

Date of Hearing: April 19, 2022

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 1594 (Ting) – As Amended April 7, 2022

As Proposed to be Amended

SUBJECT: FIREARMS: CIVIL SUITS

KEY ISSUE: IN ORDER TO APPLY BASIC PRINCIPLES OF CIVIL JUSTICE AND ACCOUNTABILITY TO GUN MANUFACTURERS, IMPORTERS AND DEALERS WHO ARE IRRESPONSIBLE, RECKLESS, AND NEGLIGENT IN THE SALE OR MARKETING OF THEIR PRODUCTS, SHOULD THE CALIFORNIA ATTORNEY GENERAL, LOCAL GOVERNMENTS, AND SURVIVORS OF GUN VIOLENCE BE SPECIFICALLY AUTHORIZED TO PURSUE LEGAL ACTION IN CALIFORNIA COURTS AGAINST THEM?

SYNOPSIS

This bill, co-sponsored by the Brady Campaign and Attorney General Rob Bonta, would allow the California Attorney General, local governments, and survivors of gun violence to pursue legal action in California courts against gun manufacturers, importers and dealers who are irresponsible, reckless, and negligent in the sale or marketing of their products. In doing so, it would apply basic principles of civil justice and accountability to these parties, just as they apply to all others in society. High-profile mass shootings, such as the one in downtown Sacramento that killed six and wounded twelve, are reminders of the epidemic of gun violence in the state. In an average year, 3,160 people die from a gun in California, and 6,843 are injured. Gun violence often tracks with availability of guns. While California has enacted some of the strictest gun laws in the country, some efforts to hold the gun industry responsible for misconduct is frustrated by federal law. The federal Protection of Lawful Commerce in Arms Act (PLCAA) prohibits civil liability actions from being brought in State or Federal Court against gun dealers and manufacturers for harm incurred due to the illegal use of non-defective products. But the PLCAA specifies six exceptions to this prohibition, including one at issue in this bill: An action in which a manufacturer or seller of a firearm, ammunition, or components parts “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.”

In order to hold gun manufacturers, importers and dealers who are irresponsible, reckless, and negligent in the sale or marketing of their products to the same standard of accountability for their actions as other parties, this bill would clearly state the conditions under which they are subject to liability for their wrongdoing. The bill creates a “firearm industry standard of conduct” that applies to every “firearm industry member” (defined to mean “a person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products”). The standard of conduct would require such a member to do certain things, and prohibit them from doing others. Failure to comply with any requirement of the standard of conduct would be a violation of the firearm industry standard of conduct, and cause for bringing a civil action—by the AG, a city attorney, county counsel, or person who has suffered harm because of a firearm industry member’s conduct—in a court of

competent jurisdiction against the firearm industry member. The bill is supported by a number of gun violence prevention advocates, local governments, and the Consumer Attorneys of California. It is opposed by California Rifle and Pistol Association, Inc. and National Rifle Association – Institute for Legislative Action. The author has proposed a number of clarifying amendments that are incorporated into the summary of the bill, below.

SUMMARY: Allows the California Attorney General, local governments, and survivors of gun violence to pursue legal action in California courts against gun manufacturers, importers and dealers who are irresponsible, reckless, and negligent in the sale or marketing of their products. Specifically, **this bill:**

1) Makes the following findings and declarations on behalf of the Legislature:

- a) The Legislature's intent and purpose in enacting the Firearm Industry Responsibility Act is to protect public health and safety in California by promoting safe and responsible firearm industry member practices and ensuring that firearm industry members may be held justly accountable for wrongful conduct that endangers and harms the public in California.
- b) Firearm industry members' business conduct has enormous direct and secondary impacts on individuals, families, and communities across California. Firearm industry members profit from the sale, manufacture, distribution, importing, or marketing of lethal products, and products designed to be used with and for lethal products, that are frequently used to threaten, injure, and kill human beings in California, and which frequently cause enormous harms to individuals' and communities' health, safety, and well-being, as well as economic opportunity and vitality.
- c) The firearm industry has long been made aware of these harms, and has been called on to adopt reasonably feasible and effective reforms to their business practices to prevent or minimize those harms, but many firearm industry members have failed to do so.
- d) California has adopted critical laws regulating aspects of the firearm industry. However, some members of the firearm industry have continued to develop dangerous business practices and to manufacture, sell, distribute, and market increasingly dangerous new products designed to circumvent and undermine these laws. That purpose has often been explicit in advertisements for products ranging from unserialized ghost gun build kits to bump stocks to bullet button assault weapons, and many more.
- e) Accordingly, the Legislature finds that it is necessary to proactively establish an affirmative obligation that firearm industry members meet a reasonable standard of conduct, and face civil liability for harms caused by knowing violations of that standard, including when those violations do not constitute criminal conduct.
- f) Many other industries are required to adopt reasonable controls that are reasonably feasible and effective at preventing foreseeable and substantial risks to the public, including the illicit use of their products. The Firearm Industry Responsibility Act is intended to bring regulation of firearm industry members who conduct business in California, who sell their products to California consumers, and who have reason to believe that their products will be sold or possessed in California, closer in line with these widely accepted public health and safety standards.

