

Cuba: Trends and Developments

Practice Update

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By [Martin Domb](#), [Pedro A. Freyre](#), [Augusto E. Maxwell](#), and [Christopher S. Carver](#)

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Update on Helms-Burton Act Cuba "Trafficking" Cases

This update on Helms-Burton Act (the Act) cases focuses on five significant developments during the past year.

1. In the Havana Docks cases against four cruise lines, District Judge Beth Bloom granted summary judgment as to liability in favour of the plaintiff and likely will enter money judgments [update: has entered judgments] against each

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cruise line after the parties have submitted their respective calculations of damages under the statute. These are the only Helms-Burton cases to date in which a plaintiff has prevailed. The judgments are certain to be appealed on several grounds [update: notices of appeal have been filed].

2. In late November, the Eleventh Circuit Court of Appeals issued long-awaited rulings in two appeals. In *Del Valle*, it reversed the dismissal of a claim at the beginning of the case, holding that the complaint sufficiently alleged that the court has personal jurisdiction over the two online hotel-booking company defendants. In *Garcia-Bengochea* (two similar cases, each against a cruise line), it affirmed the dismissal of the claims on the ground that the plaintiff inherited, and therefore “acquired”, his claim after the statutory cut-off date in 1996. In both cases, the panel ruled that the plaintiffs properly alleged Article III standing at the pleadings stage.
3. In the *Seaboard* case, Judge Bloom granted summary judgment, this time to the defendant, based on a factual finding regarding an issue that had not been directly addressed in any other Helms-Burton case: that the port and dock facilities that the defendant shipping company used were distinct from the properties on that port that had been confiscated from the plaintiff.
4. Two cases featured significant rulings that the federal court in Florida lacks personal jurisdiction over the defendants. In *Herederos*, the Eleventh Circuit affirmed the dismissal of a claim against a Canadian mining company; in *North American Sugar Industries*, a magistrate judge recommended the dismissal of claims against three foreign companies and two US companies, arising from a shipment of wind turbine blades from China to Cuba [update: the district court adopted the recommendation and dismissed the case].

5. In another November ruling by the Eleventh Circuit, the court vacated a three-year stay of the case by the district court, which had stayed the case pending the European Union's decision on an application by the Spain-based defendant, under the EU's blocking statute, for permission to defend the case. As it was not clear when, if ever, the European Union would adjudicate the application, the appeals court directed that the case proceed.

Havana Docks Cases

In May 2022, Judge Bloom issued a comprehensive decision in which she granted the plaintiff summary judgment as to liability – denying the cruise lines' motions for summary dismissal on numerous grounds – and left for determination at trial only the amount of the damages to be awarded in relation to each cruise line. The “lawful travel” exception in the Act's definition of “traffics” was a focal point of the decision. The cruise lines maintained that their use of the dock fell within the exception, and therefore was not trafficking, because cruises to Cuba were expressly authorised by a general licence issued by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and were even publicly encouraged by then-President Barack Obama. Judge Bloom held, however, that none of the cruise lines engaged in “lawful travel” because the general licence only permitted travel that satisfied one or more of 12 purposes described in the regulations, such as “people-to-people” interactions, and the licence expressly prohibited “primarily tourist-oriented activities.” Judge Bloom noted, quoting from the regulations, that the “tourist-oriented activities” purpose requires “a full-time schedule of activities” that entail “meaningful interaction between the traveller and individuals in Cuba.” The decision includes detailed descriptions of the daily activities of each cruise line's passengers while in Cuba and concludes that, as the passengers engaged mostly in tourism and did not comply with the people-to-people requirement, the cruise lines therefore did not engage in “lawful travel.”

Judge Bloom also (among other rulings):

- rejected several arguments by the cruise lines based on the fact that, at the time of the confiscation in 1960, the plaintiff did not own the dock but rather held a limited concession that was to expire in 2004, years before the cruise lines began service to Cuba in 2016, and that gave the plaintiff only the non-exclusive right to operate cargo services, not passenger travel;
- held that the cruise lines had actual as well as constructive knowledge of the plaintiff's claim and therefore "knowingly and intentionally" violated the statute;
- rejected constitutional arguments that the statute is an ex post facto law (by virtue of the cause of action for trafficking having been suspended from its enactment in 1996 until the suspension was lifted in 2019), that it violates the cruise lines' due process rights (in that the cruises were licensed and encouraged by the Executive Branch), and that the statutorily-mandated damages would be unduly punitive and excessive, also in violation of due process; and
- rejected the cruise lines' argument that the plaintiff did not suffer an injury-in-fact and therefore lacks standing to assert the claims.

