

**TERM ANALYSIS (2023-2024):  
U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT**

**ARTÍCULO**

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**INTRODUCTION**

The United States Court Appeals for the First Circuit is the designated federal appellate court to hear appeals from the district courts of Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico. The District Court for the District of Puerto Rico has formed part of the First Circuit by congressional mandate since 1915.<sup>1</sup> The Puerto Rico district court is unique amongst the territories in having originally been a Territorial Court under Article IV of the United States Constitution until 1966 when the 89th United States Congress and President Lyndon B. Johnson conferred upon it Article III

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<sup>1</sup> 38 Stat. 803 (1915).

status with all the duties and privileges pertaining to.<sup>2</sup> It is the only United States territory to possess an Article III court. Puerto Rico's relationship with the First Circuit has marked its history of federal appellate practice and as such, it is indispensable to carefully review the determinations of the First Circuit as a regular editorial endeavor. This is to be one of, if not the first, but not the last, analysis of its kind at the University of Puerto Rico.

In the period of July 2023 to July 2024, the First Circuit had a case load of 309 appeals. Of those, 129 originated in the district of Puerto Rico, comprised of 67 civil appeals and 59 criminal appeals. 144 appeals were decided between July and December 2024, with the remaining 165 being decided from January to July 2024. The Federal Bar Association University of Puerto Rico Law School Student Chapter assembled a committee to assess those appeals from the district of Puerto Rico and produce a term analysis. After much deliberation and research, eight of the most consequential cases were chosen. Overall, there are several trends of note. First, in criminal cases there is increasing controversy in the Circuit regarding the nature and extent of judicial discretion in sentencing now that the federal sentencing guidelines are no longer compulsory. Second, novel questions being presented in civil litigation as to diversity jurisdiction and maritime contractual disputes. And third, a consistent reification of the powers of the Financial Oversight and Management Board to further intervene in Puerto Rican affairs.

## I. INTERPLAY BETWEEN LOCAL AND FEDERAL PROSECUTIONS

### A. *United States v. Arce-Ayala*, 91 F.4th 28 (1st Cir. 2024)

#### i. Facts and Procedural History

The accused, Samuel Arce-Ayala, was indicted by a grand jury and later charged in connection with criminal activities perpetuated with and for the benefit of *Los Menores*, a drug trafficking organization within the Commonwealth of Puerto Rico.<sup>3</sup> He was charged by the Government with “conspiring to possess with the intent to distribute controlled substances in violation of 21 U.S.C. §§ 841 (a)(1), 846, and 860 (‘Count I’), and with possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924 (c)(1)(A) (‘Count II’).”<sup>4</sup>

When the accused was indicted and charged, he was serving time in Puerto Rico for crimes committed in connection with *Los Menores*.<sup>5</sup> Specifically, he had already served in the Commonwealth sixty-four months of an eight-year sentence.<sup>6</sup> The time served was a central part of the plea agreement Arce-Ayala entered into with the Government.

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2 80 Stat. 764 (1966) (See GUILLERMO A. BARALT, HISTORY OF THE FEDERAL COURT IN PUERTO RICO, 1899-1999, (2004) for a detailed overview of the historical and constitutional evolution of the United States district court for the district of Puerto Rico).

3 *United States v. Arce-Ayala*, 91 F.4th 28, 31 (1st Cir. 2024).

4 *Id.*

5 *Id.*

6 *Id.*

The plea agreement stated that Arce-Ayala would plead guilty to both Counts of the indictment.<sup>7</sup> As part of the agreement, the parties stated the maximums and minimums of the terms of imprisonment, the applicable sentencing range per the United States Sentencing Guidelines (“U.S.S.G”), the offense level for each count, and a recommended prison sentence of 120 months for Count I and a sixty month sentence for Count II.<sup>8</sup> Both sentences were recommended to be served consecutively. A central part of the guilty plea agreement was that Arce-Ayala would be credited with time served for his Commonwealth convictions due to them being considered *relevant conduct* according to U.S.S.G §§ 5G1.3, 5K2.23.<sup>9</sup>

During trial at the district court of Puerto Rico, certain facts came to light. Mainly that it was not possible to credit Arce-Ayala for time served. U.S.S.G. §§ 5G1.3, 5K2.23 were not applicable due to his Commonwealth sentence already being completed and that crediting his time served would entail a sentence below the mandatory minimums.<sup>10</sup> When these facts came to light, Arce-Ayala made several requests to retract the plea agreement, even proposing a different agreement that would entail a higher enhancement.<sup>11</sup> The Government did not agree to modify the agreement.<sup>12</sup> Due to the reluctance of the Government, Arce-Ayala filed multiple motions, with their central argument being that his plea agreement did not comply with Rule 11 of Federal Criminal Procedure.<sup>13</sup> The district court denied the motions.<sup>14</sup> Arce-Ayala was sentenced to one hundred twenty (120) months for Count I and sixty (60) months for Count II.<sup>15</sup>

On appeal, Arce-Ayala argued that the plea agreement violated Rule 11.<sup>16</sup> Per the Rule, the accused must understand the consequences of pleading guilty. According to Arce-Ayala, at the moment of accepting the agreement he was under the incorrect assumption that he would be credited for time served.<sup>17</sup> This turned out not to be the case. Therefore, the district court should have allowed him to retreat his agreement.

The First Circuit began their analysis by stating that per Rule 11, a defendant may retract a guilty plea. Nevertheless, they must demonstrate a fair and just reason for their withdrawal.<sup>18</sup> This is determined by considering the following factors:

[C]ourts typically consider: “(1) whether the original plea was knowing, intelligent, and voluntary and in compliance with Rule 11, (2) the strength of the reason for withdrawal, (3) the timing of the motion to withdraw, (4) whether the defen-

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7 *Id.*

8 *Id.* at 31-32.

9 *Id.* at 32.

10 *Id.* at 33.

11 *Id.* at 34.

12 *Id.* at 35.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 37.

17 *Id.*

18 *Id.* at 35-36.

dant has a serious claim of actual innocence, (5) whether the parties had reached (or breached) a plea agreement, and (6) whether the government would suffer prejudice if withdrawal is permitted.”<sup>19</sup>

These typical considerations are not an exhaustive list.<sup>20</sup> An inferior court has the discretion to consider other relevant factors. Apart from these factors, there are three *core concerns* related to the correct application of Rule 11.<sup>21</sup> The First Circuit has “distilled three ‘core concerns’ of Rule 11: (1) ‘a lack of coercion,’ (2) ‘the defendant’s understanding of the charges against him,’ and (3) ‘the defendant’s ‘knowledge of the consequences of the guilty plea.’ . . . A failure to satisfy any of these core concerns ‘requires that the guilty plea be set aside.’”<sup>22</sup> In the case of Arce-Ayala, his appeal hinged on the third *core concern*: the knowledge of the consequences of his guilty plea.

