FOUR YEARS SINCE THE TRIGGERING OF TITLE III OF HELMS BURTON: THE PLAINTIFFS HAVE NOT DONE WELL

Cuatro años desde la activación del Título III de la Ley Helms-Burton: Los demandantes no han tenido éxito

Dr. Peter Fox

Partner, Law firm of Scoolidge, Peters, Russotti & Fox LLP
New York (Estados Unidos)
https://orcid.org/0009-0008-4767-093X
pfox@sprfllp.com

Dr. Natalia Delgado

Director, Cuba Capacity Building Project at Columbia Law School
New York (Estados Unidos)
https://orcid.org/0009-0003-2684-7488
ndelgado@law.columbia.edu

Abstract

This article discusses key court decisions interpreting the law known as "Helms-Burton". The discussion reviews how the courts have interpreted the statute, describing the legal terrain, the elements of the claim under the statute, statutory and constitutional limitations, and jurisdictional issues. Moreover, it explains how the passage of time –from the effective date of the statute until the expiration of the last presidential suspension of Title III of the statute– has become a near total bar to Title III claims.

Key words: private right of action; trafficking; confiscation; Helms-Burton; Title III.

Resumen

Este artículo analiza las decisiones judiciales clave que interpretan la ley conocida como "Helms-Burton". La discusión revisa cómo los tribunales han interpretado el estatuto, describiendo el terreno legal, los elementos de la reclamación bajo el estatuto, las limitaciones estatutarias y constitucionales y los problemas

de jurisdicción. Además, explica cómo el paso del tiempo, desde la fecha efectiva del estatuto hasta la expiración de la última suspensión presidencial del Título III del estatuto, se ha convertido en una barrera casi total para las reclamaciones del Título III.

Palabras clave: derecho de acción privada; traficar; confiscar; Helms-Burton, Título III.

Sumario

1. INTRODUCTION

It has been more than four years since the expiration of the last presidential suspension of Title III of the Cuban Liberty and Democratic Solidarity Act –better known as "Helms Burton"[1]– and so now is an appropriate time to assess the status of litigation commended under Title III's private right of action.

With one major exception, plaintiffs have not done well. Indeed, aside from the Havana Dock Corporation's stunning $400 million-plus combined judgement against four cruise lines, plaintiffs have lost every major judicially resolved case.[2]

Although statutory and constitutional limitations on the federal court's exercise of personal jurisdiction have been an obstacle for plaintiffs (and almost certainly a major deterrent to prospective plaintiffs who opted not to sue), it is the passage of time that has most worked against Title III plaintiffs: The passage of time since the confiscation of their property, which has made it difficult to adequately allege a defendant's scienter required to establish that the defendant "trafficked" in the property. And, most importantly, the amount of time that Title III remained presidentially suspended.

---

1 22 U.S.C. §6021 *et seq*.

2 This analysis does not purport to be an exhaustive survey of Title III litigation, but significant research reveals only one plaintiff – Havana Docks– has received a favorable judgment. Several notable cases remain pending, however.

Because 23 years passed between the enactment of Helms-Burton and the expiration of the last presidential suspension, legislative language limiting Title III's right of action to persons who "acquired" ownership of claim to confiscated properties before March 12, 1996 –which must have seemed innocuous when the law as drafted in 1996, has become a near total bar to Title III claims based on the confiscation of property originally owned by individuals or Cuban companies.

Unlike the jurisdictional problems, the plaintiff's bar does not appear to have initially grasped the breadth the courts would give to the term "acquire," and case after case has been dismissed on the pleadings because the plaintiff – who nearly always "acquired" the claim through inheritance – cannot allege ownership of it prior to March 1996.

The specifics of these pleading obstacles, along with several other issues on which the courts have now passed are described below.

2. THE LEGAL TERRAIN

2.1. HELMS-BURTON

President Clinton signed Helms-Burton into law on March 12, 1996.[3] The legislation reflects an effort to increase pressure on the Cuban government in the wake of the Soviet Union's collapse and corresponding economic uncertainty on the island. In addition to codifying the United States' existing trade embargo against Cuba,[4] Congress targeted foreign private businesses that might invest in the county. Title IV of Helms-Burton bars individuals from entering the United States who have economic ties to property expropriated from U.S. nationals,[5] and Title III provides a private right of action against such individuals and like-situated business organizations.

But, perhaps in response to separation-of-powers concerns, Congress delegated authority to the President to suspend the right of action under Title III in six-month intervals.[6] President Clinton did just that upon the effective date

[3] Congress. Gov., Actions Overview H.R.927 - 104th Congress (1995-1996), https://www.congress.gov/bill/104th-congress/house-bill/927/actions.

[4] *See* 22 U.S.C. § 6032.

[5] *See id.* § 6091.

[6] *See id.* §§ 6085(c)(1)-(2)

of Title III,[7] and every president has done the same since then until President Trump's decision in April 2019.

2.1.1. Title III: The Private Right of Action

The private right of action created by Title III is broad. Broken-down, the claim has five elements: (1) Any person that, after a certain date in 1996, (2) traffics (3) in property which was confiscated by the Cuban government on or after January 1, 1959, (4) shall be liable to any United States national (5) who owns a claim to such property.[8]

As for potential defendants, the term "person" is broadly defined as "any person or entity, *including* any agency or instrumentality of a foreign state.[9]

The liability-generating conduct is also broadly defined. For the purposes of Title III, a person "traffics" in confiscated property if that person:

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.[10]

The term "traffics" has an important carveout, however. "Traffics" does *not* include "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".[11]

---

7 Lobe, Jim, "U.S.-CUBA: Clinton Delays Lawsuit Provisions in Helms-Burton", *Inter Press Service News Agency*, July 16, 1996, http://www.ipsnews.net/1996/07/us-cuba-clinton-delays-lawsuit-provisions-in-helms-burton

8 *See* 22 U.S.C. § 6082.

9 *Id.* § 6023(11).

10 *Id.* § 6023(13).

11 *Id.*

Furthermore, under a subsection headed "Applicability," the right of action is limited in most instances to plaintiffs who "acquired" claims prior to March 1996. Specifically, the provision reads: "In the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996".[12] As noted above, this limitation must have seemed minor when Congress passed the law in 1996, but 27 years later it is an insurmountable obstacle to most prospective Title III plaintiffs.

2.1.2. Jurisdiction

Helms-Burton does not exist in a vacuum. Rather, the operation of the Title III in the United States Courts remains subject to the United States Constitution and the interplay of other statutes, both federal and state. Although Title III creates federal subject matter jurisdiction over cases brought thereunder, it does nothing to affect the rules of *personal* jurisdiction which are set by the Constitution and the statutory law of the states in which the courts sit. Under the Due Process Clause of the U.S. Constitution, domestic courts exercise only limited personal jurisdiction. The dispute must have a connection to the state in which the court sits, or the defendant must be "at home" in that state. Recent Supreme Court case law has made it clear that simply doing sustained business or having a subsidiary headquartered in a state does not make a defendant at home there.[13] State law may further narrow the basis for personal jurisdiction over out-of-state plaintiffs, delineating the types of in-state contacts required to confer jurisdiction.

Similarly, the court's subject matter jurisdiction over congressionally created rights of action –like that under Title III– is limited by the constitutional requirement that all matters before the federal courts concern a "case or controversy".[14]

Finally, the Foreign Sovereign Immunities Act ("FSIA") limits the subject matter jurisdiction of U.S. courts over agencies and instrumentalities of foreign states

---

[12] *Id.* § 6082(a)(4)(B).

[13] *See Daimler AG v. Bauman*, 571 U.S. 117 (2014).

[14] *See* U.S. Const. art. III § 2, cl. 1.

in certain circumstances.[15] The interplay of Title III's express creation of a right of action against such entities with FSIA's limitations was an open question at the time of the last presidential suspension's expiration.

