

# **Bond Case Briefs**

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## **BONDS - PUERTO RICO**

### **Altair Global Credit Opportunities Fund (a), LLC v. United States**

**United States Court of Federal Claims - November 23, 2020 - Fed.Cl. - 2020 WL 6865053**

Bondholders filed suit against United States, seeking just compensation for alleged taking of their pledged property serving as collateral for their bonds issued by Puerto Rico's employers retirement system (ERS), including their right to receive timely principal and interest payments, as well as their purported liens on and contractual right to future employer contributions to ERS, after Oversight Board established by Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), incorporating Bankruptcy Code, to pursue judicially supervised debt restructuring for Puerto Rico drafted ERS bond legislation and mandated its enactment to transfer bondholders' collateral to Puerto Rico without compensation.

Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.

The Court of Federal Claims holds that:

- Board was not federal entity within Tucker Act jurisdiction;
- Board's actions were not attributable to United States;
- PROMESA did not bar Tucker Act jurisdiction;
- Bondholders lacked property interest required for takings claim based on liens; and
- Impairment of bondholders' contractual right was insufficient for taking.

Puerto Rico's Financial Oversight and Management Board that allegedly effected taking of bondholders' liens on their pledged property and their contractual right to timely payment of principal and interest by Puerto Rico's Employers Retirement System (ERS), as issuer of bonds, was not "federal entity" subject to Tucker Act jurisdiction, but rather, was "local entity," under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), providing that Board "shall be created as an entity within the territorial government" and "shall not be considered to be a department, agency, establishment, or instrumentality" of federal government, and Congress gave Board structure, duties, and powers consistent with entity in territorial government.

Puerto Rico Financial Oversight and Management Board's actions, that allegedly effected taking of bondholders' liens on their pledged property and their contractual right to timely payment of principal and interest by Puerto Rico's Employers Retirement System (ERS), as issuer of bonds, could not be attributed to United States, under sole-sovereign doctrine, thus barring exercise of Tucker Act jurisdiction over claims under Fifth Amendment Takings Clause that applied to Puerto Rico through Fourteenth Amendment, since Board was instrumentality of Puerto Rico, and Board's acts were attributable to Puerto Rico as expressly directed in Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

Court of Federal Claims' prior determination that Congress did not withdraw Tucker Act jurisdiction in Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) or direct all suits

under PROMESA to federal district court was law of the case that barred United States from asserting that same argument in subsequent motion to dismiss for lack of jurisdiction over bondholders' takings claims arising from their alleged liens on and contractual right to future contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds.

Bondholders' takings claims arising from their alleged liens on and contractual right to future contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, was ripe, even though bondholders were still litigating value of their bonds in other courts, since claims were based on retroactive application of Bankruptcy Code provision incorporated in Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), and bondholders' separate ongoing litigation only affected extent of damages.

Prior determination by district court and First Circuit, that under Puerto Rico law bondholders did not have property interest in alleged liens on future employer contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, collaterally estopped bondholders from relitigating issue of whether they had property interest required for their claims seeking just compensation for alleged taking of their purported liens; issue of property interest in liens was identical to issue in prior proceeding, was litigated and resolved, and was necessary to resulting judgment, and bondholders had full and fair opportunity to litigate that issue.

Under Puerto Rico law, bondholders lacked property interest in their purported liens on future employer contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, thus barring their claims seeking just compensation for alleged taking of their liens, since ERS did not have property interest in future employer contributions as they were merely expectancy rather than fixed and calculable at time of ERS's petition under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) provision incorporating Bankruptcy Code providing that property acquired by debtor after petition was not subject to any lien resulting from any security agreement entered into by debtor before petition.

Bondholders lacked property interest in their contractual right to future employer contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, thus barring bondholders' claims seeking just compensation for alleged taking of their contracts by ERS's petition under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) provision incorporating Bankruptcy Code, since bonds were not taken by petition or underlying statutory authority, but rather, their value was impaired, which was insufficient for taking, as at most, Bankruptcy Code took some subject matter of contract, namely, future employer contributions, but not contract itself.

Government's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), incorporating Bankruptcy Code, that enabled Puerto Rico's debt restructuring, did not result in regulatory taking of bondholders' contractual right to future employer contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, by cutting off bondholders' ability to receive benefit of future employer contributions to ERS; Penn Central factors weighed against taking, as contributions were merely expectancy and bonds still existed, United States did not interfere with investment-backed expectations of bondholders who were warned that bankruptcy was possibility, and government had legitimate interest in mitigating Puerto Rico's fiscal emergency.