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# The Uncertain Status of the Puerto Rico Ports Authority: Working Towards a Uniform Arm-of-the-State Test

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# COMMITTEE NEWS

## Admiralty and Maritime Law

### Navigating the Pitfalls of Maritime Mediations

#### Introduction

The shipping industry in the United States often involves the performance of complex maritime contracts. It is not uncommon for the parties to these contracts to engage in disputes when one of these contracts is breached by one of the contracting parties. When this happens, there are four primary methods for resolving these disputes: direct negotiation, litigation, arbitration, or mediation.

#### Background

This article will first briefly examine the particulars of the primary methods for resolving maritime contract disputes. The article will then conclude by focusing on some of the pitfalls that parties should avoid when attempting to resolve a maritime contract dispute.

[Read more on page 25](#)



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## The Uncertain Status of the Puerto Rico Ports Authority: Working Towards a Uniform Arm-of-the-State Test

### I. INTRODUCTION

Many port authorities are allocated special status and therefore partake in the parent state's Eleventh Amendment immunity as effective arms-of-the-state. This serves several important policy goals, yet the precedent surrounding the arm-of-the-state test is muddled. This results in different tests and standards, depending on the court hearing the case, leading to different results for different entities. The Port Authority of Puerto Rico ("PRPA") is in an especially vulnerable situation, due to its dual function as a governmental and corporate entity. The unclear status of what role the function of an entity should play in determining its status under the Eleventh Amendment has produced conflicting holdings for the PRPA in various cases, even within the same circuit. Such lack of clarity erodes public policy reasons for according arms-of-the-state special status under the Eleventh Amendment.

This paper will explain how this special vulnerability came to be by examining the legal theory of arm-of-the-state immunity in general. Then, specific application in cases involving the PRPA will be addressed. A path toward greater predictability and certainty will then be examined.

### II. SOVEREIGN IMMUNITY

#### A. Generally

Sovereign immunity is a legal doctrine sounding in common law which leaves the king immune from suit in his own courts.<sup>2</sup> This common-law concept has been embraced by the United States in several forms, including immunity for foreign sovereigns and the federal government.<sup>3</sup> The Supreme Court of the United States has found the common-law concept to be embedded in the structure of the U.S. Constitution.<sup>4</sup> The sovereignty of both foreign and domestic entities has been recognized by U.S. courts.<sup>5</sup>

The Eleventh Amendment has long been held as the embodiment of the common-law concept as it pertains to states.<sup>6</sup> According to the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>7</sup> Read in "light of historical evidence," this limits the diversity jurisdiction of Article III, §2 short

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of actions brought by citizens against states.<sup>8</sup> However, there is a long history of judicial interpretation “injecting broad notions of sovereign immunity into the whole corpus of federal jurisdiction” from the Eleventh Amendment.<sup>9</sup> States are held to be entitled to immunity from suit in federal court not only when diversity is invoked,<sup>10</sup> but also when a federal question is raised, or the cause of action lies with admiralty and maritime jurisdiction,<sup>11</sup> unless the state has waived that right.<sup>12</sup>

The “immediate purpose” of the Eleventh Amendment was, as Hector Blaudell explains, as “closing state treasuries to federal courts.”<sup>13</sup> It has also been interpreted broadly as “confirming sovereign immunity as a constitutional principle and thus protecting states’ dignity interests.”<sup>14</sup> The primary goal of protection of state interests may be agreed upon by the courts, but the application of the principle has not been uniform, leading to disparate tests between circuits. One area in which this disarray becomes obvious is when courts grant corresponding Eleventh Amendment immunity to entities organized under state law to be arms of the state.

### ***B. Sovereign Immunity for Arms of the State***

The Eleventh Amendment bars actions against the state itself and against entities deemed to be arms of the state. Entities deemed to be “sufficiently close to the state so as to, in effect, be part of the state itself” are entitled to immunity as states themselves.<sup>15</sup> This practice serves several important purposes, including protection of state dignity and state fisc from federal interference.<sup>16</sup> By allowing a state to structure an entity that performs a vital state purpose to share its Eleventh Amendment immunity, the state may, as Blaudell explains, “promote effective public administration” by allowing the entity relative autonomy without fear of liability by the entity.<sup>17</sup> If a State and a private actor form an economic partnership for a State purpose but the private actor is left vulnerable to potential liability while the State is not, this puts the private party at an imbalanced risk.<sup>18</sup> The state’s treasury – and therefore its dignitary interests – is opened to risk if the State may be haled into federal court because of the transaction. Despite the multitude of cases, there is still no uniform test for establishing when or what type of entity is entitled to such immunity.<sup>19</sup> And even though the Supreme Court addressed the issue somewhat recently<sup>20</sup>, there remain significant gaps.

### ***C. Puerto Rico is treated as a State for the Purposes of the Eleventh Amendment.***

While courts routinely grant immunity for entities established as arms of states, the same is not true for territories and other federal bodies.<sup>21</sup> Federal entities like the District of Columbia and territories like the Northern Mariana Islands and the U.S.

Virgin Islands are not entitled to the same immunity as a state.<sup>22</sup> However, Puerto Rico, while not a state, has consistently been accorded Eleventh Amendment immunity by courts of appeal, especially the First Circuit. The Supreme Court has declined to directly address Puerto Rico's constitutional status<sup>23</sup> for sovereign immunity.<sup>24</sup>

Several courts, most notably the First Circuit and D.C. Circuit, have recognized Puerto Rico's status under the Eleventh Amendment.<sup>25</sup> The First Circuit considers Puerto Rico's immunity as "settled," a "verity," "consistently held," and "beyond dispute."<sup>26</sup> The D.C. Circuit has held that the Puerto Rican Federal Relations Act grants Puerto Rico the same sovereign immunity that states possess from suits arising under federal law.<sup>27</sup> This special treatment of Puerto Rico has elevated the Commonwealth to a state-like status for the Eleventh Amendment.

