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Don't Cry for Me Argentine Bondholders: Argentina and Exchange Bondholders File Certiorari Petitions

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On February 18, both Argentina and the Exchange Bondholders Group filed petitions for writs of certiorari with the Supreme Court, seeking review of the Second Circuit's rulings in the *pari passu* litigation. We discuss below the certiorari procedure, followed by comments on substantive arguments raised by Argentina and the Exchange Bondholders.

Our many prior comments on Argentina's *pari passu* litigation, as well as all of the material pleadings and decisions (including the two February 18 certiorari petitions), can be found on our Argentine Sovereign Debt webpage, at <http://www.shearman.com/argentine-sovereign-debt>.

Certiorari and the Procedural Schedule

A petition for a writ of certiorari is the means by which a party asks the Supreme Court to exercise its discretionary appellate function. The Supreme Court's Rules (at Rule 10) clearly set forth the standards that the Court applies in considering whether to grant cert:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- a. *a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;*
- b. *...*
- c. *...a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Of significance with respect to the pending certiorari petitions are three points clearly reflected in Rule 10: the Supreme Court is available to resolve conflicts between different federal circuit courts on important matters; the Court's focus is limited to questions of federal law; and the Court "*is not primarily concerned with the correction of errors in lower court decisions.*" See also *Shapiro et al., Supreme Court Practice* (10th ed.) at 278. The Court grant rate on cert petitions is around four percent.¹

NML and the other plaintiffs in this case will file briefs in opposition to the certiorari petitions, which are currently due to be filed not later than March 24, although 30-day extensions are commonly requested and granted. Once briefs in opposition are filed, Argentina and the Exchange Bondholders Group can each file a reply brief. There is no fixed date for the filing of the reply, although it is generally filed within two weeks of the filing of the opposition briefs.

Amicus briefs are common in Supreme Court practice. (Approximately a dozen amicus briefs were filed in this case with the Second Circuit.) Amicus briefs will be due on March 24.

It is possible that the Supreme Court will rule on the two petitions prior to the Court's summer recess, which begins in late June. If the Court has not released its decision prior to that recess, the Court's decision will probably not be released earlier than late September. If certiorari were to be granted, the case would not be heard until the 2014-2015 term of the Court, which runs from October 2014 through June 2015.

We note that the Supreme Court will hold argument in a totally different appeal by Argentina, involving the issue of the permissible scope of discovery against a sovereign. (That case has Supreme Court Docket number 12-842.) The argument is to be heard on April 21. The *pari passu* issue and the particular Foreign Sovereign Immunity Act (FSIA) issue addressed in the Second Circuit's *pari passu* case decisions are not at issue in that other case, and will not be ruled on by the Court in its decision in that case.

Petition Filed by Argentina (Supreme Court Docket No. 13-990)

Argentina addresses two issues in its petition: (1) its contention that the *pari passu* clause was misconstrued by Judge Griesa in the Southern District and by the Second Circuit, and (2) its contention that the ratable payment injunction violates the provision of the FSIA (28 USC § 1609) that immunizes sovereign property from "*attachment arrest and execution.*"

▪ **Pari Passu Clause**

Argentina faces a fundamental obstacle in obtaining Supreme Court review of its challenge to the Second Circuit's decision on the construction of the *pari passu* clause: that issue is solely a matter of New York state law, and, as discussed above, the Supreme Court does not hear appeals on matters of state law. In an effort to work its way around that obstacle, Argentina asks the Supreme Court to grant its certiorari petition with respect to this issue, but then to certify to the New York Court of Appeals (New York's highest court) the issue of the proper construction of the *pari passu* clause.

¹ We discussed various statistics relevant to cert petitions, as well as the possibility that the Court may "call for the views of the Solicitor General," in previous notes. See "*Don't Cry for Me Argentine Bondholders*" Notes dated June 27, 2013 and August 27, 2013.

(Certification is the process by which the court of one jurisdiction requests the courts of another jurisdiction to provide its views.)

In the absence of a compelling argument that the state law *pari passu* question merits Supreme Court review, or that the *pari passu* question is intertwined with the FSIA issue, Argentina's plea for "certiorari and certification" would appear to be very unlikely to succeed. Argentina does not advance such arguments. We expect that the Second Circuit's existing decision on *pari passu* will be the last word on this issue.

