

## Torts and Guns

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### *Abstract*

*When Hillary Clinton and Bernie Sanders squabbled during their 2015-16 election campaigns over the federal Protection of Lawful Commerce in Arms Act (PLCCA), they were talking past each other, misleading their listeners, and failing to understand what this statute pre-empting some state tort claims against the gun industry was actually about. Many critics of PLCCA argue that gun makers and sellers should be liable just like those in the auto, pharmaceutical drug, and tobacco industries. Yet, it is very rare for defendants in those industries to be successfully sued in tort for the sort of conduct that gun control advocates would like to hold the gun industry liable. In contrast to the hopes and fears of Clinton and Sanders, repealing PLCCA would not likely result in a burst of successful lawsuits, although some might be winners. Perhaps potential and actual tort litigation against this industry is better understood as part of a longer term battle over public opinion and eventual legislative reform.*

*Key words:*

*Gun litigation; tort claims; pre-emption; negligent marketing*

In 2015 and 2016, during the Democratic Party's primary election process, Secretary Hillary Clinton kept hammering Senator Bernie Sanders for his earlier vote in favor of the Protection of Lawful

Commerce in Arms Act (PLCAA) which came into law in 2005 after being signed by then President Bush.<sup>1</sup> Clinton kept complaining that this federal statute gives sweeping “immunity” from civil litigation to gun makers and gun dealers.<sup>2</sup> Sanders sought to justify his vote<sup>3</sup> for PLCAA by saying that it was essential for rural Vermont gun shops to be free from the risk of being sued and held liable if they responsibly sold a gun to a local resident and that gun was somehow later used in a homicide.<sup>4</sup>

I view both of these positions to be exaggerations and misrepresentations of what PLCAA was about and what it provides.<sup>5</sup> In this article I will show how the candidates were talking past each other and focus instead on what PLCAA tort pre-emption provisions were actually meant to achieve. I will then suggest through comparisons with other industries that even without this federal protection plaintiffs in gun cases would still face a very high barrier to winning tort claims of the

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<sup>1</sup> 15 U.S.C. §§ 7901-7903

<sup>2</sup> The gun industry is "the only business in America that is wholly protected from any kind of liability." *Hillary Clinton on Wednesday, October 7th, 2015 in a town hall-style campaign event in Iowa.* <http://www.politifact.com/truth-o-meter/statements/2015/oct/16/hillary-clinton/clinton-gun-industry-wholly-protected-all-lawsuits/>; [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-act-facts-and-policy/?utm\\_term=.bd34a2a6ad9d](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-act-facts-and-policy/?utm_term=.bd34a2a6ad9d).

<sup>3</sup> At the time, Sanders was a Vermont congressman, not a senator.

<sup>4</sup> <http://www.ibtimes.com/protection-lawful-commerce-arms-act-controversial-gun-law-bernie-sanders-voted-has-2141492>.

<sup>5</sup> For a good overview of the mis-statements on both sides, as well as a nice look at the real purpose of PLCAA, see <http://www.vox.com/2015/10/14/9533389/bernie-sanders-gun-lawsuits-democratic-debate>.

sort now pre-empted. I will close by locating potential tort claims in gun cases in the wider political battle over gun control.

As the primary campaign evolved, Clinton won the political posturing battle on this issue since Sanders finally conceded he would support, indeed cosponsor,<sup>6</sup> a bill put before the Senate<sup>7</sup> that would repeal the key tort pre-emption provisions of PLCAA.<sup>8</sup> That bill was introduced by Connecticut Senator Richard Blumenthal and was linked to a House bill introduced by California Congressman Adam Schiff, a long time ally of the Brady Center and other gun control groups.<sup>9</sup> Schiff had been itching to overturn PLCCA for some time.<sup>10</sup> Of course the Blumenthal and Schiff bills did not get anywhere in the last Congress (and surely remain implausibly headed for passage in the new Congress).

I can understand why a Connecticut senator would put forward even a hopeless bill that he could at least argue would have increased the prospects for success of the then-ongoing lawsuits brought by his constituent families of children massacred in the December 2012 Sandy

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<sup>6</sup> For Sanders' cave in, see <http://www.cnn.com/2016/01/28/politics/bernie-sanders-gun-law-reversal/> and <https://www.govtrack.us/congress/bills/114/s2469/summary>. For a criticism of Sanders for supporting the repeal of PLCCA, see <http://www.chicagotribune.com/news/opinion/zorn/ct-sanders-gun-liability-misfire-perspec-0113-20160120-column.html>.

<sup>7</sup> S. 2469 114<sup>th</sup> Congress.

<sup>8</sup> Sanders also reportedly said that he would insist that the repeal of PLCCA would assure his innocent rural Vermont gun shops from being sued in the ways he feared in his initial presidential campaign statements in support of PLCCA. <https://www.rt.com/usa/329337-gun-manufacturer-liability-bill/>.

<sup>9</sup> For the parallel House bill see, HR. 4399, The Equal Access to Justice for Victims of Gun Violence Act.

<sup>10</sup> <http://www.npr.org/sections/thetwo-way/2013/01/14/169317524/lawmaker-plans-bill-to-lift-immunity-for-gun-manufacturers-and-dealers>.

Hook Elementary School shooting (more on this below). At the same time, I have wondered whether these bills were even more about getting Clinton nominated, by giving her something specific to bludgeon Sanders with, than about achieving real change in gun litigation. Both Blumenthal and Schiff were Clinton supporters, and gun control was one issue on which Clinton sought to place herself as markedly more progressive than Sanders.<sup>11</sup>

Anyway, in their back and forth, both sides seemed to be saying that if only PLCAA were repealed this would result – for good or for bad – in a great deal of tort liability being imposed on both gun makers and gun sellers.<sup>12</sup> I am quite skeptical of that, as I will explain.

For one thing, the repeal of PLCAA would still confront would-be plaintiffs in several jurisdictions with *state* statutes that limit tort liability of those in the firearms business.<sup>13</sup> After all, the central goal of PLCAA was to create a nationwide limit on tort claims that would bring in the rest of the states that had not yet passed state-level tort pre-emption of

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<sup>11</sup> <http://www.cbsnews.com/news/election-2016-bernie-sanders-throws-his-support-behind-new-gun-legislation/>. See also, <http://time.com/4197582/bernie-sanders-gun-manufacturers-immunity/>.