#### **D. History of Cases**

Having ascertained that Puerto Rico enjoys the same immunity accorded states, we next turn our attention to the *types* of entities to which a court will grant immunity. The Supreme Court has addressed arm-of-the-state Eleventh Amendment immunity on several occasions. While the Court has addressed the issue fairly recently, it is informative to look to past cases to determine what factors the Court has traditionally considered relevant in determining immunity under arm-of-the-state doctrine. In *Mount Healthy City School District Board of Education v. Doyle*,<sup>28</sup> the Court determined a school board was not immune in a contract dispute. In making the determination that the school board was more akin to a political subdivision (and therefore not entitled to immunity), the Court looked to several factors: the entity's designation under state law, the supervision of the state over the entity, funding received by the entity from the state, and whether the entity generated its own revenue.<sup>29</sup> The Court determined that the school board's status under state law as a municipal entity and ability to generate its own revenue outweighed the state's financial assistance and administrative control, factors that would have pointed toward the board being an arm. The Court focused on the "nature of the entity," its treatment by state law, and its closeness to the state's treasury,<sup>30</sup> but did not explain the weight it gave to the different factors it assessed.<sup>31</sup>

Immediately after *Mount Healthy*, the Supreme Court again addressed the issue in *Lake Country Estates v. Tahoe Regional Planning Agency*<sup>32</sup> ("*Lake Country*"). At issue was whether the agency, created by the compact, acted under federal authority (by virtue of the compact) or under color of state law when conducting land management functions. Due to its nature as a compact clause entity, the intent of the states in forming the agency, and the actual operation of the agency, the agency was not entitled to immunity.<sup>33</sup> Simpson-Wood suggests that the Court here

offered more guidance than it did in *Mount Healthy* by providing a longer list of relevant factors,<sup>34</sup> including an analysis of the agency's organic statute, the power to appoint officials, the source of funding for the entity, whether the agency's financial obligations were binding on the state, which government (local or state) was involved in the entity's functions, and whether agency action was subject to state control or veto.<sup>35</sup> Generation of revenue addressed in *Mount Healthy* went unmentioned. The Court instructed that the intent of the state should be considered when determining whether an entity should be cloaked with Eleventh Amendment immunity.<sup>36</sup> This focus on state intent is more helpful than prior standards, but courts still struggled to determine any test that could be pulled from *Lake Country*.

After *Lake Country*, the United States Court of Appeals for the District of Columbia Circuit addressed the issue in *Morris v. Wash. Metro. Area Transit Auth.*<sup>37</sup> ("*Morris*") by applying the factors laid out by the Supreme Court in *Lake Country*. The Court in *Morris* sought to determine the "nature of the entity" and whether there was "good reason to believe" the state structured the entity to have immunity through three factors: whether the state intended the entity to have sovereign immunity, the degree of control exerted by the state over the entity, and the extent of the entity's impact on the state treasury.<sup>38</sup> The Second and Third Circuits likewise sought to apply *Lake Country*, but placed different weights on the *Lake Country* factors than had the D.C. Circuit in *Morris*.<sup>39</sup> Courts since *Lake Country* have confronted the *Lake Country* standards but have failed to explicitly accord them relative weight. This omission, according to Simpson-Wood, underscores the need for a clear standard for ascertaining arm-of-the-state status.<sup>40</sup>

### 1. The Hess Doctrine

In 1994, the Supreme Court again addressed arm-of-the-state immunity in *Hess v. Port Authority Trans-Hudson Corporation*<sup>41</sup> ("*Hess*"). In *Hess*, the Supreme Court handed down its most clearly articulated arm-of-the-state test to date. The issue was whether PATH, a compact clause entity<sup>42</sup> created by New York and New Jersey, and a subsidiary of the port authorities of each state, was entitled to sovereign immunity.<sup>43</sup> First, the Court looked to certain of the factors discussed in previous cases, such as the connection between the entity and the state's treasury, the structure of the entity, and the state's control over the entity.<sup>44</sup> Finding these inconclusive, the Court then returned to the "twin reasons" for the Eleventh Amendment.<sup>45</sup> Analysis focused on the connection to the state treasury, and the Court concluded that if "as a practical matter ... a judgment must expend itself against the state treasuries, common sense and the rationale of the Eleventh Amendment require that sovereign immunity attach itself to the agency."<sup>46</sup> A court must ask whether a State would be "in fact obligated to bear and pay" the indebtedness of an agency, and if the answer is "no," "both legally



and practically,” then Eleventh Amendment immunity is not implicated.<sup>47</sup> Since there was no substantial connection to either state treasury, the Court found PATH was not entitled to immunity.<sup>48</sup>

## 2. Recent Developments

The current status of arm-of-the-state doctrine is unclear. While *Hess* presents us with the best method of assessment of whether a state entity enjoys immunity, serious gaps have allowed, or even encouraged, lower courts to develop an array of variations. One commentator observed that “any existing lower court precedent could be made to fit” with the *Hess* decision.<sup>49</sup>

The circuits are divided. Some, like the First, have followed the approach taken by the Supreme Court in *Regents of the University of California v. Doe*<sup>50</sup> (“*Doe*”) and have looked to the “state’s legal liability” rather than the “practical impact of the judgment” (on the state’s treasury).<sup>51</sup> In *Doe*, the Court addressed a claim that the university had violated an employment contract. The Court in *Doe* departed from the “practical matter” inquiry of *Hess* to focus instead on a “formalistic question of ultimate financial liability.”<sup>52</sup> Other circuits have followed the Eleventh and focused on the “practical impact.”<sup>53</sup>

## III. PORT AUTHORITIES

### A. Generally

In the U.S., port management is usually conducted by a port authority or other entity which may take the form of a governmental or quasi-governmental entity.<sup>54</sup> Such an entity is an instrumentality “established by enactment or grants of authority by the state legislature.”<sup>55</sup> This can take place on the state, local, or municipal level. Ports may also be governed by private corporation, but in the U.S., the line between a public entity and a private port management corporation is often blurred.<sup>56</sup> Two or more states with a mutual interest in port management may, with the consent of Congress, found an entity by interstate compact.<sup>57</sup> When a court must determine whether an entity qualifies for arm-of-the-state immunity, it is usually in one of three settings described above,<sup>58</sup> and it is primarily special purpose corporations and government entities which courts find to be entitled to share state immunity.<sup>59</sup>