## ii. Reasoning and Analysis

The First Circuit stated that the expressions made by the district court judge would have led any reasonable person to the same conclusion that Arce-Ayala arrived at.<sup>23</sup> Even though the agreement did not guarantee credit for time served, the comments made by the district court regarding the guilty plea did not allow any other interpretation.

The Government argued that the district court comments were meant to explain “[the] ‘legitimate’ effects of the provision, ‘not the illegal one [Arce-Ayala] desired.’”<sup>24</sup> This argument held no sway over the First Circuit. Moreover, the First Circuit called out that this is not the first time a defendant has been induced to error by the Government. In *United States v. Candelario-Ramos*, the Government eventually admitted that they had negotiated a plea under a mistaken understanding of the *relevant conduct* provision.<sup>25</sup> The same provision that was the basis of Arce-Ayala’s guilty plea.

It is important to note that Arce-Ayala’s confusion was aggrieved by the incorrect interpretation of the applicable law by his legal counsel. Nonetheless, the First Circuit limited themselves to state that the incorrect legal advice simply supports the defendant’s argument that they did not have the requisite knowledge to enter a guilty plea pursuant to Rule 11.<sup>26</sup>

After analyzing the case on appeal, the First Circuit summed the relevant facts of the case as follows:

[A]rce-Ayala was told by his defense counsel that the sixty-four months he spent in Commonwealth custody would be credited toward his federal sentence.

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<sup>19</sup> *Id.* at 36.

<sup>20</sup> *Id.* (citing *United States v. Gardner*, 5 F.4th 110, 114 (1st Cir. 2021)).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 36-37 (citing *United States v. Williams*, 48 F.4th 1, 6 (1st Cir. 2022); *United States v. Todd Isom*, 85 F.3d 831, 835 (1st Cir. 1996)).

<sup>23</sup> *Id.* at 37.

<sup>24</sup> *Id.* at 39.

<sup>25</sup> *Id.* at 40 (citing *United States v. Candelario-Ramos*, 45 F.4th 521, 523 (1st Cir. 2022)).

<sup>26</sup> *Id.* at 41.

The district court then seemingly confirmed that mistaken assumption through a series of misleading remarks. Because he did not know that the mandatory minimum prison sentence set an inviolable floor as to the amount of credit he could receive for time served on the Commonwealth sentences, Arce-Ayala lacked sufficient “knowledge of the consequences of the guilty plea.” *Williams*, 48 F.4th at 6 (quoting *Cotal-Crespo*, 47 F.3d at 4). Arce-Ayala’s plea thus violated a “core concern” of Rule 11 and must be set aside. *See Todd Isom*, 85 F.3d at 835.<sup>27</sup>

The First Circuit then vacated the judgment, remanded the case to the district court, and dictated that Arce-Ayala shall be permitted to withdraw his guilty plea.<sup>28</sup>

The case of Arce-Ayala revolves around one central issue, according to the First Circuit: the violation of any of the *core concerns* of Rule 11 leads to the invalidation of a guilty plea. Therefore, a district court should either: (1) allow the retraction of the guilty plea; (2) allow the modification of the guilty plea to comply with the *core concerns* of Rule 11, or (3) invalidate the guilty plea *motu proprio*.<sup>29</sup> Additionally, the defendant’s legal counsel, the Government—and especially the district court judge—must refrain from making declarations that would lead a reasonable person to misunderstand the elements of a guilty plea.<sup>30</sup> A central issue is that a person who decides to enter a guilty plea must clearly understand the consequences of said plea; thus, a lack of knowledge entails a lack of validity.

### *B. United States v. Flores*, 86 F.4<sup>th</sup> 399 (1st Cir. 2024)

#### i. Facts and Procedural History

After acquiring a warrant for his arrest under domestic violence charges, police officers intercepted Emiliano Flores in a local McDonald’s. He was found with a “machine gun loaded with thirty-three rounds of ammunition, and he possessed an additional thirty rounds.”<sup>31</sup> Additionally, “[a]n empty shell casing was also found in the vehicle in which Flores had been riding at the time of his arrest.”<sup>32</sup> This incident led to his being federally charged with unlawful possession of a machine gun, to which he pled guilty. The judge, over the objection of the defense, adopted the probation’s presentation report and set Flores’s base offense level at twenty for possessing the machine gun as a *prohibited person* due to his self-admitted drug use.<sup>33</sup> However, he deducted three levels for accepting responsibility, resulting in a total offense level of seventeen.<sup>34</sup> The judge then assigned Flores to the lowest category, I, for his criminal history (the presentence report stated that the domestic violence charges were dropped by the commonwealth court during the preliminary

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<sup>27</sup> *Id.* (citing *Williams*, 48 F.4th at 6).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 36-37, 39.

<sup>30</sup> *Id.* at 36-37 (citing *Williams*, 48 F.4th at 6).

<sup>31</sup> *United States v. Flores-González*, 86 F.4th 399, 408 (1st Cir. 2023).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 415.

<sup>34</sup> *Id.*

hearing).<sup>35</sup> Flores was given an advisory prison sentence of twenty-four to thirty months as a result.<sup>36</sup> The defense asked for a twenty-four-month period, while the government suggested a thirty-month period.<sup>37</sup> The judge gave a forty-eight-month sentence, which is eighteen months longer than the maximum recommended punishment.<sup>38</sup> The justifications given by the district judge under the provisions in 18 U.S.C. § 3553(a) were: to protect the public, to deter others from copying the crime, and to reflect how serious the crime was.<sup>39</sup> Through the appeal, Flores contends three errors. First, he disagrees with the court characterizing him as a *prohibited person*.<sup>40</sup> Second, he indicates that the judge “erred by giving too much weight to community factors and failing to individually design his sentence.”<sup>41</sup> Lastly, he argues that “the judge substantively erred by imposing such a stiff sentence on a first-time offender for no other reason than that he had a machine gun.”<sup>42</sup> The *prohibited person* defense was weighed in favor of the government by both panels. However, the heart of the dispute was centered around the last two arguments.

