

**FOR IMMEDIATE RELEASE****March 5, 2012**

# **COURT URGED TO UPHOLD PRESUMPTION THAT LEGISLATION IS NOT RETROACTIVE**

***(Empresa Cubana Exportadora v. Dep't of Treasury, S.Ct. No. 11-945)***

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to review (and ultimately overturn) an appeals court decision that undercuts a longstanding rule of statutory construction: that federal legislation is presumed not to apply retroactively unless Congress includes a clear statement to the contrary.

In a brief filed in *Empresa Cubana Exportadora v. Dep't of Treasury*, WLF argued that the presumption against retroactivity applies in all cases – not merely (as the appeals court ruled) in cases in which the rights that would be adversely affected by retroactive application are strongly “vested” rights. The legislation at issue in this case, if applied retroactively, would eliminate trademark rights that have been in place for decades.

“The presumption against retroactive legislation is deeply rooted in American law. It is based on the common-sense idea that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place,” said WLF Chief Counsel Richard Samp after filing WLF’s brief. “Congress generally is free to make legislation retroactively applicable if that is its wish. But a requirement that Congress must make its retroactive intent clear helps ensure that Congress has actually considered the issue and has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness,” Samp said.

The case involves a U.S. trademark registration for “Havana Club” rum. Petitioner (“Cubaexport”) is a Cuban corporation that has held the trademark registration since 1976. In the ensuing years, Cubaexport (in partnership with the French company Pernot Ricard) developed the brand, and Havana Club has been transformed from a small regional brand into the second-largest rum brand outside the United States. Until the U.S. embargo of Cuba is lifted, Cubaexport cannot sell its rum in the United States.

The embargo (which has been in place since 1963) has never, however, prevented Cuban corporations from registering their trademarks in the U.S. Regulations issued in 1963 by the Office of Foreign Assets Control (OFAC, a branch of the Treasury Department) provide that such corporations have a “general license” to register and renew their trademarks in the U.S.

In 1998, Congress adopted legislation that sought to limit the right of some (but not all) Cuban corporations to engage in “transactions” with the U.S. Patent and Trademark Office. Based on events that took place in 1960, Cubaexport was one of the affected corporations. Cubaexport took the position, however, that the 1998 Act should not be interpreted as having retroactive effect (because nothing in the Act clearly expressed such a congressional intent). Accordingly, Cubaexport argued, the 1998 law had no effect on the “Havana Club” trademark registration because it was issued 22 years before adoption of the 1998 Act. OFAC disagreed and informed Cubaexport in 2006 that its registration was no longer valid and would not be renewed.

Last year, the U.S. Court of Appeals for the District of Columbia Circuit upheld OFAC’s position and dismissed Cubaexport’s lawsuit challenging that position. It did not dispute that applying the 1998 Act to Cubaexport would constitute a retroactive application of the law and that the Act did not include language expressing an intent that the law should apply retroactively. The Court nonetheless held that the presumption against retroactivity should not apply because Cubaexport did not have a “vested right” in its trademark registration – because OFAC had made clear that any trademarks for Cuba-affiliated corporations were subject to revocation at any time. Judge Silberman dissented.

In its brief urging the Supreme Court to review the case, WLF argued that the D.C. Circuit decision has driven a large hole in the presumption against retroactivity. WLF argued that prior Supreme Court case law has indicated that the presumption against retroactivity applies to *all* legislation that affects substantive rights, not simply to legislation that affects substantive rights that are fully vested. WLF noted that entities whose rights are fully vested have little need for the presumption against retroactivity because various provisions of the Constitution (e.g., the Fifth Amendment’s Takings Clause) protects against any constitutional abrogation of their rights. WLF argued that the presumption is designed to assist those – such as Cubaexport – who have expended funds based on a reasonable expectation that Congress will not repeal existing law. It is designed to prevent the unfairness that can attend retroactive legislation in the absence of clear evidence that Congress really intended retroactive application, WLF asserted.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. It devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF’s brief is posted on its web site, [www.wlf.org](http://www.wlf.org).