3. THE CASES

3.1. JURISDICTION

3.1.1. Personal Jurisdiction

As predicted by some commentators,[16] personal jurisdiction has proved difficult for some plaintiffs to establish. The U.S. trade embargo essentially guarantees that all core "traffickers" in confiscated property are based abroad, and the cases reveal that the more direct the trafficking, the more difficult it is to establish personal jurisdiction.

Take for example the case of *Herederos de Roberto Gomez Cabrera, LLC v. Teck Resources Limited*.[17] There, the plaintiff –a holding company for the shares of Rocoga Minera, S.A., which had been inherited by the children of Rocoga's late owner– sued a Canadian mining company for partnering with the Cuban state-owned mining company, Geominers S.A., to extract minerals from mines confiscated from Rocoga.[18] The allegations, if true, are textbook trafficking. But the defendant, Teck, is not a U.S. company, and its activities in Cuba had nothing to do with its connections to the United States –which are several subsidiaries in Washington State and a mine in Alaska.[19] The court had little trouble dismissing the case for lack of personal jurisdiction.[20]

An even worse example of failure to consider personal jurisdiction prior to filing a case is *Iglesias v. Pernod Ricard, PSA*, in which the heirs to Conac Cueto C.I.A. sued the French distiller, alleging that Pernod Ricard's joint venture with the Cuban government was using facilities and equipment confiscated from

---

15 *See* 28 U.S.C. § 1602 et seq.

16 Fox, Peter, "Will Putting Title III of Helms-Burton into Effect Open the Litigation Floodgates?", Colum. L. Sch. Bluesky Blog, May 14, 2019, http://clsbluesky.law.columbia.edu/2019/05/14/will-putting-title-iii-of-helms-burton-into-effect-open-the-litigationfloodgates

17 No. 20-CV-21630 (S.D. Fla.).

18 *See* Am. Compl. (Dkt. No. 7), 20-CV-21630 (S.D. Fla. July 8, 2020).

19 535 F.Supp.3d 1299 (S.D. Fla. 2021).

20 *Id.*, *aff'd* 43 F.4th 1303 (11th Cir. 2022).

Conac Cueto to produce Havana Club rum.[21] Again, if proven, these activities would be an open-and-shut case of trafficking. But Iglesias plaintiffs failed to include any substantive allegations tying the trafficking to the United States.[22] After the initial complaint was dismissed,[23] the plaintiffs filed a second amended complaint, containing an allegation that a subsidiary of Pernod Ricard was selling Havana Club at duty free stores in the Miami airport, but, after representatives of Pernod Ricard denied the allegation under oath on a motion to dismiss, the plaintiff's abandoned the argument and the case was dismissed with prejudice.[24]

A closer call is *North American Sugar Industries, Inc. v. Xinjiang Goldwind Science & Technology Company*,[25] brought in the U.S. District Court for the Southern District of Florida. There, the plaintiff, a New Jersey corporation, formerly known as the Cuban-American Sugar Company, alleged that a Chinese wind-power company, it's Hong Kong contracting agent, and a suite of logistics and consulting companies involved in exporting wind turbine blades to Cuba trafficked in North American's former port facility of Puerto Carupano because the blades shipped through the facility.[26] The blades were allegedly manufactured by a subsidiary of General Electric, and, according to North American, the defendants conspired to evade the therefore applicable Cuban trade embargo, by routing the shipment of the blades through the Port of Miami –which they allegedly believed would result in an automatic license from the U.S. Office of Foreign Asset Control.[27] Unlike in the *Herederos* and *Iglesias* cases, the alleged trafficking was less direct. Rather than operating the confiscated property, the defendants were merely alleged to have used the property –as a port to unload a shipment of energy equipment. And, unlike *Herederos* and *Iglesias*, the alleged trafficking had a closer connection to the United States since the shipment of equipment was allegedly routed through Miami. For the district court, however, the role of Florida in the defendants' alleged conspiracy was insufficient to establish personal jurisdiction in part because

---

21 Am. Compl. (Dkt. No. 22), No. 20-CV-20157 (S.D. Fla. Apr. 6, 2020).

22 No. 20-CV-20157, 2020 WL 13367465 at *8 (S.D. Fla. Aug. 17, 2020).

23 *Id.*

24 No. 20-CV-20157, 2021 WL 3083063 (S.D. Fla. June 17, 2021), *aff'd* No. 21-12398, 2022 WL 1815846 (11th Cir. June 3, 2022).

25 No. 20-CV-22471 (S.D. Fla.).

26 Am. Compl. (Dkt. No. 189), No. 20-CV-22471 (S.D. Fla. Nov. 1, 2021).

27 *Id.*

there was no territorial connection between the activity (in Florida) and the harm (in New Jersey, where North American is headquartered).[28] An appeal in the case is pending in the Eleventh Circuit.[29]

Finally, there has been one significant victory for plaintiffs on jurisdictional questions. In *De Valle v. Trivago GmbH*, three heirs to confiscated beach properties sued an international group of online travel booking services, including the entities behind the brands Booking.com, Expedia, Hotels.com, and Orbitz.[30] The plaintiffs alleged that, through their interactive websites, the booking services allowed U.S. residents (including those in Florida, where the case was filed) to make reservations at hotels the Cuban government had built on the confiscated properties.[31] The district court concluded that that merely maintaining a website accessible in Florida was not sufficiently connected to the trafficking to confer personal jurisdiction, and dismissed the case.[32] The Eleventh Circuit reversed and remanded. It held that, because the booking services were, in fact, sold to Florida residents, through the accessible websites, the harm of the trafficking occurred in Florida and personal jurisdiction was proper.[33] *Rodriguez v. Imperial Brands*,[34] which remains pending in district court, promises to raise similar issues. There, the plaintiff heirs to a cigar company claim that a Cuban joint venture allegedly operating the cigar company's confiscated factory, Corporación Habanos, S.A., one of its partners, and the U.S.-based subsidiaries of its advertising agency are subject to personal jurisdiction through social-media content accessible in Florida.[35] Unlike *De Valle*, however, there do not appear to be allegations that Florida residents could buy any of Habanos's cigars through the social-media posts, which should make the case distinguishable.

---

28 645 F.Supp.3d 1352 (S.D. Fla. 2022).

29 No. 23-10126 (11th Cir.).

30 Second Am. Compl. (Dkt. No. 50), No. 19-CV-22619 (S.D. Fla. Mar. 27, 2020).

31 *Id.*

32 No. 19-CV-22619, 2020 WL 2733729 (S.D. Fla. May 26, 2020).

33 56 F.4th 1265 (11th Cir. 2022). On remand, the district court again dismissed the case, determining that the two the three plaintiffs acquired their claims after the March 12, 1996, bar date, and that none of the plaintiffs adequately alleged the defendants acted with requisite scienter. *See* No. 19-CV-22619, 2023 WL 5141699 (S.D. Fla. Aug. 10, 2023). Both issues are further discussed below.

34 No. 20-CV-23287 (S.D. Fla.).

35 Second Am. Compl. (Dkt. No. 208), No. 20-CV-23287 (S.D. Fla. Mar. 9, 2022).

Taken together, the personal jurisdiction cases tend to confirm that the most obvious cases of trafficking are the most difficult ones for which to demonstrate personal jurisdiction. Additionally, the deterrent effect of personal jurisdiction should not be underestimated. Cases like *Herederos*, *Iglesias*, and *Rodriguez*, where the defendants are alleged to be actually operating the confiscated property are a minority the federal courts' Title III docket. Far more common are cases where the defendants are alleged to participate in, or profit from the trafficking through some tangential activity –like using a port, as in *North American*, or brokering a hotel reservation, as in *De Valle*. The reason why the core traffickers in cases like these are left out of the complaint may be because plaintiffs' lawyers have (correctly) concluded that there is no basis for personal jurisdiction over them.