After an appellate panel heard the case, the opinion was vacated and the appellate court saw the case again as an *en banc* opinion.<sup>43</sup> The *en banc* panel was divided three to three and so, the district court’s judgment was affirmed. One half of the panel confirmed the sentence because they understood that it was reasonable, and that the court adequately considered the alleged high percentage of violence that was occurring on the island. On the other hand, the judges that went against the lower court’s decision considered that the sentence should have been made with an individualized approach and should have considered all the factors surrounding Flore’s circumstances. In sum, the district court’s decision was solely based on the future deterrence effect that the sentence could have on Puerto Rican citizens to not commit gun crimes. This, in our opinion, is not only an abuse of discretion, but a problem that raises constitutional questions.

## ii. Reasoning and Analysis

Although deterrence in a community is a valid justification for imposing upward sentences across circuit courts, the sentencing guidelines and the discretion they permit were

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35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 416.

39 *Id.* at 416. 18 U.S.C. § 3553(c) states that:

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32.

18 U.S.C. § 3553(c) (2018).

40 *Flores-González*, 86 F. 4th at 417.

41 *Id.*

42 *Id.*

43 28 U.S.C. § 46 (c) (1996) (“Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.”).

not intended to justify the type of action taken here. It has been noted that their “principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.”<sup>44</sup> Can the decision developed by the appellate forum be called justice? Based entirely on the discretion granted by the sentencing guidelines, District Judge Besosa rooted his decision on the high crime rate in the community where the defendant was arrested. He adopted a punitive theory that fails to achieve the purposes of justice intended with the implementation of the guidelines. The sole purpose of promulgating the rules is not merely deterrence, for Congress also intended them to enable an effective and fair sentencing system.<sup>45</sup> A distinguishable element that we must consider is the fact that both dividing panels relied on *United States v. Flores-Machicote*.<sup>46</sup> In this case, as the opposing panel notes, a judge may use community factors in determining their sentences. However, they must not go *too far*.<sup>47</sup> As we have mentioned before, the central issue with the decision before us is that the sentencing judge relied merely on Puerto Rico’s gun violence issue for the decision and intended the sentence to serve a deterrence effect on the island’s population. This was not only a non-justifiable explanation given the circumstances, but an ineffective way of preventing future offenders from violating the law.<sup>48</sup> The opinion in *Flores-González* opens the door for district courts to base their decisions on where the offense was committed, rather than focusing on the reasons why the accused committed the offense. Such a shift could lead to harmful reforms in our criminal justice system.

It is an alarming statement that the appellate court found that the sentence imposed by the district court fell within the parameters of *substantive reasonableness*. In this case, it becomes particularly important to highlight Flores’s characteristics at the time of the incident. Emiliano Flores was merely nineteen years old when he was apprehended. Not only was he young, but he also had no prior criminal record before the event. The Court should have analyzed the factors that surrounded Flores at the time of events, like the nature and severity of the crime, his mental health, socioeconomic status, among other factors. However, it relied solely on its perception of our country’s violence and on inflammatory evidence.<sup>49</sup> What the Court called individualized attention was merely the district court’s

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<sup>44</sup> United States Sentencing Commission, Guidelines Manual Ch. 1 Pt. A, 9 of PDF (Nov. 2013), [https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013\\_Guidelines\\_Manual\\_Full.pdf](https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf).

<sup>45</sup> United States Sentencing Commission, Guidelines Manual Ch. 1 Pt. A, 11 of PDF (Nov. 2023), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2023/GLMFull.pdf>.

<sup>46</sup> *United States v. Flores-Machicote*, 706 F.3d 16 (1st Cir. 2013).

<sup>47</sup> *Id.* at 24.

<sup>48</sup> *Five Things About Deterrence*, NATIONAL INSTITUTE OF JUSTICE (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence> (A 2016 report from the US Department of Justice’s National Institute of Justice notes the following about crime deterrence: “Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not “chasten” individuals convicted of crimes, and prisons may exacerbate recidivism.”).

<sup>49</sup> See *United States v. Flores-González*, 86 F.4th 399, 414 (1st Cir. 2023) (The district judge played an audio and video recording of a machine-gun massacre prior to announcing Flores’s punishment, which even he acknowledged had little to do with Flores’s particular actions other than the fact that he had unlawfully obtained the weapon in Puerto Rico.).

consideration of the municipality where the arrest took place. If we compare this decision with the one that this court took in *Reyes Correa*,<sup>50</sup> it becomes harder to see how the upward variance in the sentence was justified. After having an encounter with a police officer, using illegal substances and not following the instructions of his outpatient treatment program, Reyes was once again accused, and his supervised release terms were revoked.<sup>51</sup> The district court imposed a sentence of thirty-six months, the statutory maximum for the violations, and triple the time that the accused and the government had asked for.<sup>52</sup> The defendant alleged that the sentence was substantially unreasonable, one of the same arguments that we see in *Flores*.<sup>53</sup> In *Reyes* however, the First Circuit stated that the district court had not justified the upward variance in the sentence. The reasons given by the court for the upward sentence were: “[t]o reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence, and to protect the public from additional crimes . . .”<sup>54</sup> The court of appeals noted that the reasoning given by the court was generic and was not what Congress intended. Since it was a case of a person who was suffering from a substance abuse disorder that led to a parole violation, the court did not find this to be a case that was different and deserving of such an inflated sentence. Similar reasons were given in the case of *Flores*, yet the appellate court found that, in that instance, it was enough. Finally, it was stated in *Reyes* that “the justification, whether inferred or explicit, must demonstrate that this case differs from the norm[.]”<sup>55</sup> If we analyze the facts that led to the conviction of *Flores*, it is difficult to see how the case differs from the norm. The ongoing trend in the district courts of the First Circuit, particularly in cases from Puerto Rico, calls for a clear line to be drawn between judicial discretion and the sentencing guidelines. The judge is given a certain amount of power that allows for the imposition of personal biases. The decision in this case was not *sufficiently justified*, as required by 18 U.S.C. § 3553(c) and the jurisprudence on the matter. The First Circuit outlined the criteria that must be considered for a sentence with an upward variance based on community characteristics to withstand an appellate review. It stated:

First, a defendant can insist that the community characteristics must be derived from information that is “reliable and accurate.” Second, the community characteristics must be relevant to the individual defendant or the charged offense. To put a finer point on it, when the charged offense is possession of a machine gun, community characteristics regarding the prevalence of gun violence in the community in which the offense took place is sufficiently relevant. Third, the sentencing court must consider all relevant section 3553(a) factors. Finally, *any variance imposed must be substantively reasonable; it must have both “a plausible sentencing rationale and a defensible result.”*<sup>56</sup>

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50 United States v. Reyes-Correa, 81 F. 4th 1 (1st Cir. 2023).

