For opinion see 126 S.Ct. 1045

Briefs and Other Related Documents

Supreme Court of the United States.
THE EUROPEAN COMMUNITY, et al., Petitioners,
v.
RJR NABISCO, INC., et al., Respondents.
Departments of the Republic of Colombia, Petitioners,
v.
Philip Morris Companies, Inc., et al., Respondents.
No. 05-549.
December 14, 2005.
On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Reply Brief

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***1** The Opposition Brief addresses issues that are not germane to the Petition, but does not, and cannot, dispute the main points on the Petition.

1. The Second Circuit's conclusions that Petitioners had claimed that "defendants violated tax laws" (App. 14a), and sought to compel Respondents to "obey [foreign] tax laws" (App. 14a n.10), are clearly erroneous. Petitioners made no such claims (Pet. 22-25), and even Respondents do not suggest otherwise. On the contrary, Respondents concede that Petitioners did not allege that Respondents were tax debtors. The court below thus misapprehended the equitable claims.

2. It is indisputable that the Second Circuit, on remand from this Court, applied

its own, pre-*Pasquantino* version of the revenue rule to bar the equitable claims. App. 14a n.10. Accordingly, the Second Circuit applied an incorrect standard and reached an incorrect result in dismissing the equitable claims.

3. Respondents acknowledge, as they must, that the Second Circuit held that the federal courts " 'may not' " hear Petitioners' equitable claims. Opp. 24 (citing App. 43a). The Fourth and Eleventh Circuits (and settled law), in contrast, have held that the revenue rule is a permissive abstention doctrine.

The Second Circuit's decision is unprecedented and warrants review by this Court.

This Case Does Not Assert a Claim Against a Tax Debtor

The Second Circuit made two pivotal errors (which are not addressed or disputed by Respondents): that Petitioners claimed that "defendants violated tax laws" (App. 14a), and that Petitioners' equitable claims sought to compel Respondents to "obey [foreign] tax laws." App. 14a n.10. Petitioners never made such claims; Petitioners repeatedly disavowed such claims; and, in any event, Petitioners *could not* have made such claims because Respondents are not alleged to be tax debtors. Pet. 22-25. Indeed, it is undisputed that there is no claim that Respondents are tax debtors. This critical fact was brought to the attention of the Second Circuit, but was overlooked. Pet. at 22-23. The Second Circuit's decision is thus clearly and demonstrably erroneous.

The equitable claims, as pled, do not implicate the revenue rule. These claims do not seek to "collect" taxes or "enforce" foreign tax laws, contrary to Respondents' suggestions. Opp. i, 1. On the contrary, the equitable claims seek to enjoin and deter *domestic* conduct, committed by *domestic* defendants, that contravenes *domestic* common law. If the equitable claims succeed, Respondents would be enjoined from selling cigarettes to and through organized criminal network and terrorist groups - conduct that threatens security interests in the United States and elsewhere, and harms interests that are wholly independent of tax collection. This conduct, which the Second Circuit found to be irrelevant to its revenue rule analysis (App. 32a), should not be immunized by the revenue rule. [FN1]

> FN1. Respondents accuse the Petitioners of "recharacterizing their claims." Opp. 20. As Petitioners have made clear, "*the Defendants themselves are not alleged to owe taxes*." Pet. 22 (citation omitted) (emphasis in original). There was no tax claim against Respondents that could have been "recharacterized."

***3** Respondents would have this Court gloss over the dispositive fact that they are not alleged to be tax debtors. Respondents state: "Petitioners assert that the Second Circuit 'applied an incorrect legal standard' because a 'claim for injunctive relief under domestic law ... falls well outside the traditional ambit of the revenue rule.' " Opp. 21 (quoting, in part, Pet. 21). In fact, the *full* quote from the Petition is: "A claim for injunctive relief under domestic law (*against domestic defendants which are not alleged to owe foreign taxes*) falls well outside the traditional ambit of the revenue rule." Pet. 21 (emphasis added). [FN2]

> FN2. Respondents' discussion of tax treaties is irrelevant. *See* Opp. 2, 17-18. Respondents are not alleged to be tax debtors, and therefore, their obligations are not defined, covered, or addressed by tax treaties. As this Court recognized in *Pasquantino*, tax treaties do not limit otherwise applicable "*domestic*" law. *Pasquantino v. United States*, 125 S. Ct. 1766, 1773, 1776 (2005) (emphasis in original). Moreover, Respondents' suggestion that the revenue rule would bar the U.S. government from seeking *equitable* relief in *foreign* courts is incorrect. *See* Pet. 26-28 & n.7. Finally, the

Republic of Colombia does not recognize the revenue rule (C.A. App. 3003-13) and, therefore, the revenue rule would not bar a U.S. claim in the Colombian courts as Respondents allege. Opp. 18.

