

Second Circuit Rejects \$2 Billion Class Action Award Against The Republic of Argentina

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On May 27, 2010, the Court of Appeals for the Second Circuit affirmed in part and remanded in part a district court's decision certifying class actions against the Republic of Argentina and granting over \$2 billion in damages to eight classes of plaintiffs. Puricelli v. The Republic of Argentina, No. 09-0332, 2010 WL 2105132 (2nd Cir. May 27, 2010) ("*Puricelli*"). While the Court of Appeals concluded that class certification was appropriate, it held that the district court erred in entering aggregate class-wide relief, as opposed to determining individual relief.

Eight separate putative class actions were filed in the district court by holders of defaulted Argentine bonds, asserting their right to repayment against the Republic of Argentina. The district court certified eight classes of plaintiffs who purchased bonds prior to the date the class actions were filed and who held them continuously until the time of final judgment. Members of the classes differed because they purchased their bonds at different times, some purchased directly from Argentina while others bought their bonds in the secondary market, and some accelerated their bonds while others did not. In January, 2009, the district court granted summary judgment to the plaintiffs and entered judgments totaling over \$2 billion in damages to the eight classes, based on aggregate damages derived from "reasonable estimates" of the total amounts of damages the classes might recover.

The Republic of Argentina appealed, arguing that, in certifying the classes, the district court had misapplied Rule 23 of the Federal Rules of Civil Procedure, and erroneously granted aggregate relief based on estimates, as opposed to individual damage determinations.

The Court of Appeals first considered the Republic of Argentina's argument that class action resolution was appropriate because plaintiffs failed to satisfy Rule 23(b)(3)'s requirements of adequacy of representation, predominance, and superiority. The Court of Appeals rejected each of these claims. First, the court found that while there was a possible conflict of interest because the lead counsel represented all eight classes, as well as individual plaintiffs in non-class actions, these possible conflicts threatened the damage allocation stage of the proceeding, not the liability phase. Second, the Court of Appeals determined that "the hunt for assets capable of satisfying Argentina's obligations to the plaintiffs" satisfied the requirement that a common question of law or fact predominate, and predominance was not negated by the defendant's concession of liability. Finally, the Court of Appeals concluded that a class action was a superior means of adjudicating the controversy because proceeding individually would be prohibitive for members of the

class with small claims.

Next, the Court of Appeals addressed defendant's argument that the district court's grant of aggregate class-wide judgments was improper because it was based on global estimates of Argentina's liability derived from expert opinion, and not on individualized proof. The Court of Appeals also noted that the district court acknowledged that the estimates were likely inflated, but had justified the award based on the fact that recovery was unlikely due to the improbability of ever reaching Argentina's assets.

The Court of Appeals held that such estimates violated the Rules Enabling Act, 28 U.S.C. § 2072(b), which forbids the use of federal rules of procedure to "abridge, enlarge or modify any substantive right." Specifically, the Court of Appeals stated that an award based on estimates allowed the plaintiffs to encumber property to which they had no colorable claim. As a result, the court vacated the district court's damage awards, concluding that the award was inappropriate because it did not even roughly reflect the aggregate amount owed to class members, and remanded for more accurate damages to be determined.

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