According to Mary Brooks, while port management can be structured in a multitude of ways, ports fall within certain patterns which can help determine the type of entity in question. Certain functions, such as licensing and permitting, customs, port monitoring, and policy control, are considered typically “governmental.” Other typical port functions, such as cargo handling, pilotage, line handling, marketing, and

waste disposal, are not definitively proprietary or governmental. Especially within the U.S., where port management is “fragmented with a web of public and private organizations involved in management at national, regional, and local levels, each with differing priorities, requirements, and procedures,” there is often significant overlap between the types of functions performed by a port management entity.<sup>60</sup>

### ***B. Puerto Rico Ports Authority***

The Puerto Rico Ports Authority is a government-owned corporation organized under the Puerto Rico Department of Transportation. It is both a government entity and a corporation – a “body corporate and politic . . . constituting a public corporation and government instrumentality.”<sup>61</sup> It is created as the “successor” entity of the Puerto Rico Transportation Authority, but has a “legal existence and personality separate and apart from those of the Government and any officials thereof.”<sup>62</sup>

The PRPA is structured to be a separate entity from the government of the Commonwealth, but still has close ties to Puerto Rico’s government. The Commonwealth is not bound by the actions of the PRPA, nor is it liable for PRPA’s debts.<sup>63</sup> PRPA also has total autonomy when making decisions and has the power to sue and be sued.<sup>64</sup> These factors all indicate that PRPA is separate from the Commonwealth. The laws of Puerto Rico also create strong ties between the Commonwealth and the PRPA. The strongest indication of this is Puerto Rico’s statutory assumption liability for certain actions arising when PRPA acts in its official governmental capacity.<sup>65</sup> And while PRPA exists as a corporation, it has no private owners and pays no taxes, and must submit yearly financial statements to the legislature and Governor for approval and is audited regularly by the Controller of Puerto Rico.<sup>66</sup> This indicates that while PRPA exists as an independent entity, the Commonwealth has a high degree of oversight over its actions. Further, while the Board of the PRPA is not a government entity, its officials have close ties with the Commonwealth, and the Governor of Puerto Rico has power over appointment and removal.<sup>67</sup> Finally, PRPA is governed by laws that apply to government agencies generally.<sup>68</sup>

The functions of the PRPA include both private and public functions typical of port management entities, which is not uncommon for port authorities as described above. The PRPA is in charge of the development, improvement, ownership, operation, and management of transportation in Puerto Rico, including mass marine transport.<sup>69</sup> PRPA also is charged with control of the waters of Puerto Rico, its ports, docks, and harbor zones,<sup>70</sup> and controls the regulation of pilot services, marine trade and navigation, and vessel inspection as well.<sup>71</sup>



## IV. IS THE PUERTO RICO PORTS AUTHORITY ENTITLED TO IMMUNITY

### A. How Courts Have Previously Treated the PRPA

A court will grant port authorities Eleventh Amendment immunity if it determines the entity has sufficient ties to the state. Puerto Rico, while classified as a “Commonwealth” and a territory, is treated as a state for sovereign immunity.<sup>72</sup> Despite this, courts have not treated PRPA with consistency.

The United States District Court for the District of Puerto Rico addressed the issue of PRPA’s status in *Canadian Transport Co. v. Puerto Rico Ports Authority*<sup>73</sup> (“*Canadian Transport*”). In determining that the PRPA was not entitled to Eleventh Amendment immunity, the Court weighted two factors: whether the treasury of Puerto Rico was responsible for a judgment against the PRPA, and whether the agency had the power to sue and be sued.<sup>74</sup> Language in the statutes governing the PRPA was used to make this determination.<sup>75</sup> The First Circuit modified this test in *P.R. Port Auth. v. M/V Manhattan Prince*.<sup>76</sup> The Court looked to the type of activity involved in the suit (here, setting and enforcing harbor pilot standards), stating that determining immunity rested on “the type of activity [the entity] engages in and the nature of the claim asserted against it.”<sup>77</sup> The *Prince* court ultimately concluded that, like a public service commission, the PRPA performed a governmental function rather than a proprietary one and therefore deserved immunity for a claim of pilot negligence.<sup>78</sup>

The First Circuit returned to the issue two years later in *Royal Caribbean v. PRPA*, a suit by the crew of the M/S Sovereign of the Seas for personal injury after a steel post on a pier broke.<sup>79</sup> The Court determined PRPA was not entitled to Eleventh Amendment immunity because it failed to demonstrate the “specific activities which gave rise” to the suit were governmental in nature. This case used the *Prince* “type of activity” test, but determined that in this instance, the PRPA acted as a private entity and not as a state actor, and was therefore not entitled to sovereign immunity.<sup>80</sup>

A year later in *Metcalfe & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*<sup>81</sup> (“*Metcalfe & Eddy*”), the First Circuit applied *seven factors* and again focused on the distinction between “governmental or proprietary” function of an agency in a particular instance.<sup>82</sup> This entity, despite its “function as a government utility,” was found not to be an arm of the Commonwealth as this was only one factor, which was outweighed by other factors weighing against the agency existing as an arm of the Commonwealth.<sup>83</sup> The Court further explained that when determining whether an entity is qualified for immunity, the “primary concern is to minimize federal courts’ involvement in disbursement of state fisc.”<sup>84</sup> The First Circuit again tested the arm-of-the-state doctrine, this time for a hospital, in *Fresenius Medical*

*Care Cardiovascular Resources, Inc., v. Puerto Rico & Caribbean Cardiovascular Center Corp.* (“*Fresenius*”),<sup>85</sup> a suit for breach of contract. The Court invoked *Hess* for a two-step analysis: the first step looked to a state’s dignitary interest by examining “how the state has structured the entity.”<sup>86</sup> This requires analysis of several factors to determine state intent.<sup>87</sup> If these point in different directions, then a court should turn to the risk that the damages will be paid from the public treasury.<sup>88</sup> This is essentially a *practical* inquiry into whether the Commonwealth would be bound by the debts of the entity. The Court assessed the function of the entity within the first step, or structural analysis, of the entity, but concluded that the agency was not entitled to immunity as “nothing about [the entity] marks it as serving a uniquely governmental function.”<sup>89</sup>

