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# Cuba: Helms-Burton Act Trends and Developments

Practice Update

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## Update on Helms-Burton Act Cuba "Trafficking" Cases

Since the last update on Helms-Burton Act cases a year ago:

- a handful of additional cases were commenced, bringing the total number of cases, since the suspension of the 1996 Act's civil remedy provision was lifted in May 2019, to about 40;
- two courts of appeal have issued rulings; both affirmed the dismissal of cases on the ground that the plaintiff did not "acquire" the claim by the statutory cut-off date in 1996;
- that issue, and others, have been or are being briefed in three other appeals from dismissals by district courts;

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- no case has reached trial yet, and no court has entered judgment in favour of a plaintiff;
- four closely related cases, in which a company that asserts a claim to the Havana dock sued four cruise lines, may be tried in early 2022 if motions for summary judgment recently filed by the cruise lines are not successful; and
- in some cases involving Europe-based defendants, courts have continued to grapple with Helms-Burton "blocking statutes", in particular, whether, and if so for how long, a case should be stayed while the European authorities consider whether to allow the defendants to defend the case.

We discuss these developments below mainly by issue, as in our previous update.

## "Acquiring" the Claim Before March 12, 1996

Two appellate decisions, and further district court rulings, have solidified this defence as a basis for early dismissal of claims. It is based on a provision of the Act that states: "In the case of property confiscated before March 12, 1996 [which is almost invariably the case], a United States national may not bring an action under this section on a claim to the confiscated property *unless such national acquires ownership of the claim before March 12, 1996*" (emphasis added).

In March 2021, in Gonzalez v Amazon.com, a panel of the Court of Appeals for the Eleventh Circuit (which covers federal courts in Florida and two neighbouring states) affirmed the dismissal of a claim because the plaintiff did not acquire the claim, from his mother, until 2016. The plaintiff had claimed that Amazon trafficked in agricultural land, which Cuba confiscated from the plaintiff's grandfather, by selling charcoal produced on that land. And in August 2021, in Glen v American Airlines, a panel of the Fifth Circuit (which covers Texas and two neighbouring states) – while reversing the district court's ruling that Glen lacked

standing to sue (discussed below) – nevertheless affirmed the dismissal in favour of the airline because Glen inherited the claim from his mother and aunt in 1999 and 2011. Glen's claim was that American Airlines had trafficked in confiscated beachfront property on which hotels later were built, by offering online booking services for those hotels.

In March 2021, the same plaintiff, Glen, had seen his similar claims against other defendants dismissed on the same grounds by a Delaware district court. Glen sued several online booking companies, Glen v TripAdvisor (alleging trafficking by offering online bookings at the hotels), and two credit card companies, Glen v Visa (alleging trafficking by processing credit card charges at the hotels). Glen's appeal from those dismissals is being briefed in the Third Circuit Court of Appeals (which covers Delaware and two neighbouring states).

In October 2021, the Eleventh Circuit again heard oral argument on this issue, in Garcia-Bengochea v Carnival (Bengochea). The plaintiff in that case tried to factually distinguish the circumstances in which he "acquired" the claim from those of plaintiffs in earlier cases in which the dismissal on this ground was affirmed by Eleventh and Fifth Circuit panels (Gonzalez v Amazon and Glen v American Airlines, respectively).

It is difficult to conceive that panels in the Eleventh Circuit (in Bengochea) or the Third Circuit (in Glen v TripAdvisor) would hold differently on this issue than the earlier panels in the Eleventh and Fifth Circuits. In these and other cases in which this issue arose, two of the Act's sponsors, former Congressman Dan Burton and former Senator Robert Torricelli, filed amicus briefs asserting that the Act was not intended to cut off the rights of heirs of original claimants. The two appellate courts and several district courts that have ruled on this issue to date gave no weight to that position and applied the "plain meaning" of the statute's provision, holding

that “acquires” includes by inheritance as well as by other means.

## Plaintiff’s “Standing” to Bring Suit

Defendants’ argument that a plaintiff lacks standing to bring a suit has not fared as well so far. The principle that a plaintiff must have standing to sue derives from Article III of the US Constitution, which defines, and therefore limits, the power of federal courts to decide cases. To have standing, a plaintiff must have suffered a “concrete injury” that is fairly traceable to the defendant’s conduct and can be redressed by a judicial decision. The Supreme Court has held that a plaintiff does not establish injury merely by plausibly alleging the elements of a claim created by an act of Congress. The injury thus must exist independently of the claim defined by the statute. Defendants therefore have argued that a Helms-Burton plaintiff has not suffered any injury, independent of the elements of a trafficking claim as stated in the statute, traceable to defendants’ use of property that Cuba confiscated decades earlier.