After an initial briefing concerning how to calculate damages, both sides and Judge Bloom agreed that a trial was not necessary, and that the judge would determine the damages amounts based on further briefing. The damages starting point is the amount certified by the Foreign Claims Settlement Commission (FCSC) in 1971, which set the total value of the dock at the time it was confiscated (in 1959) at USD9,179,700.88. The parties disputed several issues regarding statutorily required add-ons to that amount – interest and trebling. In orders issued in September and October 2022, Judge Bloom ruled, based on her interpretation of the statute, that:

- the applicable interest rate is “the weekly average 1-year constant maturity [U.S.] Treasury yield for each week over the period between the date of confiscation [in 1959] and the date Plaintiff brought each case against each Defendant [in 2019];”
- interest will be simple, not compounded annually; and
- the trebling will occur after interest has been added.

The parties are scheduled to provide their respective calculations, including the plaintiff’s attorneys’ fees, which are also recoverable, by early December 2022.

A number of issues, including a challenge to the constitutionality of the damages provision of the statute and the amounts awarded, are still to be briefed and adjudicated. [Update: In late December, Judge Bloom entered judgment in the amount of about \$113 million against each of the four cruise lines.] Once the damages are determined and judgments are entered, the cruise lines will pursue their appeals. [Update: The cruise lines recently filed their notices of appeal.]

Del Valle and Garcia-Bengochea Appeals

In late November 2022, the Eleventh Circuit Court of Appeals issued two opinions in these consolidated appeals, with both decisions issued by the same three-judge panel. These rulings were long-awaited, especially by litigants in cases pending in the federal court in Miami, where most Helms-Burton cases have been brought and in which Eleventh Circuit rulings are binding.

In Del Valle, the plaintiffs claimed that hotel online booking companies Expedia and Booking.com (and some of their affiliates) trafficked in beachfront property Cuba confiscated from the plaintiff’s family in 1960 by booking rooms at two hotels later built on that property. The district court dismissed on the ground that it lacked personal jurisdiction over the

non-Florida defendants based on the complaint's allegations. The defendants did not challenge the jurisdictional allegations. The appellate court reversed, holding that the court has specific jurisdiction under the "tortious acts" prong of Florida's long-arm statute and the exercise of jurisdiction does not violate the defendants' constitutional due process rights. The case will now proceed in the district court.

The opinion in *Del Valle* also considered, and rejected, the defendants' alternative ground for affirmance – that the plaintiff lacks standing under Article III of the U.S. Constitution. The panel was required to address this issue because it entails the court's jurisdiction over the subject-matter of the lawsuit (as distinguished from personal jurisdiction, which concerns a court's jurisdiction over a particular defendant). The panel briefly discussed its ruling on this issue and referred to the fuller analysis of it in its companion decision in *Garcia-Bengochea* (discussed below).

The ruling on personal jurisdiction in *Del Valle* did not break new legal ground. Significantly, the dismissal by the district court had been based only on the allegations of the complaint – the defendants having submitted no affidavits or exhibits rebutting any of those allegations – and with no jurisdictional discovery. This therefore presented the purely legal issue of whether the complaint's jurisdictional allegations, which the court was obligated to assume to be true, were enough to establish personal jurisdiction.

The complaint's key jurisdictional allegations were that the booking companies maintained fully interactive websites accessible in Florida (and everywhere else), that Florida residents in fact used the websites to book rooms at the hotels built on the property to which the plaintiffs asserted a claim, that the websites used "search engine optimization" tools that generated follow-up emails to Florida residents (among others) who searched for those or nearby

hotels, and that the booking companies earned commissions on the bookings and advertising revenue from web traffic generated by the listing of the hotels.

The appellate court held that personal jurisdiction exists under established precedent based on the undisputed allegations. The alleged tortious conduct (trafficking under the Act) occurred in part in and caused injury to the Florida plaintiffs in Florida, thus satisfying the Florida long-arm statute. Exercising jurisdiction in these circumstances does not violate due process because the booking companies, through their targeted marketing in and revenue derived from Florida, “purposely availed” themselves of the privilege of conducting activities within the forum (Florida) and there is a sufficient relationship among the plaintiffs’ claim, the defendants’ activities, and the forum.

In the companion Garcia-Bengochea appeal, the plaintiff (in two separate cases) claimed that Carnival and Royal Caribbean, respectively, trafficked in a dock in Santiago, which Cuba confiscated in 1960 from a company whose shares the plaintiff inherited, by docking and disembarking passengers there beginning in 2016.

