

PROMESA OVERSIGHT BOARD SUES GOVERNMENT PROVIDERS FOR PREFERENTIAL PAYMENTS IN BANKRUPTCY

PROMESA grants extensive authority to the Oversight Board, including the powers of a trustee under title 11 of the United States Code as incorporated into PROMESA (the “Bankruptcy Code”). PROMESA §§301, 315.

One of the primary counts upon which the Oversight Board has sued multiple government providers, are for payments made by the PR government or its corporate agencies to defendants within 90 days from the filing of the bankruptcy petition on May 3, 2017.

In bankruptcy, a preferential payment is a payment made for the benefit of certain creditors shortly before filing for bankruptcy. The idea behind this provision is that the debtor was heading towards insolvency for some time and shortly before filing the petition paid some creditors and not many others. This provision brings back the last monies paid out into the bankruptcy estate for a more equitable distribution as prescribed by the distribution priorities among all creditors.

The OB, acting as bankruptcy trustee, has exerted its power to mover the court to revert or undo preferential payments and recover that money or property to distribute among all of your creditors.

The preference period prior to filing of the petition is usually 90 days, unless the payee was an insider, which increases the period to a year before filing of the petition. An insider is a relative, friend or business associate. In other words, if a payment was by the PR Government or its Public Corporations after March 3, 2017 to a non insider, it would be subject to being voidable and recovered by the OB.

The OB is alleging that during the 90 days before the Petition Date (the “Preference Period”), the Commonwealth made certain transfers of interests in the Commonwealth’s property, in the form of cash, to or for the benefit of the Defendant (“90-Day Transfers”) in the aggregate amount of a certain sum. The OB is pursuing the avoidance of Preference Period Transfer Pursuant to 11 U.S.C. § 547. The OB alleges that the 90-Day Transfers are avoidable pursuant to 11 U.S.C. § 547 and recoverable pursuant to 11 U.S.C. § 550.

There are defenses to these claims such as payments made in the ordinary course of business or for new value. These defenses will be discussed in another article.