Helms-Burton Lawsuits: Recent Decisions Clarify the Statute's Limits as Claims Continue

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In May 2019, the United States government made available a private right of action under Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (also known as Helms-Burton), 22 U.S.C. §§ 6021-6091. The private cause of action, which had lain dormant for over 22 years (it had been suspended by executive order), purportedly provides U.S. nationals whose "property" was "confiscated" by the Cuban government with a special rights of action. Specifically, Title III of Helms-Burton allows U.S. nationals that "own" a "claim" over such property to sue persons and entities engaged in "trafficking" in that property.[1] Trafficking is defined as "knowingly and intentionally" taking various actions with respect to confiscated property, including "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property."[2] A qualifying plaintiff may recover from the defendant the value of the confiscated property, potentially with treble damages, as well as attorney's fees.

Title III's activation created immediate risks for companies doing business with or involving Cuba. Since May 2019, plaintiffs have brought Helms-Burton lawsuits against U.S. and international companies in a variety of sectors, including banking and finance, tourism, oil and gas, and property development, all on the theory that the defendants, by doing business in Cuba, have trafficked in property confiscated from those plaintiffs. Many, but not all, of these lawsuits were brought in the United States District Court in the Southern District of Florida (S.D. Fla.), where a number of alleged victims of Castro-era seizures reside.

These lawsuits already have given rise to case law that, at least preliminarily, identifies the basic pleadings standards that such plaintiffs must satisfy in order to withstand a motion to dismiss. These cases thus afford some guidance to defendants (or potential defendants) as they analyze their exposure to Title III claims.

Plaintiff Must Plead a Claim to Property Expropriated by the Cuban Government and Also Show That the Defendant Trafficked in That Same Asset

Among the first lawsuits brought under Title III were a group of claims in the S.D. Fla. against the major cruise lines whose ships had, until recently, been docking in the ports of Havana and Santiago, Cuba. Several of these lawsuits were brought by Havana Docks Corporation, the alleged former owner of the commercial leasehold property known as the Havana Cruise Port Terminal, a waterfront facility that was expropriated in the early years of the Castro regime. The plaintiff alleged that the cruise line companies had trafficked in their former property from 2017-18, in that they had allegedly caused their ships to embark and disembark cruise passengers in Cuba, which allegedly satisfied Title III's definition of trafficking.

The cruise line companies moved to dismiss on the grounds that, among other things, the long-term leasehold interests once held by the plaintiffs would have expired in 2004. They argued that they could not have trafficked in property claimed by plaintiffs in such circumstances. In January 2020, Judge Beth Bloom of the S.D. Fla. agreed with that argument and dismissed two of the plaintiff's actions.[3] In doing so, the court focused on the statute's requirement that a plaintiff must own a claim to confiscated property.

[1] 22 U.S.C. § 6085(a)(1).

[2] 22 U.S.C. § 6023(13).

[3] *Havana Docks Corp. v. MSC Cruises SA Co.*, No. 19-CV-23588, 2020 WL 59637, at *1 (S.D. Fla. Jan. 6, 2020) (*Havana/MSC*); Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd., No. 19-CV-23591, 2020 WL 70988, at *1 (S.D. Fla. Jan. 7, 2020) (*Havana/NCL*).

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Such a claim, it held, "can only extend as far as its property interest at the time of the Cuban Government's wrongful confiscation."[4] Thus, "if the interest at issue is a leasehold, following the plain language of the statute, a person would have to *traffic in the leasehold* in order for that person to be liable to the owner of the claim to the leasehold."[5] As neither of the defendants could be said to have done this (their ships docked in harbor more than a decade after the leasehold would have expired), there could be no trafficking claim.

The court explained that, if Title III were read more expansively, it would impermissibly broaden the plaintiff's Title III rights beyond the original scope of its property rights. Were this permitted, the court reasoned, a defendant might be "'trafficking' in confiscated property for which someone else would properly own a claim."[6]

The Havana Docks cases, if upheld on appeal, indicate that Helms-Burton claims concerning confiscated leasehold property will cease to be viable when the date of the original leasehold expires. It further suggests that, in order to establish trafficking, a Helms-Burton plaintiff will be required to identify both its claim over confiscated property and the nature of the property with some specificity in order for a trafficking claim to be tested.

Plaintiff Must Plausibly Allege That Defendant Knowingly Trafficked in Expropriated Assets

Other decisions have focused on Helms-Burton's requirement that the defendant's alleged trafficking was "knowing[] and intentional[]." This became an issue in *Gonzalez v. Amazon.com* (also filed in the S.D. Fla.), where a plaintiff accused an online retailer and an associated merchant of trafficking in confiscated property now owned by the Cuban government — specifically, charcoal that had been produced on land once owned by the plaintiff's family. The defendants moved to dismiss, claiming that the plaintiff had not plausibly shown that he knew he was using or benefiting from his family's former property.

On March 10, 2020, Judge Robert Scola of the S.D. Fla held that the defendants' knowledge had not been adequately pleaded. The court cited the legislative history of Helms-Burton, in particular a lawmaker's statement (during 1996 congressional debates) that "the only companies that will run afoul of this new law are those that are knowingly and intentionally trafficking in the stolen property of U.S. citizens."[7] In *Gonzalez*, the plaintiff claimed that it could be inferred that the defendants knew they were trafficking in confiscated Cuban farmland property because the charcoal was advertised as Direct from Farmers in Cuba.[8] But the court held that this conclusory allegation failed the basic federal pleadings standards established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).[9] It held that the mere fact that the charcoal was produced on Cuban farmland was not sufficient to "demonstrate that the defendants knew the property was confiscated by the Cuban government" or "that it was owned by a United States citizen."[10] As the remainder of the plaintiff's claims were conclusory in nature, the complaint was dismissed, with leave to replead.[11]

The holding in *Gonzalez* indicates that courts will require plaintiffs to show more than mere suspicion that a state-owned asset within Cuba had been confiscated, but that a plaintiff also must show the defendants' knowledge that the asset had been both confiscated and "owned" by an American citizen. This is a potentially significant hurdle for plaintiffs in future Helms-Burton claims.