3.1.2. Subject Matter Jurisdiction

Standing. As noted above, federal judicial power is limited by the Constitution to actual "cases" and "controversies" –which, in part, means that the plaintiff must have suffered harm that is traceable to the defendant's conduct, and which is susceptible to remedy by the court.[36] This doctrine is known as "Article III standing" or "Constitutional standing."

In multiple cases, defendants have argued that Title III plaintiffs lack constitutional standing. Generally speaking, these defendants have characterized plaintiffs' injuries as being for the loss of the property underlying their claims, and argued that this type of injury is not traceable to the defendants' conduct –even if such conduct were to constitute trafficking for purposes of the statute– because the injury was caused the Cuban government's confiscation of the property, not from defendant's subsequent use of, or profit from, the property. In the same vein, these defendants have argued that this type of injury cannot be remedied by the court because, even if the plaintiffs obtain judgments against the defendants, the properties will remain in the hands of the Cuban state.

These arguments imply that Title III's private right action is almost entirely unconstitutional because only lawsuits against the Cuban state itself –the sole party responsible for confiscation– could survive scrutiny.

Courts have not been persuaded. In a decision on motions to dismiss a pair of consolidated cases, *Glen v. Trip Advisor LLC et al.*[37] and *Glen v. Visa, Inc. et al.*,[38]

---

[36] *See Lujan v. Nat'l Wildlife Feder'n*, 497 U.S. 871 (1992).

[37] No. 19-CV-1809 (D. Del.)

[38] No. 19-CV-1870 (D. Del.)

a judge in the U.S. District Court for the District of Delaware rejected the defendants' injury-through-confiscation standing argument, concluding that trafficking gives rise to a different type of injury; one akin to the harm that supports claims for unjust enrichment at common law.[39] The court drew on Supreme Court precedent that makes clear that, for purposes of constitutional standing, injuries do not need to be tangible –*e.g.* the loss of the property itself– if such injuries are similar to harm that has traditionally been recognized as a basis for lawsuit in England or the United States and Congress has expressed an intent to make such injuries redressable.[40] Once the injury was properly framed as emanating from the supposedly unjust enrichment derived from the alleged trafficking of the properties –not the confiscation of them itself– then the court deemed it traceable to the defendants' conduct and redressable through Title III.[41]

This District of Delaware court's reasoning was endorsed by the U.S. Court of Appeals for the Fifth Circuit in yet a third case featuring Robert Glen as plaintiff, *Glen v. American Airlines*,[42] and by the U.S. Court of Appeals for the Third Circuit when it considered Mr. Glen's *Trip Advisor* and *Visa* cases on appeal.[43] In turn, these appellate decisions, along with variety of similar district court decisions, influenced the decision of the U.S. Court of Appeals for the Eleventh Circuit to reject standing defenses in the consolidated appeals of *Garcia-Bengochea v. Carnival Corp.* and *Garcia-Bengochea v. Royal Caribbean Cruises, Ltd.*[44] In the *Bengochea* appeals, the Eleventh Circuit characterized the plaintiff's alleged injury more closely to that advocated by the defendants –*i.e.*, loss of rights in the confiscated property (in those cases, docks)– but nevertheless concluded that the injury was traceable to alleged trafficking and redressable by the court

---

39 529 F.Supp.3d 316 (D. Del. 2021).

40 *Id.* at pp. 326-327.

41 *Id.* at pp. 327-328. The court nevertheless dismissed Mr. Glen's complaints because he acquired his claim to the confiscated property after March 12, 1996. *See id.* at 328-31.

42 7 F.4th 331, 334-36 (5th Cir. 2021). Like the district court in Delaware, however, the Fifth Circuit entered judgment for the defendant American Airlines because the Mr. Glen's pleading revealed that he acquired his claim after March 12, 1996. *Id.* at 336-37.

43 Nos. 21-1842 & 21-1843, 2022 WL 3538221 (3rd Cir. Aug. 18, 2022). Although affirming Mr. Glen's constitutional standing to sue, the Third Circuit still affirmed the district court's dismissal of his cases because Mr. Glen was collaterally estopped from rearguing the effect of the March 12, 1996, acquisition bar because he litigated and lost that issue in his Fifth Circuit case against American Airlines. *Id.* at *2-*3.

44 57 F.4th 916, 922-23 (11th Cir. 2023).

because, if proven, it generated income for the Cuban government that should have belonged to the plaintiff.[45]

In all, decisions from three of the twelve territorial federal circuit courts of appeal, combined with analogous district court decisions in at least two other circuits,[46] mean that constitutional standing not a viable defense to a Title III action. The case law serves as the lone doctrinal bright spot for Title III plaintiffs.

Foreign Sovereign Immunities Act. An interesting jurisdictional corner of Helms-Burton jurisprudence has emerged from the interplay between Title III and the Foreign Sovereign Immunities Act ("FSIA"). As noted above, Helms-Burton includes agencies and instrumentalities of a foreign state as the among the "persons" who may be liable under Title III. Generally speaking, however, the agencies and instrumentalities of foreign states are immune from jurisdiction in the United States pursuant to FSIA unless the claims against them fall into one of several enumerated exceptions.[47] The question of which statutory regime controls –the apparently wholesale private right of action conferred by Helms-Burton, or presumptive immunity conferred by FSIA– was presented in *Exxon Mobile Corporation v. Corporación CIMEX S.A. et al.*, where the plaintiff Exxon sued two Cuban government-owned entities (and the alleged alter-ego of one of them) that Exxon claims operate gas stations and oil refineries confiscated from a former Exxon subsidiary.[48] Exxon argued that Helms-Burton abrogated FSIA's immunity for the Title III defendants.[49] Exxon relied on language in Helms-Burton giving precedence to Title III in any conflicts with the provisions of Title 28 of the U.S. Code (which cover procedure in the federal courts, and among which FSIA is found) to argue that Title III's right of action trumped FSIA's immunity.[50] The court disagreed. Drawing on case law that distinguishes a right of action for subject matter jurisdiction, the court determined that there was no conflict between the statutes.[51] For the court,

---

45 *See id.* at pp. 924-928.

46 *See, e.g.*, *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, 534 F.Supp.3d 1, 30-32 (D.D.C. 2021); *Sucesores de Don Carlos Núñez y Doña Pura Gálvez, Inc. v. Société Générale, S.A.*, 577 F.Supp.3d 295, 307-10 (S.D.N.Y. 2021).

47 *See* 28 U.S.C. § 1602 *et seq*.

48 Am. Compl. (Dkt. No. 33), No. 19-CV-1277 (D.D.C. Mar. 6, 2020).

49 534 F.Supp.3d 1, 11 (D.D.C. 2021).

50 *See id.*

51 *See id.* at pp. 11-14. The court also used a variety of canons of statutory interpretation to conclude that Congress did not intend for Title III to abrogate FSIA. *See id.*

one statute (FSIA) determines who may be sued in federal court, while another (Helms-Burton) controls whether there is a basis for such a suit.[52] Having determined that FSIA applies, the court proceeded to analyze the application FSIA's exemptions to Exxon's claims, determining that Exxon had successfully pled that one defendant's alleged trafficking fell within an exemption, but that it failed to plead around immunity for the other two defendants, but that jurisdictional discovery was warranted.[53] Exxon has appealed the court's decision that Title III does not independently confer subject matter jurisdiction over the defendants, and defendants have appealed the court's decision that the one of Exxon's claims falls within a FSIA exemption and that Exxon is entitled to jurisdictional discovery with respect to its other claims.[54]

3.2. PROBLEMS WITH THE MERITS

In addition to problems establishing personal jurisdiction, plaintiffs in Title III cases have struggled to adequately plead the elements of the claim under the statute. By far, the biggest challenge for them has been the bar on actions based on claims "acquired" after March 12, 1996, which courts have interpreted to apply to claims obtained through inheritance after that date. The passage of time, in this case with respect to the time elapsed since confiscation, has also made it difficult for plaintiffs to successfully allege scienter on the part of defendants in the absence of pre-suit notice of alleged trafficking. Finally, plaintiffs have sometimes had difficulty connecting the trafficking alleged to the claim that they own or even describing the trafficking itself.