<sup>12</sup> For a thoughtful and thorough earlier attack on PLCCA, see Justice Denied: The Case Against Gun Industry Immunity, <http://efsgv.org/wp-content/uploads/2013/11/Justice-Denied-Report-PDF.pdf> See also, the position of the Brady Center on PLCCA suggesting that all sorts of valid cases are precluded by PLCCA. <http://www.bradycampaign.org/the-protection-of-lawful-commerce-in-arms-act-plcaa>. See the position of the Center for American Progress <https://www.americanprogress.org/issues/guns-crime/reports/2016/01/15/128949/immunizing-the-gun-industry-the-harmful-effect-of-the-protection-of-lawful-commerce-in-arms-act/>. For an example of what I view as a highly exaggerated view of tort claims that PLCCA precluded, see also [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/05/bernie\\_sanders\\_on\\_guns\\_vermont\\_independent\\_voted\\_against\\_gun\\_control\\_for.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/bernie_sanders_on_guns_vermont_independent_voted_against_gun_control_for.html).

<sup>13</sup> For a full listing and description of state laws pre-empting lawsuits against gun companies, see <http://smartgunlaws.org/category/state-immunity-statutes/>.

the sort that tort-limiting advocates sought. If nothing else, this suggests that if somehow PLCAA were actually repealed, the NRA and its gun industry supporters would renew their efforts on a state-by-state basis to provide themselves with legal protection.

Anyway, a look at some of these state laws shows that Clinton spoke too broadly. PLCAA is primarily intended to protect gun makers and gun sellers from liability in situations in which the gun is then *criminally* used.<sup>14</sup> Hence, as the law itself makes clear, it does not pre-empt ordinary product liability claims with respect to guns that have manufacturing or design defects that cause harm to people or their property.<sup>15</sup> Moreover, even when the guns are used criminally, there are

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<sup>14</sup> 15 U.S.C. 7901 (b) Purposes (1) “To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.” For the NRA’s celebratory announcement on the signing of the law by President Bush, see <https://www.nrapvf.org/articles/20051026/president-bush-signs-protection-of-lawful-commerce-in-arms-act-landmark-nra-victory-now-law>.

<sup>15</sup> See the exception contained in 15 U.S.C. 7903(5) (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.” This means that product defect claims that arise when guns accidentally injure ordinary consumers or that arise because a gun somehow fired without the user pulling the trigger and thereby injured someone else are not meant to be pre-empted by PLCAA. A settlement has been recently reached with Remington with respect to allegations that some of the rifles they sold would accidentally fire and hence are defective product (Remington denied the allegations but agreed to a settlement). Note that this litigation concerns financial losses and not actual injuries or deaths. For the terms of the settlement, see <http://remingtonfirearmsclassactionsettlement.com/>.

In any event, it is important to appreciate that the “except” portion of the product liability definition does restrict some plausible cases. For example, suppose a claim is made that a gun is defective because it fails to include “smart gun” technology that would prevent its being fired by anyone except the person whose fingerprints are linked to the trigger. This sort of “trigger lock”

several situations in which the pre-emption provisions do not apply – perhaps most importantly when 1) the seller knew or should have known that the actual buyer is not legally allowed to possess the gun,<sup>16</sup> or 2) (and to be discussed below) the seller negligently entrusted someone with the gun.<sup>17</sup>

It should also be emphasized that PLCAA itself makes clear that it does not create any cause of action.<sup>18</sup> It is still up to states to decide whether or not they want to impose liability on enterprises in situations in which PLCAA refrains from pre-empting them. It turns out that in some states the language of their gun industry pre-emption statute is broader than is the federal law. In such places, claims that would be allowed under federal law would not be allowed anyway because of state law.<sup>19</sup> To

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would prevent young children from accidentally firing a gun they stumble upon in the home, and lawsuits in those settings are not pre-empted by PLCCA – although whether they would actually win on product “defect” grounds is another matter. But note well that this same technology could also make stolen guns unable to fire in the hands of others, and that could potentially prevent a great number of injuries and deaths that come about from the use of such guns stolen guns today. However, in settings where the plaintiff is shot by the volitional criminal use of a stolen gun without the trigger lock feature that sort of product defect claim is blocked by the exception to the exception provision in PLCCA noted here.

<sup>16</sup> 15 U.S.C. 7903(5) (A) (iii).

<sup>17</sup> See the exception in 15 U.S.C. 7903 (5) (A) (ii) “an action brought against a seller for negligent entrustment.” Negligent entrustment is then defined in 7903 (5) (B) “As used in subparagraph (A) (ii), the term ‘negligent 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.”

<sup>18</sup> 15 U.S.C. 7903(5) (C) “no provision of this Act shall be construed to create a public or private cause of action or remedy.”

<sup>19</sup> Alaska’s law restricting tort claims against gun makers and sellers contains no negligent entrustment exception. Alaska Stat. § 09.65.155. Colorado’s immunity law only allows private product liability claims that are narrowly defined and clearly excludes claims based on actions by third parties. Colo. Rev. Stat. § 13-21-501 and 504.5(1) Florida law contains no exceptions for

emphasize the point, and cutting against Clinton's claim, such state laws provide rather more sweeping immunity than does PLCAA.

In practice, so far there have been but a few cases that have successfully made their way through the PLCCA exceptions and resulted in tort recovery for plaintiffs – primarily when gun dealers sold weapons to people they knew they should not have been selling to.<sup>20</sup>

At the same time, as I will next explain, it also seems clear that Senator Sanders' responsible gun dealers never needed, and still do not need, federal *or* state statutory protection of the sort PLCAA provides.

One could imagine a world in which gun sellers (both manufacturers and retailers) were held *strictly liable* in tort for harms caused by the guns they make and/or sell. That is, anytime someone was injured or killed by a gun, the maker and retailer of that gun could be forced to pay compensation to the victim or the victim's family. Under such a regime, presumably every gun buyer would pay extra when purchasing the weapon and that money would in turn be used to fund the compensation of gun victims. But that is not the law anywhere today, and in today's world its prospects of adoption are infinitesimal.<sup>21</sup> Indeed, even those

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negligent entrustment, although it is vague as to the extent to which it covers private lawsuits, in contrast to suits by public agencies. <http://www.flSenate.gov/Laws/Statutes/2011/790.331>.

<sup>20</sup> For example, two Milwaukee police officers won a case against a gun shop on the ground that an employee knew the weapon was being bought for an underage person in the shop who later shot the officers. <http://www.cnn.com/2015/10/13/us/milwaukee-badger-guns-negligence-lawsuit/index.html>. For a description of several cases that have been won despite PLCAA and have been dismissed on the basis of PLCCA, see <http://smartgunlaws.org/gun-laws/policy-areas/other-laws/gun-industry-immunity-statutes/>.

