 1989) (A person is guilty of criminal nuisance in the second degree when: (1) By conduct either unlawful in itself or unreasonable under all circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or (2) He knowingly conducts or maintains any premises , place or resort where persons gather for purposes of engaging in unlawful conduct); *Beretta U.S.A. Corp.*, 524 F.3d at 390.

116 *See Beretta U.S.A. Corp.*, 524 F.3d 384, 400 (2d. Cir. 2008).

117 *Id.*

118 *Id.*

119 *See* Ileto v. Glock, Inc., 565 F.3d 1126, 1138 (9th Cir. 2009); *Beretta U.S.A. Corp.*, 524 F.3d at 389.

ers, importers, distributors, and sellers.[120] The plaintiffs alleged the defendants intentionally placed an excessive amount of firearms into the market with the knowledge that they would be sold to illegal buyers.[121] Under California's common law tort statute, plaintiffs may seek compensation from defendants whom "foreseeably and proximately caus[e] injury, emotional distress, and death through knowing, intentional, reckless, and negligent conduct."[122] The 2005 enactment of the PLCAA required courts to dismiss all pending and future lawsuits preempted by the legislation.[123] In accordance with the PLCAA, the district court dismissed the claims against the federal firearm licensees named as defendants.[124] On appeal, the plaintiffs argued their suit fell within the PLCAA's third exception, as the city of Gary had in *Smith & Wesson Corp*.[125] The plaintiffs argued the federal firearm licensee defendants knowingly violated the California Civil Code, which codified general tort law.[126] The Ninth Circuit disagreed, concluding that general tort claims against firearm manufacturers, like the claim brought here, were exactly what Congress intended to preempt by enacting the PLCAA.[127] Although California chose to codify general tort law claims into its civil code, the Ninth Circuit held it could not overcome Congress's purpose for enacting the PLCAA.[128]

Finding the text of the PLCAA inconclusive, courts turned to its purpose section to determine the proper scope of the term "applicable."[129] The purpose section of the PLCAA revealed that Congress intended to preempt suits brought under general tort theories of liability, even where those theories of tort liability have been codified.[130] The PLCAA's predicate exception was meant to apply only to state or federal statutes regulating the manufacture, importation, sale, marketing, and use of firearms.[131] Therefore, judicial decisions affecting

120 *Ileto*, 565 F.3d at 1130.

121 *Id.*

122 *Id.*

123 *Id.* at 1131.

124 *Id.*

125 Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 429 (Ind. Ct. App. 2007).

126 *See* CAL. CIV. CODE §§ 1714(a), 3479, 3480 (West 2012); *Ileto*, 565 F.3d at 1132-33.

127 *Ileto*, 565 F.3d at 1138.

128 *Id.* at 1137-38.

129 Protection of Lawful Commerce in Arms Act, 15 U.S.C § 7901(b) (2005); *see also Ileto*, 565 F.3d at 1135; City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 401 (2d Cir. 2008).

130 *Ileto*, 565 F.3d at 1136.

131 Ileto v. Glock Inc., 565 F.3d 1126, 1136 (9th Cir. 2009).

those types of statutes will, in turn, have a determinative effect on suits the PLCAA potentially bars.[132]

D. District of Columbia v. Heller

1. Case Background

This suit finds its roots in the District of Columbia's general prohibition of the possession of handguns.[133] According to the District of Columbia Official Code, it is illegal to carry a firearm that has not been registered.[134] Furthermore, the District of Columbia prohibits the registration of handguns.[135] Registered firearms may be kept within the home, but they must be either disassembled and unloaded or be rendered secure by some type of locking device.[136] Despite being a District of Columbia special police officer and authorized to carry a handgun while on duty, the District of Columbia refused to permit Dick Heller to register a handgun he desired to keep in his home.[137] Heller filed suit against the District of Columbia, seeking to enjoin it from enforcing its ban on handgun possession and its licensing requirement for carrying a firearm within the home.[138]

2. Holding in *District of Columbia v. Heller*

To determine whether the District of Columbia's statute violated the Second Amendment, the Supreme Court first turned to the Amendment's meaning.[139] The Second Amendment states: "[a] well[-]regulated [m]ilitia, being necessary to the security of a free [s]tate, the right of the people to keep and bear [a]rms, shall not be infringed."[140] The District of Columbia argued the right enshrined in the Second Amendment is guaranteed only in connection to service in a militia.[141] Heller, however, interpreted the Second Amendment to