51 *Id.* at 4-5.

52 *Id.* at 6.

53 *Id.* at 6.

54 *Id.* at 10.

55 *Id.* at 12.

56 United States v. Flores-González, 86 F.4th 399, (1st Cir. 2023) (emphasis added) (citations omitted).

If we consider the final factor, which requires taking such aspects into account, this sentence cannot be deemed rational or defensible. Again, given Flores's characteristics, the upward variance is far from being a defensible outcome.

The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishments.<sup>57</sup> In our view, the discretion allowed in this decision disregards the prohibition set by the federal Constitution. The eighteen-month variance imposes a cruel punishment on the defendant, given that he was not even guilty of using the illegal weapon, but of merely possessing it. Long-term sentences are unduly harsh, especially when they are established for drug-related and non-violent acts. Given that most people *age out* of crime and become less dangerous with time, longer prison sentences rarely result in extra benefits for public safety.<sup>58</sup> Rather, long sentences may negatively impact the mental health, family relationships, and employment opportunities of inmates once they are released from jail.<sup>59</sup> As an additional protection, the Constitution of the Commonwealth of Puerto Rico provides: "It shall be the public policy of the Commonwealth ... to regulate its penal institutions in a manner that effectively achieves their purposes and to provide ... adequate treatment of delinquents in order to make possible their moral and social rehabilitation."<sup>60</sup>

How can we promote the rehabilitation of defendants in our country if we don't begin by giving them a fair punishment that aligns with the realities they face? We cannot support this decision that blindly manifests the stereotypes about Puerto Rico's population. The decision promulgated by the Court may have a striking effect on marginalized communities. It may result in unjustified departures from the Guidelines and the use of unlimited subjective discretion. A standard that allows judges to substantially deviate from the recommended sentencing can defeat the rationality and consistency that individualized sentencing punishments must try to achieve. This fundamental sentencing principle was violated by the district court's sentence. Additionally, *Flores-González's* sentence could erode public trust in the criminal justice system and weaken respect for the law in our circuit.

*C. United States v. Muñoz-Martínez, 79 F.4th 44 (1st Cir. 2023)*

i. Facts and Procedural History

Appellant Jorge Muñoz Martínez appeals his single-count conviction under the Racketeer Influenced and Corrupt Organizations Act ("RICO") on several claims of error, of which the Court only considers whether a rational jury were to have found him guilty of extortion and extortion conspiracy under Puerto Rican law, a predicate offense for the federal RICO statute.<sup>61</sup> In the summer of 2018, Muñoz was charged alongside six others with RICO

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<sup>57</sup> U.S. CONST. amend. VIII.

<sup>58</sup> See, e.g., Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87:1 UMKC LAW REVIEW 113, (November 5, 2018), 319832 UMKC 87-1 Special Issue Text 11 (sentencingproject.org).

<sup>59</sup> *Id.*

<sup>60</sup> P.R. CONST. art. VI, § 19 (trans).

<sup>61</sup> Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c).

violations stemming from their conduct as narcotics officers within the Caguas Drug Unit (“CDU”) between 2014 and 2018. He had a trial by jury in 2019 whereby he was found guilty. The Government’s evidence included testimony from several other former CDU narcotics officers. Muñoz’s codefendants testified that many search warrants executed by the unit were unlawful and involved the illegal seizure of property from those being searched.<sup>62</sup> The panel—led by Circuit Judge Howard—answered in the negative, overturning Muñoz’s conviction.

## ii. Reasoning and Analysis

The panel’s reversal of the district court focused on precise definitions of statutory language, so much so as to cite several dictionaries—legal and otherwise.<sup>63</sup> Two phrases of importance are *pattern of racketeering activity* as contained in the RICO statute and “[compelling] another person to deliver property” from Article 191 of the Puerto Rico Penal Code.<sup>64</sup> The Court understood that a bare resignation upon a show of authority to steal property is not equivalent to an act of compulsion.<sup>65</sup> Under this scheme, the person abusing their authority would have to insist on a voluntary turnover of property rather than a plain surrender. Without delivery, there is no compulsion; without compulsion, there is no crime of extortion, and without that predicate offense there can be no conviction under RICO. Here, “consent is ‘the razor’s edge that distinguishes extortion from robbery.’”<sup>66</sup> This result is significant in how it limits the bounds of a possible RICO charge not just in relation to Puerto Rican statutes but in its applicability to the rest of the districts within the First Circuit. Such an offense is not a mere additional federal layer to state charges but has precise parameters that must also be met. These safeguards are fundamental to the federal penal system.

## II. DEVELOPMENTS IN CIVIL DOCTRINE

### A. *Caribe Chem. Distribs. v. S. Agric. Insecticides, Inc.*, 96 F.4th 25 (1st Cir. 2024)

#### i. Facts and Procedural History

The court where a plaintiff presents a case can be crucial to the type of remedy they are going after, and how the case will play out. After being sued in a state court, defendants frequently wish to transfer their cases to federal court. To prevent a judicial order from becoming a golden ticket for a defendant to remove the case to federal court, the *voluntary/involuntary rule* was judicially created. Recently, the First Circuit adopted this principle in the case discussed below. Southern Agricultural Insecticides (“Southern”) is a company

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<sup>62</sup> United States v. Muñoz-Martínez, 79 F.4th 44, 48, 52 (1st Cir. 2023).

<sup>63</sup> *Id.* at 52, 55.

<sup>64</sup> *Id.* at 47, 51 (citing P.R. LAWS ANN. tit. 33 § 4877).

<sup>65</sup> *Id.* at 56.

