



10-1976

United States Trust Co. of New York v. New Jersey

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>



Part of the [Constitutional Law Commons](#)

Recommended Citation

United States Trust Co. of New York v. New Jersey. Supreme Court Case Files Collection. Box 40. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

time in view of ~~runway~~
Revenue Bonds (not Hess, of course)

A far reaching decision
allowing ~~Port Authority~~
legislatures of N.Y. & N.J.
to repudiate contract
terms ~~with~~ an issue
of Revenue Bonds by
Port Authority

N.J. Ct held this
OK so long as Bonds not
Preliminary Memo
destroyed!

Although the
seems involved
are phenomenally
large, I tend
to agree with
the memo writer

Conf. of June 17, 1976
List 1, Sheet 1

No. 75-1712

GABY

v.

PORT AUTHORITY OF NEW
YORK & NEW JERSEY

Appeal from Sup. C't. of N.J.
(Pashman, J., dis in part;
per curiam)

Timely

State/Civil

Please see memo for No. 75-1687.

6/9/76

Bradley

that the case
was correctly
decided. You
probably know
more than I
about the
bond market and
the Contract Clause,
however.

I read the Jurisd. Statement in 75-1687 (U.S. Trust case), and was not persuaded
that it is worth full treatment.

Phil

Preliminary Memo

Conf. of June 17, 1976
List 1, Sheet 1

No. 75-1687

U.S. TRUST CO. OF NEW
YORK

v.

NEW JERSEY

Appeal from Sup. C't. of N.J.
(Pashman, J., dis in part;
per curiam)

Timely

State/Civil

No. 75-1712

GABY

v.

PORT AUTHORITY OF NEW
YORK & NEW JERSEY

(same as above)

(same as above)

Timely

I. SUMMARY: This case arises from a suit challenging a 1962 covenant between N.Y. and N.J. and the holders of Port Authority bonds (incl Ap'pt U.S. Trust) which provided that the states and the Port Authority were precluded from applying the Authority's

revenues for passenger railroad purposes without the consent of the bondholders. In 1972 Gaby sued claiming the covenant was unconstitutional. In 1974 it was repealed (not because of Gaby's suit). Gaby now urges support for the repeal and that the original covenant was unconstitutional. (Interstate Compact Clause, Act I § 10), U.S. Trust claims that the repeal was unconstitutional (Contract Clause, id.) and that the covenant must be reinstated.

II. FACTS: The Port Authority of N.Y. and N.J. was formed by interstate compact in 1921. In 1960 it was proposed that the Authority take over the Hudson and Manhattan RR which was then bankrupt. The N.Y. legislature authorized this but the N.J. legislature felt that they couldn't hope to float the bonds for this venture without limiting the future involvement of the authority in the predictably unprofitable commuter rail business. Consequently the covenant was passed in 1962 which authorized

Covenant
→
→
the acquisition of the railroad (and construction of the World Trade Center) but provided that the "2 States covenant and agree with each other and with the holders of any affected bonds . . . that so long as such bonds remain outstanding . . ." none of the revenues pledged as security for the bonds would be used for "any railroad purposes whatsoever" without the consent of the bondholders.

The constitutionality of the covenant was challenged in an appeal to this Court. Courtesy Sandwich Shop v. Port Authority, 12 NY2d 379, appeal dismissed 375 U.S. 78 (1963). *For what?*

In 1973 the states decided to repeal the covenant prospectively (i.e., it wouldn't affect existing bondholders such as U.S. Trust). However, since many of the pre-existing bonds did not expire until 2077 it meant that the Authority could not build some subway lines which it was felt were needed.

Accordingly in 1974 the two state legislatures simply repealed the covenant. The next day, U.S. Trust filed the instant action in the N.J. courts and ^{later} filed a still pending identical action vs. the State of N.Y. in N.Y. Courts (U.S. Trust suggests that this case be noted and held pending outcome of the potentially dispositive ^{1/} N.Y. case). U.S. Trust claimed a contract clause violation plus deprivation of property (value of the bonds) without due process.

Meanwhile in 1972 appt Gaby had filed a class action on behalf of N.J. residents claiming that the original covenant was invalid because it was an interstate compact which had not been approved by Congress in violation of Art I § 10 Cl 3. (The original 1921 compact had been consented to by Congress). Gaby now also asks that the repeal be upheld.

The two cases were consolidated. The N.J. Superior Court in an extremely lengthy opinion (70 pp) upheld the repeal as a 1/Potentially dispositive because if the state courts of either state finds the repeal invalid, then it is wiped out.

Said to be Interstate compact

proper exercise of the police power. Consequently it did not reach the question of the validity of the now repealed covenant.

The court found that the covenant "cannot be said to have been the 'primary consideration'" in a decision of investors to purchase Port Authority bonds. The court noted that the bonds received an "A" rating from Moody and Standard and Poor before, during and after repeal of, the covenant.