<sup>21</sup> Then California Supreme Court Chief Justice Roger Traynor preliminarily explored the idea of sweeping strict liability for harms caused by products in 1965, but this idea has never been embraced by courts in the years since then. See, Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 *Tennessee Law Review* 363 (1965). Even a strict liability regime with an exception for suicide injuries and deaths is currently implausible.

pushing for what one might term “enterprise liability” with respect to guns don’t really promote that sort of strict liability in tort. They are after what they view as irresponsible practices.<sup>22</sup> And that would exclude the dealers that Sanders seemed so concerned about. Put differently, there is no serious movement to hold responsible dealers liable in tort.<sup>23</sup>

So, if there would not be liability for responsible conduct in any event, and if states can still impose liability for negligent entrustment, for the sale of guns to those who may not legally possess them, and for defective products, just what was the point of PLCAA anyway?

The answer is that those seeking to attack the gun industry through tort law had, in the 1980s and 1990s, put forward some very imaginative new theories of civil liability of the gun industry generally grouped under the heading of “negligent marketing,”<sup>24</sup> (discussed below), and the defendants were worried about those claims. These lawsuits were being

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Suicides account for a substantial majority of the gun deaths in the U.S. each year.  
<https://fivethirtyeight.com/features/gun-deaths/>.

<sup>22</sup> Instead of strict liability in tort, those injured or families of those killed by firearms could similarly be provided cash benefits through a gun victims’ compensation plan funded perhaps by a tax on gun makers. For an example of such a proposal see, <http://www.nytimes.com/2013/06/24/opinion/make-gun-companies-pay-blood-money.html>. This idea, aimed in part at internalizing the social costs of guns into their price, is also but a remote political possibility at present.

<sup>23</sup> The pre-PLCAA organized effort to sue gun companies was clearly not aimed at the responsible rural gun shops that seemingly so worried Sanders. For a discussion of the role of litigation in the gun control campaign more broadly and the argument that abandoning normal politics was only fair given the outsized legislative influence of the NRA, see Timothy Lytton, *The NRA, The Brady Campaign & the Politics of Gun Litigation*, in **Suing the Gun Industry** (Timothy D. Lytton ed. University of Michigan Press 2005) Chapter 6 at pp. 152-175.

<sup>24</sup> See generally, Lytton supra note 23, for the most important overview of this topic. See also, Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 Seton Hall Legis. J. 777 (1996).

brought not only by individual victims of gun violence but also by governments (sometimes asserting “public nuisance” legal theories as a variation on conventional tort claims). On the whole, these efforts were not yet successful<sup>25</sup> and (as discussed later) probably would have remained unsuccessful in most, but not all, cases.<sup>26</sup> But they were bothersome.

First, even a few successful cases could have been severely damaging to at least some defendants. Second, the industry saw these inventive legal theories as allowing judges and juries to use the “common law” to enact legal changes that the gun control lobby had little or no chance of achieving at that time via the conventional political process. Hence, as what they viewed as a matter of principle, the NRA and its allies were outraged by what they saw as an “end run.”<sup>27</sup> Third, a large and well-

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<sup>25</sup> After winning below, the plaintiffs had their hopes crushed by the California Supreme Court in *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001), rev 'g *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146 (Ct App. 1999). The same pattern played out in New York. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (rejecting the federal district court's interpretation of New York law in *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999)).

<sup>26</sup> Richard C. Ausness, *Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S. C. L. Rev. 907 (2002).

<sup>27</sup> See the findings in PLCCA 15 U.S.C. 7901(a) (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.” And 15 U.S.C. 7901(a) (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

organized campaign of these sorts of lawsuits, which the NRA viewed the gun control groups as being engaged in,<sup>28</sup> could itself impose significant costs on gun companies and put many of them out of business, even if those able to fight the litigation to the end would eventually escape liability.<sup>29</sup>

If nothing else, in the meantime some defendants would be under pressure to settle on terms not to their liking, and very much not to the liking of other would-be defendants. A step in this latter direction occurred in 2000 when then President Clinton brokered a settlement with the leading firearms maker Smith & Wesson in which the firm agreed to a range of marketing controls.<sup>30</sup> This settlement so infuriated the pro-gun side that a well organized boycott of Smith & Wesson products was launched, leading in the end to a restructured firm's abandonment of the settlement.<sup>31</sup>

Moreover, the pro-gun folks could see something of a precedent in the tobacco industry that they did not like. There, state attorneys general sued the tobacco companies on a wide range of cleverly imagined but

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doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.”

<sup>28</sup> See generally, Timothy Lytton, An Overview of Lawsuits Against the Gun Industry, in Lytton supra note 23, Introduction at pp. 1-15.

<sup>29</sup> For some skeptical comments about a “put them out of business” strategy for gun litigation, see Stephen Sugarman, Comparing Tobacco & Gun Litigation, in Lytton supra note 23, Chapter 8 at pp. 205-07.

<sup>30</sup> For the details of the agreement, see <https://archives.hud.gov/news/2000/gunagree.html>.

<sup>31</sup> Timothy Lytton, The Complementary Role of Tort Litigation in Regulating the Gun Industry, in Lytton supra note 23, Chapter 10 at p. 261. For more details, see Charles C. Sipos, The Disappearing Settlement: The Contractual Regulation of Smith & Wesson Firearms, 55 Vanderbilt Law Review 1297 (2002).

often unpromising legal theories.<sup>32</sup> None of these cases was ever actually successful all the way to the end, and there is good reason to believe that the industry would have eventually won the litigation in many, most, or possibly even all of the states where they had been sued. But there was a risk of losing, and in Minnesota one case was actually in trial and not going all that well for the tobacco companies.<sup>33</sup> So, one can see why alarm bells were ringing loudly in tobacco company board rooms.

As a result, the tobacco companies eventually agreed to the so-called Master Settlement Agreement (or MSA) that ended all of these government-sponsored lawsuits. In my view, much of what the firms agreed to by way of changes in how they market cigarettes has done little for the tobacco control movement.<sup>34</sup> The main positive impact of the MSA, as I see it, has been the imposition of the equivalent of about a fifty cent per pack tax on cigarettes, and this helped to reduce sales and in turn to somewhat reduce smoking prevalence.<sup>35</sup>

Anyway, for the gun industry this scenario did not look good, and it probably seemed especially threatening to the NRA and its friends because 1) gun sellers and gun makers are not the same sort of deep

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<sup>32</sup> Stephen Sugarman Review of Kip Viscusi Smoke-Filled Rooms 13 Law & Politics Book Review (No. 1) 1-9 (2003) <https://www.law.berkeley.edu/files/bookreview2.pdf>.