Before addressing the “merits” issue of whether Garcia-Bengochea timely “acquired” the claim, the court discussed at length whether the plaintiff had properly alleged Article III standing. To have standing, a plaintiff must meet the following criteria:

- they have suffered an injury in fact;
- that injury can be fairly traced to the defendant’s conduct; and
- that injury can be redressed with a favourable decision.

The cruise lines did not challenge the third requirement; an award of damages under the Act

obviously would satisfy that element. The cruise lines made three main arguments:

1. that Garcia-Bengochea suffered no concrete injury because he was not affected by the cruise lines' use of the dock – he “would be in precisely the same position he stands in now” if they had not used the dock;
2. his injury, if any, is not traceable to the cruise lines, but rather to the fact that the Cuban government confiscated the dock more than 60 years ago; and
3. if the injury is deemed to be intangible, there is no standing to sue because Congress cannot create a cause of action to redress an intangible injury unless the cause of action “bears a close relationship” to a claim with “common law roots.”

The court rejected each argument. It ruled that the cruise lines' first two arguments, regarding injury and traceability, are based on an incorrect understanding of the injury. The injury as defined in the Act is not the Cuban government's confiscation of the property, but rather the use of that property for commercial gain without compensating or obtaining the plaintiff's permission for it. That is a concrete injury, and it is traceable to the cruise lines. As the court further explained, an injury may have multiple causes. As alleged in the complaints, Garcia-Bengochea was injured “by both the Cuban government's initial confiscation of the property and the cruise lines' subsequent trafficking in the property.” This is enough to satisfy both the injury and traceability elements of standing at this stage of the proceedings.

Even if the injury were deemed to be intangible, there would still be standing, according to the court, because the claim of trafficking as defined in the Act bears a close relationship to the common law claim of unjust enrichment.

The Eleventh Circuit's ruling essentially ends the argument advanced by defendants in many Helms-Burton cases that a Helms-Burton plaintiff lacks Article III standing, at least at the pleadings stage. The Eleventh Circuit's ruling follows the Fifth Circuit's 2021 ruling in *Glen v American Airlines* on the same issue, and is consistent with every other appellate and district court on this issue. However, because standing entails the court's subject-matter jurisdiction, which must exist at all stages of a case (including through the appellate process), it is possible that the development of facts in discovery in a particular case could lead to the conclusion that the plaintiff lacks standing.

Even though Garcia-Bengochea has standing, on the merits the Eleventh Circuit agreed with the district court that the statutory requirement that a plaintiff must have "acquired" the claim before 12 March 1996 does apply to persons, like Garcia-Bengochea, who inherited their claims after that date. The appellate court therefore ruled that Garcia-Bengochea's claims were properly rejected by the district court.

The court based its holding almost entirely on the "ordinary meaning" of the word "acquires", and noted that the Fifth Circuit and other courts have come to the same conclusion. In an interesting concurrence, Judge Adalberto Jordan analysed the meaning of "acquired" more deeply and concluded that it could be – and, given the Act's purpose of deterring trafficking in confiscated property and granting U.S. persons a right of action, very arguably should be – construed more narrowly to exclude passive acquisitions such as by inheritance. Judge Jordan nevertheless concurred in the result because longstanding principles of statutory construction required it. The subdivision of the Act setting the 12 March 1996 cut-off date for acquiring claims applicable to confiscations before that date is immediately followed by another subdivision applicable to confiscations after 12 March 1996. This latter subdivision applies expressly to a narrower class of acquisitions – "by assignment for value" –

which language excludes, for example, inheritances. Judge Jordan concluded, applying statutory construction principles, that the “combined language” of these two subdivisions “cannot bear the weight” of Garcia-Bengochea’s argument that “acquires” has the same narrow meaning in both subdivisions.

It is noteworthy that the Eleventh Circuit did not rule in either case on the applicability of the lawful travel clause, even though two of the questions answered by the U.S. government in its amicus brief (at the court’s request) concerned how that clause should be interpreted. The lawful travel clause is part of the Act’s definition of “traffics.” It states that the term “traffics” “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.” The defendants in Garcia-Bengochea and Del Valle – like defendants involved in the travel or transportation industries in other cases – argued that their travel-related activities were authorized by the U.S. government, such as by general or specific licenses, and thus qualified as lawful travel and were not trafficking. The issue of how the lawful travel clause should be interpreted and applied thus remains very much alive, as shown by the Havana Docks cases.

