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Cuba: Trends & Developments

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CUBA

Trends and Developments

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Update on Helms-Burton Act Cuba "Trafficking" Cases

Introduction

This update on the Helms-Burton Act (the "Act") focuses on the most significant development during this past year: the entry of judgments totalling about USD440 million against four cruise lines in the Havana Docks cases, and the pending appeal from those judgments.

Before we delve into those cases, there have been notable decisions in two other cases. In Del Valle v Trivago GmbH et al, the plaintiffs alleged that defendants trafficked by booking rooms at hotels built on those properties. In February 2023, the Eleventh Circuit reversed a dismissal for lack of personal jurisdiction of claims by heirs of beachfront property owners against hotel booking companies. After the case returned to the trial court, the defendants moved to dismiss on several other grounds; in August 2023, the trial court again dismissed the case, mainly on the ground that the plaintiffs failed to allege sufficient facts to show that defendants acted "knowingly and intentionally", as the Act requires. The plaintiffs have appealed from that second dismissal. The knowledge and intent requirement under the Act, also broadly referred to as "scienter", is already being addressed (among other issues) by the Eleventh Circuit in the Havana Docks cases described below.

In North American Sugar Company v Xianjiang Goldwind Science & Technology Co, et al, the trial court dismissed for lack of personal jurisdiction claims against three sets of defendants that sold and arranged for the shipment and delivery of wind turbine blades to a Cuban port formerly owned by the plaintiff corporation. That decision is also on appeal to the Eleventh Circuit, where the briefing has been completed. A decision is not expected until 2024.

We do not address these cases further because personal jurisdiction decisions are generally fact specific, usually independent of the Act's text. Whether a court can exercise personal jurisdiction over a defendant depends mainly on the contacts the defendant had with the court's forum – Florida, in most cases under the Act – both generally and in relation to the alleged trafficking claim.

As a brief overview, the Act's civil liability provisions grant a US national the right, subject to various limitations and conditions, to sue and collect money damages from persons that have knowingly and intentionally trafficked in – that is, used or derived economic benefit from – property that the Cuban government expropriated in or after 1959 and in which the US national claims an interest.

Havana Docks – the judgments

In December 2022, the trial court in the Southern District of Florida entered large dollar judgments against each of four cruise lines: USD109,671,000 against Carnival and USD109,849,000 against each of Royal Caribbean, Norwegian, and MSC cruise lines (the amounts, here and below, are rounded to the nearest thousand). The four judgments total just under USD440 million.

These large judgments reflect the Act's provisions for calculating damages, which encompass: (i) the greater of either the present value of the property in which a defendant trafficked – in this case, the Havana dock, which each cruise line used to disembark and embark passengers – or its value on the date of expropriation plus interest from then until the action was commenced (in this case, 59 years of interest, from 1960 until 2019); (ii) that amount than tripled; plus (iii) attorneys' fees and costs.

To illustrate, the judgment of USD109,849,000 against each of three cruise lines was reached by: (i) taking USD9,178,000, the value of the dock in 1960 as determined by the US Federal Claims Settlement Commission (FCSC) in 1971 (which the Act deems to be a property's presumptive value); (ii) adding accumulated interest of USD27,377,000, thus arriving at the "current value" of USD36,557,000; (iii) trebling that amount to USD109,671,000; and adding (iv) USD3,465,000 in attorneys' fees and USD224,000 in costs.

Some aspects of this calculation were disputed by the parties, most significantly: (i) whether interest should be simple or compounded annually (the trial court awarded only simple interest); and (ii) whether the trebling should occur before or after interest has been added (the trial court sided with the plaintiff and held "after").

Note that the judgment amount is based on the full "value" of the property awarded against each defendant and is entirely unrelated to the extent of a defendant's trafficking, any actual loss demonstrated by the plaintiff, or any benefit obtained by the defendant. The judgments in this case would have been exactly the same whether a cruise line had used the dock once or a thousand times. If the defendant had been a hotdog vendor that used the same dock, the judgment against the vendor would have been the same. And a judgment against one defendant does not diminish a judgment against a second defendant as to the same property.

Since the suspension of the right to pursue a Helms-Burton civil action was lifted in May 2019, the Havana Docks cases are the only ones of the forty-plus filed where a plaintiff has been awarded a judgment. Assuming the Eleventh Circuit addresses the substantive issues raised, the eventual decision and analysis will likely have significant import for all future cases under the Act.

