

The Burger Court Opinion Writing Database

Ross v. Bernhard

396 U.S. 531 (1970)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 30, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 42 - Ross v. Bernhard

Dear Potter:

Join me in your dissent.

W.E.B.

W. E. B.

Mr. Justice Stewart

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

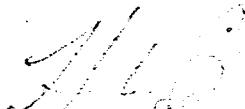
70
January 5, 1969

Dear Byron:

Re: No. 42- Ross v. Bernhard

As I told you several days ago, I agree with
your opinion in this case.

Sincerely yours,



H. L. B.

Mr. Justice White

cc: Members of the Conference

January 30, 1970

Re: No. 42 - Ross v. Bernhard

Dear Potter:

I have now read your proposed recirculation, and I am still of the view that the inclusion of the matters we have been discussing, even in the diluted form contained in your revise, detracts from your otherwise powerful opinion. I am returning the print of your revise, which you were kind enough to send me in advance of recirculation, indicating the portions of the opinion which I think might be omitted. See pp. 6-7.

Should you be persuaded to this point of view, you might wish to add something further with reference to Dairy Queen, to the effect that its holding, as in Beacon Theatres, simply ^{was} ~~say~~ that a plaintiff by joining legal and equitable causes of action in one complaint cannot avoid a jury trial on the legal issues. Perhaps such an addition would fit in at the bottom of p. 7.

Having said all this, I am content to leave the matter in your hands. So in either event, please join me.

Sincerely,

JMH

Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

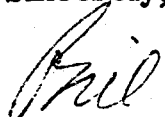
December 17, 1969

RE: No. 42 - Ross v. Bernhard, et al.

Dear Byron:

I agree with your opinion in the above
case.

Sincerely,


W. J. B. Jr.

Mr. Justice White

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 17, 1969

No. 42 - Ross v. Bernhard

MEMORANDUM TO THE CONFERENCE

Although I think Byron has written an excellent opinion in this case, I still have in mind writing a dissent.

Sincerely yours,

P.S.
/

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

2

SUPREME COURT OF THE UNITED STATES

Author: Stewart, J.

JAN 28 1970

No. 42.—OCTOBER TERM, 1969

Circulated: _____

Recirculated: _____

Howard Ross and Bernard
Ross, as Trustees for Lena
Rosenbaum, Petitioners,
v.
Robert A. Bernhard et al. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[February —, 1970]

MR. JUSTICE STEWART, dissenting.

By holding as it does that the plaintiff in a shareholder's derivative suit is constitutionally entitled to a jury trial, the Court today seems to rely upon some sort of ill-defined combination of the Seventh Amendment and the Federal Rules of Civil Procedure. Somehow the Amendment and the Rules magically interact to do what each separately was expressly intended not to do; namely, to enlarge the right to a jury trial in civil actions brought in the courts of the United States.

The Seventh Amendment, by its terms, does not extend, but merely *preserves* the right to a jury trial "in suits at common law." All agree that this means the reach of the Amendment is limited to those actions which were tried to the jury in 1791 when the Amendment was adopted.¹ Suits in equity, which were historically tried to the court, were therefore unaffected by it. Similarly, Rule 38 of the Federal Rules has no bearing on the right to a jury trial in suits in equity, for it simply preserves inviolate "the right of a trial by jury as declared by the

¹ Where a new cause of action is created by Congress, and nothing is said about how it is to be tried, the jury trial issue is determined by fitting the cause into its nearest historical analogy. *Luria v. United States*, 231 U. S. 9 (1913); see James, *Right to a Jury Trial in Civil Actions*, 72 Yale L. J. 655.

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pp. 637

To: The Clerk
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

No. 42.—OCTOBER TERM, 1969

Circulated: _____

Recirculated: JAN 30 1970

Howard Ross and Bernard
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Rosenbaum, Petitioners,
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Robert A. Bernhard et al. } On Writ of Certiorari to
the United States Court
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[February —, 1970]

MR. JUSTICE STEWART, dissenting.

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pp. 1, 6, 7

To: The Chief Justice
Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 42.—OCTOBER TERM, 1969

From: Stewart, J.

Circulated: _____
Recirculated: JAN 30 1970

Howard Ross and Bernard }
Ross, as Trustees for Lena } On Writ of Certiorari to
Rosenbaum, Petitioners, } the United States Court
v. } of Appeals for the Sec-
Robert A. Bernhard et al. } ond Circuit.

[February —, 1970]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE HARLAN join, dissenting.

In holding as it does that the plaintiff in a shareholder's derivative suit is constitutionally entitled to a jury trial, the Court today seems to rely upon some sort of ill-defined combination of the Seventh Amendment and the Federal Rules of Civil Procedure. Somehow the Amendment and the Rules magically interact to do what each separately was expressly intended not to do; namely, to enlarge the right to a jury trial in civil actions brought in the courts of the United States.

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70912

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: White, J.

No. 42.—OCTOBER TERM, 1969

Circulated: 12-15-69

Recirculated: _____

Howard Ross and Bernard
Ross, as Trustees for Lena
Rosenbaum, Petitioners,
v.
Robert A. Bernhard et al. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[December —, 1969]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Seventh Amendment to the Constitution provides that in "Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Whether the Amendment guarantees the right to a jury trial in stockholders' derivative actions is the issue now before us.

Petitioners brought this derivative suit in federal court against the directors of their closed-end investment company, The Lehman Corporation, and the corporation's brokers, Lehman Brothers. They contended that Lehman Brothers controlled the corporation through an illegally large representation on the corporation's board of directors, in violation of the Investment Company Act of 1940, 15 U. S. C. § 80a-1 *et seq.*, and used this control to extract excessive brokerage fees from the corporation. The directors of the corporation were accused of converting corporate assets and of "gross abuse of trust, gross misconduct, willful malfeasance, bad faith, gross negligence." Both the individual defendants and Lehman Brothers were accused of breaches of fiduciary duty. It was alleged that the payments to Lehman Brothers constituted waste and spoliation, and that the contract between the corporation and Lehman Brothers had been violated. Petitioners requested that the defendants

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pp 3, 6, 7

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
 Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: White, J.

Circulated: _____

No. 42.—OCTOBER TERM, 1969

Recirculated: 1-29-70

Howard Ross and Bernard
Ross, as Trustees for Lena
Rosenbaum, Petitioners,
v.
Robert A. Bernhard et al.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[February —, 1970]

MR. JUSTICE WHITE delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 16, 1969

Re: No. 42 - Ross v. Bernhard

Dear Byron:

Please join me.

Sincerely,


T.M.

Mr. Justice White

cc: The Conference