- g) Firearm industry members' failures to adopt reasonable controls to protect public health and safety have led to foreseeable and grave public harms that could have been reasonably prevented with minimal cost or effort.
- h) Such failures also provide an unfair business advantage to irresponsible firearm industry members over more responsible competitors who take reasonable precautions to protect human life and well-being.
- i) The Legislature intends to ensure a level playing field for responsible firearm industry members, incentivize firearm industry members to take reasonable steps to protect public health and safety, and ensure that members of the California public who are harmed by a firearm industry member's violation of law, and public officials acting on behalf of the people of California, may bring legal action to seek appropriate justice and fair remedies for those harms in court.

2) Defines the following for purposes of the bill:

- a) "Ammunition" has the same meaning as provided in subdivision (b) of Section 16150 of the Penal Code.
- b) "Firearm" has the same meaning as provided in subdivisions (a) and (b) of Section 16520 of the Penal Code.
- c) "Firearm accessory" means an attachment or device designed or adapted to be inserted into, affixed onto, or used in conjunction with a firearm which is designed, intended, or functions to alter or enhance the firing capabilities of a firearm, the lethality of the firearm, or a shooter's ability to hold and use a firearm.
- d) "Firearm-related product" means a firearm, ammunition, a firearm precursor part, a firearm component, and a firearm accessory that meets any of the following conditions:
 - i) The item is sold, made, or distributed in California.
 - ii) The item is intended to be sold or distributed in California.
 - iii) It is reasonably foreseeable that the item would be sold or possessed in California.
- e) "Firearm precursor part" has the same meaning as provided in Section 16531 of the Penal Code.
- f) "Firearm industry member" shall mean a person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products.
- g) "Reasonable controls" means reasonable procedures, acts, or practices that are designed, implemented, and enforced to do the following:
 - i) Prevent the sale or distribution of a firearm-related product to a straw purchaser, a firearm trafficker, a person prohibited from possessing a firearm under state or federal law, or a person who the firearm industry member has reasonable cause to

believe is at substantial risk of using a firearm-related product to harm themselves or another or of possessing or using a firearm-related product unlawfully.

- ii) Prevent the loss or theft of a firearm-related product from the firearm industry member.
 - iii) Ensure that the firearm industry member complies with all provisions of California and federal law and does not otherwise promote the unlawful manufacture, sale, possession, marketing, or use of a firearm-related product.
- 3) Provides that a firearm industry member must comply with the firearm industry standard of conduct; and it shall be a violation of the firearm industry standard of conduct for a firearm industry member to fail to comply with any requirement below:
- a) A firearm industry member who manufactures, markets, imports, offers for wholesale, or offers for retail sale a firearm-related product shall do both of the following:
 - i) Establish, implement, and enforce reasonable controls.
 - ii) Take reasonable precautions to ensure that the firearm industry member does not sell, distribute, or provide a firearm-related product to a downstream distributor or retailer of firearm-related products who fails to establish, implement, and enforce reasonable controls.
 - b) A firearm industry member shall not manufacture, market, import, offer for wholesale, or offer for retail sale a firearm-related product that is likely to create an unreasonable risk of harm to public health and safety; provides, for the purposes of this prohibition, that the following apply:
 - i) A firearm-related product shall not be considered abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety based on a firearm's inherent capacity to cause injury or lethal harm.
 - ii) There shall be a presumption that a firearm-related product is abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety if any of the following exist:
 - A) The firearm-related product's features render the product most suitable for assaultive purposes instead of lawful self-defense, hunting, or other legitimate sport and recreational activities.
 - B) The firearm related-product is designed, sold, or marketed in a manner that foreseeably promotes conversion of legal firearm related-products into illegal firearm-related products; or
 - C) The firearm-related product is designed, sold, or marketed in a manner that is targeted at minors or other individuals who are legally prohibited from accessing firearms.
 - c) A firearm industry member shall not engage in any conduct related to the sale or marketing of firearm-related products that is in violation of the following sections:

