

Helms-Burton Act Litigation Against Financial Institutions: A Quick Reference Guide

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In light of recent changes in US law, companies—including non-US companies—that have done business in or with Cuba since March 12, 1996, may be exposed to civil suits in US court seeking very large civil damages awards. This quick reference guide explains that risk and how best to mitigate it.

<p>1. What is the Helms-Burton Act?</p>	<p>On March 12, 1996, the United States enacted the Cuban Liberty and Democratic Solidarity Act, generally known as the “Helms-Burton Act.” Under Title III of the Helms-Burton Act, any person, including a non-US financial institution, that “traffics in” property confiscated by the Cuban government on or after January 1, 1959, may be liable for money damages to any “United States national who owns the claim to such property.”</p>
<p>2. Why are suits under Title III of Helms-Burton Act now possible?</p>	<p>US allies have objected strenuously to the extraterritorial reach of Title III. Consequently, Presidents Bill Clinton, George W. Bush and Barack Obama each used the authority given them under Helms-Burton to suspend the Title III right of action. In May of 2019, President Donald Trump broke with that bipartisan tradition, allowing Title III suits to proceed.</p>
<p>3. What does it mean to “traffic” in confiscated property?</p>	<p>Under the Helms-Burton Act, a person “traffics” if, among other things, that person “engages in a commercial activity using or otherwise benefiting from confiscated property” or “profits from” trafficking by another person. Plaintiffs have taken a very broad view of what this means and in some cases have maintained that even doing business with the National Bank of Cuba is sufficient to support liability.</p>
<p>4. What damages are plaintiffs seeking?</p>	<p>The Helms-Burton Act allows plaintiffs several options for measuring their damages. Plaintiffs can seek damages equal to the present value of the confiscated assets at issue. In the alternative, plaintiffs can seek damages equal to the value of confiscated property on the day it was confiscated (often in 1959 or 1960), with interest through today. Some plaintiffs have calculated their damages as being hundreds of millions, or even billions, of dollars. Plaintiffs also can recover attorneys’ fees in certain circumstances.</p>

<p>5. Does the Helms-Burton Act allow punitive damages?</p>	<p>The Helms-Burton Act does not allow punitive damages. However, in cases in which plaintiffs provide the defendant with a statutorily specified notice, and the defendant does not stop trafficking within 30 days of receiving the notice, damages can be tripled.</p>
<p>6. What does a Helms-Burton Act notice from plaintiffs look like?</p>	<p>A typical notice will come from a plaintiffs' law firm, will set forth the plaintiffs' view of how the recipient is trafficking in confiscated assets, advise the recipient that damages will be tripled if the recipient does not cease the alleged trafficking within 30 days and demand that the recipient cease such supposed trafficking.</p>
<p>7. Who is at risk for getting a Helms-Burton notice and being sued?</p>	<p>In our experience, financial institutions are at risk if they meet one or more of the following criteria:</p> <ul style="list-style-type: none"> • The financial institution was subject to a fine by the US government (e.g., the Office of Foreign Assets Control) in connection with its business activities in Cuba or involving Cuban counterparties. • There is a public record that the financial institution did business in Cuba or with Cuban counterparties, particularly if such business was recent, ongoing or high-profile.
<p>8. What financial institutions have been sued under the Helms-Burton Act?</p>	<p>A variety of financial institutions already have been sued under the Helms-Burton Act, including French, Spanish and Canadian banks as well as a major credit card company. Companies involved in travel to Cuba, including airlines and cruise lines, have also been sued.</p>
<p>9. Are more suits expected?</p>	<p>Yes. Plaintiffs' lawyers that have already brought Helms-Burton suits have stated that they have a queue of Helms-Burton actions that are ready for filing. President Biden could suspend Title III's private right of action—something each president is empowered to do unilaterally—but his administration has not indicated that it plans to do so.</p>

