THE NINTH CIRCUIT FORECLOSES A BULLET SIZED HOLE IN THE PLCAA IN *ILETO V. GLOCK*, 565 F.3D 1126 (9TH CIR. 2009)

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I. INTRODUCTION

On October 26, 2005, President George W. Bush signed the Protection in Lawful Commerce in Arms Act (PLCAA) into law.[1] The Act was intended to effectively close the gap in the rising numbers of lawsuits filed against firearm manufacturers for merely producing or distributing a firearm that was used to commit a criminal act.[2] On one hand, the gun industry, Congress, and the President looked to the Act as the final step in protecting an otherwise legal industry from a massive amount of private litigation.[3] On the other hand, opponents of the bill saw the Act as a measure that unlawfully foreclosed the opportunity for cities or victims of gun violence to seek redress from the appropriate defendants.[4] Because the Act's provisions require immediate dismissal of all pending actions,[5] the plaintiffs in these actions immediately began devising lines of attack against the PLCAA.[6]

In *Ileto v. Glock, Inc.,* the Ninth Circuit decided the issue of whether a plaintiff's claims under state tort law were preempted by the passage of the PLCAA.[7] The plaintiffs argued that the defendants violated state law, and thus the lawsuit could proceed as an exception to the PLCAA.[8] In *Ileto*, the Ninth Circuit was correct in its findings that the PLCAA preempted the plaintiff's claims against Glock and RSR because of the purpose, the plain

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1. Protection in Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–03 (2006).
2. 15 U.S.C. § 7901.
3. R. Clay Larkin, Note, *The "Protection of Lawful Commerce in Arms Act": Immunity for the Firearm Industry is a (Constitutional) Bulls-Eye*, 95 KY. L.J. 187, 187 (2007).
4. *Id.*
5. 15 U.S.C. § 7902(b).
6. Larkin, *supra* note 3, at 187. While numerous challenges have been made to the constitutionality of the PLCCA, they are not within the range of this Note. See Larkin, *supra* note 3, for a discussion of the constitutionality of the PLCAA. *See also* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 392–99 (2d Cir. 2008) (discussing the constitutionality of the PLCAA).
7. Ileto v. Glock, Inc. (*Ileto III*), 565 F.3d 1126 (9th Cir. 2009).
8. *Id.* at 1132–33.

text, and the legislative history of the Act. The lack of a roadmap for future cases, however, allows lower courts to deviate from the intended exceptions of the PLCAA. Further, the Ninth Circuit was correct in finding that the PLCAA did not preempt the claims against China North because China North was not federally licensed and thus not within the protection of the PLCAA.

The resulting focus of this Note is centered upon whether a State's general nuisance and tort statutes are applicable to the sale or marketing of firearms, and thus within the listed exceptions as provided by the PLCAA. Section II of this Note will describe the brief history of litigation against the firearms industry, the enactment of the PLCAA, and the cases that have interpreted the pertinent exceptions to the PLCAA. Section III will offer a detailed exposition of *Ileto v. Glock, Inc.* Section IV will analyze the court's decision to preclude plaintiffs' claims against Glock and RSR, to allow the plaintiffs' claims against China North, and finally, to decide whether the court gave lower courts the guidance necessary to decide what statutes are applicable to the sale or marketing of firearms.

II. LEGAL BACKGROUND AND PASSAGE OF THE PLCAA

A review of the relevant legal history of firearms litigation is necessary to better understand post-PLCAA case law. Part A of this section reviews the recent whirlwind of litigation used as a means to further regulate the firearm industry. Part B of this section describes the passage of the PLCAA. Finally, Part C of this section summarizes the cases arising after the enactment of the PLCAA.

A. Legal Climate before the PLCAA

The gun industry endured lawsuits long before words such as "Columbine" and "NRA" found their way into everyday speech.[9] These claims arose under theories of product liability and negligence, similar to those against any other manufacturer of goods.[10] During the 1980s, attorneys began to file complaints asserting that gun manufacturers should be accountable for the use of their products in criminal activities.[11] Under this theory, every gun manufacturer would become strictly liable for any and all injuries caused by its products.[12] Attorneys filed mountains of

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9. Allen Rostron, *Shooting Stories: The Creation of Narrative and Melodrama in Real and Fictional Litigation against the Gun Industry*, 73 UMKC L. REV. 1047, 1049 (2005) (citing Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (Ex. 1837)).
10. *Id.* at 1049.
11. *Id.* at 1049–50.
12. *Id.* at 1050.

paperwork in an attempt to bring the entire industry to its knees, and in effect, reduce the availability of firearms to the end user.[13]

The onslaught of litigation resulted in a large body of case law heavily in favor of gun makers.[14] This forced attorneys to carefully select the underlying legal theories and factual situations with more care.[15] These new claims targeted gun manufacturers whose behavior could be considered especially dangerous or negligent.[16] Attorneys looked for high profile shootings involving weapons made by manufacturers exceptionally apathetic to the use of their weapons.[17] In addition, numerous cities and states followed form and filed their own claims.[18] These claims were based on the collective cost of the alleged negligence of gun manufacturers whose products were consistently used for criminal activities.[19]

In response to this wave of litigation, states began to pass laws clarifying their own view of the liability of gun manufacturers. For example, Virginia limited the liability of the firearms industry, while the District of Columbia's statute essentially held gun manufacturers absolutely liable, regardless of product defect.[20]

B. Call for Reform: Enactment of the PLCAA

In the midst of this climate, Congress swiftly took action to remedy the question of gun manufacturer liability.[21] On October 26, 2005, President George W. Bush signed the Protection of Lawful Commerce in Arms Act (PLCAA) into law.[22] The statute's most important provision dismissed all pending and future claims brought under the previously discussed theories.[23]

The Act contains both a listing of findings and purposes as a means of providing context to the statutory language.[24] Congress found, among other

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13. Elizabeth Peer et al., *Taking Aim at Handguns*, NEWSWEEK, Aug. 2, 1982, at 42 (describing an attorney who bragged of his caseload against the gun makers). In that attorney's opinion, he could single handedly raise the cost of the manufacturers insurance and force this increase onto the end user, in effect lowering demand by raising prices. *Id.* He reasoned that he could achieve this outcome without winning a single case. *Id.*
14. Rostron, *supra* note 9, at 1050.
15. *Id.* n.17.
16. *Id.* at 1051.
17. *Id.* at 1053. *See*, *e.g.*, Halberstam v. S.W. Daniel, Inc., No. 95 Civ. 3323 (E.D.N.Y. 1998) (collections of pleadings and court documents) and Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146 (Cal. Ct. App. 1999), *rev'd*, 28 P.3d 116 (Cal. 2001).
18. Rostron, *supra* note 9, at 1054.
19. *Id.*
20. Larkin, *supra* note 3, at 190.
21. 15 U.S.C. §§ 7901–7903 (2006).
22. *Id.*
23. *Id.*
24. 15 U.S.C. § 7901.

