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COURT OF APPEALS

STATE OF NEW YORK

MOSHE MARCEL AJDLER,

Appellant,

-against-

NO. 18

PROVINCE OF MENDOZA,

Respondent.

20 Eagle Street
Albany, New York
February 14, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is Ajdler v. the Province of Mendoza.
3 Counsel?

4 MR. MCGINLEY: Good afternoon, Your Honors. May
5 it please the court, Michael McGinley, from Dechert LLP on
6 behalf of the appellant, Mr. Ajdler, and joined by my
7 colleague, David Hoffner.

8 I'd like to reserve two minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. MCGINLEY: The plain terms of the indenture
11 that apply here in this court's decision in NML Capital,
12 allow Mr. Ajdler to recover post-maturity interest within a
13 four-year limitations period, including on claims after the
14 principal is time-barred.

15 JUDGE WILSON: Forever?

16 MR. MCGINLEY: Your Honor, our position is that -
17 - - is that once he - - - once - - - once he brings his
18 claim, if he prevails on his claim, that then merges the
19 contract into the judgment if - - -

20 JUDGE WILSON: But he could wait until 2060 to
21 bring the claim?

22 MR. MCGINLEY: Well, we also think laches would
23 apply in some kind of extreme scenario where he waited
24 multiple decades, but yes, Your Honor, I mean, we - - - we
25 think that the plain terms of the contract provide that

1 post-maturity interest is available. This court's decision
2 in NML Capital says so.

3 And it - - - and it - - - and the - - - the
4 court's decision in NML Capital also points out that in a
5 complex financial document like this, fi - - - financial
6 instrument, the terms are construed against the bond
7 issuer. And there's very good reasons for that, because
8 they have complete control over the terms that are written
9 into the bond. If Mendoza didn't want post-maturity
10 interest to continue to run past the time of - - - of a - -
11 -

12 CHIEF JUDGE DIFIORE: But aren't the post-
13 maturity interest payments a conditional remedy, partial
14 contract remedy, that conditioned on the breach? Isn't
15 that we've said?

16 MR. MCGINLEY: No, I don't think so, Your Honor.

17 CHIEF JUDGE DIFIORE: No?

18 MR. MCGINLEY: I mean, in NML Capital, what the
19 court said was that they're two separate obligations. And
20 that, you know, the - - - the fact - - -

21 CHIEF JUDGE DIFIORE: Well, but - - -

22 MR. MCGINLEY: - - - that one might - - - might -
23 - - the limitations period might run, doesn't mean that the
24 limitations period on the other runs.

25 JUDGE STEIN: But - - - but can't - - - under - -



1 - under that case, I mean, it - - - it didn't - - - it
2 didn't deal with this particular question or this
3 particular situation, and couldn't that more logically be
4 understood to mean that - - - that you could sue on the
5 interest before the principal matured, and that was the
6 reason for dividing the two halves of the - - -

7 MR. MCGINLEY: I don't think so, Your Honor, beca
8 - - - because what NML Capital dealt with post-maturity
9 interest payments, and what the court says is that the only
10 event that would extinguish the - - - the obligation to
11 remit those payments is payment of principal or the merger
12 of the contract into a judgment.

13 JUDGE GARCIA: But it was a timely action there,
14 or am I wrong?

15 MR. MCGINLEY: It - - - it was.

16 JUDGE GARCIA: In NML.

17 MR. MCGINLEY: It was but, you know, the logic of
18 the court's decision is that the only events that can
19 extinguish the right to remit payment is the - - - on
20 interest - - - is the payment of principal, under the plain
21 terms of the contract, or a merger into a judgment.

22 CHIEF JUDGE DIFIORE: But didn't we distinguish
23 between pre-judgment and post-judgment interest, and isn't
24 that where - - -

25 MR. MCGINLEY: There was a - - - there's a



1 distinction between pre-judgment and post-judgment, but
2 there's not a distinction between post-maturity and pre-
3 maturity. And what the court says in NML Capital is that -
4 - -

5 CHIEF JUDGE DIFIORE: I meant post-maturity;
6 excuse me. I said post-judge - - -

7 MR. MCGINLEY: Sure.

8 CHIEF JUDGE DIFIORE: I meant post-maturity.

9 MR. MCGINLEY: I don't think the court drew any
10 relevant distinction in terms of a plaintiff's ability to
11 bring suit on the separate obligation to pay interest.

