

# The Burger Court Opinion Writing Database

## *Lehman Brothers v. Schein*

416 U.S. 386 (1974)

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

November 29, 1973



Re: 73-439 - Lehman Brothers v. Schein  
73-440 - Simon v. Schein  
73-495 - Investors Diversified Services v. Schein

Dear Bill:

At Conference I voted to deny cert in the above.  
My present view, like Potter's, is that we should deny  
but, if we grant, your limiting approach is a good solution.

Regards,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

April 9, 1974

Re: No. 73-439 - Lehman Brothers v. Schein, et al  
No. 73-440 - Simon v. Schein  
No. 73-495 - Investors Diversified Services v.  
Schein, et al

Dear Bill:

Please join me.

Regards,

Mr. Justice Douglas

LSB

Copies to the Conference

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73-439, 73-440, AND 73-495

4-5-74

Lehman Brothers, Petitioners,  
73-439 v.

Jacob Schein et al.

Benjamin Simon, Petitioner.  
73-440 v.

Jacob Schein and Marvin  
H. Schein.

Investors Diversified Services,  
Inc., et al., Petitioners,  
73-495 v.

Jacob Schein et al.

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

[April —, 1974]

MR. JUSTICE DOUGLAS delivered the opinion of the  
Court.

These cases are here on petitions for certiorari and  
raise one identical question.

These are suits brought in the District Court for the  
Southern District of New York. Lum's, one of the  
respondents in the *Lehman Brothers* petition, is a Florida  
corporation with headquarters in Miami. Each of the  
three petitions which we consolidated for oral argument  
involve shareholder's derivative suits naming Lum's and  
others as defendants; and the basis of federal jurisdiction  
is diversity of citizenship, 28 U. S. C. § 1322 (a)(1),  
about which there is no dispute.

The complaints allege that Chasen, president of Lum's,  
called Simon, a representative of Lehman Bros., and told



de Brennan

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73-439, 73-440, AND 73-495

Lehman Brothers, Petitioners,  
73-439                      v.  
Jacob Schein et al.

Benjamin Simon, Petitioner,  
73-440                      v.,  
Jacob Schein and Marvin  
H. Schein.

Investors Diversified Services.  
Inc., et al. Petitioners.  
73-495                      v.  
Jacob Schein et al.

Recirculated:

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

[April — 1974]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases are here on petitions for certiorari and raise one identical question

These are suits brought in the District Court for the Southern District of New York. Lum's, one of the respondents in the *Lehman Brothers* petition, is a Florida corporation with headquarters in Miami. Each of the three petitions which we consolidated for oral argument involve shareholder's derivative suits naming Lum's and others as defendants; and the basis of federal jurisdiction is diversity of citizenship, 28 U. S. C. § 1322 (a)(1), about which there is no dispute.

The complaints allege that Chasen, president of Lum's, called Simon, a representative of Lehman Bros., and told

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Recounted:

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On Writs of Certiorari to  
the United States Court  
of Appeals for the Sec-  
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On Writs of Certiorari to  
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FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

  
CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

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

November 21, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 73-439 Lehman Brothers v. Schein, et al.  
No. 73-440 Simon v. Schein  
No. 73-495 Investors Diversified Services, etc. v. Schein

I suggest the following Order in the above cases:

"The cases are consolidated and the petitions for certiorari are granted limited to the following question:

"Did the Court of Appeals for the Second Circuit err in not certifying the question of Florida law to the Florida Supreme Court pursuant to Florida's certification procedure? Fla. Stat. Ann. Sec. 25.032 (1961), Fla. App. Rules, R. 4.61 (1967) ."

I should point out that apparently no party made a motion in the Court of Appeals that that court certify the question to the Florida Supreme Court. Judge Kaufman's dissent, however, was based in part on the failure of his colleagues "to utilize Florida's Certified Question Statute." Petition in No. 73-439 pages 31A-32A. And the failure of the Court of Appeals to certify is a question presented in each petition. Under the circumstances, I would not regard the failure of any party affirmatively to ask for certification as precluding our taking the case and laying down some guidelines governing resort to these procedures.