The Second Circuit Exceeded the Permissible Scope of Review

Respondents ignore the basic principles of civil practice. The case comes before this Court in the context of an appellate ruling affirming a judgment dismissing a complaint on a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Pet. 23-24. In reviewing a motion to dismiss, the court must assume that all well-pleaded factual allegations are true and draw all reasonable inferences in the plaintiffs favor. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

The Second Circuit did not follow this well-established standard. Rather, the Second Circuit recharacterized the pleadings, drew all inferences *against* Petitioners, and attributed equitable claims to Petitioners that were: (i) not pled in the ***4** Complaints; (ii) specifically disavowed by the Petitioners; and (iii) legally unavailable because Respondents are not alleged to be tax debtors. Pet. 22-25.

The Second Circuit Deprived Petitioners of a Hearing Upon Their Claims as Pled

Contrary to Respondents' assertion (Opp. 24), there has never been a claim-by-claim analysis of the claims *as pled*.

On remand, the Second Circuit did not consider each claim as pled. Rather, the Second Circuit recharacterized the Petitioners' equitable claims, aggregated the claims, and reached the incorrect and sweeping conclusion that the "present *suit*" was one to collect tax revenue and related costs. App. 13a (emphasis added); *see* Opp. at 16 n.6. This Court, in contrast, underscored the importance of conducting a claim-by-claim analysis in resolving a revenue rule defense. *Pasquantino*, 125 S. Ct. at 1777. The Second Circuit, through its misapprehension of the equitable claims as pled, and its failure to conduct a claim-by-claim analysis of those claims, failed to apply the applicable standard of review.

It cannot seriously be contended that the Second Circuit undertook a "thorough analysis" of Petitioners' claims. Opp. 11. While some claims for damages (previously asserted in the lower courts) might implicate the revenue rule as suggested by Respondents (Opp. 3), it is unimaginable that the revenue rule could reach the equitable claims as pled. This Court should therefore review and summarily reverse the judgment of the Second Circuit. *See* *Dye v. Hofbauer*, 126 S. Ct. 5 (*per curiam*) (2005) (judgment summarily reversed where the Court of Appeals simply overlooked properly presented claim); *Lincoln Property Co. v. Roche*, 126 S. Ct. 606 (2005) (judgment summarily reversed where the Court of Appeals, in disregard of the pleadings, purported to ascertain the real party in interest).

The Second Circuit Applied an Incorrect Legal Standard to Dismiss the Equitable Claims

Respondents suggest that this Court's review is not warranted because the Second Circuit's decision applies a "long-settled" (Opp. 15) and "longstanding" (Opp. 19) rule. This argument is wholly misplaced.

The Second Circuit applied its own, overly broad "version" of the revenue rule to bar the equitable claims. Pet. 21 (citing App. 14a n.10). That "version" focused only upon the purported "effect" of the claims as recharacterized by the Second Circuit (App. 14a n.10); in contrast, this Court's revenue rule analysis focused upon the "domestic" conduct at issue (*Pasquantino*, 125 S. Ct. at 1777), the "*domestic*" legal basis of the claim (*id.* at 1776), and whether the " 'whole object'

" of the claim is to collect foreign taxes (*id.* at 1777) (citation omitted). There should be no question that, prior to *Pasquantino*, the revenue rule was "unclear" and "uncertain[ ]" in scope. *Id.* at 1778. The Second Circuit's overly broad, pre-*Pasquantino* "version" of the revenue rule is not well-established. [FN3]

> FN3. The Second Circuit's "version" of the revenue rule also conflicts with the *en banc* decision of the Fourth Circuit, holding that the revenue rule only "pertains to the nonenforcement of foreign tax judgments." *United States v. Pasquantino*, 336 F.3d 321, 329 & n.3 (4th Cir. 2003) (*en banc*), *aff'd*, 125 S.Ct. 1766 (2005). Respondents' effort to limit the Fourth Circuit's holding to "criminal prosecution[s]" (Opp. 15) is unavailing. There is one revenue rule, equally applicable in civil and criminal cases, as the Fourth Circuit confirmed.