things, that the litigation amassing against an entire industry, most of whom are lawful makers, sellers, or distributers of firearms, was "an abuse of the legal system."[25] The overarching purpose of the legislation aimed at eliminating frivolous causes of action based solely on the use of the product in a criminal or unlawful activity.[26] The statute also intended to protect a citizen's right to lawfully use firearms,[27] unimpeded by litigation responsible for indirectly driving up the cost of firearms and ammunition.[28]

The actual language used by the PLCAA is simplistic, yet to the point. In full, § 7902 states:

> (a) In general
> A qualified civil liability action may not be brought in any Federal or State court.
> (b) Dismissal of pending actions
> A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.[29]

A qualified civil action is further defined as a suit against a dealer, manufacturer, or trade association resulting from the unlawful use of a firearm.[30] Although this definition blocks most suits from being filed, the statute contained six exceptions to the general rule.[31] The exception pertinent to this Note is triggered by a defendant manufacturer's knowing

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25. 15 U.S.C. § 7901(a)(6).
26. 15 U.S.C. § 7901(b)(1).
27. 15 U.S.C. § 7901(b)(2–3).
28, Tom Baker & Thomas O. Farrish, *Liability Insurance & the Regulation of Firearms*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORT 292 (Timothy D. Lytton ed., 2005).
29. 15 U.S.C. § 7902.
30. 15 U.S.C. § 7903.
31. 15 U.S.C. § 7903(5)(A). The Act does not preclude:

> (i) an action brought against a transferor convicted under [§] 924(h) of Title 18, 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 . . . (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 . . . or (vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

Id.

violation of a federal or state statute "applicable to the sale or marketing" of firearms.[32]

C. Case Law Interpreting the PLCAA

The litigation following the enactment of the PLCAA raised questions as to which state statutes were applicable to the sale or marketing of firearms. After Congress enacted the PLCAA, plaintiffs tried to get around the language of § 7902 by claiming that their state nuisance and negligence statutes should be considered as applicable to the sale or marketing of firearms.[33] The remainder of this section will discuss the lower court decisions interpreting which state statutes were, in fact, applicable to the sale or marketing of firearms and thus triggering the Act's exception. The remainder of this section will discuss the lower court decisions interpreting which state statutes were applicable to the sale or marketing of firearms thus triggering the Act's exception.

1. The Second Circuit's Decision on the Applicability of New York's Criminal Nuisance Statute to the "Sale or Marketing of Firearms"

The Second Circuit became the first federal appellate court to decide whether a general nuisance statute could fall within the predicate exception of the PLCAA.[34] In this case, the city of New York sought injunctive relief from the nuisance that the gun manufacturers created with their marketing and distribution schemes.[35] The City alleged that the defendants were knowingly redirecting guns to illegal markets.[36] In addition, the defendants allegedly chose to be indifferent to the distributors and dealers who were "feed[ing] the illegal secondary market."[37] The City requested injunctive relief that would force the manufacturers to employ specific controls to inhibit the stream of firearms into the city.[38]

The city argued that the complaint fit the exception as defined by § 7903(5)(A)(iii).[39] The complaint alleged a violation of criminal nuisance

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32. 15 U.S.C. § 7903(5)(A)(iii).
33. *See, e.g.,* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1579 (2009); District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (D.C. 2008), *cert. denied*, 129 S.Ct 1579 (2009); Smith & Wesson Corp. v. City of Gary, 875 N.E.2d 422 (Ind. Ct. App. 2007).
34. *Beretta U.S.A. Corp*., 524 F.3d 384.
35. *Id.* at 391.
36. *Id.*
37. *Id*. (quoting Amended Complaint at ¶ 8).
38. *Id.*
39. *Id.* at 399. The Second Circuit refers to this section of the Act as the "predicate exception." This Note will adopt this moniker and similarly refer to the nuisance and tort laws as being the "predicate statutes."

in the second degree.[40] Conversely, the manufacturers argued that the predicate exception was only intended to include statutes specifically applicable to the sale or marketing of firearms.[41] The lower court agreed with the city, finding that the nuisance statute was applicable to the sale or marketing of firearms according to the plain text of the PLCAA.[42]

The court of appeals was quick to point out that the New York nuisance statute is a law of general applicability and "has never been applied to firearms suppliers for conduct like that complained of by the city."[43] This fact definitely influenced the court in deciding that the New York nuisance law was not applicable to the sale or marketing of firearms.[44] In coming to this decision, the court first analyzed the meaning of the word applicable in the context of the statute.[45] The district court relied heavily on the plain meaning of applicable in deciding that the nuisance statute was "capable of being applied" to the "sale or marketing of firearms."[46] The Second Circuit found this "plain meaning" of applicable to be out of context and did not accurately reflect Congress' intent.[47] The court recognized that the meaning of applicable, by itself, was ambiguous and moved on to statutory construction as a means of resolving the apparent conflict.[48] Through the use of statutory canons such as *noscitur a sociis*[49] and *ejusdem generis,*[50] the court settled on a definition that required a predicate statute to "regulate the firearms industry."[51] The court found that the listed examples provided by Congress in § 7903(A)(5)(iii)(I)-(II) should limit the meaning of applicable to the type of violations expressed by the examples.[52] This contextual definition was found to be a more appropriate representation of the intent of Congress.[53]

In the context of the PLCAA's purposes, the court found that a narrow reading of the applicable statutes was appropriate because of the statutes listed in § 7901(a)(4).[54] Accordingly, the court relied on Congress' finding

