

Calm before the storm? What we can learn from the slow start to Helms-Burton cases

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In May, President Trump became the first president in 23 years not to suspend the application of Title III of the Helms-Burton Act, which allows US nationals to sue persons and entities who “traffic” in property confiscated by the Cuban government in 1959 and the early 1960s.¹

In the ten weeks since Title III took effect, claimants have already filed at least nine lawsuits against more than a dozen Cuban and European companies, as well as against one American company.

The US Foreign Claims Settlement Commission previously certified nearly 6,000 US claims to property expropriated by the Cuban government, each of which could potentially become the basis for a Title III lawsuit or part of a larger class action.

Although the number of lawsuits filed so far is fewer than many experts expected, the potential for a large volume of lawsuits still remains high.

The US Foreign Claims Settlement Commission (FCSC) previously certified nearly 6,000 US claims to property expropriated by the Cuban government, each of which could potentially become the basis for a Title III lawsuit or part of a larger class action. In addition, there could be as many as 200,000 more uncertified claims.²

Despite the large number of potential claims, the smaller-than-expected number of suits may reflect a reluctance by US companies to sue Cuban government entities, or European or other companies with whom they have or hope to have business relationships, as well as ambiguities in the law that may complicate litigation.

Companies doing business in Cuba should closely monitor how the first wave of Title III lawsuits fares in the courts. These cases will clarify the scope of Title III and will likely influence how other potential claimants choose to proceed.

SUITS FOR CONFISCATION OF PORTS, HOTELS, REFINERIES, AND A BANK

On May 2, the first day Title III became effective, three suits were filed. The energy conglomerate Exxon Mobil sued two Cuban state-owned companies, Corporación Cimex S.A. and Unión

Cuba-Petróleo, for trafficking in oil refineries, service stations, and other facilities that the Cuban government seized from Exxon Mobil’s predecessor Standard Oil in 1960.³

The FCSC previously certified Standard Oil’s claim, which is now held by Exxon Mobil, for more than \$71.6 million in losses resulting from confiscation.⁴ Exxon is seeking damages that include the value of the certified claim, interest, treble damages, and other costs — totaling nearly \$280 million.⁵

The two other suits filed on the first day were against US cruise operator Carnival for docking its cruise lines on confiscated waterfront property.⁶ In the first lawsuit, Havana Docks Corporation sued Carnival based on a certified claim to the Havana Cruise Port Terminal which it owned and operated from 1917 until the Cuban Government confiscated it in 1960.⁷

In the second lawsuit, an individual, Javier Garcia-Bengochea, sued Carnival for trafficking on a port located in Santiago de Cuba seized from his family and in which Garcia-Bengochea claims 82.5% interest.⁸

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These suits — against a defendant whose ships have simply been docking at the confiscated ports — demonstrate how broadly “trafficking” can be construed by plaintiffs under Title III.⁹ The suits are also somewhat surprising in that they have been filed against a US company, rather than against Cuban or non-US companies.

Carnival has filed a motion to dismiss the claims on the grounds that its engagement in the Cuban ports is not “trafficking” under a travel-related exclusion to the definition in Helms-Burton and, separately, that it resulted from travel to Cuba that had been specifically licensed by the Treasury Department’s Office of Foreign Assets Control.¹⁰

The fourth suit, which is a class action, was filed on May 20 by a Cuban American family that claims ownership of the Hotel San Carlos in Cienfuegos.¹¹ The family is suing numerous Cuban companies and officials for trafficking in their confiscated property and is seeking class certification for the lawsuit on the grounds

that the defendants operate at least 34 other hotels, resorts, and tourist attractions that are all confiscated properties of Cuban American heirs.¹²

The Hotel San Carlos has been renovated and renamed and is currently managed by the Spanish hotel company Meliá Hotels International SA. Plaintiffs state that they will add Melia, one of the most significant foreign investors in Cuba,¹³ if Melia does not compensate them for use of their property.¹⁴

The same plaintiffs have filed four other lawsuits — all class actions — against other Cuban companies, as well as the online booking platform Trivago GmbH,¹⁵ which is a German subsidiary of the US travel website Expedia, and the Dutch booking platform Booking.com BV.¹⁶

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The plaintiffs argue that Trivago and Booking.com benefited from their confiscated property through their booking services, commissions, and fees.¹⁷ These suits are predicated on an expansive theory that anyone providing services to the allegedly confiscated hotels is “trafficking” in the confiscated hotels, based on the broad definition of “trafficking” in Title III.

Most recently, on July 10, the heirs to Banco Nuñez, a Cuban bank nationalized and absorbed into Banco Nacional de Cuba (BNC) by the Cuban Government in 1960, filed a lawsuit against the French bank Societe Generale S.A.

The estimated damages in the lawsuit, which include the alleged value of the heirs’ interest when the bank was nationalized, plus treble damages, interest, and plaintiffs’ attorneys’ fees, are approximately \$792 million.¹⁸

The plaintiffs claim 10.5% equity of BNC, the percentage of the Cuban banking industry that Banco Nuñez controlled at the time the industry was nationalized, but they do not hold a *certified* claim related to this interest. Without a certified claim, the plaintiffs have additional hurdles to overcome, including a requirement in Title III to demonstrate that they could not have brought a claim before the FCSC to certify their interest in BNC.

