

NOTES

SECTION 898: TARGETING THE COMPANIES BEHIND GUN VIOLENCE IN NEW YORK WITH PUBLIC NUISANCE DOCTRINE

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INTRODUCTION

When gun companies fail to take adequate precautions to prevent their weapons from foreseeably entering illegal gun trafficking markets, they are predictably contributing to the gun violence epidemic.¹ Since these companies are not the ones who fire the guns, holding the gun industry accountable for illegal gun violence requires a legal doctrine with a realistically broad understanding of cause and effect, aimed at, more than anything, abating a large-scale public harm in a practical way. The ancient doctrine of public nuisance is well suited for the task.²

On July 6, 2021, the New York State Legislature enacted sections 898-a to -e of the New York General Business Law (section 898), creating a clear path for public entities and private gun violence victims to sue gun industry members for their role in the gun violence public nuisance in New York.³ This Note explores why the legislature took a public nuisance approach to curbing gun violence, framing section 898 within public nuisance doctrine's broader common law history and legal elements.

To unpack how and why New York took this approach, the first Part of this Note traces the history of public nuisance doctrine from its origin in medieval common law, through modern applications, into gun violence lawsuits in New York, and finally, into section 898. To understand why this approach is legally useful, Parts II and III compare the elements of common law public nuisance doctrine to the elements of section 898 and explore constitutional issues, respectively.

1. See *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 449-50 (E.D.N.Y. 2003) (“The evidence ... demonstrated that ... manufacturers and distributors ... can, through ... handgun traces and other sources of information, substantially reduce the number of firearms leaking into the illegal secondary market and ultimately into the hands of criminals.... This supervision and control ... would be consistent with that of other industries involved with dangerous products.”). For data about how handguns travel from manufacturers to criminal users in New York, see *Target on Trafficking: New York Crime Gun Analysis*, OFF. OF THE ATT’Y GEN. OF N.Y. [hereinafter *Target on Trafficking*], <https://targettrafficking.ag.ny.gov/> [<https://perma.cc/C5TN-92G8>].

2. See generally Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 *YALE L.J.* 702 (2023).

3. N.Y. GEN. BUS. LAW § 898 (McKinney 2021).

Ultimately, this Note finds that section 898 tactfully approaches gun violence because it builds on one of the most successful doctrines for holding the legal gun industry liable for illegal gun violence in courts across the United States, and in New York in particular. The statute leverages benefits of common law public nuisance doctrine like lower causation and fault standards compared to other torts. At the same time, section 898 makes it easier for New York State municipalities and gun violence victims to mitigate the gun violence public nuisance than public nuisance common law elements alone would allow by establishing that the gun industry has a duty to the public, narrowly defining what kind of evidence is needed, expanding standing for private plaintiffs, and overcoming the Protection of Lawful Commerce in Arms Act (PLCAA), a federal law passed in 2005 that grants civil immunity to the gun industry.⁴

Plaintiffs have filed four lawsuits under this statute so far,⁵ but it is only the beginning. This Note posits that section 898 has the potential to succeed at curbing illegal gun violence by expanding liability to the gun industry for its contributions to the crisis beyond what was previously possible. New York's statutory public nuisance approach can be a model for other states seeking to abate the illegal gun violence crisis, as well as other systemic health crises, by holding culpable deep-pocketed, financially motivated suppliers accountable.⁶

4. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03; *see infra* Part III.A.

5. Complaint, *People v. Arm or Ally, LLC* (N.Y. Sup. Ct. filed June 29, 2022) (No. 451972/2022), *rev'd*, *York v. Arm or Ally, LLC* (S.D.N.Y.) (No. 22-cv-6124); Complaint & Demand for Jury Trial, *Steuer v. Glock, Inc.*, (E.D.N.Y. filed May 31, 2022) (No. 1:22-cv-3192); Complaint & Demand for Jury Trial, *City of Buffalo v. Smith & Wesson, Inc.* (N.Y. Sup. Ct. filed Dec. 20, 2022), *rev'd*, (W.D.N.Y.) (No. 23-CV-66-FPG); Complaint & Demand for Jury Trial, *City of Rochester v. Smith & Wesson, Inc.* (N.Y. Sup. Ct. filed Dec. 21, 2022), *rev'd*, (W.D.N.Y.) (No. 23-CV-6061-FPG).

6. Six other states—Delaware, New Jersey, Illinois, Washington, California, and Hawaii—have since followed New York's lead and adopted similar statutes. John Russell, *Gun Group Asks Second Circuit to Revive Its Challenge to 'Public Nuisance' Law*, COURTHOUSE NEWS SERV. (Nov. 3, 2023), <https://www.courthousenews.com/gun-group-asks-second-circuit-to-revive-its-challenge-to-public-nuisance-law/> [<https://perma.cc/UG42-SZ7Z>]. That said, legislation that enables litigation is just one way to change industry behavior. This type of solution ought to be considered one option within a full range of political dynamics.

I. PUBLIC NUISANCE IN CONTEXT: MEDIEVAL ENGLISH CRIME TO GUN VIOLENCE STATUTE

Public nuisance is a centuries-old common law doctrine.⁷ It has been central to litigation instigated to combat the effects of tobacco, opioids, environmental harms, and gun violence over the past several decades in jurisdictions throughout the United States.⁸ In the early 2000s, public nuisance was one of the most successful causes of action against gun industry defendants, motivating the industry and its trade associations to lobby Congress to pass the Protection of Lawful Commerce in Arms Act (PLCAA), a liability shield against private lawsuits.⁹ Through section 898, New York State's Legislature also harnessed public nuisance, but in a *statute* that also overcomes the PLCAA liability shield.¹⁰ This Part situates section 898 within broader public nuisance history, exploring the doctrine's root in English common law, its evolution in contemporary United States jurisprudence, and its near success in *NAACP v. AcuSport*, a 2003 New York lawsuit that paved the way for section 898.