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40. *Id.* (citing N.Y. PENAL § 240.45 (2009)).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 400.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 401.
49. *Id.* ("The meaning of doubtful terms or phrases may be determined by reference to their relationship with other associated words or phrases.").
50. *Id.* ("Where general words are accompanied by a specific enumeration of person or things, the general words should be limited to persons or things similar to those specifically enumerated" (internal quotations omitted)).
51. *Id.* at 402.
52. *Id.*
53. *Id.*
54. *Id.*

that statutes such as "the Gun Control Act of 1968,[55] the National Firearms Act,[56] and the Arms Id. [*sic*] Control Act"[57] heavily regulated the firearms industry, and thus, should help guide the interpretation as to which statutes Congress intended to be predicate statutes.[58] The court also concluded that exceptions to a statute should be read narrowly in order to give full weight to the actual purpose of the statute.[59] A broad reading of this exception would allow too many statutes to apply to the exception and, therefore, negate Congress' intent to safeguard the firearms industry from frivolous claims.[60]

The court also looked to the legislative history for further support of its decision,[61] despite expressly discounting the persuasiveness of legislative history versus other forms of statutory interpretation.[62] The relevant legislative history involved statements that the *Beretta U.S.A. Corp* case pending before the Second Circuit was an "example . . . of exactly the type of . . . lawsuit this bill will eliminate."[63] Proposed amendments to increase the liability were also defeated because they would have "successfully remove[d] any teeth from the Act."[64] The court opined that the statements further supported its narrow definition.[65]

The court held that the New York nuisance law did not apply to the sale or marketing of firearms, but it did not foreclose the argument that the nuisance law could apply in the future.[66] The court concluded its opinion with a roadmap for lower courts to use in analyzing whether a statute is applicable to the sale or marketing of firearms.[67] The court stated that the exception includes statutes "that expressly regulate firearms, or that courts have applied to the sale and marketing of firearms."[68] It also includes "statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms."[69] This holding appears to leave open the opportunity for a New York state court to apply the criminal nuisance statute to the "sale or marketing of firearms." Shortly after *Beretta U.S.A. Corp*, an Indiana Appellate Court had the opportunity to

55. 18 U.S.C. §§ 921–931 (2006).
56. 26 U.S.C. §§ 5801–5872 (2006).
57. 22 U.S.C. §§ 2751–2799 (2006).
58. *Beretta U.S.A. Corp.*, 524 F.3d at 402 (quoting 15 U.S.C. § 7901(a)(4) (2006)).
59. *Id.* at 403.
60. *Id.*
61. *Id.*
62, *Id.*
63. *Id.* (citation omitted).
64. *Id.* at 404.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69 *Id.*

decide a case in which the state supreme court had spoken on the applicability of the state's nuisance law to the sale and marketing of firearms.

2. The Indiana Appellate Court's Approach Using Distinguishing Facts in Smith & Wesson Corp. v. City of Gary

In a completely different result from *Beretta U.S.A. Corp*, the Indiana Appellate Court found a complaint alleging public nuisance to be within the predicate exception of the PLCAA.[70] The outcome of the case, as the appellate court admitted, can be distinguished from both *Beretta U.S.A. Corp* and the trial court's ruling in *Ileto* on the basis of the specific allegations contained in the complaint.[71] The court used these facts to conclude that the plaintiff's claims could proceed in the face of the PLCAA's preclusion powers.[72]

The City of Gary had run an undercover sting operation with the goal of intercepting illegal handguns before their arrival on the streets.[73] Undercover agents announced that they could not legally buy guns (due to no license or felony convictions) but then tried to work out a "straw purchase" with retailers.[74] The dealers named in the complaint were alleged to have knowingly sold guns through the practice of "straw purchases."[75] In addition, the complaint asserted that dealers failed to collect the necessary information for background checks, sold too many guns to a single person, and deliberately moved guns around the regulations and into the hands of illegal buyers.[76] The manufacturers allegedly knew of the large quantity of illegal handgun sales at the retail level.[77] The city also claimed that the manufacturers could have changed their distribution practices to prevent the illegal purchases, but chose not to.[78]

The city alleged multiple levels of harm. First, the city pointed to the 124 gun murders that took place within cities limits between 1997 and 1998.[79] Next, the city argued that, from 1997 to 2000, the defendant

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70. Smith & Wesson Corp. v. City of Gary (*City of Gary III*), 875 N.E.2d 422 (Ind. Ct. App. 2007).
71. *Id.*
72. *Id.*
73. *Id*. at 425.
74. *Id.* A "straw purchase" is accomplished when a go-between with the legal qualifications to own a gun, purchases a gun or guns for someone not qualified to buy or possess a gun.
75. *Id.* The defendants included Sturm, Ruger & Company, Inc., Colt's Manufacturing Company, LLC, Beretta U.S.A. Corp., Smith & Wesson Corp., Browning Arms Company, B.L. Jennings, Inc. and Bryco Arms Corporation, Glock, Inc., Beemiller, Inc., Phoenix Arms, and Taurus International Manufacturing, Inc. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

retailers sold 764 of the 2,136 handguns recovered from crimes.[80] Finally, the city alleged that as a result of the illegal handgun sales, it had to provide additional support and resources to "investigate and prosecute the violations of law."[81] The three counts of the complaint asserted public nuisance, negligence in distribution of guns, and negligent design, respectively.[82]

Initially, the trial court dismissed all claims as to all defendants for failure to state a claim.[83] The court of appeals affirmed the dismissal as to the claims of negligence, but reversed the trial court on the issue of public nuisance.[84] The court found that the retailers could be held liable for public nuisance due to their participation in the "straw purchase" schemes.[85] The city appealed the ruling and the Indiana Supreme Court granted transfer.[86] The state supreme court found that, taken as true, the city's allegations were "sufficient to allege an unreasonable chain of distribution of handguns sufficient to give rise to a public nuisance generated by all defendants."[87] The final ruling reversed the court of appeals as to all claims.[88] The City could continue to pursue public nuisance claims against the defendants, including manufacturers, and advance the claims of negligent distribution and negligent design.[89]

After the case was remanded to the trial court, Congress enacted the PLCAA.[90] Soon after, the defendants moved for dismissal or in the alternate, judgment on the pleadings.[91] The trial court denied both motions and the defendants appealed.[92] The court of appeals was then left to decide whether the PLCAA barred the City's claims.[93] The City argued that the public nuisance law did indeed fit within the "predicate exception" included in the PLCAA.[94] As recognized by the Second Circuit in *Beretta U.S.A. Corp.*, the liability of the manufacturers hinged on the court's interpretation of "applicable."[95] The City argued that the Indiana Supreme Court had already applied the nuisance law to the sale of firearms in this very case,