- i) Paragraph (1), (2), (3), (4), (5), (6), (7), (8), or (9) of subdivision (a) of Section 1770.
 - ii) Section 17200 of the Business and Professions Code.
 - iii) Section 17500 of the Business and Professions Code.
 - iv) Section 17508 of the Business and Professions Code.
- 4) Makes an act or omission by a firearm industry member in violation of the firearm industry standard of conduct shall be actionable under this section.
- 5) Provides that the following may bring an action in a court of competent jurisdiction:
 - a) A person who has suffered harm because of a firearm industry member's conduct.
 - b) The Attorney General, in the name of the people of the State of California, to enforce the bill's requirements and remedy harm caused by a violation.
 - c) A city attorney, in the name of the people of that city, to enforce to enforce the bill's requirements and remedy harm caused by a violation.
- 6) A county counsel, in the name of the people of that county, to enforce the bill's requirements and remedy harm caused by a violation.
- 7) Authorizes a court, if it determines that a firearm industry member engaged in conduct in violation of the firearm industry standard of conduct set forth above to award any or all of the following:
 - a) Injunctive relief sufficient to prevent the firearm industry member and any other defendant from further violating the law.
 - b) Damages.
 - c) Attorney's fees and costs.
 - d) Any other appropriate relief necessary to enforce this title and remedy the harm caused by the conduct.
- 8) Provides that in an action alleging that a firearm industry member failed to establish, implement, and enforce reasonable controls, there shall be a rebuttable presumption that the firearm industry member knowingly failed to implement reasonable controls if both of the following conditions are satisfied:
 - a) The firearm industry member's action or failure to act created a reasonably foreseeable risk that the harm alleged by the claimant would occur.
 - b) The firearm industry member could have established, implemented, and enforced reasonable controls to prevent or substantially mitigate the risk that the harm would occur.

- 9) Provides that if the rebuttable presumption described in 7), above, is established, the firearm industry member has the burden of proving by a preponderance of the evidence that the firearm industry member established, implemented, and enforced reasonable controls.
- 10) Clarifies that an intervening act by a third party, including, but not limited to, criminal misuse of a firearm-related product, shall not preclude a firearm industry member from liability.
- 11) Clarifies that the bill shall not be construed or implied to limit or impair in any way the following:
 - a) The right of a person or entity to pursue a legal action under any other authority.
 - b) An obligation or requirement placed on a firearm industry member by any other authority.
- 12) States that the bill shall be construed and applied in a manner that is consistent with the requirements of the California and the United States Constitutions.
- 13) Makes the bill operative on July 1, 2023.
- 14) Includes a severability clause, so that if any provision of this act, or part of this act, any clause within this act, any combination of words within this act, or the application of any provision or part or clause or combination of words of this act to any person or circumstance, is for any reason held to be invalid or unconstitutional, the remaining provisions, clauses, words, or applications of provisions, clauses, or words shall not be affected, but shall remain in full force and effect, and to this end the provisions of this measure are severable.

EXISTING LAW:

- 1) Makes everyone responsible, not only for the result of their willful acts, but also for an injury occasioned to another by their want of ordinary care of skill in the management of their property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on themselves. (Civil Code Section 1714 (a).)
- 2) Defines “unfair competition” to mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act of false advertising specifically prohibited by Section 17500 *et seq.* of the B&P Code. (B&P Code Section 17200.)
- 3) Authorizes civil actions for injunctive relief for violations of unfair competition laws to be prosecuted in the name of the people of the State of California upon their own complaint exclusively in a court of competent jurisdiction by any of the following:
 - a) The Attorney General;
 - b) A district attorney;
 - c) A county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance;