Some district court judges and a Third Circuit panel have sided with plaintiffs on this issue. In Glen v American Airlines, the appellate panel opined that Helms-Burton gave “rightful owners” of properties confiscated by Castro “the legally cognizable right… to assert a concrete injury” based on a defendant’s “trafficking” in those properties. Citing the Supreme Court’s explanation in other standing cases – that central to assessing whether a plaintiff suffered a concrete injury is whether the alleged harm “has a close relationship” to a harm traditionally recognised by US courts under common law – the appellate panel stated that a Helms-Burton trafficking claim is akin to the tort of unjust enrichment.

American Airlines had also argued that Glen was not harmed because he never acquired title to the property itself, the property having been confiscated long before he inherited anything. The court held

that this argument "goes to the merits of Glen's claim, not his standing." This ruling suggests that, although the panel concluded that Glen sufficiently alleged standing, he ultimately may have been unable to prove that he had an interest in the hotels in which American Airlines allegedly trafficked. (That merits issue will not arise in this case, as the appeals court dismissed the case because Glen did not timely acquire the claim.)

The book is not closed on the defence of lack of standing. The issue (among others) was argued in October 2021 before an Eleventh Circuit panel in two Helms-Burton cases, Del Valle v Expedia and Bengochea. It is also being briefed, as an alternative ground for affirmance, in the Third Circuit appeal from the dismissal of Glen's cases against the hotel booking and credit card companies (discussed above). It remains to be seen whether these circuit courts reach the same conclusion, regarding standing, as the Third Circuit panel.

## Personal Jurisdiction

A court's lack of personal jurisdiction over a defendant remains a viable defence but is heavily dependent on the particular facts of the case, mainly regarding (i) the defendant's relationship with the state in which the court is located, and (ii) the relationship between the claim and the defendant's acts in that state.

The defence is not available to a defendant incorporated or based in the state in which it is sued. But, for Helms-Burton defendants that have little or no connection to the state in which they were sued, and where any connection they have is unrelated to the alleged trafficking of property in Cuba, lack of personal jurisdiction is a strong potential path to dismissal.

A complaint's allegations about a defendant's forum-related activities do not always provide a sufficient factual basis for a court to rule on a motion to

dismiss for lack of personal jurisdiction at the pleadings stage. When a court deems the complaint's allegations sufficient, it may dismiss without further factual submissions. In Del Valle v Expedia, for example, the court dismissed the claim against Expedia – which is neither incorporated nor headquartered in Florida but allegedly sells hotel bookings there via its website – *based only on the complaint*, without either side having submitted affidavits or other evidence. The propriety of that ruling – under the particular facts of that case – was one of the issues recently argued before the Eleventh Circuit, in which a decision is pending.

In another Florida case, Cueto Iglesias v Pernod Ricard, the court dismissed claims against a France-based defendant (Pernod) for lack of personal jurisdiction. The plaintiffs claimed that Pernod trafficked by marketing and selling cognac in Florida (and elsewhere) using barrels and other equipment that the Cuban government confiscated in 1963, and that a Cuba-Pernod joint venture created in 1993 continued to use that equipment. The plaintiffs claimed that Pernod, though based in France, "trafficked" in Florida through Florida-based subsidiaries that it controlled and whose separate corporate status the court should disregard. The judge allowed the plaintiffs to amend the complaint to include factual allegations supporting their "alter ego" theory but did not allow discovery on that or other personal jurisdiction issues. The plaintiffs' appeal from the dismissal is being briefed in the Eleventh Circuit.

In North American Sugar Industries v Xinjian Goldwind Science & Technology Co. (NASI), the plaintiff alleges that three sets of defendants – a China-based seller of wind-farm equipment and US and Singapore-based affiliates of Europe-based shipping companies – allegedly trafficked in a Cuban port by shipping equipment there. After all defendants moved to dismiss for lack of personal jurisdiction, the court granted the plaintiff's request to take "limited" discovery of facts bearing on

personal jurisdiction. This has included extensive document production, responses to written interrogatories, and depositions of defendants' corporate representatives on limited topics. That discovery having been completed, the motions to dismiss on this ground are currently being briefed.

