

The Practical Effect of Blocking Statutes on Helms-Burton Title III Actions

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There has been a lot of anticipation in various communities, both positive and negative, about what will happen when litigation under Title III of the Helms-Burton Act becomes a reality. In fact, it is a reality, but not everything is positive for claimants in such litigation. One obstacle to be considered is the so-called blocking statutes that have been enacted by various governments. This article is presented to provide some background on the practical effect of these statutes.

When the Helms-Burton Act (the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996), 22 U.S.C. §§ 6021-6091, was enacted, Title III permitted legal action against people and entities who “trafficked” in property confiscated by the Cuban government. The word “trafficking” was so broadly defined as to encompass anything that anyone could have done in connection with property in Cuba. The scale of expropriation was also so broad that virtually any property in Cuba would be considered off limits to ownership, use, or development of any type.

Many nations were aghast at the audacity of the scope of Title III. They have long considered the extraterritorial application of U.S. laws excessive. To combat its extraterritorial effect, they passed “blocking statutes.” These statutes permit a national of the applicable country who is subjected to Title III liability to sue the Title III litigant for damages in the defendant’s home country. In addition, the blocking statutes mandate that a judgment obtained under Title III not be enforced in the defendant’s home country. Besides these rights, the blocking statutes almost uniformly prohibit compliance with the Helms-Burton prohibitions, including requests by the courts of the United States.

What is the practical effect of a blocking statute? First, venue of Title III litigation will almost always need to be in the United States. Second, Title III litigation will only be effective if assets of the defendant are in the United States. Third, the Title III plaintiff cannot have assets in the defendant’s

country. Fourth, if witnesses or documents are required to be obtained from the defendant outside the United States, any subpoena or other request will not be honored.

In the case of the recent litigation commenced by the U.S.-citizen heirs of Rafael Lucas Sánchez Hill against the Meliá hotel chain, the European Union has threatened to use the EU blocking statute (Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom) as well as asserting its rights under the World Trade Organization for sanctions against the United States. The EU blocking regulation applies to any individual or entity that is an EU national or that is incorporated in the EU. Accordingly, in the 28 countries comprising the EU (27 after Brexit), any pursuit of compensation will be blocked from enforceability, and if the plaintiff has a presence or assets in the EU, it and they will be at risk.

Finally, while this article has concentrated on the problems the plaintiff will have in pursuing a Title III claim, it should be noted that blocking statutes place people and entities with a presence in the United States and assets in the United States between a rock and a hard place. Under the blocking statutes, the defendant violates its own law by complying with U.S. court orders. If the U.S. court levies sanctions as a result, the defendant may consider that it has no choice but to comply in the United States.

As more cases are filed, the U.S. effects of Title III will become clearer. At the moment, it remains unclear if Title III will be able to be practically enforced except in specific, narrowly defined fact situations and only against U.S. defendants.

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