12 JUDGE GARCIA: But if we have basically two
13 choices which - - - with a third issue, I guess, thrown in
14 in some ways, but one is, we can adopt your rule and say,
15 maybe laches, but you could bring this action in 2060. Or
16 we could say you have a hard-cap four-year, in this case,
17 statute of limitations or six in another; you have to bring
18 an action by then, and you can get whatever payments are
19 due at least in that time period up to the time you bring a
20 timely action. Why would we adopt the 2060 rule?

21 MR. MCGINLEY: Well, I mean, first of all I don't
22 think there's any incentive for someone to sandbag and wait
23 for forty years - - -

24 JUDGE GARCIA: Well, what was the incentive here?

25 MR. MCGINLEY: There - - - there was no



1 incentive. It's - - - there's - - - there's nothing in the
2 complaint that gets to this, but my understanding is, it's
3 just a mere oversight on behalf of my client. That doesn't
4 mean that his right was extinguished, though. In fact,
5 Section 4.7 of the indenture specifically says that any
6 delay in asserting a right doesn't waive that right.

7 JUDGE GARCIA: Because we don't take it well when
8 someone tries to extend the statute of limitations, right?
9 That's a policy basis we've used to justify certain
10 decisions. So it seems to me this would be, perhaps, the
11 ultimate extension.

12 MR. MCGINLEY: With all respect, I would
13 disagree, because we're not seeking to extend the statute
14 of limitations, here, the prescription period, on the
15 principal. We admit that principal is time-barred at this
16 point. We also admit that we would only be able to look
17 back four - - - four years, so at any point, the window
18 would only be a floating four-year window, which is not
19 that extreme of a - - - of a scenario.

20 And you know, we should keep in mind, the reason
21 why we're here is because - - -

22 JUDGE WILSON: Well, it would be - - - it would
23 be back four years and into the future in perpetuity, no?

24 MR. MCGINLEY: No, because our position is that
25 at any point that we enforce our rights through a lawsuit,



1 if we prevail, that that extinguishes the claim that merges
2 into a judgment, and so we can't bring further claims on
3 interest.

4 JUDGE STEIN: Yeah, but - - - but time for you to
5 make that first enforcement action, there - - - there's no
6 limit on that under your rule, other than, as you say,
7 laches, which I'm not sure I understand how you get laches
8 in a - - - in a - - - in a legal action for a breach of
9 contract damages.

10 MR. MCGINLEY: I mean, I think there would be
11 practical limitations because, you know, most holders would
12 - - - their incentive would be to bring it sooner, and I
13 don't see there being any - - -

14 JUDGE STEIN: But the problem is, is that there's
15 no way to draw - - - there's really no way to draw a line.
16 So - - - so what you're - - - you're relying on, as I see
17 it, is, you know, assuming that most people won't want to
18 wait that long, but, you know. Can we - - - can we have a
19 rule based on that assumption?

20 MR. MCGINLEY: I - - - I mean, Your Honor, the -
21 - - I think the rule is dictated by the plain terms of the
22 indenture. I mean, that's what the court says in NML
23 Capital. We're here because their indenture provided that
24 they would pay interest until payment of principal. And
25 the - - - and the ultimate reason we're here is that they



1 voluntarily decided to stop fulfilling their obligations
2 under the indenture.

3 So I think their - - - their claim that somehow
4 they're going to be victimized by this perpetual accrual of
5 claims rings hollow, because they could pay - - -

6 JUDGE RIVERA: But - - - but - - - but there is a
7 - - -

8 MR. MCGINLEY: - - - the principal at any point.

9 JUDGE RIVERA: But, you know, there's a public
10 policy to have closure and to not have these stale claims
11 and the argument really is about decades, if not
12 generations into the future.

