

The Burger Court Opinion Writing Database

Kern County Land Co. v. Occidental Petroleum Corp.

411 U.S. 582 (1973)

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

May 3, 1973

Re: No. 71-1059 - Kern County Land Co. v. Occidental
Petroleum Corp.

Dear Byron:

Please join me.

Regards,

WB

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 7, 1973

MEMORANDUM TO CONFERENCE:

In due course I will circulate a
dissent in 71-1059, Kern County Land Co. v.
Occidental Petroleum Corp.

W^{WD}
William O. Douglas

The Conference

3
1st DRAFT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

No. 71-1059

Kern County Land Company,
Petitioner,
v.
Occidental Petroleum
Corporation.

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

4/2/73

[April — 1973]

MR. JUSTICE DOUGLAS, dissenting.

The Court, in resorting to an *ad hoc* analysis of the "possibility for the speculative abuse of inside information," charts a course for the interpretation of § 16 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p (b), that in my mind undermines the congressional purpose. I respectfully dissent.

I

"The statute is written broadly, and the liability it imposes is strict," *Reliance Electric Co. v. Emerson Electric Co.*, 404 U. S. 418, 431 (DOUGLAS, J., dissenting). Except for narrowly drawn exceptions, it is all-inclusive.¹ The operative language provides:

"... any profit realized by [a beneficial owner, director, or officer] from *any purchase and sale*, or

¹ Section 16 (b) provides in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer [other than an exempted security] within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverably by the issuer, irrespective of any intention on the part of such beneficial owner, director, or

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 71-1059

Circulated:

Kern County Land Company, Petitioner, v. Occidental Petroleum Corporation. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Recirculated: 4-4

[April —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

The Court, in resorting to an *ad hoc* analysis of the "possibility for the speculative abuse of inside information," charts a course for the interpretation of § 16 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p (b), that in my mind undermines the congressional purpose. I respectfully dissent.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. April 4, 1973

RE: No. 71-1059 Kern County Land Co. v.
Occidental Petroleum Corporation

Dear Bill:

Please join me in your dissent in the
above.

Sincerely,



Mr. Justice Douglas

cc: The Conference

B

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 3, 1973

71-1059 - Kern Cty. Land Co.
v. Occidental Petroleum

Dear Bill,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

PS,
J.

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 71-1059 - Kern County Land Company v.
Occidental Petroleum Corp.

I had intended to vote to affirm in this case but did not do so at conference. My hesitation was occasioned by my thought that the option was the major issue in the case, only to discover that two of the Brethren considered the exchange, rather than the option, determinative. The question in that respect is closer than I thought, but I still can't accept an involuntary exchange occasioned by merger as a "sale" for the purpose of § 16(b).


B.R.W.

Now add & vote
to affirm
Leave your w/
Mr. Justice Marshall

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 3-6-73

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1059

Kern County Land Company,
Petitioner,
v.
Occidental Petroleum
Corporation. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[March —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 16 (b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p (b),¹ provides that officers, directors, and holders of more than 10% of the listed

¹ "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer [other than an exempted security] within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or

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

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CHAMBERS OF
JUSTICE BYRON R. WHITE

March 12, 1973

Re: No. 71-1059 - Kern County Land Co. v. Occidental
Petroleum Corp

Dear Lewis:

I have no objection whatsoever to your filing the concurrence appended to your note of March 12.

With respect to your first point--whether we should inquire into the "possibility of abuse"--it must be remembered that when Occidental extended its tender offer on May 11, it was already a 10% shareholder of the company. At least with respect to the shares acquired thereafter I would suppose the inquiry would be appropriate. If there was a possibility of abuse, whether these shares obtained by the tender offer should be treated as having been obtained all at one time or at separate times is a question unresolved by cases in this Court.

Sincerely,

Byron

Mr. Justice Powell

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 13 & 14

From: White, J.

2nd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Recirculated: 4-5-73

No. 71-1059

Kern County Land Company, Petitioner,
v.
Occidental Petroleum Corporation. } On Writ of Certiorari to
the United States Court
of Appeals for the Second Circuit.

