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April 25, 2012

COURT URGED TO UPHOLD CREDITORS' RIGHT TO COLLECT FOREIGN STATES' DEBT

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

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Second Circuit to uphold the right of bondholders to enforce their contractual rights against foreign states that have defaulted on their commercial debt.

In a brief filed in *NML Capital, Ltd. v. Republic of Argentina*, WLF argued that the Foreign Sovereign Immunities Act already provides foreign states with significant immunity from lawsuits in American courts. WLF argued that in instances in which Congress has not chosen to extend immunity to foreign states, it is inappropriate for federal courts to create their own immunity theories and thereby undermine the ability of creditors to collect their debts.

The case involves bonds issued by Argentina in the 1990s (the “FAA Bonds”). Argentina defaulted in 2001 and since then has made no payments on the bonds. In order to induce creditors to purchase the bonds, Argentina had expressly waived its sovereign immunity from suit and agreed to *in personam* jurisdiction in New York courts. As a result of that waiver, all agree that the Foreign Sovereign Immunities Act (the “FSIA,” a 1976 federal law that would otherwise protect Argentina from lawsuits in U.S. federal courts) did not prevent bondholders from suing Argentina for nonpayment in U.S. District Court for the Southern District of New York. At issue now is whether the FSIA bars bondholders from seeking specific performance of the terms of the bond contract (*i.e.*, an injunction requiring Argentina to perform its contractual obligations).

Argentina argues that the FSIA bars federal courts from issuing such injunctions. The district court issued injunctive relief, and Argentina has appealed. In its brief urging the Second Circuit to affirm the district court’s order, WLF argued that although the FSIA imposes limitations on attaching property belonging to a foreign state, those limitations do not apply to other forms of injunctive relief that do not target any specific property belonging to the foreign state.

“WLF is 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 counsel Richard Samp after filing WLF’s brief. “Playing favorites among its creditors would place Argentina in violation of its bond agreement. The courts should not permit Argentina to do so, particularly because it has more than sufficient

foreign reserves to pay all its rightful creditors,” Samp said.

The bond agreement provides that Argentina’s “payment obligations” under the FAA Bonds “shall at all times rank at least equally” with all other comparable indebtedness. Notwithstanding that contractual provision, Argentina has been making interest payments to holders of Exchange Bonds – bonds distributed by Argentina in 2005 to creditors who agreed to accept them in exchange for their substantially-more-valuable FAA Bonds. The district court injunction bars Argentina from continuing to make these unequal payments. The injunction provides that *if* any future payments are made to holders of Exchange Bonds, then comparable payments must be made to holders of FAA Bonds.

In its brief urging affirmance, WLF disputed Argentina’s contention that the injunction is an “end run” around the FSIA’s prohibition against attachment of assets that belong to a foreign country and are located outside the United States. WLF argued that the injunction cannot be deemed an attachment because it does not encumber any specific Argentinian assets and because it does not require that any payments be made at all – only that Argentina must ensure any payments it chooses to make are distributed equitably among its creditors.

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.

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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.