

AMENDMENTS TO THE PUERTO RICO  
UNIFORM SECURITIES ACT

The proposed amendments to the Puerto Rico Uniform Securities Act (the "Securities Act") contained in House Bill number 2545, Act Number 167 of July 26, 1999 ("Act 167"), were recently enacted into law. Act 167 amends the Securities Act to bring it into compliance with the requirements of the National Securities Markets Improvement Act of 1996 ("NSMIA"). NSMIA is a federal statute

that divided the universe of regulation to which parties in the securities markets are subject. NSMIA established a bright line test which preempts state regulation over those persons subject to federal jurisdiction because of the type or volume of their business.

Act 167 amended several of the existent definitions of the Securities Act. For example, the definition of 'Agent' now excludes individuals who represent an issuer in connection with transactions involving securities covered by federal law (as defined in Act 167 and hereinafter) described under section 18(b)(3) and 18(b)(4)(D) of the Securities Act of 1933. Additionally, Act 167 changed the definition of 'Investment Adviser' to include financial planners and those persons who, as an integral part of other related financial services, provide to others the services described in article 401(f) of the Securities Act. However, it excluded from the definition: (1) investment adviser representatives, (2) investment advisers covered under federal statutes, and (3) any person excluded from the definition of investment adviser under section 202(a)(11) of the Federal Investment Advisers Act of 1940.

Furthermore, Act 167 added four new definitions to article 401 of the Securities Act. The most significant is the definition of 'Investment Adviser Representative.' This term is defined as: "any partner, officer or director of an investment adviser, or a person that has

a similar status or that performs similar functions; or any person (except for ministerial or clerical personnel) that is employed by or is associated with, a registered investment adviser, or an investment adviser that should register, pursuant to the provisions of this Act; or that has a place of business in Puerto Rico and, (with the exception of the ministerial or clerical personnel) is employed by, or is associated with a federal covered investment adviser and performs any of the following functions: (1) makes recommendations or issues any other type of advice in connection with securities, (2) administers accounts or securities portfolios of customers, (3) determines the recommendations or advice that should be issued with regards to securities, (4) procures, offers or negotiates the sale of, or sells, investment advisory services, or (5) supervises employees that perform any of the aforementioned functions."

Additionally, Act 167 defines investment advisers and securities subject to registration with the U.S. Securities and Exchange Commission (the "SEC") as "federally covered investment advisers" and "federally covered securities." With respect to federally covered investment advisers, it requires them to file a notice of declaration of registration with the Commissioner that includes copies of all the documents filed with the SEC, including amendments, along with a consent to service of process and a \$500 fee ("Notice Filing").

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## CORPORATE LAW

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Federally covered investment advisers which only clients in Puerto Rico are: investment companies, other investment advisers, broker-dealers, banks, trust companies, savings and loan associations, employee benefit plans with less than one million dollar in assets, Puerto Rico public agencies or governmental instrumentalities, and/or insurance companies, are not subject to the Notice Filing requirement.

Investment adviser representatives must also register and pay the highest registration fee found in any of the United States, namely \$500.

With respect to federally covered securities, before they are offered for sale in Puerto Rico, the issuer or its representative must file with the Commissioner a copy of the declaration of registration filed with the SEC, including amendments, together with a fee that ranges from

\$350 to \$1,500. Additionally, a quarterly sales report must be filed with the Commissioner.

Act 167 grants the Commissioner the authority to issue an order to suspend the offering or sale of a federally covered security if the Commissioner concludes that the order is in the public's interest and the provisions of article 307 of the Securities Act concerning the registration of an offering of federal covered securities have been violated.

The enactment of Act 167 was necessary to conform the Securities Act to the requirements of NSMIA. Of equal importance to achieve compliance with NSMIA is the need to amend the existing Regulation under the Uniform Securities Act of Puerto Rico (the "Regulation"), a project which is well underway as evidenced by the publication by the Commissioner of a

Notice on August 11, 1999, inviting the general public to submit comments to a proposed new Regulation. A general overview of the proposed amendments to the Regulation is included herein. ■

### COMMISSIONER OF FINANCIAL INSTITUTIONS PROPOSES A NEW REGULATION UNDER THE UNIFORM SECURITIES ACT

The Office of the Commissioner of Financial Institutions (the "Commissioner") is currently evaluating the scope of a new regulation to be issued under the Puerto Rico Uniform Securities Act (the "Proposed Regulation"), in light of the changes brought about by the adoption of NSMIA in the United States.

The Commissioner has been discussing the contents of the Proposed Regulation with members of the industry and industry associations. Among the requirements imposed by such Proposed Regulation as currently drafted are the submission of daily reports to the Commissioner regarding the pricing of non-listed securities originating in Puerto Rico. The Proposed Regulation also requires the registration of branch offices, and adopts federally accepted practices like the Plain English rules for the preparation of prospectuses, when written in the English language.