13 But at - - - but help me here, these Section 4.6
14 of the indenture, that says, "Notwithstanding any other
15 provision of this indenture, bondholder has a right to
16 receive payment of the principal and interest on the stated
17 maturity." Why - - - why doesn't that mean that it - - -
18 it's all from the maturity and it's four years from there,
19 and that's as far as you can go out?

20 MR. MCGINLEY: Sure, and of course, that - - -
21 you know, that's - - - that's my friend on the other side's
22 argument. What we would say is that 4.6, by and large,
23 what that does is it says, no longer is it the trustee that
24 - - - that would bring the suit, that the bondholder has a
25 right that point. The bondholder can sue for principal and



1 interest that had accrued up to that point, so we're
2 talking about pre-maturity interest there.

3 The argument that the other side makes it somehow
4 that then extinguishes post-maturity interest claims or
5 accelerates their prescription period is inconsistent with
6 Section 15, the prescription period - - -

7 JUDGE RIVERA: Yeah, but I - - - but - - - but I
8 don't understand how you get around the beginning of 4.6,
9 "Notwithstanding any other provision," meaning this is the
10 provision that binds, and this is the one that says a
11 bondholder has the right to sue from - - - for payment and
12 interest as of the maturity date.

13 MR. MCGINLEY: So two ways of - - - two ways I
14 would say that that's - - -

15 JUDGE RIVERA: Yes.

16 MR. MCGINLEY: - - - that doesn't mean what - - -
17 what the other side says.

18 JUDGE RIVERA: Okay.

19 MR. MCGINLEY: One is that, "Notwithstanding
20 other provision" is clearly talking about 4.1 through 4.5,
21 which talk about the trustee's ability to sue, and - - -

22 JUDGE RIVERA: Yeah, except it doesn't say that.
23 It says "Notwithstanding any other provision in this
24 indenture" which means the entire document.

25 MR. MCGINLEY: Sure, and then what I'd say is the



1 - - - the next provision, 4.7, says that no right or remedy
2 conferred in the indenture is at - - - is exclude - - - is
3 meant to exclude any other right or remedy, and that
4 they're cumulative. And - - -

5 JUDGE FEINMAN: So, I - - - I want to take a step
6 back and have a more basic understanding of - - - of what
7 you're arguing the post-maturity interest is. If it's not
8 a - - - a contractual remedy, it is consideration for the
9 indenture, like the pre-mat - - - maturity interest?

10 MR. MCGINLEY: We do believe that it's a
11 contractual remedy. We brought a breach of contract
12 action.

13 JUDGE FEINMAN: Okay. So I just - - - you know,
14 if - - - if that's the case, how can you just pursue that,
15 you know, with an unlimited time duration? I - - - I just
16 - - -

17 MR. MCGINLEY: Of course, we don't argue - - -

18 JUDGE FEINMAN: I mean, we - - - we've never - -
19 - that that just seemed to be so against the - - - the
20 public policy of the state.

21 MR. MCGINLEY: I - - - I don't think so, Your
22 Honor. And - - - and just to be clear, we - - - we don't
23 think you could bring it forever. We've proposed two
24 limiting principles. But it also is fully consistent with
25 - - - with what the court said in NML Capital, which is



1 that when you have separate obligations, one to pay
2 interest until the principal is paid, and one to pay
3 principal, that those accrue separately, and that the
4 interest payments continue to accrue even after post-
5 maturity.

6 JUDGE FAHEY: Well, isn't that the ultimate
7 question? It - - - it's almost an epistemological question
8 about what we know and when we know it, I guess, because
9 the - - - the question here is - - - is - - - can interest
10 exist without principal? And - - - and to accept your
11 argument, we have to accept that principal has no
12 relevance, the statute of limitations has run on principal,
13 but it can still continue to run on interest. And isn't
14 that contrary to 400 years of common law that said interest
15 is - - - interest follows principal?

