

Legal Sidebar

Can Creditors Enforce Terrorism Judgments Against Cuba?

09/29/2015

Cuba's [removal](#) from the State Department's list of state sponsors of terrorism on May 29, 2015 means that it is immune from lawsuits in U.S. courts for any acts of terrorism outside the United States it commits (or supports) after that date. But are Cuba's assets in the United States immune from attachment to satisfy judgments obtained under the [Foreign Sovereign Immunities Act \(FSIA\) terrorism exception](#) prior to that date? The answer appears to depend on the courts' interpretation of two statutes that lift [foreign sovereign immunity for foreign government property](#) in the United States in terrorism cases.

Cuba was designated a state sponsor of terrorism from 1982 to May 2015. Plaintiffs have won 11 cases against Cuba under the FSIA terrorism exception, with damages now totaling about \$4 billion, not including interest. Most of these judgments were obtained in state courts, many involved conduct that occurred prior to Cuba's terrorism designation, and all were obtained as default judgments without an entry of appearance by the Cuban government. (See [chart](#). This figure does not include one judgment of \$200 million won in a Florida state court that did not invoke the FSIA. The judgment has been [deemed unenforceable](#) by the U.S. Court of Appeals for the D.C. Circuit due to lack of jurisdiction in the awarding court. The plaintiff has asked the Supreme Court to review this finding).

Some of the awards have been satisfied from frozen Cuban assets in the United States, at least in part, but the bulk of the amount remains uncollected as judgment creditors scour the country for attachable assets. Creditors must locate property in the United States that is owned by Cuba and is subject to an FSIA exception to immunity. Two exceptions may apply.

[Section 201 of the Terrorism Risk Insurance Act \(TRIA\)](#) provides that:

Notwithstanding any other provision of law... in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [the FSIA terrorism exception], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

"Terrorist party" is defined to include "a foreign state designated as a state sponsor of terrorism under [applicable laws]." Since Cuba is no longer designated as a state sponsor of terrorism, it may be argued that it is not a "terrorist party" under TRIA. One court [reached this conclusion](#) with respect to North Korea, holding its assets were not available for collection under TRIA due to its removal from the terrorist state list. But on appeal, the U.S. Court of Appeals for the Second Circuit [affirmed the holding](#) only on the basis that North Korea was no longer designated even at the time the judgment was awarded. A petition for certiorari has been filed, but even if granted, may not resolve whether, in the case of a country that was designated as a state sponsor of terrorism at the time judgment was entered, "blocked assets of that terrorist party" include assets that remain blocked after that government no longer meets the definition for "terrorist party."

The [FSIA](#) itself provides an exception to immunity for foreign government property used for a commercial activity in

the United States if:

the judgment relates to a claim for which the foreign state is not immune under [section 1605A](#) or [section 1605\(a\)\(7\)](#) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

A [similar provision](#) applies to the property of an [agency or instrumentality](#) of a foreign state engaged in commercial activity in the United States. These provisions alone have provided little relief for state terrorism judgment holders because the property of an agency or instrumentality of a foreign state is not generally available to satisfy the liabilities of that state itself (or a different agency or instrumentality of that state) unless it can be shown that the target agency or instrumentality is not a separate juridical entity from the liable party under the so-called [Bancec test](#). They also do not overcome the [Cuban Assets Control Regulations](#) restrictions on attaching property in which Cuba has an interest, which require a license from the Treasury Department Office of Foreign Assets Control (OFAC).

Congress amended the FSIA in 2008 to provide a means to get around these obstacles in certain cases. In order to reach the property of agencies and instrumentalities of state sponsors of terrorism, despite their separate juridical status, [28 U.S.C. 1610\(g\)\(1\)](#) provides:

the property of a foreign state against which a judgment is entered under [section 1605A](#), and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of-

- (A) the level of economic control over the property by the government of the foreign state;
- (B) whether the profits of the property go to that government;
- (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
- (D) whether that government is the sole beneficiary in interest of the property; or
- (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

To get around the OFAC restriction, [28 U.S.C. 1610\(g\)\(2\)](#) provides:

Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act [TWEA] or the International Emergency Economic Powers Act [IEEPA].

The catch here for judgment creditors is that their judgment must have been entered pursuant to the terrorism exception as it was enacted in the [National Defense Authorization Act for FY 2008](#) (FY 2008 NDAA) or [converted to such a judgment after entry pursuant to the terms of that act](#). But perhaps the more formidable barrier to collection by judgment holders is the availability of Cuban assets in the United States subject to attachment under the laws of the state where the executing court is located. As of the end of 2014, [OFAC reported](#) the existence of just [\\$270.3 million](#) worth of blocked assets related to Cuba in the United States, but not all of this property is actually owned by Cuba. Courts have [held](#) that both TRIA and the FSIA provisions permitting attachment of foreign property to satisfy terrorism judgments do not permit the attachment of assets solely on the basis that they are subject to regulation or are blocked by OFAC; the judgment creditors must also establish an ownership interest on the part of the defendant country. (See [this previous Sidebar post](#) for an explanation of one example).

In the absence of new legislation or a diplomatic resolution of the issue, it is conceivable that the [reestablishment of](#)

[diplomatic relations between the United States and Cuba](#) and the envisioned increase in commercial ties between the two countries will eventually result in the availability of more Cuban assets subject to attachment in the United States, at least for some of the creditors. On the other hand, the existence of outstanding judgments against Cuba without the protection of foreign sovereign immunity may deter those commercial ties from developing.

Terrorism Judgments against Cuba

Case	Compensatory Damages	Punitive Damages	Notes
Alejandro v. Cuba (Brothers to the Rescue plane shootdown , 1996)	\$49,927,911.00	\$137,700,000.00	Plaintiffs received about \$97 million and relinquished their right to collect further damages under the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA).
Hausler v. Cuba (sham trial and execution of U.S. plantation owner , 1960)	\$100,000,000.00	\$300,000,000.00	
Martinez v. Cuba (sham marriage to Cuban spy, rape by fraud , 1996)	\$7,175,000.00	\$20,000,000.00	Plaintiff recovered \$198,000 under VTVPA in return for relinquishment of right to pursue collection of punitive damages, but may continue to pursue the remaining compensatory damages.
McCarthy v. Cuba (U.S. citizen executed for smuggling , 1961)	\$67,000,000.00	\$0.00	Judgment satisfied through TRIA garnishment of frozen funds.
Saludes v. Cuba (Cuban journalist imprisoned since 2003)	\$2,500,000.00	\$25,000,000.00	
Suarez v. Cuba (torture and murder of dissident prisoner, 1959-1977)	\$2,750,000.00	\$250,000,000.00	
Sullivan v. Cuba (1963 aircraft shootdown)	\$21,000,000.00	\$0.00	
Vera v. Cuba (murder of Cuban dissident in Puerto Rico in 1976)	\$49,346,713.00	\$0.00	Punitive damages of \$50 million were struck by federal court in New York.
Villoldo v. Cuba (torture and suicide of U.S. landholder in Cuba , 1959)	\$1,785,000,000.00	\$1,000,000,000.00	
Weininger v. Cuba (Bay of Pigs execution , 1961)	\$21,562,000.00	\$65,000,000.00	Compensatory portion of damages satisfied through TRIA garnishment.
Wiederspan v. Cuba (torture and killing of Batista regime army officer , 1959)	\$63,630,534.37	\$0.00	
TOTAL:	\$2,169,892,158.37	\$1,797,700,000.00	

Source: CRS