

## ***Mexico v. Smith & Wesson: Judge Dismisses Complaint Citing PLCAA and Standing Issues***

### **Introduction**

In August of 2021, Mexico brought a lawsuit against seven gun manufacturers and one gun wholesaler in the U.S. District Court for the District of Massachusetts.<sup>1</sup> The case elicited substantial commentary, including in the present forum,<sup>2</sup> for the novelty of the legal theories evoked, the international law issues raised, and the possible ramifications of the lawsuit. The court dismissed all of Mexico's claims, primarily based on the Protection of Lawful Commerce in Arms Act (PLCAA). This *Insight* reviews the court's decision, highlights some weaknesses particularly with respect to the extraterritoriality analysis, and explores what may come next in this case and the broader accountability effort.

### **Overview of the Complaint and Dismissal Order**

The 139-page 9-count complaint asserts that the Mexican government and its people have been “victimized by a deadly flood of military-style and other particularly lethal guns that flows from the U.S. across the border, into criminal hands in Mexico.”<sup>3</sup> This, the complaint avers, was the “foreseeable result” of the defendants’ actions and business practices, which have aided and abetted the “killing and maiming of children, judges, journalists, police, and ordinary citizens throughout Mexico.”<sup>4</sup> The complaint also alleges that defendants have continued to sell to dealers in the United States that are supplying weapons (illegally) across the border to Mexico, and even designing weapons to appeal to the Mexican market, and especially to violent cartels in Mexico. Mexico contended that this conduct violated state tort law and Connecticut and Massachusetts consumer protection statutes.

Defendants moved to dismiss arguing that they were immune from suit under the federal PLCAA. The PLCAA prohibits bringing lawsuits against gun manufacturers and dealers in state or federal court, but also creates exceptions to that immunity.<sup>5</sup> Mexico argued that the PLCAA did not apply because the injury complained of was the result of a “transnational tort” that occurred in Mexico, resulting from the unlawful misuse of guns in Mexico, not the United States,<sup>6</sup> and thus urged the application of Mexican law. It also argued that the suit was permitted under various exceptions to the PLCAA.<sup>7</sup>

On September 30, 2022, the complaint was dismissed.<sup>8</sup> Writing for the court, Chief Judge Saylor was sympathetic to Mexico’s lawsuit, noting that “a substantial portion of the blame” for the gun-related homicides Mexico is suffering “rests with American citizens.”<sup>9</sup> In setting aside Mexico’s claims, however, he found that the PLCAA “unequivocally bars lawsuits seeking to hold gun manufacturers responsible for the acts of individuals using guns for their intended purpose.”<sup>10</sup> Although finding that Mexico had made a sufficient showing of standing for the complaint to survive a motion to dismiss on most counts, the court concluded that the lawsuit nonetheless had to be dismissed for failure to state a claim upon which relief could be granted.<sup>11</sup> Mexico has announced its intention to appeal.<sup>12</sup>

The court found that Mexico had met the burden of demonstrating that the injury to the Mexican government and its citizens was “fairly traceable” to the defendants’ conduct, which thereby met the test of Article III standing.<sup>13</sup> This finding could assist Mexico on appeal. However, on the question of the PLCAA, the court found that it applied and barred at least 7 out of the 9 counts of the complaint. For the one count that did not run afoul of the PLCAA (the claim against Colt premised upon Connecticut law), the court held that standing was not present. These findings are discussed below.

### **The Inapplicability of Mexican Law and the Bar Posed by the PLCAA**

Mexico argued that because tort claims are generally governed by the law of the place of the injury, Mexican law, not the PLCAA, should apply to the dispute. Alternatively, Mexico argued that many of its claims might fit within the PLCAA’s exceptions.<sup>14</sup> On the first point, the court disagreed, finding that no choice-of-law analysis was necessary as the PLCAA was a “jurisdiction-stripping statute,”<sup>15</sup> meaning that it deprived the federal courts of jurisdiction over all civil actions or proceedings brought by *any person* against a manufacturer or seller of a firearm. Since Mexico’s lawsuit was unquestionably a “civil action or proceeding” resulting from the sale of firearms that were in turn criminally or unlawfully misused, the court concluded that the lawsuit was barred.