The D.C. Circuit addressed PRPA’s Eleventh Amendment immunity in *Puerto Rico Ports Authority v. Federal Maritime Commission* (“*PRPA v. FMC*”).<sup>90</sup> This case was an appeal from an administrative decision by the FMC holding that the PRPA was not an arm of the Commonwealth following a claim by terminal operators that the PRPA had violated the federal Shipping Act of 1984 in the management of its terminals. In overturning the decision and determining that PRPA was entitled to arm-of-the-state immunity<sup>91</sup>, the Court applied a two-step test, looking at three factors under the first step. These factors are structural factors including “state intent, including the entity’s functions; state control; and the entity’s overall effect on the treasury.”<sup>92</sup> As in *Fresenius*, the Court considered the PRPA’s function within its analysis of the state’s intent. It looked to the laws of Puerto Rico to ascertain “whether PRPA performs functions typically performed by state governments, as opposed to functions ordinarily performed by local governments or non-governmental entities.”<sup>93</sup> With other factors, the Court concluded that the PRPA was entitled to immunity as “PRPA’s enabling act and Puerto Rico’s Dock and Harbor Act indicate that PRPA performs its functions to promote the ‘general welfare’ and to increase ‘commerce and prosperity’ for the benefit of ‘the People of Puerto Rico,’ which can be classified as a primarily governmental function.”<sup>94</sup>

### ***B. Grajales v. Puerto Rico Ports Authority***

A look at the inconsistencies in cases dealing with Eleventh Amendment immunity in Puerto Rico shows the lack of an adequate test. This is further demonstrated by the First Circuit’s holding this past year in *Grajales v. Puerto Rico Ports Authority*.<sup>95</sup> In *Grajales*, the Court purported to follow *Hess*, *Fresenius*, and *PRPA v. FMC* by analyzing PRPA’s status in two steps.<sup>96</sup> In the first, the intent of Puerto Rico in creating the PRPA is ascertained by looking to various “structural indicators.”<sup>97</sup>

While the First Circuit looked to the same factors as had the D.C. Circuit in *PRPA v. FMC*, the First Circuit concluded that they do not show that the Commonwealth

“clearly structured [PRPA] to share its sovereignty.”<sup>98</sup> This led to divergent results between the two circuits, despite the similarity in factors examined. The *Grajales* Court knew of this discrepancy and even addressed it directly. While the D.C. Circuit had focused on the “governmental-versus-proprietary functions” of an entity in general “as the test for assessing the sovereign immunity of a special purpose corporation,” the First Circuit, according to the Court, had “expressly departed from that narrow focus.”<sup>99</sup> Rather, after *Fresenius*, the First Circuit had shifted away from a “case-specific” analysis of the functions of an entity for examining structural indicators as a whole.<sup>100</sup> In light of *Hess* and, subsequently *Fresenius*, the functions of an entity, according to the First Circuit, are to be considered with other structural indicators in the first step of *Hess*.<sup>101</sup> The distinction between proprietary and government functions is no longer treated as dispositive, but the structural indicators as a whole are to be considered.<sup>102</sup>

While the Court declined to address the proprietary-versus-government distinction, it addressed the general function of the PRPA with other factors in the first step of its analysis with the relationship of the PRPA to the Commonwealth’s fisc, the characterization of PRPA under Commonwealth law, and the control exerted by the Commonwealth over PRPA. Under this first step, the Court found that the majority of factors pointed away from PRPA being an arm, or were inconclusive. Only the governmental control factor pointed clearly towards PRPA being an arm, as the Commonwealth does “exercise a meaningful degree of control and supervision over the PRPA.”<sup>103</sup> The laws of the Commonwealth, according to the Court, characterize the PRPA as an “instrumentality of the Commonwealth,” but also indicate it has a “legal existence and personality separate and apart” from the Government.<sup>104</sup> In assessing PRPA’s function, the description of PRPA’s function as “promoting the ‘general welfare’ and ‘increas[ing] commerce and prosperity ... for the people of Puerto Rico” was not sufficient to indicate that PRPA is an arm.<sup>105</sup> Rather, the functions of the PRPA include a “mix of functions of which some are characteristic of arms and others are not.”<sup>106</sup> In analyzing the fiscal relationship between the PRPA and the Commonwealth, the Court concluded that the connection was not sufficient to establish PRPA as an arm. Despite a statutory commitment by the Commonwealth to pay PRPA’s tort damages, the law still “reserves the ‘wall’ between PRPA’s liability and the Commonwealth’s fisc.”<sup>107</sup>

The Court found no clear answer under the first step of the test, as the factors pointed in different directions. The Court then moved on to the second step, which the Court addressed briefly, indicating that the “picture is quite clear” that PRPA’s potential liability poses no risk to the Commonwealth’s fisc.<sup>108</sup> The Court looked to the structure and design of the PRPA to determine that it is essentially an

independent financial entity from the Commonwealth for the purposes of liability.<sup>109</sup> The Court concluded that the PRPA had not “met its burden to show that it is an arm of the Commonwealth” under step two, and is therefore not entitled to Eleventh Amendment immunity in the suit.<sup>110</sup>

## V. AFTER GRAJALES: OUTSTANDING ISSUES FACING THE PRPA'S STATUS AS AN ARM OF THE COMMONWEALTH

The First Circuit's most recent conclusion regarding the status of PRPA has further complicated an already thorny area of law, leaving a circuit split between the D.C. and First Circuits on the status of PRPA. The lack of a clear determination of Puerto Rico's status under the Constitution, the failure of any court to adhere to a consistent test, even within a single circuit, and lack of guidance from higher courts on the weight accorded to various factors have left the status of PRPA's vulnerability to suit on shaky ground.