- d) A city attorney of a city having a population in excess of 750,000;
 - e) A city attorney in a city and county;
 - f) A city attorney who has the consent of the district attorney; or
 - g) A city prosecutor in a city having a full-time city prosecutor. (B&P Code Section 17204.)
- 4) Specifies, under the Consumer Legal Remedies Act, that certain unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful. (Civil Code Section 1770.)
 - 5) Prohibits any person or specified entity with intent to dispose of real or personal property or to perform services, from making, or causing to be made, any statement about that property or those services, which is untrue or misleading, and which is known, or reasonably could be known, to be untrue or misleading. Prohibits any such statement to be made, or cause to be made, with the intent not to sell that property or those services at advertised prices. Provides that a violation of this prohibition is a misdemeanor punishable by imprisonment and a specified fine. (Business and Professions Code Section 17500.)
 - 6) Prohibits any person doing business and advertising to consumers in California from making a false or misleading advertising claim. Enumerates a process whereby such a claim may be investigated and relief sought. (Business and Professions Code Section 172508.)
 - 7) Defines “ammunition” to include any bullet, cartridge, magazine, clip, speed loader, autoloader, ammunition feeding device, or projectile capable of being fired from a firearm with a deadly consequence. Specifies that “ammunition” does not include blanks. (Penal Code Section 16150 (b).)
 - 8) Defines “firearm” as a device designed to be used as a weapon and from which is expelled, through a barrel, a projectile by the force of an explosion or other form of combustion. Specifies that “firearm” includes the frame or receiver of the weapon. (Penal Code Section 16520 (a)-(b).)
 - 9) Defines “firearm precursor part” to mean a component of a firearm that is necessary to build or assemble a firearm and is either an unfinished handgun frame or an unfinished receiver, including both a single part receiver and a multiple part receiver. Requires the Department of Justice to provide written guidance and pictorial diagrams of each category of precursor parts. Exempts from this definition firearms parts that can only be used on antique firearms. Specifies that a firearm precursor part is not a firearm or the frame or receiver thereof. (Penal Code Section 16531.)
 - 10) Prohibits, under the federal Protection of Lawful Commerce in Arms Act, a civil liability action from being brought in State or Federal Court by a person against a manufacturer or seller of a specified firearm or component part, or trade association, for relief resulting from the criminal or unlawful misuse of a firearm or component part by the person or a third party. Provides that specified actions are exempt from this prohibition, including an action in which the seller or manufacturer knowing violated a State or Federal statute applicable to the sale or

marketing of the product, and in which the violation was a proximate cause of the harm for which relief is sought. (15 U.S.C. Sec 7902.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill, co-sponsored by the Brady Campaign and Attorney General Rob Bonta, would allow the California Attorney General, local governments, and survivors of gun violence to pursue legal action in California courts against gun manufacturers, importers and dealers who are irresponsible, reckless, and negligent in the sale or marketing of their products. In doing so, it would apply basic principles of civil justice and accountability to these parties, just as they apply to all others in society. According to the author:

Almost every industry in the U.S. is held liable for what their products do, but the gun industry is not held to the same standard. As a result of the gun industry's lobbying after a series of lawsuits in the 1990's held the firearm industry liable for reckless practices, President Bush signed the Protection of Lawful Commerce in Arms Act (PLCAA) in 2005. PLCAA provides gun manufacturers and dealers with some immunity from lawsuits, shielding them from legal accountability. Consequently, PLCAA disincentivizes the firearms industry from following all federal, state and local laws ensuring firearms meet California standards, and educating gun purchasers of their responsibilities. Though there are some exceptions to PLCAA, there remains limited liability ability to hold the industry accountable and as a result, those impacted by gun violence are often unable to seek accountability and justice. AB 1594 aims to ensure the gun industry does not evade basic principles of civil justice that all others in society are subjected to by allowing the California Attorney General, local governments, and survivors of gun violence to pursue legal action in California courts against irresponsible, reckless, and negligent gun manufacturers, importers and dealers.

Gun Violence in California. High-profile mass shootings, such as the one in downtown Sacramento that killed six and wounded twelve, are reminders of the epidemic of gun violence in the state. In an average year, 3,160 people die from a gun in California, and 6,843 are injured. (Everytown for Gun Safety, *Gun Violence in California* (Jan. 2022).) For children and teens, firearm related injuries are the third-leading cause of death. (Cunningham, et al., *The Major Causes of Death in Children and Adolescents in the United States* (Dec. 2018) The New England Journal of Medicine.) Communities of color are acutely impacted by gun violence. The rate of gun homicides among Black Californians is more than 10 times higher than among white Californians. (Everytown for Gun Safety, *supra*.) For Latinx Californians, the rate of gun deaths is four times as high. (*Ibid.*) Relative to other states, California ranks 44th in the rate of firearm deaths, but 30th in the rate of firearm homicides and assaults. (CDC/National Center for Health Statistics, *Firearm Mortality by State* (March 2022); Everytown for Gun Safety, *Gun Violence in California* (Jan. 2022).)