132 *See id.* at 1136.
133 District of Columbia v. Heller, 554 U.S. 570, 573 (2008).
134 D.C. CODE §§ 7-2501.01(12), 7-2502.01(a) (2001); *see Heller*, 554 U.S. at 574-75.
135 D.C. CODE § 7-2502.02(a)(4) (2001); *see Heller*, 554 U.S. at 574-75.
136 D.C. CODE § 7-2507.02 (2001); *see Heller*, 554 U.S. at 575.
137 *Heller*, 554 U.S. at 575-76.
138 *Id.*
139 District of Columbia v. Heller, 554 U.S. 570, 576 (2008).
140 U.S. CONST. amend. II.
141 *Heller*, 554 U.S. at 577.

not include any requirement of militia service.[142] Rather, Heller interpreted the Second Amendment to protect "an individual right to possess a firearm . . . and to use that arm for traditionally lawful purposes."[143] After examining both the prefatory and operative clauses of the Second Amendment, Justice Antonin Scalia, writing for the majority, determined it would be inconsistent with the Amendment's language to protect only the right of those in the militia, when the right is more clearly vested in the people.[144] Turning then to the definition of the term "arms," Justice Scalia rejected the argument that "arms" could only refer to those types of firearms in existence throughout the eighteenth century.[145] Instead, Justice Scalia interpreted the term "arms" to refer to "all instruments that constitute bearable arms."[146] "[T]o keep and bear arms" is best interpreted to mean the wearing, bearing, or carrying of arms in preparedness for offensive or defensive action.[147] Justice Scalia concluded the individual has the right to keep and bear arms vested in the Second Amendment.[148]

However, like the rights conferred by the First Amendment, the Second Amendment is not without limits.[149] It does not extend to any weapon nor to any manner of carry for any purpose imaginable.[150] Prohibiting the concealed carry of arms has long been considered lawful, along with prohibiting firearm possession by convicted felons and the mentally ill.[151] The Second Amendment's protected classes of arms were limited those "'in common use at the time'"[152] This limitation, Justice Scalia concluded, was based on the historical prohibition

---

142 *See id.*

143 *Id.*

144 *Heller*, 554 U.S. at 580-81. The prefatory clause of the Second Amendment being: "[a] well[-]regulated [m]ilitia, being necessary for the security of a free [s]tate," and the operative clause being: "the right of the people to keep and bear [a]rms, shall not be infringed;"; *see also* Weissman, *supra* note 22, at 3494-95.

145 District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

146 *Id.* at 582.

147 *Id.* at 583 (citing Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

148 *Heller*, 554 U.S. at 595; Weissman, *supra* note 22, at 3483.

149 *Heller*, 554 U.S. at 595; Weissman, *supra* note 22, at 3496.

150 *Heller*, 554 U.S. at 626.

151 District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

152 *Id.* at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

on the carry of "dangerous and unusual weapons."[153] By stating this limitation, Justice Scalia understood that arms useful for military service may be banned.[154] However, this limitation does not affect the Second Amendment's operative clause.[155] Rather, it reflects the idea of the militia being a group of able-bodied citizens who would bring a variety of lawful weapons, not necessarily the sophisticated weapons necessary to counter modern bombers and tanks, to bear in their duty.[156]

3. *District of Columbia v. Heller* Brought to Bear Against the States

The *McDonald v. City of Chicago* decision made the holding in *Heller* applicable against the states through the Fourteenth Amendment.[157] The City of Chicago maintained laws extremely similar to those of the District of Columbia, barring the possession of unregistered firearms, while simultaneously barring the registration of most handguns.[158] Chicago residents who had been targeted by threats and violence, and believed that access to firearms would provide them with a degree of protection, brought suit against the city for violating the Second and Fourteenth Amendments.[159] In determining whether the Second Amendment was applicable to the states, the Supreme Court had to determine whether the right to keep and bear arms was "deeply rooted in this Nation's history and tradition."[160] Writing for the majority, Justice Alito found the decision in *Heller* to have made this determination.[161] Throughout history, self-defense has been recognized as a basic right.[162] The *Heller* decision held that the right to self-defense was a primary component of the Second Amendment.[163]

---

153 *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (4th ed. 1769)).

154 *Id.*

155 *See id.* at 627-28.

156 *See Heller*, 554 U.S. at 627.

157 *See* McDonald v. City of Chicago, 561 U.S. 742, 750 (2010); *see generally* District of Columbia v. Heller, 554 U.S. 570 (2008).