Under the correct legal standard, the revenue rule does not bar Petitioners' common law equitable claims. In *Pasquantino*, this Court determined that the wire fraud case did not seek as its " 'whole object' " to " 'collect tax for a foreign revenue,' " and was, therefore, not barred by the revenue rule. *Pasquantino*, 125 S. Ct. at 1777 (citation omitted). Where the sole purpose of ***6** the claim is *not* to collect taxes, the claim is not barred by the revenue rule. *See U.S. Securities and Exchange Commission v. Shull*, [1999] CarswellBC 1772, 1999 WL 33191253 (B.C.S.C. [In Chambers]) (Can.) (SEC may seek enforcement of U.S. judgment; "the disgorgement order is neither a penal sanction nor a taxation measure" even though a portion of the recovery would pay "some taxes"). It is undisputed that the equitable claims do not seek, in whole or part, to collect taxes owed by Respondents. Therefore, the revenue rule does not bar the common law equitable claims. [FN4]

> FN4. Respondents assert that the EC and Member States recognize the revenue rule. Opp. 18 n.7 (citing European Communities: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters art. 1, July 28, 1990, 29 I.L.M 1413, 1418). However, the said Convention addresses the reciprocal recognition of *judgments*, just as the revenue rule (as defined by the Fourth and Ninth Circuits and the Restatement (Third) on Foreign Relations Law) addresses claims to enforce *judgments* against tax debtors. In any event, because this is neither an action to enforce any sort of foreign judgment, nor an action against a tax debtor, the Convention is irrelevant.

Respondents assert in a footnote that the Second Circuit applied the "whole object" test as stated in *Pasquantino*. Opp. 16 n.6. This argument does not withstand scrutiny. The Second Circuit dismissed the equitable claims under its pre-*Pasquantino* version of the revenue rule (App. 14a n.10); only the dissent in *Pasquantino* embraced the Second Circuit's overly-broad version of the revenue rule. Moreover, the Second Circuit did not apply the "whole object" test to each claim; it applied the test to what it perceived to be the "suit" as a whole (App. 13a), in conflict with *Pasquantino*, which requires a claim-specific review. Most importantly, the Second Circuit did not apply the "whole object" test to the equitable claims *as pled*; the Second Circuit recharacterized and imputed claims to Petitioners that were not made and could not have been made.

***7** Illustrating the sweeping nature of their view of the revenue rule, Respondents assert that the revenue rule covers all claims that might indirectly "enforce" or "vindicate" foreign law. Opp. i, 3, 17, 19-22. This Court, however, rejected this amorphous and subjective view of the revenue rule, holding that "the revenue rule never proscribed all enforcement of foreign revenue law." *Pasquantino*, 125 S. Ct. at 1778. The "indirect," "incidental" or "attenuated" enforcement of foreign tax law - such as may occur in cases under domestic law addressing domestic conduct - is permissible. *Pasquantino*, 125 S. Ct. at 1777-79. Thus, even if the equitable

claims had an indirect effect of furthering foreign interests, the revenue rule would not bar that result. [FN5]

FN5. Respondents argue against injunctive relief, raising the specter of fifty States applying differing laws to address their conduct. Opp. 2, 20. The revenue rule is inapplicable to the equitable claims as pled, and there would be no occasion for *any* state to apply the revenue rule to such claims. In any event, it is well-established, across a spectrum of jurisdictions, that an equitable remedy is available to a governmental plaintiff to enjoin the sort of cross-border tortious activity at issue here. *See, e.g.*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 564 (1851) (government may seek injunction to enjoin cross-border public nuisance); *see also* Restatement (Second) of Torts § 821C cmt. j (1979).

Pasquantino Is Not Limited to Criminal Cases

Respondents suggest that review is not warranted because *Pasquantino* is limited to criminal cases. Opp. i, 1, 9-10, 12-15. However, Respondents do not address the fact that, in *Pasquantino*, this Court confirmed that there is only *one* version of the revenue rule, equally applicable in civil and criminal cases. In *Pasquantino*, a *criminal* case, this Court recognized and applied a revenue rule definition that was developed in modern *civil* cases. In turn, this Court vacated and remanded in the present civil case for consideration of this Court's guidance in *Pasquantino*. This Court by its GVR Order obviously intended ***8** its guidance to be followed on remand in the present *civil* case *European Community v. RJR Nabisco, Inc.*, 125 S. Ct. 2611 (2005). [FN6]

FN6. Respondents embrace a "civil-criminal distinction," arguing that the revenue rule is defined and applied differently in civil and criminal cases. Opp. 9-10, 12-15. There is *one* revenue rule, and if the particular claim does not seek to collect foreign taxes from a tax debtor (as here), the claim does not trigger the revenue rule, regardless of the identity of the plaintiff. The factual predicate for invocation of the revenue rule - a tax claim against a tax debtor - is not present in the instant case, and the "civil-criminal" distinction is not remotely implicated by the equitable claims before this Court. Because the claims before this Court are not tax claims, none of the policies said to underlie the revenue rule is implicated, there is no risk of embroiling the courts in the conduct of foreign relations, and no special safeguards are necessary to allow the cases to be heard.

