

DEFENDING LAWSUITS FILED BY PR OVERSIGHT BOARD UNDER PROMESA AND NEED TO IMMEDIATELY RETAIN COUNSEL

Last week the Oversight Board, (O.B.) acting as a trustee of the PR government ¹ and co-plaintiff, the Official Committee of Unsecured Creditors, filed over 300 lawsuits trying to collect monies from a very wide gamut of entities that the PR government had paid monies to in the last four (4) years since May 3, 2017, date of the filing of the Bankruptcy Petition.

The named defendants are very diverse: they include entities such as Walmart, Microsoft, Merck, banks, savings and loans, brokerage houses, bond holders etc.

The bulk of the allegations are for the unlawful transfers/payment during 90 days prior to filing of the bankruptcy petition (referred to as the "Petition Date". The complaints allege the avoidance of Preference Period Transfer Pursuant to 11 U.S.C. § 547). Other periods for unlawful transfers consist of two (2) years ["Code Fraudulent Transfer Period"] in violation of 11 U.S.C. § 548(a)(1)(B) and four (4) years [the "Paulian Fraudulent Transfer Period"].

The Oversight Board refers to its authority to recover the transfers pursuant to: Recovery of Avoided Transfer Pursuant to 11 U.S.C. § 550.

Other allegations by the Oversight Board include: the unlawful disbursements pursuant to 2 L.P.R.A. § 97, 3 L.P.R.A. § 283h); the contract was not executed in writing in violation of 2 L.P.R.A. § 297; insufficient documentation under 2 L.P.R.A. § 97; 3 L.P.R.A. § 283h(a); 3 L.P.R.A. §§ 2301-05, 8613; the contract was not registered with the Controller's Office and unlawful pursuant to: *Ocasio v. Alcalde Mun. de Maunabo*, R-84-356, 1988 WL 580831 (P.R. Apr. 19, 1988); *Mun. de Quebradillas v. Corp. de Salud de Lares*, 180 D.P.R. 1003, 1015-16 (2011); the transfers were disbursements of public funds not authorized by law. 2 L.P.R.A. § 97; 3 L.P.R.A. § 283h(a); see also, e.g., 3 L.P.R.A. §§ 2301-05, 8613 [requiring documentation of contracts with Commonwealth]; the transfers exceeded the terms of the contract with the PR government; transfers that did not correspond to the contract with the PR Government or public corporations such as PREPA or PRASA.

The O.B. is obviously trying to bring back monies paid out by the PR government or its public corporations, in the previous four (4) years from the date that the Petition was filed. It is using the bankruptcy provisions, PR law and jurisprudence, to place the burden on the service/product providers.

Adding insult to injury, if the defendant had any claims against the PR government for goods and services already provided and not paid for, the O.B., pursuant to 11 U.S.C. § 502(d), is requesting that those Claims of the Defendant against the

¹ trustee under title 11 of the United States Code as incorporated into PROMESA (the "Bankruptcy Code"). PROMESA §§ 301, 315,

Commonwealth be **disallowed** until such time as the Defendant pays to the Oversight Board an amount equal to the aggregate amount of the Transfers. Finally, the Oversight Board request for pre-judgment and post judgment interest at the maximum legal rate.

A defendant may have provided **bonafide** these goods and services. Nonetheless, the bankruptcy and local laws allow for this legal process. Further justifying the O.B.'s suits is its claim that documentation available to the O.B. or the requirements/process in which it was carried out, does not fully support the payments were bonafide.

Looking at the big picture, the Oversight Board needs to stop or toll the statute of limitations until all is sorted out. The O.B. needs to ensure that the payments were lawful and according to all the technical requirements when contracting with the PR government, as discussed in the local jurisprudence.

In the next 90 days, the Board's lawyers, through process servers, will be serving all defendants. For the defendant that has not been served, but knows it has been named in the suit, the first step is to seek advice of legal counsel to help steer you towards the most effective defense and/or seek the resolution of the lawsuit. It is not prudent to wait until receive process to search for experienced legal counsel. In PR, the firms that have attorneys experienced in federal litigation are few. There are firms already representing parties in PROMESA, which may prevent them from representing an entity due to a conflict of interest. Although there is a community of bankruptcy lawyers, many of these are solo practitioners, generally specializing in debtor or creditor representation through the bankruptcy process. A defendant needs to assess whether it wants a firm or a solo practitioner to defend the lawsuit. It is a good idea to interview with the firm or lawyer to ensure the client is comfortable with the lawyers involved. It is a process that may take more than one interview, so start immediately will be helpful. Legal counsel will need time to examine the supporting documentation as applicable to the complaint as well as analyze the potential defenses or motions to dismiss that it will raise within the limited time afforded to answer the complaint.

In the meantime, each named defendant needs to compile all the documentation to support its defense. Among these documents re: contract with the PR government of public corporation, any addendums, modifications, whether formal or informal such as emails or correspondence; cancelled checks received for the services provided; evidence or proof that the goods or services were provided/delivered to the government.