On August 11, 1999, after extensive participation by the industry and trade associations, and in compliance with the requirements of the Uniform Administrative Procedure Act of Puerto Rico, the Commissioner published its Notice of Proposed Rulemaking, providing the general public with a thirty (30) day period for comments, or requests for hearings, on the Proposed Regulation. ■

### Editorial Staff

*The contents of  
PUERTO RICO*

#### BUSINESS LAW NOTES

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## TAX LAW

### Circuit Court defines "Taxable Year" for Patente Tax Purposes

**T**he municipal license tax ("Patente Tax") is self imposed by the taxpayers by filing an annual return with the municipality. The tax is computed based on the volume of business (i.e., gross income) of the taxpayer for its accounting year preceding the filing of the return. While the tax is payable at the commencement of each semester of the year that commences on the July 1<sup>st</sup>, following the filing of the return and ends on the subsequent June 30 (the "Fiscal Year"), there is no statutory or regulatory provision expressly defining the term "taxable year" for Patente Tax purposes. The prevailing view among Puerto Rico tax practitioners has been that the "taxable year" is the Fiscal Year, but heretofore the Puerto Rico appellate courts had not ruled with respect to this matter.

The absence of legal authorities regarding the definition of "taxable year" has triggered numerous disputes between taxpayers and municipalities, stemming from the municipalities' efforts to postpone the adverse impact of Patente Tax exemptions on their tax coffers. Generally, the municipalities have attempted to defer the exemptions by

arguing that the taxable year is the taxpayer's accounting year used to compute the tax, instead of the Fiscal Year.

In Suiza Dairy Corporation v. Municipio de Aguadilla, Civil No. KCO 1996-0003, the Puerto Rico Circuit Court of Appeals confirmed that the taxable year for Patente Tax purposes is the Fiscal Year. In Suiza, the taxpayer claimed Patente Tax exemption for Fiscal Year 1996-97, relying on article 9 of the Puerto Rico Agricultural Incentives Act of 1995, as amended. Article 9 grants Patente Tax exemption for "taxable years" commencing on or after January 1, 1996.

The Municipality of Aguadilla notified a tax deficiency to Suiza Dairy alleging that since the tax payable for Fiscal Year 1996-97 was based on Suiza Dairy's year ended December 31, 1995, the exemption was not applicable for Fiscal Year 1996-1997. In other words, the municipality sought to deny the exemption by claiming that the taxable year for purposes of the tax payable for Fiscal Year 1996-1997 was the year ended December 31, 1995, instead of Fiscal Year 1996-1997.

Suiza Dairy, represented by our firm, challenged the deficiency in court arguing that while the tax imposed for Fiscal Year 1996-1997 was admittedly computed based on Suiza Dairy's year ended December 31, 1995, the taxable year for municipal tax purposes is the Fiscal Year because that is the period for which the tax is paid. To support this proposition Suiza Dairy noted that the tax is prepaid for each semester of the Fiscal Year and that no tax is due for the second semester of the Fiscal Year if the taxpayer discontinues operations in the municipality during the first semester. On the other hand, the Municipality of Aguadilla, sustained that the term "taxable year" should be interpreted as the taxpayer's accounting year given that the tax is computed on the volume of business of such year. Since Suiza Dairy computed its tax for Fiscal Year 1996-97 based on its volume of business for its year ended December 31, 1995, the municipality of Aguadilla claimed that Suiza Dairy was not entitled to the exemption. The Court of First Instance ruled in favor of the municipality of Aguadilla, but its decision was revoked by the Circuit Court of Appeals.

### DEPOSIT RULES FOR PUERTO RICO INCOME TAX WITHHELD ON SALARIES AND WAGES

**A**ct No. 262 of September 3, 1998, amended section 6181 of the Puerto Rico Internal Revenue Code, Act No. 120 of October 31, 1994, as amended (the "P.R. Code") relating to the deposit rules for the withholding of income tax at source from wages and salaries.

Specifically, the amendments modify the deposit system for taxes withheld and apply to taxes withheld after January 1, 1999. In general, the new provisions can be summarized as follows:

**1. Employers whose withholding taxes do not exceed \$500 in one quarter.** These employers are not required to make monthly deposits. Instead, they pay their taxes when they file their quarterly return.

**2. New employers and employers who have withheld and informed over \$500 but less than \$50,000 during the period of July 1 of the year before last and June 30 of the past year.** These employers will be considered "monthly depositors" and will continue to deposit their taxes no later than the fifteenth (15) day of the month following the withholding.

**3. Employers who have withheld and informed more than \$50,000 during the period of July 1 of the year before last and June 30 of the past year.** These employers will be considered "biweekly depositors" and shall deposit the withheld taxes as follows: (i) if the employer pays on Wednesday, Thursday or Friday, the employer shall deposit on the following

Wednesday; and (ii) if the employer pays on Saturday, Sunday, Monday or Tuesday, the employer shall deposit on the following Friday.

**4. Employers who have withheld \$100,000 or more taxes on any day of a deposit period.** These employers shall deposit no later than on the close of the business day following the date of withholding.

The determination of whether an employer is a "monthly depositor" or a "biweekly depositor" will be done annually, based on the payments made during the previous 12 months. Finally, it is important to note that this deposit system is similar to the one presently used for federal social security tax purposes.