Havana Docks – the appeal

As of this writing, the appellate briefing is complete. The cruise lines filed their reply briefs in early December 2023, which completed the parties' briefing. Five amicus curiae (friend of court) briefs have also been filed – four in support of the cruise lines and one in support of the plaintiff. The Eleventh Circuit is unlikely to issue its decision until well into 2024.

The cruise lines have raised five main issues on appeal.

The plaintiff's property interest was limited, and ended long before the alleged trafficking

From the outset, the cruise lines sought dismissal because the plaintiff never owned the dock or any structures or equipment on it. Rather, the plaintiff had a 99-year concession from the Cuban government to improve and operate the dock. This concession by its terms was to expire in 2004, about 12 years before the cruise lines began sailing to Cuba. The cruise lines also maintain – based on the opinion of a Cuban law expert who analysed the concession and the Cuban law of ports – that the concession was limited to cargo operations, and that it could not and did not prevent "the public, including cruise lines", from using the dock to embark and disembark passengers.

Regarding the first issue – whether the plaintiff had any property interest at the time of the Cuba cruises in 2016–19, given that its concession would have ended in 2004 – the trial court changed its view twice in written opinions issued during the early stages of these cases. The trial court first denied Carnival's motion to dismiss

on that ground (among others). Later, it reached the opposite conclusion in the cases against the three other cruise lines and dismissed the claims against them on that ground. Finally, after Carnival asked the court to conform the decision in its case to that of the other cruise lines – and the plaintiff sought reconsideration – the trial court concluded that it was bound by the FCSC's 1971 decision, which had not only valued the plaintiff's interest in the dock (at about USD9.2 million), but had also determined that the plaintiff in fact had a property interest in the dock. The trial court therefore denied dismissal on this ground and subsequently granted summary judgment in favour of the plaintiff on this issue.

In its appellee's brief, the plaintiff relies heavily on what it considers to be the conclusive effect the Act gives to the FCSC decisions regarding claim ownership (in addition to the presumptive correctness of its valuation decisions). The plaintiff notes that the property interest that the FCSC valued was not a fee ownership in the dock, but rather the bundle of concessionary rights that the plaintiff held and Cuba expropriated in 1960, which still had 44 years to go. The plaintiff also disagrees with the cruise lines' argument that the concession was limited to cargo operations, and cites text in the concession suggesting that the concession gave it the right to operate the port "and rights in the real property itself".

This issue involves facts peculiar to these cases. Though its resolution is important to the outcome of these cases, it is not likely to have broad application in other Helms-Burton cases.

The lawful travel clause

The Act defines "traffics" to exclude "uses of property *incident* to *lawful* travel to Cuba, to the extent that such... uses of property are *necessary* to the conduct of such travel" (emphasis added). All parties to the appeal agree that the use of the dock was "incident" to (that is, related to) travel to Cuba. The trial court held, however, (i) that the travel was not "lawful", because the passengers spent too much of each day on touristic activities and did not follow a "full schedule" of "people-to-people" activities, and thus were outside of the applicable regulations; and (ii) the use of the dock was not "necessary", because the cruise lines could have used other docks in Cuba.

The cruise lines challenge both these holdings. Regarding the "lawful" element, they point out that OFAC (the Office of Foreign Assets Control, a branch of the US Department of State that, among other functions, administers the Cuba sanctions regulations) had issued a general licence for passengers to travel to Cuba for any of 12 permitted purposes, such as educational or religious activities, as well as "people-to-people" interactions, and that all passengers signed affidavits certifying that they were complying with one or more of these authorised categories. They disagree with the overly strict way in which the trial court interpreted the "full schedule" requirement, which would leave passengers no time during the day for any "free time or recreation" or to "purchase a meal or a bottle of water." They also maintain that they were entitled to rely on the passengers' certifications without having to direct or monitor their activities hour-by-hour.

The plaintiff counters that, given the actual activities that passengers engaged in, as established by discovery and as the trial court painstakingly analysed, "the cruise lines' efforts to characterize those tours as people-to-people educational exchange activities make a mockery of the law". The plaintiff points out, for example, that the cruise lines organised shore tours for their

passengers in Cuba and therefore knew how the passengers spent their time. These activities, the plaintiff asserts, constituted tourism, not people-to-people exchanges, and therefore are not authorised by the regulations, which make clear that tourism is not one of the permitted forms of "lawful" travel to Cuba.