158 *See McDonald*, 561 U.S. at 750; *Heller*, 554 U.S. at 573.

159 *McDonald*, 561 U.S. at 751-52.

160 *Id.* at 767 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

161 *Id.* at 767-68 (citing *Heller*, 554 U.S. at 599).

162 *Id.* at 767.

163 McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (citing District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

Justice Scalia's decision in *Heller* made it clear the rights prescribed in the Second Amendment are "deeply rooted in this Nation's history and tradition."[164] Because the Second Amendment protects a fundamental right, it is as applicable to the states as it is to the federal government.[165]

II. THE EFFECT OF *DISTRICT OF COLUMBIA V. HELLER* ON FIREARM MANUFACTURER LIABILITY UNDER THE PLCAA

A. *What May Be Banned Following the Decision in* District of Columbia v. Heller

To determine *District of Columbia v. Heller*'s effect on firearm manufacturer liability, the types of regulations that may be enacted after the *Heller* decision must first be understood. The Second Amendment vests the right to keep and bear arms in individuals regardless of their membership in a militia.[166] In *Heller*, Justice Scalia concluded the term "arms" does not only refer to those in existence at the time of the Bill of Rights' ratification, but rather to "all instruments that constitute bearable arms."[167] However, Justice Scalia recognized limitations on the types of arms that could be kept and borne by individuals.[168] Recognizing that carrying "dangerous and unusual weapons" has historically been prohibited, Justice Scalia stated only those arms "in common use at the time" were among the Second Amendment's protected class.[169]

The prohibitions in *Heller* mean the weapons that would be "most useful in military service" may be banned without violating the Second Amendment.[170] Eighteenth century militias brought arms they kept in their homes when called into service, not arms specifically created for fending off military attack.[171] In the Eighteenth Century it may have been commonplace for citizenry to maintain arms in their

164 *McDonald*, 561 U.S. at 768 (citing *Heller*, 554 U.S. at 592-94 (2008); *see also Glucksberg*, 521 U.S. at 721).

165 *McDonald*, 561 U.S. at 791.

166 *Heller*, 554 U.S. at 580-81, 595.

167 *Id.* at 582.

168 *See id.* at 627.

169 *Id.*

170 *Id.*

171 *Id.*

homes able to match those brought to bear against them by a military force.[172] But in the modern era it would be unusual for a citizen to have this same capability.[173] However, it is unclear when a weapon ceases to be "dangerous and unusual," and begins to be "in common use."[174] This lack of clarity has created a legal fog over the area of firearm manufacturer liability.

If firearm manufacturers produced, marketed, or sold "dangerous and unusual weapons" which could be banned, then a suit brought against them would probably fall under the PLCAA's second exception.[175] A "qualified civil liability action" does not include "an action brought against a seller for negligent entrustment or negligence per se."[176] A firearm manufacturer violating a statute banning the manufacture, marketing, or sale of a firearm would be negligent per se.[177] It could also fit into the PLCAA's predicate exception if the statute was found to be "applicable to the sale or marketing of" firearms.[178] However, if a firearm manufacturer produced, marketed, or sold weapons "in common use," a suit against them would likely be dismissed under the PLCAA.[179] There would be no statute in existence to violate or to be "applicable to the sale or marketing of" firearms.[180] But what would cause a firearm to be either "dangerous and unusual" or "in common use at the time?"[181] Justice Scalia, in *Heller*, recognized that weapons considered "most useful in military service" or "dangerous and unusual" may be banned.[182] Justice Scalia also concluded firearms "in common use at the time" were in a class of weapons protected by the Second Amendment.[183] This legal fog over firearm manufacturer liability is best illustrated by the manufacture, marketing, and sale of semiautomatic rifles, like the AR-15.

---

172 District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

173 *See id.*

174 *See id.*

175 *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(A)(ii) (2005); District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

176 15 U.S.C. § 7903(5)(a)(ii).

177 *See* discussion *infra* Part I.C.

178 15 U.S.C. § 7903(5)(a)(iii).

179 15 U.S.C. § 7903; *see* District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

180 *See* 15 U.S.C. § 7903(5)(a)(ii)-(iii).

181 *Heller*, 554 U.S. at 627.

