

Title III Suits Under The Helms-Burton Act — A Primer

The Trump administration has announced that it will allow the suspension of Title III of the Helms-Burton Act to lapse as of May 2, 2019, thereby allowing eligible individuals and companies to file lawsuits in U.S. courts seeking compensation for property expropriated by the Cuban government since 1959. This is the first time that Title III will be activated, after having been suspended by every president since President Clinton just after the law became effective in 1996.

I. Background

Since 2017, recently restored diplomatic relations between the United States and Cuba have been rapidly deteriorating: the Trump administration reinstated travel restrictions for U.S. citizens to Cuba and published the Cuba Restricted List, prohibiting U.S. individuals and companies from doing business with the entities listed. In November 2018, the U.S. administration signaled that it was giving Title III of the Helms-Burton Act a serious review. Accordingly, in March, the administration announced that it would only suspend Title III for another 45 days instead of the previously standard 6 months. This signaled a possible lifting of the suspension. On April 3, 2019 the administration announced that the suspension would be renewed for just 14 days from its April 17 expiration date, through May 1. And on April 17, the administration announced that it would not renew Title III's suspension after the May 1 expiration date, thereby allowing suits under Title III as of that date.

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, known as the “Helms-Burton Act” after its sponsors, was initially tabled in 1995. In 1996, however, the Cuban Air Force shot down two civilian planes flown by a Miami-based nonprofit group known as “Brothers to the Rescue”. Two weeks later, Congress passed the law, and President Clinton signed it.

The Helms-Burton Act had four primary objectives: (1) to codify the United States’ embargo on Cuba, thereby requiring consent of Congress for modification of the sanctions; (2) to articulate explicit conditions precedent to be met before the embargo can be lifted; (3) to dissuade foreign countries from doing business with Cuba and exclude any foreign nationals from the United States who traffic in confiscated property; and (4) to protect Americans’ rights in property confiscated by the Castro regime.

Title III of the Helms-Burton Act created a private right of action for U.S. nationals in U.S. courts against those individuals or corporations “trafficking” in property expropriated by the Cuban government since 1959. The activation of Title III, after its 23-year suspension, exposes companies around the world, but particularly in the U.S. and Canada, as well as in Europe (primarily France and Spain), to legal action in U.S. courts by those whose property was confiscated by the Castro regime between 1959 and 1996.

Some of the international criticism of Title III is centered around how broadly the Helms-Burton Act defines “trafficking.” The term essentially creates civil liability for nearly any direct or indirect involvement in a business that has interest in, or derives revenue from, property that was confiscated by the Cuban government, provided the venture was “knowingly and intentionally”

entered into. Notably, because Title III has been inactive since the enactment of the law, there is substantial uncertainty as to courts' views on the breadth of scope this term will be given in litigation arising under Title III.

Claims can be brought by both U.S. and foreign persons and companies who were either U.S. citizens or were otherwise subject to the jurisdiction of the United States at the time that their property was confiscated and who submitted claims that were evaluated and certified by the U.S. Justice Department's Foreign Claims Settlement Commission ("FCSC"). These "certified claims" are afforded priority and are given special status.

Nevertheless, so called "uncertified claims"—those that were not presented for certification before the FCSC—may also be brought by individuals and companies who were Cuban (or nationals of other countries, but not the United States) at the time their property was confiscated, and who later became naturalized or incorporated in the United States. Prospective plaintiffs asserting claims that have not already been certified by the Foreign Claims Settlement Commission could face challenges in establishing title to confiscated properties. So while U.S. plaintiffs whose property was confiscated in the 1960s but never had their claims certified could bring claims, they will have the additional hurdle of proving they were the legitimate owners of the property.

The Helms-Burton Act provides civil remedies in the form of money damages that are the greater of (1) the amount certified by the FCSC plus interest; (2) the amount determined by the court-appointed special master plus interest; or (3) the fair market value of the property, calculated as either current value of the property or the value of the property at the time of expropriation plus interest, whichever is greater. The claimant may also recover court costs and attorneys' fees.

Title III also provides treble damages for the increased liability incurred for claims certified by the FCSC, and by defendants who fail to cease "trafficking" in the confiscated property within 30 days after receiving notice by a claimant that an action is to be initiated against them.

II. Opinion

Potential claims

Potential claimants should carefully evaluate certain factors at the outset to ensure the validity of their claims.

Title III specifies that only cases in which the amount in controversy exceeds \$50,000 (exclusive of interest costs, and attorneys' fees) may be brought under the Section. Of the approximately 6,000 certified claims, approximately 900 refer to original losses in excess of \$50,000. Importantly, with almost 60 years of interest, these claims will have grown considerably in value. Considering that Cubans who became naturalized U.S. citizens during the Castro regime are eligible to bring claims, however, the number of potential law suits could be even higher.

Unless the claim has already been certified by the Foreign Claims Settlement Commission, claimants will have to present evidence of legal ownership of the confiscated property to a special master appointed by the court, who will make the determination for evidentiary purposes regarding the validity of the ownership for the claim.

Potential Defenses

There are a number of potential defenses to claims brought under Title III of the Helms-Burton Act.

