

Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Ruling in Argentina bond case subjects the sovereign to federal discovery, (Jun. 16, 2014)

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By Jim Hamilton, J.D., LL.M.

The Supreme Court has ruled in a case brought by hedge fund creditors that purchased Argentina bonds that the Foreign Sovereign Immunities Act did not immunize Argentina from the post-judgment discovery of information concerning its extraterritorial assets. Foreign sovereign immunity has always been a matter of grace and comity on the part of the United States, said the Court, not a Constitutional restriction. Thus, any sort of immunity defense made by a foreign sovereign in a federal court must stand on the Act's text or fall, and in this case, discovery won out (*Republic of Argentina v. NML Capital, Ltd.*, June 16, 2014, Scalia, A.).

The opinion was 7-1, with Justice Scalia writing for the Court and Justice Ginsburg in dissent. Justice Sotomayor took no part in the decision. The narrow issue before the Supreme Court in this case was on the scope of the Foreign Sovereign Immunities Act. The Court assumed, without deciding, that a federal district court has the discretion under the Federal Rules of Civil Procedure to permit the discovery of third-party information bearing on a judgment debtor's extraterritorial assets.

Second Circuit decision. The Court was reviewing a Second Circuit ruling that the Republic of Argentina's decision to pay only holders of the exchange bonds it newly issued, but not holders of its old bonds (including the plaintiff hedge funds), constituted a breach of the *pari passu* clause contained in the Republic's 1994 Fiscal Agency Agreement. Based on that holding, the appeals court affirmed an injunction requiring Argentina to make a ratable payment to the plaintiffs in respect of the old bonds whenever it pays any amount due under the terms of the new exchange bonds.

This injunction would have required Argentina to pay the hedge fund creditors approximately \$1.33 billion when it made the next interest payment on its exchange bonds. The Second Circuit panel held that an equal treatment provision in the bonds barred Argentina from discriminating against the hedge fund bonds in favor of bonds issued in connection with restructurings and that Argentina violated that provision by ranking its payment obligations on the defaulted debt below its obligations to the holders of its restructured debt. Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the agreement, said the court.

Foreign Sovereign Immunities Act. According to the Court, the text of the Act confers on foreign states two kinds of immunity. First, and most significantly, a foreign state is immune from the jurisdiction of the courts of the United States unless it waives jurisdictional immunity, and here Argentina did waive immunity with regard to the hedge fund creditors. Consequently, the Act makes Argentina liable in the same manner and to the same extent as a private individual under like circumstances.

The Act's second immunity-conferring provision states that property in the United States of a foreign state is immune from attachment and execution unless it is used for a commercial activity in the United States and some other enumerated exception to immunity applies, such as the one allowing for waiver. The fact that Argentina's diplomatic or military property could enjoy immunity does not mean that the hedge fund creditors would be unable to execute on other types of property. The Court noted that the reason for this case is that the creditors do not yet know what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law.

The hedge funds ask for information about Argentina's worldwide assets generally, so that they can identify where Argentina may be holding property that is subject to execution. To be sure, said the Court, that request is

bound to turn up information about property that Argentina regards as immune. But the creditors may think the same property not immune. In that case, what the Court described as Argentina's "self-serving legal assertion" will not automatically prevail; the federal district court will have to settle the matter.

The Court did note the concerns of the United States as *amicus curiae* that upholding this type of discovery order might provoke reciprocal adverse treatment of the United States in foreign courts and harm the United States' foreign relations more generally. However, the Court said that these apprehensions are better directed to that branch of government with the authority to amend the Foreign Sovereign Immunities Act: the U.S. Congress.

Cert. denied on second Argentina bond issue. In a second case connected to the Argentina bond issue, the Court declined to review the part of the Second Circuit holding that an equal treatment provision in the bonds barred Argentina from discriminating against the hedge fund bonds. Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the agreement, said the appeals court, a ruling left standing by the Supreme Court's denial of *certiorari*.

The case is No. 12-842.

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Companies: NML Capital LTD

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