182 *Id.*

183 *Id.*

B. *A Brief History of Semiautomatic Rifles in the United States*

In *Heller*, Justice Scalia specifically mentions that "weapons that are most useful in military service . . . may be banned."[184] Justice Scalia gives the M-16 rifle as an example of such a weapon.[185] Eugene Stoner of the Armalite Corporation began development of the M-16 in 1957 in response to a request by the commanding general of the United States Continental Army Command, General Willard C. Wyman.[186] The request by General Wyman was for a light rifle, capable of fully automatic—continuous fire so long as the trigger is depressed—or semiautomatic—a singular round fired per trigger pull—fire, chambered in a high velocity .22 caliber cartridge, with equal or greater lethality than the standard issue rifle of the U.S. Army throughout World War II.[187] Following testing against both the M-14, the standard issue rifle of U.S. forces at the time, and the prolific rifle of the Soviet Union, AK-47, the Air Force adopted the M-16 on January 2, 1962; the U.S. Army followed suit on December 11, 1963.[188] Semiautomatic firearms, previously referred to as self-loading firearms, have been available for purchase in the United States for more than a century.[189] The AR-15 is a semiautomatic variation of the fully automatic M-16 rifle and has become overwhelmingly popular among the civilian population in the United States.[190] "In 2012, semiautomatic sporting rifles [like the AR-15] accounted for twenty percent of all retail firearm sales."[191] Since 1986, approximately 1.6 million AR-15 style firearms have been manufactured in the United States, and they account for 5.5 percent of all firearms in circulation in the United States.[192]

---

184 *Id.*

185 District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

186 *See* U.S. DEP'T ARMY, ADA95311, REPORT OF THE M16 RIFLE REVIEW PANEL: HISTORY OF THE M16 RIFLE SYSTEM (1968), at C-1, http://www.dtic.mil/dtic/tr/fulltext/u2/a953110.pdf.

187 *Id*.

188 *See* REPORT OF THE M16 RIFLE REVIEW PANEL: HISTORY OF THE M16 RIFLE SYSTEM, at C-15; *see also* Martin K.A. Morgan, *U.S. M16*, AM. RIFLEMAN, June 22, 2012, https://www.americanrifleman.org/articles/2012/6/22/us-m16/.

189 *See* Kolbe v. Hogan, 813 F.3d 160, 177 (4th Cir. 2016) ("In 1893, the 'Borchardt semiauto pistol' was developed for the civilian market.").

190 *See id.* at 174-77.

191 *Id.* at 174.

192 Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1261 (D.C. Cir. 2011).

C. *Firearm Manufacturer Liability for a "Dangerous and Unusual Weapon"*

Those arguing semiautomatic rifles may be banned latch onto the term "dangerous," and Justice Scalia's use of the M-16 rifle as an example of a firearm that may be banned.[193] Although it is not disputed that semiautomatic rifles, like the AR-15, are "in common use," it is argued that these types of firearms are strikingly similar mechanically and physically to firearms that may be banned as "dangerous *and* unusual."[194] Semiautomatic rifles are conceivably capable of firing at approximately the same rate as fully automatic firearms.[195] Parts are interchangeable between the semiautomatic AR-15 and the M-16 rifles which could potentially make the AR-15 fully automatic.[196] The semiautomatic AR-15 is able to accept large capacity magazines designed originally for the M-16 and utilized by the military.[197] Further, an uncertainty exists about the utility of semiautomatic rifles, like the AR-15.[198]

At the core of the Second Amendment is the right to self-defense.[199] According to the line of reasoning that would label AR-15s, and the semiautomatic rifles that resemble them, as dangerous, they are ill-suited for use in self-defense.[200] In fact, the characteristics of semiautomatic rifles would "increase the danger to law-abiding users and innocent bystanders if kept in the home or used in self-defense situations."[201] Semiautomatic rifles able to accept large capacity magazines are therefore not protected by the Second Amendment, and they may be banned without violating the Second Amendment. If Congress enacted a statute prohibiting the possession of semiautomatic rifles, the statute must fit into the PLCAA's predicate exception, or be "applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which

193 *See id.* at 1262-63.

194 District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (emphasis added); *see Heller II*, 670 F.3d at 1261.

195 *Heller II*, 670 F.3d at 1263.

196 *Id.* at 1263.

197 *Id.*

198 Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1261 (D.C. Cir. 2011).

199 *Heller*, 554 U.S. at 628.

200 *Heller II*, 670 F.3d at 1261; *but see* Kolbe v. Hogan, 813 F.3d 160, 175-76 (4th Cir. 2016).