W.J.B. Jr.

*Dear*  
*OK*  
*WJB*  
COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS



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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 18, 1974

RE: Nos. 73-439, 440 & 495 - Lehman, Simon  
and Investors Diversified, etc. v. Schein

Dear Bill:

I agree.

Sincerely,



Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

November 26, 1973

No. 73-439, Lehman Brothers v. Schein  
No. 73-440, Simon v. Schein  
No. 73-495, Investors Div. Serv. v. Schein

Dear Bill,

I continue to think that certiorari  
should be denied in this case. If, however,  
certiorari is granted, I think the order you  
have drafted is entirely satisfactory.

Sincerely yours,

PS  
/

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

April 19, 1974

Nos. 73-439, 73-440, and 73-495  
Lehman Brothers v. Schein, et al.

Dear Bill,

I am glad to join your opinion for the  
Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 21, 1973

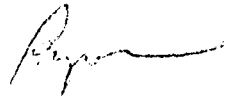
Re: No. 73-439 - Lehman Brothers v. Schein  
No. 73-440 - Simon v. Schein  
No. 73-495 - Investors Diversified Services  
v. Schein

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Dear Bill:

Your proposed question is satisfactory to  
me.

Sincerely,



Mr. Justice Brennan

Copies to Conference

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: White, J.

Nos. 73-439, 73-440 AND 73-495 Circulated: 4-11-74

Recirculated: \_\_\_\_\_

Lehman Brothers, Petitioners,  
73-439 v.

Jacob Schein et al.

Benjamin Simon, Petitioner,  
73-440 v.

Jacob Schein and Marvin  
H. Schein.

Investors Diversified Services,  
Inc., et al., Petitioners,  
73-495 v.

Jacob Schein et al.

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

[April —, 1974]

MR. JUSTICE WHITE, concurring.

I concur in the result on the grounds that the District Court, presented as it was with an unsettled question with respect to the law of a distant State, should have utilized the available procedure for certifying the question to the Florida courts for authoritative resolution. I am unready, however, to hold that the federal courts must abstain in any case involving state law questions whenever "there is doubt as to local law and where the certification procedure is available."

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 18, 1974

Re: Nos. 73-439, 73-440 & 73-495, Lehman Bros.  
v. Schein

Dear Bill:

I join your opinion and my separate  
concurring opinion is withdrawn.

Sincerely,



Mr. Justice Douglas

Copies to Conference

COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 26, 1973

Re: No. 73-439 Lehman Brothers v. Schein, et al.  
No. 73-440 Simon v. Schein  
No. 73-495 Investors Diversified Services, etc. v. Schein

Dear Bill:

I agree with your proposed order in these cases.

Sincerely,



T. M.

Mr. Justice Brennan

cc: The Conference

COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 18, 1974

Re: No. 73-439 -- Lehman Brothers v. Schein  
No. 73-440 -- Simon v. Schein  
No. 73-495 -- Investors Diversified Services, Inc. v.  
Schein

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Dear Bill:

Please join me.

Sincerely,

  
T. M.

Mr. Justice Douglas

cc: The Conference



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 21, 1973

No. 73-439 - Lehman Brothers v. Schein, et al  
No. 73-440 - Simon v. Schein  
No. 73-495 - Investors Diversified Services, etc. v.

Dear Bill:

I agree with your proposed order in the above cases.

Sincerely,



Mr. Justice Brennan

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AND THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 19, 1974

Re: No. 73-439 - Lehman Brothers v. Schein  
No. 73-440 - Simon v. Schein  
No. 73-495 - Investors Diversified Services, Inc.  
v. Schein

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Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

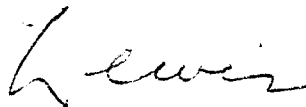
November 21, 1973

No. 73-439 Leham Brothers v. Schein, et al  
No. 73-440 Simon v. Schein  
No. 73-495 Investors Diversified Services, etc. v. Schein

Dear Bill:

Your proposed order in the above cases looks fine to me.

