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January 7, 2013

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 district court 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.

"Federal courts do not have the right to order a sovereign nation to use property located within its own borders to pay debts, but the courts act properly when, as here, they order compliance with a nation's contractual commitments to provide 'equal treatment' to all bondholders," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Argentina is acting wrongly when it selectively refuses payments as a way of punishing bondholders who refuse to accede to its take-it-or-leave-it debt renegotiation demands," Samp said.

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 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, it 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 has 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, have joined Argentina in this second appeal.

The brief filed by WLF this week urges 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 includes 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.

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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.