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Cuba: Trends and Developments

Practice Update

January 22, 2021

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Substantive U.S. Court Rulings in Helms-Burton Act Cuba "Trafficking" Cases

In last year's Cuba trends and developments chapter (*Chambers Global Practice Guides*, *Litigation 2019* (second edition)), we focused on lawsuits filed in the USA in the first six months after the Trump administration, in May 2019, activated the civil remedy provision of the Helms-Burton Act. That provision (in Title III of the Act) gives a U.S. national (individual or company) the right to bring a civil action for damages against companies and individuals that "traffic" in property that Cuba confiscated, and to which the plaintiff asserts a claim. The law gives the President the power to suspend that provision for six-month periods. When the law was enacted in 1996, President Clinton immediately suspended the civil remedy

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provision, and he and every President since did likewise, every six months, until the suspension was lifted in May 2019.

A total of 21 lawsuits were filed during the first six months that the civil remedy provision was in effect, but only a handful of additional cases have been filed since then. At the time of our previous article, the courts had not issued any substantive rulings. Now, a year later, six judges in eight cases in two federal districts have issued such rulings, all based on the pleadings – that is, before discovery and based only on the factual allegations in the complaints (which are assumed to be true only for purposes of the dismissal motions) and the courts' legal interpretation of the relevant statutory provisions.

In four cases, the court dismissed the claims with prejudice; those rulings are now on appeal. In one case, the court granted dismissal on one ground (lack of personal jurisdiction over the defendant), denied dismissal on other grounds, and gave the plaintiffs leave to file an amended complaint to try to correct the deficiencies in the personal jurisdiction allegations. In the other three cases – all involving the same plaintiff, the same judge, the same property, but three different defendants – the judge denied dismissal on several grounds. In these three cases, the defendants do not have the right to appeal at this time, because "interlocutory" appeals (before the court enters a final judgment) generally are not allowed in federal cases. Discovery, therefore, is proceeding in those cases. The eight substantive rulings are described below according to the issues they addressed.

"Acquiring" the Claim Before 12 March 1996

Three cases were dismissed because the plaintiff did not "acquire" the claim before the Act became law on 12 March 1996, as Title III requires. In the case first dismissed on this ground, Gonzalez v Amazon, in the Southern District of Florida before Judge Robert

N. Scola, Jr., an individual plaintiff alleged that Amazon and another online retailer trafficked in agricultural land, which Cuba confiscated from the plaintiff 's predecessor, by offering for sale charcoal produced on that land.

The second dismissal on this ground, Bengochea v Carnival, in the Southern District of Florida before Judge James Lawrence King, involved an individual suing a cruise line for trafficking in the dock in Santiago, Cuba, which Cuba confiscated from the plaintiff 's predecessor, by disembarking passengers on that dock.

The third such dismissal, *Glen v. American Airlines*, in the Northern District of Texas before Judge John H. McBryde, involved an individual claiming that an airline trafficked in beachfront land owned by the plaintiff 's predecessors by operating an online booking service for hotels later built on that land.

In all three cases, the plaintiffs inherited the claim from one or more family members after 12 March 1996. They argued that the act's provision requiring them to have "acquired" the claim before that date does not apply – and Congress did not intend it to apply – to acquisitions by inheritance. They asserted that the term "acquires" is ambiguous, and that to deny plaintiffs the right to sue based solely on when the family member from whom they inherited happened to die would be contrary to the law's intent. The three judges concluded that the statutory provision is not ambiguous, that "acquires" does include inheritance, and that therefore any evidence of legislative intent (which, in any event, does not directly address this question) is not relevant. All three cases are on appeal – the two Florida cases in the Eleventh Circuit, and the Texas case in the Fifth Circuit.

The plaintiff in the third case, Robert Glen, also brought two other cases – based on the same beachfront properties and hotels – against (i) Visa and Mastercard, for allowing the use of their

branded credit cards at the hotels, and (ii) Expedia, Booking.com and other similar companies, for offering online reservation services for those hotels. These cases are in the District of Delaware, before Judge Leonard P. Stark. Motions to dismiss these cases on this ground (among others) have been briefed and are currently awaiting decision.