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 426.
85. *Id.* (citing City of Gary v. Smith & Wesson Corp. (*City of Gary I*), 776 N.E.2d 368, 389 (Ind. Ct. App. 2002).
86. *Id.*
87. City of Gary *ex rel.* King v. Smith & Wesson Corp. (*City of Gary II*), 801 N.E.2d 1222, 1241 (Ind. 2003)
88. *Id.* at 1249.
89. *Id.*
90. *City of Gary III,* 875 N.E.2d at 426.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 429.
95. *Id.* at 430.

and thus the exception should apply.[96] The manufacturers countered with a narrow interpretation and argued that Indiana nuisance law is not "applicable to the sale or marketing" of firearms.[97] The court found that the Indiana Supreme Court had generally applied the Indiana nuisance statute to the manufacturer's alleged activities, but it was unclear whether or not this statute was "applicable to the sale or marketing of firearms for purposes of the PLCAA."[98]

The court outlined its analysis as to "whether the predicate exception is ambiguous by examining the language of the predicate exception, the context of the predicate exception, and the broader context of the predicate exception within the PLCAA."[99] This analysis centered on the definition of the word "applicable."[100] The court found that, generally, the definition of applicable is "capable of being applied."[101] On its face, the language of the statute was unambiguous, and therefore, the Indiana public nuisance statute was applicable to the sale or marketing of firearms.[102] The court disagreed with the defendant's argument that the Indiana nuisance statute is too broad and is in no way comparable to the regulatory statutes set forth in the subsections of the predicate exception.[103] In the end, the court did not set forth whether it is necessary under the PLCAA to violate a statute that is "facially" applicable to the sale or marketing of firearms.[104]

The court based its finding on the Indiana Supreme Court's interpretation of Indiana's public nuisance law in the first appeal of this matter.[105] In that appeal, the state supreme court found that "generally, gun regulatory laws leave room for the defendants to be in compliance with those regulations while still acting unreasonably and creating a public nuisance."[106] The supreme court also pointed to Indiana's law on the sale of handguns and noted that the facts in the complaint alleged violations of those statutes.[107] Therefore, the appellate court concluded that even if the PLCAA required an underlying violation of a statute facially applicable to firearm sales or marketing, the city had alleged sufficient facts to satisfy this requirement.[108] In the end, the court found that there was no ambiguity

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* The subsections referred to are 15 U.S.C. § 7903(A)(5)(iii)(I) and (II) (2006).
104. *Id.* at 432.
105. *Id.*
106. *City of Gary II,* 801 N.E.2d 1222, at 1232–33, 1235 (Ind. 2003).
107. *Id.* at 1234–35.
108. *City of Gary III*, 875 N.E.2d at 432–33.

as to the meaning of the predicate exception[109] and declined to apply any canons of statutory construction.[110]

The defendants responded with an argument that the PLCAA was intended to specifically deny this type of claim.[111] However, the court could not "say that the Manufacturers [were] engaged in the '*lawful* design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products,' or that the harm '[was] solely caused by others.'"[112] The court found that the City's nuisance and negligence claims contained sufficient allegations of the defendant's knowing violation of state and federal firearms regulations, and thus, this case fell within the predicate exception to the PLCAA.[113]

The results of *City of Gary III* and *Beretta U.S.A. Corp.* directly contradict each other. On one hand, the Indiana appellate court found that in specific situations, public nuisance law could fit within the predicate exception as framed by the PLCAA. The Second Circuit, however, with a much more thorough analysis of the predicate exception, found that a nuisance law violation could not fit within the exception, but may have left the door open for a New York state court to allow such an action by applying the New York law to the "sale or marketing of firearms."

III. EXPOSITION OF *ILETO v. GLOCK*

In *Ileto v. Glock*, the Ninth Circuit decided that California's laws on nuisance and negligence did not meet the requirements of the PLCAA's predicate exception.[114] This decision broke new ground for the circuit. It did, however, use a similar line of reasoning as that of the Second Circuit in *Beretta U.S.A. Corp*.

A. Facts and Procedural Posture

On August 10, 1999, Buford Furrow entered the North Valley Jewish Community Center in Grenada Hills, California, carrying a 9mm Glock Odell 26, a 9mm Norinco (China North) rifle with an illegally shortened barrel, a 7.62 caliber Maadi model RML automatic rifle, and a .22 caliber Davis Industries model D-22.[115] Once inside the community center, Furrow shot three children, one teenager, and one adult.[116] After running from the

109. *Id.* at 433
110. *Id.* at 435.
111. *Id.* at 433.
112. *Id.* (alteration in original) (quoting 15 U.S.C. § 7901(A)(5)-(6) (2006)).
113. *Id.* at 434–35.
114. *Ileto III*, 565 F.3d 1126, 1138 (9th Cir. 2009).
115. Ileto v. Glock (*Ileto I*), 194 F. Supp. 2d 1040, 1045–46 (C.D. Cal. 2002).
116. *Id.*

Center, Furrow shot and killed Joseph Ileto, a postal worker on his mail route.[117] As evidenced by only 9mm shell casings being found at the scenes, Furrow used only the Glock and the Norinco pistols to carry out his shooting spree.[118] At the time of the shootings, Furrow was barred from possessing any firearms.[119]

The plaintiffs in this matter included Lillian Ileto, the lone, surviving parent of Joseph Ileto; Joshua Stepakoff, a minor through his parents Loren Lieb and Alan Stepkanoff; Mindy Finkelstein, a minor through her parents David and Donna Finkelstein; Benjamin Kadish, a minor through his parents Eleanor and Charles Kadish; and Nathan Powers, a minor through his parents Gail and John Powers.[120] They filed suit in Los Angeles Superior Court on August 9, 2000, against all manufacturers, importers, marketers, distributors, and dealers of firearms illegally obtained and used in the commission of these crimes in Los Angeles.[121] The defendants included Glock, Inc., Glock GMbH, China North Industries Corp. (China North), Davis Industries, Republic Arms, Inc., Jimmy L. Davis, Maadi, Bushmaster Firearms, Imbel, The Loaner Pawnshop Too, David McGhee, and 150 other Doe Defendants.[122] The original complaint included seven causes of action.[123] Lillian Ileto was the only plaintiff to state a cause of action for both survival and wrongful death.[124] All other plaintiffs, including Ileto, joined in bringing claims for public nuisance, negligence, negligent entrustment, and unfair business practices.[125]