16 MR. MCGINLEY: So, with respect, I would disagree
17 that that's what - - - exactly what we're saying. The
18 first point that I would make - - - and - - - and I - - -
19 I'm getting questions. Your Honor, I want to make sure I
20 have reserved some time for rebuttal. Is that okay for me
21 - - -

22 CHIEF JUDGE DIFIORE: Of course, you have, yes.

23 MR. MCGINLEY: Okay.

24 The first point that I would make is that the
25 limitations period doesn't extinguish the underlying right.



1 JUDGE FAHEY: Okay.

2 MR. MCGINLEY: What it functions as is a bar to
3 the remedy and therefore it can be waived. If we were to -
4 - - if - - - if when we brought this suit - - -

5 JUDGE FAHEY: Yes, that - - - that would be great
6 if interest and principal were two separate things. It re
7 - - - it requires you to do that, and - - - and - - - and
8 you argue that in the indenture, that - - - that they are
9 two separate things.

10 MR. MCGINLEY: That's - - - that's correct.

11 JUDGE FAHEY: That - - - that's right. And NML
12 Capital says that. How do you reconcile - - - are you
13 familiar with Chapin?

14 MR. MCGINLEY: I am.

15 JUDGE FAHEY: Okay.

16 MR. MCGINLEY: And I'd love to talk to you about
17 that. So in Chapin, it was a very different contract. In
18 Chapin, there - - - the payment, the installment payments,
19 were for principal and interest together, like a normal
20 mortgage interest. And the claimant in that case brought a
21 foreclosure action.

22 JUDGE FAHEY: Right.

23 MR. MCGINLEY: Right? In - - - in Union Trust,
24 by contrast, which is what New York jurisprudence relies
25 on, it was clear that they were separate obligations.



1 JUDGE FAHEY: Well, Williston doesn't, though, do
2 they?

3 MR. MCGINLEY: No, but the case that Williston
4 relies on actually says that in some circumstances,
5 interest payments can accrue separate from principal.

6 JUDGE FAHEY: But - - - but you'll acknowledge
7 that Will - - - Williston goes the other way on that.

8 MR. MCGINLEY: I would acknowledge that the text
9 of Williston says something different. The points I would
10 make are that New York jurisprudence is about New York
11 jurisprudence, whereas Williston is making a basic claim
12 about the common law. And I would say that - - - that the
13 case that Williston relies on actually supports our
14 argument, because it says that in some circumstances, if
15 it's clear that interest payments are separate and apart
16 from principal payment, they can function that way. It's
17 also what the Second Department said in Amrusi only two
18 years ago, applying this court's reasoning in NML Capital.

19 JUDGE FAHEY: You were on Chapin, though. I
20 don't want to get you to far off that, because I think
21 that's a key case for you to address.

22 MR. MCGINLEY: Ye - - - yeah, and - - - and again
23 in Chapin, the difference is you had the payment, the
24 installment payments that were due, were principal and
25 interest together, right. And - - - and I think that



1 that's why it was more in line with the traditional cases
2 which treat interest as a mere shadow or an incident of
3 principal.

4 But once courts were confronted with scenarios
5 like this one where you have separate obligations, the
6 parties clearly treat it as separate obligations, they said
7 that the terms of the contract have to govern, and that the
8 two function differently. And that's why you see Union
9 Trust and Amrusi reaching a different result - - -

10 JUDGE STEIN: But - - - but they - - - they - - -

11 MR. MCGINLEY: - - - than Chapin.

12 JUDGE STEIN: They deal specifically with this -
13 - - this mortgage interest, some call it, mort - - -
14 mortgage interest exception.

15 MR. MCGINLEY: Yeah.

16 JUDGE STEIN: This isn't a mortgage here, so how
17 do - - - how - - - I mean, and there - - - there are a
18 whole bunch of other circumstances surrounding - - -

19 MR. MCGINLEY: Sure.

20 JUDGE STEIN: - - - Union Trust and - - - and - - -
21 - and the cases that followed that, that - - -

22 MR. MCGINLEY: Yeah.

23 JUDGE STEIN: - - - aren't applicable here, so -
24 - -

25 MR. MCGINLEY: So in Union Trust, it only talked



1 about the moratorium statute as an alternative holding.
2 The - - - the core of the holding was that they were
3 separate obligations, and they had to be treated as such.
4 Amrusi is clearly not a moratorium case; it's from 2017.