Gun violence often tracks with availability of guns. Research demonstrates that access to a gun makes it five times more likely that a woman will be killed by a domestic abuser. (Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study* (July 2003) American Journal of Public Health.) In mass shootings, the use of an assault weapon is strongly associated with higher death and injury. In a study of mass shootings nationally, researchers found that the use of an assault weapon resulted in more than two times as many people killed and 24 times as many people wounded. The pandemic appears to have exacerbated gun violence in California. At the onset of the pandemic, concerns about crime

resulted in a 66 percent increase in gun purchases in California. (Lofstrom, *Gun Deaths Drive California's Largest-Ever Rise in Homicides* (July 2021) PPIC.) Accordingly, gun homicides jumped by 41 percent in California in 2020, and unintentional shootings of children increased by 30 percent nationally. (Everytown Research & Policy, *Gun Violence and COVID in 2020* (May 2021).)

Gun restrictions in California. California has enacted some of the strictest gun laws in the country, which has earned it an “A” rating on the annual gun law scorecard issued by the Giffords Law Center to Prevent Gun Violence. (Giffords Law Center, *Annual Gun Law Scorecard* (2021), available at <https://giffords.org/lawcenter/resources/scorecard/>.) Among California’s 107 gun laws are universal background checks on all firearm transfers, regardless of where and between whom those transfers occur; a ten-day waiting period for firearm purchases; design specifications and safety testing of handguns that are allowed to be sold in the state; restriction on who can sell guns; who can buy and own guns, and restrictions on the number and types of ammo and guns one can purchase in the state, including a ban on assault weapons and automatic weapons.

Immunity for gun manufacturers and dealers. As a general rule, “[e]veryone is responsible, not only for the result of [their] willful acts, but also for an injury occasioned to another by [their] want of ordinary care or skill in the management of [their] property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury [on themselves].” (Civil Code Section 1714 (a).) According to the California Supreme Court, Section 1714 embodies a fundamental principle of liability for failure to exercise such care, and that “it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by Civil Code Section 1714, no such exception should be made unless clearly supported by public policy.” (*Rowland v. Christian* (1968) 69 Cal. 2d 108, 112.)

Despite this principle of personal accountability for wrongdoing, as well as the state’s numerous gun restrictions, the right to file a civil action against a gun manufacturer or dealer is hamstrung by a federal immunity statute titled the Protection of Lawful Commerce in Arms Act. (15 U.S.C. Sec 7902.) Signed by President George W. Bush in 2005, the Protection of Lawful Commerce in Arms Act (PLCAA) prohibits civil liability actions from being brought in State or Federal Court against gun dealers and manufacturers for harm incurred due to the illegal use of non-defective products. Importantly, the PLCAA specifies six exceptions to this prohibition:

- 1) An action brought against someone convicted of “knowingly transfer[ing] a firearm, knowing that such firearm will be used to commit a crime of violence” by someone harmed by such unlawful conduct;
- 2) An action brought against a seller for negligent entrustment or negligence;
- 3) An action in which a manufacturer or seller of a firearm, ammunition, or components parts “***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;”
- 4) An action for breach of contract or warranty in connection with the purchase of the product;

- 5) “An action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage;”
- 6) An action commenced by the Attorney General to enforce the Gun Control Act or the National Firearms Act.

The third exception, also known as the “predicate exception,” has been the subject of considerable judicial scrutiny. Under this exception, a plaintiff may bring a suit if they successfully prove that a manufacturer or dealer knowingly violated an underlying statute “applicable to the sale or marketing” of a firearm or ammunition and this violation was the proximate cause of the harm. Two federal appellate rulings have adopted a narrow interpretation of the word “applicable,” ruling that “applicable” statutes are those that specifically regulate the firearm industry. (See *City of New York v. Beretta USA Corp.* (2nd Cir. 2008) 524 F.3d 384 and *Ileto v. Glock, Inc.* (9th Cir. 2009) 565 F.3d 1126.) This interpretation has resulted in dismissal of a number of suits that argue “applicable” should be broadly defined to include state laws such as public nuisance statutes that address endangerment of health and safety.