Plaintiff Must Demonstrate Claim Was Acquired Prior to March 12, 1996

The court in *Gonzalez* also focused on Helms-Burton's general prohibition on a plaintiff's claims involving confiscated property unless a plaintiff "acquire[d]ownership of the claim" to that property before March 12, 1996.[12] Judge Scola held that the plaintiff had failed to satisfy the Act's requirements concerning claims ownership because the complaint "lack[ed] allegations regarding when Gonzalez inherited the claim from his grandfather, when Gonzalez became a United States citizen, if Gonzalez's grandfather was a United States citizen, and, if so, when Gonzalez's grandfather became a citizen."[13]

The question of acquisition through heirship has arisen in other cases. In *Garcia-Bengochea v. Carnival Corp*., there is a pending motion to dismiss on the ground that the plaintiffs inherited their claims after March 12, 1996. In February 2020, a proposed amicus brief opposing such dismissal was submitted by former Rep. Dan Burton, R-Ind., and former Sen. Robert Torricelli,

[4] *Havana/MSC*, 2020 WL 59637, at *3; *accord Havana/NCL*, 2020 WL 70988, at *3.

[5] *Havana/MSC*, 2020 WL 59637, at *3 (emphasis added).

[6] *Id.* at *4; *accord Havana/NCL*, 2020 WL 70988, at *4. A motion for reconsideration of the court's order remains pending at the current date.

[7] *Gonzalez v. Amazon.com, Inc.*, No. 19-23988-CIV, 2020 WL 1169125, at *1 (S.D. Fla. Mar. 11, 2020).

[8] *Id.*

[9] *Id.* at *2; *see also id.* at *1 (emphasizing that, under *Twombly*, "a plaintiff must … articulate 'enough facts to state a claim to relief that is plausible on its face.'" (citing *Twombly*, 550 U.S. at 570).

[10] *Id.* at *2

[11] An amended complaint was filed on March 25, 2020, which purports to expand on both the knowledge and claims ownership issues.

[12] 22 U.S.C. § 6082(a)(4)(B). This requirement does not apply if the property was confiscated after that date, but this was inapplicable in Gonzalez and indeed most other cases, because it appears most property seizures occurred in the early years of the Castro-led revolution.

[13] *Gonzalez* at *2.

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D-N.J., two of the chief sponsors of Helms-Burton.[14] In their proposed brief, they argue for expansive approach to claims ownership, arguing that "Congress intended that heirs should enjoy the right to sue under Title III even if they inherited their claims after March 12, 1996."[15] In response, defendants in that case have argued that "there is no particular reason to accept the brief as neither Congressman Burton nor Torricelli are entitled to special consideration in interpreting the Helms-Burton Act," and that "'[r]ecent statements by Senators or Congressmen about the meaning or intent of past legislation are irrelevant and may not be considered by a court interpreting the legislation.'"[16]

While the fate of this particular *amicus* submission remains unresolved (the dismissal motion in *Garcia-Bengochea* is also still pending at the time of writing), it is possible that further amici, on both sides of this issue, will emerge. Moreover, the statutory cut-off of March 12, 1996, likely will become important in other Helms-Burton cases. Indeed, the fact that some original owners of alleged "claims" have now died is an unfortunate but inevitable consequence of the 22-year lag between Title III's passage and the activation of the private right of action, as well as the fact that Fidel Castro's revolutionary government first assumed power in 1959.

Helms-Burton litigation is unusually challenging, not just because of the statute's unique provisions and subject matter, but also because many of the Castro government's asset seizures occurred approximately 60 years ago. In *Gonzalez* and the two *Havana Docks* decisions, the courts examined particular elements of Helms-Burton (e.g., the "property" component, the intent requirement and the rules regarding claims acquisition) and then applied the general rules of federal pleading to determine whether, in its judgment, an adequate Helms-Burton claim had been pled. Based on these decisions, litigants should expect that federal courts will apply a degree of rigor in analyzing Helms-Burton complaints and thus will require plaintiffs to do more than simply recite the statute's elements. This appears particularly important where issues of knowledge or intent are being pled.

At the same time, Helms-Burton case law is still in its early stages, and the claims arising under the statute have yet to be examined at the federal appellate level. It is possible that one of the above cases will give the Eleventh Circuit (which hears appeals from the S.D. Fla.), or perhaps even the United States Supreme Court, the chance to weigh in on these issues and supply further guidance to litigants on the criteria for a viable Helms-Burton claim.

[14] *See Garcia-Bengochea v. Carnival Corp.* No. 1:19-cv-21725-JLK, motion of former Rep. Burton and former Sen. Robert Torricelli for leave to file *amicus curiae* brief (S.D. Fla., Feb. 24, 2020).

[15] *See Garcia-Bengochea v. Carnival Corp.* No. 1:19-cv-21725-JLK, proposed brief of former Rep. Dan Burton and former Sen. Robert Torricelli as *amicus curiae* at 2 (S.D. Fla., Feb. 24, 2020).

[16] *Garcia-Bengochea v. Carnival Corp.* No. 1:19-cv-21725-JLK, defendants' brief in opposition to motion of former Rep. Dan Burton and former Sen. Robert Torricelli for leave to file *amicus curiae* brief at 5 (S.D. Fla., Feb. 26, 2020).