201 *Heller II*, 670 F.3d at 1261.

relief is sought" for a plaintiff to bring a suit against a firearm manufacturer.[202]

1. "Dangerous and Unusual Weapons" and the PLCAA's Predicate Exception

The PLCAA's third exception—the predicate exception—states that "the term 'qualified civil liability' action . . . shall not include 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."[203] The *Beretta U.S.A. Corp.* and *Ileto* cases shed some light on the meaning of the term "applicable" in this exception.[204] Statutes qualifying for the predicate exception must not be of general applicability and cannot be codified general tort claims, which Congress clearly intended to preempt by enacting the PLCAA.[205] However, the meaning of "applicable" in the predicate exception is still not entirely clear.[206] For a suit brought against a firearm manufacturer for the manufacture, sale, and marketing of semiautomatic rifles, the violated statute must be "applicable to the sale or marketing of" firearms.[207] Whether a statute prohibiting the manufacture, sale, marketing, and possession of semiautomatic firearms is "applicable to the sale or marketing of the product" is dependent upon whether the deciding court takes the approach of the Court of Appeals of Indiana in *Smith & Wesson Corp.*, or that of the Second Circuit in *Beretta U.S.A. Corp.* and the Ninth Circuit in *Ileto.*[208]

a. *The Court of Appeals of Indiana's Approach*

In *Smith & Wesson Corp.*, the Court of Appeals of Indiana rejected the defendants' argument that the PLCAA's predicate excep-

---

202 Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(a)(iii) (2005).

203 15 U.S.C. § 7903(5)(a)(iii); *see also* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 390 (2d Cir. 2008); Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 429-30 (Ind. Ct. App. 2007).

204 *Beretta U.S.A. Corp.*, 524 F.3d at 400; *Ileto*, 565 F.3d at 1133-34.

205 *Beretta U.S.A. Corp.*, 524 F.3d at 400; *Ileto*, 565 F.3d at 1135-36.

206 *Compare Beretta U.S.A. Corp.*, 524 F.3d at 400 *and Ileto*, 565 F.3d at 1133-34 *with Smith & Wesson Corp.*, 875 N.E.2d at 434.

207 *See* 15 U.S.C. § 7903(5)(a)(iii).

208 *See* 15 U.S.C. § 7903(5)(a)(iii); *Beretta U.S.A. Corp.*, 524 F.3d at 389; *Ileto*, 565 F.3d at 1130*; Smith & Wesson Corp.*, 875 N.E.2d at 434.

tion only applied to statutes regulating the marketing or sale of firearms.[209] Rather, they agreed with the plaintiffs that, because the Supreme Court of Indiana had applied the statute in question to the sale and manufacture of firearms, their suit fell easily into the PLCAA's predicate exception.[210] A statute prohibiting the possession of a semiautomatic rifle, like the AR-15, on its face would not apply to the marketing or sale of firearms. But, if the possession of semiautomatic rifles is prohibited, then the sale of semiautomatic rifles to individuals within that statute's jurisdiction would also be barred. Purchasers of semiautomatic rifles within the statute's jurisdiction would be unlawful purchasers, and the marketing and sale of semiautomatic rifles to those individuals would also be unlawful. A court could then find the statute could be applied to the marketing or sale of semiautomatic firearms, and in turn that the statute regulated the marketing or sale of firearms. If the court followed the approach of the Indiana Court of Appeals, a suit against firearm manufacturers for the marketing and sale of semiautomatic rifles to individuals in an area where they are prohibited would likely fall into the PLCAA's predicate exception.

b. *The Second Circuit's Approach*

In *Beretta U.S.A. Corp.*, the Second Circuit disagreed with the plaintiffs that New York's criminal nuisance statute was "applicable to the sale or marketing of" firearms.[211] Rather, New York's criminal nuisance statute was of general applicability and did not encompass the conduct complained of on the part of the firearm manufacturer.[212] It was not important to the Second Circuit that the criminal nuisance statute did not expressly reference firearms.[213] A hypothetical statute prohibiting the possession of semiautomatic firearms would be far more specific than New York's criminal nuisance statute.[214] Although more specific than the criminal nuisance statute, the hypothetical stat-

209 Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 432 (Ind. Ct. App. 2007).

210 *Id.* at 430, 434.

211 City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 400 (2d Cir. 2008)

212 *Id.*

213 *Id.* at 400-01.

