

Litigator of the Week: Joseph Neuhaus of Sullivan & Cromwell



By Scott Flaherty
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After more than nine years of litigation and a total of three appeals, Joseph Neuhaus of Sullivan & Cromwell secured an appellate victory this week that cleared Argentina's central bank from having to cover more than \$2 billion in defaulted Argentinian bond debt.

With a ruling on Monday, the U.S. Court of Appeals for the Second Circuit sided with Neuhaus and his longtime client, Banco Central de la Republica Argentina (BCRA), against investment funds EM Ltd. and NML Capital Ltd., and their lawyers, Gibson, Dunn & Crutcher's Theodore Olson and Debevoise & Plimpton's David W. Rivkin. The appeals court ruling reversed a district judge in Manhattan who had allowed the funds to try to hold BCRA liable for some of Argentina's bond debt. The Second Circuit ordered the lower court to dismiss the funds' complaint against BCRA with prejudice.

Monday's decision comes in a long-running dispute over bond debt that the Argentinian government defaulted on in 2002. Under the Foreign Sovereign Immunity Act (FSIA), foreign governments are typically shielded from lawsuits in U.S. court over defaulted debt. But Argentina, which had a history of defaulting, had agreed to waive that immunity in connection with a set of bonds it began issuing to investors in 1994.

Looking to collect, the hedge funds in 2003 had filed a series of lawsuits in Manhattan, directly targeting the Argentinian government. They ultimately secured judgments totaling \$2.4 billion. But when Argentina failed to pay, the hedge funds and their lawyers began pursuing other avenues to recoup their losses, including holding BCRA liable.

They filed suit in 2006 against BCRA, seeking a declaratory judgment in Manhattan federal court that the central bank was effectively an "alter ego" of the Argentinian government, which allegedly had significant control over BCRA. But, since Argentina had waived its immunity, the hedge funds argued, that waiver should extend to BCRA, meaning the central bank couldn't use sovereign immunity as a defense to avoid the hedge funds' claims. The central bank, as an "instrumentality" of a sovereign state, would ordinarily be immune from U.S. lawsuits under the FSIA, but there are exceptions for entities determined to be "alter egos" of the foreign government.

For its defense, BCRA turned to Neuhaus, who spends much of his time working on international commercial litigation and arbitration, with a particular focus on Latin American matters. Although BCRA wasn't an existing client, Neuhaus and fellow

Sullivan & Cromwell partner Sergio Galvis had played a tangential role in some of the earlier litigation against Argentina, filing an amicus brief in the Argentina case on behalf of the Clearing House Association, a trade group comprised of major commercial banks.

"I think it was that that brought me to the attention of the central bank," Neuhaus said Thursday.

The nearly ten years Neuhaus has spent working on the case—both as lead counsel at the district court and as lead appellate lawyer—have had their ups and downs. But Neuhaus said he's enjoyed the work for BCRA from the outset, partly because the litigation has touched on novel issues.

"For me personally, it's been a long trail, but an utterly fascinating one. The FSIA is, in many places—especially dealing with central banks—terra incognita," said Neuhaus. "So, we are making law. Which is really just about as good as it gets in my world."

Earlier in the litigation, the Sullivan & Cromwell partner helped BCRA win two appeals that largely involved disputes over certain assets that the Argentinian bank held in the Federal Reserve Bank of New York. But with the case back at the district court again, U.S. District Judge Thomas Griesa in Manhattan sided with the hedge funds in 2014 on the broader question of the extent to which BCRA was independent from Argentina's government. The judge ruled that the state's control over BCRA made the bank an "alter ego" of the government, effectively waiving its immunity.

On appeal, Neuhaus argued that while there were certainly ties between Argentina's government and BCRA, there wasn't enough evidence to suggest that the government controlled the central bank's day-to-day operations. The Argentine government's waiver of sovereign immunity shouldn't apply to BCRA, he contended.

In Monday's ruling, the Second Circuit agreed. Although the court expressed concern that its conclusion could allow the Argentinian government to continue shirking its debts, the appeals court ruled that BCRA operated with a level of independence from the government that entitled the central bank to invoke its own sovereign immunity.

Barring further appeal, the ruling ends the hedge funds' case against BCRA.

"For the client, it appears this nine year saga is over," said Neuhaus. But he said he believes the impact will reach beyond his client. "This makes it clear that New York is a hospitable place for central banks to keep their foreign currency reserves," he said. "That is good for the United States and for the dollar."