<sup>33</sup> Id.

<sup>34</sup> Stephen Sugarman, Book Reviews, 22 Journal of Public Policy and Management 712 (2003) (<https://www.law.berkeley.edu/files/bookreview.pdf>.)

<sup>35</sup> A side impact of the MSA has been the enormous financial enrichment of many private lawyers who handled these cases on behalf of state governments and earned huge legal fees. Many have used these fees to help fund legal claims against altogether different corporate defendants and to make contributions to the political campaigns of candidates running on platforms hostile to corporate defendants.

pocket defendants as are the tobacco companies who control the vast share of the national cigarette market,<sup>36</sup> and 2) the plaintiff's lawyers in the gun cases, having learned something from the MSA, the marketing restrictions that plaintiffs would demand in settlement of the gun cases were highly troubling to the defendants.<sup>37</sup>

So, calling these new sorts of lawsuits "frivolous",<sup>38</sup> the NRA got several states and then Congress to provide at least some immunity – and most importantly immunity from the sorts of cases that most worried them.

As noted above, those cases focused centrally on the way that guns were *marketed*,<sup>39</sup> and both manufacturers and dealers were targeted. Most prominently, these cases claimed 1) irresponsible marketing by gun *makers*, like emphasizing in gun magazines and elsewhere firearm characteristics, such as their high capacity and ease of concealment, that appeal to prospective purchasers intent on criminal wrongdoing, and refusing to terminate dealers with disproportionately high volumes of guns traced to crime scenes, 2) irresponsible selling practices by gun

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<sup>36</sup> For an overview of the gun industry, see Tom Diaz, *The American Gun Industry: Designing & Marketing Increasingly Lethal Weapons*, in Lytton supra note 23, Chapter 3 at pp 84-90.

<sup>37</sup> Demands in the cases in play at the time were quite threatening, as illustrated by the Smith & Wesson settlement discussed above. See also the demands of cities in their public nuisance claims against gun companies and the role in several places played in the gun cases by law firms that had been involved in the MSA. See e.g. Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, in Lytton supra note 23, Chapter 5 at pp129-151.

<sup>38</sup> For example, see <http://www.gundogsonline.com/Article/Congress-Approves-Law-to-Stop-Frivolous-Gun-Lawsuits-Page1.htm>. For a recent use of this characterization, see <http://www.weeklystandard.com/hillary-is-wrong-about-gun-manufacturer-protection/article/2001459>.

<sup>39</sup> Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 *Seton Hall Legis. J.* 777(1996). See also, "[Immunizing the Gun Industry. The Harmful Effect of the Protection of Lawful Commerce in Arms Act](#)" (PDF). *Center for American Progress*. January 15, 2016.

*dealers*, even when all of the sales were technically legal under federal and state law, like turning a blind eye to what were almost surely straw purchases and selling far more firearms than the legitimate local market could bear knowing this would yield a proliferation of guns in the secondary criminal market and 3) irresponsible selling of certain types of weapons to the public.

The recent litigation arising out of the horrific 2012 Sandy Hook Elementary School slaughter illustrates this latter objection. After already fatally shooting his mother, Adam Lanza then fatally shot 26 people at the school, 20 of whom were students -- after which Lanza killed himself.<sup>40</sup> Family members of Lanza's victims at the school have sued the manufacturer, distributor, and retailer of the assault weapon that Lanza used.<sup>41</sup> Their central legal argument is that the high-powered fast-firing weapon used in the killings should never have been sold to ordinary buyers and should have been made available, if at all, only to the military and law enforcement.<sup>42</sup> But, since PLCCA was clearly intended to pre-empt negligent marketing litigation when firearms are criminally used, plaintiffs needed to fit their claims under the PLCAA exceptions. They primarily did so by labeling the sale of such guns to ordinary buyers as "negligent entrustment."

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<sup>40</sup> [https://en.wikipedia.org/wiki/Sandy\\_Hook\\_Elementary\\_School\\_shooting](https://en.wikipedia.org/wiki/Sandy_Hook_Elementary_School_shooting).

<sup>41</sup> For stories presenting the long chronology of this litigation, see e.g., <https://business-humanrights.org/en/gun-industry-lawsuit-re-sandy-hook-shooting-in-usa/?dateorder=datedesc&page=1&componenttype=all>.

<sup>42</sup> <https://jonathanturley.org/2014/12/16/long-shot-litigation-sandy-hook-families-sue-manufacturer-and-distributor-of-lanzas-bushmaster-ar-15/>.

Alas, the concept of negligent entrustment, which PLCCA conventionally defines,<sup>43</sup> does not readily fit here where the weapon in question was earlier on legally sold to the killer's mother. The classic negligent entrustment sale would be when the would-be buyer came into the gun shop drunk or stoned or clearly mentally ill and/or raving about needing to kill someone.<sup>44</sup> The idea that the gun manufacturer in the Sandy Hook case was irresponsible in entrusting this sort of gun to regular gun dealers, or that the gun dealer was irresponsible in entrusting it to the killer's mother just does not fit the pattern.

To be sure, in the singular case of *Moning v. Alfonso*<sup>45</sup> the plaintiffs were able to get to the jury on the question of whether a dangerous slingshot should have been entrusted to a minor who then injured the victim. But putting a dangerous product in the hands of a child feels quite different from entrusting a legally-competent adult woman, who was a gun enthusiast and who owned several firearms, with yet another highly dangerous gun.<sup>46</sup> So it was no real surprise that the trial judge eventually

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<sup>43</sup> 15 U.S.C. 7903 (5) (B) the term "negligent 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."

<sup>44</sup> Henry Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 *Arkansas Law Review* 101 (1966). In November 2106 a Missouri gun shop settled a case for more than \$2 million after selling a gun to a mentally ill woman whose mother pleaded with the shop not to sell to her dangerous daughter. The buyer then shot and killed her father. The case was based on a "negligent entrustment" theory. <http://www.kansascity.com/news/local/article116462698.html>.

<sup>45</sup> 400 Mich. 425 (1992)

<sup>46</sup> Lawsuits against the mother of the killer (who was shot to death by her son before the killer moved on to the killings at the school) are a different matter. On the theory that she negligently allowed her son access to her weapons, such claims were filed against her estate by the families of some of the victims, seeking access to her homeowner's insurance policy. Polansky, Rob (March 13, 2015). "[Nine Sandy Hook families sue Lanza estate](#)". *Eyewitness News 3. WFSB*. In 2015, families of 16 of the victims reportedly agreed to a settlement with the insurers for a

dismissed the plaintiffs' claims in the Sandy Hook case.<sup>47</sup> Undaunted, the plaintiffs have now appealed to the Connecticut Supreme Court, which has agreed to hear the case, and have enlisted amicus briefs on their behalf.<sup>48</sup> But I believe that most legal observers find the prospects of this case slim in the face of PLCCA.