If the plaintiffs can overcome these procedural hurdles, they then must demonstrate that Societe Generale is liable for “trafficking” in expropriated property. According to the complaint, the plaintiffs’ are arguing that Societe Generale has been “trafficking” because it has generated millions of dollars in profit from processing transactions for and collecting fees from BNC.¹⁹

Societe Generale is the second defendant (in addition to Expedia) that is the target of a Title III suit after having been

recently penalized by the Office of Foreign Assets Control (OFAC) for alleged Cuba-related sanctions violations that are being used as a factual basis for the Title III claim.²⁰

WHY THE SLOW START?

Many experts had expected the activation of Title III to result in hundreds, if not thousands, of lawsuits.²¹ Title III creates a presumption of damages in the amount of claims certified by the FCSC and, more attractive still, allows recovery of treble damages in addition to the amount of the claim, plus interest, plus attorneys’ fees.

Moreover, the FCSC maintains a publicly available list of the 5,913 US claimants whose claims have been certified, providing a roadmap of potential plaintiffs. Despite the blueprint for claimants and plaintiffs’ counsel, the slow start to Title III litigation may indicate that the US companies with the largest claims are reluctant to sue Cuban government entities or European, Canadian, Asian, and Latin American companies with whom they do business or (in the case of Cuban companies) hope to do business in the future.

Plaintiffs’ lawyers may be hesitant to represent individuals with smaller claims, given that litigation under Title III is likely to be protracted and costly, and there may be difficulties ultimately collecting damages from the Cuban government or Cuban entities even where litigation is successful.

Title III states that the interest should be based on the standard civil judgments statute, which sets the rate at current levels.

Many of the several thousand certified claims are for less than \$5,000 in losses, which, even with interest, may not result in particularly large winnings especially when considered against the burdens of litigation (and the roughly \$6,000 special filing fee for Title III suits).

The success (or lack thereof) of the initial class action suits will be telling as to whether the hurdles of small claims may be overcome through future class action litigation.

MANY AMBIGUITIES REMAIN TO BE RESOLVED

The nine lawsuits already filed highlight some of the many ambiguities in Title III. For example, the law seems to permit the same plaintiff to recover for the same “trafficking” from multiple defendants who may “profit” from a particular confiscated property. How the hotel plaintiffs fare in their cases against various defendants may help clarify the equitable limits of recovery for a single claimant under Title III.

Similarly, a single defendant who benefits in a very limited way from alleged “trafficking” (such as Trivago or Carnival, who have likely benefitted from alleged “trafficking” at values far less than the alleged value of the underlying claims) would seem to potentially be liable for the *entire* value of a given claim, if the defendant is found liable for “trafficking” at all.

In addition, the law is unclear regarding the rate of interest allowable to claimants. Title III provides that for certified claims, trafficking individuals or companies will be liable to the US claimants for the greater of monetary damages equaling the amount certified by the FCSC or the fair market value of the property, plus interest.²² Title III states that the interest should be based on the standard civil judgments statute, which sets the rate at current levels.²³

However, the FCSC claims, which were certified roughly half a century ago (and well before the passage of the Helms-Burton Act in 1996), originally set forth a 6% per annum interest rate. Since interest rates are at historic lows, the rates that are potentially applicable to Title III lawsuits vary so widely that for some claims the difference could be hundreds of millions of dollars. Exxon has asserted that the 6% rate, as opposed to the Title III rate, should apply in the valuation of its claim.²⁴

Finally, while there are no exceptions under Title III for US persons or US companies that traffic on confiscated property, there are some statutory exceptions to Title III’s definition of “trafficking.” These exceptions include the delivery of international telecommunication signals to Cuba and transactions and uses of property that are both necessary and incidental to lawful travel to Cuba.²⁵

How these exceptions are interpreted by courts, as well as whether companies can be subject to Title III liability if they are engaged in other “lawful” Cuba-related activity, such as other activity licensed by OFAC, remains to be seen.

CONCLUSION — ‘FEAR OF MISSING OUT’

Although the number of Title III lawsuits filed so far has been smaller than expected, given the large potential damages and interest available to successful claimants, more lawsuits can be expected, especially if the early cases are resolved in ways favorable to plaintiffs.

Some plaintiffs and plaintiffs’ lawyers may also be moved by FOMO (“fear of missing out”) from a concern that a different US administration might re-suspend Title III, which would prevent new lawsuits from being filed but would not affect existing suits.