LITIGATION

CONTINUING DUTY OF CONDOMINIUMS TO MAINTAIN WATCHFUL EYE FOR DAMAGES CAUSED BY THIRD PARTIES

Puerto Rico's general tort statute, Article 1802 of the Puerto Rico Civil Code, imposes liability on any person or entity who by an act or omission causes damage to another through fault or negligence. In general, Puerto Rico courts have given an endlessly broad definition to the concepts of fault or negligence defined in Article 1802. The Supreme Court has been reluctant to set substantive limits on the type of tort cases that may be brought under Article 1802, preferring to judge each case individually without making any categorical exclusions. As one might expect under such a flexible approach, the list of legal tort claims in Puerto Rico is considerably lengthier and more encompassing than under common law and is capable of infinite expansion. A plaintiff's entitlement to recovery merely hinges on his ability to prove fault or negligence on the part of the defendant and his or her real damages, including any of the many varieties of human suffering.

reestablish the safe conditions of the condominium when a garbage truck from the service provider causes damages to the condominium's property. The court faced the challenge of establishing which party's obligations made it liable, a decision that can only be made upon closer examination of the subtleties of each party's obligations and the means by which these were acquired.

In this case, a cement platform on which a trash container was situated, was surrounded on three sides by concrete walls.

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The rear wall served to retain the soil behind the platform because the platform was built into the slope of a small knoll. Frequently, residents would climb the knoll, stand above the container, behind the rear wall, and deposit their garbage. This practice would facilitate their efforts, as garbage was simply dropped

and maintain the safety of its premises. This obligation inherently obligates the Condominium to prevent third parties from damaging the property, and, subsequently, to see to it that if such damages do occur, they are properly repaired. Thus, with the accident, a duty arose, making the Condominium responsible for reestablishing the safety of its premises, specifically the garbage platform. Simultaneously, BFI had a clear and distinct duty to pay for the damages that one of its drivers negligently caused. At the Condominium's request, BFI paid a third party to repair the rear wall. The person whom BFI paid to make such repairs, failed, however, to fix adequately a hole in the knoll left behind when the soil fell through the damaged wall. The Condominium knowingly disregarded the existence of this hole.

On October 29, 1995, Mr. de Jesús Adorno, a maintenance employee of the Condominium, was injured when he climbed the knoll behind the platform, as was customary, and fell into this rear hole while attempting to deposit a heavy bag of dirt unto the trash container below. Subsequently, in January of 1997, Mr. de Jesús filed a civil action claim against BFI, claiming negligence and seeking relief for the physical, emotional, and economic injuries he sustained. In January of the following year, the district court granted BFI's motion for summary judgment and denied the plaintiff's motion because "BFI had no duty to repair the hole that caused plaintiff's injury."

The district court's ruling was appealed. The plaintiff argued that BFI was negligent in leaving

unto the container below. In August of 1990, one of BFI's truck drivers backed into the rear wall. Upon impact, both part of the wall and soil from the knoll previously retained by this wall, crumbled unto the platform. Instantaneously, a new relevant set of obligations originated from the event. First, the Condominium has a perpetual duty, under Puerto Rico Law, to establish

In de Jesús-Adorno v. Browning Ferris Industries, 160 F. 3d 839 (1st Cir.1998), the United States Court of Appeals for the First Circuit grappled with the contours of Article 1802 when two entities possess overlapping legal obligations. A condominium and a garbage disposal service provider both inherit similar obligations to

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the hole unrepaired since it had a traditionally recognized duty to repair it, which arose from its original negligent act. The appellate court, however, did not concur. Instead, it found that BFI adequately satisfied its original duty of ordinary care, which required it to compensate the Condominium for the damages to the wall. Their driver's negligent act did not vest BFI with a perpetual legal duty to maintain the safety of the Condominium's premises. Because of its driver's negligent act, BFI had a legal and binding duty to alert the Condominium administrator of the damage and reimburse the Condominium for the repair, but nothing else. Having notified the administrator and making the adequate payment, BFI satisfied all its obligations and could not be held liable for Mr. de Jesús's injury.

The Condominium, meanwhile, had a non-delegable, encompassing, and perpetual duty to maintain its premises in reasonably safe conditions. This duty carried with it many inherent and relevant obligations, one of which was to inspect and verify that the original repair was adequate. The Condominium negligently breached this obligation when it disregarded the inadequate repair.

Only the Condominium had a right to enter the property to effectuate inspections or remedies to the original repair. Encompassed by its duty to maintain its premises safe, it was the Condominium's duty to inform BFI that the repair was inadequate, in which

case, BFI would assume a new duty to pay for or remedy the original repair. BFI was never notified, thus absolving them of any further obligations. Based on this reasoning and the proper identification of the obligations corresponding to each party, the appellate court affirmed the district court's original ruling in favor of the defendant.

Surrounding circumstances are crucial in defining the parties' obligations to assign liability. While BFI had a legal and binding liability to make or fund the original repair, the mere fact that it had no right to enter the property repeatedly, liberated BFI of any further obligation to inspect the repair or effectuate any new repairs inside the Condominium's premises. The Condominium also has an encompassing right to maintain its premises safe. Inherent in this duty is the obligation to fix damages by third parties, specifically to see to it that BFI's damage is properly repaired, a

duty it clearly breached.