However, some state courts have adopted a broader interpretation of the predicate exception. For example, in a suit filed by the parents of the Sandy Hook victims against Remington Arms, the manufacturer of the rifle used to kill 26 people (20 of whom were children between six and seven years old), at Sandy Hook Elementary School, the Connecticut Supreme Court ruled that the defendants, by marketing the illegal use of their products, violated the Connecticut Unfair Trade Practices Act (CUTPA). (*Soto v. Bushmaster Firearms Int’l, LLC.* (Conn. 2019) 202 A.3d 262.) The court noted that, because deceptive marketing is regulated by unfair trade practice laws, rather than firearms-specific statutes, CUTPA is an applicable statute as specified in the predicate exception. In February of 2022, the plaintiffs announced that they reached a settlement with the company for \$73 million. The settlement also allowed the plaintiffs to share internal company documents obtained during discovery that provide evidence of the company’s unfair marketing practices promoting the illegal use of firearms.

This bill. In order to hold gun manufacturers, importers and dealers who are irresponsible, reckless, and negligent in the sale or marketing of their products to the same standard of accountability for their actions as other parties, this bill would clearly state the conditions under which they are subject to liability for their wrongdoing.

The bill creates a “firearm industry standard of conduct” that applies to every “firearm industry member” (defined to mean “a person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products”). The standard of conduct would require such a member to do certain things, and prohibit them from doing others. Failure to comply with any requirement of the standard of conduct would be a violation of the firearm industry standard of conduct, and cause for bringing a civil action—by the AG, a city attorney, county counsel, or person who has suffered harm because of a firearm industry member’s conduct—in a court of competent jurisdiction against the firearm industry member.

The bill makes the following components of the firearm industry standard of conduct:

- 1) A firearm industry member is *required* to both of the following:
 - a) Establish, implement, and enforce reasonable controls as defined in Section 3273.50.
 - b) Take reasonable precautions to ensure that the firearm industry member does not sell, distribute, or provide a firearm-related product to a downstream distributor or retailer of firearm-related products who fails to establish, implement, and enforce reasonable controls.
- 2) A firearm industry member is *prohibited from* manufacturing, marketing, importing, offering for wholesale sale, or offering for retail sale a firearm-related product that is “abnormally dangerous and likely to create a substantial and an unreasonable risk of harm to public health and safety.”

Relative to this second provision, the bill notably provides that there shall be a presumption affecting the burden of producing evidence that a firearm-related product is “abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety” under any of the following circumstances:

- a) The firearm-related product's features render the product most suitable for assaultive purposes instead of lawful self-defense, hunting, or other legitimate sport and recreational activities;
- b) The firearm related-product is designed, sold, or marketed in a manner that foreseeably promotes conversion of legal firearm related-products into illegal firearm-related products; or
- c) The firearm-related product is designed, sold, or marketed in a manner that is targeted at minors or other individuals who are legally prohibited from accessing firearms.

This presumption is rebuttable. If established, the firearm industry member would have the burden of proving by a preponderance of the evidence that the firearm industry member established, implemented, and enforced “reasonable controls” as that phrase is defined in the bill. Furthermore, the bill clarifies that an intervening act by a third party, including, but not limited to, criminal misuse of a firearm-related product, does not preclude a firearm industry member from liability under the bill.

Other predicate acts that would establish liability under the bill. As explained above, the bill provides two basic ways for a firearm industry member to be held civilly liable: for either failure to comply with the “firearm industry standard of conduct” (by failing to perform required acts to ensure reasonable controls, for example), or for operating in a manner that creates a substantial risk of harm to the public. In addition, a firearm industry member can be held liable under the bill for violating specified product safety laws in relation to their sales or marketing of firearms. Those laws, and a description of how they are relevant to the bill, is described below.

- A violation of paragraph (1), (2), (3), (4), (5), (6), (7), (8), or (9) of subdivision (a) of Section 1770 of the Civil Code.

Section 1770 of the Civil Code, the Consumer Legal Remedies Act (CLRA), specifies that certain unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful. In relation to the bill, the following acts would constitute violations of the CLRA to the extent that the “goods” met the definition of a “firearm-related product” (a

firearm, ammunition, a firearm precursor part, a firearm component, or a firearm accessory that is sold, made, or distributed in California; intended to be sold or distributed in California; or that would foreseeably be sold or possessed in California):