Like Secretary Clinton, the supporters of the bills put before Congress to repeal PLCAA argue that no other industry enjoys the legal shield that the gun industry does -- giving as counter-examples firms such as auto companies, pharmaceutical drug companies and even tobacco companies.<sup>49</sup>

They are right to some extent, although this claim is somewhat exaggerated. I would argue, for example, that vaccine makers enjoy even broader immunity than gun companies enjoy<sup>50</sup> – a point conceded by some gun control advocates who also point out that at least there is an alternative compensation scheme available to victims of vaccines.<sup>51</sup> As

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proportionate share (about \$100,000 each) of the \$1,500,000 policy.

<http://www.courant.com/news/connecticut/hc-sandy-hook-lawsuit-settled-20150803-story.html>.

<sup>47</sup> <http://www.pbs.org/newshour/rundown/judge-tosses-sandy-hook-lawsuit-gun-maker/>.

<sup>48</sup> P. J. D'Annunzio, Doctors Urge Court to Reinstate Sandy Hook Suit Against Gunmakers, The Connecticut Law Tribune, March 14, 2017. See also the law professors' brief (although this brief focuses on whether Connecticut law should be extended to find "negligent entrustment" in this case, it does not focus on whether that would suffice in the face of PLCCA's traditional definition of the concept.) CITE Forthcoming.

<sup>49</sup> See e.g. [https://www.washingtonpost.com/opinions/katrina-vanden-heuvel-the-case-for-gun-liability-laws/2013/09/24/e0e8adb4-2457-11e3-b3e9-d97fb087acd6\\_story.html?utm\\_term=.ea646d287dc7](https://www.washingtonpost.com/opinions/katrina-vanden-heuvel-the-case-for-gun-liability-laws/2013/09/24/e0e8adb4-2457-11e3-b3e9-d97fb087acd6_story.html?utm_term=.ea646d287dc7).

<sup>50</sup> See *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011). See generally, Nora Freeman Engstrom, A Dose of Reality for Specialized Courts: Lessons from the VICP, 163 *Pennsylvania L. Rev.* 1631 (2015).

<sup>51</sup> See e.g., Justice Denied: The Case Against Gun Industry Immunity, <http://efsgv.org/wp-content/uploads/2013/11/Justice-Denied-Report-PDF.pdf>.

I see the law at present, victims of guns are also in a somewhat analogous position to victims of so-called Class C medical devices that have been carefully reviewed and approved by the FDA. Because of federal pre-emption legislation, the latter may not be challenged via tort law even if the victims and their lawyers claim these devices are nonetheless defective.<sup>52</sup>

In any event, would there be widespread tort liability for gun companies were both PLCAA and state pre-emption laws all repealed?

The central argument I will put forward is that it is not easy to find good examples from other important industries of defendants being held liable for the sorts of cases that gun victim plaintiffs would like to win.<sup>53</sup>

Take the motor vehicle accident problem. It is well understood that car companies make vehicles intended to be sold to ordinary drivers that are capable of going more than 100 miles per hour even though that is well more than the maximum road speed allowed. Surely the car companies know that some owners regularly drive faster than, say, 75 miles per hour and cause accidents because of their speeding. Product liability law today generally requires product makers to take into account foreseeable product misuse.<sup>54</sup> Does this make cars involved in very high speed

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<sup>52</sup> See *Riegel v. Medtronic*, 552 U.S. 312 (2008). By contrast, there is no federal pre-emption of tort claims if the medical devices have been approved merely because they are substantially equivalent to devices grandfathered in because they were on the market before 1976. *Medtronic, Inc. v Lohr*, 518 U.S.470 (1996).

<sup>53</sup> But see Vernick, John S., Lainie Rutkow, and Daniel A. Salmon (November, 2007). "[Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles](#)". *American Journal of Public Health*. **97**: 1991–7. [doi:10.2105/AJPH.2006.092544](#).

<sup>54</sup> *Larsen v. General Motors Corp*, 391 F. 2d 495 (8<sup>th</sup> Cir 1968) embraced the now generally accepted “crashworthy” doctrine, forcing automakers to design cars to be safer in the aftermath of a driver carelessly causing an accident. It is now well understood that manufacturers who can

crashes defectively designed? Although there is something appealing about this idea, I don't see successful cases being brought on this theory,<sup>55</sup> and given the record so far I'd be surprised if they were successful.<sup>56</sup>

Next, I imagine that in today's high-tech world motor vehicles could be engineered so that (perhaps absent an emergency) they could not be driven faster than the posted speed limit on the road on which they are currently travelling (and I assume that self-driving cars currently have and will continue to have this feature). Does the failure to include this speed-control function in all of today's new motor vehicles make them defective so that the manufacturer would be liable in tort to victims of drivers whose speeding (at any speed) causes accidents? This too is an appealing idea, but I don't see such cases.<sup>57</sup>

In the same vein, surely by now all new cars could be sold with breathalyzer type testers included (often called ignition interlock devices) so that a driver with too high a breath-alcohol reading would be

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reasonably foresee misuse that could be avoided or reduced by design changes and/or warnings can be held liable on product "defect" grounds for failing to take reasonable steps to preclude or reduce the risk. See e.g., *Lugo v. LJM Toys, Ltd.* 552 N.W.2d 162 (N.Y. 1990) and *Hood v. Ryobi America Corp.*, 181 F.3d 608 (4<sup>th</sup> Cir. 1999). See generally Restatement (Third) of Torts: Product Liability §§ 2(b), 2(c) (1998).

<sup>55</sup>Gina M. Dominicis, *No Duty at Any Speed? Determining the Liability of the Automobile Manufacturer in Speed-Related Accidents*, 14 *Hofstra Law Review* 403 (1986).

<sup>56</sup> *Schemel v. General Motors Corp.*, 261 F. Supp 134 (S.D. Ind. 1966) aff'd 384 F. 2d 807 (7<sup>th</sup> Cir. 1967) cert denied 390 U.S. 945 (1968).