The Plaintiff's "Standing" to Bring Suit

Three judges presiding over five cases have reached different results on the issue of whether the plaintiff has "standing" to assert a claim under the Act. Under Article III of the U.S. Constitution, which defines the power of the judicial branch, a court has power (subject matter jurisdiction) to decide a case only if the plaintiff has standing – that is, if the plaintiff sustained a concrete injury, that is fairly traceable to the defendant's conduct, and that can be redressed by a judicial decision. The issue of standing arises in Helms-Burton cases because the Supreme Court has held that a plaintiff does not establish that it has standing merely by plausibly alleging the elements of a claim created by an act of Congress. In other words, the plaintiff's injury must exist independently of the claim defined by the statute.

In *Glen v. American Airlines*, Judge McBryde (in the Texas district) ruled that the plaintiff lacks standing because his alleged injury is not distinct from the civil remedy created by Title III in 1996, but rather is traceable to the Cuban government's confiscation of his forebears' land in 1960. Judge McBryde concluded that the plaintiff was not harmed – his claim regarding the property was not affected – by the airline merely doing business with the hotels.

In later issued rulings, two judges in the Florida district reached the opposite result. In *Cueto v. Pernod Ricard* – in which two individual plaintiffs allege that a French liquor company trafficked in physical and intellectual assets of a cognac company that Cuba confiscated from the plaintiffs' family – Judge Kathleen M. Williams denied

dismissal on the issue of standing. She concluded that the plaintiffs' injury does not derive from the Cuban government's confiscation six decades ago, but rather consists of the defendant's alleged acts of "trafficking" as defined in Title III. In so ruling, Judge Williams did not refer to the principle, well-established by Supreme Court precedent, that violation of a statute does not, by itself, create standing.

Judge Beth Bloom also denied dismissal on the standing issue in each of three cases involving the same plaintiff (Havana Docks Corp.) and the same property (the dock in Havana), but three different defendants: Carnival Cruise Line, Norwegian Cruise Line and MSC Cruises. In these cases, the plaintiff company alleges that the cruise lines trafficked in the Havana dock by disembarking passengers there. The plaintiff held a 99-year concession to the dock, of which 44 years remained at the time Cuba confiscated the dock in 1960.

In her decisions, Judge Bloom, unlike Judge Williams, discusses at length the leading cases on standing, including the principle "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing". Judge Bloom concluded that the plaintiff did sustain a concrete harm, but her description of that harm is simply the violation of the statutory right to seek damages for trafficking in confiscated property.

The issue of standing will be reviewed on appeal by the Fifth Circuit in the Texas case, *Glen v. American Airlines*, but not (at this time) by the Eleventh Circuit in the Florida cases, *Cueto* and *Havana Docks*, because – as mentioned above – the dismissal in *Glen* is a final order, whereas the denials of dismissal in the Florida cases are interlocutory orders, which may not be appealed at this time (absent permission of both the district court and the court of appeals). In the *Glen* appeal, even if

the appellate court reversed on the standing issue (holding that Glen has standing), the appellate court could affirm on either of the two other grounds on which the district court granted dismissal.

Personal Jurisdiction

Two judges have issued rulings that, based on the plaintiffs' allegations, the court lacks personal jurisdiction over the defendants. A U.S. court not only must have the power to decide a type of case (known as subject matter jurisdiction), but it also must consider (if raised by the defendant in a timely fashion) whether it may rule as to a particular defendant (known as personal jurisdiction). A court's authority to rule as to a given defendant generally depends on the nature and extent of the defendant's contacts with the court's forum and the relation between the defendant's activities in that forum and the plaintiff 's claim.

In *Del Valle v. Trivago* – in which three individuals allege trafficking by two online hotel booking companies (Expedia and Booking.com) regarding hotels built on land confiscated from the plaintiffs' family – Judge Federico A. Moreno, of the Southern District of Florida, dismissed the case for lack of personal jurisdiction over the defendants. The dismissal was based only on the plaintiffs' allegations in the complaint, which the court assumed to be true for purpose of the motion, without any factual declarations or other evidence bearing on jurisdiction having been submitted by either side.

Judge Moreno addressed the two kinds of personal jurisdiction – general and specific. He held that the court lacked specific jurisdiction, which requires that the claim arise from the defendant's activities in the forum, because maintaining a website accessible to persons everywhere, including in Florida, is not a legally sufficient connection to Florida, even if the claim were shown to arise from sales to Florida residents (a factual question he did not reach). As to

general jurisdiction – which does not require that the claim arise from the defendant's activities in the forum but requires that the defendant maintain a very substantial connection with the forum – Judge Moreno ruled that the plaintiffs' allegations concerning the defendants' use of websites in Florida fell "woefully short" of the allegations needed to establish "substantial and not isolated activity within this state". The plaintiffs are appealing this ruling in the Eleventh Circuit.