On May 23, 2001, the plaintiffs filed a first amended complaint (FAC).[126] The FAC asserted only negligence and public nuisance claims in addition to Ms. Ileto's survival and wrongful death claim.[127] In addition to reducing the causes of action, The Loaner Pawnshop Too and David McGhee were not renamed as defendants.[128] However, the FAC did replace two of the John Doe defendants with RSR Management Corporation and RSR Wholesale Guns Seattle, Inc.[129]

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117. *Id.*
118. Ileto v. Glock (*Ileto II*), 349 F.3d 1191, 1216 (9th Cir. 2003).
119. *Id.* In 1998, Furrow was committed to a psychiatric hospital. *Id.* In 1999, he was convicted of assault in the second degree. *Id.* Furrow pled guilty to multiple counts and was sentenced to multiple life sentences to run concurrently with 120 years. *Id.*
120. *Ileto I*, 194 F. Supp. 2d at 1043–44.
121. *Id.* at 1044.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*

China North moved for removal to federal court.[130] On March 25, 2002, the district court granted all of the defendants' motions to dismiss.[131] The district court found that a nuisance claim could not be supported by the "distribution of a non-defective product."[132] In addition, the court found that the FAC did not allege any facts of proximate cause or duty; therefore, the FAC did not state a claim of negligence either.[133] The claims of survival and wrongful death were also dismissed because of their dependency on the negligence and public nuisance claims.[134] The plaintiffs appealed to the Ninth Circuit for review of the negligence and public nuisance claims only.[135]

In the case's first appeal, the Ninth Circuit held that the plaintiffs did state a claim for public nuisance and negligence against those manufacturers, distributors, and sellers of the specific firearms used in the shooting.[136] In turn, the court affirmed the dismissal of the causes of action against those manufacturers, distributors, and sellers of firearms whose weapons or ammunition were not used in the shootings.[137] The case was reversed in part, affirmed in part, and remanded back to the district court.[138]

On remand, the district court halted discovery and requested briefs on the implications of the newly enacted PLCAA.[139] In a separate order, the district court denied China North's motion for summary judgment because China North was not a federal firearms licensee, and thus, was not protected by the PLCAA.[140] The Ninth Circuit consolidated the appeals of the plaintiffs and China North.[141]

B. Opinion of the Court

The majority of the court[142] found that California nuisance and tort law is not "applicable to the sale or marketing of firearms," and therefore,

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130. *Id.* China North moved for removal under 28 U.S.C. §§ 1330, 1603 (2006).
131. *Id.* at 1061.
132. *Id.*
133. *Id.* at 1056.
134. *Id.* at 1061.
135. *Ileto II*, 349 F.3d 1191, 1191 (9th Cir. 2003).
136. *Id.* at 1217.
137. *Id.* at 1216.
138. *Id.* at 1217.
139. *Ileto III*, 565 F.3d 1126, 1131 (9th Cir. 2009).
140. *Id.*
141. *Id.*
142. Judge Berzon filed a dissenting opinion. The heart of the dissent revolved around the constitutional avoidance doctrine and argued that the majority's finding forced the court to analyze the constitutionality of the Act. The majority responded to this by stating that court cannot look away from the text and purpose of the statute in order to "save" it from constitutional review. *See id.* at 1146–63 (Berzon, J., dissenting).

does not fall under the predicate exception.[143] The court's opinion was based upon a three-pronged analysis consisting of the text of the statute,[144] the purpose of the statute,[145] and the legislative history.[146] The court's analysis started with a foundation in the stated purposes of the PLCAA.[147] Given the findings and expressly stated purpose of the Act, the court found that Congress intended to "preempt common-law claims, such as general tort theories of liability."[148] The court characterized the plaintiffs' claims as "classic negligence and nuisance," therefore generally considered to be a part of the common law.[149]

Plaintiffs argued that the scope of the predicate exception should include "*all state statutes* that *could be applied* to the sale or marketing of firearms."[150] Because of California's codification of the common law, the plaintiffs concluded that the general tort causes of action fell within the exception.[151] The manufacturers, as in previous cases, argued that the predicate statute must facially regulate the sale or marketing of firearms.[152] The decision of the court again turned on the definition of applicable within the predicate exception.[153]

The court addressed the difficulty of finding a plain meaning of the word applicable.[154] In describing the opposing definitions of the parties, the court pointed out this ambiguity by referencing both the defendants' and plaintiffs' definitions as being contained within Black's Law Dictionary.[155] The court, confident that applicable has a broad range of meaning, looked to the context of the word within the statute and then to the "broader context of the statute as a whole."[156]

The court observed that plaintiffs' definition was too broad within the context of the two examples that followed the predicate exception.[157] The examples provided have, at minimum, a direct connection with the sale or marketing of firearms.[158] If any statute could be applicable to the sale or marketing of firearms, specific examples would be unnecessary and

143. *Id.* at 1138.
144. *Id.* at 1133.
145. *Id.* at 1135.
146. *Id.* at 1136.
147. *Id.* at 1135.
148. *Id.*
149. *Id.* at 1136 (quoting *Ileto II*, 349 F.3d 1191, 1202 (9th Cir. 2003)).
150. *Id*. at 1136 (emphasis added).
151. *Id*. at 1133.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* Black's Law Dictionary defines applicable as both "capable of being applied" and "relevant," therefore leading to the result that there is no plain meaning of "applicable." *Id.*
156. *Id.* at 1134 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).
157. *Id*.
158. *Id.*

superfluous.[159] The *Ileto* court then distinguished itself from the decision of the Indiana Court of Appeals in *City of Gary*.[160] The court reasoned that in *City of Gary*, the plaintiff alleged specific firearm regulation violations such as knowingly selling firearms to those not qualified to possess firearms.[161] For this reason, the Ninth Circuit found *City of Gary* to have a limited significance to the matter at hand.[162]

Upon finding that a narrow definition of applicable was appropriate, the court moved to the stated purpose of the PLCAA for further support.[163] Plaintiffs argued that because California codified its common law, the general, "common law" tort claims brought in this matter do allege a statutory violation.[164] The court disagreed for three reasons.[165] First, the court explained that California did not codify its common law to stop the "judicial evolution" of the common law, but instead to solidify and present the concepts in as orderly a fashion as possible.[166] In reference to § 7901(a)(7), the court found that the PLCAA was intended to curb just such a judicial evolution of the common law in regards to the firearm industry.[167] Second, Congress expressed in its findings that federal, state, and local law already regulate the firearm industry.[168] Therefore, it is logical to assume that when Congress required a statutory violation, it was referring to a violation of an existing statute regulating firearms rather than a common law tort claim "codified by a given jurisdiction."[169] Finally, national uniformity in applying the PLCAA would be impossible if the plaintiff's argument were followed.[170] Consequently, the court found that the PLCAA preempted common law tort claims such as those brought by plaintiff, regardless of whether the common law had been codified in that specific jurisdiction.[171]