A. Origins in English Common Law

In medieval England, public nuisance was originally a criminal action to prevent people from infringing upon the rights of the

7. Kendrick, *supra* note 2, at 705.

8. *See id.* at 705-06.

9. 15 U.S.C. §§ 7901-03; *see* Heidi Li Feldman, *Public Nuisance Liability and the Irrelevance of the Second Amendment*, DUKE CTR. FIREARMS L. (Apr. 12, 2022), <https://firearmslaw.duke.edu/2022/04/public-nuisance-liability-and-the-irrelevance-of-the-second-amendment/> [<https://perma.cc/3T8B-7TL9>] (discussing early 2000s public nuisance suits that survived appellate motions to dismiss and thus “motivated the gun industry and its trade associations to lobby Congress to extinguish injured parties’ right to hold gun makers and sellers civilly accountable for their role in gun violence,” resulting in the PLCAA). For context on other pre-PLCAA approaches to suing the gun industry, *see* generally TIMOTHY D. LYTTON, *Introduction: An Overview of Lawsuits Against the Gun Industry*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Timothy D. Lytton ed., 2005).

10. N.Y. GEN. BUS. LAW § 898-c (McKinney 2021).

Crown.¹¹ The earliest public nuisance cases dealt with defendants who encroached upon the public road, called the king's highway.¹² In the mid-fourteenth century, public nuisance expanded to abate various kinds of interferences with public resources, including disruptions of the public market, air pollution from burning chemicals, and diversion of water from a mill.¹³ Over time, any act that interfered with rights common to "all Her Majesty's subjects" could be a public nuisance.¹⁴ As early as 1535, private entities who suffered particular harm by the broader public nuisance could also recover special damages, turning the criminal writ into a per se tort.¹⁵

B. Recent U.S. Litigation

When English common law arrived in the United States, public nuisance came with it, soon to evolve to new uses.¹⁶ In recent decades, common law public nuisance suits have been pivotal in curbing the harmful behaviors of large companies that have caused public health crises and other environmental harms.¹⁷ Public nuisance "provided the architecture for the lawsuits that impelled the tobacco industry to historic settlements of \$246 billion with all fifty states."¹⁸ The doctrine "recently served as the backbone for more than three thousand opioid lawsuits across the country, as well as hundreds more seeking to hold producers of greenhouse gases accountable for climate change."¹⁹ It can usefully address a

11. See William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998 (1966). It is worth noting that *public* and *private* nuisance were originally different doctrines, though they have been influencing one another since medieval times due to their common name and concepts. See F. H. Newark, *The Boundaries of Nuisance*, 65 L. Q. REV. 480, 482-83 (1949).

12. Prosser, *supra* note 11, at 998.

13. See *id.*

14. *Id.* at 998-99 (quoting JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (2d ed. 1890)).

15. *Id.* at 997, 1005; see also Kathleen Ann O'Neill, Note, *Chemical Nuisance: Application of Public Nuisance Theory as a Remedy for Environmental Law Violations*, 26 SUFFOLK U. L. REV. 51, 55 (1992).

16. For older United States public nuisance history, see Kendrick, *supra* note 2, at 718-21. For more recent history, see *id.* at 721-27, 731-32, 736. For critiques of how public nuisance has evolved in the United States, see *id.* at 736-91.

17. *Id.* at 705.

18. *Id.*

19. *Id.*

wide variety of harms, from handgun violence to lead contamination, water pollution, and predatory lending.²⁰ Even when plaintiffs do not win their cases, their efforts can draw attention to public harms and change defendant behaviors through a mix of bad publicity, settlements, and the cost of litigation.

Public nuisance statutes have long been part of the doctrine's evolution.²¹ By the middle of the twentieth century, most—if not all—state legislatures passed general public nuisance statutes that “provided a statutory basis for actions that had always proceeded at common law.”²² In addition, legislatures commonly pass statutes specifying that certain conduct or conditions are public nuisances, whether or not they would constitute a public nuisance under common law elements.²³ Today, public nuisance doctrine remains relevant in part because it fills a unique need: targeting powerful, financially motivated defendants whose apparently legal actions lead to unacceptable, foreseeable, and traceable downstream harms.²⁴

C. Gun Violence in New York: NAACP v. AcuSport, Inc.

The NAACP effectively applied public nuisance common law doctrine in the Eastern District of New York in 2003, paving the way for the legislature to enact section 898.²⁵ In *NAACP v. AcuSport, Inc.*, the NAACP sued eighty gun manufacturers and importers and fifty gun distributors, alleging that imprudent sales and distribution practices made handguns available to criminals, juveniles, and other people prohibited by law from possessing and using handguns, endangering members of the NAACP and interfering with the use of public space.²⁶ Plaintiffs lost the case only because

20. Plaintiffs did not win most of these cases. *See id.* at 705-06. However, even dismissed, lost, or settled cases can shed light on public harms and change defendant behavior.

21. *See id.* at 721.

22. *Id.*

23. *See generally* 14 LEE S. KREINDLER, DAVID C. COOK, NOAH H. KUSHLEFSKY & MEGAN W. BENNETT, NEW YORK PRACTICE SERIES: NEW YORK LAW OF TORTS § 4:8 (2023); *see, e.g.*, N.Y. MULT. RESID. LAW § 305 (McKinney 2022) (holding that dangerous multifamily dwellings are a per se public nuisance).

24. *See generally* Kendrick, *supra* note 2.

25. *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 446 (E.D.N.Y. 2003).