In the four combined Havana Docks cases, Judge Bloom held that the cruise lines are not protected by the lawful travel clause because their passengers engaged mostly in tourism rather than “people-to-people” or other activities specifically allowed by licenses or regulations. Her ruling on that ground (among others) will no doubt be appealed to the Eleventh Circuit. Further, in the cases involving cruise lines and hotel booking companies, the travel is by passengers. In other Helms-Burton cases, by contrast, such as Seaboard and North American Sugar (both discussed below), the clause has been invoked by shipping companies, which maintain that commercial shipping also entails “travel” and therefore is protected if it is “lawful.” In those cases,

the issue of “tourism” would not arise; the main issues are whether cargoes indeed “travel” and whether the shipments at issue were “lawful.”

Seaboard Case

In August 2022, Judge Bloom granted summary judgment for the defendant shipping company, Seaboard, dismissing plaintiff Odette Blanco de Fernandez’ claim on a ground not previously ruled on in a Helms-Burton case: that the property in a Cuban port to which she asserted a claim, which Cuba had confiscated in 1960 from companies allegedly owned by her family, was physically distinct from the port facilities that Seaboard actually has used, since 2019, when delivering containers of frozen chicken to that port. Briefly, the family’s confiscated property was located on the east side of the port, known as Bay of Mariel, whereas Seaboard docked its ships at and delivered its containers to a terminal located on the west side of the Bay.

De Fernandez argued that a concession Cuba granted to her family in 1955 included the right to “all facilities” throughout the Bay, and, further, that her family also owned a large tract of land on the west side of the Bay that Seaboard used to store its containers. Judge Bloom rejected De Fernandez’s first argument based on “a plain reading” of the concession, which the court interpreted as granting rights only “on the east side of the Bay where the town of Mariel is located.” The court noted in this regard that the concession granted the right to construct a terminal in “part of said Bay of Mariel.” Judge Bloom rejected De Fernandez’s second argument for lack of evidence: although the court accepted the proof that her family had owned 11,000 acres on the west side of the Bay (not including the land under the container terminal that Seaboard admittedly used), De Fernandez presented no admissible evidence that Seaboard stored containers in or otherwise used facilities located on any part of those 11,000 acres. This finding was based on the court’s painstaking review and discussion of evidence, including detailed maps submitted by each

side (two of which are printed in the decision) depicting the location and boundaries of the container terminal used by Seaboard.

De Fernandez also argued that Seaboard trafficked indirectly in her family's confiscated property because it benefitted from the use by other actors – its agent and the operator of the container terminal – of port facilities generally by their participation in a “special economic zone” operated at that port by the Cuban government. Judge Bloom rejected this argument based on the same factual findings: that there was no evidence that Seaboard's ships or containers used or benefitted from facilities beyond the perimeter of the container terminal itself.

As these findings were sufficient for dismissal, Judge Bloom did not consider the other grounds that Seaboard had raised, such as that Seaboard did not “knowingly and intentionally” traffic in any property, or that its shipping services constituted “lawful travel” and thus were not “trafficking.”

De Fernandez is appealing and indicated that she will challenge the summary judgment decision and also the court's prior rulings:

- excluding certain elements of the plaintiff's experts' reports and evidence (on procedural and evidentiary grounds); and
- dismissing the claims of other family members (who had initially been included as co-plaintiffs) because they, unlike Blanco de Fernandez, acquired their claims by inheritance after the statutory cut-off date of 12 March 1996.

Briefing on the appeal is expected to be completed in early 2023.

Personal Jurisdiction Rulings

Two other significant rulings concerning personal jurisdiction were issued, in August 2022 (in addition

to the Eleventh Circuit's November 2022 ruling in Del Valle, discussed above):

- *Herederos v Teck Resources*; and
- *North American Sugar*.

In *Herederos v Teck Resources*, an Eleventh Circuit panel affirmed the dismissal of a case against a Canadian mining company. Herederos accused the mining company of trafficking in mines Cuba had allegedly confiscated from the plaintiff's family. Due to Teck being a non-U.S. company and not being subject to general jurisdiction in any state, Herederos relied on Federal Rule of Civil Procedure 4(k)(2), which provides (in relevant part) that exercising jurisdiction is proper if it is "consistent with the United States Constitution" (ie, it does not violate a defendant's due process rights). Herederos relied mainly on two facts in arguing that jurisdiction was proper. First, it asserted that the alleged trafficking harmed it, a domestic company, in the United States, which is the relevant "forum" under Rule 4(k)(2). The Eleventh Circuit rejected this argument, noting that the due process analysis for specific jurisdiction – which requires a sufficient "affiliation between the forum and the underlying controversy" – focuses on defendant's acts in the forum, not whether the effect of those acts is felt in the forum. Herederos did not point to any activity by Teck in the U.S. that related to the alleged trafficking in Cuban mines.