- (1) Passing off goods or services as those of another.
 - (2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.
 - (3) Misrepresenting the affiliation, connection, or association with, or certification by, another.
 - (4) Using deceptive representations or designations of geographic origin in connection with goods or services.
 - (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have.
 - (6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.
 - (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
 - (8) Disparaging the goods, services, or business of another by false or misleading representation of fact.
 - (9) Advertising goods or services with intent not to sell them as advertised.
- A violation of Section 17200 of the B & P Code. This law defines “unfair competition” to mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act of false advertising specifically prohibited by Section 17500 *et seq.* of the B&P Code. This law would apply to acts that constitute unlawful, unfair, or fraudulent business practices in relation to the sale and marketing of a “firearm-related product.”
 - A violation of Section 17500 of the B&P Code. Section 17500 makes it unlawful for any person, “with intent directly or indirectly to dispose of real or personal property or to perform services, to make or disseminate or cause to be made or disseminated,” to make any statement, concerning that real or personal property or those services, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. This law would apply to untrue or misleading statements relative to a “firearm-related product.”
 - A violation of Section 17508 of the B & P Code. Section 17508 makes it unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, (2) compare the product’s effectiveness or safety to that of other brands or products, or (3) purport to be based on any fact. This law would apply to false and misleading advertising claims about a “firearm-related product.”

Remedies for violations of the firearm industry standard of conduct. The bill authorizes several potential plaintiffs to bring a civil action pursuant to the bill. First, any person “who has suffered harm because of a firearm industry member’s conduct” in violation of the firearm industry standard of conduct could bring an action in a court of competent jurisdiction. Second, the Attorney General would be allowed to bring a civil action in a court of competent jurisdiction in the name of the people of the State of California to enforce the requirements and prohibitions of the bill and to remedy harm caused by a violation of the bill. Finally, any city attorney or county counsel would be authorized to bring a civil action in a court of competent jurisdiction in the name of the people of that city or county to enforce this title and remedy harm caused by a violation of the bill.

If a court determined that a firearm industry member engaged in conduct in violation of the firearm industry standard of conduct established by the bill, it could award any or all of the following: (a) injunctive relief sufficient to prevent the firearm industry member and any other defendant from further violating the law; (b) damages; (c) attorney’s fees and costs; (c) any other appropriate relief necessary to enforce this title and remedy the harm caused by the conduct.

PLCAA and its Relevant Exception—Preemption Issues. As described above, the immunity provision of PLCAA generally shields gun manufacturers and dealers from liability in State or Federal Court for harm incurred due to the illegal use of non-defective products, except in limited cases. One exception reads as follows:

An action in which a manufacturer or seller of a firearm, ammunition, or components parts “***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;”

The new liability provisions created by the bill, as well as all of the existing consumer protection laws that are referenced in the bill—which are incorporated into the “firearm industry standard of conduct” and with which, therefore, a firearm industry member must comply, govern the sale or marketing of products. Therefore, to the extent that those laws would apply to a manufacturer or seller of a firearm, ammunition, or components parts, it appears that any violations, at least to the extent that they were “knowing” and the proximate cause of the harm for which relief is sought by a plaintiff, would appear to fall within the exception. Therefore, it appears that PLCAA would not preempt an action under the bill to hold a manufacturer or dealer civilly liable.

The bill does not appear to raise Second Amendment concerns. The Second Amendment to the U.S. Constitution provides, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Prior to 2008, the right generally was understood by federal courts to be intertwined with military or militia use. (See, e.g., *Parker v. District of Columbia* (D. D.C. 2004) 311 F. Supp. 2d 103, pp. 104-05 [noting that the “vast majority of circuit courts . . . reject[ed] an individual right to bear arms separate and apart from Militia use”].) In *District of Columbia v. Heller*, the U.S. Supreme Court held that the 2nd Amendment protects a personal right to keep and bear arms for lawful purposes, especially in one’s home; and therefore the District of Columbia’s functional ban on handgun possession in the home and its requirement that lawful firearms in the home be rendered inoperable were unconstitutional. (*District of Columbia v. Heller* (2008) 554 U.S. 570, 630-31.) Since *Heller*, the circuit courts largely have been applying a two-step inquiry to determine whether a particular law is constitutional. First, courts ask whether the challenged law burdens conduct protected by the Second Amendment. If it does not, the inquiry ends, as the law does not

implicate the Second Amendment. But if the challenged law does burden conduct protected by the Second Amendment, courts next ask whether, under the applicable type of means-end scrutiny, the law is constitutional under that standard of review. (See Congressional Research Service, “*Post-Heller Second Amendment Jurisprudence*,” pp. 12-13 (March 25, 2019).)

