

ORDINARY COURSE OF BUSINESS DEFENSE TO A CLAIM  
FOR PREFERENTIAL PAYMENT OR TRANSFER

The Oversight Board pursuant to Federal Rule of Bankruptcy Procedure 7001 and sections 105(a), 502, 544, 547, 548 and 550 of the Bankruptcy Code and Puerto Rico law to recover money for the Commonwealth of Puerto Rico, including its public corporations and instrumentalities such as PREPA and GDB.

As such it has filed adversary proceedings pursuant to section 306(a) of PROMESA. 48 U.S.C. § 2166(a) against many entities, now defendants, claiming payments were made preferentially and need to be returned to the Puerto Rico government or public corporation.

If you are a defendant being sued for having received payment by the debtor/bankrupt within the ninety (90) days prior to the filing of the bankruptcy petition has defenses under the bankruptcy code. Once such defense or exception is that it was paid or transferred in the Ordinary Course of Business pursuant to 11 U.S.C. §547(c)(2).

The defendant being sued for receiving a preferential payment or transfer must prove by a preponderance of the evidence that: 1) the debt was incurred in the ordinary course of business or financial affairs of the debtor and the creditor; 2) payment was made in ordinary course of business between the parties; OR 3) payment was done in ordinary business terms between the debtor and creditor (transferee).

Under the second item to be proved, the courts have found it is a subjective inquiry as to the business practices of these particular parties, not determined by industry practices. The factors considered are: a) length of time of the dealings of the parties; b) same or different manner of payment; c) same or different amount of payment; d) usual or unusual conduct of creditor or debtor to either collect or pay on the debt; e) advantage gained by creditor by debtors insolvency (such as gain additional security).

The idea is to demonstrate that there was nothing unusual about the payments that are currently being attempted to be set aside. The courts have looked at pre-preference period as a base line of dealings between the parties and used it to determine whether payments were ordinary or not.

\*Whether payments were made/received in the ordinary course of business or financial affairs of the debtor and transferee; *or*

\*Whether payments were made/received according to ordinary business terms.

11 U.S.C. § 547(c) (2)(A) & (B).

When a transfer is made under the “ordinary business terms”, the legal inquiry is a more objective test and will look to the industry wide behavior (as opposed to the subjective test of the parties particular dealings). It will look at the common practices of those same businesses in making payments, including when in distress.

If you are a defendant in this situation, the questions to ask are as follows:

When did the payments begin? For what amounts? Reason for payments? Were they timely or late? Was contract terminated? Were payments usual (amount, time, manner, place)?

As pertains to the industry: were these type of payments common? Was the late timing also common.

In conclusion, this defense is accepted by the courts, as well as, sometimes even by the trustee. It does, however, require much documentation to establish it.