### A. *Whether a determination on an entity's status as an “arm” is dispositive is unclear, leading to diverging conclusions within a single circuit.*

One question that remains open is whether a judicial determination of the status of an entity is dispositive in future cases. The D.C. Circuit has held that the “status of an entity does not change from one case to the next,”<sup>111</sup> but “once an entity is determined to be an arm of the State ... that conclusion applies unless and until there are relevant changes in the state law governing the entity.”<sup>112</sup> However, other circuits have failed to adopt this conclusion. This is *precisely* what has happened to PRPA. While the law governing PRPA has not changed, its status in relation to Puerto Rico's sovereign immunity has changed from case to case and fact pattern to fact pattern.

### B. *PRPA's status under Puerto Rican Law indicates that the functionality test may be most appropriate, but courts have failed to follow this standard consistently.*

In particular, courts addressing PRPA's status have failed to determine whether the functionality of PRPA is dispositive; that is, does the action performed by the PRPA (or any entity) giving rise to a cause of action in a particular case determine whether the entity is entitled to immunity? Using the function of an entity as a factor in determining whether it qualifies as an arm can be traced back to *Hess*<sup>113</sup> and is still used by many courts,<sup>114</sup> as demonstrated in *Grajales*.<sup>115</sup> However, the way this test is applied varies between circuits and, sometimes, even within the same circuit. Whether there is (or ought to be) a distinction between a general inquiry into

the functions of an entity or a case specific one is unclear. In *Grajlaes*, the Court claimed to be following precedent in *Fresenius* in assessing the general functions of the PRPA rather than the specific ones giving rise to the suit. One particularly problematic issue with this method is that the laws of the Commonwealth itself treat the liability of the PRPA differently depending on context. Most notably, the Commonwealth of Puerto Rico assumes *exclusive* liability for damages caused by the PRPA or the actions of the Administrator or other employee when the PRPA's actions may be considered official or governmental in nature.<sup>116</sup> Especially if the First Circuit claims to consider how the Commonwealth treats the entity in its assessment of liability, with a focus on the statutory structure of the entity, this directly contradicts the Court's decision not to address the nature of the action of the PRPA in any specific context in its test. The functional sorting of entities has been and should remain an influential part of an analysis of an entity's status, but especially when a sovereign has made the specific function of an entity as relevant for liability as has Puerto Rico for the PRPA, the consideration of the specific function in question remains relevant. Both the holistic approach of the D.C. Circuit and the structural approach of the Eleventh miss the mark.

## VI. CONCLUSION

The status of the PRPA in U.S. courts is unclear. Courts have differed in their assignment of weight of the factors in *Hess*, and have refrained from making the relative weight accorded the factors explicit. Puerto Rico's ability to manage the PRPA as a government corporation will eventually be eroded due to this lack of consistency. If arm of the state policy allows efficient organization by local governments without fear of liability, then how should Puerto Rico treat the PRPA when different courts can reach different interpretations of the same statute, allowing the PRPA different status from case-to-case? If the purpose is to promote economic partnerships between the Commonwealth and private entities (which the Commonwealth might even fund for state purposes), this goal is also frustrated by the inability to predict PRPA's status in any situation.

Given the uncertain status of the PRPA, Puerto Rico is left with the question of how to treat local entities with which it interacts substantially, especially the PRPA. Port authorities, like many government corporations, are both sources of income for the state and business partners and actors in vital state business.<sup>117</sup> The inability of the Commonwealth to predict how a court will view PRPA, even when Puerto Rico has characterized the entity as an arm through traditional mechanisms like legislation, compromises its ability to govern and control such entities.



The claim of many courts in clothing arms-of-the-state with Eleventh Amendment is the end goal of protection of state's dignitary interests. Courts consistently look to how the state itself treats this entity, primarily by examining how the state has structured the entity through legislation. Under Puerto Rican law, PRPA is treated differently by the Commonwealth depending on what type of activity is being performed. Embracing the "type of activity" test in a context-specific inquiry is an excellent starting point for future courts to determine PRPA's status. Doing so would promote consistency by deferring to the Commonwealth's treatment of the entity, and would promote public policy by allowing PRPA and the Commonwealth to predict when and if PRPA and the Commonwealth might be open to liability. This, in turn, would promote the goals of granting an entity like a port authority with immunity in the first place. ➤

## Endnotes

1 Jessica is currently a third-year law student at the University of Richmond in Richmond, Virginia. As a native of the Commonwealth, she plans to sit for the Virginia bar exam after graduation. She may be contacted at [jessica.landry@richmond.edu](mailto:jessica.landry@richmond.edu)

2 "First, the law ascribes to the king the attribute of sovereignty, or pre-eminence ... [H]ence, it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies the superiority of power..." WILLIAM BLACKSTONE, *THE SOVEREIGNTY OF THE LAW* 94 (Gareth Jones, ed., Palgrave Macmillan 1973).

3 The federal government has waived some of its sovereign immunity through the Federal Tort Claims Act (28 U.S.C.A. 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-2680) and the Tucker Act (28 U.S.C.A. §§ 1346(a) and 1491). See generally ROBERT FORCE, *ADMIRALTY AND MARITIME LAW* 202-203 (Kris Markarian, ed, 2nd ed. 2013); 2 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* §20 (5th ed. 2011).

4 *Alden v. Maine*, 527 U.S. 706, 715-28 (1999) (state sovereign immunity derives from the fundamental nature of the Constitution). See also Hector G. Blaudell, Comment, *Twins or Triplets? Protecting the Eleventh Amendment Through a Three-Prong Arm-Of-The-State Test* 105 MICH. L. REV. 837, 837 n.1 (2007).

5 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602 – 1611. See also FORCE, *ADMIRALTY AND MARITIME LAW* *supra* note 2 at 204-205. Sovereign immunity for states is recognized under the U.S. Constitution and extends only to states and arms of the states, but not to municipal or local governments. *Id.* at 202-203.