The court's decision is contestable. A perfectly reasonable interpretation of the law, and one consistent with the presumption against extraterritoriality so often applied by the Supreme Court to determine the geographic scope of federal statutes,<sup>16</sup> would be to *exclude* from the terms "criminal or unlawful misuse" situations in which the criminality or unlawful use occurred abroad. The presumption provides that "absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."<sup>17</sup> The preoccupation of the PLCAA is to protect firearm manufacturers so they can continue to supply "citizens" with continued access to a steady supply of firearms for lawful purposes that could be defeated by liability actions."<sup>18</sup> Thus, it is not obvious that lawsuits brought by parties injured abroad fall within the ambit of the law.<sup>19</sup> Additionally, as the court itself noted, there was scant evidence from the text of the statute itself that it was intended to apply to conduct abroad. Finally, given that the presumption's underlying rationale is "to protect against unintended clashes" between U.S. laws and "those of other nations which could result in international discord,"<sup>20</sup> the fact that Mexico appeared in its sovereign capacity, and the absence of any protest from the United States to the litigation, should have cautioned against extending the PLCAA to this case.

Because the court acknowledged that the text was inconclusive, the presumption against extraterritoriality was not overcome under the first prong of the *RJR Nabisco v. European Community* test, which asks whether it was clearly Congress's intention to have the statute apply extraterritorially.<sup>21</sup> The presumption was overcome, however, under step two of the analysis, which asks if the conduct that is the focus of the statute's concern occurred in the United States, because Mexico was "seeking to hold defendants liable for practices that *occurred* within the United States and only *resulted* in harm in Mexico."<sup>22</sup>

Finally, the court's decision that the PLCAA amounted to a "jurisdiction stripping" statute did not engage with cases finding that the PLCAA is a substantive defense that does not defeat federal jurisdiction.<sup>23</sup> A finding that the PLCAA provided a substantive defense would have allowed the court to engage in a choice-of-law analysis from the outset, which could have resulted in a favorable decision for Mexico on claims governed by Mexican law (following Massachusetts choice-of-law rules).<sup>24</sup> As highlighted by the amicus brief filed by transnational litigation scholars supporting Mexico's position, applying Mexican law to this case would not be contrary to accepted principles of public international law or conflict of laws, and would be consistent with the practice of other states.<sup>25</sup> Moreover, as they note, in adopting the PLCAA "Congress's overriding concern was with protecting the Second Amendment rights of U.S. citizens in the United States, not the access of Mexican citizens to guns in Mexico."<sup>26</sup>

## What About Exceptions to the PLCAA?

The PLCAA has six exceptions permitting civil actions against gun manufacturers and distributors, three of which were potentially applicable: the “predicate exception,” the “negligence *per se*” exception, and the “design-defect” exception. The court rejected the negligence *per se* and the design-defect exceptions, finding them inapplicable given Mexico’s claims. It left open the possibility that the predicate exception applied, however. This exception requires plaintiffs to prove that a manufacturer or seller knowingly violated a federal or state statute “applicable to the sale or marketing” of a firearm or ammunition *and* the violation was a “a proximate cause of the harm for which relief is sought.”<sup>27</sup> Although U.S. courts disagree on its interpretation, the predicate exception has offered the most viable pathway of redress to victims of gun violence. The predicate exception only applies to statutory causes of action, not common law torts. Thus, it was only available for Count 7 of the complaint (against Colt) alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA) and Count 8 alleging a violation of the Massachusetts Consumer Protection Act (against Smith & Wesson).

Following the reasoning in *City of New York v. Beretta*,<sup>28</sup> the court found that the predicate exception was “not available to permit lawsuits based on violations of generally applicable state statutes that do not specifically address firearms.”<sup>29</sup> However, such statutes could fall within the predicate exception if they had been applied in the past to the sale or marketing of firearms, or “clearly can be said to implicate the purchase and sale of firearms.”<sup>30</sup> Although the court refrained from determining whether CUTPA fell within the exception, the court’s working assumption that it did may offer plaintiffs an opening on appeal.

Having found the predicate exception potentially applicable to the two state claims, however, the court found that Mexico lacked standing to present its CUTPA claim (applying Connecticut law). Instead, it found the causal link between the defendant’s conduct and the plaintiff’s harm was “too remote” and proximate cause was missing between the purportedly unfair trade practices of Colt and Mexico’s injuries because the plaintiff’s harms were “too derivative of the injuries of others.”<sup>31</sup> This is in contrast to the court’s finding that Mexico *did* have standing on the other counts because the harm Mexico suffered was “fairly traceable” to the defendants’ actions (applying federal law). Interestingly, the court drew a contrast between claims brought by the direct victims of gun violence and those asserted by Mexico on behalf of the victims of gun violence, perhaps suggesting that if individual victims had brought the lawsuit, or been added to the lawsuit, it might have withstood dismissal.