Second, Herederos asserted that Teck engaged in various businesses in the United States through its subsidiaries, which are incorporated and headquartered in the United States, and therefore Teck was subject to general jurisdiction in a U.S. court. The Eleventh Circuit rejected this argument, because Herederos did not show that any of Teck's subsidiaries was an "alter ego," and agreed with the district court's factual findings that the subsidiaries were independent entities whose presence and activities in the U.S. could not be attributed to Teck. The court also noted that Herederos failed to show

that any acts by these subsidiaries were related to the claim of trafficking in Cuban property.

In North American Sugar, a report and recommendation (R&R) by Magistrate Judge Alicia Otazo-Reyes recommended the dismissal of claims filed in the Miami federal court against three sets of defendants: two related China-based sellers, a U.S. affiliate of a Danish freight-forwarder, and Singapore and Houston affiliates of a German shipping group. North American Sugar accused all defendants of trafficking in a Cuban port, one of the assets that Cuba confiscated from the plaintiff in 1959, by allegedly participating in the sale and shipment to that port of wind turbine blades for use in a large Cuban wind farm project.

North American Sugar's position is that the district court may exercise jurisdiction over all defendants because the two ships that carried the blades from China to Cuba made brief planned stops in the Port of Miami, before proceeding to Cuba, in order to comply with an export licence that authorised the shipments to Cuba, given that the blades were manufactured by an affiliate of a U.S. company. It alleges that all defendants participated in or were aware of the planned stops in Miami. The jurisdictional facts were the subject of extensive discovery.

The magistrate judge concluded that the events surrounding the ships' stops in Miami were not a "substantial aspect" of or "essential to the success" of defendants' alleged trafficking in the Cuban port, and in any event, none of the defendants performed any meaningful acts in relation to the Miami stops. She therefore recommended dismissal as to all defendants for lack of personal jurisdiction. As of this writing, the plaintiff's objections to the R&R are pending before Judge Darrin Gayles. [Update: In mid-December 2022, Judge Gayles adopted the R&R and dismissed the case as to all defendants. North American Sugar has filed a notice of appeal.]

The EU Blocking Statute

By its November ruling, the Eleventh Circuit vacated a long-standing stay issued by the district court in *Canto Marti v Iberostar* and directed that the case proceed. *Canto Marti* commenced this case almost three years ago, in January 2020, alleging that in 2016 the Spanish hotel company Iberostar began to traffic by operating a hotel that Cuba confiscated from her family some sixty years ago. Shortly after the case was filed, the district judge granted Iberostar's motion to stay the case while Iberostar applied to the European Union, under the EU's blocking statute, for permission to defend the case, and while it awaited the EU's action. The blocking statute (among other things) prohibits companies based in its member states from participating in a Helms-Burton case absent the EU's permission. In Spain, a company that violates this prohibition is subject to a fine of up to €600,000.

After reviewing the history of the application, mainly through opaque monthly status reports filed with the district court by Iberostar, the Eleventh Circuit concluded that the district court abused its discretion by keeping in effect a stay that was "immoderate" because it was "indefinite in duration and scope" and because the district court's reasons for doing so – (1) international comity, (2) fairness to litigants, and (3) judicial economy – did not support a continued stay. The opinion concluded: "Almost three years have passed since Marti first filed her lawsuit. She cannot recoup those three years. But now she can pursue her claims, Iberostar can assert its defenses, and this suit can continue." In sum, it was the long period of inaction by the EU that could no longer be justified.

Conclusion

Coming into 2023, the first instance of a plaintiff (Havana Docks) prevailing in a litigated Helms-Burton case is about to be seen, at least at the trial level. The judgment amounts are bound to be substantial, given Judge Bloom's determination that

the statute requires her to add 60 years of pre-judgment interest to and then treble the FCSC's valuation of the dock at over USD9 million as of 1959. The other recent rulings of interest, discussed above, illustrate:

- that claimants who inherited or otherwise acquired their claims after 12 March 1996, for property confiscated before that date, have no actionable claim; that in some cases, such as in Seaboard, a detailed comparison between the property to which a plaintiff asserts a claim and the property that a defendant allegedly exploited may prove fruitful, if they are physically distinct;
- that personal jurisdiction continues to be a strong potential avenue for dismissal for companies sued in states where they are neither incorporated nor based, and where they engaged in little or no activity that was substantively related to the claim of trafficking in property located in Cuba; and
- that while EU based defendants may obtain a stay for a reasonable period while they seek permission under the EU blocking statute to defend a case, U.S. courts will not tolerate inordinate delays based on European proceedings under that statute.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.