## The "Lawful Travel" Clause

Many Helms-Burton defendants have been sued for their Cuba-related activities in the travel industry – cruise lines, airlines, hotels, online booking companies, and credit card companies. These defendants have invoked the lawful travel clause in motions to dismiss. The clause, which appears in the Act's definition of "traffics," states that the term "does not include... 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" (emphasis added). These defendants generally can establish the "incident" and "lawful travel" elements, because "incident to" indisputably has a broad meaning, and the travel-related services the defendants provided were authorised by US regulation.

Plaintiffs have raised various arguments in opposing dismissal on this ground at the pleadings stage. Procedurally, they have argued that the clause is an affirmative defence which, therefore, can only be decided at later stages of the case. Factually, they have argued that defendants' activities were not "necessary." In the cruise line cases, for example, the plaintiff asserts that the ships could have disembarked passengers in Havana or elsewhere in Cuba without using the Havana dock. The cruise lines argue that Cuba *required* them to use that dock, and as a matter of interpretation, plaintiffs argue that the term "necessary" means indispensable, whereas defendants point to many judicial decisions holding that it means something short of that, such as convenient, useful, suitable, proper, or conducive to the end sought.

Two district court judges issued early decisions, in 2019, in cases against cruise lines – Bengochea (later dismissed on other grounds) and Havana Docks – adopting plaintiffs' position that the lawful travel clause is an affirmative defence, which, therefore, must be established by the defendants, not negated by the plaintiff in the complaint. The judges denied dismissal on that basis *on the pleadings*, leaving the defendants free to pursue the lawful travel defence at a later stage.

That later stage arrived in the four related Havana Docks cases. In September 2021, after extensive discovery proceedings ended, the cruise lines filed a joint motion for summary judgment. The lawful travel clause is a centrepiece of that motion. It is supported by extensive facts developed in discovery, including documents and affidavits and deposition testimony of fact and expert witnesses. These motions are still pending.

The judge presiding over these four cases will first determine whether there is any material issue regarding the *facts*' bearing on the lawful travel clause (such as whether the cruise lines could have conducted their cruises without using the Havana dock). If the material facts are not in dispute, the judge will then determine, as a matter of law, whether the use of that dock constituted "lawful travel" as defined in the Act. If she finds that issues of material fact remain, those facts would be decided at trial. Subject to the outcome of the summary judgment motions – which are based on several other grounds besides the lawful travel clause – the court has scheduled the trial for early 2022.

## "Knowing and Intentional" Conduct

There has been one noteworthy decision during the past year on whether a plaintiff has sufficiently alleged that a defendant "knowingly and intentionally" engaged in alleged acts of trafficking. In Glen v Visa and its companion case – in which the district court dismissed as to all defendants because

Glen "acquired" his claim too late (discussed above) – the court dismissed the claim against Visa for the additional reason that plaintiff failed to allege knowing and intentional conduct by Visa. As the complaint alleged, promptly after Visa received a pre-suit notice from Glen's lawyers informing Visa of Glen's claim and his intention to bring a Helms-Burton suit against it, Visa stopped authorising the use of its cards at the hotels in question. The purpose of such pre-suit notices is to make a plaintiff whose claim has not been certified by the Federal Claims Settlement Commission eligible to recover treble damages if the defendant continues to traffic after receiving the notice.

All other defendants in the two related cases (several online booking companies and one other credit card company), along with Visa, had moved to dismiss for (among other grounds) the plaintiff's failure to sufficiently plead the knowing and intentional element of a trafficking claim. The district court agreed with the defendants' *legal* position (consistent with two other district courts in Helms-Burton cases) that, to satisfy the scienter element, a plaintiff must plausibly allege that a defendant knew that the property in question was "confiscated," because that is also an element of a trafficking claim. The court rejected the plaintiff's argument that the defendants must have known that the property was confiscated because it is general knowledge that the Castro regime confiscated essentially all private property.

The court held, however, that the plaintiff plausibly alleged knowing and intentional conduct by the defendants other than Visa because the plaintiff alleged that they continued to traffic after they received the plaintiff's pre-suit notice of his claim. Whether a defendant's continuing to engage in alleged trafficking after it receives a pre-suit notice can satisfy the scienter requirement at the pleading stage is one of the issues being briefed in the Third Circuit appeal from the dismissal of Glen's claim for failure to timely acquire his claim.

## Constitutional Issues

There have been no significant rulings on constitutional challenges to the Helms-Burton Act since the September 2020 decisions in the Havana Docks cases, in which District Judge Bloom rejected arguments by certain cruise lines, at the pleadings stage, that the Act constituted an ex post facto law or that the lines did not have fair notice that they could be subject to a trafficking claim.