26. *Id.*

they did not meet the common law's "quasi-standing element" at trial,²⁷ which required them to prove that, as a non-governmental person, they suffered "special" or "peculiar" injuries that differed "in kind, and not just degree," from general community injuries borne by the entire public.²⁸

While the court could have kept its decision short because there was a missing element, it instead published an unusually detailed 261-page memorandum and order that included illustrative charts and "reads like a blueprint for bringing a successful public nuisance claim against the industry."²⁹ Besides this "quasi-standing element" for non-governmental plaintiffs, the decision essentially affirmed the NAACP's public nuisance theory. The court stated:

The evidence presented at trial demonstrated that defendants are responsible for the creation of a public nuisance and could—voluntarily and through easily implemented changes in marketing and more discriminating control of the sales practices of those to whom they sell their guns—substantially reduce the harm occasioned by the diversion of guns to the illegal market and by the criminal possession and use of those guns.³⁰

This decision, along with others in different jurisdictions, made gun industry members nervous.³¹ Two years after the 2003 *NAACP* decision, the gun industry lobby responded by inducing Congress to pass the Protection of Lawful Commerce in Arms Act (PLCAA), a federal statute that grants immunity from civil liability to manufacturers, sellers, and trade associations for the criminal or unlawful misuse of firearms by plaintiffs or third parties.³²

D. Overcoming Gun Industry Immunity with Statutes

The PLCAA protects gun companies from civil liability, but includes several exceptions, including an exception for statutes:

27. *Id.*

28. *Id.* at 455 (quoting *Wheeler v. Lebanon Valley Auto Racing Corp.*, 755 N.Y.S.2d 763, 765 (N.Y. App. Div. 2003)).

29. LYTTON, *supra* note 9, at 13.

30. *NAACP*, 271 F. Supp. 2d at 446.

31. *See supra* note 19 and accompanying text.

32. 15 U.S.C. §§ 7901-03.

plaintiffs can still sue and win when gun manufacturers or sellers knowingly violate statutes applicable to the sale or marketing of firearms, and when that violation is a proximate cause of the harm for which relief is sought.³³

Following the PLCAA, suits were brought in different jurisdictions alleging that gun industry defendants violated existing non-gun-specific statutes.³⁴ In *City of New York v. Beretta U.S.A. Corp.*, the Second Circuit limited the predicate exception to three kinds of statutes: those that (a) “expressly regulate firearms,” those that (b) “courts have applied to the sale and marketing of firearms,” and those that (c) “do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.”³⁵

Section 898 was specifically crafted to meet the PLCAA’s predicate exception as defined by the Second Circuit’s *Beretta* decision.³⁶ It may seem odd that the New York Legislature would use *NAACP*, a district court case with little precedential value decided nearly a decade earlier *against* the liability they sought, as a model for legislation in 2021 that met the *Beretta* rule. But the 2005 PLCAA put the evolution of further gun violence litigation on pause, and *NAACP* was the closest that any plaintiff has come to holding the legal gun industry liable for its contributions to illegal gun violence in New York. The legislature’s approach is efficient in that it builds on the *NAACP*’s hard work; the *NAACP* decision itself is full of useful facts that plaintiffs can use to supplement their arguments

33. 15 U.S.C. § 7903(5)(A)(iii).

34. In *Soto v. Bushmaster Firearms Int’l, LLC*, victims of the Sandy Hook Massacre won by proving that gun industry defendants violated the Connecticut Unfair Trade Practice Act through unethical marketing that depicted their guns as ideal for use in “offensive, military style missions” against perceived enemies. 202 A.3d 262, 272-73 (Conn. 2019); see also Linda S. Mullenix, *Outgunned No More?: Reviving a Firearms Industry Mass Tort Litigation*, 49 Sw. L. REV. 390, 402-03 nn. 70-76 (listing attempts to sue the gun industry under exceptions to the PLCAA).

35. 524 F.3d 384, 404 (2d Cir. 2008). Only the Second and Ninth Circuit have considered the viability of gun litigation under the PLCAA’s predicate statute exception, resulting in a circuit split. Mullenix, *supra* note 34, at 403.

36. S.B. 7196, 2021-22 Leg. Sess. Sponsor Memorandum (N.Y. 2021), <https://www.ny.senate.gov/legislation/bills/2021/S7196> [<https://perma.cc/H22X-BN9L>] (“This bill has been drafted to comport with the [PLCAA] ... as construed by the ... Second Circuit in *City of New York v. Beretta*.... Through the PLCAA, the firearms industry is shielded from civil liability except when the basis for that liability is a ‘predicate statute’ that is applicable to the sale or marketing of firearms. With the passage of this bill, it is our hope that the right of the People to hold the firearms industry accountable will be restored.”).

today. To target illegal gun violence in New York, the legislature harnessed the synergy between legislation and litigation to get an important job done.

II. COMPARING A SECTION 898 GUN VIOLENCE CASE TO A COMMON LAW PUBLIC NUISANCE CASE

This Part compares the elements of section 898 to common law public nuisance cases in New York. It finds that section 898 strengthens public nuisance beyond the common law by clarifying which behaviors or omissions lead to public nuisance liability, establishing the level of duty owed, adopting the doctrine's levels of fault, adopting the doctrine's lower causation requirements, and expanding private standing.

A. Clarifying Acts or Omissions that Lead to Liability

Compared to the common law elements, section 898 is easier to wield because it is more specific about what behaviors lead to public nuisance liability. New York's common law defines a public nuisance as an unreasonable interference with rights common to the general public, whether through conduct or omissions.³⁷ Public nuisance actions usually protect the following rights common to the general public: health, safety, property, morals, comfort, and the use of a public place.³⁸ Courts have pursued fact-intensive analyses to determine whether actions that plaintiffs allege violate these rights and thus meet this definition of public nuisance.³⁹

Under traditional public nuisance doctrine, a court can find that a defendant created a public nuisance if the defendant took *any* action that infringed on one or more rights common to the public.

37. 9 JAMES A. SEVINSKY, DAVID A. MUNRO & GORDON J. JOHNSON, N.Y. PRAC. SERIES: ENV'T L. AND REGUL. IN N.Y. § 1:3 (2d ed. 2023); *see also* KREINDLER ET AL., *supra* note 23, § 4:8. The Restatement (Second) of Torts defines a public nuisance as “unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1977); *see also* NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 448 (E.D.N.Y. 2003) (“[A]n interference with a public right occurs when the health, safety, or comfort of a considerable number of persons in New York is endangered or injured, or the use by the public of a public place is hindered.”).