Sincerely,



Mr. Justice Brennan

lfp/ss

cc: The Conference

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

April 9, 1974

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

No. 73-439 Lehman Bros. v. Schein, et al  
No. 73-440 Simon v. Schein  
No. 73-495 Investors Diversified Services  
v. Schein, et al

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Dear Bill:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Douglas

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 19, 1974

No. 73-439 Lehman Brothers v. Schein  
No. 73-440 Simon v. Schein  
No. 73-495 Investors Diversified Services  
v. Schein

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Dear Bill:

Please join me in your recirculation of April 19.

Sincerely,



Mr. Justice Douglas

lfp/ss

cc: The Conference

COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

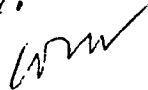
November 23, 1973

Re: No. 73-439 - Lehman Brothers v. Schein  
No. 73-440 - Simon v. Schein  
No. 73-495 - Investors Diversified Services v. Schein

Dear Bill:

I did not vote to grant certiorari in these cases,  
but your proposed order is fine with me.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 12, 1974

Re: Nos. 73-439, 73-440, and 73-495 - Lehman  
Brothers v. Schein et al.

Dear Bill:

In due course, I anticipate circulating a dissent in  
these cases.

Sincerely,

Mr. Justice Douglas

Copies to the Conference

RECEIVED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Rehnquist  
Mr. Justice Souter  
Mr. Justice Ginsburg  
Mr. Justice Breyer  
Mr. Justice Alito  
Mr. Justice Kagan

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73-439, 73-440, AND 73-495

4-17-

Lehman Brothers, Petitioners,  
73-439 v.

Jacob Schein et al.

Benjamin Simon, Petitioner,  
73-440 v.

Jacob Schein and Marvin  
H. Schein.

Investors Diversified Services  
Inc., et al., Petitioners,  
73-495 v.

Jacob Schein et al.

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

[April --, 1974]

MR. JUSTICE REHNQUIST, dissenting.

of

The Court says that use of state court certification procedures by federal courts "does of course in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Ante*, at 5. It also observes that "[w]e do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory," and further states that "[i]ts use in a given case rests in the sound discretion of the federal court." *Ante*, at 5. I agree with each of these propositions, but find myself at a loss to understand how the Court proceeds from them to the conclusion that the judgment of the Court of Appeals should be reversed.

Petitioners here were defendants in the District Court. That court, applying applicable New York choice-of-law rules, decided that Florida law governs the case and,

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 19, 1974

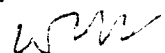
Re: Nos. 73-439, 73-440, and 73-495 - Lehman Brothers,  
et al.

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Dear Bill:

I am filing a separate opinion in this case, but as indicated in that opinion I now join your opinion for the Court also.

Sincerely,



Mr. Justice Douglas

Copies to the Conference

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73-439, 73-440, AND 73-495

Circuit

Recorded 4-19-

Lehman Brothers, Petitioners,  
73-439 v.

Jacob Schein et al.

Benjamin Simon, Petitioner,  
73-440 v.

Jacob Schein and Marvin  
H. Schein.

Investors Diversified Services.  
Inc., et al., Petitioners.  
73-495 v.

Jacob Schein et al.

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

[April —, 1974]

MR. JUSTICE REHNQUIST, concurring.

The Court says that use of state court certification procedures by federal courts "does of course in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Ante*, at 5. It also observes that "[w]e do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory," and further states that "[i]ts use in a given case rests in the sound discretion of the federal court." *Ante*, at 5. I agree with each of these propositions, but think it appropriate to emphasize the scope of the discretion of federal judges in deciding whether to use such certification procedures.

Petitioners here were defendants in the District Court. That court, applying applicable New York choice-of-law rules, decided that Florida law governs the case and,