

# The Burger Court Opinion Writing Database

## *Bankers Trust Co. v. Mallis*

435 U.S. 381 (1978)

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. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

December 10, 1977

Re: 76-1359 - Bankers Trust Co. v. Mallis

MEMORANDUM TO THE CONFERENCE:

Subject to what Bill Rehnquist turns up in the memorandum he agreed to do on this case, my vote is to reverse. This is what I indicated tentatively before I left the Conference.

Regards,

WB B

Mr. Brewer  
60777

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

CHAMBERS OF  
THE CHIEF JUSTICE

February 21, 1978

RE: 76-1359 - Bankers Trust Co. v. Mallis

Dear Bill:

The above case is indeed "on the list", being the final line of page 1, Feb. 17, 1978 list. I suggest you raise these alternatives at the Friday Conference this week.

Regards,

WRB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
THE CHIEF JUSTICE

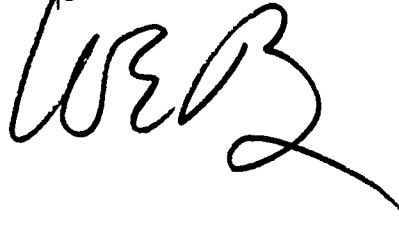
February 23, 1978

Re: 76-1359 - Bankers Trust Co. v. Mallis

Dear Bill:

Supplementing my response to your February 21 memo, I am in general agreement with your position. Whether the 4-4 is firm can only be flushed out tomorrow at Conference.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', written over the typed name 'Mr. Justice Rehnquist'.

Mr. Justice Rehnquist

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

CHAMBERS OF  
THE CHIEF JUSTICE

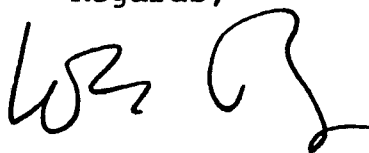
March 14, 1978

Re: 76-1359 - Bankers Trust Co. v. Samuel Mallis, et al

Dear Bill:

I join the March 13 Per Curiam.

Regards,



Mr. Justice Rehnquist

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 3, 1978

MEMORANDUM TO THE CONFERENCE

RE: No. 76-1359 Bankers Trust Co. v. Samuel Mallis, et al.

I've read with interest Bill Rehnquist's thoughtful memorandum and regret that I cannot agree with it. I think we correctly decided the question in the Per Curiam written by Bill in United States v. Indrelunas, 411 U.S. 216 (1973), where we said:

"Since both parties implicitly concede that the jurisdiction of the Court of Appeals was based on the provisions of 28 U.S.C. Sec. 1291, making final decisions of the district courts appealable, the correctness of the Court of Appeals's decision depends on whether the District Court's judgment of February 25, 1971, was a final decision. That question, in turn, depends on whether actions taken in the District Court previous to the February date amounted to the "entry of judgment" as that term is used in Fed. Rule Civ. Proc. 58. 411 U.S., at 216."

I remain of that view.

W.J.B. Jr.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 13, 1978

RE: No. 76-1359 Bankers Trust Co. v. Mallis

Dear Bill:

I agree.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

March 14, 1978

76-1359, Bankers Trust Co. v. Mallis

Dear Bill,

I agree with the Per Curiam you have  
circulated in this case.

Sincerely yours,

PS  
/

Mr. Justice Rehnquist

Copies to the Conference



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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 5, 1978

Re: Bankers Trust Company  
v. Samuel Mallis and  
Franklyn Kupferman,  
No. 76-1359

Dear Bill,

I appreciate the care with which you have prepared your illuminating memorandum in this case. At this juncture, I would prefer the waiver approach if you are prepared to live with it, as you seem to be.

Sincerely,



Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 17, 1978

Re: 76-1359 - Bankers Trust Co.  
v. Mallis

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Dear Bill,

I acquiesce.

Sincerely yours,



Mr. Justice Rehnquist  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 17, 1978

Re: No. 76-1359, Bankers Trust v. Mallis

Dear Bill:

Please join me in the Per Curiam.

Sincerely,

*J.M.*  
T. M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

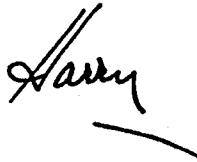
March 13, 1978

Re: No. 76-1359 - Bankers Trust Co. v. Mallis

Dear Bill:

Will you please add at the end of your proposed per curiam that I took no part in the consideration or decision of this case.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 13, 1978

No. 76-1359 Bankers Trust Co. v. Mallis

Dear Bill:

I agree with your Per Curiam in the above case.