While the Puerto Rican courts willingly allow a broad and diverse spectrum of tort cases to be defined under Article 1802, the subtleties of each case are crucial factors that the courts examine on

an individual basis. Under other circumstances, BFI might have been found liable for Mr. de Jesús's injury. The Condominium's perpetual duty to maintain its premises safe combined with BFI's lack of a right to enter the property, however, resulted in a

ruling in favor of BFI. While this flexible approach to tort law under Article 1802 does allow for an ever-expanding realm of cases to be presented, the courts have appropriately signaled their emphasis that each case be judged separately. If it had not been for the specific and thorough examination of each party and their individual obligations, the courts might have not reached the same decision.

While the ever-expanding concept of fault under Article 1802 can be disheartening to some because of the equally expanding number of liability claims, this case provides a glimmer of hope with far-reaching ramifications. While Puerto Rico courts refuse to categorically exclude tort cases, thus, letting their numbers rise, the courts still exhibit the ability and determination to dissect each individual case. This determination should bring some ease and comfort to citizens who believe their potential liabilities are expanding out of control. The courts, with this case, show that the specifics of each case will be scrutinized that much closer. It may seem alarming that out of the expanding nature of the definition of tort under Article 1802 more liabilities are imposed on persons and entities. This case should bring some solace, however, in that these newly arising obligations are scrutinized that much closer and circumscribed by their particular circumstances. And, while an entity may be found to possess more legal obligations, their liability to a plaintiff will be much more limited by the specifics of the circumstances. Just as BFI's obligations to repair the damages were found limited by its lack of a right to enter the property, its liability to the plaintiff was not found substantial.

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LITIGATION

PRECONTRACTUAL NEGOTIATIONS AS MINIMAL CONTACTS SUFFICIENT FOR JURISDICTION

A court must have personal jurisdiction over a person or entity before it can flex its legal muscle and proceed to make any judgment against them. The simplest definition of personal jurisdiction includes all those that reside in the state where the court sits. Complications occur, however, when controversies or litigation arise in the state as a result of actions by a person or entity that resides in another state or country. In light of such events, courts have established thorough guidelines that describe in detail the terms and conditions that enable them to exert personal jurisdiction over persons that reside, or entities located, in states or countries different from the one where the court sits. These guidelines focus on interpreting the nonresident party's actions within the state where the court can exert its jurisdiction. Every question over personal jurisdiction, thus becomes an exercise in verifying whether these terms and conditions have been properly met.

In today's global markets and world economy, corporations constantly conduct business in places outside the state where their main offices are located, operating beyond the jurisdiction of their own state's legal system. This has created a need for states to expand their jurisdiction to apply to entities who enter the state and conduct business there. Again, it appears logical that any entity entering another state to do business should be forced to abide and be subject to that state's legal system. Corporations are complex organisms, however, and business transactions are long ordeals that differ every time. It is not an easy task to determine the exact point in time during business negotiations in another state that an entity becomes subject to the jurisdiction of the courts of that other state. Is mere physical trespass enough for a state to exert its jurisdiction over a nonresident or must negotiations reach a more advanced stage before jurisdiction can be exerted? Guidelines must be established by each state that determine what level of entry or amount of contact is sufficient for that state's courts to exercise their jurisdiction.

The power of a United States district court to assert personal jurisdiction over a nonresident defendant is first governed by that particular state's "long arm statute." A long arm statute is a legislative act by the state which provides for personal jurisdiction, via substituted service of process, over persons or corporations which are nonresidents of the state and which voluntarily go into the state, directly or by agent, or communicate with persons in the state, for limited purposes, in actions which concern claims relating to the performance or execution of those purposes. Puerto Rico's long arm statute, Rule 4.7 of the Puerto Rico Rules of Civil Procedures allows for the exertion of personal jurisdiction in cases when litigation arises out of transactions conducted in Puerto Rico. A local court is entitled to jurisdiction over a person if the person "transacted business" in Puerto Rico, regardless of the person's origin or residence. The term "business," however, is interpreted in its most general terms. For this reason, the Supreme Court of Puerto Rico has further developed a three-part test to determine which business transactions are sufficient for the Commonwealth's long arm statute to allow for the assertion of jurisdiction. Under this test, first, there must be an act done or consummated within Puerto Rico by the nonresident defendant. Physical presence is not necessary; the act or transaction may be by mail. Second, the cause of action must arise out of the defendant's action within Puerto Rico. Third, the cause of action must be substantial enough to meet the due process requirement of fair play and

substantial justice established years ago by the United States Supreme Court. Having met all three of these requirements, the court can then proceed to exert its jurisdiction over a person who is not a resident of Puerto Rico.

The United States District Court for the District of Puerto, in Generadora de

Electricidad del Caribe v. Foster Wheeler Corp., 30 F.Supp. 2d 196 (1998), utilized this very test to decide Foster Wheeler's motion to dismiss the case for a lack of personal jurisdiction. In February of 1989, Generadora de Electricidad del Caribe, Puerto Rico Resource Recovery Leasing, and Caribbean Environmental

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Sales and Development, Inc., all corporations organized and existing under the laws of Puerto Rico, and Mr. Gustavo Díaz together approached Foster Wheeler with a proposal to develop a power generation project jointly in the Dominican Republic. Foster Wheeler is composed of several corporations, one organized under the laws of Switzerland and another under the laws of the British Virgin Islands. The Foster Wheeler group was represented by Mr. Edmundo Eisen, a citizen of Argentina residing in Spain. After numerous agreements had been executed in furtherance of the development of the project, Foster Wheeler withdrew from the project on March 12, 1993. This abrupt withdrawal caused plaintiffs great expense and prompted them to file a civil action suit for breach of contract and fraud. Defendants reacted by filing a motion to dismiss the case for lack of personal jurisdiction.