38. KREINDLER ET AL., *supra* note 23, § 4:21.

39. *See id.*

Section 898 takes a narrower approach. The statute specifies new rules that the gun industry must follow and explicitly declares that failure to follow these rules contributes to the specific public nuisance “declared in article 400 of the penal law,” the section of New York’s penal law that describes the nuisance of illegal firearm possession.⁴⁰ The new rules read as follows:

§ 898-b(1). No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.

§ 898-b(2). All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.⁴¹

The statute seems to draw these rules directly from the evidence that the plaintiffs provided in *NAACP v. AcuSport*.⁴² There, the NAACP worked with credible experts to research gun manufacturer practices and empirically analyze how those practices correlated to how often their guns ended up in the hands of criminal users in New York, based on guns recovered from crimes (called “crime guns”).⁴³

Studying a range of different practices, economists found a negative correlation between crime gun count and certain precautions: when manufacturers implemented approved or authorized dealer programs, required dealers to provide evidence of storefronts,

40. 2021 N.Y. Sess. Laws Ch. 237 (S. 7196) § 1 (McKinney) [hereinafter *Section 898 Legislative Findings and Intent*].

41. N.Y. GEN. BUS. LAW §§ 898-b(1) to (2) (McKinney 2021). “Qualified product” includes firearms (including antique firearms), ammunition, and component parts of firearms or ammunition, that have been shipped or transported in interstate or foreign commerce. *See id.* § 898-a(6) (“‘Qualified product’ shall have the same meaning as defined in 15 U.S.C. section 7903(4).”). The New York State Legislature is currently considering adding a third subdivision to § 898-b that would establish a private right of action against gun industry members for marketing firearms and firearm related products to minors. S.B. 8125, 2023-24 Leg. Sess. (N.Y. 2024); A.B. 5834, 2023-24 Leg. Sess. (N.Y. 2023).

42. *See* 271 F. Supp. 2d at 446-48.

43. *Id.* at 522 (citing studies conducted by economist Lucy P. Allen).

recorded who they sold to, visited their dealers regularly, commissioned market studies, maintained distributor agreements, imposed controls over how dealers advertised their products, and inquired about inventory levels, fewer of their guns were possessed illegally and used in crimes in New York.⁴⁴ In addition, manufacturers who attempted to identify high-risk dealers, who provided training to dealers about how to block straw purchases, who limited the number of guns that dealers sell to a single customer, and who imposed strong sanctions on dealers that diverted guns into the criminal market, contributed fewer crime guns to illegal gun violence in New York.⁴⁵ The *NAACP* court held that these controls amounted to reasonable precautions in part because they were in line with voluntary controls taken by companies who deal with other dangerous products.⁴⁶

Given the language of section 898-b, it seems that the drafters of section 898 were aware of, and intended to build on, the evidence presented in *NAACP* to establish which acts and omissions contribute to the gun violence public nuisance as per their statute.⁴⁷ Based on *NAACP*, drafters could be confident that plaintiffs would find evidence of these ongoing gun industry behaviors. Further, drafters could feel confident about the overall efficacy of their new statute because *NAACP* offers empirical evidence that variations in these particular practices make New York safer.⁴⁸ Compared to the common law doctrine, section 898-b gives plaintiffs a boost by providing clearer instructions about what evidence they need to present in their lawsuits to prevail.

B. Establishing Duty

Section 898 has one path to liability for when defendants behave unlawfully, and another for when they behave negligently. Focusing only on negligence, many previous common law public nuisance cases have failed because plaintiffs were unable to establish that

44. *Id.*

45. *Id.* at 514.

46. *Id.* at 450.

47. See N.Y. GEN. BUS. LAW § 898-b (McKinney 2021).

48. See *infra* notes 55-57 and accompanying text.

defendants had a duty to the plaintiff or the public to begin with.⁴⁹ Section 898 provides a serious leg up to common law public nuisance cases because it presupposes that such a duty exists, since duties that do not exist at common law may be created by negligence statutes.⁵⁰

In pre-section 898, pre-PLCAA New York common law gun violence public nuisance cases, the court determined whether gun industry defendants had a duty of care to the public through a multi-factor totality of circumstances test.⁵¹ Factors included reasonable expectations of parties and society, foreseeability, and public policy.⁵² In contrast, section 898's legislative findings and intent essentially describe a set of circumstances that presupposes a duty.

In its legislative findings and intent, the legislature states that it is imperative to create new ways to hold the gun industry liable because stringent New York state and local laws have not been sufficient to quell the gun violence public health crisis.⁵³ Seventy-four percent of firearms used in crimes in New York are purchased out of state and travel to New York illegally.⁵⁴ This illegal trafficking takes place in part because the gun industry fails to take reasonable precautions.⁵⁵ The section 898 legislative findings and intent clearly articulate that “those responsible for the illegal or unreasonable sale, manufacture, distribution, importing or marketing

49. *See, e.g.,* Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21, 30 (2d Cir. 2001) (finding that gun manufacturers owed no duty to gun violence survivors under New York law).

50. Jonathan K. Youngwood, *Negligence*, in 4F ROBERT L. HAIG, N.Y. PRAC. SERIES: COM. LITIG. IN N.Y. STATE CTS. § 130.23 (5th ed. 2022) (“A statute establishing a negligence cause of action may either expand an existing common law duty or create duties to those not owed a duty of care in common law for the protection and safety of that group.”).

51. *See* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001).