In *Cueto* (mentioned above under "standing"), Judge Williams granted Pernod's motion in part, based on lack of personal jurisdiction, but gave the plaintiffs leave to file an amended complaint in which they might rectify the deficiencies she found with the jurisdictional allegations in the initial complaint. Judge Williams ruled, first, that the plaintiffs cannot establish general jurisdiction over Pernod because Pernod is incorporated and has its principal place of business in France; also, under the U.S. Constitution and Supreme Court precedent, general jurisdiction over a corporation exists only where it is incorporated or has its principal place of business, with very rare exceptions.

Judge Williams also considered specific jurisdiction (also known as "long-arm" jurisdiction) even though the plaintiffs did not allege any of the statutory bases, under the applicable Florida statute, for such jurisdiction. The plaintiffs alleged that Pernod had sufficient contacts with Florida based on the activities of its subsidiary, called Pernod USA. However, the complaint did not allege sufficient facts to enable the judge to ascribe Pernod USA's activities to the parent company, Pernod, which was the named defendant – in other words, to disregard the separate corporate status of the subsidiary – or to determine other statutory and constitutional requirements for asserting long-arm jurisdiction. As noted, the judge gave the plaintiffs leave to file an amended complaint "to advance allegations to establish specific jurisdiction, if appropriate".

Sufficiently Pleading "Knowing and Intentional" Conduct

Although the term "traffics" – as defined in the Act – encompasses a broad range of commercial activity relating to confiscated property, the definition limits the term's reach by providing that, to constitute "trafficking", the defendant must have acted "knowingly and intentionally". This requirement concerns the defendant's "state of mind" and is sometimes referred to by the Latin term "scienter".

Three judges have issued three different rulings on this issue. All agree that a plaintiff must plausibly allege facts showing that a defendant acted knowingly and intentionally, and that "conclusory" allegations to that effect are not enough. In *Glen v. American Airlines*, Judge McBryde ruled that the plaintiff did not sufficiently allege the defendant's scienter. To traffic under the Act, wrote Judge McBryde, "a person must know that the property was confiscated by the Cuban government and intend that such property be the subject of their commercial behavior". The judge rejected the plaintiff 's argument that American Airlines must have known that the property on which the hotels were built was confiscated because, as the plaintiff argued, everyone is aware that the Cuban government confiscated "all real property in Cuba".

Judge Scola had reached the same conclusion in the first of his two decisions in *Gonzalez v. Amazon* (as Judge McBryde noted in his ruling). In the first decision, Judge Scola granted the defendants' motion to dismiss on two grounds, holding that the plaintiff failed to allege (i) that the plaintiff acquired his claim before 12 March 1996 (discussed above), or (ii) that the defendants acted knowingly and intentionally. Judge Scola allowed the plaintiff to file an amended complaint to try to rectify both failures. In his second ruling, on the amended complaint, Judge Scola dismissed on the first ground, without the need to reach the "knowingly and intentionally" ground. On appeal from the ruling

as to that first ground, the court of appeals may consider, and affirm on, either or both grounds.

The third ruling on this issue went the other way. Judge Williams, in *Cueto v. Pernod*, cited factual allegations in the complaint – such as Cuban newspaper articles describing the government's confiscation of rum and alcohol companies, and markings on barrels and other confiscated property – and held that these allegations (vague though they appear to be) are sufficient at the pleading stage. Their veracity can be challenged by defendants in later stages in the case.

Constitutional Issues

Some defendants have argued in dismissal motions that the Title III claim asserted against them violates the U.S. Constitution. These arguments include:

- that the claim constitutes an ex post facto law, in that the conduct alleged to be "trafficking" was lawful at the time the defendants engaged in it (e.g., cruises to Cuba, which at that time were authorised, and even encouraged, by the U.S. government);
- that the claim violates the due process clause because, given the 23-year suspension of Title III, the defendants did not have fair notice that they may be subject to it;
- that the definition of "traffics" is impermissibly vague; and
- that the damages to which Title III exposes defendants – the value of the property, plus 60 years of interest, and, in most cases, trebled, without regard to the defendant's profit or the plaintiff 's loss – is impermissibly excessive and punitive.

