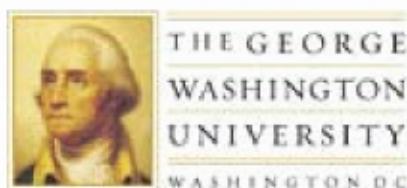


The Burger Court Opinion Writing Database

TSC Industries, Inc. v. Northway, Inc.
426 U.S. 438 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



✓
Supreme Court of the United States
Washington, D. C. 20542

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1976

Re: 74-1471 - TSC Industries, Inc. v. Northway, Inc.

Dear Thurgood:

I join your proposed opinion dated June 2.

Regards,

W.B

Mr. Justice Marshall

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543
3

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 7, 1976

RE: No. 74-1471 TSC Industries v. Northway

Dear Thurgood:

I agree.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543
①

CHAMBERS OF
JUSTICE POTTER STEWART

June 7, 1976

No. 74-1471, TSC Industries v. Northway

Dear Thurgood,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1976

Re: No. 74-1471 - TSC Industries, Inc. v. Northway

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

Copies to Conference

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

From: Mr. Justice Marshall
Circulated: JUN 2 1976

Recirculated: _____

No. 74-1471 -- TSC Industries, Inc. v. Northway, Inc.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The proxy rules promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 bar the use of proxy statements that are false or misleading with respect to the presentation or omission of material facts. We are called upon to consider the definition of a material fact under those rules, and the appropriateness of resolving the question of materiality by summary judgment in this case.

I

The dispute in this case centers about the acquisition of petitioner TSC Industries, Inc. by petitioner National Industries, Inc. In February 1969 National acquired 34% of TSC's voting securities by purchase from Charles E. Schmidt and his family. Schmidt, who had been TSC's founder and principal shareholder, promptly resigned along with his son from TSC's board of directors.

11/15/24

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: JUN 9 1976

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1471

TSC Industries, Inc., et al.,
Petitioners,
v.
Northway, Inc. } On Writ of Certiorari to the
United States Court of
Appeals for the Seventh
Circuit.

[June —, 1976]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The proxy rules promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 bar the use of proxy statements that are false or misleading with respect to the presentation or omission of material facts. We are called upon to consider the definition of a material fact under those rules, and the appropriateness of resolving the question of materiality by summary judgment in this case.

I

The dispute in this case centers about the acquisition of petitioner TSC industries, Inc., by petitioner National Industries, Inc. In February 1969 National acquired 34% of TSC's voting securities by purchase from Charles E. Schmidt and his family. Schmidt, who had been TSC's founder and principal shareholder, promptly resigned along with his son from TSC's board of directors. Thereafter, five National nominees were placed on TSC's board, Stanley R. Yarmuth, National's president and chief executive officer, became chairman of the TSC board, and Charles F. Simonelli, National's executive vice president, became chairman of the TSC executive

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: JUN 10 1976

13, 19, 24

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-1471

TSC Industries, Inc., et al.,
Petitioners,
v.
Northway, Inc. } On Writ of Certiorari to the
United States Court of
Appeals for the Seventh
Circuit.

[June —, 1976]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The proxy rules promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 bar the use of proxy statements that are false or misleading with respect to the presentation or omission of material facts. We are called upon to consider the definition of a material fact under those rules, and the appropriateness of resolving the question of materiality by summary judgment in this case.

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The dispute in this case centers about the acquisition of petitioner TSC industries, Inc., by petitioner National Industries, Inc. In February 1969 National acquired 34% of TSC's voting securities by purchase from Charles E. Schmidt and his family. Schmidt, who had been TSC's founder and principal shareholder, promptly resigned along with his son from TSC's board of directors. Thereafter, five National nominees were placed on TSC's board, Stanley R. Yarmuth, National's president and chief executive officer, became chairman of the TSC board, and Charles F. Simonelli, National's executive vice president, became chairman of the TSC executive

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 16, 1976

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 74-1471, TSC Industries, Inc. v.
Northway, Inc.: and No. 74-1042, Ernst & Ernst v.
Hochfelder

No. 75-969, S.D. Cohn & Co. v. Woolf - Respondents brought this 10b-5 action against petitioners, a broker-dealer and its general partner. Respondents claimed that they were induced, by material misrepresentations and omissions, to participate in the "private placement" of convertible debentures that were not registered under the Securities Act. Petitioners filed a "counterclaim" charging, among other things, that respondents had concealed from the issuer and petitioners the fact that they were purchasing the debentures for a number of individuals in addition to themselves.

After trial, the District Court found that respondents had failed to establish any 10b-5 violations, and that in any event recovery by respondents was barred by the defense of in pari delicto.

The Court of Appeals held that respondents' conduct did not place them in pari delicto with the petitioners. On the merits of respondents' 10b-5 claim, the Court of Appeals declined to consider the validity of the District Court's findings regarding specific misrepresentations and omissions. Instead, the Court of Appeals considered whether the transaction involved qualified as a private offering, exempt from the registration requirements of the Securities Act under §4(2). Finding the record inconclusive on this point, the Court of Appeals vacated and remanded with these directions. If the petitioners are unable to establish the availability of the exemption, they will be liable to respondents for failure to disclose information that "makes the §4(2) exemption unavailable" (a category of information that includes, but is not limited to, information that would have been disclosed by registration), if the information is such that a reasonable investor "might have considered [it] important in the making of his investment decision."

There is no reason to think that the definition of materiality contained in TSC, a 14a-9 case, should not apply to a 10b-5 case. Accordingly, the Court of Appeals' "might" formulation of the standard is inaccurate. (It is somewhat puzzling that the Court of Appeals used the "might" formulation; Judge Wisdom, who wrote the Court of Appeals' opinion, had explicitly rejected that standard in Smallwood v. Pearl Brewing Co., 489 F.2d 579, 603-604.) While the Court of Appeals did not pass on the materiality of any omissions or misrepresentations, but merely remanded to the District Court, which can perhaps be expected to apply the correct standard of materiality, we might nevertheless grant, vacate and remand in light of TSC.

The Court of Appeals did not consider what standard of culpability is appropriate in a 10b-5 action, so Ernst & Ernst has no bearing on the petition.

✓ The contentions advanced in the petition -- relating to the Court of Appeals' ruling on the in pari delicto defense and its view of the interaction between 10b-5 and the registration provisions of the Securities Act -- do not appear to warrant consideration, at least in the present posture of the case.

I will vote to grant, vacate and remand in light of TSC. 



T. M.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1976

Re: No. 74-1471 - TSC Industries, Inc. v. Northway

Dear Thurgood:

It is my understanding that footnote 11 will be withdrawn.
On that understanding, I am glad to join your opinion.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 7, 1976

(2)

No. 74-1471 TSC Industries v. Northway

Dear Thurgood:

Please join me in your excellent opinion.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

✓ Supreme Court of the United States
Washington, D. C. 20543
④ ✓

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 7, 1976

Re: No. 74-1471 - TSC Industries v. Northway

Dear Thurgood:

Please join me.

Sincerely,

WRW

Mr. Justice Marshall

Copies to the Conference