[March —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 16 (b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p (b),¹ provides that officers, directors, and holders of more than 10% of the listed

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*Stylistic changes**gr 3/8*

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
 Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Furnished:

No. 71-1059

Recirculated: 4-20-73

Kern County Land Company,
Petitioner,
v.
Occidental Petroleum
Corporation. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[March —, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 16 (b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p (b),¹ provides that officers, directors, and holders of more than 10% of the listed

¹ "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer [other than an exempted security] within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 8, 1973

Re: No. 71-1059 - Kern County Land Co. v.
Occidental Petroleum Corp.

Dear Byron:

Please join me.

Sincerely,


T.M.

Mr. Justice White

cc: Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 11, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 71-1059 - Kern County Land Co. v.
Occidental Petroleum Corp.

My vote at the conference on this case was to reverse, but the vote was tentative. On further study of the matter over the weekend, I am now tentatively inclined the other way. This is prompted by a conclusion, still somewhat unfirm, that the exchange of stock, compulsory as it was, was not a sale under Section 16(b).

Sincerely,

H. A. B.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 5, 1973

Re: No. 71-1059 - Kern County Land Co. v. Occidental Petroleum

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

Copies to the Conference

71-1059

Dear Harry -
I wrote this for
Byrne who is undecided.
But as you were "tentative",
I thought I might try
to win you over too.
Lewis

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M
V F P 10
12/10/52
memorandum
Attached to memo
12/10/52

MEMORANDUM

TO: Mr. Justice White

DATE: December 9, 1972

FROM: Lewis F. Powell, Jr.

No. 71-1059 Kern County v. Occidental

As you reserved your decision in this case, perhaps you will not mind if I try to focus more sharply the views I expressed at the Conference.

There are two questions in the case: (i) whether the option constituted a "sale" within the meaning of § 16(b); and (ii) whether the merger*, resulting in the compelled exchange of Occidental's shares in Old Kern for the shares of Tenneco, constituted a "sale" within the meaning of the statute? My understanding at the Conference was that the first question presents no difficulty, but that you are in doubt as to the answer to the second. It is this question, which I will address briefly. **

*The transaction actually took the form of a transfer of the business and assets of Old Kern to New Kern (a subsidiary of Tenneco created for the purpose) in exchange for preference stock of Tenneco, followed by the liquidation of Old Kern and distribution in liquidation of the Tenneco shares to the stockholders of Old Kern. The parties are in agreement that the transaction is the equivalent, for present purposes, of a statutory merger if it be assumed that all of the other elements (required vote, absence of dissenters' rights, etc.) are present.

**Actually, I can add nothing - except my own experience - to what is said in Occidental's brief and to a lesser extent in Judge Friendly's opinion.

S^Y 12
Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 7, 1973

Re: No. 71-1059 Kern County Land Co. v.
Occidental Petroleum

Dear Byron:

Please join me in your opinion for the Court.

It is possible that I may do a short concurrence limited specifically to the status of a compelled exchange by virtue of a merger. I know from my own experience that the practicing bar would like more definitive guidance on this hazy area. It may well be that nothing constructive can be added to what you have said already, but if I can find the time I may take a look at it.

In any event, I am with you.

Sincerely,



Mr. Justice White

cc: The Conference

March 12, 1973

Re: No. 71-1059 Kern County Land Co. v.
Occidental Petroleum

Dear Byron:

I am thinking of filing a concurrence in Kern County along the lines of the enclosed draft, unless you prefer that I not do so.

I think you have written a fine opinion. The purpose of my concurrence is merely to sharpen up one point with a somewhat different emphasis.

Sincerely,

Mr. Justice White

lfp/ss

bc: Larry

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 5, 1973

No. 71-1059 Kern County Land Co. v.
Occidental Petroleum Corporation

Dear Byron:

I write to reaffirm my joining in your opinion for the Court, and to say that I probably will not file the brief concurring opinion which I drafted. Thus, if everyone has voted and the case is ready to come down, it can be cleared at our April 13th Conference.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 30, 1973

Re: No. 71-1059 - Kern County v. Occidental

Dear Byron:

Please join me in your opinion for the Court.

Sincerely,

white

Mr. Justice White

Copies to the Conference