

Latinvex

June 17, 2020



The Carnival Paradise passes the El Morro Castle in Havana, Cuba.
(Photo: Sven Creutzmann/Carnival Cruise Lines)

Cuba: Helms-Burton Statute's Limits

US courts grapple with "trafficking" claims against corporate defendants.

BY RYAN D. JUNCK STEVE KWOK AND TIMOTHY G. NELSON

In May 2019, the United States government made available a private right of action under Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (also known as "Helms-Burton"), 22 U.S.C. §§ 6021-6091. The private cause of action, which had lain dormant for over 22 years (it had been suspended by executive order), purportedly provides U.S. nationals whose "property" was "confiscated" by the Cuban

government with a special rights of action. Specifically, Title III of Helms-Burton allows U.S. nationals that “own” a “claim” over such property to sue persons and entities engaged in “trafficking” in that property. Trafficking is defined as “knowingly and intentionally” taking various actions with respect to confiscated property, including “engag[ing] in a commercial activity using or otherwise benefiting from confiscated property.” A qualifying plaintiff may recover from the defendant the value of the confiscated property, potentially with treble damages, as well as attorney’s fees.

Title III’s activation created immediate risks for companies doing business with or involving Cuba. Since May 2019, plaintiffs have brought Helms-Burton lawsuits against U.S. and non-U.S companies in a variety of sectors, including banking and finance, tourism, oil and gas, and property development, all on the theory that the defendants, by doing business in Cuba, have trafficked in property confiscated from those plaintiffs. Many, but not all, of these lawsuits were brought in the United States District Court in the Southern District of Florida (“S.D. Fla.”), where a number of alleged victims of Castro-era seizures reside.

These lawsuits already have given rise to case law that, at least preliminarily, identify some of the rules about which plaintiffs qualify under the statute, and which lie outside its scope. Some other decisions, however, have engendered uncertainty about Helms-Burton’s operation that may need to be resolved by the federal appellate courts.

Plaintiff Must Demonstrate Claim Was Acquired

Prior to March 12, 1996

Helms-Burton contains a statutory “cut-off” that is keyed to the date of its enactment (March 12, 1996). Specifically, it states that an action is only available if the plaintiff “acquire[d]ownership of the claim” to that property before March 12, 1996. This cut-off has become the focus of judicial attention in several cases.

In *Gonzalez v. Amazon.com*, filed in the S.D. Fla. in 2020, a plaintiff accused an online retailer and an associated merchant of “trafficking” in confiscated property now owned by the Cuban government — specifically, charcoal that had been produced on land once owned by the plaintiff’s family. The defendants moved to dismiss, claiming that the plaintiff had not plausibly shown that he knew he was using or benefiting from his family’s former property.

On March 10, 2020, Judge Robert Scola of the S.D. Fla dismissed plaintiff’s claim on several grounds, including that he had failed to satisfy the Act’s requirements concerning claims ownership because the complaint “lack[ed] allegations regarding when Gonzalez inherited the claim from his grandfather, when Gonzalez became a United States citizen, if Gonzalez’s grandfather was a United States citizen, and, if so, when Gonzalez’s grandfather became a citizen.” Plaintiff was given leave to replead and, on March 25, 2020, filed an amended complaint that purported to explain the chain of ownership.

In his amended complaint, Mr. Gonzalez stated that his father had "inherited" the land (or the claim to it) from his grandfather in 1988, and then his mother inherited the property from his father in November 2016. She allegedly then "chose to pass her ownership claim" to him.

On May 11, 2020, Judge Scola issued a further opinion, dismissing plaintiff's claim with prejudice on the grounds that it violated the 1996 cut-off. On the "plain language" of the statute, His Honor held, the "U.S. national" bringing the claim must have "acquired" its interest prior to March 12, 1996. "Congress," he held, "did not intend for those who acquired an interest in confiscated property after 1996 to bring Helms-Burton Act claims if their property was confiscated before March 12, 1996." This was "consistent with its intent, which is to prevent individuals from transferring their ownership interest in confiscated property to a United States citizen after the Act's enactment in 1996." Accordingly, Mr. Gonzalez lacked standing to advance a Title III claim.

This holding, if upheld on appeal, indicates a potentially significant limitation on the scope of Helms Burton. Indeed, the fact that some original owners of alleged "claims" have now died is partly a consequence of the 22-year lag between Title III's passage and the activation of the private right of action, as well as the fact that Fidel Castro's revolutionary government first assumed power in 1959.

