

## FIRST LAWSUITS FILED UNDER THE HELMS-BURTON ACT FOR TRAFFICKING IN SEIZED CUBAN ASSETS

On April 17, 2019, the Trump Administration announced, in a break from the practice of three previous administrations, that it would no longer waive a provision of the "Helms-Burton Act" that allows US parties to sue non-US persons and entities for "trafficking" in property confiscated by the Cuban government under the Castro regime—and potentially receive treble damages. The definition of "trafficking" is extremely broad, and immediately after the suspension was lifted, on May 2, 2019, two suits were filed in federal court in Miami against Carnival Cruise Lines for using the services of two port facilities allegedly confiscated in 1960.

### The Title III Private Action Provision

Title III of the Helms-Burton Act, or Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, enacted over twenty years ago, would have allowed US parties to sue to recover damages from those who trafficked in their confiscated property. However, the Act included a provision allowing the President to suspend the right to sue, for a renewable six-month period. Every President since President Clinton has done so.

In an effort to increase pressure on Cuba for its support of President Maduro of Venezuela, the Trump Administration announced in April that it will no longer suspend the lawsuit provision. This action was part of a package of financial and travel sanctions measures announced at the same time. It took effect on May 2, 2019.

### First Lawsuits Filed Immediately Upon Lifting of the Suspension

Immediately upon the lifting of the suspension, two suits were filed in the US District Court in Miami alleging that Carnival Cruise Lines had trafficked in confiscated property.

Both were filed by the same law firm, and they include virtually identical allegations. The first, *Javier Garcia-Bengochea v. Carnival Corp.* (No. 19-CV-21725), alleges that the Cuban Government confiscated certain waterfront commercial property, 82.5% owned by the plaintiff at the time, in the Port of Santiago de Cuba in October 1960. It further alleges that Carnival Cruise Lines "regularly embark[ed] and disembark[ed] its passengers" on that property " without the authorization of" the plaintiff. The complaint seeks the greater of "the amount certified by the Foreign Claims Settlement Commission, plus interest" (a point addressed further below); the amount certified by a special master; or the fair market value of the property – multiplied by three.

The second suit, *Havana Docks Corp. v. Carnival Corp.* (No. 19-CV 21724), alleges that the Cuban Government confiscated the Havana Cruise Port Terminal in 1960, and that Carnival Cruise Lines has since used that property to embark and disembark its passengers. The complaint seeks the same form of damages, as the *Garcia-Bengochea* complaint, also trebled.

These cases are at the very initial stages, and will certainly involve intense motions practice and potentially further proceedings in the months to come.

## Implications

The change to US policy, as illuminated by these complaints, raises a variety of questions.

First, the big picture. Numerous US parties have potential claims to confiscated assets in Cuba. And the definition of "trafficking" is so broad that numerous others are at risk for lawsuits claiming that they profited from the use of those assets.

Second, the definition of "traffics." The Act defines a person who traffics as anyone who knowingly and intentionally:

- i. sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
- ii. engages in a commercial activity using or otherwise benefiting from confiscated property, or
- iii. causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person, without the authorization of any United States national who holds a claim to the property.

The second and third prongs are particularly broad. For example, the *Carnival* plaintiffs have alleged that the second prong provides them claims against Carnival for "engage[ing] in a commercial activity using or otherwise benefitting from confiscated property" – i.e., the confiscated docks. And the third sweeps in others who may participate in or profit from that activity, raising the prospect of parent company or business partner liability.

The Act distinguishes between claims that have been certified by the U.S. Foreign Claims Settlement Commission – which is a body within the US Department of

Justice with jurisdiction over claims against foreign governments – and those that have not. Certified claims are subject to the full damages provisions – including treble damages. Uncertified claims are subject to damages if the trafficking continues after the defendant's receipt of notice of the claim. The two cases demonstrate this difference, as the pleadings lay out which claims are certified and which are uncertified. The Act has a two year statute of limitations, running from the date that "the trafficking giving rise to the action has ceased to occur."

No case has litigated these issues to-date, and persons and companies will have arguments in response to Helms-Burton Act claims. But litigation is more than a threat; it has begun to happen.

### **Implications Outside the US**

Other jurisdictions – in particular Canada and the European Union – have enacted counter-measures designed to blunt the effects of Helms-Burton Act litigation; in particular "clawback" provisions allowing defendants to recover an equivalent amount of damages from successful plaintiffs. And the EU challenged the Act in the WTO upon its enactment. While that challenge was suspended during the US suspension of the lawsuit provision, it may well be raised again now.

### **Conclusion**

Long-dormant, as a result of the current Administration's policy shift Title III of the Helms-Burton Act now presents a real risk for persons and companies doing business with Cuba. It is as yet unclear how broadly the Act will be interpreted, but companies should consider their potential risk under the Act when conducting or entering into business directly and indirectly involving Cuba.

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