<sup>66</sup> *Id.* at 53 (citing United States v. Cain, 671 F.3d 271, 283 (2d Cir. 2012)).

based in the state of Florida in the United States, which was sued in the state court of First Instance by the Puerto Rican company, Caribe Chem (“Caribe”). Also named as defendants were a Puerto Rican company and its president. The controversy revolved around a dispute regarding the appropriate forum to address the filed lawsuit. At the beginning of the proceedings, Caribe filed the claim in state court under the premise that the federal court was not qualified to handle the matter due to the absence of any grounds conferring jurisdiction to that forum. Subsequently, as a result of the eventual complete diversity between the parties following the dismissal of the other Puerto Rican defendant, Southern submitted a notice of removal to the state court. The Court denied the motion and granted Caribe’s motion to remand the case to the Commonwealth court. In due course, Southern appealed the order. The appellate court declined to allow removal to the district court, basing its decision on what is known as the *voluntary/involuntary rule*. This “rule governs whether such a change in the make-up of the parties allows the remaining defendants to remove the case to federal court under 28 U.S.C. [sec.] 1446.”<sup>67</sup> The aforementioned rule gives the plaintiff almost complete control over the removal of a case to federal court, as removal cannot proceed without their consent. The Court goes on to interpret the statutory language of 28 U.S.C. sec. 1446(b)(3) because defendants had alleged that the rule was abrogated by its implementation. This section states, in part, that:

[I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an [ . . . ] order or other paper from which it may first be ascertained that the case is one which is or has become removable.<sup>68</sup>

## ii. Reasoning and Analysis

The Court emphasized that, as the statute indicates, the order must make a case removable. After evaluating the common law developed before and after the statute was passed, it was determined that it has long been established that for the order to enable the case to be removed, it could not be entered over the plaintiff’s objections. Thus, Congress *implicitly codified* the voluntary/involuntary rule in the language of section 1446.<sup>69</sup>

The Court further noted that, due to 28 U.S.C. [sec.] 1447(d), which normally prohibits review of orders remanding removed cases to state court, the recent implementation of the voluntary/involuntary rule had probably frequently eluded appellate review. Overall, the doctrine establishes that a case does not become removable merely because of a court order; rather, the plaintiff’s voluntary action must take precedence over that determination.<sup>70</sup> This approach aims to safeguard two principles: that federal jurisdiction is not later lost due to the possible reinstatement of the non-diverse defendant following a plaintiff’s appeal, and the plaintiff’s free choice of the forum where they wish to address their dis-

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<sup>67</sup> Caribe Chem. Distributors, Corp. v. S. Agric. Insecticides, Inc., 96 F.4th 25, 28 (1st. Cir. 2024).

<sup>68</sup> 28 U.S.C. § 1446.

<sup>69</sup> Caribe Chem. Distributors, Corp., 96 F.4th at 31.

<sup>70</sup> 28 U.S.C. § 1447.

pute.<sup>71</sup> Ultimately, the Court adopts the trend of other circuit courts and settles that when non-diverse defendants are dismissed without the plaintiff's voluntary action, removal is prohibited by the voluntary/involuntary rule.

*B. Amador v. United States, 98 F.4th 28 (1st Cir. 2024)*

i. Facts and Procedural History

José Mulero Vargas was indicted on multiple charges related to drug trafficking. At the beginning of the proceedings, the accused presented a financial affidavit stating that he was indigent and therefore should be provided with a public defender.<sup>72</sup> Nonetheless, during the trial, multiple private attorneys filed notices of appearance. One of these being Jedrick Burgos Amador. Due to Mulero's initial claim of indigency, the United States solicited the district court to inquire about the attorney fees paid to Burgos Amador and other attorneys:

[T]he United States moved the district court to inquire into “[t]he source of the attorney fees which have caused attorneys Jedrick Burgos Amador and Ricardo Lozada Franco to appear on behalf of [Mulero]” and “[w]hether defense counsel have been retained or paid by someone other than the defendant . . . [i]f so, whether defense counsel have a potential conflict of interest . . . [w]hether defendant waives any such conflict of interest; and . . . [w]hether the Court should accept the waiver.”<sup>73</sup>

In response, Mulero moved to strike stating that the district court could convene a hearing if the Government could demonstrate an actual or potential conflict. The motion was denied, and an evidentiary hearing was scheduled before a Magistrate.<sup>74</sup>

From the outset of the evidentiary hearing, the Magistrate spoke in favor of the hearing, stating *motu proprio* that there was cause for the hearing. Burgos Amador argued that the Government wanted to investigate if someone connected to the criminal enterprise of Mulero was paying the attorney fees, that he could provide the identity of the third party, and that no conflict whatsoever existed. The Magistrate nevertheless sustained that the Government had established a *prima facie* case for the evidentiary hearing.<sup>75</sup>

As their first witness, the Government called Burgos Amador who asserted his Fifth Amendment right and stated that it would be, in his opinion, unethical if he testified. Nevertheless, Burgos Amador declared that another attorney had paid his fees. The other attorney testified that the accused mother had retained Burgos Amador and all other attorneys that had appeared. Evidence was provided to sustain the testimony. At the end of

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<sup>71</sup> *Caribe Chem. Distributors, Corp.*, 96 F.4th at 30.

<sup>72</sup> *Amador v. United States*, 98 F.4th 28, 30 (1st Cir. 2024).

<sup>73</sup> *Id.* at 30-31.

<sup>74</sup> *Id.* at 31.

<sup>75</sup> *Id.*

the hearing, the Magistrate stated that: “[B]y invoking the Fifth Amendment, Burgos and Lozada ‘indicated to this Court . . . that to answer the questions, you would be implicating yourselves in criminal activity. That is the understanding of the Court and that is what the record will so reflect.’”<sup>76</sup>

The Magistrate recommended that Burgos Amador and the other attorney be disqualified and that disgorgement proceedings move forward. The district court adopted the recommendation. Burgos Amador presented a motion for reconsideration, which was denied, and two motions for appeal regarding his disqualification and the order for disgorgement.<sup>77</sup>

## ii. Reasoning and Analysis

The issues before the First Circuit were whether Burgos Amador’s appeal was timely and whether the disqualification and disgorgement were valid. Regarding the timeliness of the appeal, the central issue was whether Rule 4(a) or Rule 4(b) of Federal Appellate Procedure applied. Rule 4(a) applies to civil appeals while Rule 4(b) applies to criminal appeals.<sup>78</sup>

The Government argued that Rule 4(b) should be applied to Burgos Amador’s appeal, in which, in this case, his appeal would not have been timely. Nonetheless, the First Circuit explained that the application of Rule 4(a) or Rule 4(b) is not determined by the central case but by “the substance and context” of the appeal.<sup>79</sup> Therefore, in a criminal case Rule 4(a) is applicable if the appeal does not concern a criminal matter. It has become common practice by the courts that collateral orders in criminal cases be treated as civil matters regarding the application of Rule 4.