NOTES

- ¹ See Arnold & Porter Advisory (Apr. 22, 2019), Turnabout: Preparing for the Trump Administration’s New Cuba Restrictions and Lawsuits on “Trafficking” in Confiscated Property, <https://bit.ly/3003NkD>.
- ² See *id.*
- ³ See Complaint, *Exxon Mobil Corp. v. Corporacion Cimex S.A. and Union Cuba-Petroleo*, No. 19-CV-1277 (D.D.C. May 2, 2019).
- ⁴ *Id.* at 8.
- ⁵ Mengqi Sun, *Exxon Mobil Sues Cuban Companies Over Seized Property*, The Wall Street Journal (May 3, 2019), <https://on.wsj.com/2HTeK0I>.
- ⁶ Marc Frank and Nelson Acosta, *Carnival First Company Sued for Profiting from Expropriated Cuban Property*, Reuters (May 2, 2019), <https://reut.rs/31HL3ad>.
- ⁷ Complaint, *Havana Docks Corp. v. Carnival Corp.*, No. 1:19-cv-21724 (S.D. Fla. May 2, 2019).
- ⁸ Complaint, *Garcia-Bengochea v. Carnival Corp.*, No. 1:19-cv-21725 (S.D. Fla. May 2, 2019). A portion of Garcia-Bengochea’s claim was certified in 1970. *Id.*
- ⁹ Under 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.” 22 U.S.C. § 6023(13)(A).
- ¹⁰ See Motion to Dismiss, *Havana Docks Corp. v. Carnival Corp.*, No. 1:19-cv-21724 (S.D. Fla. May 30, 2019).
- ¹¹ Complaint, *Mata et al. v. Grupo Hotelero Gran Caribe et al.*, No. 1:19-cv-22025 (S.D. Fla. May 20, 2019).
- ¹² See *id.*
- ¹³ Jonathan Levin and Stephen Wicary, *Exiles Target Cruise, Hotel Companies to Recoup Their Piece of Cuba*, Bloomberg (June 13, 2019), <https://bloom.bg/2OWWrNQ>.
- ¹⁴ See Complaint, *Mata et al. v. Grupo Hotelero Gran Caribe et al.*, No. 1:19-cv-22025 (S.D. Fla. May 20, 2019). In addition, a suit alleging Cuban trafficking claims was filed against Meliá in Spanish courts in June. Mario J. Penton, *Meliá faces \$10 million lawsuit for hotels on confiscated properties in Cuba*, Miami Herald Mail Media (June 15, 2019), <https://hrlt.us/2yVbVab>.
- ¹⁵ Jonathan Levin, *Exiles Sue Expedia’s Trivago for ‘Trafficking’ in Cuban Property*, Bloomberg (June 19, 2019), <https://bloom.bg/33yWWRg>.
- ¹⁶ Complaint, *Echevarria et al. v. TRIVAGO GMBH et al.*, No. 1:19-cv-22621 (S.D. Fla. Jun 24, 2019); Complaint, *Trinidad v. TRIVAGO GMBH et al.*, No. 1:19-cv-22629 (S.D. Fla. Jun 24, 2019); Complaint, *Del Valle et al. v. TRIVAGO GMBH et al.*, No. 1:19-cv-22619 (S.D. Fla. Jun 24, 2019); Complaint, *Mata et al. v. TRIVAGO GMBH*, No. 1:19-cv-22529 (S.D. Fla. Jun 18, 2019).
- ¹⁷ Complaint, *Mata et al. v. TRIVAGO GMBH*, No. 1:19-cv-22529 (S.D. Fla. Jun 18, 2019).
- ¹⁸ Jonathan Stempel, *Societe Generale Sued for \$792 Million by Heirs of Cuban Bank Seized by Castro*, Reuters (July 10, 2019), <https://reut.rs/2yT3RH8>.

¹⁹ Complaint at 17, *Sucesores de Don Carlos Nunez y Dona Pura Galvez, Inc. v. Societe Generale, S.A.*, No. 1:19-cv-22842 (S.D. Fla. Jul 10, 2019).

²⁰ See OFAC Settlement with Expedia (June 13, 2019), <https://bit.ly/2KxqeZc>; and OFAC Settlement with Societe Generale (Nov. 19, 2018), <https://bit.ly/2OUX5pF>.

²¹ Carmen Sesin, *Claims Under Cuban Seized-Property Law Are Fewer Than Expected*, NBC News (June 3, 2019), <https://nbcnews.to/2Z9l8qo>.

²² 22 U.S.C. § 6082.

²³ 28 U.S.C. § 1961.

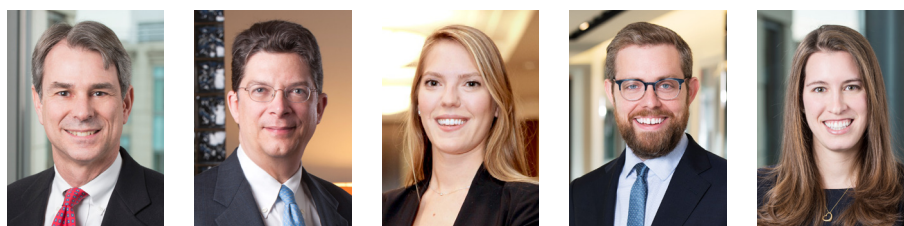
²⁴ Complaint at 16, *Exxon Mobil Corp. v. Corporacion Cimex S.A. and Union Cuba-Petroleo*, No. 19-CV-1277 (D.D.C. May 2, 2019).

²⁵ 22 U.S.C. § 6023(13)(B).

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