The cruise line defendants have again raised constitutional challenges in their recently filed motions for summary judgment (following discovery). They argue that (i) defendants cannot constitutionally be punished for conduct (cruises to Cuba) that the US government licensed and encouraged; (ii) imposing liability under the Act would be impermissibly retroactive, as the cruises took place while the Act's liability provisions had remained suspended since its 1996 enactment; and (iii) the Act's measure of damages – the entire value of the property allegedly trafficked (in this case, the dock), plus interest, and then trebled (plaintiff seeks about USD700 million from each of the four cruise lines, or USD2.8 billion total) – is grossly disproportionate to the activity on which liability would be based.

Defendants that assert constitutional challenges to a federal statute must give written notice to the US Attorney General, so that the US government may defend, or otherwise comment on, the statute's constitutionality. In one Helms-Burton case the US government recently urged the court to defer ruling on constitutional issues until the court has first considered other, non-constitutional grounds for dismissal. If and when cases reach the stage at which defendants are held liable and the amount of the damages must be determined, constitutional issues, particularly regarding the Act's draconian measure of damages, are bound to surface (or resurface) and be hotly contested.

## "Blocking *Statutes*"

In some cases, Europe-based defendants have invoked, and courts have grappled with, blocking statues, whose aim generally is to nullify the Helms-Burton Act civil remedies provision.

In the Florida case Canto Marti v Iberostar, filed in January 2020, the court issued a stay, in April 2020, at Iberostar's request, pending the European Union's decision whether to allow Iberostar to defend the case, and twice extended the stay over plaintiff's objection. At the time of writing, the case has been stayed for about 19 months. The plaintiff appealed from these orders, claiming that they are effectively "final" decisions. The appellate court requested briefing on, but has not yet decided, whether it has jurisdiction to hear and decide this appeal at this time.

In another Florida case, Rodriguez v Imperial Brands, a different judge also ordered a stay, pending a decision by the UK (post-Brexit) on whether to allow Imperial to defend the case. The judge limited the stay to a defined period (from 23 September 2020 to 9 February 2021). Shortly before the stay was to expire, the UK granted Imperial permission "to file and litigate a motion to dismiss." Dismissal motions by all defendants are scheduled to be heard by the court in December 2021.

Blocking statutes provide other significant protections to individuals or companies based in a European Union member state (or another country that has a similar blocking statute) – apart from providing that such a defendant needs the governing authority's permission to defend itself in a Helms-Burton case. The EU statute provides, for example, that a US court's judgment will not be "recognised or enforceable" by a European Union member state (Article 4), and that a person engaged in commerce, which is targeted in a Helms-Burton lawsuit, is "entitled to recover any damages, including legal costs, caused to that person ... from [that] person or

any other entity causing the damages or from any person acting on its behalf or intermediary" (Article 6).

If a plaintiff were to obtain a judgment against a defendant protected by a blocking statute, therefore, collection of the judgment from assets outside the USA would be highly speculative. In addition, prosecuting a Helms-Burton case against such a person exposes the US plaintiff, and persons acting on its behalf, to potential liability in the defendant's home country in an amount at least equal to than that faced by the defendant in the US action.

## Conclusion

Court decisions over the past year have reinforced that a plaintiff has no viable claim if the plaintiff inherited or otherwise acquired the claim after 12 March 1996. Such claims can and should be dismissed at the pleadings stage, before any discovery. Another strong potential ground for early dismissal is that the court lacks personal jurisdiction over the defendant – although this issue may require development of a factual record, such as discovery limited to that issue. Failure to sufficiently plead facts that a defendant acted knowingly and intentionally may also lead to early dismissal, provided the material facts concerning that element are not legitimately disputed.

Other potentially dispositive grounds for dismissal, notably the lawful travel clause, have not succeeded at the pleadings stage, for two main reasons:

- the few courts that have considered the issue have held that the lawful travel clause is an affirmative defence, and therefore a plaintiff need not disprove the defence in its complaint; and
- the defence may raise factual issues that a court cannot decide until discovery has been completed.

Only a few cases have reached the stage in which discovery has been completed and summary judgment motions are being briefed. Many factual and legal issues, including issues of statutory interpretation (of such key terms as “traffics” and “property,” for example), and constitutional issues, particularly regarding the Act’s nonsensical measure of damages, are yet to be resolved or meaningfully addressed by the courts.

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