The court also referenced two examples of the legislative history for further support of a narrow definition of applicable.[172] First, the legislators'

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159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 1136.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* ("The liability actions . . . 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.").
168. *Id.* (quoting 15 U.S.C. § 7901(a)(4)).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

comments in reference to exceptions are tailored to either violations of criminal law or federal firearms statutes.[173] The court specifically referenced a vast amount of commentary on this specific issue.[174] Second, the court looked to specific references of this very case found in the legislative history.[175] The Congressional Record mentioned *Ileto v. Glock* by name in reference to the specific types of lawsuits that the PLCAA would preempt.[176] The court noted that the legislative history should not be given too much weight, however, under these circumstances; the history further supported a limited definition of "applicable."[177] Therefore, California's codified common law tort claims were not applicable to the sale and marketing of firearms, and the plaintiffs' claims were properly dismissed.[178]

Additionally, the court addressed the claims against China North and found that those claims were not preempted because the PLCAA is only intended to protect manufacturers and sellers if they are federally licensed.[179] The statute defines manufacturer and sellers as follows:

> The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under [federal law].[180]
>
> The term "seller" means, with respect to a qualified product . . . (C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.[181]

China North argued that the PLCAA protects not only federally licensed manufacturers and sellers, but also *all* manufacturers of

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173. *Id.* at 1137.
174. *Id. See, e.g.,* 151 CONG. REC. S9089 (daily ed. July 27, 2005) (statement of Sen. Craig) ("This bill does not shield [those who] . . . have violated existing law . . . and I am referring to the Federal firearms laws.") (alterations in original); 151 CONG. REC. S9221 (daily ed. July 28, 2005) (statement of Sen. Hutchison) ("[Lawsuits] would also be allowed where there is a knowing violation of a firearms law.") (alterations in orginal); 151 CONG. REC. S9218 (daily ed. July 28, 2005) (statement of Sen. Craig) ("The gun makers . . . would continue to face civil suits for defective products or for violating sales regulations.") (citation omitted).
175. *Ileto III*, 565 F.3d at 1137.
176. *Id. See* 151 CONG. REC. E2162 (Oct. 20, 2005) (statement of Rep. Stearns) ("I want the Congressional Record to clearly reflect some specific examples of the type of predatory lawsuits this bill will immediately stop[:] . . . [an] example is the case of *Ileto v. Glock*, in Federal court in Los Angeles, CA.") (alterations in original).
177. *Ileto III*, 565 F.3d at 1137.
178. *Id.* at 1146.
179. *Id.*
180. 15 U.S.C. § 7903(2) (2006).
181. 15 U.S.C. § 7903(6).

ammunition.[182] However, a reading that would allow any manufacturer of firearms to escape liability by merely manufacturing ammunition as well did not persuade the court.[183] Rather, it found "[t]he PLCAA preempts specified types of liability actions; it does not provide a blanket protection to specified types of defendants."[184] Therefore, the district court's denial of the motion to dismiss was affirmed because the PLCAA had not preempted claims against China North.[185]

In conclusion, the Ninth Circuit's holding affirms the district court, but leaves little guidance for future courts applying a similar analysis. However, the court did reason that the claims against China North were not preempted and such claims could have drastic consequences for foreign firearms manufacturers that are not federally licensed.

IV. ANALYSIS

The Ninth Circuit properly decided that the plaintiff's claims were preempted by the PLCAA because the alleged statutory violations were not applicable to the sale or marketing of firearms.[186] In addition, the court accurately found that China North was not federally licensed and therefore outside the scope of protection of the PLCAA.[187] The court was also correct in applying the law, and as a result, putting unlicensed foreign manufacturers squarely within the sights of the same suits that the PLCAA was intended to dismiss. Finally, the Ninth Circuit provided insufficient guidance for lower courts faced with deciding whether a particular state would fall within the predicate exception.

A. The Court Correctly Denied Plaintiffs' Claims Against Glock and RSR by Using A Narrow Definition of "Applicable."

The Ninth Circuit properly concluded that Congress intended applicable to have a narrow meaning.[188] The court's first step in the analysis was looking at the actual text itself.[189] The defendants in the matter argued that an applicable statute was one that either "exclusively (or at least explicitly)" regulated firearms.[190] On the other hand, the plaintiffs

182. *Ileto III*, 565 F.3d at 1145 (emphasis added).
183. *Id.*
184. *Id.*
185. *Id.* at 1146.
186. *Id.* at 1126.
187. *Id.* at 1146.
188. *Id.* at 1138.
189. *Id.* at 1133.
190. *Id.*

argued that applicable should be broadly construed and that a statute must only be "capable of being applied" to the sale or marketing of firearms.[191]

The term applicable has more than one meaning. Indeed, the court acknowledged that the word has a "spectrum of meanings," including the definitions put forth by both the plaintiffs and defendants.[192] Under this assumption, the court found that applicable was ambiguous, and that Congress' intent could only be found by looking into the context in which the word was used and "the broader context of the statute as a whole."[193] Given the number of definitions for "applicable," it was appropriate for the court to look into the context of the word to find Congress' intended meaning.