As for the "necessary" element, the parties and the trial court differ first on whether the term means "essential" – in the sense that there is no alternative – or merely "important". Each side has cited court decisions, in cases not involving the Act, that support its interpretation. A recent Supreme Court decision, for example, stated that "necessary" as used in a clause in the US Constitution "does not mean absolutely necessary". Ayestas v Davis, 128 S. Ct. 1080, 1093 (2018).

Even if "necessary" means "essential", the cruise lines maintain, their use of the dock met that standard because their chosen destination was not Cuba generally, but rather Havana, and the Cuban government required cruise lines to use the Havana dock when traveling to Havana; it rejected requests from the cruise lines to use alternatives, such as anchoring offshore and shuttling passengers to shore in smaller vessels.

The plaintiff concedes that "necessary" "is susceptible of two different meanings, one lenient (eg, helpful, useful, convenient) and the other strict (eg, required, critical, essential)". But, it argues, construing "necessary" leniently "would be meaningless", because then the word would add nothing to the statute's requirement that the use of the property be both "incident" and "necessary" to the travel. The plaintiff repeats its argument, which the trial court accepted, that the cruise lines could have docked elsewhere in Cuba, rather than Havana, as some other cruise lines did.

Although trial and appellate courts have previously considered and ruled on the lawful travel clause, they have done so in the context of cases only at the pleadings stage; they have not addressed the clause in the context of the facts of a case, as occurred in the Havana Docks cases. In the pleadings stage decisions, the courts have uniformly held that the issue constitutes an affirmative defence, which, therefore, defendants have the burden of proving. If the Eleventh Circuit reaches the lawful travel issue – which it should unless it reverses the judgments on other grounds – the analysis will be influential in other Helms-Burton cases.

Knowledge and intent

The Act requires that a defendant have acted "knowingly and intentionally" in order to be liable for trafficking. The cruise lines (except Carnival) argue that this scienter requirement must be strictly applied given: (i) the punitive nature of the remedy that the Act imposes on a trafficker, and (ii) the difficult dividing line in these cases between "lawful conduct the government wants to promote [cruising to Cuba] and unlawful conduct it wants to prevent [trafficking in property expropriated from US nationals]". They argue that the trial court erred in holding that the cruise lines acted with the requisite scienter, given that the plaintiff's concessionary rights, if they had not been expropriated in 1960, would have expired in 2004, 12 years before the cruise lines first sailed to Cuba (as discussed above).

The plaintiff asserts that the cruise lines had the requisite knowledge and intent because they knew, by no later than February 2019, of the 1971 certified claim decision by the FCSC, which is public, and which identifies the very

dock that the cruise lines used as the property that Cuba confiscated from the plaintiff in 1960. The plaintiff asserts that the scienter requirement in the Act applies, not to "trafficking", with "the additional requirements and legal defences that entails", but rather to "engaging in a commercial activity using confiscated property". In other words, according to the plaintiff, that the cruise lines believed they had a valid defence to a trafficking claim based on the expiration of the concession in 2004 does not negate the district court's finding that they knew and intended to commercially exploit property that Cuba had confiscated from the plaintiff. The plaintiff also argues that the cruise lines are estopped from making this argument because they blocked the plaintiff's effort to take discovery regarding the cruise lines' knowledge at the time of the Cuba sailings, representing to the district court that "they would not present evidence to a factfinder regarding any such beliefs in the legality of their conduct".

Because scienter is a required element of a trafficking claim, the Eleventh Circuit's analysis of this issue should have broad applicability.

Excessive damages

The cruise lines' first argument in this regard is based on the principle that "a plaintiff is entitled to only one satisfaction for a single injury". In this case, however, the plaintiff stands to recover all of the damages that the Act provides for – the entire present value of the dock, tripled, plus fees and costs, nearly USD110 million – not once, but four times. And, if the plaintiff were to identify other "traffickers" in the future, it could recover the same amount from each of them yet again. As one of the cruise lines states, "a plaintiff with a claim to property that was used by 100 or 1,000 defendants could recover 100 or 1,000 times the value of its claim".

