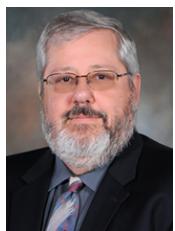


# Decision on Mexico's Gun Suit



By Paul Engel

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- Does Mexico have standing to sue American gun manufacturers?
- Does the Protection of the Lawful Commerce in Arms Act protect the manufacturers?
- Who's responsible for the gun crimes of criminal drug cartels?

Back in June [I wrote about the oral arguments in Mexico's lawsuit](#) against American gun manufacturers and distributors. While the court overall came to the expected decision, I think it's still worth some time digging into the logic and reasoning of the justices.

## **Protection of the Lawful Commerce in Arms Act**

In an attempt to prevent the nuisance lawsuits filed by several United States cities, Congress passed the PLCAA, the Protection of the Lawful Commerce in Arms Act.

The Protection of Lawful Commerce in Arms Act (PLCAA) bars certain lawsuits against manufacturers and sellers of firearms. As relevant, it provides that a "qualified civil liability action . . . may not be brought in any Federal or State court," 15 U. S. C. §7902(a), and defines that term to include a "civil action or proceeding" against a firearms manufacturer or seller stemming from "the criminal or unlawful misuse" of a firearm by "a third party," §7903(5)(A).

[SMITH & WESSON BRANDS, INC., ET AL. v. ESTADOS UNIDOS](#)

## MEXICANOS

While sometimes referred to as blanket immunity for gun manufacturers, there actually are situations where suit can be filed.

But PLCAA's general bar on these suits has an exception, usually called the predicate exception, relevant here. That exception applies to lawsuits in which the defendant manufacturer or seller "knowingly violated a State or Federal statute applicable to the sale or marketing" of firearms, and the "violation was a proximate cause of the harm for which relief is sought." §7903(5)(A)(iii).

## SMITH & WESSON BRANDS, INC., ET AL. v. ESTADOS UNIDOS MEXICANOS

That line "knowingly violated a State or Federal statute applicable to the sale or marketing" of firearms is important. Not only does the manufacture have to violate a law, they have to know they're doing it. Furthermore, the violation must be related to the cause of the lawsuit. In fact, the PLCAA was passed specifically to stop the type of lawsuit Mexico brought to the federal courts.

Here, the Government of Mexico sued seven American gun manufacturers, alleging that the companies aided and abetted unlawful gun sales that routed firearms to Mexican drug cartels.

## SMITH & WESSON BRANDS, INC., ET AL. v. ESTADOS UNIDOS MEXICANOS

The government of Mexico claims that these gun manufacturers aided and abetted gun sales that were being sent to Mexican drug cartels. As Noel J. Francisco argued before the court:

Again, no case in history supports that theory. Indeed, if Mexico is right, then every law enforcement organization in

America has missed the largest criminal conspiracy in history operating right under their nose, and Budweiser is liable for every accident caused by underage drinkers since it knows that teenagers will buy beer, drive drunk, and crash.

Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments

So what was the basis of Mexico's allegation that these companies knowingly violated state or federal law?

The basic theory of its suit is that the defendants failed to exercise "reasonable care" to prevent trafficking of their guns into Mexico, and so are responsible for the harms arising there from the weapons' misuse. ... It alleges that the manufacturers were "willful accessories" in unlawful gun sales by retail gun dealers, which in turn enabled Mexican criminals to acquire guns. And it sets out three kinds of allegations relating to how the manufacturers aided and abetted retailers' unlawful sales: The manufacturers allegedly (1) supply firearms to retail dealers whom they know illegally sell to Mexican gun traffickers; (2) have failed to impose the kind of controls on their distribution networks that would prevent illegal sales to Mexican traffickers; and (3) make "design and marketing decisions" intended to stimulate cartel members' demand for their products.

SMITH & WESSON BRANDS, INC., ET AL. v. ESTADOS UNIDOS MEXICANOS

Remember, in order for the exception clause of the PLCAA to be effective, the alleged activity must directly lead to the harm alleged. During oral arguments, Justice Thomas asked Mr. Francisco, attorney for the gun manufacturers, to list the chain of events Mexico was describing.

JUSTICE THOMAS: Would you just list the chain for our benefit?

1. FRANCISCO: Sure. It starts out with a licensed

manufacturer, a manufacturer that the federal government says is allowed to make firearms. It then distributes its legal firearms to licensed distributors, distributors who the federal government says are allowed to distribute them.