The Court in *Heller* observed that certain regulations restricting access to firearms were “longstanding” and “presumptively lawful,” including restrictions on possessing and selling certain types of weapons, and conditions on the commercial sale of firearms. (*Heller, supra*, 554 U.S. 570, 626-27 and fn.26.) Given that the civil liability provisions of this bill apply only to firearm *industry* members (defined under the bill to mean “a person, firm, corporation, company, partnership, society, joint stock company, or any other entity or association engaged in the manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products”), it seems consistent with longstanding and presumptively lawful restrictions on the commercial sale of firearms. Therefore it likely does not implicate the 2nd Amendment. Rather, the bill imposes liability only on these persons and entities, and only when they fail to abide by a standard of conduct requiring them to follow the law and act in a safe, honest, and responsible manner in the course of conducting their business.

Author’s amendments. The author proposes a number of amendments to simplify and clarify the bill. Among other things, the amendments do the following:

- Add a definition of “firearm accessory” to the bill.
- Revise the definition of “reasonable controls” to be more straightforward.
- Clarify what the “firearm industry standard of conduct” requires and what conduct of firearm industry members it prohibits.

The amendments are incorporated into the SUMMARY of the bill, above.

ARGUMENTS IN SUPPORT: Co-sponsor Brady Campaign writes the following about why the bill is necessary:

AB 1594 will function as an exception to PLCAA, ensuring that valid civil claims can be brought against the gun industry for their dangerous, negligent, and even unlawful actions. The possibility of civil liability will not only provide civil justice to victims and survivors but also encourage the gun industry to act responsibly to help stem the tide of crime guns that harm Californians, particularly in urban areas where communities of color are disproportionately harmed. Having operated with special protections for years, the industry has had no financial incentive to curb irresponsible conduct and instead puts profits over people. The prospect of civil liability can lead to safer products and better conduct that the industry has resisted for years.

Co-sponsor Attorney General Rob Bonta observes that the bill “will provide California with the ability to hold the firearm industry responsible for their misconduct.”

The intent of the legislation is to govern the sale and marketing practices of firearms manufacturers and distributors who do business in California in order to require they make reasonable efforts to prevent their products from being used unlawfully. If gun industry members fail to take proper precautions in their marketing and distribution, AB 1594 will authorize the Department of Justice and individual Californians to file civil suits to recoup the damage from those failures.

Consumer Attorneys of California write, “AB 1594 enacts the Firearm Industry Accountability Act outlining reasonable standards for industry conduct to protect public health and safety in California. The bill also creates a cause of action for harms caused by failing to comply with these standards. Lastly, AB 1594 allows the Department of Justice, cities, counties, and survivors of victims of gun violence to pursue claims against the gun industry.”

ARGUMENTS IN OPPOSITION: In their letter of opposition, the National Rifle Association writes the following about the bill:

AB 1594 seeks to frustrate law-abiding gun owners and the firearms industry by empowering tort attorneys and politically-motivated public attorneys to drive firearm, ammunition, and firearm accessories manufacturers, wholesalers, and dealers out of business with frivolous litigation. . . .The term “reasonable controls” is not defined as conforming to a specific set of measures or regulations, rather these “controls” are indeterminate and would be above and beyond what California and federal law explicitly require. Moreover, industry members would be required to ensure that any other member of the industry that they deal with has implemented such “reasonable controls.”

The ambiguity of the term “reasonable controls” in the legislation is purposeful. That ambiguity is designed to permit private actors and governments to torment the firearms industry through costly litigation in the widest array of circumstances, even when those industry members comport their behavior to the specific state and federal statutes and regulations governing their conduct.

The California Rifle and Pistol Association observes that the bill, “[I]s so broad almost anyone could bring civil action against the firearm industry. It is an attack on the lawful commerce of firearms with an intent to limit the availability of firearms.”

REGISTERED SUPPORT / OPPOSITION:

Support

Attorney General Rob Bonta (co-sponsor)
Brady Campaign (co-sponsor)
City and County of San Francisco, Board of Supervisors
City of Berkeley
City of Los Angeles
Consumer Attorneys of California
Everytown for Gun Safety Action Fund
Giffords
Moms Demand Action for Gun Sense in America
Students Demand Action for Gun Sense in America
Women Against Gun Violence

Opposition

California Rifle and Pistol Association, Inc.
National Rifle Association – Institute for Legislative Action

Analysis Prepared by: Alison Merrilees and Alec Watts / JUD. / (916) 319-2334