6 Taylor Simpson-Wood, *While it May Be True the King Can Do No Wrong. What About His Offspring?* 5 S.C.J.INT'L.L. & BUS. 153, 164-6 (2009). "...Finding that the 'bare text of the [Eleventh] Amendment is not an exhaustive description of the states' constitutional

immunity from suit,' the majority of the Court has elected to employ an expansive interpretation of the language of the Eleventh Amendment," holding that it "should extend to state instrumentalities or entities in cases where the state is not a named party to the action."

7 U.S. Const., amend. XI.

8 *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 53 (1994) (Stevens, J., concurring).

9 *Id.*

10 *Welch v. Tex. Dep't of Highways*, 483 U.S. 468 (1987) (*in personam*), *Ex Parte New York*, 256 U.S. 503 (1926) (*in rem*).

11 FORCE, *ADMIRALTY AND MARITIME LAW* note 2 *supra* at 203-204.

12 SCHOENBAUM note 2 *supra* at 503. Congress may also abrogate state's sovereign immunity in federal court (but not in state court) under the Fourteenth Amendment. See 32 AM. JUR. 2d *Federal Courts* §980.

13 Blaudell, Comment, 105 MICH.L.R. at 838. See also *Chisholm v. Georgia*, 2 U.S. 419 (1793), superseded by U.S. Const. Amendment XI.

14 Blaudell, Comment, 105 MICH.L.R. at 838, and n.5.

15 Jameson Bilborrow, Comment, *Keeping the Arms in Touch*, 64 EMORY L.J. 819, 821 (2015)

16 The "twin goals of the Eleventh Amendment – protection of the state's treasury and of its dignitary interests – explicitly govern Arm-of-the-state analysis." *Fresenius Medical Care Cardiovascular Resources, Inc., v. Puerto Rico & Caribbean Cardiovascular Center Corp.*, 322 F.3d 56, 62 (1 Cir. 2003), cert. denied 540 U.S. 878 (2003). See also *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. at 39-41.

17 Blaudell, Comment, 105 MICH.L.R. at 851.

18 *Id.* at 852.

19 Blaudell, Comment, MICH.L.R. at 838.

20 See generally *Hess, supra* note 7.

21 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FED. PRAC. & PROC. JURIS. §3524.2* (3d ed). 32A AM. JUR. 2d *Federal Courts* §956.

22 *CSX Transp. Inc. v. Williams*, 406 F.3d 667, 672 n.7 (D.C. Cir. 2007) (*District of Columbia*); *Norita v. Northern Mariana Islands*, 331 F.3d 690, 692-696 (9th Cir. 2003); *Aguon v. Commonwealth Ports Authority*, 316 F.3d 899, 901-904 (9th Cir. 2003) (*Northern Mariana Islands*); *Tonder v. M/V The Burkholder*, 630 F.Supp 691 (D.V.I. 1986) (*U.S. Virgin Islands*).

23 Neither will we seek to determine Puerto Rico's Constitutional status in this paper, but for further reading see Colin Miller, *Sovereign Impunity: Why Double Jeopardy Should apply in Puerto Rico*, 73 Wash. & Lee Rev. Online 174 (2016) (Federal Death Penalty Act); *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863 (2016); Juan R. Torruella, *Outstanding Constitutional and International Law Issues Raised by the United States-Puerto Rico Relationship* (April 14, 2014). Minnesota L.R., Headnotes, Forthcoming.

24 *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 141 n.1 (1993) (declining to address Eleventh Amendment status), *aff'g but declining to address Eleventh Amendment issue raised in Metcalf & Eddy Inc. v. P.R. Aqueduct & Sewer Auth.*, 991 F.2d 935 (1st Cir. 1993); *Puerto Rico v. Fresenius Medical Care Cardiovascular Center Corp.*, 540 U.S. 878 (2003), *denying cert. for Fresenius Medical Care Cardiovascular Resources, Inc., v. Puerto Rico & Caribbean Cardiovascular Center Corp.*, 322 F.3d 56, 62 (1 Cir. 2003); *Int'l Shipping Agency, Inc. v. P.R. Ports Authority*, 555 U.S. 1170 (2009), *denying cert. for P.R. Ports Authority v. Federal Maritime Comm'n.*, 531 F.3d 868 (D.C.Cir. 2008).

25 That Puerto Rico is treated as a state for the purposes of the Eleventh Amendment is established



doctrine. See also 2 SCHOENBAUM note 2 *supra* §20-2 at 505. "As we have held and as the parties here agree, moreover, the Puerto Rican Federal Relations Act grants Puerto Rico the same sovereign immunity that states possess from suits arising under federal law." [PRPA v. FMC](#), 531 F.3d at 872. "The Commonwealth of Puerto Rico is treated as a state for Eleventh Amendment purposes." [Fresenius](#), 322 F.3d at 61. The First Circuit "has consistently held that Puerto Rico, though not a state, is entitled to Eleventh Immunity as if it were." Adam D. Chandler, Comment, [Puerto Rico's Eleventh Amendment Status Anxiety](#), 120 YALE L.J. 2183, 2187, 2189 (2011).

26 [Chandler, Comment](#), 120 YALE L.J. at 2189.

27 [Puerto Rico Ports Authority v. Federal Maritime Com'n](#), 531 F.3d 868, 872 (D.C.Cir. 2008), cert. denied, [Int'l Shipping Agency, Inc. v. PRPA](#), 555 U.S. 1170 (2009). See also note 23 *supra*.

28 [429 U.S. 274](#) (1977).

29 [Id](#) at 280.

30 Blair Brogan, Note, [Between a Dock and a Hard Place](#), 33 TUL. MAR. L.J. 515, 516 (2009).

31 [Mount Healthy](#), 429 U.S. at 280.

32 [440 U.S. 391](#) (1977).

33 [Id.](#) at 401-2.

34 [Simpson-Wood](#), 5 S.C.J. Int'l L. & B. at 168.

35 [Lake Country](#), 440 U.S. at 402.

36 [Id](#) at 402.

37 [781 F.2d 218](#) (D.C.Cir. 1986) (finding the creation of entity by compact clause did not definitively establish it as a federal entity, but rather was an "instrumentality of "each of the signatory parties" to the interstate compact, Pub.L. No. 89-774, Sec. 4, and thus a creature of the states and the District of Columbia, which acts "under color of state law.")