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The court found that the plaintiff established sufficient facts to justify the assertion of jurisdiction in Puerto Rico over Foster Wheeler. First, the evidence clearly demonstrated that Foster Wheeler, through its agents, actually came to Puerto Rico on three occasions to meet with plaintiffs and their lawyers to discuss and negotiate the proposed project. These repeated willful entries into the forum and the execution of two agreements were not random, isolated, or fortuitous acts. Instead, these voluntary acts were purposely carried out in Puerto Rico. In that way, all parties in the negotiations avoided themselves of the benefits and protections of Puerto Rico's particular laws. Foster Wheeler consciously and purposely chose Puerto Rico as a forum to conduct business because of the tax-exemptions specific to Puerto Rico that no other jurisdiction could offer. It was not coincidental that Foster Wheeler chose Puerto Rico to conduct its business. It

was entirely reasonable that its actions in Puerto Rico meant to reap the benefits of a specific tax-exemption would also subject it to all of Puerto Rico's laws. Foster Wheeler countered this assertion with the claim that its minimal dealings in Puerto Rico paled in comparison to those performed in other forums. This argument was deemed irrelevant, however, because the court's only task is to review the actions carried out in Puerto Rico, disregarding whether these were the brunt of the business or simply a small fraction.

At first glance, personal jurisdiction appears to be a shady and nebulous line. Upon closer inspection, though, states have formulated precise mechanisms that dictate when personal jurisdiction over non-residents persons and entities may be asserted. While these mechanisms utilize the entity's actions as criteria for judgment, what courts are truly attempting to decode and judge are the parties'

intentions. Foster Wheeler acted with clear and purposeful intentions when it entered Puerto Rico's business foray. While intentions must be gleaned from the actions that proceeded them, they are the true bases for personal jurisdiction. Because intentions are not readily apparent, courts must base their judgment on actions such as physical entry, meetings, the execution of contracts, and other such business transactions. Every action must fall under some jurisdiction and carry with it the corresponding consequences. This case demonstrates a logical approach to determine which jurisdiction has precedence when business transactions span multiple forums. Foster Wheeler could not reasonably expect to benefit from Puerto Rico's jurisdiction yet not fall under it. Just like every action has an equal and opposite reaction, every action in a certain forum that benefits from any particular legislation simultaneously falls subject to every applicable portion of the forum's laws.

## LABOR LAW

### PUNITIVE DAMAGES AWARDS AGAINST EMPLOYERS WHO INTENTIONALLY DISCRIMINATE

In Kolstad v. American Dental Association, 1999 WL 407481 (U.S.), the United States Supreme Court considered an award of punitive damages in an action under Title VII of the Civil Rights Act of 1964. The cause of action arose when a female employee sued the American Dental Association for allegedly discriminating against her because of her gender by promoting a male employee to a position she sought. She requested punitive damages under 42 U.S.C. § 1981a (b) (1), alleging intentional discrimination "with malice or with reckless indifference to the employee's federally protected rights." The District Court denied such request for lack of

supporting evidence and the Court of Appeals affirmed adding that the employer must have engaged in some egregious misconduct.

The United States Supreme Court held that an employer's conduct does not need to be egregious to award punitive damages although the egregious conduct may be proof of the requisites of malice or reckless indifference. Therefore, the Court concluded that section 1981 of the Civil Rights Act allows punitive damages based solely on the employer's state of mind. The terms malice and reckless indifference pertain to the employer's knowledge that he may be acting in violation of federal law and not to the

employer's awareness that it is engaging in discrimination. Therefore, the Court sustained that employees do not have to prove employer's egregious misconduct in order to be granted punitive damages.

In the same case, the Court faced a second issue: under what circumstances is the principal liable for an agent's conduct acting in a managerial capacity? The Court found that in the punitive damages context an employer may not be vicariously liable for a discriminatory employment decision of its managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII.

## LABOR LAW

### SUPREME COURT LIMITS THE APPLICABILITY OF THE AMERICANS WITH DISABILITIES ACT OF 1990

In three recent cases the United States Supreme Court faced the issue of whether it is necessary to take into account the measures that mitigate an individual's impairment when evaluating if such a person is disabled within the meaning of the Americans with Disabilities Act (ADA).

In Sutton v. United Air Lines, 1999 WL 407488 (U.S.), two sisters who suffered from severe myopia applied for a position as commercial pilots in United Air Lines. They were called for an interview but they were not offered the job because their eyesight did not meet the airline's requirement of visual acuity. Consequently, they filed a civil action alleging discrimination because of their impairment.

The district court dismissed the action and the court of appeals affirmed, holding that the employment applicants did not meet the definition of "qualified individual with a disability." The Supreme Court held that the determination of whether an individual is disabled or not should be made with reference to measures that mitigate the individual's impairment. Accordingly, the ADA requires an evaluation of the individual's disability to determine whether such disability substantially limits a major life activity.