214 *See* N.Y. PENAL LAW § 240.45 (Consol. 1989) ("A person is guilty of criminal nuisance in the second degree when: (1) By conduct either unlawful in itself or unreasonable under all circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or (2) [h]e knowingly conducts or main-

ute would not encompass the conduct of firearm manufacturers. The Second Circuit's approach is highly focused on the language of the statute said to fit into the PLCAA's predicate exception.[215] The hypothetical statute prohibiting the possession of semiautomatic rifles allowed by the ruling in *Heller* would refer only to their possession due to the inherent dangerousness of semiautomatic firearms.[216] The *Heller* decision does not call for a statute prohibiting the manufacture, marketing, and sale of "dangerous and unusual weapons," only their possession.[217] Therefore, a hypothetical statute could not encompass the manufacture, marketing, and sale of semiautomatic firearms. Following the approach of the Second Circuit, a hypothetical statute prohibiting the possession of semiautomatic rifles would not encompass the conduct of a firearms manufacturer engaging in otherwise lawful practices.

c. *The Ninth Circuit's Approach*

The Ninth Circuit's approach in *Ileto* could be duplicated by a state enacting a prohibition on the possession of semiautomatic rifles and codifying general tort law.[218] However, even under these circumstances, a suit against a firearm manufacturer would likely not survive the PLCAA's dismissal requirement. The prohibition on possession of semiautomatic rifles would not be deemed "applicable to the sale or marketing of" firearms.[219] General tort claims brought against firearm manufacturers for the actions of third parties are exactly what Congress intended to preempt by enacting the PLCAA.[220] Codification of general tort claims does not make them "applicable to the sale or marketing of" firearms, and thus such a suit would not fit into the PLCAA's predicate exception.[221] The only way that a tort claim could proceed against a firearm manufacturer is if the firearm malfunc-

tains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.").

215 *See Beretta U.S.A. Corp.*, 524 F.3d at 400.

216 *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008); Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1261 (D.C. Cir. 2011).

217 *See Heller*, 554 U.S. at 626-28.

218 *See* Ileto v. Glock, Inc., 565 F.3d 1126, 1132-33 (9th Cir. 2009).

219 *See* 15 U.S.C. § 7903(5)(a)(iii) (2005)

220 *See*, 15 U.S.C. § 7903(5)(a)(iii) (2005); *Ileto*, 565 F.3d at 1138; Larkin, *supra* note 15, at 191.

221 15 U.S.C. § 7903(5)(a)(iii).

tioned in some way that caused the harm complained of, because the PLCAA does not immunize firearm manufacturers "from traditional products liability claims."[222]

D. *The Flawed Reasoning of the Argument That a Firearm May Be Banned for Being "Dangerous" and Similar to the M-16*

If a firearm was found to be a "dangerous and unusual weapon," then it is foreseeable that suits brought against a firearm manufacturer for the manufacture, marketing, and sale of that firearm would not be preempted by the PLCAA.[223] The court deciding the case would follow the approach of the Court of Appeals of Indiana in *Smith & Wesson Corp.*, and find that the law prohibiting the possession of semiautomatic rifles was also "applicable to the sale or marketing" of firearms.[224] The suit would then fit into the PLCAA's predicate exception. However, the line of reasoning that has brought the deciding court to this conclusion has several flaws. The first flaw being it relies on finding a particular type of firearm—semiautomatic rifles for instance—to be "dangerous."[225] But in the *Heller* decision, the term "dangerous" is not the only standard necessary to ban a particular type of firearm.[226] The entirety of the phrase is "dangerous *and* unusual weapons."[227] If the phrase were "dangerous or unusual weapons," then the two terms could be separated, and if a weapon were to be dangerous then its possession could be prohibited.[228] But the phrase is "dangerous *and* unusual weapons";[229] to not be protected by the Second Amendment, a weapon must be both.[230] In the case of semiautomatic rifles, their presence in the civilian market for over a

---

222 15 U.S.C. § 7903(5)(a)(v); *see also* discussion *supra* Part I.C.

223 *See* 15 U.S.C. § 7903(5)(a)(i-vi); District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (citing Blackstone, *supra* note 153, at 148-49).

224 15 U.S.C. § 7903(5)(a)(iii); s*ee* Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422, 434 (Ind. Ct. App. 2007).

225 *Heller*, 554 U.S. at 627.

226 *See id.*

227 *Id.* (emphasis added).

228 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116-17 (2012).