Courts have uniformly treated appeals from orders in criminal cases that are collateral to criminal punishment as civil matters for purposes of Rule 4:

For example, courts have applied Rule 4(a) to appeals from the denial of the return of property under Fed. R. Crim. P. 41(e); sureties’ appeals of bail-bond forfeiture orders; appeals from proceedings under 21 U.S.C. [sec.] 853(n) in which third parties claim an interest in criminally forfeited property; appeals from the enforcement of restitution orders; and appeals from orders denying a criminal defendant the right to obtain attorney’s fees under the Hyde Amendment (18 U.S.C. [sec.] 3006A).<sup>80</sup>

The Government contended that due to the evidentiary hearing being connected to Mulero’s Sixth Amendment right to counsel, a right limited to criminal prosecution, Burgos Amador’s appeal is *an ipso facto* criminal appeal. The Government’s argument held no sway over the First Circuit.<sup>81</sup>

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<sup>76</sup> *Id.* at 32.

<sup>77</sup> *Id.*

<sup>78</sup> FED. R. APP. P. 4.

<sup>79</sup> *Amador*, 98 F.4th at 33-34.

<sup>80</sup> *Id.* at 34 (citation omitted).

<sup>81</sup> *Id.* at 35.

The issue before the magistrate judge was whether there was a possible conflict of interest. The applicable rules in the inquiry regarding the accused conflict were the Model Rules of Professional Conduct, civil rules that apply to all attorney-client relationships. Additionally, disqualification and disgorgement are not considered criminal punishments, instead they are commonly utilized as civil remedies. Therefore, regarding an appeal for disqualification and disgorgement, Rule 4(a) applies. This means that Burgos Amador's appeal was presented on time.<sup>82</sup>

The other central issue of Burgos Amador's appeal was the merits of the district court's order for disqualification and disgorgement. Burgos Amador asserted that there was a lack of basis for the evidentiary hearing, that it was an error to subject him to examination under oath, and that the invocation of his Fifth Amendment was improperly utilized to sustain the order for disqualification and disgorgement.

In its review, the First Circuit determined that the district court exceeded its discretion: "[W]e conclude that the district court exceeded its discretion in subjecting Burgos to sworn direct examination by prosecution counsel when the district court did not know, and lacked reason to know, that there was a particular conflict of interest arising out of a third-party payment."<sup>83</sup>

Even though inferior courts must inquire about the possibility of a conflict that violates a defendant's Sixth Amendment, the inquiry must be substantiated. When Burgos Amador was subjected to the evidentiary hearing, there was no evidence by part of the Government of a possible conflict. Nonetheless, the evidentiary hearing was carried out.

Burgos Amador contended that allowing the prosecution to interrogate him constituted an abuse of judicial discretion. The First Circuit concurred, allowing the prosecution to interrogate a defendant's attorney can lead to a conflict of interest or it can damage the attorney-client relationship. Therefore, the courts must operate with an abundance of caution. The Magistrate, even after Burgos Amador stated that he was allowed by his client to provide the identity of the third party and was going to do so, insisted on placing Burgos Amador under oath and held the door wide open for him to be interrogated by the prosecution.<sup>84</sup>

The Government argued that Mulero's initial financial affidavit indicating indigency substantiated the inquiry. Even if the appearance of a private attorney in a short amount of time after claiming indigency may seem suspect, this alone does not give a district court enough reason to believe that a conflict exists. It is even less suitable as a basis for allowing a defendant's counsel to be interrogated by the prosecution.<sup>85</sup>

According to the First Circuit, no part of the record sustained Burgos Amador being subjected to interrogation by the prosecution. The actions of the inferior courts did not meet the requirements for an evidentiary hearing of a conflict arising under the Sixth Amendment and even less met the requirements for subjecting Burgos Amador to interrogation. Even more, the conduct that led to the sanction was a direct consequence of the

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 36-37 (emphasis omitted).

<sup>84</sup> *See Amador*, 98 F.4th at 36-37.

<sup>85</sup> *See Id.* at 39.

inferior courts' decision to subject Burgos Amador to examination. Therefore, the First Circuit reversed the disgorgement order due to the disqualification order being insufficiently supported.<sup>86</sup>

Burgos Amador's appeal elucidates the following multiple points that must be considered regarding an inquiry into a possible conflict, a subsequent disqualification, and disgorgement order:

1. An evidentiary hearing regarding a possible conflict must be substantiated
2. On appeals based on disqualification and disgorgement Rule 4(a) applies even if the main case is criminal
3. An attorney should not be placed under oath, nor the opposition should be allowed to interrogate them unless there is a valid reason to do so
4. The courts should limit the evidentiary hearing to not create conflict in the attorney-client relationship and therefore be the direct cause of the conflict that merits sanctioning

Even if the inquiry is to protect the defendant's Sixth Amendment rights, it must also be considered that said rights also include the right to choose one's attorney. Therefore, an inquiry must be properly substantiated because, instead of protecting a defendant's rights, it can have the opposite effect.

*C. P.R. Fast Ferries LLC v. SeaTran Marine, LLC, 102 F.4th 538 (1st. Cir. 2024)*

i. Facts and Procedural History

Central to the case of *P.R. Fast Ferries v. SeaTran Marine* is a contractual dispute concerning the enforcement of mandatory mediation and forum-selection clauses against a non-signatory. Here, the contract in question only bound the signatories P.R. Fast Ferries ("Fast Ferries") and Mr. Cade, LLC. With that resolved, the question that follows is whether SeaTran Marine committed a breach of contract and *culpa in contrahendo* against Fast Ferries. The doctrine of *culpa in contrahendo* holds that in the course of contractual negotiations, the parties ought not to arbitrarily withdraw from the ongoing proceedings,<sup>87</sup> as doing so may render them liable under the general tort liability statute of the Puerto Rico Civil Code.<sup>88</sup>

The district court of Puerto Rico ruled that, since the contract between Fast Ferries and Mr. Cade, LLC. did not contain an express termination date, it remained effective. Therefore, the mediation and forum-selection clauses were binding and constituted grounds for dismissal. However, the district court did not resolve the inquiry of whether SeaTran was, in fact, a signatory to the contract.

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<sup>86</sup> See *Id.* at 40.

<sup>87</sup> *P.R. Fast Ferries v. SeaTran Marine, LLC, 102 F.4th 538, 542 n.1 (1st Cir. 2024).*

<sup>88</sup> *Id.* See also *Velázquez Casillas v. Forest Lab'ys, Inc., 90 F. Supp. 2d 161, 166 (D.P.R. 2000).*

Fast Ferries appeals on two grounds: first, that the contract had expired, rendering the mediation and forum-selection clauses inapplicable; and second, that the tort claim against SeaTran should not have been dismissed because SeaTran was not a signatory to the contract. The First Circuit, in an opinion authored by Circuit Judge Laura E. Montecalvo, affirmed the district court's dismissal.<sup>89</sup>

This controversy began in 2018 when the Puerto Rico Maritime Transportation Authority ("PRMTA") consented to a Master Time Charter Agreement ("MCTA") with Fast Ferries. Therein, Fast Ferries agreed to "provide ferries, with both personnel and deckhands" to assist the PRMTA on their transportation route between the island of Puerto Rico and the island municipalities of Vieques and Culebra.<sup>90</sup> Fast Ferries then contracted with Mr. Cade, LLC, to subcharter the motor vessel Mr. Cade and secure a licensed crew in compliance with the MCTA's terms. More specifically, the Master Agreement operated in conjunction with a Short Form Time Charter Agreement for each individual vessel.