3.2.1. Acquired before March 12, 1996

As explained above, under Section 6082(a)(4)(B), for Title III claims based on confiscations of property before Helms-Burton was signed into law on March 12, 1996, the plaintiff must have "acquired" the claim prior to March 12, 1996. Searching for the intent behind any Congressional act is a speculative exercise, and some jurists have questioned whether a single purpose can be ever determined given that legislating is an inherently group exercise.[55] That said, it seems likely that Congress was concerned about the development of a claims-trading market for Title III claims following the passage of Helms-Burton.

---

52 *Id.*

53 *See id.* at pp. 14-30.

54 No. 22-7019 (D.C. Cir.).

55 Breyer, Stephen, "On the Uses of Legislative History in Interpreting Statutes", 65 *S. Cal. L. Rev.*, 1992, pp. 845, 863-867.

Legislative history supports this thesis. The House Conference Report, for example, stated that this provision was "intended, in part, to eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section".[56]

Whatever its intent, however, Congress used the broad term "acquire" to limit the applicability of the right of action, which, as colloquially used, would seem to reach the receipt of claims through means other than purchase for value. Such a reading of the term is nearly compelled when the next provision of the "Applicability" subsection is considered. Section 6082(a)(4)(*C*) provides: "In the case of property confiscated on or after March 12, 1996, a United States national who, after the property is confiscated, acquires ownership of a claim to the property by assignment for value, may not bring an action on the claim under this section". As used in this provision, the term, "acquires," has a different and broader meaning than the term, "assignment for value", implying that "acquires" includes transfers of a claim beyond purchase and sale. The two most common forms of transfer of legal rights beyond purchase and sale are gift and inheritance. Bedrock principles of statutory interpretation require that courts ascribe the same meaning to terms when they are used in the same statute, and so the broader meaning of "acquires" in Subsection (a)(4)(C) –to include gifts and inheritances– should be applied to Subsection (a)(4)(b) as well.

When Congress enacted Helms-Burton, the interpretation of "acquired" in Subsection (a)(4)(B) did not have much import. On March 12, 1996, and in the immediate months thereafter, there was little opportunity for claims to change hands by means other than purchase since the primary alternative means for transfer in purchases and sale would be unlikely to occur in any great numbers. But, over the course of the 23 years that the Title III right of action remained suspended, a large number of claimants –the majority of whom, after all, were old enough to have owned property in Cuba the early 1960s– died and passed down their Title III claims to their younger relatives.

Courts have uniformly ruled that these, second generation, claimants are barred by Subsection 6082(a)(4)(B) from asserting claims under Title III. The most complete analysis is the concurring opinion of the Eleventh Circuit's afore-mentioned decision in the consolidated appeal of *Bengochea v. Carnival*

---

[56] *García-Bengochea v. Carnival Corp.*, 57 F.4th 916, 936 (11th Cir. 2023) (Jordan, J., concurring) (quoting H.R. Conf. Rep. 104-468 at 59 (March 1, 1996)).

Corporation and *Bengochea v. Royal Caribbean Cruises, Ltd.* In *Bengochea*, the defendant cruise lines adduced undisputed evidence that the plaintiff had inherited in 2000 shares of a company that he alleged owned certain waterfront property in Santiago de Cuba, which he alleged the cruise lines had used.[57] The district court granted the defendants' motion for judgment on the pleadings, and the plaintiff appealed arguing that the term "acquired" in Subsection (a)(4)(B) is limited to purchases.[58] The Eleventh Circuit affirmed the district court's decision. The majority opinion noted that every court to consider the question had likewise determined that the term "acquired" includes receipt through inheritance[59] and quoted with approval the Fifth Circuit's decision in *Glen v. American Airlines* (also discussed above), which relied on the dictionary definition of "acquire" to reach that conclusion.[60] In his concurring opinion, Judge Jordan, examined the context and legislative history of Helms-Burton, and performed the statutory interpretation exercise involving analysis of Subsection (a)(4)(C) explained above.[61] He concluded that, although Congress most likely did not intend to preclude claimants like Mr. Bengochea, its "poor" drafting had nonetheless foreclosed Mr. Bengochea's claim.[62]

As noted, when the Eleventh Circuit decided *Bengochea* in November 2022, every court to consider this issue had decided it the same way. And since *Bengochea*, the trend has continued.

With the U.S. courts of appeal for two circuits and every district court to consider the issue having rejected plaintiffs' efforts to exclude transfers via inheritance from the scope of Section 6082(a)(4)(B)'s bar on post-1996 "acquired" claims, the law seems settled. Only the plaintiffs who have owned claims to confiscated property since before March 12, 1996, can sue under Title III. This rule limits the universe of prospective plaintiffs to three relatively narrow groups.

The *first*, and smallest, group consists of individuals who owned confiscated property at the time of confiscation and are still alive. Given that most

---

57 *See id.* at pp. 921-922, 928-929.

58 *Id.* at p. 930.

59 *Id.* at p. 931.

60 *Id.* at pp. 930-931.

61 *Id.* at pp. 933-937 (Jordan, J., concurring).

62 *Id.* at p. 937 (Jordan, J., concurring).

confiscations occurred over sixty years ago, the youngest members of this group would be in their eighties.

The *second* group of prospective plaintiffs are individuals who inherited claims to confiscated properties before March 12, 1996. There are reasons to suspect that this group too is fairly small. To begin with, prior to the passage of Helms Burton, there was no mechanism for Cuban emigrees (as opposed to U.S. citizens at the time of confiscation, who had access to the Foreign Claims Settlement Commission ("FCSC")) to recover damages in the United States, and so there would have been little incentive to bequeath an interest in confiscated properties to heirs. Moreover, many of the heirs who inherited Title III claims prior to 1996 are likely themselves now growing old, and of course cannot pass down or assign away the claims.

The *third* group of prospective plaintiffs are juridical entities, such as corporations, which can theoretically "live" forever under the laws of the government by which they are organized. This group is also relatively small. While many of the confiscated properties may have been owned by Cuban *sociedades anónimas* ("S.A.s") at the time of the Cuban Revolution, there is no indication that any of these companies were reincorporated in the United States. Rather, since only "United States nationals" have claims under Title III, claims based on properties owned by Cuban companies typically have been advanced by the now U.S.-nationalized individuals who owned shares in the Cuban companies –or the heirs to such shares.[63] As natural persons, these types of plaintiffs have the same problems navigating the "acquisition" bar date discussed above.