Personal Jurisdiction. A primary defense to any claim under Title III will be a challenge to personal jurisdiction. This is especially true for non-U.S. defendants who do not themselves do business in the United States. To establish general jurisdiction, plaintiffs must show the defendant is “at home” under *Daimler AG v. Bauman*, 571 U.S. 117 (2014). This can be very difficult to show for non-U.S. defendants who do not have a principal place of business in the United States. Likewise, to establish specific jurisdiction, plaintiffs must show that their claims arise from contacts in the United States. Thus, the alleged trafficking activity must necessarily take place in the United States. And to establish quasi in rem jurisdiction, a plaintiff must identify property of the defendant that is within the court’s district and show that the defendant has “sufficient minimum contacts” with the forum state such that the action does not offend “traditional notions of fair play and substantial justice.” As such, it will also be extremely difficult to establish quasi in rem jurisdiction over a foreign defendant whose only property in the forum is not the subject of the litigation.

Statute of Limitations and other bars. Under Title III, claims brought more than two years after the trafficking has ceased are time-barred, and U.S. nationals who were eligible to bring claims before the Foreign Claims Settlement Commission, but failed to do so, cannot bring an action now. It is unclear, however, whether courts will apply “equitable tolling” to allow otherwise stale suits to proceed. Furthermore, in any claim previously denied by the Commission, courts must accept the Commission’s findings as conclusive.

Blocking statutes/foreign extraterritorial measures. Some jurisdictions, including Canada, Mexico, the United Kingdom, and the European Union, passed legislation to block judgments under the act, making them essentially unenforceable in the jurisdiction where the defendants have assets. As such, even if they are successful in pursuing a Title III action in the U.S., plaintiffs with interests in jurisdictions that have adopted blocking legislation may be deterred from bringing the claim due to the inability to collect on their judgments and the potential adverse consequences they may face overseas. For example, many potential plaintiffs are large corporate groups that own assets in foreign jurisdictions that have adopted “clawback” remedies. These plaintiffs may be deterred from bringing a Title III action in the U.S. by the likelihood of retaliatory litigation abroad.

Exemption of certain industries. Title III of the Helms-Burton Act carves out some limited exceptions from the term “trafficking,” including “the delivery of international telecommunication signals to Cuba,” as well as trading and holding publicly traded securities, and the “transactions and uses of property incident to *lawful* travel to Cuba.”

Challenging title to confiscated properties. The ability to challenge title to confiscated properties turns on whether a claim has been certified by the Foreign Claims Settlement Commission. For certified claims, certification serves as conclusive proof of ownership and provides a presumption in favor of the valuation of the property set by the Commission, which is rebuttable only by clear and convincing evidence. However, defendants facing uncertified claims may challenge title and valuation of a property under a lower evidentiary burden.

Constitutionality/legality of Title III. Some commentators have suggested that Title III of the Helms-Burton Act may be vulnerable to constitutional challenges. Potential sources of constitutional or legal challenges to Title III include the Act of State doctrine, which limits the ability of courts to cast judgment on the acts of foreign governments in their own territory, as well as the equal protection and due process clauses. It should be noted, however, that Helms-Burton expressly renders the Act of State doctrine inapplicable to suits brought under Title III. Certain other constitutional or legal challenges, while theoretically available, will likely be uphill battles.

International legal considerations. Shortly after Congress passed the Helms-Burton Act, several countries initiated proceedings against the United States in the WTO, claiming that Title III violated the United States' obligations under international law. However, these proceedings were dismissed after the United States suspended Title III. Nevertheless, defendants facing a claim under Title III could encourage foreign countries to reinitiate proceedings before the WTO, which may in turn, put pressure on the United States to reimplement the stay on Title III. Moreover, Title III will likely be a subject of discussion at upcoming bilateral negotiations between the United States and the EU and the United States and Japan. Potentially affected companies, in discussing Helms-Burton with their respective governments, should stress the enormity of the potential legal and financial consequences of the decision to lift Title III's suspension.

III. Significance

Next steps for potentially affected companies

Looking forward, companies, and individuals, should take the following proactive steps to limit their exposure.

Contact and consult with knowledgeable counsel. Given the possible value of Title III actions, potentially affected companies should secure the advice of counsel with expertise in Title III and related issues. Doing so is especially important because it is expected that claimants will swiftly begin to file suit now that the Administration has lifted Title III's suspension.

Conduct due diligence to evaluate potential exposure. Companies should evaluate their assets and business interests to determine whether they can be traced back to property confiscated by Cuba or whether they otherwise relate to such property. Companies should also carefully review future business opportunities for potential liability under Title III, and consider including provisions in future contracts requiring disclosure, representations, and warranties with respect to "trafficking" as defined under Title III. Foreign entities should become familiar with the laws of foreign countries to identify potential blocking statutes, claw-back provisions, and other potential protections.

Document holds. Potentially affected companies should also consider implementing litigation holds to ensure that they do not run afoul of discovery obligations in future litigation. Any time litigation can be reasonably anticipated, particularly here with respect to claims that are already certified, at-risk companies must ensure that all potentially relevant electronically stored or other information is preserved. These efforts should include issuance of document holds to key individuals with any information about Cuba-related assets.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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