The question of acquisition through heirship has arisen in other cases. In *Garcia-Bengochea v. Carnival Corp.*, there is a pending motion to dismiss on the ground that the plaintiffs inherited their claims after March 12, 1996. In February 2020, a proposed amicus brief opposing such dismissal was submitted by former Rep. Dan Burton, R-Ind., and former Sen. Robert Torricelli, D-N.J., two of the chief sponsors of Helms-Burton. In their proposed brief, they argued for an expansive approach to claims ownership, arguing that "Congress intended that heirs should enjoy the right to sue under Title III even if they inherited their claims after March 12, 1996." In response, defendants in that case have argued that "there is no particular reason to accept the brief as neither Congressman Burton nor Torricelli are entitled to special consideration in interpreting the Helms-Burton Act," and that "[r]ecent statements by Senators or Congressmen about the meaning or intent of past legislation are irrelevant and may not be considered by a court interpreting the legislation."

In May 2020, Judge Leonard King of the S.D. Fla ruled that the former legislators' amicus submission, while "appreciated," was "unnecessary" in that case, and therefore declined to receive it into the record. Undeterred, Messrs. Burton and Torricelli applied for and received permission to attend a virtual "Zoom" hearing on defendants' motion to dismiss, as "observers." Their continuing engagement in the case is a reminder of the political attention that Helms-Burton cases have received.

Plaintiff Must Plausibly Allege That Defendant Knowingly Trafficked in Expropriated Assets

A further requirement in Helms-Burton is that, to establish that a defendant is liable for "trafficking" in confiscated property, a plaintiff must show that the defendant's conduct

was “knowing[] and intentional[].” This issue received attention in Gonzalez. In his March 2020 decision, in addition to enforcing the cut-off date, Judge Scola held that plaintiff had failed to plead that the defendants in that case (the online merchant and the retailer) had actually known that the sale of the goods in question (the charcoal) involved the land allegedly seized from by Mr. Gonzalez's family.

Reviewing the legislative history of Helms-Burton, the court highlighted a lawmaker's statement (during 1996 congressional debates) that “the only companies that will run afoul of this new law are those that are knowingly and intentionally trafficking in the stolen property of U.S. citizens.” Against that background, the court held, a plaintiff could not rely on conclusory or implausible allegations of “knowledge,” as this failed the basic federal pleadings standards established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In seeking to avoid dismissal, Mr. Gonzalez had claimed that it could be inferred that the defendants knew they were trafficking in confiscated Cuban farmland property because the charcoal was advertised as “Direct from Farmers in Cuba.” The court held, however, that the mere fact that the charcoal was produced on Cuban farmland was not sufficient to “demonstrate that the defendants knew the property was confiscated by the Cuban government” or “that it was owned by a United States citizen.”

The holding in *Gonzalez I* indicates that courts will require plaintiffs to show more than mere suspicion that a state-owned asset within Cuba had been confiscated, but that a plaintiff also must show the defendants' knowledge that the asset had been both confiscated and “owned” by an American citizen. This is a potentially significant hurdle for plaintiffs in future Helms-Burton claims.

Uncertainty Over the "Claim" to "Property" that Can be the Subject of a Title III Action

Helms-Burton requires that a plaintiff own the “claim” to the “property” that was expropriated by the Cuban Government. This requirement has resulted in some confusion in the case law.

The question of what constitutes a “claim” to confiscated “property” has arisen in the context of the “Havana Docks” cases – a group of claims in the S.D. Fla. against the major cruise lines whose ships had, until recently, been docking in the ports of Havana and Santiago, Cuba. These lawsuits were brought by Havana Docks Corporation, the alleged former owner of the commercial leasehold property known as the Havana Cruise Port Terminal, a waterfront facility that was expropriated in the early years of the Castro regime. In these claims, plaintiff alleged that the cruise line companies had trafficked in their former property from 2017-18, in that they had allegedly caused their ships to embark and disembark cruise passengers in Cuba, which allegedly satisfied Title III's definition of trafficking.

The cruise line companies moved to dismiss on the grounds that, among other things, the long-term leasehold interests once held by the plaintiffs would have expired in 2004. Initially, these motions found favor: in January 2020, Judge Beth Bloom of the S.D. Fla.

sided with defendants, and held that because a plaintiff must own a claim to confiscated property, such a claim, "can only extend as far as its property interest at the time of the Cuban Government's wrongful confiscation." Thus, "if the interest at issue is a leasehold, following the plain language of the statute, a person would have to traffic in the leasehold in order for that person to be liable to the owner of the claim to the leasehold." On that view, once the original date of the lease expired, so too did any possible Helms-Burton claim for "trafficking" in the subject property.