In two cases, heirs to Title III claims have created *new* U.S. corporate vehicles to hold their claims, but they did so too late to avoid the March 12, 1996 acquisition bar. In *Herederos de Roberto Gomez Cabrera, LLC v. Teck Resources Limited*, discussed above, the heirs to shares in a Cuban mining company assigned their interests in the shares to a newly created U.S. limited liability company for the purpose of bringing a Title III claim against alleged traffickers

---

[63] *See, e.g.*, Second Am. Compl. (Dkt. No. 208), *Rodríguez v. Imperial Brands,* No. 20-CV-23287 (S.D. Fla. Mar. 9, 2022); Second Am. Compl. (Dkt. No. 67), *Moreira v. Société Général*, 20-CV-9380 (S.D.N.Y. Feb. 4, 2022); Second Am. Compl. (Dkt. No. 82), *Sucesores de Don Carlos Núñez y Doña Pura Gálvez, Inc. v. Société Générale, S.A.*, 20-CV-851 (S.D.N.Y. Sept. 11, 2020); Am. Compl. (Dkt. No. 7), *Herederos de Roberto Gómez Cabrera, LLC v. Teck Resources Ltd.*, 20-CV-21630 (S.D. Fla. July 8, 2020); Am. Compl. (Dkt. No. 22), *Iglesias v. Pernod Ricard, PSA*, No. 20-CV-20157 (S.D. Fla. Apr. 6, 2020); Compl. (Dkt. No. 1), *García-Bengochea v. Carnival Corp.*, 19-CV-21725 (S.D. Fla. May 5, 2019).

in the mining company's confiscated property. In addition to determining that it lacked personal jurisdiction over the defendant, the court in *Herederos* concluded that the plaintiff LLC's claim would have been dismissed on the merits in any event because the assignment of the shares occurred in 2019.[64] Since the LLC plaintiff "acquired" the claims in 2019 –well after March 12, 1996– the claims were barred. Similarly, efforts of heirs to some of the shares of the Cuban bank, Banco Núñez, to consolidate their interests in the bank's confiscated property by creating a Florida corporation failed in *Sucesores de Don Carlos Núñez y Doña Pura Gálvez, Inc. et al. v. Société Générale, S.A. et al.* because the heirs' assignments of their shares to the new corporation occurred in 1997.[65]

The lack of juridical entities with claims based on Cuban ownership of confiscated properties leaves the owners of claims based on the confiscation of U.S. company-owned property as apparently the sole members of the third group of prospective plaintiffs. So, for example, in *Havana Docks* cases discussed below, the U.S. company that owned a concession to certain freight docks in Havana was able to avoid problems with the acquisition bar because, despite turnover among its shareholders, the company has remained active from the time of confiscation through the present. The same is true for the Exxon Mobile Corporation –one of the world's biggest oil companies– which has not needed to worry about issues arising from claims changing hands in its litigation against several Cuban state-owned entities because it has owned its claims to oil and gas properties in Cuba continuously since those properties' confiscation, and the New Jersey corporation formerly known as the Cuban-American Sugar Company. Both companies have maintained Title III actions discussed above without stumbling over the March 12, 1996, acquisition bar date.

3.2.2. United States National

As discussed above, Title III's right of action is limited to "United States nationals". The requirement that plaintiffs bringing Title III claims be U.S. nationals is straight forward and has generally not given rise to litigation.[66] Less clear is whether the U.S. national requirement extends back to the acquisition of a claim, or even to pre-revolutionary ownership of the confiscated property.

---

64 535 F.Supp.3d 1299, 1307-09 (S.D. Fla. 2021), *aff'd* 43 F.4th 1303 (11th Cir. 2022).

65 577 F.Supp.3d 295, 303-05 (S.D.N.Y. 2021).

66 The exception is the *Havana Docks* cases discussed below where, on unusual facts, the parties disputed the current nationality of the plaintiff corporation.

In *López-Regueiro v. American Airlines, Inc.* the court adopted such part of a magistrate judge's report and recommendation that the plaintiff's claim be dismissed because –although the plaintiff was a U.S. national at the time of the litigation– he had not been one in 1989 when he inherited his father's shares of the Cuban company that allegedly owned the Havana airport.[67]

Even more radically, the court also adopted such part of the report and recommendation that recommended dismissal the plaintiff's claim on the separate grounds that the confiscated property (the airport) was not owned by a U.S. national *at the time of confiscation*.[68] Despite the fact that the reference to "United States national" in the operative liability provision of the Title III seems focused on the current status of prospective plaintiffs, the magistrate judge in *López-Regueiro* relied on the statute's legislative findings to conclude that Congress intended to limit the class of Title III plaintiffs to the U.S. nationals at the time of confiscation.[69]

Such an interpretation of Title III, which would cut off the right of action to Cuban emigrees entirely, is contrary to the general understanding of Title III since its inception,[70] and has been rejected by the only other court to consider the argument. In *de Fernández v. CMA CGM S.A.*, the court turned away the defendants' argument based on *López-Regueiro* that the plaintiff's claim should be dismissed solely because her relatives were not U.S. nationals at the time their property was confiscated.[71] It wrote, "[l]ike this Court, the *Regueiro* court recognized that '[a]bsent from [the] subsection defining liability for trafficking is any explicit condition that the confiscation have deprived a United States national of the property at issue'. Rather than end the inquiry there, the court proceeded to look at the findings within the statute and determined Congress only intended to provide a remedy to plaintiffs who were United States nationals at the time their property was taken. But as recognized by the *Regueiro* court, the text of the civil remedy section is clear, so this Court finds no need to go beyond it".[72] The court in *de Fernandez* went on to further criticize

---

67 No. 19-CV-23965, 2022 WL 2352414 (S.D. Fla. June 30, 2022).

68 *Id.*

69 No. 19-CV-23965, 2022 WL 2399748, at *6 (S.D. Fla. May 20, 2022).

70 *See, e.g.*, *Garcia-Bengochea v. Carnival Corp.*, 57 F.4th 916, 932-39 (11th Cir. 2023) (Jordan, J., concurring).

71 No. 21-CV-22778, 2023 WL 4633553, *8-*10 (S.D. Fla. July 20, 2023).

72 *Id.* at *8.

the *López-Regueiro* court's statutory interpretation, concluding that, even if the legislative findings were considered, they were not at odds with the generally accepted interpretation that Congress did not limit Title III's right of action to U.S. property owners in Cuba at the time of confiscation.[73] *López-Regueiro* is currently on appeal in the Eleventh Circuit,[74] and so appellate guidance on the issue is expected soon.

3.2.3. Scienter

The term "scienter" is typically used in the law to mean knowledge of the nature of one's act or omission. In the context of Title III, it is used as a stand-in for the statute's *mens rea* requirement –specifically, the part of the definition of "traffics" that limits that term to "knowing and intentional" conduct.

As a general matter, U.S. courts are relatively lenient about the degree of specificity with which plaintiffs must allege scienter because facts pertaining to a defendant's state of mind are seldom within the control of the plaintiff. That said, in federal court, there is a minimum pleading standard, requiring a plaintiff to at least provide enough facts to *infer* a defendant's scienter.

With respect to Title III, the broad sweep of conduct defined to constitute "trafficking" means that plaintiffs would not have difficulty pleading scienter as required not only for the defendants' activities (it can be fairly inferred that most parties know their own acts and intend to commit them), but also as to the status of the properties affected by such acts.

This is exactly the interpretation that courts have adopted when confronted with the question. In *Glenn v. American Airlines*[75] and *Glen v. Trip Advisor*,[76] for example, courts rejected arguments by plaintiffs that the scienter element of "trafficking" applied only to the defendant's knowledge of its own activities, holding instead that the element extended at least to cover whether the affected Cuban property had been confiscated. Other courts have reached

---

[73] *Id.* at *9-*10.

[74] No. 23-12568 (11th Cir.)

[75] No. 20-CV-482-A, 2020 WL 4464665, at *5-*6 (N.D. Tex. Aug. 3, 2020), *rev'd on other grounds*, 7 F.4th 331, 334-36 (5th Cir. 2021).