5 JUDGE STEIN: But they are mortgage cases.

6 MR. MCGINLEY: It's a mortgage case, but it's on
7 a note, right. And it - - - and it's - - - and it also was
8 not a foreclosure action. It was not on payments that were
9 principal and interest together. It was on separate
10 interest payments that under the note said continue to
11 accrue until payment of principal, which is identical to
12 the language here.

13 And so I think if you look at those cases
14 together, and you look at your - - - this court's decision
15 in NML Capital, it's clear that the parties' contract has
16 to control, particularly in a sophisticated financial
17 instrument that - - - that the bond issued.

18 JUDGE RIVERA: Well, when they entered the
19 contract, NML had not yet been decided.

20 MR. MCGINLEY: Sure, but when - - - when
21 Argentina entered its contract, NML had not yet been
22 decided.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. MCGINLEY: Thank you.

25 CHIEF JUDGE DIFIORE: Your welcome.



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Counsel?

MR. BOCCUZZI: Thank you, Your Honor, and may it please the court, Carmine Boccuzzi from Cleary Gottlieb on behalf of the respondent, the Province of Mendoza.

The certified question should be answered no. Plaintiff had the right to sue at maturity for its principal and all interest due and owing until principal was paid or merged into a judgment. That is what 4.6 provides, as well as the promise, relied on by friend, that interest is owed until principal is paid.

That is, in fact, how the plaintiff pleaded their claim. If you look at the complaint, which begins at A-4 in the appendix, it's partic - - - it specifically starts in paragraph 1, saying this is a claim for principal together with all accrued and owing interest. It then goes on to cite repeatedly and at length, Section 4.6, and then in the one cause of action - - - there are four causes of action in the complaint - - - three of them are based on the so-called pari passu clause, which is not an issue here. There's one cla - - - claim for damages, the first cause of action, and that is for principal and interest.

And they state in paragraph 62, as well as the prayer for relief, that they are entitled to "an amount to be determined at trial, but not less than an amount equal to the principal of plaintiff's bonds, together with all



1 accrued and unpaid interest due pursuant to the terms of
2 the bonds."

3 JUDGE STEIN: Is there a distinction between pre-
4 maturity and post-maturity interest? For example, that
5 pre-maturity interest could be considered consideration and
6 post-maturity interest might be considered remedial. And -
7 - - and if you agree with that, how does that factor into
8 the issue here?

9 MR. BOCCUZZI: You - - - you can think about that
10 in that way, and so the idea of post-maturity interest as
11 remedial even more puts it in line with the case law that
12 we cite, going back decades and decades in New York
13 jurisprudence, that it falls with the principal.

14 But the other way to think about it, is to think
15 about what is the moment of accrual? How do you get to
16 claim this principal - - - this interest? Exclude me - - -
17 excuse me. And it's clear from the document - - - and this
18 is also in NML, Your Honors. In NML, NML did in a timely
19 manner, what these folks want to do in untimely manner,
20 which is NML came right after maturity or acceleration, and
21 they said what we get is the principal. We get all
22 interest, whether it was pre-maturity and not paid, or
23 post-maturity, and we get that through merger into
24 judgment. And that is how this court characterized the
25 claim, and they get interest on top on that interest at the



1 statutory rate, under the CPLR 5001.

2 And so, if we follow the cases from this court,
3 the Vigilant case in 1995, the Hahn Auto Warehouse case.
4 We cited also the Knapp case from the First Department in
5 1894. When the facts are the - - - on the ground are such
6 that you can make your claim, then you've got to do it,
7 because the statute has started to run, and so that is what
8 NML did. And it was - - - it was specifically stated in
9 the ability to get principal plus all interest going into
10 the future.