They then sell to licensed retailers, retailers that the federal government says are allowed to retail. Those retailers, some very small percentage of them, an unknown number but some small percentage of them, transfer those firearms illegally to straw purchasers.

The straw purchaser then hands it over to the actual purchaser. You then have a smuggle across an international border, yet another violation of law. The smuggler then presumably gives it to the cartels who are illegally possessing the firearm in Mexico under Mexican law as my friends have described it.

Then the Mexican cartels engage in murder and mayhem against the good people of Mexico, all of which in turn causes the Mexican government to have to spend money to respond to that murder and mayhem.

With respect, there's not a single case in history that comes close to that. They don't even cite cases that find a manufacturer, I think, ever liable for the unlawful criminal misuse of its products, other than the cases that PLCAA was meant to prohibit and perhaps other than the Avis case, the Florida Supreme Court case.

But they certainly don't cite anything that comes close to that chain of causation, which is more extreme than the cases that PLCAA was meant to prohibit.

#### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

As you can see, the criminality does not come from the actions

of the gun manufacturers or distributors, but further, most of it much further, down the chain. This explains the court's opinion.

Held: Because Mexico's complaint does not plausibly allege that the defendant gun manufacturers aided and abetted gun dealers' unlawful sales of firearms to Mexican traffickers, PLCAA bars the lawsuit.

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#### **Court Opinion**

Let's take a moment and look at the reasoning the court used.

Federal aiding and abetting law reflects the view that a person may be responsible for a crime he has not personally carried out if he deliberately helps another complete its commission. To aid and abet a crime, a person must take an affirmative act in furtherance of the offense and intend to facilitate its commission

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As was pointed out during oral arguments, gun manufacturers sell their products to federally licensed gun distributors, who then sell them to federally licensed gun dealers, who then sell them to retail customers. Yes, some small percentage of those retail customers are committing a crime for purchasing those guns for others (straw purchases). And yes, some of those straw purchases are smuggled across the border for drug cartels who may use them to commit murder and mayhem, but that is several steps away from the manufacturers.

Against the backdrop of that law, Mexico's complaint does not plausibly allege that the defendant manufacturers aided and abetted gun dealers' unlawful sales of firearms to Mexican

traffickers. ...

Mexico's lead claim—that the manufacturers elect to sell guns to, among others, known rogue dealers—fails to clear that bar.

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However, that wasn't Mexico's only allegation.

For related reasons, Mexico's second set of allegations—that the manufacturers have declined to suitably regulate the dealers' practices—cannot fill the gap. Of course, responsible manufacturers might well impose constraints on their distribution chains to reduce the possibility of unlawful conduct. But a failure to do so is what Twitter called “passive nonfeasance.” 598 U. S., at 500. Such “omissions” and “inactions”—especially in an already highly regulated industry—are rarely the stuff of aiding-and-abetting liability, and nothing in Mexico's allegations makes them so.

#### SMITH & WESSON BRANDS, INC., ET AL. v. ESTADOS UNIDOS MEXICANOS

In other words, there is no legal requirement to further regulate the already highly regulated firearms industry, even if Mexico thinks there is.

The last allegation from Mexico is one I've heard many times from various cities, states, and anti-gun groups.

Finally, Mexico's allegations about design and marketing decisions add nothing of consequence. Mexico focuses on production of “military style” assault weapons, but these products are widely legal and purchased by ordinary consumers. Manufacturers cannot be charged with assisting criminal acts simply because Mexican cartel members also prefer these guns. The same applies to firearms with Spanish-language names or graphics alluding to Mexican history—while they may be

“coveted by the cartels,” they also may appeal to “millions of law-abiding Hispanic Americans.” Even the failure to make guns with non-defaceable serial numbers cannot show that manufacturers have “joined both mind and hand” with lawbreakers in the manner required for aiding and abetting.

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It is not a crime to make weapons simply because they look like, yet do not operate like, “military style assault weapons”. Neither is it a crime to use Spanish names or imagery on weapons. Imagine telling Taco Bell that they could not use a sombrero on their logo or name their production tacos and burritos because Mexican drug cartels are drawn to them. And the idea of “non-defaceable serial numbers” is ludicrous, since all it takes to remove such a number is something harder than the material it’s etched it. I guess government ignorance of reality is not limited to the United States.

#### **Thomas Concurrence**

While Justice Thomas did agree with the opinion of the court, he wanted more.