<sup>57</sup> Distracted driving is understood to be a serious problem, especially today, with the growth in smart phones and the seeming unwillingness of all too many people to set them aside while driving. It is alleged that smart phone makers can insert a feature that would disable the phone while its owner is driving except perhaps for those apps that provide instructions to the driver's destination. We are beginning to see lawsuits about this issue, although as of this writing, none has yet succeeded. See, e.g., <https://www.theguardian.com/technology/2017/jan/24/apple-class-action-lawsuit-texting-driving-iphone-patent>.

unable to start the car. These devices are now frequently required of those convicted of “driving under the influence.”<sup>58</sup> Does this make *all* cars without such devices defective products? Including such devices in all vehicles this could go a long way towards preventing drunk driving by those who have yet to be caught and convicted. Again, there is something attractive about this idea, and yet, I don’t see successful cases based on this theory.<sup>59</sup>

In short, if failure to preclude expected abuse by drivers, even when feasible, does not currently seem to lead to auto company tort liability, it is difficult to see why it would readily do so for gun makers.

Car companies sell vehicles to car rental companies who in turn rent them to the public. If a would-be renter staggers to the counter obviously drunk or high, it would be irresponsible to turn the keys over to such a customer even if he had a reservation. If a company did that, and the driver then had an accident based on drunk driving, the common law would probably impose liability on the car rental agency for negligent entrustment.<sup>60</sup> But if the car rental company knew that a clearly sober customer with a valid license had a recent DUI

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<sup>58</sup> About half the states mandate these devices after first time DUI convictions and the other half are in various ways somewhat more lenient. <http://www.ncsl.org/research/transportation/state-ignition-interlock-laws.aspx>.

<sup>59</sup> The current cost of such devices is estimated to be \$100 to initially install plus perhaps \$50-100 a month to lease. This is a significant cost to those who lease low end vehicles, although presumably the cost could be significantly reduced were an ignition interlock device built into all new vehicles. Persistent complaints about these devices are that they have too many false positives (i.e., the driver is thought to have had too much alcohol when this is not the case) or simply malfunction and prevent the vehicle from starting. See also, *Buczowski v. McKay*, 441 Mich. 96 (1992) (K Mart held not liable after legally selling shotgun ammunition to an intoxicated buyer who promptly carelessly injured the victim).

<sup>60</sup> This is parallel to the exception for negligent entrustment in PLCCA

conviction<sup>61</sup> and provided her with the keys that probably would not be negligent entrustment.<sup>62</sup> So, if that customer then stopped at a bar outside the airport parking lot, drank a few shots and then crashed her car into someone, the car rental company would probably not be liable.<sup>63</sup> Moreover, if Hertz learns that certain of its franchise locations are renting cars that are disproportionately in accidents, would Hertz be liable for any future accidents for failure to cease providing that franchise with cars to rent? I don't think so.<sup>64</sup>

The answers to these various hypotheticals I have presented are not all crystal clear, and if I changed the facts a bit the prospects for plaintiffs winning could perhaps be increased. Indeed, many might think that plaintiffs should win in several of these examples as I presented them, even if the law seems otherwise at present. Moreover, there are certainly some situations in which defendants have been held liable for irresponsibly enabling injuries to occur.<sup>65</sup> A good example of negligent marketing occurred when a Los Angeles radio station with lots of teen listeners held a contest in which the first person to catch up with a travelling disk jockey would win a prize. The D.J. was driving around,

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<sup>61</sup> If she had several recent DUI convictions that might be a different matter, but in that case she likely would not have a currently valid license.

<sup>62</sup> See e.g., *Osborn v. Hertz Corp.* 252 Cal. Rptr. 613 (App. 1988).

<sup>63</sup> Compare *Vince v. Wilson*, 561 A.2d 103 (Vt. 1989), where a victim was able to sue a car dealer who sold a vehicle to someone who carelessly caused an accident. But evidence was presented there that the car dealer had been warned about the buyer's dangerousness.

<sup>64</sup> Current law covering rental car companies includes a provision known as the "Graves Amendment," 49 U.S.C. § 30106, which calls for preemption and abolition of any state statute or common law precedent that held rental or leasing agencies vicariously liable for the negligence of the driver who rented the vehicle, except when the owner itself was negligent or engaged in criminal wrongdoing. <https://www.law.cornell.edu/uscode/text/49/30106>.

<sup>65</sup> Robert Rabin, *Enabling Torts*, 49 De Paul L. Rev. 435 (1999).

stopping at various places, and the station was broadcasting clues as to the whereabouts of “The Real Don Steele.” Two teen drivers were following the D.J., each seeking to be the first to get to him once he stopped. In the course of this pursuit, one of the teens carelessly forced some other vehicle off the freeway killing the driver. The California Supreme Court upheld a judgment against the radio station for what was, in effect, a negligently waged advertising campaign.<sup>66</sup> But such cases are few and far between.

To be sure, the folks urging the repeal of PLCAA and its state equivalents are technically only arguing that they should be given a chance to prove tort liability, rather than being cut off at the outset.

So, fair enough. Maybe Clinton was correct that it is unfair that creative plaintiffs’ lawyers cannot even *try* to use tort law more broadly in the fight to reduce gun injuries and deaths. But, by thinking about the matter in the motor vehicle context, one can see that it would be wrong to assume that on the substantive merits there are lots of clearly winnable gun cases out there that would be successfully brought were PLCAA and state counterparts repealed – although that is not to say that no cases against the gun industry would be winnable.<sup>67</sup>

Consider whether it is appropriate to hold Bushmaster (the maker of the assault weapon used in the Sandy Hook Elementary School shootings) liable in tort for legally selling assault rifles to the public that are then used by some criminals to kill people when most buyers of those weapons don’t commit crimes and claim to get considerable utility from owning and perhaps regularly shooting these sorts of weapons. When asked why they would own assault weapons, those interviewed offered a

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<sup>66</sup> Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975).

<sup>67</sup> See e.g., Johnson v Bryco Arms, 304 F. Sup.2d 383 (E.D. N.Y. 2004).

wide range of reasons.<sup>68</sup> Some get a thrill of taking these guns to a firing range and have so many bullets explode from the barrel in rapid order. Others use them for hunting, especially for small game. Still others with a military background feel comfortable owning a familiar weapon, or maybe they have no military experience but having a weapon like this makes them feel cool and powerful, imagining themselves to be like those who fire off such weapons in the media. People who are gun collectors sometimes wish to own an assault weapon simply because it is legal to do so and this fills out their collection. Other collectors believe it is important for ordinary citizens to possess high power weapons to ward off the risk of a tyrannical government dominating the public by force and the risk of ISIS and “radical Islam” waging a violent campaign inside the U.S. Less sweepingly, other buyers believe that knowing that homeowners can possess these sorts of weapons helps deter home invasions by criminals and that these weapons will quite effectively be able to protect the owner and his/her family in the event of such an invasion.<sup>69</sup>

Attempts to hold defendants liable in tort in what are sometimes termed “generic” defect cases, where the plaintiff claims the product should simply not be sold to ordinary consumers, have been broadly unsuccessful. More than thirty years ago the New Jersey Supreme Court took a bold step in favor of using tort law to push certain products out of

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<sup>68</sup> Thom Patterson, Why Would Someone Own a Military-Style Rifle? <http://www.cnn.com/2012/12/21/us/military-style-weapons-ireport/>; Meghan Keneally, AR-15 Owners Explain Why They Have Their Guns, <http://abcnews.go.com/US/ar-15-owners-explain-guns/story?id=39873644>.