▪ **FSIA Issue**

Argentina argues energetically that the ratable payment injunction issued by Judge Griesa and endorsed by the Second Circuit "flouts the FSIA" and "achieve[s] what the FSIA directly forbids: They coerce a foreign sovereign into satisfying a money debt with immune assets." See Argentina's certiorari petition at 23. Argentina does not seriously argue that there is a split among the circuits with respect to this particular issue; in fact, Argentina seems to argue that Circuit law is consistent. See Argentina's certiorari petition at 26. Rather, Argentina argues strenuously that the Second Circuit incorrectly applied Section 1609 and the cases that construe it. See Argentina's certiorari petition at 27 ("The panel rendered [§1609] toothless....").

As made clear in Supreme Court Rule 10, error alone is rarely a sufficient basis for a grant of certiorari. And in the absence of a clear circuit split, certiorari for Argentina will most likely depend on a determination by the Court – or, more specifically, four Justices, the number required to grant certiorari – that the Second Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." However, analysis of the Second Circuit opinion from which certiorari is sought can be seen as simply an application of the long-standing and widely endorsed principle of law that Section 1609's prohibition against "attachment arrest and execution" cannot be avoided by structuring and labeling the relevant order as an injunction. It is hard to argue that the Second Circuit set out a new rule of law or a novel construction of Section 1609. While the Court certainly has very broad discretion and has shown an affinity for hearing FSIA cases, a customary application of the standards set forth in Rule 10 suggests certiorari for Argentina remains a long shot.

Petition Filed by the Exchange Bondholders Group (Supreme Court Docket No. 13-991)

The Exchange Bondholders Group also filed a petition for certiorari, although in some respects it is more in the nature of an amicus brief. For example, the opening sentence of the Exchange Bondholders Group petition reads, "Petitioner supports the grant of certiorari that the Republic of Argentina is seeking in this same case." See Exchange Bondholders Group certiorari petition at i. That position is not surprising, in view of the fact that the Second Circuit determined (with one judge dissenting), as set forth in its decision of August 23, 2013, that the Exchange Bondholders Group had "no appellate standing." In the absence of standing, the Exchange Bondholders Group's petition is of course doomed.

The Exchange Bondholders Group advances three arguments for certiorari:

▪ **The Ratable Payment Injunction Is Coercive**

The Exchange Bondholders Group first argues that the ratable payment injunction is an abusive exercise of the federal court's equitable powers, both as an inappropriate remedy for a simple breach of contract, and as an unprecedented use of the injunctive power "as leverage against the Republic." See Exchange Bondholders Group certiorari petition at 18-19 and 24. While this is probably the Exchange Bondholders Group's strongest argument, it would appear to fall short of the

kind of “*departure*” provided for in Supreme Court Rule 10(a), quoted above, especially in light of the countervailing argument that the lower courts have wide discretion in fashioning equitable relief.

▪ **The Ratable Payment Injunction Violates the Fifth Amendment**

The Exchange Bondholders Group also argue that their Constitutional rights under the Fifth Amendment are violated by the ratable payment injunction, because “*the Injunctions impair, condition, and will ultimately extinguish the Exchange Bondholders’ private right to bond payments in a targeted and deliberate effort to aid Respondents in collection of a purely private contract debt.*” See Exchange Bondholders Group’s certiorari petition at 27. The Second Circuit rejected this argument on the basis that the injunction did not deprive holders of Exchange Bonds of any property.

The issue of whether judicial action can give rise to an unconstitutional taking is unsettled. However, given the standing and other issues facing the Exchange Bondholders Group, it seems unlikely that this case would be seen by the Court at an appropriate vehicle to resolve that complex issue.

▪ **The Exchange Bondholders Group Have Standing to Appeal**

As mentioned above, the Second Circuit (with one judge dissenting) has already denied the Exchange Bondholders Group appellate standing. While such standing may be a point as to which there could be reasonable differences in view, given Argentina’s undoubted standing and the Exchange Bondholders Group’s secondary role, it would appear unlikely that the Court would grant certiorari to consider this issue, which is a gateway matter.

* * *

The next key event in this ongoing saga will be the filing of the plaintiffs’ briefs in opposition to certiorari, which will have an important impact on the likelihood of Supreme Court review. Stay tuned.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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