The Court today correctly decides that Mexico has not plausibly pleaded that its suit falls under the predicate exception to the Protection of Lawful Commerce in Arms Act (PLCAA). ... I write separately to note that the Court’s opinion does not resolve what a plaintiff must show to establish that the defendant committed a “violation.” §7903(5)(A)(iii). It concludes only that Mexico has not adequately pleaded its theory of the case—that, as a factual matter, the defendant gun manufacturers committed criminal aiding and abetting.

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Justice Thomas wants the court to state what would constitute a violation of §7903(5)(A)(iii). There's just one problem with that. It is the role of the legislature to modify the law, not the courts. Remember, the legislative branch writes the law, the judicial decides cases and controversies based on the law. This is another example of judicial activism, this time by one of the most "conservative" justices. And while Justice Thomas may be wrong about the who, I think he has a point regarding the what.

It seems to me that the PLCAA at least arguably requires not only a plausible allegation that a defendant has committed a predicate violation, but also an earlier finding of guilt or liability in an adjudication regarding the "violation." Allowing plaintiffs to proffer mere allegations of a predicate violation would force many defendants in PLCAA litigation to litigate their criminal guilt in a civil proceeding, without the full panoply of protections that we otherwise afford to criminal defendants. ... Particularly given the PLCAA's aim of protecting gun manufacturers from litigation, see §7901, this issue warrants careful consideration.

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I agree with Justice Thomas on this point. Could Sig Sauer or Glock be found liable for a crime they have not even been charged with, much less been found guilty of? What about their right to confront the witnesses against them and compel witnesses in their favor?

#### **Jackson Concurrence**

Justice Thomas wasn't the only one who wanted the court to do more. Justice Jackson wrote her own concurrence.

The Court holds that Mexico's complaint fails to plausibly allege that gun manufacturers aided or abetted violations of firearms laws, as necessary to trigger the predicate exception

to the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U. S. C. §7903(5)(A)(iii). I agree. I write separately to explain that, in my view, the complaint's core flaw is its failure to allege any nonconclusory statutory violations in the first place.

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Interesting. Justice Jackson makes a point. Not only did Mexico not argue a plausible instance of aiding or abetting, they didn't even show an actual legal violation in the first place.

Tellingly, that failure exposes Mexico's lawsuit as precisely what Congress passed PLCAA to prevent. PLCAA was Congress's response to a flood of civil lawsuits that sought to hold the firearms industry responsible for downstream lawbreaking by third parties. ... Activists had deployed litigation in an effort to compel firearms manufacturers and associated entities to adopt safety measures and practices that exceeded what state or federal statutes required. Congress expressed concern that these lawsuits "attempt[ed] to use the judicial branch to circumvent the Legislative branch." §7901(a)(8). PLCAA embodies Congress's express rejection of such efforts—stymying those who, as Congress put it, sought "to accomplish through litigation that which they have been unable to achieve by legislation." .. Put differently, PLCAA reflects Congress's view that the democratic process, not litigation, should set the terms of gun control.

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While I frequently disagree with Justice Jackson, she has a very valid point here. This case is exactly what the PLCAA was designed to prevent, including protecting manufacturers from retaliatory legislation for their participation in legal

commerce.

It is for these reasons that I view Mexico's allegations as insufficient to satisfy PLCAA's predicate exception, regardless of whether the business practices described might suffice to establish aiding-and-abetting or other forms of vicarious liability in distinct statutory or common-law contexts. ... Devoid of nonconclusory allegations about particular statutory violations, Mexico's lawsuit seeks to turn the courts into common-law regulators. But Congress passed PLCAA to preserve the primacy of the political branches—both state and federal—in deciding which duties to impose on the firearms industry. Construing PLCAA's predicate exception to authorize lawsuits like the one Mexico filed here would distort that basic design.

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You mean when Congress passed legislation to stop the courts from acting as regulators of the firearm industry, they actually meant to prevent the courts from acting as regulators? It is with all the sarcasm I can muster that I say, "Inconceivable!"

### **Conclusion**

Based on the review of the oral arguments, I'm not surprised that the court came to this decision. I'm even pleased that two justices, with such divergent judicial philosophies, both agreed that for a lawsuit to survive under the PLCAA, there needs to be more than allegations of criminality, but some due process showing actual criminality. And for all of those who talk about Justice Thomas being conservative while Justice Jackson being liberal, notice which of the two wanted to use the courts to act as regulators of the PLCAA?

While Mexico has been sent packing on this case, I would keep your eyes open for future attempts to criminalize the

manufacture of a legal product based on the criminal actions of others.

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