<sup>69</sup> See also, Marty Hayes, Why American Citizens Need Assault Weapons, <https://armedcitizensnetwork.org/why-american-citizens-need-assault-rifles>; Evan F. Nappen, 101 Reasons Why You NEED an “Assault Weapon,” <http://www.evannappen.com/101-reasons-to-own-an-assault-firearm.html>; Wayne Allyn Root, Why I’m Buying an Assault Weapon Today -- and So Should You, <http://www.breitbart.com/big-government/2016/06/18/im-buying-assault-rifle-today/>.

the market by concluding that the jury could decide that an above ground swimming pool was “defective” even if it could not be made reasonably safer after the plaintiff was badly injured having dived into three and a half feet of water.<sup>70</sup> In effect, the jury could decide that this common product should not be sold to the public because the jurors believed that it was simply too dangerous despite the benefits it provided. But this case has not generally been followed<sup>71</sup> and the New Jersey legislature, in response, substantially narrowed the court’s holding.<sup>72</sup>

The Restatement of Torts (Third) (Products Liability) permits imposing liability on makers of products which have a “manifestly unreasonable design,” giving prank exploding cigars as an example; but the Restatement rejects the application of this provision to “commonly and widely distributed products such as alcoholic beverages, firearms, and above-ground swimming pools ...”<sup>73</sup>

To be sure, the case can be made that it is socially undesirable to sell assault weapons to the public, and between 1994 and 2004 there was a federal ban on such sales with respect to 19 specific weapons.<sup>74</sup> But this law expired and was not renewed. The broad principle underlying the Restatement of Torts is that if the legislature has not precluded the sale (especially when having been asked to address this very issue), the tort system and individual juries should not generally disrupt the market.

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<sup>70</sup> O’Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983).

<sup>71</sup> See e.g., Baughn v. Honda Motor Co., 727 P.2d 655 (Wash. 1986).

<sup>72</sup> N.J.S.A. 2A:58C-3.

<sup>73</sup> Restatement of Torts (Third) Products Liability Section 2, comments d and e.

<sup>74</sup> Federal Assault Weapons Ban, [https://en.wikipedia.org/wiki/Federal\\_Assault\\_Weapons\\_Ban](https://en.wikipedia.org/wiki/Federal_Assault_Weapons_Ban).

Return to the motor vehicle context. Surely, the auto companies are not about to be held liable for the conduct of drivers who use their cars to commit “road rage” that injures or kills people. Moreover, I do not believe that result would change if it turns out that certain vehicle models are disproportionately used in road rage incidents.

As any even irregular viewer knows, auto companies show lots of ads on TV in which their cars are driven in amazing ways. If someone tries to copy that behavior and carelessly kills someone, will the auto maker be held liable? I have not seen such cases, and while these ads often contain small print warnings that what you watched was carried out by a professional driver on a special course, I don’t think such notices are necessary to legally protect the advertiser from tort liability.<sup>75</sup>

Turning to tobacco products, the glamour of the Marlboro man in cigarette commercials, or the association in ads of smoking with being “cool” or having a socially appealing “lifestyle” has not been successfully used to impose tort liability on tobacco companies. Nor have cigarette smoking victims been able to hold liable those who sold them cigarettes on the ground that chewing tobacco (and now e-cigarettes) are enormously less dangerous and should have been sold them instead as an alternative nicotine delivery device. A drug company is unlikely to be held liable if an individual patient manages to obtain a large quantity of its legal opioid drugs and then dies from an overdose. All of these examples too are meant to illustrate the difficulties that gun victims would continue to face even absent PLCCA.

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<sup>75</sup> Even Tom Magliozzi, one of the famous Car Talk hosts, called, not for precluding such ads, but asking the ads to contain a big notice saying “this is stupid driving.”  
<http://www.thechainlink.org/forum/topics/why-is-reckless-speed-promoted-in-nearly-all-auto-ads?page=3&commentId=2211490%3AComment%3A897660&x=1#2211490Comment897660>.

On the other hand, with respect to opioids, a more promising litigation strategy might be to sue drug companies who knew or readily could have known that certain doctors were vastly over-prescribing these drugs, using one or a few drug stores whose pharmacists were well aware of the practice. If that conduct was ignored by the drug makers (e.g., by failing to cut off the pharmacies who continued to fill those doctors' prescriptions), perhaps the drug companies should risk tort liability.

By analogy, this suggests that absent PLCCA there just might be a window to success in attacks on gun companies for carelessly failing to police their dealers. Indeed, because of the especially dangerous nature of guns, as has been emphasized in other tort settings,<sup>76</sup> it is imaginable that, in the end, gun companies could be somewhat *more* vulnerable to tort claims under theories that are likely less successful against auto, drug, and tobacco companies.<sup>77</sup> This possibility exposes a somewhat disingenuous nature of the frequent argument against PLCCA that if auto and drug makers are subject to tort law, why not gun makers. But the deeper vision is that, given the full operation of tort law, plaintiffs might be able to hold the gun industry liable in analogous circumstances in which auto and drug companies would not be.

Ultimately, perhaps the gun safety advocates don't really expect to win all that many torts cases. Maybe they see the prospect of a nation free of

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<sup>76</sup> E.g. *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

<sup>77</sup> Despite the generally unappealing reputation of the tobacco companies, they have one substantial advantage over gun companies – their victims are mostly the user of their products, not innocent third parties. Still, even the passive smoking cases against tobacco companies have largely gone nowhere; indeed, in Florida where it looked as though there was going to be a gold mine in suits by flight attendants who suffered from diseases caused by second-hand smoke on planes, the pickings, at least so far, remain thin. Stephen Sugarman, *Mixed Results from Recent Tobacco Litigation*, 10 *The Tort Law Review* 94-126 (2002).