11 JUDGE RIVERA: What - - - what's your response to
12 his point about Section 4.7, that all the rights are
13 cumulative?

14 MR. BOCCUZZI: All - - - all that - - -

15 JUDGE RIVERA: And I read 4.6 as you suggest it
16 should be read.

17 MR. BOCCUZZI: I'm sorry?

18 JUDGE RIVERA: I read 4.6 as you suggest it
19 should be read, but he says, oh, Judge, you've forgotten
20 about 4.7, that says all these rights are cumulative.
21 What's your response to that?

22 MR. BOCCUZZI: 4.7 further proves the point,
23 because that means, to the extent there are rights reserved
24 for the trustee in 4.1, and if you look at Section 4.1(b),
25 it is, I believe, where it talks about if there's a



1 nonpayment of principal. It states explicitly the trustee
2 then can go in on behalf of twenty-five percent of the
3 principal holders and demand all principal with all
4 interest owed, the whole amount.

5 So it's not this, everything is divergent, and
6 interest floats out here, separate and apart from the
7 concept of principal. That ties it together, and he had
8 the right to avail himself of that, because, as pled in the
9 complaint at paragraph 29, since there was such an
10 overwhelming acceptance of the exchange offer that the
11 Province of Mendoza did because of its financial straits,
12 by the time he - - - we were in 2004, 2005, he had over
13 twenty-five percent of the outstanding principal, because
14 his client or his predecessor-in-interest was the last
15 person who didn't take the deal.

16 And so they could have had the trustee bring this
17 remedy or, pursuant to 4.6, which it says, ignore 4.5,
18 which is limitations, what you can do. If you are owed
19 principal and interest, bondholder, you can do it.
20 Absolute and unconditional rights. Those are the words in
21 4.6. He had that right to do it. It started, therefore,
22 to run under the contract at four years; if we were in the
23 statutory context, it'd be six years.

24 And his contrary rule, Your Honors, is
25 unworkable. He is saying I would like to have four years



1 of interest - - - the four years of interest that accrued,
2 by the happenstance of when I decide to bring my complaint.
3 So here between 2013 and 2017.

4 JUDGE FEINMAN: So what is the actual rule you're
5 proposing?

6 MR. BOCCUZZI: The actually rule we're proposing
7 is to apply the Vigilant standard, and say, when you had
8 the right, the ability to assert a claim, whether for
9 principal or interest, the statute of limitations begins to
10 run. And so if you have not brought that claim within the
11 four years, then you are time-barred.

12 JUDGE GARCIA: Counsel, if we answer the first
13 question, no, do we need to reach the question in Footnote
14 6 of the Circuit opinion?

15 MR. BOCCUZZI: No, you don't, Your Honor. You
16 don't.

17 JUDGE GARCIA: And that's because the statute
18 would already have run anyway on those in - - - let's call
19 them the in-term interest payments - - -

20 MR. BOCCUZZI: Correct.

21 JUDGE GARCIA: - - - in the four-year period?

22 MR. BOCCUZZI: Correct. And - - - and the issue
23 in - - - in Footnote 6 is academic here, because if they
24 wanted to take the advantage of the - - - the so-called
25 mortgage rule, they would have had to have sued no later



1 than 2015. Since they came in at 2017, even importing that
2 rule into this context, which I would say the court should
3 not do, wouldn't help them. So it's - - - it's very
4 academic for purposes of this footnote - - -

5 CHIEF JUDGE DIFIORE: You're asking us to look at
6 this case as an accrual case, not as an enforcement case?

7 MR. BOCCUZZI: I see them going hand-in-hand, but
8 if that distinction is helpful to Your Honor, then I accept
9 it. But the point is when do you look at when the claim
10 accrues. You add the time and if you've sued after that
11 time, you can't enforce the claim, thought about in that
12 way.