The ensuing complaint turns on two key questions: first, if the Master Agreement and its choice of law provision was still in effect, which mandates arbitration proceedings in Lafayette, Louisiana and upon failure of arbitration to litigate only in the United States district court for the Western District of Louisiana, Lafayette-Opelousas Division<sup>91</sup>. Second, and most crucially, whether said clause can be enforced against a non-signatory—in this case resulting in the dismissal of the *culpa in contrahendo* claim brought by Fast Ferries against Mr. Cade and SeaTran.

## ii. Reasoning and Analysis

The Court affirmed District Judge Jay García-Gregory's order on both the ongoing existence of the contract and the enforcement of the arbitration clause on SeaTran as a non-signatory. Despite affirming the dismissal on the same grounds—that the contract was still effective and binding—the panel makes an important distinction as to what the controlling law ought to have been in the district court. Judge García's order relied on local Puerto Rican maritime law, contrary to the agreement's express designation of "admiralty and maritime laws of the United States" as the appropriate body of law to supplement the text of the contract.<sup>92</sup> There are exceptions under which local law can be incorporated, but there was no compelling interest to do so in these set of facts. In this respect, the Court simply corrected the district's reasoning to reach the same conclusion.

The court also upheld the dismissal of the tort claim, rejecting the appellant's argument. It emphasized the principle of contractual fairness, asserting that a non-signatory cannot selectively benefit from favorable provisions of an agreement while avoiding its burdens, particularly when contractual intent is evident.

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<sup>89</sup> *Id.* at 551.

<sup>90</sup> *Id.* at 542-43.

<sup>91</sup> *Id.* at 543.

<sup>92</sup> *Id.* at 545.

### III. BROADENING OF THE FISCAL OVERSIGHT & MANAGEMENT BOARD'S POWERS

#### A. *Fin. Oversight & Mgmt. Bd. v. Hernández-Montañez*, 58 F.4th 580 (1st Cir. 2023)

##### i. Facts and Procedural History

In 2016, President Barack Obama passed the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), which established a Financial Oversight and Management Board for Puerto Rico (“FOMB”) with the goal of restructuring Puerto Rico’s astounding debt crisis. Among the powers conferred to the FOMB was “the authority to develop and certify budgets for Puerto Rico”<sup>93</sup>—an authority that had previously belonged to the Commonwealth’s elected government.

The initial suit filed in the district court of Puerto Rico was brought in 2018 by Rafael Hernández-Montañez, who was at the time a minority leader of the House of Representatives, and multiple mayors and representatives from the Puerto Rico Legislature. The controversy concerned the budget that was imposed by the FOMB for the 2018-2019 fiscal year. In approving this financial plan, the budget that was originally passed by the Puerto Rico Legislature and signed by the governor, was annulled. The plaintiffs alleged that the FOMB’s determination violated the Constitution’s Territorial Clause.<sup>94</sup> Eventually, the district court dismissed the causes of action for both a lack of standing regarding the legislator’s claim, and for failure to state a claim on which relief could be granted for the mayors. Hernández’s was the only one of the plaintiffs that continued with the appeal of the lower court’s decision.

On appeal, the First Circuit reiterated that Hernández, as an individual legislator, could not lead a claim because Article III of the U.S. Constitution prevented him from doing so.<sup>95</sup> The court went on to explain that the legislator could not proclaim that he suffered a personal injury when, the initial claim that he had presented, was based on an attack to the Legislature as a whole. The fact that Hernández was named Speaker of the House during the proceedings, did not change the court’s conclusion, because nowhere in the initial suit was it pointed out that his constitutional claim was being brought by the Speaker on behalf of the House of Representatives or that the figure had the power to do so. The First Circuit then confirmed the lower court’s judgment.<sup>96</sup>

##### ii. Reasoning and Analysis

As this and previous cases have shown, the courts tend to favor the complete autonomy of the FOMB. Once again, the self-governing status that Puerto Rico has ostensibly enjoyed since the establishment of the Commonwealth has been undermined by the federal government of the United States. The budgeting process is no longer in the hands of the

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<sup>93</sup> Hernández-Montañez v. Fin. Oversight (In re Fin. Oversight), 58 F.4th 580, 583 (1st Cir. 2023).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 584.

<sup>96</sup> *Id.* at 584-85.

Puerto Rican elected officials, but in control by the whims of a Board enabled by Congress. By limiting the jurisdictional basis for officials to come forward and bring claims against the FOMB, there is no space available to ensure that our island's interests are being kept in mind. The decision confirms that our relationship with the United States has become more of a colonial bond with the mainland rather than a territorial association.

True sovereignty cannot be achieved by oppressive measures like the ones that the FOMB promulgates. The limited autonomy that the federal government had allowed was completely stripped with the implementation of PROMESA. The rejection of the government's proposal by unelected officials is an attack on our very own democratic system. Due to its historical lack of sovereignty, Puerto Rico has been unable to develop sustainable economic policies, which has resulted in a reliance on outside funding and policies that put debt repayment ahead of infrastructure and social services.<sup>97</sup> The Financial Oversight and Management Board's austerity measures have exacerbated poverty, cut back on public services, and encouraged Puerto Ricans to leave the island in search of better chances abroad.<sup>98</sup>

*B. Fin. Oversight & Mgmt. Bd v. Cooperativa de Ahorro y Crédito Abraham Rosa (In re Fin. Oversight & Mgmt. Bd.), 79 F.4th 95 (1st Cir. 2023)*

i. Facts and Procedural History

In August 2004, Suiza and VTM, both milk producers, filed a complaint in the district court of Puerto Rico alleging that the Milk Industry Regulation Administration of the Commonwealth of Puerto Rico ("ORIL") regulatory scheme violated their rights under the Commerce Clause, the Fifth Amendment, the Fourteenth Amendment and under Puerto Rico law.<sup>99</sup> In summary, Suiza and VTM requested and alleged the following:

They sought to enjoin ORIL's regulatory scheme and requested a declaratory judgment that the ORIL Administrator's acts were unconstitutional. Among other complaints, they alleged that "ORIL's regulatory structure, which precluded them from making a reasonable profit in their milk business, constituted a confiscation of property in violation of the Takings Clause." VTM and Suiza moved for a preliminary injunction to prevent the Administrator of ORIL from continuing to implement the contested regulations.<sup>100</sup>

The Takings Clause establishes that "[n]or shall private property be taken for public use, without just compensation."<sup>101</sup> Suiza's and VTM's central argument was that the reg-

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<sup>97</sup> See Jorge Ruiz, *An Unfulfilled Promise: Colonialism, Austerity, and the Puerto Rican Debt Crisis*, HARV. POL. REV. June 2022, <https://harvardpolitics.com/unfulfilled-promise-2/>.

