



August 28, 2013

Court Reaffirms Creditors' Right To Collect Foreign States' Debt

(NML Capital, Ltd. v. Republic of Argentina)

U.S. Court of Appeals for the Second Circuit

The U.S. Court of Appeals for the Second Circuit this week reaffirmed the right of bondholders to enforce their contractual rights against foreign states that have defaulted on their commercial debt. The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in *NML Capital, Ltd. v. Republic of Argentina*. In its brief, WLF argued that the district court below acted properly in ordering Argentina not to play favorites among its creditors by paying interest to some bondholders while ignoring the legitimate claims of others. WLF disputed Argentina's claim that the district court's order would adversely affect the ability of other nations to renegotiate their indebtedness.

"WLF was concerned that Argentina's arguments would open the door to a legal regime under which sovereign debtors would be free to play favorites among their creditors," said WLF Chief Counsel Richard Samp after the appeals court released its decision. "We are pleased that the appeals court correctly concluded that Argentina should not be permitted to violate its own bond agreements, particularly since it has more than sufficient foreign reserves to pay all its rightful creditors," Samp said.

The case involved bonds issued by Argentina in the 1990s (the "FAA Bonds"). Argentina defaulted in 2001 and since then made no payments on the bonds. In 2005, Argentina tendered a take-it-or-leave-it exchange offer to all FAA Bondholders. It offered to give them newly issued Exchange Bonds, worth less than 30% of their FAA Bonds, if they agreed to relinquish existing payments claims. About 3/4 of the bondholders accepted the offer, but the Plaintiffs in this lawsuit did not. Argentina then adopted a statute (the "Lock Law") prohibiting any payments to bondholders who refused to take the 70% "haircut." For the past eight years, Argentina has made regular interest payments to Exchange Bondholders but has paid nothing to the holdouts. During that period, Argentina's economy has boomed, and it now has sufficient currency reserves to honor *all* foreign debt obligations.

In October 2012, the Second Circuit determined that Argentina was violating the "Equal Treatment" provision of the FAA Bond agreement by making payments to some bondholders but not others. It upheld a district court order prohibiting Argentina from continuing to make payments to Exchange Bondholders unless it also made payments to the Plaintiffs. After the case was remanded to the district court, that court spelled out in a November order the details of its injunction, including the formula for determining how much money must be paid to the Plaintiffs in order to afford them

“Equal Treatment” and the list of third parties who “participate” in Argentina’s bond payments and thus (by virtue of federal court rules) are also bound to comply with the injunction.

Argentina filed yet another appeal, objecting to the district court’s resolution of those two issues. Several third parties, including a group representing the Exchange Bondholders, also joined Argentina in the second appeal. Once again, however, the federal appeals court held that Argentina has no legal basis to pick and choose among the bondholders it will repay.

In its brief, WLF urged the Second Circuit to uphold the district court’s November 2012 order. In particular, WLF argued that the order does not interfere with the rights of Exchange Bondholders. WLF noted that the record confirms that Argentina has more than sufficient foreign currency reserves to make payments both to the Plaintiffs and to Exchange Bondholders. The latter group fears that the district court’s order will lead Argentina to pay *no one*, thereby defaulting on its payments to Exchange Bondholders as well. WLF responded that if Argentina does not pay its interest obligations on the Exchange Bonds, it will be because it chooses not to, not because the district court’s injunction will place Argentina in a position from which it will be financially unable to pay.

WLF noted that Argentina’s latest brief included an offer of compromise: it says it would be willing to amend the Lock Law (the law prohibiting all payments to holdouts) if the Plaintiffs agree to accept a small fraction of the amount they are owed. WLF argued that this offer of compromise demonstrates that the Lock Law is not the inviolable prohibition against payments that Argentina has heretofore made it out to be. Rather, WLF argued, the offer demonstrates that should the courts reject Argentina’s appeals, it can make payments to the Plaintiffs (and thereby avoid the need to default on other debts) by the simple expedient of amending the Lock Law.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared in numerous federal and state courts in support of legal standards that ensure equal treatment of all creditors and prevent debtors from favoring some creditors at the expense of others.

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF’s brief is posted on its web site, www.wlf.org.