38 [Morris](#), 781 F.2d at 223-4.

39 [Port Auth. Police Ben. Assn. v. Port Auth. of New York and New Jersey](#), 819 F.2d 413, 418 (3d Cir. 1987), abrogated by [Hess](#), *infra* note 40; [Feeny v. Port Auth. Trans-Hudson Corp.](#), 873 F.2d 628 (2d Cir. 1989).

40 [Simpson-Wood](#), 5 S.C.J. INT'L. L. & BUS. at 169. "The unworkable nature [of the *Lake Country* test] soon became evident as lower courts struggled to apply the arm-of-the-state test." Some courts elaborated on the list presented in *Lake Country*, while others "gave different weight to the various factors to be considered."

41 [513 U.S. 30](#) (1994).

42 Compact clause entities are formed between two or more states with the consent of Congress. [72 AM. JUR. 2d States, Etc. §9](#). Along with *Lake Country*, *Hess* establishes a presumption against compact clause entities being entitled to Eleventh Amendment Immunity. [Hess](#), 513 U.S. at 402. "We then set out a general approach: We would presume the Compact Clause agency does not qualify for Eleventh Amendment immunity 'unless there is

good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose."

43 [Hess](#), 513 U.S. at 32-33.

44 [Id](#) at 43-7.

45 [Id](#) at 47.

46 [Id](#) at 50.

47 [Id.](#) at 51.

48 [Id](#) at 52-3.

49 [Bilsborrow, Comment](#), 64 EMORY L.J. at 828. See L. Pahl Zinn, Note, [Hess v. Port Authority Trans-Hudson Corporation: Erosion of the Eleventh Amendment](#), 1995 DETROIT C.L. MICH. ST.U.L.REV. 1417, 1459.

50 [519 U.S. at 431](#).

51 [Blaudell, Comment](#), [MICH.L.R.](#) at 843.

52 [Doe](#), 519 U.S. at 431. It is the "entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance," that is germane to arm of the state inquiry.

53 [Id](#) at 843. See also [Manders v. Lee](#), 338 F.3d 1304 (11th Cir. 2003) (no single factor dispositive but source of funds for judgment important). See 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE CIVIL ¶ 123.23[4] (2016) (*summary of tests by circuit*).

54 Per the American Association of Port Authorities, there are currently 83 registered port authorities within the United States. AAPA SEAPORTS OF THE AMERICAS: 2015 MEMBERSHIP DIRECTORY, <http://www.nextbook.com/naylor/AAPD/AAPD0015/index.php?navItemNumber=20779>

55 REXFORD B. SHERMAN, SEAPORT GOVERNANCE IN THE UNITED STATES AND CANADA, [http://www.aapa-ports.org/files/PDFs/governance\\_uscan.pdf](http://www.aapa-ports.org/files/PDFs/governance_uscan.pdf)

While other countries, like Canada, have a centralized port system organized under the government, the U.S. has a less structured system with no national port authority. See also Mary R. Brooks, *The Governance Structure of Ports*, 3 R. of Network Economics 168 (2004).

56 The Port Authority of Virginia is created as a "body corporate and as a political subdivision of the Commonwealth." [Va. Code §62.1-128](#). The VPA is also considered an arm of the Commonwealth of Virginia entitled to sovereign immunity under the Eleventh Amendment. [Va. Code §62.1-132.2\(A\)\(4\)](#). See also [Love v. Virginia Port Authority](#), Docket No. 2:16-cv-00160 (E.D. Va. Apr 01, 2016) (defense of sovereign immunity assumed by opposing party). [http://pilotonline.com/business/ports-rail/after-time-off-following-miscarriage-ex-employee-says-virginia-port/article\\_86643b12-3e24-5ced-86c8-c348cac56ed4.html](http://pilotonline.com/business/ports-rail/after-time-off-following-miscarriage-ex-employee-says-virginia-port/article_86643b12-3e24-5ced-86c8-c348cac56ed4.html) . Likewise the South Carolina State Ports Authority is created as a government instrumentality with the "powers of a body corporate," S.C. Code Ann. §§ 54-3-10, [54-3-140](#), and has

generally been held to be an arm of the state of North Carolina for Eleventh Amendment purposes. See e.g. [Ristow v. SCSPA](#), 58 F.3d 1051 (4th Cir. 1995); [SCSPA v. FMC](#), 243 F.3d 165 (4th Cir. 2001), *aff'd* [FMC v. SCSPA](#), 535 U.S. 743 (2002).

57 See note 41, *supra*.

58 [PRPA v. FMC](#) 531 F.3d at 872.

59 See Sherman, *supra* note 57 page 3 for the ways that port agencies organized under state legislation may be organized. See also Brooks, *supra* note 57.

60 Brooks *supra* note 57 at 174.

61 [P.R. Laws Ann. Tit. 23 §333\(a\)](#) (LexisNexis 2017).

62 *Id.*

63 [P.R. Laws Ann. Tit. 23 §§333\(b\), 336\(v\)](#) (LexisNexis 2017).

64 [P.R. Laws Ann. Tit. 23 336\(d\), 336\(3\)\(f\)](#) (LexisNexis 2017).

65 [P.R. Laws Ann. Tit. 23 §2303](#) (LexisNexis 2017)

66 [P.R. Laws Ann. Tit. 23 §§348, 345, 338](#) (LexisNexis 2017).

67 [P.R. Laws Ann. Tit. 23 §§334, 335](#) (LexisNexis 2017)

68 [P.R. Laws Ann. Tit. 23 §§336\(l\), §337\(a\)](#) (LexisNexis 2017).

69 [P.R. Laws Ann. Tit. 23 §336](#) (LexisNexis 2017).

70 [P.R. Laws Ann. Tit. 23 §2202](#) (LexisNexis 2017).

71 [P.R. Laws Ann. Tit. 23 §§2401 – 2418; 2201, 2301](#) (LexisNexis 2017).