<sup>98</sup> *Id.*

<sup>99</sup> *Fin Oversight Mgmt. Bd. v. Cooperativa y Ahorro y Crédito Abraham Rosa (In re Fin. Oversight & Mgmt. Bd.)*, 79 F.4th 95, 105 (1st Cir. 2023).

<sup>100</sup> *Id.* (citation omitted).

<sup>101</sup> U.S. CONT. amend. V, cl.4.

ulatory scheme imposed by ORIL inhibited them from making a reasonable profit and therefore constituted a *de facto* violation of the Takings Clause.

The district court granted the preliminary injunction and ordered that a temporary mechanism be established as a remedy. The preliminary injunction was appealed but was held by the First Circuit. It is important to note that, on the original appeal, the First Circuit did not go into the validity of the Takings Clause claim.

Afterward, in 2013, VTM and Suiza reached a settlement with ORIL and the Secretary of the Department of Agriculture of Puerto Rico:

[P]ursuant to the agreement, ORIL would “promulgate a new regulatory scheme.” The settlement also specified that Suiza and VTM were owed approximately \$171 million in “regulatory accrual,” —approximately \$123 million of which was owed to Suiza— and designated two sources for payment of that liquidated accrual amount. First, as specified in paragraph [fourteen] of the settlement agreement, the Commonwealth would contribute just over half of the amount in direct payments to Suiza and VTM. Second, milk prices would be increased, such that the remaining balance of the regulatory accrual would be borne by consumers, over time, through the surcharge.

The settlement agreement explained that it was a “final, absolute, binding and unappealable Judgment.” Moreover, the parties agreed that the stipulation would “have the effect of dismissing the instant case with prejudice.” The agreement specified that the “parties have agreed to settle all matters pending in the instant action . . . without conceding any of Plaintiffs['] . . . claims as alleged in the complaint, or the validity of any of the judicial orders, opinions or resolutions entered by [the various courts].”<sup>102</sup>

The district court approved the settlement agreement in November 2013. The agreement remained in place without issue until May 2017. In 2017, the FOMB filed Title III petitions to restructure the Commonwealth’s debts. After multiple negotiations and proceedings, the FOMB presented a Modified Eighth Amended Plan of Adjustment for the Commonwealth and two instrumentalities (“Plan”). The Plan was approved by the Title III court and accordingly Suiza’s claim was classified as being part of Class 53. Those who are part of Class 53 are entitled to receive 50% of their claim. Additionally, Suiza would not be able to reclaim the regulatory approval accrual as specified in paragraph fourteen of the settlement. Other claimants were classified as Class 54 and were therefore entitled to receive 100% of their claims.

Due to being classified as Class 53, and therefore only entitled to receive 50% of their claim, Suiza objected to the confirmation of the Plan. They made four arguments in opposition:

First, it argued that it had a Takings Clause claim that was non-dischargeable. Next, it maintained that because its claim had not been objected to, it must be deemed allowed and could not be modified through the plan confirmation

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<sup>102</sup> *Fin. Oversight Mgmt. Bd.*, 79 F.4th at 105.

process. Third, Suiza claimed that the Plan unfairly discriminated against Suiza, given that its takings claims were not exempted from discharge but the Class 54 claims were. Finally, it contended that the Plan provided an improper third-party release by precluding Suiza from recouping the discharged portion of the Commonwealth's obligation from another source.<sup>103</sup>

The Title III court confirmed the Plan and held that Suiza did not have a valid Taking Clause Claim and that Suiza only had a contractual claim that could be impaired via bankruptcy.

On appeal, Suiza presented the same four arguments it had presented before the Title III court. The four arguments were rejected and the determination by the inferior court was upheld. The determinations by the First Circuit were as follows: (1) Suiza did not have a valid Takings Clause Claim and even if they did, any such claim was relinquished when they entered into the voluntary 2013 settlement agreement;<sup>104</sup> (2) even if there was a procedural error, it was harmless, and the process carried out by the Title III court awarded Suiza the same opportunity to expose their claim as they would have had if the FOMB had filed a formal objection;<sup>105</sup> (3) there was no discrimination due to Suiza not having a valid Takings Clause Claim and being classified as either Class 53 or Class 54 predicated on having a valid takings claim,<sup>106</sup> and (4) the Plan, contrary to Suiza's belief, does not constitute a third party-release due to the only party obligated and release being the Commonwealth.<sup>107</sup>

The First Circuit affirmed the determination made by the Title III court and therefore Suiza is only able to receive 50% of their claim.<sup>108</sup>

## ii. Reasoning and Analysis

This case, which follows a long line of decisions regarding the FOMB, once again reinforces the far-reaching powers they hold. Through a Title III proceeding, they were able to modify a settlement agreement that had been in vigor for three and a half years; an agreement that was approved by the district court and was incorporated into a consent decree.

Additionally, as part of the settlement agreement it was agreed by all parties that the settlement agreement constituted a "final, absolute, binding and unappealable Judgment" and that it would "have the effect of dismissing the case with prejudice".<sup>109</sup> By the First Circuit affirming the Title III court, they have set the precedent that, among the powers held by the FOMB, is the ability to initiate proceedings that can lead to the modification or invalidation of a settlement. This decision signals that the door is open for the FOMB to modify or invalidate judicial determinations via similar proceedings.

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<sup>103</sup> *Id.* at 106.

<sup>104</sup> *Id.* at 106-08.

<sup>105</sup> *Id.* at 108.

<sup>106</sup> *Id.* at 114.

<sup>107</sup> *Id.* at 115.

<sup>108</sup> *Id.* at 114.

<sup>109</sup> *Id.* at 105.