Finally, the court found that the requirements of the Massachusetts consumer-protection statute had not been met because the defendants' actions were neither "unfair" nor "deceptive." Given that the firearms at issue did "exactly what they are advertised to do," and the defendants' advertising was not "immoral, unethical, oppressive or unscrupulous," the complaint failed to allege that the marketing practices of Smith & Wesson were unfair.

## **Conclusion**

Mexico's lawsuit has attracted wide interest among international law scholars because of its creative mix of state, federal, foreign, and international law. It has also resonated with many—including Chief Judge Saylor—frustrated with the terrible scourge of gun violence in the United States and abroad and the apparent impossibility of taking effective U.S. legislative action to overcome it. As Mexico considers the framing of its appeal, it might consider adding individual plaintiffs with clearer connections to the misuse of U.S. weapons in Mexico to benefit from statutes like CUTPA, which the court appeared to recognize as potentially applicable. It also might redouble its efforts to argue that the PLCAA is a substantive rather than a procedural immunity, meaning that if state choice-of-law rules are applied, the PLCAA might not apply at all. Finally, Mexico could take another run at arguing for the inapplicability of the PLCAA to harm in Mexico relying upon the presumption against extraterritoriality. Of course, even if the court had decided to apply Mexican law and *not* to apply PLCAA, the doctrine of comity or *forum non conveniens* could have resulted in the suit's dismissal. Perhaps this is why Mexico recently filed another lawsuit, this time against brick-and-mortar stores in Arizona,<sup>32</sup> and has also taken its case to the Inter-American Commission on Human Rights.<sup>33</sup>

Meanwhile, the terrible toll of gun violence continues, at home and abroad, violating the human rights of men, women, and children, unable to live their lives in peace, attend schools safely,<sup>34</sup> visit a store or nightclub, attend a concert,<sup>35</sup> or cast a ballot<sup>36</sup> without worrying a gunman will end their lives. If the Constitution is "not a suicide pact,"<sup>37</sup> neither was the Second Amendment meant to be a death sentence. It is perhaps not impossible to hope that some combination of state, federal, foreign, and international law will permit some regulation of the gun violence epidemic at home and abroad.

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<sup>1</sup> Estados Unidos Mexicanos vs. Smith & Wesson, et. al., U.S. D.Mass., filed August 4, 2021, <https://www.courthousenews.com/wp-content/uploads/2021/08/mexico-smith-wesson-complaint.pdf> [hereinafter Complaint].

<sup>2</sup> William Slomanson, *Mexico v. Smith & Wesson: Cross-Border Implications*, 26 ASIL INSIGHTS (Mar. 24, 2022), [ASIL Insights 2021 V26 I1 0.pdf](https://www.asilinsights.org/2022/03/24/mexico-v-smith-wesson-cross-border-implications/).

<sup>3</sup> Complaint, *supra* note 1, ¶ 2.

<sup>4</sup> *Id.* ¶ 15.

<sup>5</sup> The PLCAA has been critiqued elsewhere. See Kaya van der Horst and León Castellanos-Jankiewicz, *Ensuring Access to Courts for Gun Victims: The Case for Repealing PLCAA*, JUST SECURITY (Sept. 8, 2022), <https://www.justsecurity.org/82922/ensuring-access-to-courts-for-gun-victims-the-case-for-repealing-plcaa/>.

<sup>6</sup> Complaint, *supra* note 1, ¶ 20.

<sup>7</sup> William S. Dodge and Ingrid (Wuerth) Brunk, *Mexico v. Smith & Wesson: Does U.S. Immunity for Gun Manufacturers Apply Extraterritorially?* JUST SECURITY (Aug. 19, 2021), <https://www.justsecurity.org/77815/mexico-v-smith-wesson-does-us-immunity-for-gun-manufacturers-apply-extraterritorially/>.

<sup>8</sup> Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al., Civil Action No. 21-11269-FDS, Memorandum and Order on Defendants' Motions to Dismiss (Sept. 30, 2022), <https://tliblog.org/wp-content/uploads/2022/09/Mexico.OpinionMTD.pdf> [hereinafter Memorandum and Order].

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 13-14. The court did not reach the motion to dismiss for lack of personal jurisdiction.