[76] 529 F.Supp.3d 316, 331-33 (D. Del. 2021).

the same conclusion without discussion.[77] By the time the *Sucesores de Don Carlos Núñez y Doña Pura Gálvez, Inc. et al. v. Société Générale, S.A. et al.* was decided, the debate had moved to whether plaintiffs also needed to allege that the defendant know specifically from *whom* the property was confiscated and whether the term "intentional" in Title III's scienter standard requires actual knowledge of all of the forgoing.[78]

Needless to say, even the lesser standard of constructive knowledge of a property's prior status is difficult for plaintiffs to meet. In *Sucesores*, the court rejected arguments that allegations as to the existence of Cuban laws passed in early 1960s declaring banking to be a public function, and the nationalization of well-known U.S. banks would have put the defendants on notice that Banco National de Cuba (with which the defendants allegedly transacted business) contained the assets of confiscated private banks.[79] The allegations were insufficient for "[t]he Court [to] reasonably infer that Defendants had reason to know in 2000 that the Cuban government had seized the assets and infrastructure of Banco Núñez forty years earlier and transferred them to BNC".[80] An even more extreme argument was rejected in *Glen v. Trip Advisor*, where the Court declined to adopt the plaintiff's contention that constructive knowledge could be inferred in all cases because, "[t]hat the Castro regime expropriated property from Cuban and U.S. nationals following the revolution is no mystery".[81] The Court rightly concluded that such a reading would mean that "the knowledge element would be automatically satisfied for essentially any property located in Cuba, a proposition that is not consistent with the statute".[82]

The requirement that plaintiffs allege that defendants at least have reason to know that specific Cuban properties with which they interact were confiscated might be an insurmountable pleading obstacle were it not for that courts have

---

77 *See, e.g.*, *Gonzalez v. Amazon.com Inc.*, No. 19-CV-23988, 2020 WL 1169125, at *2 (S.D. Fla. Mar. 11, 2020).

78 577 F.Supp.3d 295, 310-11 (S.D.N.Y. 2021). The court in *Sucesores* declined to decide the question since, as described below, the plaintiffs there failed to meet the meet the minimum threshold of plausibly alleging that the defendants knew the Cuban property affected by their activities had been confiscated.

79 *Id.* at pp. 311-312.

80 *Id.* at p. 312.

81 529 F.Supp.3d 316, 332 (D. Del. 2021).

82 *Id.*

held that pre-filing plaintiff cease and desist sent defendants in advance of lawsuits are sufficient to satisfy the trafficking scienter element.[83] The problem for plaintiffs is that their Title III claims only become actionable if the defendant continues to use, profit, or otherwise benefit from the confiscated property after receiving the notice. Since defendants tend to cease activities related to confiscated properties after receiving notice, pleading trafficking in these instances has proved difficult,[84] leaving plaintiffs in a Catch 22 –unable to plead Scienter for pre-notice trafficking and unable to plead trafficking post notice.

3.2.4. Claims and Trafficking

Finally, there have been cases where the nature of the defendant's interaction with the confiscated property or the plaintiff's rights to the property are too vague (or too, simply, wrong) to survive a motion to dismiss or summary judgment. *Moreira et al. v. Société Général et al.* is one such case. There, after claims of the plaintiffs, heirs to the confiscated Banco Pujol, based on specific allegations of trafficking had been dismissed as untimely,[85] the court was left to consider whether the plaintiffs amended complaint contained properly plead claims that BNP Paribas trafficked the Banco Pujol property within the statute of limitations. All the plaintiffs could allege was that BNP Paribas delivered cash to Banco Nacional de Cuba's offices in Switzerland.[86] For the court, the alleged commercial activity was too indefinite to plead trafficking. The court noted that the complaint did "not include any facts concerning the amount of currency provided; the frequency of the deliveries; or, most significantly, what, if anything, BNC did with the currency and whether BNC gave anything to Paribas in exchange for it".[87]

Similarly, in a case brought by the sole surviving sibling of a group that once owned a concession to operate maritime facilities in the Mariel Bay, the court in *de Fernandez v. Seaboard Marine, Ltd.* concluded on summary judgment that the geographic scope of the plaintiff's concession –in which the defendant was

---

83 *See Id.; Sucesores de Don Carlos Núñez y Doña Pura Gálvez, Inc. v. Société Générale, S.A.,* 577 F.Supp.3d 295, 312-14 (S.D.N.Y. 2021).

84 *See id.* (allegations in second amended complaint of post-notice trafficking too vague); *Sucesores de Don Carlos Núñez y Doña Pura Gálvez, Inc. v. Société Générale, S.A.*, No. 20-cv-851, 2023 WL 2712505, at *3-*5 (S.D.N.Y. March 30, 2023) (allegations in third amended complaint of post-notice trafficking still too vague and conclusory).

85 573 F.Supp.3d 921, 928-34 (S.D.N.Y. 2021).

86 No. 20-CV-9380, 2023 WL 2051169, at *1 (S.D.N.Y. Feb. 16, 2023).

87 *Id.* at *3.

allegedly trafficking– was not the entirety of Mariel Bay, but rather only the east side of the bay.[88] Because the defendant's commercial activities were only alleged to occur on west side of the bay, the Court entered summary judgment in favor of the defendant.[89]

3.3. THE HAVANA DOCKS CASES

Finally, there is the one set of cases in which a plaintiff has recovered –the so called, *Havana Docks* cases. These are a set of four cases against four cruise lines brought by the U.S. company that owned a concession to operate three piers in the Port of Havana. The case has featured multiple issues discussed above, including litigation over what it means for a company to be a "U.S. National"; the scope of the property interest represented by ownership of a "claim" to a governmental concession; the lawful travel exemption to the definition of trafficking; and the facts needed to establish a defendant acted with scienter where the plaintiff's claim has been certified by the FCSC. As discussed below, the district court concluded that their evidence entitled the plaintiff concessionaire to judgment as a matter of law on all of these issues and awarded it more than $110 million from each of the four cruise lines that it sued. An appeal is pending.

3.3.1. The Facts

In 1960, the Havana Docks Corporation was a U.S. company in possession of a 99-year concession to operate three large piers in the Port of Havana.[90] The concession ran from 1905, when a predecessor version of it was issued, through 2004.[91] Havana Docks' operations were nationalized by the Cuban government and, in 1967, the company filed a claim with the FCSC.[92] In 1971, the FCSC validated the claim and determined that the Cuban government owed Havana Docks around $9 million, plus interest from the time of the confiscation.[93]

---

[88] No. 20-CV-25176, 2022 WL 3577078, at *11-*12 (S.D. Fla. Aug. 19, 2022). Claims by heirs to the deceased siblings were dismissed in an earlier decision because they acquired the claims after 1996. *See* No. 20-CV-25176, 2021 WL 3173213, at *8-*9 (S.D. Fla. July 27, 2021).

[89] No. 20-CV-25176, 2022 WL 3577078, at *16 (S.D. Fla. Aug. 19, 2022).

[90] 592 F.Supp.3d 1088, 1121 (S.D. Fla. 2022).

[91] *Id.* at p. 1120.

[92] *Id.* at p. 1121.

[93] *Id.* at pp. 1121-1122.

Decades later, in 2015, after the enactment of Helms Burton but while Title III remained suspended, the U.S. government –which has restricted travel to Cuba under the Trading the Enemy Act since 1963– changed its license for so-called "people-to-people" educational travel to Cuba from a specific license (*i.e.*, case-by-case) to a general license.[94] It also granted a general license to for cruise lines to transport people from the United States to Cuba.[95] Shortly thereafter, a number of cruise lines began offering travel to Cuba for people who self-certified that they qualified for the general people-to-people travel license.[96] Most of these cruises included calls in Havana.