The court held that because plaintiffs' vision, with corrective

measures, was normal, they were not actually disabled under subsection (a) of the ADA. Plaintiffs alleged that they were disabled within the scope of the ADA because the airline regarded them as disabled in the major life activity of working. However, the Supreme Court found that this allegation was insufficient because the position sought was a single job and not a class of jobs or a broad range of jobs.

The same date, the Supreme Court decided the case of Albertsons, Inc. v. Kirkingburg, 1999 WL 407456 (U.S.). Here, a former employee who suffered from amblyopia, an uncorrectable sight condition, was dismissed from his job at Albertsons for failing to meet the Department of Transportation's (DOT) vision standard and was not rehired after he obtained a waiver from the DOT. He brought forth an action against his former employer alleging discrimination under the ADA. The district court granted summary judgment in favor of the defendant and the appellate court reversed and remanded holding that the plaintiff had established a disability by demonstrating that the manner in which he sees differs from the manner in which most people see. The Supreme Court found that persons with monocular vision must prove that they have an impairment and that such impairment substantially limits a major life activity. Furthermore, the Court held that an employer may justify its job qualification standards by

complying with the applicable safety regulations which bind it. The Court sustained that because the experimental waiver program did not modify the visual acuity standards, the defendant was not obliged to disregard the basic standards.

The third case regarding the ADA was Murphy v. United Parcel Service (UPS), 1999 WL 407472 (U.S.). The case arose when an employee was fired from his job as a mechanic, a position which required him to drive commercial vehicles. The employment termination was motivated by the company's learning that his blood pressure exceeded the DOT's health requirements for drivers of commercial vehicles. He brought an action under the ADA against his former employer but the district court entered summary judgement in favor of the defendant and the court of appeals affirmed. The Supreme Court reaffirmed its opinion that for a determination regarding a person's disability within the meaning of ADA, corrective measures should be taken into account. Thus, the Court held that the plaintiff was not disabled nor was he regarded as such, but rather was an unqualified UPS mechanic for being unable to obtain the DOT's certification. The Court held that for a person to be regarded as disabled, he has to be regarded as such with respect to performing a class of jobs and not a job in particular. ■

# TELECOMMUNICATIONS LAW

## THE PUERTO RICO TELECOMMUNICATIONS REGULATORY BOARD AND THE BATTLES FOR ITS JURISDICTIONAL POWERS

The Puerto Rico Telecommunications Regulatory Board (“Board”) was created pursuant to the Puerto Rico Telecommunications Act of 1996, 27 L.P.R.A. §§ 265 et seq. (the “Act”). The Act provides broad powers to the Board to effectuate the Act’s purposes. The Puerto Rico Telephone Co., Inc. (“PRTC”), however, understands that these powers are not as broad and is litigating in several forums to establish what it understands to be the limited powers of the Board.

**I. Power to Set Maximum Tariffs.** One of the most important powers of the Board currently being questioned is the power to establish maximum telecommunications tariffs. This issue is currently being litigated before the Puerto Rico Supreme Court in the case of PRTC v. Board, CC99-068. The Board alleges that pursuant to Art. III-7 and Art. II-10 of the Act, once a tariff complaint is filed at the Board and the Board determines, after an evidentiary hearing, that the tariff is not cost based and reasonable, the Board may establish a maximum tariff. The Board argues that the power to impose a maximum tariff is implied in the above articles and that it is necessary to achieve two of the main purposes of the Act: (1) to ensure that telecommunications services are offered at

cost plus a reasonable profit; and (2) to assure that a competitive telecommunications market exists in Puerto Rico.

This is a case of first impression in Puerto Rico and is the first case in which the Supreme Court of Puerto Rico will have to interpret or deal with the Act. Whatever the result, the case will no doubt become the leading telecommunications case in Puerto Rico. This case is being litigated by AAMG.

The power to establish maximum tariffs is very important to the Board and necessary to implement the public policies of the Act. For this reason, parallel efforts are being undertaken at the Legislature by the Board and PRTC competitors to amend the Act so that it explicitly permits the Board, not only to set maximum

tariffs, but to set tariffs once a complaint is filed and the Board determines with evidence that the tariff is not cost based. The House Bill No. 1959 (“the Bill”) is aimed at providing precisely these powers to the Board. The Bill, proposed by Rep. Angel Cintrón, has already been approved by the

House of Representatives and is currently being debated in the Senate. A Senate public hearing was held on August 17, 1999, in which the Board, PRTC and all the major

telecommunications players provided comments.

**II. Power to Award Damages.** Another Board power in dispute is the jurisdictional power of the Board to hear damage cases and to award damages as one of the remedies for a complaint. In a different case from that discussed above, AAM&G filed the first ever damages complaint at the Board on behalf of Teléfonos Públicos de Puerto Rico (“TPPR”). PRTC, of course, opposed the jurisdiction of the Board to award damages as a remedy for a complaint. PRTC alleges that if a complaint must be heard by the Board because of its expertise (“primary jurisdiction”), the Board must resolve all the disputes except the damage claims. Then, after the case is resolved, the case must be re-filed at the Superior Court to resolve the damage issues.

This, of course, creates an expensive and time consuming dichotomy of forums every time a plaintiff wants to file a damages complaint which deals with telecommunications issues.