The trial court decided, however, that the Act by its terms provides for recovery from each trafficker, in good part because a plaintiff should be entitled to recover for future acts of trafficking. Otherwise, once one defendant paid a judgment to a plaintiff, the Act would be toothless in deterring anyone else from trafficking in the same property. In supporting this aspect of the trial court's decision, the plaintiff notes that the Act "nowhere states that a trafficker is *not* liable for damages if another trafficker has already paid damages for trafficking in the same confiscated property" (emphasis in original). The plaintiff also argues that each cruise line is properly liable for the full amount of the statutory damages because each inflicted a separate injury on the plaintiff by using the dock "without plaintiff's authorisation". If any cruise line had requested (and paid for) the plaintiff's authorisation to use the dock, then it would not have been liable for trafficking.

The cruise lines also argue that damages are impermissibly excessive under the Due Process Clause of the US Constitution because they are "wholly disproportionate to the offence and obviously unreasonable". The trial court dismissed this argument because the judgment against each cruise line – large though it may seem – is what the Act requires under its express terms and, in any event, is not disproportionate to the substantial revenue that each cruise line earned from the Cuba cruises. The plaintiff echoes these points, and adds that Congress designed the damages provision as it did, based on the value of the property and including interest and, in appropriate cases, trebling, precisely to deter trafficking in property confiscated by Cuba from US nationals.

Three of the cruise lines also raise the argument that the trebling should be applied before rather

than after interest is added to the 1960 value of the dock. This would have reduced the judgment amounts considerably. The plaintiff's response is, again, that the trial court properly followed the text of the Act, which requires trebling of the present value of the property, which includes accumulated interest.

The plaintiff is not a US national

The plaintiff, Havana Docks, is a Delaware corporation with its principal place of business in the UK, according to the cruise lines. The cruise lines maintain that Havana Docks is not a US national because, they say, the Act defines a "US national", when referring to an entity, as one that is both organised and "has its principal place of business" in the US; however, they argue, Havana Dock's principal place of business – its "nerve centre" – is actually in the UK because its president resides in London and he conducts the company's affairs from the UK.

The plaintiff describes this argument as "preposterous". It points out that Havana Dock's only business for the past 60 years has been to maintain its corporate status solely because of the prospect of recovering on its claim. The corporation has only two officers; although the president resides in the UK, the corporation's affairs are managed and directed by the officer in Kentucky. Further, the company has consistently listed the Kentucky office address as its headquarters. Again, although the resolution of this issue is important to the outcome of these cases, it is not likely to have broad application in many other Helms-Burton cases.

Amicus briefs

The friend-of-court briefs have focused on the "lawful travel" and damage amount issues. Three of the briefs supporting the cruise lines – by the Cruise Lines International Association, the US Travel Association, and Peter Kucik, a former official of OFAC – argue that the cruise lines are protected by the lawful travel clause, especially because they relied on OFAC's interpretation, as well as assurances and encouragement by the Obama Administration, that travel to Cuba was encouraged by US policy at the time and was not in violation of the Cuba sanctions regulations.

The other brief supportive of the cruise lines, by the US Chamber of Commerce, argues mainly that the Act's damages provisions result in impermissibly excessive and unconstitutional damages.

The one amicus brief in support of the plaintiff was filed by Daniel Fisk, who, from 1994 to 1997 – the period during which the Act was debated in Congress and signed into law – was Associate Counsel of the US Senate Foreign Relations Committee, of which the Act's co-sponsor, Senator Jesse Helms, was the chairman. Fisk describes himself as a "member of the congressional staff team who played a substantial role in the drafting and passing of the... Act". Mr Fisk argues that the judgments against the cruise lines should be affirmed because they are consistent with the "purpose, substance, and deterrent nature of the Act", and they achieve "the Act's role as part of longstanding US policy to deny resources to Cuba's Communist regime and to protect the fundamental rights of US claimants harmed by the regime's unlawful takings of their property".

Conclusion

Persons involved in Helms-Burton cases – parties, counsel, judges – as well as other interested observers, are keeping a close eye on the Havana Docks appellate proceedings. The amounts at stake are considerable, the issues to

be decided are interesting and have been well-briefed, and the decision will be consequential. Stay tuned.

Akerman LLP has developed a comprehensive analysis of the legal risks, potential actions, and defences relating to claims filed as a result of the lifting of the suspension of Title III of the Helms-Burton Act in 2019. The firm currently represents several clients in the defence of claims resulting from the activation of this provision. This article should not be considered as a reflection of Akerman LLP's position in those cases.

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