<p>10. Where are suits likely to be brought?</p>	<p>Many of the suits have been filed in federal court in Florida, in the Miami area. A number of the current—and potentially future—Helms-Burton plaintiffs reside in Miami. Moreover, plaintiffs’ lawyers tend to believe that the jury pool there will be sympathetic to their claims.</p>
<p>11. What defenses are available?</p>	<p>Companies have a number of defenses available to them. The strength of these defenses will depend on the facts of the case and may turn on legal issues that the courts have not yet fully addressed. Several important defenses to consider are discussed below.</p> <ul style="list-style-type: none"> ● Lack of personal jurisdiction. If a company is not incorporated in the US state where it is sued and does not have its headquarters in the US state where it is sued, then plaintiffs typically would have to establish jurisdiction by showing that the defendant engaged in trafficking in that state. For example, Mayer Brown has successfully argued that a non-US Helms-Burton defendant could not be sued in Florida because it was not alleged to have done anything related to Cuba in Florida. This caused plaintiffs to abandon their preferred forum in Miami and move their case to New York. ● Article III standing. Under Article III of the US Constitution, to bring a suit, the plaintiff must have suffered a real-world injury that is “fairly traceable” to the defendant’s alleged conduct. Mayer Brown has argued, for example, that plaintiffs have failed to satisfy this requirement because their injury, i.e., confiscation of assets by Cuba, is not traceable to the defendant’s subsequent Cuban business. We anticipate a judicial decision that may address this issue in the coming months. ● No trafficking. Courts have not yet addressed many issues concerning the meaning of the definition of trafficking under the Helms-Burton Act, and defendants have argued that their alleged conduct does not meet the definition. For example, Mayer Brown has argued that plaintiffs cannot show trafficking merely by alleging that the defendant did business with a Cuban entity that benefited from trafficking. We anticipate a judicial decision that may address this issue in the coming months.

	<ul style="list-style-type: none"> ● Lack of knowledge and intent. The Helms-Burton Act requires that the defendant “knowingly and intentionally” engage in trafficking. Mayer Brown has argued, for example, that a defendant’s knowledge cannot be established by allegations that “the international community knew” that the Cuban government confiscated assets; rather, the allegations must address the defendant’s own knowledge about the particular property at issue in the case against it, and its intent to engage in activity using or benefiting from those particular assets. We anticipate a decision that may address this issue in the coming months. ● Other defenses. The Helms-Burton Act has a number of additional requirements (some very technical) that may allow a wide variety of defenses based on issues such as which plaintiffs are bringing the claim, when the plaintiffs acquired their interests in the Cuban property and the type of business the defendant is alleged to have conducted in Cuba.
<p>12. What about “blocking statutes” in the EU and Canada?</p>	<p>The European Union and Canada have enacted “blocking statutes” designed to protect against the effects of the United States’ Cuban sanctions regime. These can have several important implications:</p> <ul style="list-style-type: none"> ● Based on the EU view that suits under Title III of the Helms-Burton Act are illegitimate, the European Union and its member states may preclude or limit the filings that companies can make in US court, in their own defense, in such suits. Defendants from EU member states will need to carefully consider home country government requirements and may need to coordinate with home country authorities. Some US courts have been willing to stay Helms-Burton proceedings while that occurs, but other US courts may be less patient. ● Some EU member states, in an effort to comply with the EU blocking statute, are causing their justice ministers to actively block service of process on European Helms-Burton defendants. These states have declined to honor the Hague Service Convention for Helms-Burton cases. Defendants from EU member states will have to carefully consider their position on service of process because resisting US process has pros and cons.

13. What should I do if my company receives a Helms-Burton notice or is sued?

We recommend that you immediately engage counsel familiar with the complexities of a Helms-Burton suit and familiar with the plaintiffs' law firms that bring such suits, to assist in responding to a Helms-Burton notice or lawsuit. Counsel can assist in understanding which facts are relevant, the strength of the company's defenses and the next steps that plaintiffs' lawyers are likely to take. Counsel can then assist with key decisions, including:

- Whether to engage with plaintiffs' counsel in response to a Helms-Burton notice, balancing the benefits of learning more about the strength of the plaintiffs' case against the risk of drawing more attention from plaintiffs' counsel (and understanding that plaintiffs' counsel may not sue every defendant that receives a notice).
- Whether to discuss obligations under a blocking statute with governmental authorities, and, if so, when should this be done, and what should be said. And, further, whether it is possible to stay any US litigation while the defendant's home country government authorities consider the defendant's blocking statute obligations.
- Whether—if the company is currently engaged in business in Cuba or with Cuban counterparties—it is possible to cease such business within 30 days and if it is advisable to cease such business, balancing the value of the business and the Helms-Burton risk.
- Which defenses to raise in response to a Helms-Burton lawsuit, including whether it is possible to have the matter dismissed for lack of jurisdiction or transferred to a more appropriate venue.
- Whether it is possible to postpone discovery in the Helms-Burton litigation pending resolution of defendant's motion to dismiss the case.

If you have received a Helms-Burton notice or lawsuit and would like further information on your options, please contact Steve Wolowitz at (212) 506-2535 / swolowitz@mayerbrown.com, Alex Lakatos at (202) 422-4448 / alakatos@mayerbrown.com or Michelle Annunziata at (212) 506-2318 / mannunziata@mayerbrown.com.

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