While the Ninth Circuit should be lauded for looking for extra support for a narrow meaning of the term "applicable," the statute clearly preempts plaintiff's general tort claims. The listed examples of predicate statutes used by the court to try and narrow the definition are more than adequate in defining that the statute must, more or less, deal with firearms or the firearms industry. The first example defines a statute in which one of the defendants would have to knowingly break numerous federal *firearms* statutes in order to be found guilty.[194] The second example references a situation in which the defendants knew, or should have known, that they were selling (or disposing of) a *firearm* to a person not qualified to be in possession of firearms.[195] Both of these examples simply illustrate that a predicate statute must have some connection to the sale or marketing of firearms. In addition, the example also shows that Congress did not intend for general tort claims such as nuisance or negligent marketing to meet the requirements of the predicate exception. However, the Ninth Circuit found it necessary to look further for a more detailed, although arguably just as accurate, definition for "applicable."[196]

B. The Court Properly Excluded China North from the Protection of the PLCAA Because It Is Not a Federally Licensed Firearm Manufacturer

China North argued that it, too, should be protected from this suit by the PLCAA.[197] The plain language of the Act simply does not support this assertion. The court correctly stated that, "[t]he PLCAA preempts only

191. *Id*. (quoting BLACK'S LAW DICTIONARY 98 (6th ed. 1990).
192. *Id*. at 1134.
193. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).
194. *See* 15 U.S.C. § 7903(5)(A)(iii)(I) (2006) (emphasis added).
195. *See* 15 U.S.C. § 7903(5)(A)(iii)(II) (emphasis added).
196. *Ileto III*, 565 F.3d at 1134.
197. *Id.* at 1145.

actions brought against *federally licensed* manufacturers and sellers of firearms."[198]

This finding did not, however, stop China North from making an excellent argument using no more than Congress' sloppy drafting. China North rested its hat on the seemingly plain language of § 7903(6)(C).[199] This section defines a seller as "a person engaged in the business of selling ammunition . . . in interstate or foreign commerce at the wholesale or retail level."[200] China North read this section as allowing all sellers of ammunition, regardless of license, to be protected by the PLCAA.[201] The court rejected this notion because every other party protected by the Act is required to be federally licensed.[202] In addition, China North's presence in the case was due to its firearms and not its ammunition.[203]

The court would not bridge the gap within the PLCAA and offer blanket protection to *anyone* engaged in manufacturing of ammunition. The court simply stated, "[p]laintiffs' claims concern the manufacture and sale of firearms; we cannot conclude that those claims are pre-empted simply because China North also happens to sell ammunition."[204] China North simply "missed the boat" by not registering to be federally licensed. The requirements for licensing are not expensive or so burdensome that acquiescence is impossible.[205] However, China North possibly had other reasons for wanting to stay off the radar of the United States government.[206] The company appears to have a history of under the table deals in which they did not want the United States government to be a party. In fact, as of the time this Note is written, China North was banned from importing any goods into the United States due to alleged arms deals with Iran in 2003.[207]

In conclusion, the Ninth Circuit correctly decided that the PLCAA does not bar suits against China North. In effect, this decision may persuade more foreign manufacturers to come within the regulations of the United States in order to receive the protections offered by registration. However, in the case of China North, with a more than suspicious past,

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198. *Id.*
199. *Id.*
200. *Id.* (quoting 15 U.S.C. § 7903(6)(C)).
201. *Id.*
202. *Id.*
203. *Id.* at 1146.
204. *Id.*
205. *See* 27 CFR §§ 478.1-.171 (2009).
206. *See Chinese Firm Hit with U.S. Sanctions*, THE WASHINGTON TIMES, (May 23, 2003), *available at* http://www.washingtontimes.com/news/2003/may/23/20030523-123039-1385r/ (President Bush imposing sanctions on China North for selling "missile-related goods to Iran"); Michael S. Serrill, *Anatomy of a Sting*, TIME, (June 24, 2001), *available at* http://www.time.com/time/magazine/article/0,9171,135999,00.html (detailing a sting operation in which 2,000 machine guns were illegally smuggled into the U.S. by two Chinese companies).
207. *See Chinese Firm Hit with U.S. Sanctions*, *supra* note 205.

federal licensing is one more hurdle. The court's effective endorsement of registration, in effect, helps those manufacturers who abide by the rules, due to the newly formed bulls-eye placed squarely on the foreign manufacturers who choose not to be federally licensed. In the end, the court's decision will result in the regulation of a larger portion of the global firearms industry, which will hopefully result in keeping more illegal guns off the street and out of the wrong hands.

C. The Ninth Circuit's Interpretation of the Predicate Exception Provides a Minimal Amount of Guidance for Determining Which Statutes Are "Applicable to the Sale or Marketing of Firearms."

The Ninth Circuit prudently defined applicable with a narrow scope, but failed to explicitly provide a meaning that lower courts can consistently use for analyzing different statutes as being within the predicate exception. In *Beretta U.S.A. Corp.*, the Second Circuit laid out a specific set of guidelines for determining which statutes could fit within the predicate exception.[208] According to the Second Circuit, the predicate exception includes statutes "that expressly regulate firearms, or that courts have applied to the sale and marketing of firearms" and "encompass[es] statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms."[209] The Indiana Court of Appeals found applicable to be unambiguous and determined that the plaintiffs had alleged violations of state or federal law pertaining to the "sale or marketing of firearms."[210] The Ninth Circuit, although finding that applicable is ambiguous and requires further investigation, only provided that the PLCAA was intended to preempt claims brought under general tort theories, regardless of whether it is common law or codified.[211] Unfortunately, the Second Circuit is the only court to provide a guide for lower courts to follow. Even more unfortunately, this guide could be construed to create numerous loopholes around Congress' intent to foreclose frivolous lawsuits.

These three decisions, read together, do not provide the appropriate guidance to lower courts deciding whether a statute should come within the predicate exception. The Ninth Circuit held that general tort theories are preempted.[212] However, the Indiana Court of Appeals held that the plaintiff's nuisance claim could proceed.[213] These two courts try to

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208. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 404 (2d. Cir. 2008).
209. *Id.*
210. *City of Gary III*, 875 N.E.2d 422, 434–35 (Ind. Ct. App. 2007).
211. *Ileto III*, 565 F.3d 1126, 1136 (9th Cir. 2009).
212. *Id.* at 1135.
213. *Id.* at 1146.

reconcile each other by saying that there were different operative sets of facts.[214] This is correct, but misleading. As stated correctly, the PLCAA does not deny a class of plaintiffs' redress or protect a class of defendants from liability, but merely denies a specific class of claims. In *City of Gary III*, the City brought its claim under nuisance.[215] According to the Ninth Circuit, this is a claim that should be preempted. The Indiana Court of Appeals hangs onto the fact that the allegations contain instances in which the defendants did knowingly violate state or federal law. Thus, according to the Indiana Court of Appeals, a plaintiff needs only to allege that a manufacturer or seller knowingly violated a federal or state firearms regulation in order to bring a tort suit.