To date, only Judge Bloom, in two of the three *Havana Docks* cases before her (against Norwegian and MSC), has ruled on some of those issues, denying dismissal. As she explained in her rulings,

the ex post facto clause protects a defendant, in both criminal and civil contexts, from "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed". However, she concluded that Title III is not such a law – even though it was suspended from 1996 to 2019 and cruises to Cuba were lawful – because, when President Clinton first suspended Title III's application, he stated that he was "allow[ing] Title III to come into force" but was "suspending [only] the right to file suit for 6 months".

Judge Bloom thus accepted the plaintiff 's argument that the cruise lines (like other potential Title III defendants) have been on notice since 1996 that they could be liable for trafficking under Title III. For the same reason, Judge Bloom rejected the defendants' argument that they did not have fair notice that they could be subject to a Title III claim. As she stated, "Neither the [U.S.] government's encouragement and licensure [of the cruises to Cuba] nor the history of suspending Title III is sufficient to establish the lack of fair notice under the Due Process Clause".

Two Significant Procedural Rulings

In addition to the substantive rulings summarised above, courts have issued two significant procedural rulings.

The "Lawful Travel Clause"

The Act states that the term "traffics" does not include four kinds of activities, one of which is: "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". Defendants involved in the travel sector – cruiselines, airlines, online booking services and credit card brands – included this as a ground for dismissal in their dismissal motions. Their position, in part, is that the travel-related services they provided were "lawful"

because they were authorised by U.S. regulation (before the regulations were amended during the current administration).

Judge King in the Bengochea case, and Judge Bloom in the *Havana Docks* cases, both ruled that the lawful travel clause is an affirmative defence, which, therefore, a defendant has the burden of alleging and proving. Therefore, a plaintiff need not include factual allegations in the complaint as to why the clause does not apply. The defendants may continue to assert this defence in later stages in the case.

The European Union's Blocking Statute

This issue is potentially critical to defendants based in the European Union and certain other countries, such as Canada, which adopted so-called blocking statutes shortly after the Helms-Burton Act became law. The blocking statutes, such as European Commission (EC) Regulation 2271/96, generally protect companies in those countries from Title III claims. For example, those countries will not recognise judgments by U.S. courts in Title III cases, and companies sued under Title III have the right to sue plaintiffs (or persons acting on their behalf) that bring Title III claims. The blocking statutes also require persons to notify the EC of any Title III claim asserted against them and prohibit them from complying with discovery orders or otherwise participating in the U.S. case without the EC's permission.

Therefore, some Title III defendants based in EC member countries have sought, and obtained, stays of the U.S. proceedings while the defendants seek the EC's permission to defend the claim. In Canto Marti v Iberostar, in the Southern District of Florida, Judge Scola recently issued an order denying the plaintiff 's motion to lift the stay, continuing the stay until the EC has ruled on Iberostar's application for permission to participate in the lawsuit, and requiring Iberostar to file a report – every 30 days –

on the status of its EC application. Judge Scola noted that:

- violation of the blocking statute could expose Iberostar to fines of up to EUR600,000, imposed by the Spanish government, for each violation;
- the doctrine of international comity – whereby courts in one country may recognise acts of the courts of another country – authorise the stay;
- based on the 30-day reports that Iberostar has submitted, the EC appears to be actively considering the application; and
- considerations of fairness and potential prejudice to each side, among other factors, support the continuation of the stay.

Conclusion

Although the Title III cases filed to date are still at relatively early stages, several district courts judges have issued substantive rulings on motions addressed to the pleadings. Defendants obtained dismissal in four cases on one or more of these grounds:

- the claim was not acquired before March 12, 1996;
- the plaintiff lacks Article III standing;
- the plaintiff failed to plead the defendant's "knowledge and intent"; and
- the plaintiff 's allegations failed to show that the court has personal jurisdiction over the defendant.

One or more of these issues will be addressed on appeal in the Eleventh and Fifth Circuits. In four other cases, judges denied motions to dismiss, including on grounds (b) and (c) above, or on other grounds, such as the due process and ex post facto clauses. Dismissal motions asserting these grounds, among others, are pending in other cases. The rulings to date show that defendants have achieved reasonable success in confronting Title III

claims, and plaintiffs face a long and perilous road in pursuing such claims. Appellate rulings in the cases already on appeal, and on any additional early dismissals, will do much to shape the future paths and outcomes of these cases.

This article was originally published by Chambers and Partners' Litigation 2021 Guide *on December 4, 2020.*

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