

THE IMPLICATIONS OF THE AURELIUS DECISION

Last Friday I was sitting down to write my discussion for today on the Commonwealth and PREPA plans of adjustment when the First Circuit threw us all a curve. I will now attempt to discuss the possible implications this decision on Puerto Rico's economy and restructuring.

The Board may seek a rehearing en banc from the whole First Circuit. This means that it would ask all the Judges to review the decision to see if they will change it. It is usually not granted. Also, the Board may request a certiorari from the US Supreme Court to review the First Circuit's decision. The parties have 90 days from the judgment to seek the certiorari according to Rule 13 of the Supreme Court's Rules. In addition, Aurelius and Utier may seek certiorari of the Supreme Court from the decision not to declare void the Title III and all decisions by the Board. The Supreme Court, however, grants around 80 certs out of around 10,000 petitions. You do the math.

If there is no petition for review or it is denied, the first and most obvious implication is the need to appoint a Board by having President Trump nominate seven individuals and have them confirmed by the Senate. Not Congress, the House has no role in this. The Republican Senate. President Trump may nominate the same members but that is unlikely since its members have accumulated myriad of enemies on both sides of the isle. If the same members were nominated and confirmed, it will be business as usual until 2022, overlapping the next local administration.

If a new Board is appointed, I think we can assume that it will not be favorable to the Commonwealth and will strive to have a greater part of the debt payed. A new board may decide that Title III is not a good idea and dismiss it. Section 930(a) of the Bankruptcy Code, adopted in PROMESA, states that the bankruptcy may be dismissed for cause. Case law has stated that cause includes the desire of the debtor to dismiss the case. Since the Board is the representative of the debtor, Commonwealth, PREPA, HTA and ERS, it has the power to request this dismissal from the Court. You can imagine the mayhem this may cause.

In addition, the new Board may decide to overturn any decision by the Board, like the non-defining of essential services, payment of debt, payment of pensions, pension haircuts, or any other decision it has made in the last two years. Or it could decide the government has too many employees and decide to furlough them. We should be ready for this possibility.

Another important issue is the union contracts in PREPA. If the new Board decides not to dismiss the Title III, it may decide to unilaterally impair the union contract and under the doctrine of *NLRB v. Bildisco*, 465 U.S. 513 (1984), the debtor can impair the contract. This could mean labor unrest and more.

Talking about PREPA, its fiscal plan calls for the sale of PREPA but it is my impression politicians do not want to sell PREPA. And when I say sell PREPA, I mean sell the generation of electricity since the generation and transmission will be leased. Can the new Board force the sale? Under bankruptcy law, section 1123(a)(5)(D), adopted in PROMESA, the plan of adjustment may include the sale of part or all of the assets. And the Board is the only entity that can present a plan of adjustment under PROMESA in the Title III. I do not have an answer to this but you can imagine the conflict this would bring.

Speaking of the Fiscal Plan, the Board required from the Government a new Fiscal Plan for today and has said it will certify the plan by late April, which is within the 90 days provided by the Aurelius opinion for the appointment of a new Board. Will this be put on hold? Even if it is not, will the new Board insist on a new Fiscal Plan? Will GO's be paid and essential services defined. What will happen to the Board's objection to 2012 and 2014 GO's? Even if the new Board does not want to continue the case, the UCC is likely to want to do so and it probably could pursuant to section 926(a) of the Bankruptcy Code, also adopted in PROMESA.

Also, the Board told Judge Swain in November that it would file a plan of adjustment for the Commonwealth in 2019 and that it would probably be a cramdown, meaning asking the court to approve it even if creditors did not. Will this Board file a plan of adjustment by May and try to cram it down? Doubtful since it claimed in the GO objection that the decision there was a threshold issue for the plan of adjustment. Questions, questions.

Now let's examine the implications of some of the lesser know parts of the Aurelius opinion. At page 38 it says:

The Board Members' federal authority includes the power to veto, rescind, or revise Commonwealth laws and regulations that it deems inconsistent with the provisions of PROMESA or the fiscal plans developed pursuant to it. See 48 U.S.C. § 2144 ("Review of activities to ensure compliance with fiscal plan.").

I have always argued the Board had this power but it seemed reluctant to use it. Could the new Board use this power to, once it declares the municipalities as covered entities, consolidate them via Fiscal Plan, irrespective of the PR Constitution? Could it sell different parts of the Government? Could it eliminate or reduce pay to legislators? All these are possibilities that must be factored in if there is a new Board appointed.

I am going to mention a couple of other parts of the Aurelius opinion which at first glance seem to be peripheral to the controversy but really are not. At page 36, Judge Torruella states "[t]he only course, therefore, which we are allowed in light of *Reid* is to not further expand the reach of the "Insular Cases." What does this mean? Is this a harbinger of the Circuit's treatment to the series of cases by Judge Gelpí on SSI and Medicaid? We can only hope. Judge Torruella is over 80 and he really wants to bury the Insular cases. Will the Gelpí cases be the vehicle? Hopefully.

Finally, as all who know me are aware, I am a staunch statehooder so I can't help poking fun at the Commonwealth and Judge Torruella never disappoints. At page 46 he states:

*It is true that the Commonwealth laws are themselves the product of authority Congress has delegated by statute. See Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1875 (2016). **So the elected Governor's power ultimately depends on the continuation of a federal grant.** But that fact alone does not make the laws of Puerto Rico the laws of the United States, else every claim brought under Puerto Rico's laws would pose a federal question. (Bold added)*

The statement on Governor's power is telling. In other words, the Governor's power and the whole apparatus of the PR Government depends on Congress not changing Law 600. Or as the Court in *Downes v. Bidwell*, 182 U.S. 244, 289-290 (1901) said:

The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public wellbeing, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion."

In other words, Congress giveth and Congress taketh away. Thank you for your patience today.