The court agreed that there had been declines in the value of PA bonds but concluded that this was due to a variety of factors (e.g., problems with the Trade Center) not just the repeal and that plaintiffs had failed in their proof as to deprivation of property.

impairment of contract
As to the contract clause, the court found that the repeal does permit a "diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders. Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935)."

The court next observed that states may not only not repeal a contract but may not impair substantial rights created by same. Von Hoffman v. City of Quincy, 71 U.S. (4 Wall) 535 (1867).

However, the court reasoned that "not every impairment of a contract . . . runs afoul of the contract clause; a state acting under its reserved police powers may alter its remedial processes and thereby diminish contractual security provided it does not

destroy its quality as an 'acceptable investment for a rational investor.'" Citing Worthen Co, supra and Home B & L As'sn v. Blaisdell, 290 U.S. 398, 428-29 (1933). The court cites numerous cases where this Court has allowed states to impair contractual obligations as an exercise of the police power. (App. A99-A104) so long as they do not destroy them. Since the repeal did not destroy the bonds it was upheld. The N.J. Supreme Court affirmed "for the reasons set forth in the opinion (below) of Judge Gelman."

Answer

III. CONTENTIONS: Ap'pt says that the Constitution says that the states can't "impair" contracts, not that it can't "destroy" them. However, ap'pt cites no case to support its position that the court below had the standard wrong. Blaisdell, supra, held that "the obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them . . . and impairment . . . has been predicated upon laws which without destroying contracts derogate from substantial contractual rights." However, it is made clear that states can go quite far before such derogation occurs. I agree with the courts below that, especially in view of ap'pts inability to demonstrate any concrete losses ^{*attributable to the repeal*} they have shown neither a substantial impairment of the contract or a taking of property without due process.

As to the Gaby appeal, if the decision below is correct then Gaby may be dismissed without complaint. If the decision

is reversed, then the case should be remanded for a decision below as to the validity of the 1962 covenant, a matter which has not yet been decided by the N.J. courts. Gaby makes the argument here, without much discussion, that the covenant violates the interstate compact clause, but I don't believe that issue should be reached.

If it is reached, it would seem that, under Hicks v. Miranda, 422 U.S. 332 (1975) this Court's dismissal in the Courtesy Sandwich Shop, supra, case would control the outcome. In that case, the NYCA held that the congressional consent to the original compact encompassed the changes of the 1962 covenant. So Gaby loses in any case.

There are responses (which came in just as this memo was going to press and are not incorporated herein).

6/9/76

Bradley

Op in Ap'pts App.

gory
Deny?
Carl

June 17, 1976 Conference
List 3, Sheet 3

No. 75-1687

U.S. TRUST CO. OF
NEW YORK

Motion of Securities Industry
Association for Leave to File a
Brief, as Amicus Curiae (see
case listed page 1)

v.

NEW JERSEY

SUMMARY: The Public Finance Council of the Securities Industry Association requests leave to file an amicus curiae brief in support of the JS (see this Conf. List, p. 1). The N. J. AG has filed a brief in opposition.

CONTENTIONS: Amicus asserts that its members will be directly and substantially affected by the outcome of this litigation. In its 4 page brief amicus does not address the legal questions involved in this appeal--it is "confident" that appellant will adequately present the constitutional issue--but instead presents facts concerning the impact of a decision on the constitutionality of the repeal of the 1962 covenant on the municipal bond market generally, on the borrowing

ability of state and local governments which Council members represent as investment bankers and on the general investing public.

Appellee opposes this motion on the following grounds. (1) The motion is untimely under Rule 42 (" . . . a motion . . . may be filed only if submitted a reasonable time prior to the consideration of the (JS) . . ."). Amicus filed its motion and brief on the same day (June 7) appellee filed its motion to dismiss. [The JS was filed on May 21].

(2) Counsel for amicus were co-counsel below and members of amicus are largely members of the plaintiff class represented by appellant.

(3) The amicus brief consists "primarily of sweeping factual assertions which were disproved at trial." Offering examples of the purported use by amicus of discredited factual assertions, appellee argues that it should have had the time to present a detailed refutation of the facts presented by amicus.

(4) Amicus repeats appellant's claim that municipal bonds enjoy especially privileged protection from the reasonable exercise of governmental power, which claim was rejected below and presents no substantial federal question.

DISCUSSION: It is a close question whether or not amicus submitted its motion and brief within "a reasonable time" prior to consideration of the JS. In any event the rationale appears to favor the convenience of the Court, not the party withheld consent. Rule 42 provides that "(s)uch motions are not favored."

There is a response.

6/15/76

Goltz

PJN

Sally - check to see

Supreme Court of the United States
Washington, D. C. 20540

whether this is
done for me

✓

April 22, 1977

CHAMBERS OF
JUSTICE POTTER STEWART

Re: No. 75-1687, United States Trust Co.
v. New Jersey

Dear Harry,

I would appreciate your noting at the
foot of your opinion that I took no part in the
consideration or decision of this case.

Sincerely yours,

- P.S. /

Mr. Justice Blackmun

Copies to the Conference