There, the cruise lines docked their ships at the piers that were once subject to Havana Docks' concession.[97] To facilitate their passengers' compliance with the requirements of the general people-to-people travel license the cruise lines provided shore excursions intended to include educational activities needed for the license.[98]

3.3.2. The Case

When the cruise lines began to dock at the former Havana Docks piers, Havana Docks, which had continued to exist as active corporation in the United States –albeit without any commercial operations[99]– sent letters to the U.S. government requesting that the cruise lines and their officers and directors be penalized for various alleged violations of regulations on travel to Cuba, but the government declined to take any action.[100] Havana Docks also sent letters to the cruise lines accusing them of trafficking in the piers for the purposes of Title III and demanding that they cease and desist from docking at the piers.[101] After the suspension of Title III expired, Havana Docks sued Carnival Cruise

94 *Id.* at pp. 1109-1110.

95 *Id.* at p. 1127.

96 *Id.* at pp. 1121-1122.

97 *Id.* at pp. 1128-1130.

98 *Id.* at pp. 1129-1143.

99 *Id.* at pp. 1117-1118.

100 *Id.* at p. 1171.

101 *Id.* at pp. 1143-1144.

Lines.[102] After Carnival's motion to dismiss was denied, it sued three other cruise lines: Royal Caribbean Cruises, Norwegian Cruise Line, and MSC Cruises.[103]

The court ultimately, denied the defendants' motions to dismiss the complaints (and, in one case, for judgment on the pleadings),[104] and consolidated the cases for discovery and the parties' cross motions for summary judgment.

As a corporation with theoretically perpetual existence, Havana Docks did not a have a problem with the March 12, 1996, acquisition bar because it was the owner of the claim to confiscated property at the time of confiscation. Rather, Havana Docks struggled with a different eligibility problem. The company's president, who is also one of its two directors, lives in London.[105]

Under Helms-Burton, the nationality of a company depends on the location of its principal place of business, which in turn depends on the location of its "nerve center".[106] Since Title III's right of action is limited to U.S. Nationals, the defendants argued that Havana Docks was not a U.S. company based on evidence that its London-based president made the company's important decisions.[107] Havana Docks countered that the day-to-day administrative functions of the company's secretary and other director in Kentucky should control, along with the fact that company's address in there.[108] The court sided with the Havana Docks, concluding that the evidence of a U.S.-based nerve center was so strong that no reasonable jury could find that the company was run from abroad.[109] The defendants have appealed, arguing that that evidence is at least ambiguous enough as to require a jury trial.[110]

Another case-specific issue in *Havana Docks* concerns the scope of property interest represented by the plaintiff's claim. As noted, Havana Docks did not

---

[102] No. 19-CV-21724 (S.D. Fla.)

[103] No. 19-CV-23588 (S.D. Fla.), 19-CV-23590 (S.D. Fla.) & No.19-CV-23591 (S.D. Fla.).

[104] *Havana Docks Corp. v. Norwegian Cruise Lines Holdings LTD*, 455 F.Supp.3d 1355 (S.D. Fla. 2020).

[105] 592 F.Supp.3d 1088, 1118 (S.D. Fla. 2022).

[106] *Id.* at 1161-1165.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] Appellants' Br. (Dkt. No. 80), at 65-69, No. 23-10171 (11th Cir. June 30, 2023).

own the piers in fee simple. The piers always belonged to Cuban government, but Havana Docks had a concession to use the piers for commercial activity until 2004. The cruise line defendants argued that, since the concession would have expired by its own terms in 2004 had it not been "confiscated" –or, as more typically termed, "cancelled"– by the Cuba in 1960, Havana Docks no longer owns a claim to any existing property.[111] The argument is similar to that on which the defendant prevailed in *de Fernandez*, except that, instead of challenging the geographic scope of the plaintiff's property interest, the cruise lines challenged the temporal scope of it.

At one point, the court in *Havana Docks* agreed with the defendants, dismissing the complaints against MSC and Norwegian,[112] but then reversed itself.[113] The court reasoned that if, as it had previously concluded, the confiscation of property terminated property interests as a general matter, and so, if the scope of a plaintiff's property interest were assessed from the time of the trafficking, no claim would be viable under Title III.[114] The defendants have appealed this aspect of the court's rulings as well, arguing that the court's interpretation of the statute vests plaintiffs with new and perpetual property rights beyond those actually owned in Cuba at the time of confiscation.[115]

The parties in *Havana Docks* also disputed whether the evidence conclusively established the defendants' scienter. The issue was essentially another front for litigating the import of the time-limited nature of the concession. Havana Docks argued that uncontroverted evidence of the defendants' knowledge of the FCSC certified claim against Cuba for damages from cancellation of the concession was all that it needed to show knowing and intentional trafficking –*i.e.*, knowledge that an interest in the piers was confiscated and from whom– whereas the defendants contended that there would need to be evidence that they knew that Havana Docks's interest in the piers would continue past the 2004 expiration of the concession.[116] The court rejected the defendants'

---

[111] 592 F.Supp.3d 1088, 1117 (S.D. Fla. 2022).

[112] *See Havana Docks Corp. v. Norwegian Cruise Lines Holdings Ltd.*, 431 F.Supp.3d 1375 (S.D. Fla. 2020).

[113] *See Havana Docks Corp. v. Norwegian Cruise Lines Holdings Ltd.*, 455 F.Supp.3d 1355 (S.D. Fla. 2020).

[114] *Havana Docks Corp. v. Royal Caribbean Cruises, Ltd.*, No. 19-CV-23590, 2020 WL 1905219, at *8 (S.D. Fla. Apr. 17, 2020).

[115] Appellants' Br. (Dkt. No. 80), at 35-44, No. 23-10171 (11th Cir. June 30, 2023).

[116] 592 F.Supp.3d 1088, 1157 (S.D. Fla. 2022).

argument on the same basis that it rejected their direct challenge Havana Docks' ongoing property interest in the piers.[117] The defendants have appealed, also challenging the court's rejection of their argument that the plaintiff would need to show they knew Havana Docks was a U.S. national –another separately disputed fact.[118]

Finally, the court rejected that defendants' argument that their use of the piers qualified for the lawful-travel exception to trafficking. It will be recalled that conduct that is "incidental" to lawful travel, and "necessary" to the conduct of such travel is exempted from the definition of "trafficking" in Helms-Burton. The defendants argued that their transport of passengers who self-certified that they qualified for U.S. government's general license for people-to-people travel to Cuba, along their qualification for the general license for passenger sea service, immunized them from liability for trafficking.[119] The court disagreed. It ruled *first* that –although the passengers self-certified that they were eligible for the people-to-people travel license– most passengers did not actually qualify for a travel license because evidence suggested that their experience in Cuba was primarily touristic, not educational.[120] *Second*, the court concluded that even if the passenger travel facilitated by the cruise line defendants was lawful, use of the piers was not necessary since the people-to-people travel did not require disembarking at the Havana port.[121] The defendants have appealed, stressing separation-of-powers concerns about the court's re-examination of whether the passengers truly qualified for the people-to-people travel license.[122] They also argue that the term "necessary" as used in the exemption applies to the specific lawful travel –in this instance, a cruise shore excursion to Old Havana– not to travel to Cuba generally.[123]

4. CONCLUSION

The success (for now) of Havana Docks with its claims against the cruise lines is the exception that proves the rule of how difficult Title III actions have become

---

[117] *Id.* at 1159.

[118] Appellants' Br. (Dkt. No. 80), at 69-75, No. 23-10171 (11th Cir. June 30, 2023).

[119] 592 F.Supp.3d 1088, 1170-71 (S.D. Fla. 2022).

[120] *Id.* at 1174-89.

[121] *Id.* at 1189-94.

[122] Appellants' Br. (Dkt. No. 80), at 47-59, No. 23-10171 (11th Cir. June 30, 2023).

