Bond Case Briefs

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PROMESA - PUERTO RICO

Aurelius Investment, LLC v. Puerto Rico

United States Court of Appeals, First Circuit - February 15, 2019 - F.3d - 2019 WL 642328

Investment fund moved to dismiss petition filed by the Financial Oversight and Management Board for Puerto Rico under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), on theory that members of the Board were not properly appointed in accordance with the Appointments Clause.

The United States District Court denied motion, and fund appealed.

The Court of Appeals held that:

- Members of the Financial Oversight and Management Board for Puerto Rico were "officers of the United States," who had to be appointed in accordance with requirements of the Appointments Clause;
- Board members were principal officers of the United States, who should have been appointed by the President by and with the advice and consent of the Senate; but
- De facto officer doctrine applied to prevent dismissal of petition filed by the Financial Oversight and Management Board for Puerto Rico under PROMESA.

Members of the Financial Oversight and Management Board for Puerto Rico were "officers of the United States," who had to be appointed in accordance with requirements of the Appointments Clause, as officials who occupied continuing positions established by federal law, and who exercised significant authority, including authority to initiate and prosecute largest bankruptcy in history of the United States municipal bond market, pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), a federal law.

Members of the Financial Oversight and Management Board for Puerto Rico were principal officers of the United States, who should have been appointed by the President by and with the advice and consent of the Senate, as officials who were answerable to and removable only by the President, and who were not directed or supervised by others who were appointed by the President with Senate confirmation; while the Board members' tenure was temporary, in sense that they were appointed essentially to accomplish a single task, their authority was not limited, but spanned across the economy of Puerto Rico, overpowering that of the Commonwealth's own elected officials.

Unconstitutional provision of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which purported to authorize the President to appoint members of the Financial Oversight and Management Board for Puerto Rico without advice or consent of the Senate, could be severed from remainder of PROMESA, which contained explicit severability clause, and which provided an alternative appointments mechanism, at least as to six Board members.

De facto officer doctrine applied, to prevent dismissal of petition filed by the Financial Oversight and Management Board for Puerto Rico under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) and invalidation of all actions taken by the Board since its members were

appointed, on ground that members were unconstitutionally appointed without advice and consent of Senate; Board members were acting with color of authority in deciding to file the Title III petitions on the Commonwealth's behalf, a power squarely within their lawful toolkit, there was no indication but that they acted in good faith, and dismissal would have negative consequences for many, if not thousands, of innocent third parties who had relied on the Board's actions.

Court of Appeals, after striking down as unconstitutional a provision of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) which purported to authorize the President to appoint members of the Financial Oversight and Management Board for Puerto Rico without advice or consent of the Senate, would delay issuance of its mandate for 90 days, so as to allow the President and the Senate to validate the currently defective appointments or to reconstitute the Board in accordance with the Appointments Clause.