229 District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (emphasis added).

230 *See id.* at 627; SCALIA, *supra* note 228, at 116-17.

century and their sheer number in that market means they cannot be "unusual."[231]

The way a firearm is found to be dangerous presents a second flaw. In *Heller*, Justice Scalia explains "weapons that are most useful in military service—M-16 rifles and the like—may be banned."[232] Some courts have understood this to mean that firearms with physical and mechanical similarities to the fully automatic M-16 rifle may be banned.[233] From this understanding of how a firearm may be dangerous, a semiautomatic rifle may be banned based on its ability to fire at approximately the same rate as the fully automatic M-16; may have parts interchangeable with the M-16 to make them fully automatic; and may accept large capacity magazines.[234] But the M-16 is not used as a standard for other firearms to be measured against. Rather, it is used as an example of "weapons that are most useful in military service" which may be banned.[235] A weapon with only military applications could be banned.[236] However, even if the phrase "M-16 rifles and the like" were interpreted to use the M-16 rifle as a benchmark by which the dangerousness of other classes of firearms were measured, what makes a firearm dangerous is still not clear.[237]

There is no language in the *Heller* opinion to indicate what degree of similarity is necessary for another firearm to be dangerous.[238] It has been argued that a semiautomatic rifle is capable of approximately the same rate of fire as the fully automatic M-16.[239] But there is no indication of what rate of fire is approximate enough to a fully automatic firearm to make another firearm dangerous. Others argue the ability to interchange parts with the M-16 allows a class of firearms to be banned.[240] There is no language in *Heller* to indicate the number of parts that a firearm must be able to share with

---

231 *See Heller*, 554 U.S. at 627; *see also* Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016); Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1261 (D.C. Cir. 2011).

232 *Heller*, 554 U.S. at 627.

233 *See Heller II*, 670 F.3d at 1263.

234 *Id.* at 1263.

235 District of Columbia v. Heller, 554 U.S. 570, 627 (2008)

236 *See id.* at 627.

237 *Id.*

238 *See generally Heller*, 554 U.S. at 570.

239 *Heller II*, 670 F.3d at 1263; *see* Soto v. Bushmaster Firearms, Int'l, LLC, No. FBT-CV-15-6048103-S, slip op. 2016 Conn. Super. LEXIS 2626, at *2-4 (Conn. Super. Ct. Oct. 14, 2016).

240 *Heller II*, 670 F.3d at 1263; *see* Complaint at 17-18, *Soto*, slip op. (Conn. Super. Ct. Oct. 14, 2016).

the M-16 to be labeled as dangerous.[241] The most curious argument made is that firearms able to accept large capacity magazines share enough similarity with the M-16 to be banned.[242] The majority of firearms are able to accept large capacity magazines; this includes handguns, which Justice Scalia, in the *Heller* opinion, stated were a class of firearms protected by the Second Amendment and could not be banned.[243] None of these three arguments have been made in isolation; they have been presented together.[244] There is still no indication in the *Heller* decision that these three characteristics of a firearm, when combined, show a sufficient degree of similarity with the M-16 rifle to be considered dangerous.[245] There is nothing to show that any one of these characteristics in isolation is sufficient, nor a combination of two, or all three.

E. *Firearm Manufacturer Liability for a Firearm "In Common Use at the Time"*

With such great numbers of semiautomatic rifles in civilian hands and their longstanding availability in civilian markets, it is difficult to conceive of semiautomatic rifles as "unusual," or not "in common use at the time."[246] A firearm that cannot be considered "dangerous and unusual" cannot be banned according to the *Heller* decision.[247] If possession of semiautomatic rifles, like the AR-15, cannot be prohibited, then a firearm manufacturer cannot be negligent for manufacturing, marketing, and selling a semiautomatic rifle to a lawful purchaser. If it is lawful for an individual to purchase a semiautomatic firearm, it is not negligent per se for a firearm manufacturer to entrust their product to that individual.[248] If a firearm manufacturer were to knowingly market and sell their product to an unlawful or straw purchaser, then a suit brought against the manufacturer for harm resulting from that act could not be dismissed under the PLCAA.[249] However, without

---

241 *See generally* District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

242 *Heller II*, 670 F.3d at 1263; *see* Complaint at 17-18, *Soto*, slip. op. (Conn. Super. Ct. Oct. 14, 2016).

243 *Heller*, 554 U.S. at 628-29.

244 *Heller II*, 670 F.3d at 1263; *see Soto*, slip op. at *2-4 (Conn. Super. Ct. Oct. 14, 2016).