52. *Id.*

53. *See Section 898 Legislative Findings and Intent*, *supra* note 40. The findings and intent refer to the Community Violence Intervention Act in which the legislature declared gun violence a public health crisis three months earlier. N.Y. EXEC. LAW § 636 (McKinney 2021). New York's governor formally declared gun violence a public emergency on the day he signed section 898 into law. *See* Dan Clark, *New York Declares Gun Violence a Public Health Crisis, Outlines Plan to Address Crime*, WSKG (July 7, 2021, 4:40 AM), <https://wskg.org/new-york-declares-gun-violence-a-public-health-crisis-outlines-plan-to-address-crime/> [<https://perma.cc/477Q-C9JA>].

54. *See Section 898 Legislative Findings and Intent*, *supra* note 40 (citing a U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives statistic).

55. *See id.*

of firearms may be held liable for the public nuisance caused by such activities,” presupposing that gun industry members have a duty to the public.⁵⁶

C. Adopting Common Law Fault Standards

At common law, plaintiffs could hold defendants liable for creating or contributing to public nuisances without necessarily proving fault.⁵⁷ In other words, if defendants caused an interference with common rights, plaintiffs could recover.⁵⁸ But more recent New York cases have adopted enhanced intentional or negligence causation standards.⁵⁹ Section 898 adopts a range of standards more akin to the latter, some objective and some subjective, but all seemingly within reach.

Section 898-b(2) has an objective negligence requirement: if defendants fail to implement controls and procedures that a jury decides would be objectively reasonable, defendants are liable, regardless of their level of knowledge.⁶⁰ Section 898-b(1), on the other hand, has a subjective requirement: plaintiffs must prove that defendants either knew, or were reckless in not knowing, that they were causing harm by failing to take reasonable controls.⁶¹ Recklessness is defined as being aware of and consciously disregarding a harm, typically including willful blindness.⁶²

The subjective knowledge requirement of section 898-b(1) is probably a higher bar to clear. However, when the New York State Legislature passed section 898, it likely knew that plaintiffs would be able to prove subjective knowledge by relying in part on *NAACP*.⁶³ *NAACP* named over one hundred defendants, including

56. *Id.*

57. 94 AM. JUR.: *Trials* 1 § 25 (2004) (“A benefit in a public nuisance case is that proof of fault or negligence by the defendant is generally not required.”).

58. *See id.*

59. *See NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 448 (E.D.N.Y. 2003) (“[A] defendant must have acted intentionally or negligently, and its tortious conduct or omissions must have created, contributed to, or maintained the alleged public nuisance.”); *see also KREINDLER ET AL.*, *supra* note 23, § 4:10.10.

60. *See* N.Y. GEN. BUS. LAW § 898-b(2) (McKinney 2021).

61. *See id.* § 898-b(1). That said, this does *not* require plaintiffs to prove that defendants *intended* to cause harm. *See id.* § 898-c(2).

62. N.Y. PENAL § 15.05 (McKinney 2023); *see* N.Y. GEN. BUS. LAW § 898-a(5).

63. *See generally NAACP*, 271 F. Supp. 2d 435.

most major handgun manufacturers, importers, and distributors.⁶⁴ If these defendants did not already know that their sales practices led to illegal gun trafficking and violence in New York, the court's decision made it clear.⁶⁵ Since *NAACP* factually established that “[d]efendants had reason to believe that some of the firearms they were selling would fall into the hands of those who would violate the law and that they could take steps to reduce those violations by more prudent merchandising,” gun industry defendants are on clear notice.⁶⁶

D. Adopting Lower Common Law Causation Standards

Public nuisance common law actions tend to have lower standards for causation than typical tort actions. At common law, a defendant could be just one actor contributing to a public nuisance in the aggregate, even if there were multiple intervening criminal actors.⁶⁷ In contrast, such third-party actions would break the chain of causation in typical tort cases.⁶⁸ This broad—yet realistic—understanding of how systems of harm function makes public nuisance a potent cause of action to stymie the root causes of large scale problems that occur through predictable distribution networks.

In pre-section 898 common law public nuisance handgun cases in New York, courts adopted a range of causation standards, from the more stringent tort standard to the more permissible public nuisance standard. When the state of New York sued gun manufacturers in 2003, the First Department of the Supreme Court of the State of New York, Appellate Division, in *People ex rel. Spitzer v. Sturm, Ruger & Co.*, held that defendants’ otherwise lawful commercial activity was too remote to be held accountable as a public nuisance,

64. *Id.*

65. Even without *NAACP*, gun industry members know which retail dealers have been linked to the illegal gun trafficking of crime guns, and many have continued to work with those dealers without oversight or precautions. See Brian J. Siebel, *Gun Industry Immunity: Why the Gun Industry’s “Dirty Little Secret” Does Not Deserve Congressional Protection*, 73 UMKC L. REV. 911, 943 (2005).

66. See *NAACP*, 271 F. Supp. 2d at 507.

67. KREINDLER ET AL., *supra* note 23, § 4:11 (“Generally, all persons and entities who create or maintain a nuisance are liable for injuries caused by the nuisance.”).

68. See, e.g., RESTATEMENT (SECOND) OF TORTS § 440 (1965) (“A superseding cause relieves the actor from liability.”).

due in part to significant intervening third-party criminal activities.⁶⁹ But in *NAACP*, decided one month after *Sturm*, the District Court for the Eastern District of New York held that “defendants may be found liable for conduct creating in the aggregate a public nuisance” and that “intervening actions, even multiple or criminal intervening action, need not break the chain of causation.”⁷⁰ The *NAACP* decision explained that the causation rule for broad public harms should be less restrictive than for individual harms because “[t]he boundary will be extended as the dangers to be protected against increase.”⁷¹

The language of section 898 echoes the lower *NAACP* causation standards. The statute finds defendants liable when their behavior “results in harm,” suggesting mere practical or reasonable cause.⁷² In *NAACP*, the plaintiffs proved by “clear and convincing evidence” that the negligent or intentional conduct or omissions of gun industry defendants contributed to the public nuisance of gun violence in New York, which the court found adequate to establish liability.⁷³

Section 898 leverages the more flexible, lower causation standards of public nuisance cases like *NAACP*, where the court can find a defendant liable for being one major contributing actor among many that create New York’s gun violence public health crisis. Because gun industry defendants are not the ones pulling the trigger in New York’s gun crimes, this broader reasonable cause standard is essential to holding them liable.