This decision creates the situation in which plaintiffs could merely "plead" around the PLCAA. This is not what Congress intended. The value of the PLCAA to manufacturers is that it keeps them from having to defend the frivolous lawsuits. As described above, one lawyer did not mind losing every lawsuit against the gun industry, as long as he was forcing manufacturers to pay for and possibly go bankrupt from the vast number of suits that were filed against them.[216] If the PLCAA could be pled around, what is stopping plaintiffs from filing all of the same suits, and again burdening a legitimate and legal industry with a mountain of litigation and the costs that are included? As evidenced by the PLCAA's purpose, this is not what Congress intended. Congress tried to foreclose these frivolous suits while leaving the door open to punish members of the gun industry who failed to provide the necessary care expected from all industries inside the United States.

In addition, the Second Circuit failed to foreclose the holding of *City of Gary III* from occurring in its circuit. The court held that the predicate exception could include statutes "that courts have applied to the sale and marketing of firearms."[217] This does not stop the judicial evolution of the common law to create claims that do not exist in the history of our legal system. If anything, this gives state courts the green light to apply "any" statute that it may see fit to the "sale or marketing of firearms." This situation should sound familiar because the Indiana Court of Appeals, in the *City of Gary III*, relied on its supreme court for the application of Indiana nuisance law to the "sale or marketing of firearms." Congress did not create the PLCAA to allow state supreme courts to decide whether nuisance or tort claims should continue to be used to sue manufacturers. The PLCAA was enacted to dismiss these claims before they ever got off the ground.

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214. *Id.* at 1135 n.5.
215. *City of Gary III*, 875 N.E.2d at 425.
216. *See* Peer, *supra* note 13.
217. City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 404 (2d Cir. 2008).

The Ninth Circuit does not provide any further guidance in disapproving of these judicially created loopholes. Because of the different facts, the court did not follow the Indiana Court of Appeals. The court also did not adopt the guidelines provided by the Second Circuit. The court decided to preempt only general tort theories. This holding suffices because the court was merely following its own guidelines in not ruling on more than the issue currently before it. However, in a case of first impression and for the sake of judicial economy, a clearer set of principles would have been more appropriate for the situation. Although no court has decided to provide the direction that properly reflects the intent of Congress, each court has picked up on the clues within the statute. These clues, when combined, provide a fitting solution as to which statutes Congress intended to include within the predicate exception.

The Second Circuit's test begins with a proper guideline.[218] Congress, no doubt, intended statutes that expressly regulate firearms to be included as predicate statutes. However, any further extension or extrapolation of the exception could stretch the Act past its intended boundaries. The Second Circuit tried to extend the predicate statute's reach by including any statutes that courts have applied to the "sale or marketing of firearms."[219] It is through this second part of the test that the PLCAA loses its teeth. The open ended language chosen by Congress was recognized soon after the Act's passage.[220] This language gives judicial officers leeway in interpreting just how broad to define applicable. This unchecked freedom to interpret liability is one the Congress' reasons for the passage of the PLCAA.[221] This finding evidences the congressional intent to preclude causes of action under most, if not all, statutes that do not expressly regulate the firearm's industry.

First, Congress specifically stated that judges and juries were extending liability "without foundation in hundreds of years of the common law" and that this practice does not represent a recognized expansion of the common law.[222] Congress, by including this statement, clarifies the goal of limiting judicial interpretation of the Act. Thus, for a court to hold that Congress only intended the predicate exception to include just those statutes

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218. *Id.*

219. *Id.*

220. Alden Crow, Comment, *Shooting Blanks: The Ineffectiveness of the Protection in Lawful Commerce in Arms Act*, 59 SMU L. REV. 1813, 1821 (2006). The author found that the Act's effectiveness relied on the how judges would apply the exceptions. In this regard, the Act failed to accomplish its stated goal of eliminating "judicial activism" in this area. *Id.*

221. *Id.* at 1822. 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." *Id.*

222. 15 U.S.C. § 7901(a)(7) (2006). *See* Crow, *supra* note 218, at 1821.

that expressly regulated firearms would not be inconsistent with the previous statement.

The Second and Ninth Circuits' open-ended guidelines allow a judge to interpret around and thus circumvent the heart of the Act. Just such a situation is shown by the outcome of *City of Gary III*. In that case, the Indiana Court of Appeals found that the Indiana Supreme Court had applied the state's nuisance law to the "sale or marketing of firearms," and in effect bypassed the protection of the PLCAA.

The facts of the *City of Gary* make them easily distinguishable. The distributors and sellers in that case, if the complaint is taken to be true, were not acting within the firearms laws as set forth by the United States or Indiana. But, this case may have opened the floodgate for other plaintiffs in Indiana to use the state's nuisance law, *which has been applied to the sale or marketing of firearms*, to continue filing suits that the PLCAA was intended to preclude. Although this holding was not perfectly in line with the Act, *City of Gary* can be corrected if future courts recognize that the nuisance violation stands only because of the underlying firearms law violations.

Although unarticulated in the court of appeal's opinion, requiring plaintiffs to plead which firearm statutes were violated would solve situations murkier than the facts of *City of Gary III*. This requirement would eliminate attempts to plead a set of facts with no allegations of firearm law violations and would keep the courts from scouring the record looking for the plaintiff's ticket to proceed in the face of the PLCAA. The Act was clear in its goal of dismissing frivolous lawsuits. Any attempt to circumvent the Act must be denied because of Congress' intent with respect to the Act.

Thus, future courts should only find statutes expressly regulating the firearm industry to be "applicable to the sale or marketing of firearms." It is through this narrow definition that the Act's intended goal is realized. In addition, courts should also require that plaintiffs explicitly plead the underlying violations in order to eliminate the judicial guessing game of finding the predicate statute. These two guidelines eliminate the judicial activism and extension of the common law while still allowing plaintiffs with legitimate claims to proceed with their suits. For these reasons, only those statutes that expressly regulate the firearms industry should be included within the designation of "applicable to the sale or marketing of firearms."

V. CONCLUSION

In conclusion, the Ninth Circuit properly decided to affirm the district court's decision to dismiss the federally licensed manufacturers and

distributors, while allowing the claims against China North to proceed. The court, however, did not provide the appropriate roadmap for lower courts to properly rule on whether other statutes come within the predicate exception of the PLCAA. The only plausible interpretation of Congress' intent in this regard is to bar all claims that do not plead a violation of a statute expressly regulating the firearms industry. Only through this interpretation will the PLCAA be given the teeth that were intended by its passage.