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## **COURT UPHOLDS CREDITORS’ RIGHT TO COLLECT FOREIGN STATES’ DEBT**

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

The U.S. Court of Appeals for the Second Circuit this week upheld 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*, urging that the district court decision requiring Argentina to abide by its contractual commitments be upheld.

WLF argued that the Foreign Sovereign Immunities Act (FSIA) already provides foreign states with significant immunity from lawsuits in American courts and should not be expanded beyond its explicit provisions. The appeals court agreed, finding that the FSIA does not prevent a U.S. court from exercising its equitable powers against a foreign government that (as here) has waived its immunity from federal court jurisdiction. The ruling was a defeat for the U.S. government, which filed a brief in support of Argentina.

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 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 before the appeals court was 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 argued that the FSIA bars federal courts from issuing such injunctions. The district court issued injunctive relief, and Argentina appealed. The Second Circuit affirmed the district court’s order, agreeing with WLF 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 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 counsel Richard Samp following the appeals court’s decision. “Playing favorites among its creditors would place Argentina in violation of its bond agreement. The courts correctly concluded that Argentina should not be permitted 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 upholding the district court injunction, the appeals court rejected 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. The appeals court held 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](http://www.wlf.org).