69. 761 N.Y.S.2d 192, 201 (N.Y. App. Div. 2003).

70. *NAACP*, 271 F. Supp. 2d at 493.

71. *Id.* at 497.

72. N.Y. GEN. BUS. LAW § 898-c (McKinney 2021); see 2 NEW YORK EVIDENCE PROOF OF CASES § 26:63 (2022) (“It is within the permissible scope of legislation to impose liability for wrongful acts which have a ‘practical or reasonable’ causal connection with the injuries sustained, although the sequence of events might not satisfy the rule of proximate cause in the law of negligence generally.”).

73. *NAACP*, 271 F. Supp. 2d at 449-52 (“The defendants, viewed in the broadest sense, are less culpable than some other elements of society, but their culpability nevertheless cannot be ignored.”).

E. Expanding Standing for Private Plaintiffs

Section 898 gives more private entities standing to bring public nuisance actions against the gun industry than the traditional public nuisance doctrine. While public entities generally have the right to bring common law public nuisance actions, private plaintiffs seeking to do the same must prove that they suffered “particular harm not shared in common with the rest of the public.”⁷⁴ For example, New York courts found that commercial fishermen suffered particular harm when defendants polluted the Hudson River, and that an owner of a neighboring apartment suffered particular harm when defendants partially obstructed a public sidewalk.⁷⁵ The particular harm must be greater than harm suffered by the general public, and further, it must be different in kind.⁷⁶

The court’s ruling in *NAACP* turned on the question of private standing.⁷⁷ While the court agreed that African Americans, represented by the NAACP, suffered *greater* harm from illegal handguns due to “complex socioeconomic and historical reasons,” the court denied that this gave them special standing, because their harm was not unique in *kind*.⁷⁸

Section 898 gets rid of this problem. Section 898-e states:

Any person, firm, corporation or association that has been damaged as a result of a gun industry member’s acts or omissions in violation of this article shall be entitled to bring an action for recovery of damages or to enforce this article in the supreme court or federal district court.⁷⁹

This essentially does away with the particular injury requirement, expanding standing to any private entities who can prove they have suffered damage when defendants fail to behave as required in section 898-b.⁸⁰

74. *Id.* at 497.

75. *Id.* at 498 (citing *Leo v. Gen. Elec. Co.*, 538 N.Y.S.2d 884 (1989); *Graceland Corp. v. Consol. Laundries Corp.*, 180 N.Y.S.2d 644 (1958), *aff’d*, 160 N.E.2d 926 (1959), respectively).

76. *Id.* at 499.

77. *Id.*

78. *Id.*

79. N.Y. GEN. BUS. LAW § 898-e (McKinney 2021).

80. *See supra* Part II.A.

III. SECTION 898 OVERCOMES FEDERAL LAW CHALLENGES

As a statute rather than a common law approach to public nuisance, section 898 solves one highly important federal law problem by overcoming the PLCAA. At the same time, it generates other potential federal questions regarding preemption, dormant Commerce Clause issues, and void-for-vagueness concerns.

In December 2021, gun industry group National Shooting Sports Foundation (NSSF) brought these federal law arguments to court in its suit against the New York State Attorney General, *National Shooting Sports Foundation v. James*.⁸¹ In May 2022, the Northern District of New York ruled against the NSSF.⁸² The NSSF appealed the Northern District of New York's decision in June 2022, and the Second Circuit has yet to render a judgment as of March 2024.⁸³

A. *Overcoming the Gun Industry Immunity Shield (the PLCAA)*

The New York State Legislature explicitly passed section 898 to elude the Protection of Lawful Commerce in Arms Act (PLCAA), the federal statute that protects the gun industry from liability.⁸⁴ In 2005, Congress passed the PLCAA, granting immunity from civil liability to manufacturers, sellers, and trade associations for the criminal or unlawful misuse of firearms by plaintiffs or third parties.⁸⁵ The PLCAA has been a major barrier to civil suits against members of the gun industry for harms they have caused through the weapons business. However, the PLCAA includes six exceptions, including what courts have termed the “predicate exception.”⁸⁶

The predicate exception to the PLCAA applies when gun industry defendants knowingly violate a state or federal statute “applicable to the sale or marketing” of firearms, and when that violation was

81. Complaint at 2, *Nat'l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48 (N.D.N.Y. 2022) (No. 1:21-cv-1348).

82. *Nat'l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 60 (N.D.N.Y. 2022).

83. See *National Shooting Sports Foundation, Inc. v. James*, CONST. ACCOUNTABILITY CTR., <https://www.theconstitution.org/litigation/national-shooting-sports-foundation-inc-v-james/> [<https://perma.cc/6JFZ-788Q>].

84. See *supra* note 48 and accompanying text.

85. 15 U.S.C. §§ 7901-03.

86. *Id.* § 7903(5)(A)(iii); see *Nat'l Shooting Sports Found., Inc.*, 604 F. Supp. 3d at 58.

a “proximate cause of the harm.”⁸⁷ There is a high chance that section 898 fits the predicate exception, not least because it was written to do so.⁸⁸ Additionally, in May 2022, the Northern District of New York held that it fits the exception.⁸⁹ The Subparts below show how section 898 overcomes each element of the predicate exception to the PLCAA one by one.