13 JUDGE RIVERA: So under your rule, you mean as of
14 the maturity date?

15 MR. BOCCUZZI: Correct, because it's - - - it's
16 crystal clear at maturity you - - - you can sue, as NML
17 did, you sue for principal, and all interest with that
18 amount of interest, is judged by the standard of, until the
19 principal is paid or it merged into a judgment. And - - -

20 JUDGE WILSON: So could you - - - could you write
21 an indenture that said I'll pay you all the principal back
22 in three years and I'll pay you the interest back twenty
23 years after that?

24 MR. BOCCUZZI: Sure, you could write that.

25 JUDGE WILSON: And why isn't this that?



1 MR. BOCCUZZI: Because it's - - - it doesn't say
2 that. It says - - - right, because in - - - in your
3 hypothetical it says, I'll pay you the principal in three
4 years, I think you said. So if you didn't pay the
5 principal in three years, then they would have this
6 whatever the statute of limitations or contractual
7 prescription period to then claim the principal. And then
8 I've promised in twenty years, I'll pay you the interest.
9 So in twenty years, if I haven't done that, then we look -
10 - - look there.

11 Here it says, you have the right to get that
12 interest along the schedule or if I default on principal.
13 And so the clock starts to run. His rule, of course, is
14 unworkable.

15 JUDGE RIVERA: And - - - and in this hypothetical
16 that you just went through, the interest is accruing even
17 after the three years, when - - - when you had promised to
18 pay the principal? Or after the prescriptive period, or
19 the statute of limitations had expired?

20 MR. BOCCUZZI: Well, I - - - I guess, that
21 depends on how the hypothetical contract was written - - -

22 JUDGE RIVERA: Okay.

23 MR. BOCCUZZI: - - - but if - - - if you had a -
24 - -

25 JUDGE RIVERA: Fair enough.



1 MR. BOCCUZZI: - - - a contract that said I'll
2 pay you principal in three years and the principal will
3 accrue interest until paid - - -

4 JUDGE RIVERA: Okay, okay.

5 MR. BOCCUZZI: - - - then you would sue, and then
6 you could get your judgment, and it would include the
7 interest, but then you have this separate right, again,
8 accepting how it's written in the hypothetical, to go after
9 the interest.

10 JUDGE RIVERA: So it's that there's a certainty
11 there that - - -

12 MR. BOCCUZZI: There is - - -

13 JUDGE RIVERA: - - - addresses the public policy
14 issues that we know it's twenty years out.

15 MR. BOCCUZZI: Yes, exactly, and here you have no
16 measuring life, right. His standard is four years - - - he
17 used the term "floating" - - - floating interest - - - the
18 2060 problem. I think we used the - - - the year 2050 in
19 our brief, but that's the exact problem. Merger doesn't
20 solve that, because merger talks about success of actions.

21 And I would like to speak about merger briefly,
22 because I think merger confirms in another way why the
23 theory from the plaintiff here is wrong. Because merger
24 says, okay, if you bring on a cause, an action, and you get
25 a judgment, that bars a second action on the same cause.



1 He says, well, that would solve the problem. But once you
2 agree that a suit for interest is the same cause as another
3 suit for interest, then why isn't the same cause as the day
4 after September 4th, 2007, post-maturity, when you could
5 sue for interest and the cause accrued. So if you accept
6 the sort of merger analysis, that's another reason why this
7 claim is barred four years after.

8 I'd also like to make a point that this really -
9 - -

10 JUDGE RIVERA: So what - - - what was the point
11 of the phrase, interest is owed until the principal is
12 paid, or however it's phrased.

13 MR. BOCCUZZI: As NML says, that sets the stage
14 for when for when you bring the suit on principal, then the
15 - - -

16 JUDGE RIVERA: Well, this agreement predates NML.

17 MR. BOCCUZZI: Correct. But I - - - but I would
18 - - - I would say that it basically means that interest
19 continues to accrue at the contract rate until merged into
20 the judgment and then NML adds the fact that, since it's a
21 contractual obligation, it draws the statutory nine percent
22 interest under CPLR 5001. So that's all it does. But I
23 think for his purposes, and again, as Judge Garcia noted,
24 that was all a timely case, in NML, with - - - with this
25 case - - -



1 JUDGE RIVERA: But, okay - - - but you're saying
2 that the language is not - - - is not that it's tying the
3 interest to when the principal is paid, it's tie - - - I
4 may have misunderstood you - - - to the amount of interest?
5 Is that what you're arguing?