[123] *Id.* at 60-65.

for most plaintiffs. The *Havana Docks* cases presented several opportunities not usually available for plaintiffs. First, unlike the owners of most claims to confiscated property, Havana Docks is a corporation in continual existence since the time of confiscation. Second, because they believed that their Cuban activities were legally blessed by the U.S. government, the defendant cruise lines openly used the piers, and did so directly in connection with their U.S. based activities.

As discussed above, these factors are rare. Very few pre-1996 original owners of claims to confiscated property are still alive or in existence, and few companies or individuals using confiscated properties are U.S.-based or allow their Cuban activities to contact the United States. These dynamics, along with other difficulties such as problems establishing defendants' scienter and connecting the scope of decades-old property interests to current commercial activities, have made recoveries under Title III nearly impossible for plaintiffs thus far.

BIBLIOGRAPHY

Doctrinal source

Breyer, Stephen, "On the Uses of Legislative History in Interpreting Statutes", 65 *S. Cal. L. Rev*., 1992, pp. 845, 863-867.

Fox, Peter, "Will Putting Title III of Helms-Burton into Effect Open the Litigation Floodgates?", Colum. L. Sch. Bluesky Blog, May 14, 2019, http://clsbluesky.law.columbia.edu/2019/05/14/will-putting-title-iii-of-helms-burton-into-effect-open-the-litigationfloodgates

Lobe, Jim, "U.S.-CUBA: Clinton Delays Lawsuit Provisions in Helms-Burton", *Inter Press Service News Agency*, July 16, 1996, http://www.ipsnews.net/1996/07/us-cuba-clinton-delays-lawsuit-provisions-in-helms-burton

Legal sources

U.S. Const., art. III § 2, cl. 1.

Congress. Gov., Actions Overview H.R.927 - 104th Congress (1995-1996), https://www.congress.gov/bill/104th-congress/house-bill/927/actions.

Title 22: Foreign Relations and Intercourse, Chapter 69A: Cuban Liberty and Democratic Solidarity (LIBERTAD) ("Helms Burton"), 22 USC 6021 *et seq*.

Title 22 - Foreign Relations and Intercourse, Chapter 69A: Cuban Liberty and Democratic Solidarity (LIBERTAD) ("Helms Burton"), Subchapter I: Strengthening International Sanctions against the Castro Government, 22 USC 6031 *et seq*.

Title 22: Foreign Relations and Intercourse, Chapter 69A: Cuban Liberty and Democratic Solidarity (LIBERTAD) ("Helms Burton"), Subchapter II: Assistance to Free and Independent Cuba, 22 USC 6061 *et seq*.

Title 22: Foreign Relations and Intercourse, Chapter 69A: Cuban Liberty and Democratic Solidarity (LIBERTAD) ("Helms Burton"), Subchapter III: Protection of Property Rights of United States Nationals, 22 USC 6081 *et seq*.

Title 22: Foreign Relations and Intercourse, Chapter 69A: Cuban Liberty and Democratic Solidarity (LIBERTAD) ("Helms Burton"), Subchapter IV: Exclusion of certain Aliens, 22 USC 6091 *et seq*.

Title 28: Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. 1602 *et seq*.

Jurisprudential sources

Daimler AG v. Bauman, 571 U.S. 117 (2014).

Exxon Mobil Corp. v. Corporación CIMEX S.A., 534 F. Supp. 3d 1 (D.D.C. 2021), No. 22-7019 (D.C. Cir.).

De Fernández v. CMA CGM S.A., No. 21-CV-22778, 2023 WL 4633553 (S.D. Fla. July 20, 2023).

De Fernández v. Seaboard Marine, Ltd., No. 20-CV-25176, 2022 WL 3577078 (S.D. Fla. Aug. 19, 2022).

García-Bengochea v. Carnival Corp. and Garcia-Bengochea v. Royal Caribbean Cruises, Ltd., Nos. 21-1842 & 21-1843, 2022 WL 3538221 (3rd Cir. Aug. 18, 2022), 57 F.4th 916 (11th Cir. Nov. 23, 2022).

Glen v. American Airlines, No. 20-CV-482-A, 2020 WL 4464665 (N.D. Tex. Aug. 3, 2020), 7 F.4th 331 (5th Cir. 2021).

Glen v. Trip Advisor LLC et al., No. 19-CV-1809 (D. Del.), 529 F. Supp.3d 316 (D. Del. 2021).

González v. Amazon.com Inc., No. 19-CV-23988, 2020 WL 1169125 (S.D. Fla. Mar. 11, 2020).

Havana Docks, 592 F.Supp.3d 1088, 1121 (S.D. Fla. 2022), No. 19-CV-21724 (S.D. Fla.), No. 19-CV-23588 (S.D. Fla.), 19-CV-23590 (S.D. Fla.) & No.19-CV-23591 (S.D. Fla.), Appellants' Br. (Dkt. No. 80), at 65-69, No. 23-10171 (11th Cir. June 30, 2023) 592 F.Supp.3d 1088, 1117 (S.D. Fla. 2022).

Havana Docks Corp. v. Norwegian Cruise Lines Holdings Ltd., 455 F.Supp.3d 1355 (S.D. Fla. 2020), 592 F.Supp.3d 1088, (S.D. Fla. 2022).

Havana Docks Corp. v. Norwegian Cruise Lines Holdings Ltd., 431 F.Supp.3d 1375 (S.D. Fla. 2020).

Havana Docks Corp. v. Royal Caribbean Cruises, Ltd., No. 19-CV-23590, 2020 WL 1905219 (S.D. Fla. Apr. 17, 2020).

Herederos de Roberto Gómez Cabrera, LLC v. Teck Resources Limited, No. 20-CV-21630 (S.D. Fla.). See Am. Compl. (Dkt. No. 7), 20-CV-21630 (S.D. Fla. July 8, 2020), 535 F.Supp.3d 1299 (S.D. Fla. 2021), aff'd 43 F.4th 1303 (11th Cir. 2022).

Iglesias v. Pernod Ricard, PSA, Am. Compl. (Dkt. No. 22), No. 20-CV-20157 (S.D. Fla. Apr. 6, 2020), No. 20-CV-20157, 2020 WL 13367465 (S.D. Fla. Aug. 17, 2020), No. 20-CV-20157, 2021 WL 3083063 (S.D. Fla. June 17, 2021), aff'd No. 21-12398, 2022 WL 1815846 (11th Cir. June 3, 2022).

López-Regueiro v. American Airlines, Inc., No. 19-CV-23965, 2022 WL 2352414 (S.D. Fla. June 30, 2022), No. 23-12568 (11th Cir.).

Lujan v. Nat'l Wildlife Feder'n, 497 U.S. 871 (1992).

Moreira et al. v. Société Général et al., 573 F. Supp.3d 921, 928-34 (S.D.N.Y. 2021).

North American Sugar Industries, Inc. v. Xinjiang Goldwind Science & Technology Company, No. 20-CV-22471 (S.D. Fla.), Am. Compl. (Dkt. No. 189), No. 20-CV-22471 (S.D. Fla. Nov. 1, 2021), 645 F.Supp.3d 1352 (S.D. Fla. 2022), No. 23-10126 (11th Cir.)

Rodríguez v. Imperial Brands, No. 20-CV-23287 (S.D. Fla.), Second Am. Compl. (Dkt. No. 208), No. 20-CV-23287 (S.D. Fla. Mar. 9, 2022).

Sucesores de Don Carlos Núñez y Doña Pura Gálvez, Inc. v. Société Générale, S.A., 577 F. Supp.3d 295 (S.D.N.Y. 2021).

Del Valle v. Trivago GmbH Second Am. Compl. (Dkt. No. 50), No. 19-CV-22619 (S.D. Fla. Mar. 27, 2020), 56 F.4th 1265 (11th Cir. 2022).

Recibido: 13/1/2024
Aprobado: 12/3/2024