

NY AG Urges 2nd Circ. To Greenlight Gun Nuisance Law

By [Y. Peter Kang](#) · [Listen to article](#)

Law360 (January 9, 2023, 6:43 PM EST) -- New York's attorney general is defending a state law allowing lawsuits to be brought against gun manufacturers that cause public harm, telling the Second Circuit the statute is not preempted by a federal law that shields firearms companies from certain gun violence claims.

Letitia James, the Empire State's top legal officer, said in an [appellate brief](#) filed Friday the law is clearly allowed under the so-called predicate exception to the federal Protection of Lawful Commerce in Arms Act.

"On its face, New York's gun-related public nuisance statute regulates the sale and marketing of firearms and therefore falls well within the text of the predicate exception as conclusively interpreted by this court," the brief states.

[National Shooting Sports Foundation Inc.](#), a firearms industry trade association, and 14 of its members including Beretta USA Corp. and [Glock Inc.](#) are suing to block enforcement of the law, which was enacted in July 2021 and bars any "gun industry member" from endangering public safety through the sale and marketing of firearms. The industry claims the statute is preempted by the PLCAA and violates both the commerce and due process clauses of the U.S. Constitution.

Last year, U.S. District Judge Mae A. D'Agostino [upheld the law](#), finding the PLCAA does not extend to gun industry companies that break state or federal laws governing the production and marketing of firearms. Thus, the law can be considered a predicate exception to the PLCAA, the judge said.

On Friday, James pointed out that the PLCAA's predicate carveout gives deference to state lawmakers who seek to prevent public harm from gun violence.

"PLCAA ... respects the primary role of federal and state legislatures by permitting suits against gun industry members that have knowingly violated a predicate 'state or federal statute applicable to the sale or marketing of [a qualified] product' where such violations are alleged to be a proximate cause of a plaintiff's injury," the brief states.

James said the Second Circuit's 2008 ruling in [City of New York v. Beretta](#) is controlling precedent as it held that New York's general public nuisance statute wasn't enough to trigger the PLCAA's predicate exception, but a nuisance statute specifically tailored to the sale and marketing of firearms would be enough to pass muster.

"As this court held in Beretta, PLCAA's predicate exception permits claims under statutes that 'expressly regulate firearms' or 'clearly can be said to implicate the purchase and sale of firearms,'" the brief states.

New York's gun-related public nuisance statute, James said, "imposes direct obligations on manufacturers' and sellers' own conduct."

In addition, James contends the state law is constitutionally sound since it "fits squarely within the realm of state authority preserved by PLCAA, which was enacted pursuant to Congress' commerce

powers."

A spokesman for the [New York Attorney General's Office](#) declined to comment on Monday. An attorney for the firearms industry did not immediately respond to a request for comment.

[In October](#), the firearms industry said allowing New York's nuisance law to stand undermines the purpose of the PLCAA, which is to shield the industry from liability for harm caused by firearms that were lawfully sold.

"That implausible reading of the so-called 'predicate exception' would make nonsense of the PLCAA, sneaking in through the back door what Congress kicked out the front," the gun groups said in their opening appellate brief. "In reality, text, structure, context and common sense — not to mention this court's precedent — foreclose reading the 'predicate exception to swallow the statute.'"

In an amicus brief, the [National Rifle Association argued in October](#) that public nuisance claims can't be extended to a third party's use of an otherwise legal product, whether it's a gun or a car, in a way that might create a risk that someone else is harmed.

"Unrecognizable as nuisance, the result is a statute that prohibits no conduct in particular; leaves plaintiffs, government officials and judges free to regulate the firearms industry as they see fit; and imperils Second Amendment rights — in short, an unconstitutionally vague statute," the NRA said.

James is represented by herself and in-house counsel Barbara D. Underwood, Ester Murdukhayeva and Dennis Fan.

The gun industry is represented by Erin E. Murphy, Paul D. Clement, Matthew D. Rowen, Trevor W. Ezell and Nicholas M. Gallagher of [Clement & Murphy PLLC](#).

The case is National Shooting Sports Foundation Inc. v. James, case number [22-1374](#), in the [U.S. Court of Appeals for the Second Circuit](#).

--Additional reporting by Emily Field. Editing by Philip Shea.