1. Expressly Regulating Firearms

To overcome the PLCAA under the predicate exception, section 898 must first be a state statute “applicable to the sale or marketing” of firearms.⁹⁰ The Second Circuit’s *City of New York v. Beretta* decision created the test for this element in 2008, determining that statutes that “expressly regulate” firearms are applicable, among other types of statutes.⁹¹ In May 2022, the *Beretta* rule was directly applied to section 898 in *National Shooting Sports Foundation Inc. v. James* in the Northern District of New York.⁹² In this case, gun industry plaintiffs challenged the constitutionality of section 898.⁹³ The court held that section 898 fits the PLCAA predicate exception because it “expressly regulates firearms.”⁹⁴

2. Knowingly Violating Section 898

Next, the PLCAA states that defendants must *knowingly* violate a statute “applicable to” the sale or marketing of firearms to be held liable under the predicate exception.⁹⁵ While courts have not identified this as a distinct element in previous PLCAA predicate statute exception cases,⁹⁶ plaintiffs could likely prove this of gun industry defendants if required. Of the fifteen gun industry members who sued the New York State Attorney General in *National*

87. 15 U.S.C. § 7903(5)(A)(iii).

88. See *supra* note 48 and accompanying text.

89. See *Nat’l Shooting Sports Found.*, 604 F. Supp. 3d at 60.

90. 15 U.S.C. § 7903(5)(A)(iii).

91. 524 F.3d 384, 399 (2d Cir. 2008).

92. 604 F. Supp. 3d at 58.

93. *Id.* at 57.

94. *Id.* at 60.

95. 15 U.S.C. § 7903(5)(A)(iii).

96. See, e.g., *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262 (Conn. 2019).

Shooting Sports Foundation Inc. v. James, three of the parent entities—Smith & Wesson, Sturm, Ruger & Company, and Sig Sauer—collectively manufactured and are responsible for putting 42 percent of all domestically manufactured firearms into commerce in the United States between 2016 and 2020, amounting to over 20 million firearms.⁹⁷ When these entities sued the Attorney General over section 898 in *National Shooting Sports Foundation*, they demonstrated that they were well aware of New York’s new law. Therefore, if they violated section 898, it would be easy to show that they did so with knowledge.

Besides the evidence introduced in *National Shooting Sports Foundation* or other direct evidence of knowledge, it may be possible to presume knowledge without needing to provide details, as some courts have presumed that a sophisticated business operating within a certain regulatory regime can be properly charged with knowledge of statutes that apply to its behavior, or may broadly infer such knowledge from a defendant’s position.⁹⁸

3. Proximately Causing Harm

Finally, to fit the predicate PLCAA exception, defendants’ conduct in violation of the statute must be a proximate cause of the harm alleged.⁹⁹ Proving proximate cause traditionally requires a plaintiff to show that the defendant’s actions were both a direct and

97. U.S. DEP’T OF JUST., BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT: FIREARMS IN COMMERCE 15 (2022), <https://www.atf.gov/firearms/docs/report/national-firearms-commerce-and-trafficking-assessment-firearms-commerce-volume/download> [<https://perma.cc/JJ5W-LWVS>].

98. See *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 513 (4th Cir. 2005) (“As sophisticated businesses operating in a regulatory regime, defendants are properly charged with knowledge of the statute that applies to their behavior.”); *United States v. Kondos*, 365 F. Supp. 174, 176 (E.D. Wis. 1973) (presuming that because the defendant was an attorney, he knew his legal rights). Courts have been particularly willing to impute knowledge of governing laws onto parties handling dangerous products. See *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 565 (1971) (“But where, as here [concerning sulfuric and hydrofluosilicic acid] and as in *Balint* [concerning drugs] and *Freed* [concerning hand grenades], dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”).

99. 15 U.S.C. § 7903(5)(A)(iii).

foreseeable cause of the plaintiff's injuries.¹⁰⁰ In a broader sense, however, proximate cause is “a legal tool for limiting a wrongdoer's liability only to those harms that have a reasonable connection to his actions.”¹⁰¹ It asks whether it is “just or fair” to hold a party responsible for the alleged damage.¹⁰²

A proximate cause requirement may seem to frustrate some of the benefits of public nuisance doctrine, whether the common law or statutory version, because of its generally lower reasonable cause standard.¹⁰³ But it probably will not impede a lawsuit. In recent New York State opioid public nuisance litigation, plaintiffs won when they argued that the public suffered “direct and consequential economic injuries” as a foreseeable outcome of opioid companies' behavior.¹⁰⁴ Like the plaintiffs in that case, plaintiffs using section 898 to bring a public nuisance claim against members of the firearms industry can frame defendants' violation of the statute as causing a direct injury to the public in general, including economic injuries.¹⁰⁵ Plaintiffs can also rely on section 898's legislative history and findings—which draw a direct connection between violating the statute and causing gun violence in New York—to show that

100. See *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992); *Desiano v. Warner-Lambert Co.*, 326 F.3d 339, 347 (2d Cir. 2003); *Laborers Loc. 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235 (2d Cir. 1999).

101. *Laborers Loc. 17 Health & Benefit Fund*, 191 F.3d at 235.

102. *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 347 (E.D.N.Y. 2007) (“Proximate cause embodies a policy requirement in some tort actions that a defendant's tortious conduct be so causally sufficiently close to the harm suffered that it is just or fair to hold the defendant liable for the consequences of its actions.”).

103. See *supra* Part II.C.

104. See First Amended Complaint at 244, *People v. Purdue Pharma Inc.*, Index No. 40016/2018 (N.Y. Sup. Ct. Mar. 28, 2019), NYSCEF Doc. No. 19; N.Y. ATTY GEN., *Resolution Shuts Down Purdue, Ends Sacklers' Ability to Sell Opioids Ever Again, and Secures Unprecedented Public Disclosure* (July 8, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-helps-shut-down-purdue-pharma-secures-45-billion-sackler> [<https://perma.cc/6M65-6S5Z>].