6 MR. BOCCUZZI: No, it's - - - it's just - - -
7 it's making very clear - - -

8 JUDGE RIVERA: The CPLR, I'm sorry.

9 MR. BOCCUZZI: - - - that - - - oh, so the CPLR
10 is saying, since it's a contractual obligation - - -

11 JUDGE RIVERA: Yes.

12 MR. BOCCUZZI: - - - to pay the interest of the
13 con - - - contract rate - - -

14 JUDGE RIVERA: Yes.

15 MR. BOCCUZZI: - - - you can get, on top of that
16 contractual interest, a nine percent CPLR - - -

17 JUDGE RIVERA: Interest on the interest.

18 MR. BOCCUZZI: Correct, correct.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MR. BOCCUZZI: One - - - the other point I would
21 just say, this really risking - - -

22 CHIEF JUDGE DIFIORE: You may have another
23 moment, sir.

24 MR. BOCCUZZI: - - - inundating New York courts
25 with claims, these kind of floating claims, on long past



1 due principal claims, a particular problem for sovereign
 2 issuers. Sovereign issuers cannot go bankrupt, which means
 3 they can't stop the running of interest, and so we cite in
 4 our - - - our brief, this is just not a - - - a fanciful
 5 concern. The Second Circuit Schmidt case involved an
 6 attempt to - - - to litigate in my lifetime, Polish debt
 7 from the 1930s. We cite the claim involving Chinese bearer
 8 bonds, that were being dealt with in the federal court. So
 9 it really would be an inundation - - - potential inundation
 10 - - - for the court system of these kind of long time-
 11 barred claims. Thank you, Your Honors.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.
 13 Counsel?

14 MR. MCGINLEY: Thank you, Your Honors. I'd like
 15 to make three points. The first point is - - - is the
 16 first point I made in - - - in my opening, is that NML
 17 Capital makes it clear that the plain terms of a party's
 18 agreement control, particularly when it's a sophisticated
 19 financial document, and the - - - and the bond issuer was
 20 represented by sophisticated counsel.

21 Mendoza could've written this contract to - - -
 22 to achieve precisely the rule that they advocate here.
 23 They could have said that the prescription period runs for
 24 four years after the accrual of each claim, and all - - -
 25 and all claims are prescribed four years after maturity.



1 That's not what the indenture says. Nothing in 4.6 says
2 that either. All that 4.6 says is that upon maturity, you
3 can bring claims. That doesn't mean that unaccrued, post-
4 maturity interest claims are somehow extinguished at that
5 point.

6 The other point that I'd make is that, my friend
7 relies on Vigilant a number of times. In Vigilant, this
8 court actually said that when you have separate installment
9 payments for interest, they accrue separately. That's
10 precisely the rule that we're arguing for here.

11 The other point that I'd make is that their
12 argument about 4.6 is really just a subspecies of the
13 argument this court rejected in NML Capital, where
14 Argentina argued that maturity somehow extinguished rights
15 to interest payments after maturity.

16 And then the last point that I would make is that
17 the court does not need to find in the affirmative on
18 question 2, to find in the affirmative on question 1. We
19 think that merger and laches would supply a limiting
20 principal. If they don't, then that's only because of the
21 language that Mendoza wrote in its own indenture.

22 And we can't forget that the reason why we're
23 here is that they voluntarily stopped satisfying their
24 obligations. At any point they could've eliminated this
25 situation by paying principal, or if we prevail in this



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case, this case goes away, and Mr. Ajdler is - - - is the holder of the vast majority of remaining beneficial interests. Thank you, Your Honors.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Moshe Marcel Ajdler v. Province of Mendoza, No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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