On July 6, 1999, the Board issued a resolution on the question of whether it has the authority to award damages. The Board concluded that it indeed has the power to award damages as a remedy, but that it could also abstain from hearing damages cases if the case is too complex, the amount of damages requested is too high and/or the case requires extensive discovery and the use of several experts. It is very likely that PRTC will appeal the Board’s jurisdictional resolution.

**[PRTC] is litigating in several forums to establish what it understands to be the limited power of the [Puerto Rico Telecommunications Regulatory] Board.**

## TELECOMMUNICATIONS BRIEFS

### Court of Appeals Confirms Federal District Court's Limited Jurisdiction to Review Decisions of Puerto Rico's Telecommunications Regulatory Board

**O**n August 19, 1999, the United States Court of Appeals for the First Circuit issued an opinion (PRTC v. Telecommunications Regulatory Board of Puerto Rico, et al.), confirming that the US District Court does not have jurisdiction to review a Telecommunications Regulatory Board of Puerto Rico's ("Board") Order interpreting an interconnection agreement.

**The District Court dismissed PRTC's action concluding it lacked jurisdiction because the Board's Order was based purely on state law...**

certain charges to its customers, it did not notify the customers of such charges in violation of the "good faith" clause under Article 1210 of the

Puerto Rico Civil Code, 31 LPRA §3375. The incumbent carrier, PRTC, filed an action in the federal district court seeking review of the Board's decision under §252 of the 1996 Federal Telecommunications Act (the "ACT"). Section 252 (a) (6) of the Act empow-

District Court dismissed PRTC's action concluding it lacked jurisdiction because the Board's Order was based purely on state law and was "not an approval or disapproval of the agreement or rule regarding the agreement's conformity with 47 USC §251."

The Court of Appeals affirmed the district court's decision basing its determination on the fact that the Board's Order was based purely on state law and not on federal law. The Court stated that section 252 of the Act "does not confer authority on federal courts to review the actions of state commissions for compliance with state law." In other words, a federal district court has jurisdiction under the Act only when the Board applies federal law in its interpretation of an interconnection agreement and not when said determination by the Board is based on local law.

The Board's decision determined that the incumbent carrier, Puerto Rico Telephone Company ("PRTC") violated the interconnection agreement to the extent that, although it had the right to impose

ered federal courts with jurisdiction to review whether State commissions' interpretations of agreements between two telecommunications companies meet the requirements of section 251 of the Federal Act. The

### Wireless Telecommunications Towers Siting

**T**he location and construction of cellular and PCS towers for wireless telecommunications providers has created a tidal wave of Puerto Rico House and Senate bills for the control and limitation of their proliferation. Several citizens have criticized the government for a lapse in the regulatory zoning regime which, it is alleged, allows these towers to be constructed next to residential areas. Other critics allege a lack of hurricane proof guidelines for these towers. Some of these bills want to limit the distance between a tower and a building structure. The relevant bills are the following: House Resolution No. 5083; Senate Joint Resolution No. 1549; House Bill Nos. 2208-2210; Senate Resolution No. 2281; Senate Resolution No. 2448; House Bill No. 2569; and Senate Resolution No. 2564. Under the Federal Telecommunications Act ("Act") the States have authority over decisions regarding the placement, construction, and modification of personal wireless service facilities. 47 U.S.C. §332(7)(A). However, the Act limits this authority by prohibiting States from regulating towers on the basis of the "environmental effects of radio frequency emissions." 47 U.S.C. §332(7)(B)(iv).

## TELECOMMUNICATIONS BRIEFS

### New Telecommunications Regulatory Board's NPRMs

**T**he Telecommunications Regulatory Board of Puerto Rico (the "Board") issued three new Notice of Proposed Rule Making ("NPRM"s.)

On July 30, 1999, the Board issued an NPRM with respect to the intra-island access charges that Puerto Rico Telephone Company ("PRTC") imposes on its competitors for the use of its network. In the NPRM, the Board proposes the adoption of a cost methodology for the development of intra-island access rates to be used by access providers for interchanged access service. The Board solicited comments on the appropriate cost methodology to be implemented for local access charges in Puerto Rico. Comments were due before August 30, 1999, and reply comments were due before September 15, 1999. The Board also stated in a scheduling order that a final determination on the cost methodology selection will be taken by November 1, 1999. This NPRM is extremely important for intra-island long distance carriers and to all the telephone subscribers in Puerto Rico because the level of access charges depends on the cost methodology. If a forward-looking cost methodology is selected, access charges would be lower and, therefore, intra-island long distance calls would be available to the consumers at lower prices.

A second NPRM was issued on August 18, 1999, regarding the promulgation of a Regulation for the Installation and Operation of Public Telephones in Puerto Rico. Comments were due by September 22, 1999. This regulation is very important to all the payphone service providers in Puerto Rico. The action of the Board in promulgating this regulation arises as a result of multiple complaints filed at the Board against Puerto Rico Telephone Company for anti-competitive acts carried out by its payphone department.

On August 23, 1999, the Board issued a third NPRM to protect telecommunications consumers from fraud practices carried out by the telecommunications service providers or from third parties. This regulation would be applicable to all telecommunications service providers, including cellular and PCS companies, as well as cable tv companies. Comments were due by September 30, 1999.