105. It would be important for plaintiffs to frame defendants' harmful actions as directed to the public overall. Compare *Laborers Loc. 17 Health & Benefit Fund*, 191 F.3d at 235 (holding that a health insurance company's injuries were not direct since they arose from harmful marketing to third parties), with *Desiano v. Warner-Lambert Co.*, 326 F.3d 339, 350-51 (2d Cir. 2003) (holding that health insurance company's injuries were direct since the harmful marketing was directed to the insurance companies themselves).

defendants' statutory violation is a proximate cause of public harm.¹⁰⁶

B. Overcoming New Preemption Arguments

Unlike the common law doctrine, section 898, as a state statute, poses potential preemption questions. However, *National Shooting Sports Foundation* holds that section 898 is not preempted by federal law, neither expressly nor by obstacle conflict preemption.¹⁰⁷

First, the *National Shooting Sports Foundation* court held that section 898 is not directly preempted by federal law because it fits the PLCAA's predicate exception and is thus a permissible police power that the federal government intentionally delegated to the state of New York.¹⁰⁸ In other words, because the PLCAA makes room precisely for this kind of exception—for states to exercise their traditional police powers through statutes that expressly regulate the firearms industry—Congress preserved authority to be delegated to the states.¹⁰⁹ The court reasoned that Congress, not the courts, was the proper authority on preemption, and that Congress expressed its authority through providing this exception.¹¹⁰

Next, the Northern District of New York found that section 898 is not preempted by federal law through obstacle conflict preemption.¹¹¹ Obstacle conflict preemption is when a state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.¹¹² The *National Shooting Sports Foundation* court held that “a state statute establishing liability for improper sale or marketing of firearms is not an obstacle to any congressional objective of the PLCAA.”¹¹³

106. See *supra* Part II.B. By its very nature, a violation of section 898 presupposes proximate cause in a general, policy-level way, wherein it is appropriate to hold the gun industry liable for harm to public plaintiffs. See *Section 898 Legislative Findings and Intent*, *supra* note 40.

107. 604 F. Supp. 3d 48, 61 (N.D.N.Y. 2022).

108. *Id.* at 57-62.

109. See *id.*

110. *Id.* at 60-61.

111. *Id.* at 61.

112. *Id.*

113. *Id.*

C. Overcoming New Dormant Commerce Clause Arguments

The *National Shooting Sports Foundation* court held that section 898 did not violate the dormant Commerce Clause doctrine.¹¹⁴ This is because section 898 does not discriminate against interstate commerce in favor of intrastate commerce, but rather treats all gun industry members the same.¹¹⁵ In addition, it regulates the gun industry in a way commensurate with the local benefits it seeks to obtain—that is, protecting people.¹¹⁶ Finally, it does not amount to exclusively extraterritorial control, but is focused on protecting people within New York.¹¹⁷

D. Overcoming Void-for-Vagueness and Second Amendment Arguments

Section 898 is not void for vagueness, nor does it threaten the rights protected by the Second Amendment.¹¹⁸ The void-for-vagueness doctrine requires that laws be sufficiently clear to give people of ordinary intelligence reasonable opportunities to understand what is prohibited, as well as provide minimal guidelines to govern law enforcement.¹¹⁹ The gun industry in *National Shooting Sports Foundation* argued that section 898 should be evaluated using a stricter void-for-vagueness standard because it threatens to inhibit constitutional rights of the First and Second Amendment in relation to marketing and bearing arms, respectively.¹²⁰

Regarding the First Amendment, the *National Shooting Sports Foundation* court held that “economic regulation is subject to a less strict vagueness test” because businesses are “expected to consult relevant legislation in advance of action,” such as when creating marketing materials.¹²¹ Regarding the Second Amendment, the court reasoned that the law regulates unreasonable business

114. *Id.* at 62-66.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 65-69.

119. *Id.* at 65.

120. *Id.* at 66.

121. *Id.* (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982)).

dealings, not individuals who have Second Amendment rights.¹²² Thus, the law only had attenuated Second Amendment impacts and a higher void-for-vagueness standard was not needed.¹²³

Finally, the court rejected the gun industry's argument that section 898 is generally void for vagueness because section 898 is clear about the precautions potential defendants should take and requires that defendants act knowingly, negligently, or recklessly.¹²⁴ This contrasts with statutes that are found unconstitutional that make, for example, loitering illegal without notice or a mens rea requirement.¹²⁵

CONCLUSION

In section 898, the New York State Legislature took the best of New York's gun litigation history and made it even more powerful. Just as public nuisance opioid litigation has been a game changer for holding drug manufacturers accountable for the opioid public health crisis, statutes like section 898 could change the game for the gun violence public health epidemic.¹²⁶

States across the country should follow the lead of New York by enacting similar public nuisance statutes, especially if pre-PLCAA public nuisance common law cases were as effective in their jurisdictions as *NAACP* was in New York.¹²⁷ More broadly, states can explore the history of common law gun industry litigation in their jurisdictions, determine what common law causes of action were most successful, and model statutes after those causes of action.

Ultimately, section 898 shows how old common law doctrines can be reinvigorated by statutes to address challenges that plague our communities. We are lucky to have such a rich legal history and

122. *Id.* at 67; see also Feldman, *supra* note 9, at 4 (discussing the irrelevance of the Second Amendment to section 898).

123. *Nat'l Shooting Sports Found.*, 604 F. Supp. 3d at 67.

124. *Id.* at 67-68.

125. *Id.*

126. See Kendrick, *supra* note 2, at 706-09; *Surgeon General Calls Gun Violence an Epidemic; How Waco Reverberates Today*, NPR: HERE & NOW ANYTIME (Jan. 31, 2023, 2:04 PM), <https://www.npr.org/2023/01/31/1152844038/surgeon-general-calls-gun-violence-an-epidemic-how-waco-reverberates-today> [<https://perma.cc/D7ME-SWHX>].

127. See Russell, *supra* note 6.

dynamic legal system. As policymakers, we should be inspired to draw from our packed toolbox of legal approaches, where old common law doctrines, recent litigation history, and new legislation can come together to solve puzzles and make our communities safer and stronger today.

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