The Second Circuit's Decision Is Unprecedented

Before this case, the revenue rule had never been applied to bar equitable claims, under State common law, addressing domestic conduct by domestic companies.

Respondents point to two decisions to support their view that the revenue rule bars equitable claims for injunctive relief under State law. Opp. 22 (citing *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1365 n.4 (S.D. Fla. 2002), *aff'd*, 341 F.3d 1253 (11th Cir. 2003), *cert. denied*, 540 U.S. 1109 (2004), and *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings*, 268 F.3d 103, 135 (2d Cir. 2001)). In *Ecuador*, the court did not decide State law issues. *Ecuador*, 188 F. Supp. 2d at 1367 n.6 ("the Court only decides the applicability of the revenue rule in the civil RICO context"). Similarly, *Canada* decided only civil RICO claims and, upon the dismissal of the federal claims, the court had no occasion to address the State law claims. *Canada*, 103 F. Supp. 2d at 155 ("the court declines to exercise supplemental jurisdiction over the common law fraud action"). Both cases were ultimately the subject of a petition to this Court; however, the questions ***9** presented in both cases dealt solely with civil RICO claims. *See* Petition for a Writ of Certiorari, at i, *Canada*, 537 U.S. 1000 (2002),

2002 WL 32134733; Petition for a Writ of Certiorari, at i, *Honduras*, 540 U.S. 1109 (2004), 2003 WL 22697567. Contrary to Respondents' contentions (Opp. 1, 2, 15, 22), the denial of *certiorari* in these two cases "imports no expression of opinion upon the merits of the case[s]." *United States v. Carver*, 260 U.S. 482, 490 (1923).

Respondents Misrepresent the Views of the U.S. Solicitor General

Respondents assert that the U.S. Solicitor General stated, in the *amicus brief* in *Canada*, that equitable claims are barred by the revenue rule. Opp. 21. In fact, however, the U.S. Solicitor General expressly declined to state a position on this issue:

> [B]ecause petitioner does not press any argument that is specific to his claims for law enforcement costs and *equitable relief*, the question whether those claims can be distinguished, for purposes of the revenue rule, from petitioner's claim for lost revenue, is *not presented here*.

Brief for the United States as Amicus Curiae, at 15 n.1, *Canada*, 537 U.S. 1000 (2002) (emphasis added). In *Canada*, the U.S. Solicitor General addressed the only question before this Court, namely "[w]hether the 'revenue rule' precludes a foreign sovereign from bringing a civil RICO claim where the foreign sovereign's alleged injury is lost tax revenue and associated law enforcement costs." *Id.* at i. Accordingly, the pre-*Pasquantino* submissions noted by Respondents do not address Petitioners' equitable claims.

The Second Circuit squarely decided that the revenue rule is not an abstention doctrine, contrary to Respondents' suggestions. Opp. 23-24. The district court held that the revenue rule, as defined by the Second Circuit, was "not a manifestation of standard abstention doctrine, nor an invitation to exercise discretion." App. 51a-52a & n.1. On appeal, Petitioners contended that the revenue rule "is a discretionary doctrine" that allows a court to " 'abstain.' " App. 42a. The Second Circuit rejected this contention, holding that when the revenue rule is triggered, "the court *may not* hear those claims absent evidence that the rule has been abrogated." App. 43a (emphasis added).

The Second Circuit's decision is fundamentally at odds with the *en banc* decision of the Fourth Circuit, holding that the revenue rule is "permissive." *See United States v. Pasquantino*, 336 F.3d 321, 329 (4th Cir. 2003) (*en banc*), *aff'd*, 544 U.S. __ (2005). The holding below also conflicts with this Court's decision in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 272 (1935), and the Restatement (Third) of Foreign Relations Law § 483 (1987) - authorities which go unmentioned in the Opposition Brief. This Court should resolve these conflicts, which concern a matter of substantial and recurring importance to the administration of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Briefs and Other Related Documents **(Back to top)**

- 2005 WL 3322108 (Appellate Petition, Motion and Filing) Brief in Opposition (Dec. 01, 2005)
- 05-549 (Docket) (Nov. 01, 2005)
- 2005 WL 2875039 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari (Oct. 28, 2005)

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