PLCAA in a different light. After all, there have been astoundingly few successful lawsuits of any sort against the tobacco companies over the past sixty years.<sup>78</sup> And yet many people believe the litigation efforts that have been made, including the rare winning cases, have made a real difference in the overall fight for tobacco control.<sup>79</sup> The evidence obtained via discovery, the publicity achieved, the inappropriate comments made by tobacco officials about these cases that become part of the public record, and the like are said by many to be key in obtaining eventual legislative and administrative reform.

So maybe for gun control activists it comes down to that. They realize that their prospects *today* for imposing serious marketing restrictions on the gun industry via legislation and/or administrative rule-making are slim, but perhaps with a greater opportunity to press the gun companies and gun shops in the courts, public sentiment will sufficiently shift so as to facilitate policy changes in the future.

This is not the role we academics usually assign to tort law – as a tool used in a wider political battle. But maybe we need to think more about tort law, like we think about public hearings, twitter posts, press

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<sup>78</sup> See generally, Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in *Regulating Tobacco* (Rabin and Sugarman eds Oxford University Press 2001) at pp. 176-206. In the years since this perceptive overview was published, a few individual tort claims against big tobacco have been won, but only a few. The government's RICO claim against the industry was won, but has been held up through endless appeals, and in the end the remedy finally intended to be imposed might well be largely meaningless. For a recap and frustration over the ten years of inaction since the federal district court found the industry liable, see [Statement-Historic-RICO-Case-Against-Tobacco-Companies-Hits-Milestone.pdf](#).

<sup>79</sup> Most of this admiration of anti-tobacco lawyers seems to come from a combination of the Master Settlement Agreement (about which I expressed my doubts above) and the occasional blaring newspaper headline about a successful tort claim at the trial court level for a staggering sum of money (which routinely winds up being more quietly reversed or drastically reduced in subsequent proceedings). See, however, the reported settlement of hundreds of Florida tobacco lawsuits for \$100 million. <http://www.cnbc.com/2015/02/25/tobacco-companies-to-settle-smoking-lawsuits-for-100-million.html>.

releases, publicizing of research findings on social media, public events, and the like -- as just another instrument to be used by the parties in an ongoing legislative and administrative struggle. Indeed, for some the main hope from tort claims is not necessarily to win cases, but through the discovery permitted when cases get past a motion to dismiss, to unearth documents they imagine exist in the files on gun companies that will make more Americans view the gun industry as a pariah industry<sup>80</sup> - - in the way documents obtained from the tobacco industry, at least for a time, cast that industry in a very bad light.<sup>81</sup>

In turn, a different explanation of the bills put to Congress in the 2016 election cycle to repeal the tort pre-emption provisions of PLCCA is that the sponsors and their gun controls allies sought to use the occasion of both the election campaign and the parallel track Sandy Hook litigation to build up political support for gun control generally.<sup>82</sup> One can be confident that they felt a need for some new energy after their inability to get Congress to do anything at all responsible in the aftermath of the

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<sup>80</sup> For a discussion of the information-producing role of litigation (likening it to private sector FOIA demands), see Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, in Lytton *supra* note 23, Chapter 11 at pp. 271-291.

<sup>81</sup> Stanton Glantz, et. al. **The Cigarette Papers** (University of California Press 1996).

<sup>82</sup> For a discussion of the interactive nature of litigation and legislative initiatives in the gun control movement, see Timothy Lytton, *The Complementary Role of Tort Litigation in Regulating the Gun Industry*, in Lytton *supra* note 23, Chapter 10 at pp. 250-270. For an argument that administrative agencies and legislation are much better than courts in making the appropriate risk-reduction analysis needed to identify and implement the appropriate gun control measures, see Peter Schuck, *Why Regulating Guns Through Litigation Won't Work*, in Lytton *supra* note 23m Chapter 9 at pp. 225-249. For doubts that gun control of any sort (apart perhaps that of making it illegal for mentally ill people to possess guns) can seriously reduce crime (and calling instead for good jobs for the poor and reduced societal inequality overall) see, Don B. Kates, *The Limited Importance of Gun Control From a Criminological Perspective*, in Lytton *supra* note 23, Chapter 2 at pp. 62-84. For a much more optimistic public health picture of gun control, see Julie Samia Mair, Stephen Teret, and Shannon Frattaroli, *A Public Health Perspective on Gun Violence Prevention*, in Lytton *supra* note 23, Chapter 1 at pp. 39-61.

Sandy Hook carnage when public sentiment for gun control was riding high.<sup>83</sup>

In conclusion, looking back over the past half century, one gets the sense that concentrated litigation against certain industries seems to go in waves, as illustrated by the pattern of claims against auto, pharmaceutical drug, and tobacco industries. This is not to say that there is no ongoing tort litigation during the more quiescent periods, but rather to say that bursts of lawsuits, like fashion, come and go. Sometimes these waves of lawsuits seek also to promote legislative and administrative reform, sometimes they follow in the wake of activism by executive and legislative branches, and sometimes they are more isolated ventures largely confined to the courts. What does seem clear is that any potential tsunami of tort (and tort-like) claims against the gun industry on negligent marketing grounds was firmly blocked by PLCCA, the federal pre-emption legislation.<sup>84</sup>

Here is where candidate Clinton might have taken a more forthright stand, specifically supporting those lawsuits against gun companies regardless of whether auto, drug and tobacco companies are being held liable on analogous negligent marketing claims. This perhaps would have then pressed candidate Sanders to take his own stand on the appropriateness of using tort law to reign in various marketing practices

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<sup>83</sup> For a description of legislative and administrative actions taken on gun control outside of Congress in the wake of the Sandy Hook shooting plus the failure of two important bills brought before Congress, see [https://en.wikipedia.org/wiki/Gun\\_control\\_after\\_the\\_Sandy\\_Hook\\_Elementary\\_School\\_shooting](https://en.wikipedia.org/wiki/Gun_control_after_the_Sandy_Hook_Elementary_School_shooting)

<sup>84</sup> It is possible that the repeal of PLCCA could also facilitate successful lawsuits by victims of stolen guns that either ordinary gun owners or gun dealers negligently failed to secure and the thief then used the weapon to shoot the victim. It turns out that a considerable share of gun deaths involves stolen guns. But, even apart from PLCCA, courts have been quite reluctant to hold liable those who carelessly fail to secure their weapons. See Andrew Jay McClurg, *The Second Amendment Right to be Negligent*, 68 Florida L. Rev. 1 (2016).

in the gun industry rather than hiding behind the protection of gun dealers who were never realistically at risk.