245 *See Heller*, 554 U.S. at 627.

246 *See id.*

247 *See id.*

248 *See* discussion *supra* Part I.C.

249 Williams v. Beemiller, Inc., 100 A.D.3d 143, 145 (N.Y. App. Div. 2012).

the knowledge that the firearm being produced is ultimately being sold to an unlawful or straw purchaser, the firearm manufacture cannot held liable following the enactment of the PLCAA.[250]

Without a ban on a particular class of firearms, a suit against a firearm manufacturer cannot fall into the PLCAA's predicate exception. The PLCAA's predicate exception requires a statute "applicable to the sale or marketing of" firearms.[251] If a court interpreted "applicable" in the same manner as the Court of Appeals of Indiana, then it would be possible for that court to conclude that a prohibition on the possession of a firearm is "applicable to the sale or marketing of firearms."[252] But, if a firearm is not "unusual" and "in common use at the time," then, according to the *Heller* decision, its possession cannot be prohibited without violating the Second Amendment.[253] There being no statute for a firearm manufacturer to violate that could be interpreted as "applicable to the sale or marketing of" a firearm, a suit brought against that firearm manufacturer should be dismissed under the PLCAA because it does not fit into the PLCAA's predicate exception.

CONCLUSION

Congress passed the Protection of Lawful Commerce in Arms Act with the intended consequence that it bar suits brought by gun violence victims against firearm manufacturers "for the harm solely caused by the criminal or unlawful misuse of firearm products."[254] The PLCAA requires that all qualified civil liability actions be immediately dismissed by courts.[255] By recognizing six exceptions to the PLCAA's required dismissal, Congress created an interpretation issue for courts.[256] Some exceptions were quite clear, but others were more ambiguous. Three years later, the Supreme Court decided the *Heller* case.[257] In *Heller*, Justice Scalia concluded the Second Amendment

---

250 *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(a)(5) (2005).

251 *Id.* § 7903(5)(a)(iii).

252 Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(a)(iii); *see* discussion *supra* Part II.C.1.A.

253 District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

254 Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(b)(1).

255 *Id.* § 7902(a).

256 15 U.S.C. § 7903(5)(a)(i-vi); *see also supra* note 17.

257 *Heller*, 554 U.S. 570.

recognized the right to bear arms unrelated to service in a militia.[258] Justice Scalia also included language to indicate limits on that right.[259] But those limits indicated which firearms could *not* be prohibited, not which ones could be. Some courts do not agree with this interpretation of Justice Scalia's limitations.[260] Those courts understand the *Heller* decision created a degree of similarity test between the firearm to be prohibited and the M-16 rifle utilized by the military.[261]

Firearm manufacturer liability under the PLCAA is dependent upon what types of statutes may be passed related to the manufacture, marketing, sale, and possession of firearms.[262] Those statutes determine whether a lawsuit brought against a firearm manufacturer falls within the PLCAA's exceptions or is dismissed.[263] But what statutes may be enacted prohibiting the possession of firearms without violating the Second Amendment is unclear due to the multiple interpretations of Justice Scalia's opinion in *Heller*. On one hand, there is the interpretation that a firearm is dangerous based on its degree of similarity with the fully automatic M-16 rifle.[264] Under this interpretation, a lawsuit could be brought for the negligent entrustment of a "dangerous" firearm by a firearm manufacturer to the public. The prohibition of possession of a firearm could also allow a suit against a firearm manufacturer to fit into the PLCAA's predicate exception. But this interpretation of the majority opinion in *Heller* is flawed in two ways—it separates two terms joined together by the word "and" instead of "or," while also finding a degree of similarity test for which no standard is enunciated. A stronger interpretation of *Heller* understands it to state what types of firearm possession prohibitions may not be enacted. Firearms found to be "in common use" may not be prohibited. The "in common use" standard is far more workable than the flawed standard based on the dangerousness and degree of similarity standard. Under the "in common use" standard, a firearm manufacturer could neither be held liable nor negligent unless the firearm being manufactured could be banned after *Heller* without violating the Second Amendment.

---

258 *Id.* at 580-81.
259 District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008).
260 Heller v. District of Columbia (Heller II), 670 F.3d 1244, 1263 (D.C. Cir. 2011).
261 *Id.* at 1263.
262 *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(a)(i-vi) (2005).
263 *See id.* § 7903(5)(a)(i)-(vi).
264 *Heller II*, 670 F.3d at 1267.