In April 2020, however, Judge Bloom reversed course, granting plaintiff's motions for reconsideration and holding that plaintiffs had established standing. Judge Bloom considered, first, that her earlier view of the leasehold interest was inaccurate – and that Plaintiff was granted "a 99-year leasehold interest, not a leasehold interest ending on a date certain" and that it was therefore wrong to dismiss the claim on the grounds that the lease had expired in 2004.

Judge Bloom further held that her earlier opinion had misconstrued the statutory criteria for establishing that plaintiff held a "claim" over expropriated "property." Her Honor focused in particular on the holding of the earlier case of *Glen v. Club Mediterranean*. In that case, a judge of the S.D. Fla held that, because an expropriation brings about an extinguishment of the owner's legal title in the property, none of the victims of Castro-era expropriation could still be said to own the "property" in Cuba that had been confiscated. Instead, they own an intangible right – a "claim for compensation" against the government of Cuba. This holding was affirmed on appeal to the Eleventh Circuit.

Judge Bloom thus held that "the reasoning in *Glen I* and *Glen II* stands for the notion that the Cuban Government's confiscation of property extinguished any ownership rights of those who owned the property prior to the expropriation." Applying that test, Judge Bloom looked to whether plaintiff owned the "claim" to compensation against Cuba concerning the confiscated property. *Havana Docks*, she held, did own such a compensation "claim" – and that, it was held, was enough to show it had the requisite "claim" over confiscated "property." Thus, the length of the lease's term was immaterial. Indeed, in the court's view, "[l]imiting the allowable period of recovery to the term of the underlying property interest, in effect, nullifies Title III entirely because the Cuban Government's confiscation extinguished all of Plaintiff's property interests in the Subject Property."

Although this resulted in the restoration of the four *Havana Docks* claims, it has not resolved all of the issues associated with the ownership of a "claim" over confiscated "property"; on the contrary, it may have given rise to new problems. Defendants have sought permission bring an interlocutory appeal to the Eleventh Circuit. In addition, in their renewed motions to dismiss, the cruise lines argue that, on Judge Bloom's interpretation of the statute, the plaintiffs cannot plead that their actions have caused an "injury," as required by Article III of the U.S. Constitution and related jurisprudence. If – as they argue -- plaintiff's links with *Havana* cruise facilities were completely severed in the early 1960s (with plaintiff holding only a claim for compensation against Cuba), then it is impossible for plaintiffs to show that the defendants' actions, in using the docklands

in the late 2010s, have caused plaintiffs any cognizable injury . This, defendants claim, requires dismissal of the claims on constitutional grounds.

The Havana Docks cases thus suggest that the constitutional and interpretative issues surrounding Helms-Burton, particularly the meaning of "claim" and "property," may remain controversial for some time.

* * *

Helms-Burton litigation puts the courts in the difficult position of having to address claims about asset seizures that occurred in a foreign country approximately 60 years ago, where many of the original victims are no longer living. This task is made more difficult by the terse wording of many of Title III's key provisions, as well as the politically sensitive subject-matter.

In Gonzalez, the court examined one particular elements of Helms-Burton (the "rules regarding claims acquisition) and excluded the plaintiff's claims based on the statute's plain text. It also applied the federal courts' usual pleading rules concerning knowledge and intent. By contrast, in Havana Docks, however, the statute did not give as clear an answer to the issue (namely, what "property" or "claims" may be the subject of a claim), and the court's proffered solution – to read the statute broadly – has raised further constitutional questions.

In time, some (or perhaps all) of the issues surrounding Helms-Burton will receive scrutiny at the appellate level – most likely the Eleventh Circuit (which hears appeals from the S.D. Fla.), or perhaps even the United States Supreme Court. Until that point, the district courts will continue to grapple with this unique and challenging statute.

The authors are attorneys at Skadden. Ryan Junck is a London-based partner specializing in Government Enforcement and White Collar Crime. Steve Kwok is a Hong Kong-based partner specializing in litigation, Government Enforcement and White Collar Crime and Cross-Border Investigations. Timothy Nelson is a New York-based partner specializing in International Litigation and Arbitration.

This article is based on an updated client alert from Skadden.

© Copyright Latinvex

**Latinvex, 80 SW 8th Street, Suite 2000, Miami, Florida 33130
www.latinvex.com**