<sup>12</sup> Mexican Foreign Ministry, *Juez federal decide sobre demanda presentada por el Gobierno de México contra la negligencia de empresas de armas*, Official Press Release No. 361 (Sept. 30, 2022), <https://www.gob.mx/sre/prensa/juez-federal-decide-sobre-demanda-presentada-por-el-gobierno-de-mexico-contra-la-negligencia-de-empresas-de-armas?state=published> (in Spanish).

<sup>13</sup> Memorandum and Order, *supra* note 8, at 13-14.

<sup>14</sup> Dodge & Brunk, *supra* note 7.

<sup>15</sup> Memorandum and Order, *supra* note 8, at 19.

<sup>16</sup> *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013). See also *RJR Nabisco, Inc. v. European Community*, 570 U.S. 325 (2016).

<sup>17</sup> *RJR Nabisco*, *supra* note 16.

<sup>18</sup> PLCAA findings ¶ (7)

<sup>19</sup> The PLCAA was proposed and adopted after a wave of lawsuits were filed against gun manufacturers by municipalities and gun-control advocates, following intense lobbying from the NRA. Tom Hamburger, Peter Wallsten and Sari Horwitz, *NRA Backed federal limits on gun lawsuits frustrate victims, their attorneys*, WASH. POST (Jan. 31, 2013), <https://www.washingtonpost.com/politics/nra-backed-federal-limits-on-gun-lawsuits-frustrate-victims-their-attorneys/>.

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[limits-on-gun-lawsuits-frustrate-victims-their-attorneys/2013/01/31/a4f101da-69b3-11e2-95b3-272d604a10a3\\_story.html?itid=ik\\_inline\\_manual\\_13](https://www.justsecurity.org/wp-content/uploads/2013/01/31/a4f101da-69b3-11e2-95b3-272d604a10a3_story.html?itid=ik_inline_manual_13).

<sup>20</sup> EEOC v. Arabian American Oil Co., 499 U.S. 244, 248.

<sup>21</sup> RJR Nabisco, *supra* note 16.

<sup>22</sup> Memorandum and Order, *supra* note 8, at 24-25 (citing *Kiobel v. Royal Dutch Petroleum*).

<sup>23</sup> See *Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009); *City of New York v. Mickalis Pawn Shop*, 645 F.3d 114 (2d. Cir. 2011).

<sup>24</sup> See *Brief of Professors of Transnational Litigation as Amici Curiae*, <https://www.justsecurity.org/wp-content/uploads/2022/02/109-Transnational-Law-Profes.pdf>.

<sup>25</sup> *Id.* at 1-2.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> 15 U.S.C. § 7903(5)A(iii).

<sup>28</sup> *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

<sup>29</sup> Memorandum and Order, *supra* note 8, at 28.

<sup>30</sup> *Id.* at 29.

<sup>31</sup> Memorandum and Order, *supra* note 8, at 37.

<sup>32</sup> *Estados Unidos Mexicanos vs. Diamondback Shooting Sports, Inc*, et al., U.S. D.Ariz., filed October 10, 2022. See Y. Peter Kang, *Mexico Sues Arizona Gun Stores over Unlawful Sales*, LAW360 (Oct. 12, 2022), <https://www.law360.com/articles/1538897/mexico-sues-ariz-gun-stores-over-unlawful-sales>. By relying upon a new statute on straw sales, the lawsuit avoids the application of PLCAA. 18 U.S.C. § 932b eff. Jun. 25, 2022.

<sup>33</sup> On October 25, 2022, the Inter-American Commission on Human Rights held a thematic hearing on respect for human rights in the activities of arms companies, <https://www.gob.mx/sre/prensa/iachr-holds-thematic-hearing-on-respect-for-human-rights-in-the-activities-of-arms-companies?idiom=en>. On November 11, 2022, Mexico also requested an Advisory Opinion from the Inter-American Court of Human Rights on the obligations of states and corporations to ensure the right to life and access to justice for gun violence.

<sup>34</sup> Leila Nadya Sadat, *Torture in Our Schools?*, 135 HARV. L. REV. 512 (2022).

<sup>35</sup> Leila Nadya Sadat & Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U. J. L. & POLICY 1 (2019).

<sup>36</sup> Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation After Heller*, 116 NORTHWESTERN U. L. REV 139 (2021).

<sup>37</sup> See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 372 (1963), “while the Constitution protects against invasions of individual rights, it is not a suicide pact”. . .).