## ENVIRONMENTAL LAW

### NATURAL RESOURCES RANGERS TO IMPOSE FINES

**T**he Puerto Rico Senate is currently evaluating an amendment to the Law for the Conservation, Development and Use of Puerto Rico Water Resources to authorize the Natural Resources Rangers to issue notices of violation imposing fines, without prior hearing, for the following violations in the indicated amounts:

1. Use of water with expired franchise: \$400
2. Use of water without a franchise: \$500
3. Use of water without a copy of franchise resolution: \$200
4. Construction of water extraction system without keeping copy of permit at extraction site: \$200
5. Construction of extraction system without permit: \$500
6. Construction of extraction system with expired permit: \$400
7. Operation of extraction system without meter: \$200
8. Operation of extraction system with broken meter: \$200
9. Deviation of water to avoid meter: \$500

Fines may be imposed on a daily basis for each violation until the violation is corrected, and together with additional fines that may be imposed by the Secretary, must not exceed \$50,000 per violation.

## NEWS BRIEFS

### Amendment to the General Corporation Law of Puerto Rico

Articles 15.01 to 15.06 of the General Corporation Law of 1995 currently require that every corporation incorporated in Puerto Rico, or any foreign corporation authorized to do business in Puerto Rico, file a yearly report with the Puerto Rico Department of State (the "Department").

This report must be filed, no later than April 15th of any given year, and must contain, in addition to a duly audited financial statements, a list of all the names and mailing addresses of the corporation's directors and officers, their respective positions with their corresponding terms, and any other information deemed necessary by the government. If a corporation fails to file this report on any given year, the law authorizes the Secretary of State (the "Secretary") to impose administrative fines of no less than \$100, and no greater than \$1000. Furthermore, if the corporation is delinquent in filing their reports for two consecutive years, the Secretary is authorized to cancel the corporation's certificate of incorporation. Senate Bill 1265 ("P.S. 1265") seeks to amend Article 15.02, in an effort to promote a greater responsibility on behalf of domestic and foreign corporations, with regards to the filing of their yearly reports with the Department. P.S. 1265 would increase the minimum administrative fine from \$100 to \$500, and the maximum from \$1000 to \$2000.

Furthermore, the proposed amendment would authorize the cancellation of certificates of incorporation for corporations who are delinquent in their filings for five consecutive years, as opposed to the two years provided under the current law. The proponents of this bill hope that the threat of substantially stiffer fines will compel corporations to be more diligent in their filing of yearly reports, therefore allowing the Department to enjoy more complete and up-to-date records.

As of the date of publication, this bill had not been enacted. It has been under consideration by the House Commerce Commission since April

13, 1999.

## OFFICE NEWS

*Axtmayer Adsuar Muñiz & Goyco, P.S.C.* is

pleased to announce that Jessica Hernandez and Isabel Abislaiman-Quilez are the latest associates to join the Firm. Ms. Hernández works on telecommunications related matters. Ms. Abislaimán joined our labor and employment department.

On February 4, 1999, **Telefónica Larga Distancia de Puerto Rico, Inc.** and ClearComm, L.P. entered into a joint venture for the development of a new cellular communication network in Puerto Rico. *AAM&G* acted as counsel to Telefónica Larga Distancia de Puerto Rico, Inc.

On April 30, 1999, First Bank Corp. closed the offering of its 7.125% Non-Cumulative Perpetual Monthly Income Preferred Stock, Series B, with a total price to the public of \$90,000,000. *AAM&G* acted as counsel to the Underwriters, represented by **Paine Webber Incorporated of Puerto Rico**.

On May 21, 1999, after granting summary judgment in a sex discrimination and retaliation case, the United States District Court for the District of Puerto Rico dismissed all of Plaintiff Nilsa Santiago's claims against **Centennial P.R. Wireless Corp., d/b/a Centennial de Puerto Rico** ("Centennial"), in the case of Santiago v. Centennial, Civ. No. 97-2288 (SEC-JAC). The Court found, as Centennial had argued, that instead of discriminating against married women with children, plaintiff had simply failed to perform at the peak of the company's pre-launch stage in Puerto Rico. Centennial was represented by *AAM&G* attorneys: Marshal D. Morgan, Isabel Abislaiman and Edwin J. Seda Fernández.

On May 27, 1999, *AAM&G* attorneys Ricardo Muñiz and Ismael Vincenty participated as speakers at a seminar offered by **PaineWebber Trust Company of Puerto Rico** held in San Juan, Puerto Rico. Mr. Muñiz and Mr. Vincenty discussed all matters related to Retirement Plans in Puerto Rico.

On May 28, 1999 and June 2, 1999, Westernbank Puerto Rico closed the offering of its 7.25% Non-Cumulative Monthly Income Preferred Stock, 1999 Series B, with a total price to the public of \$50,025,000. *AAM&G* acted as acounse to the Underwriters, represented by **PaineWebber Incorporated of Puerto Rico**.

Pegasus Cable Television, Inc., a subsidiary of Pegasus Communications Corp., recently acquired all the assets of **Cable TV del Noroeste** for \$42 million. *AAM&G* acted as counsel to Cable TV del Noroeste. ■

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