72 See notes 23 and 24 *supra*.

73 [333 F.Supp. 1295](#) (D.P.R. 1975)

74 [Id](#) at 1296 – 99.

75 [Id](#) at 1297-99.

76 [897 F.2d 1](#) (1 Cir. 1990). The Court here and subsequently addressed factors in [Ainsworth Aristocrat Int'l Party v. Tourism Co.](#), 818 F.2d 1034 (1 Cir. 1987), including "local law and decisions defining the nature of the agency involved; whether payment of any judgment will come out of the state treasury; whether the agency is performing a governmental or proprietary function; the agency's degree of autonomy; the power of the agency to sue and be sued and enter into contracts; whether the agency's property is immune from state taxation and whether the state has insulated itself from responsibility for the agency's operations." [Manhattan Prince](#), 897 F.2d at 9-10.

77 [Manhattan Prince](#), 897 F.2d at 29-30.

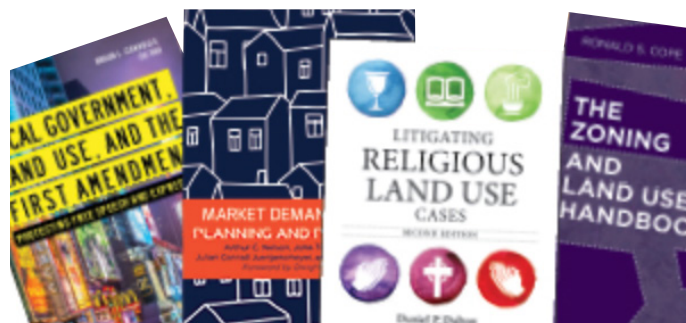
78 [Id](#) at 29-30.

79 [973 F.2d 8](#) (1 Cir. 1992).

80 [Id](#) at 12. Distinguished from *Prince* where the relevant "type of activity" was "primarily a 'governmental function,'" while the issue in *Royal Caribbean* was essentially proprietary. [Id](#) 14-15.

81 [991 F.2d 935](#) (1 Cir. 1993). See also note 23 *supra*.

- 82 [Metcalf & Eddy, 991 F.2d at 939.](#)
- 83 [Id. at 941 – 2](#) (other factors, including revenue generation, autonomous nature, power to sue and enter into contracts, inability to access state funds, and the insulation from liability by the Commonwealth outweighed PRASA's function as government entity).
- 84 [Id. at 939.](#)
- 85 [Fresenius, 322 F.3d 56 \(1 Cir. 2003\).](#) See note 13 *supra*.
- 86 [Id. at 65.](#)
- 87 [Id. at 68.](#)
- 88 [Id. at 72.](#)
- 89 [Id. at 71.](#) PRCCC claimed its functions were that of a governmental entity but used no judicial authority to support this conclusion. [Id. at 70.](#)
- 90 [PRPA v. FMC, 531 F.3d 868 \(D.C. Cir. 2003\),](#) note 26 *supra*. The D.C. Circuit chose not to address Puerto Rico's general status under the Constitution. See [531 F.3d n.1 and n.2,](#) and note 23 *supra*. The court also found informative the fact that the Attorney General of Puerto Rico filed an *amicus* brief "fully and specifically agree[ing] that, for the purposes of the claims raised against [the PRPA] before the FMC, it is an arm of the Commonwealth, and thus entitled to share in the Commonwealth's sovereign immunity from suit in federal courts and agencies." Brief for Amicus Curiae Commonwealth of Puerto Rico in Support of Petitioner at 868, [PRPA v. FMC, 531 F.3d 868 \(D.C.App. 2008\)](#) (No. 06-1407).
- 91 Terminal operators appealed but the Supreme Court declined to address the issue. See note 23, *supra*.
- 92 [PRPA v. FMC, 531 F.3d at 873.](#)
- 93 [Id. at 875.](#)
- 94 [Id. at 875-6,](#) quoting from [P.R. Laws Ann. §§348\(a\), 2109, 2202.](#)
- 95 [831 F.3d 11 \(1 Cir. 2003\).](#)
- 96 [Id. at 14-15,](#) and n.3.
- 97 [Id. at 21.](#)
- 98 [Id. at 29,](#) citing [Fresenius, 322 F.3d at 68.](#)
- 99 [Id. at 19,](#) citing [Fresenius, 322 F.3d at 874 n.3.](#)
- 100 [Id. at 19.](#)
- 101 [Id. at 18.](#)
- 102 Additionally, the court points out that neither party attempts to "classify the not-obviously-classifiable function" that gave rise to the suit in the case; rather "the parties ask us only to determine PRPA's status with reference to *Fresenius's* two-step analysis and without regard to the particular function that PRPA was performing here." [Id. at 20.](#)
- 103 [Grajales, 831 F.3d at 28;](#) see *accompanying text and notes 64 - 67 supra.*
- 104 [Id. at 21;](#) [P.R. Laws Ann. Tit. 23 §333\(b\).](#)
- 105 [P.R. Laws Ann. Tit. 23 §348\(a\).](#)
- 106 [Grajales 831 F.3d at 24.](#)
- 107 Dock and Harbor Act, [P.R. Laws Ann. Tit. 23 §§2101, 2303\(b\); Grajales, 831 F.3d at 26-7](#)
- 108 [Grajales 831 F.3d at 27.](#)
- 109 [Id. at 29.](#)
- 110 [Id.](#)
- 111 The status will not change "based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors." [PRPA v. FMC, 531 F.3d at 873.](#)
- 112 *Id.*
- 113 See *generally* Hess, [513 U.S. 468,](#) especially at 410-11 (O'Connor, S. dissenting).
- 114 See note 52 *supra* for a summary of tests used by the circuits.
- 115 While the PRPA performs both governmental and proprietary functions, the proprietary functions "are not those one expects an arm to perform." [Grajales, 831 F.3d at 23-24.](#)
- 116 [P.R. Laws Ann. Tit. 23 §2303\(b\) \(LexisNexis 2017\);](#) see note 64 *supra.*
- 117 See *supra* text and accompanying notes pp 9 – 10.



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