

Helms-Burton Act Poses New Risks and Challenges for Entities Allegedly Tied to Cuba

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Earlier this year, the Trump administration activated a previously dormant statutory provision in the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996. The statute, also known as the Helms-Burton Act (Act), includes a private cause of action allowing U.S. nationals to sue a range of persons and entities engaged in “trafficking” in property expropriated by the Cuban government. That cause of action, found in Title III of the Act, was extremely controversial at the time of enactment in 1996 and had been suspended by all previous administrations since its passage. In April 2019, however, Secretary of State Mike Pompeo announced that the Title III provisions, including the private right of action, would become fully operative on May 2, 2019.

The activation of Title III creates new risks of liability for companies, individuals and governments with business ties to Cuba. Some of those risks already have become apparent in filings made in various courts in the United States, and additional demands and lawsuits under the Act are likely in the coming months and years.

What Title III Does

The Act was drafted with the express purpose of isolating the Cuban government economically by pressuring third-party actors to refrain from or cease doing business with the governing regime. Among the tools intended to achieve this goal is the private right of action created by Title III.

Specifically, Title III states that, with certain exceptions, “any person that, after the end of the 3-month period beginning the effective date of [Title III], traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages” The private cause of action remains available to the plaintiff for two years after the alleged trafficking ceases.

The statute is notable for the breadth of its definitions (particularly of “person” and “trafficking”), extent of damages that can be sought and other enabling features.

A “person” subject to potential Helms-Burton liability includes “any person or entity, including any agency or instrumentality of a foreign state.”

“Trafficking” is defined as follows:

[A] person “traffics” in confiscated property if that person knowingly and intentionally —

- i. sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
- ii. engages in a commercial activity using or otherwise benefiting from confiscated property, or
- iii. causes, directs, participates in, or profits from, trafficking ... by another person, or otherwise engages in trafficking ... through another person,

without the authorization of any United States national who holds a claim to the property.

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Exceptions are provided for a number of activities, such as telecommunications with Cuba, lawful travel to Cuba or transactions between private Cuban citizens.

The prescribed damages in a Helms-Burton Act lawsuit could potentially extend to the entire value of the asset being trafficked, because damages are stated to be the greater of (i) fair market value of the “property” at the time of taking plus interest; (ii) its current market value; or (iii) the “amount determined” as the value of the claim, as certified by the U.S. Foreign Claims Settlement Commission (FCSC) for cases in which it has made a determination of value. A quasi-judicial, independent agency within the Department of Justice, the FCSC assesses claims by U.S. nationals against foreign governments, though it is not a court or U.S. trial body.

The FCSC confers some special advantages (or disadvantages) to claimants. Title III excludes claims by plaintiffs who had the opportunity to lodge their claims with the FCSC when it previously inquired into Cuban expropriation but failed to do so. Title III also presumes an FCSC determination of a claim’s value to be accurate and allows for trebling of damages when the commission has issued a certificate of such value.

Even in the absence of such a determination, damages may be trebled in cases where a defendant has been on specific notice that it is trafficking in confiscated property and failed to cease doing so within 30 days.

Developments Since Activation of Title III

In the first month following activation of Title III, a number of claims were filed under Helms-Burton. These notably included *Garcia-Bengochea v. Carnival Corp. (Carnival)*, a claim by private plaintiffs against Carnival Cruise Lines alleging that it had trafficked in port facilities in Havana and Santiago (allegedly formerly owned by the plaintiffs’ families), and *Marisela Mata et al. v. Grupo Hotelero Gran Caribe et al. (Mata)*, a putative class action against Cuban state enterprise Cimex and other state entities that allegedly operate the Hotel San Carlos in Cinfuegos. Both of these claims were filed in the U.S. District Court for the Southern District of Florida.

Although the private right of action is barely a month old, these cases give some indication of how future litigation might unfold.

Timing of Claims. In both cases, plaintiffs are taking the position that Title III became effective on November 1, 1996, meaning that the three-month “grace period” in Title III has long passed. The defendants have yet to fully respond, but might argue that the grace period began on May 2, 2019. The correctness of these interpretations (and their constitutional implications, if any) remain to be determined.

Treble Damages. In *Mata*, although the plaintiffs thus far have sued only Cuban state enterprises that allegedly own the hotel, they also have indicated that they view the international hotel company that manages it as an “accomplice” subject to liability under the Act. Specifically, they have claimed that, “contemporaneously” with the lawsuit against Cimex, they have, “in accordance with 22 U.S.C. § 6082(a)(3),” put a Spanish hotel company on notice that they intend to add it to the lawsuit if they are not promptly compensated for the alleged unlawful trafficking.

The mention of 22 U.S.C. § 6082(a)(3) in the *Mata* action is a reference to the treble damages provisions of Title III, giving plaintiffs the right to seek treble damages against an entity that “is to be joined as a defendant in the action” if it has been given 30 days’ notice that it is trafficking in the property. If this pattern is repeated in future Helms-Burton cases, defendants are likely to receive a 30-day notice prior to being sued.

Treatment of FCSC Certificate Holders. Plaintiffs are taking advantage of the special status of claims that have been certified by the FCSC. In *Carnival*, the plaintiff has claimed 82.5 percent ownership of waterfront property in Santiago known as “La Maritima and Terminal Naviera” that was confiscated in the early years of the Castro government. Part of that claim (a 32.5 percent portion) has allegedly been certified as expropriated property of a U.S. national by the FCSC, which (as noted above) creates certain presumptions of liability and value, and also potentially allows treble damages. The remaining portion of the claim is “uncertified,” which would require the court to evaluate the claim.

Nationality of Claimants. In *Mata*, the plaintiffs (all of whom claim to be heirs of the Cuban citizens who owned the hotel prior to its confiscation in 1962) admit that they were not U.S. nationals at the time of its seizure. This indicates that (at least on these plaintiffs’ construction of the Act) an entitlement to compensation/damages is *not* limited to persons who were U.S. nationals at the time the property was seized. It remains to be seen how the courts will address this issue.

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The Trafficking Exceptions. While plaintiffs are casting a broad net in their definitions of trafficking, defendants are seeking to rely upon the express statutory exceptions. In *Carnival*, the defendants filed a motion to dismiss on the grounds that the use of port facilities falls within the specific exception for “transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel.” A prompt decision on this motion to dismiss may give valuable guidance to those engaged in providing tourism services.

Conclusion

After only one month, the private right of action in Title III of the Helms-Burton Act already is creating serious issues for entities with business links to Cuba. As the two large claims filed in Miami federal court show, plaintiffs believing themselves entitled to relief under Title III will seek to exploit what they consider generous damages provisions, including treble damages. Although an early motion to dismiss in *Carnival* has the potential to resolve that claim, it seems likely that similar claims against other defendants will soon materialize. It may take time before the full dimensions of the risks posed by Helms-Burton will be fully apparent, but those with business interests in Cuba would be well-advised to monitor these developments closely.