Sincerely,

*Lewis*

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 19, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1359 - Bankers Trust Co. v. Mallis

Attached is a first draft memorandum of a proposed disposition of the jurisdictional issue in this case, which was assigned to me for this limited purpose by Bill Brennan at the Conference which the Chief did not attend. I have not discussed in the proposed memorandum the merits of the securities law issues decided by the Second Circuit which we granted certiorari to review.

If my recommendation is accepted, we will conclude that the Court of Appeals did have jurisdiction to decide the merits and that we likewise have jurisdiction. As I understand the present voting posture on the merits, we are split four to four, and the question for the Conference would be whether we wish to have the case re-argued before a full Court or whether we are content to simply add at the conclusion of the jurisdictional discussion a one sentence statement to the effect that the judgment of the Court of Appeals is affirmed by an equally divided Court.

If, on the other hand, a majority of the Conference prefers the view that the "separate document" requirement of Rule 58 is not waivable, and that therefore the Court of Appeals had

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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 Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 18 1977

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

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 76-1359

Bankers Trust Company,	} On Writ of Certiorari to the
Petitioner,	
v.	
Samuel Mallis and Franklyn	
Kupferman.	United States Court of Ap- peals for the Second Circuit.

[January —, 1978]

## Memorandum of MR. JUSTICE REHNQUIST.

I have fussed over what I think to be the proper disposition of the "jurisdictional" question in this case more than I like to admit, because it seems to me that there are good arguments on both sides and reasonable people could support either view.

The problem, as you will recall, is that there is no "separate document" in the record on which the "judgment" dismissing the plaintiffs' complaint is set forth as required by Fed. Rule Civ. Proc. 58. The Court of Appeals in its opinion referred to this as "the mystery document," but commented that "since the parties in the District Court have proceeded on the assumption that there was an adjudication of dismissal, we decline to stand on the technicality of the mystery document in this case." Petition for certiorari, A 7.

If the separate instrument embodying the judgment required by Rule 58 is a "technicality"—that is, if Rule 58 may be construed together with other relevant rules and statutory provisions to conclude that if there has been a final order and decision of the District Court within the meaning of 28 U. S. C. § 1291 an appeal will lie even though there is no separate document setting forth the "judgment," I am inclined to agree with the Court of Appeals.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

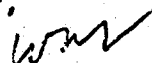
February 21, 1978

Re: No. 76-1359 - Bankers Trust Co. v. Mallis

Dear Chief:

I do not bring back with me from Conference the sheets listing the circulating opinions which you so thoughtfully place at our seats on the morning of each Friday Conference. Upon returning from last Friday's Conference, however, I had the uneasy feeling that this case, which was assigned to me for preparation of a memorandum on the jurisdictional issue by Bill Brennan at a December Conference which you were unable to attend was not on this list of circulating opinions. I would be the last to claim that it is a major case, but if I am right in my recollection I hate to see it disappear entirely from view. My file indicates that Bill Brennan has indicated his disagreement with the memorandum I circulated on December 19th, and that Potter, Byron, and John have indicated varying degrees of agreement. If the ultimate decision of the Court should be that we do have jurisdiction, my Conference notes indicate that we were split four to four on the merits of the case (Harry not participating). Some further Conference discussion would probably be necessary in order to decide whether to simply affirm by an equally divided Court, dismiss as improvidently granted (to do which, of course, we must have jurisdiction), or set down for reargument to a nine member Court.

Sincerely,



The Chief Justice

Copies to the Conference



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

From: Mr. Justice Rehnquist

Circulated: MAR 11 1978

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

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1359

Bankers Trust Company, Petitioner, v. Samuel Mallis and Franklyn Kupferman.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
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[March —, 1978]

### PER CURIAM.

Respondents sued petitioner Bankers Trust Co. under § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), for allegedly fraudulent statements. The District Court for the Southern District of New York dismissed the action on the ground that the fraud alleged had not occurred "in connection with the purchase or sale" of a security, as required by § 10 (b). 407 F. Supp. 7 (1975). The Court of Appeals for the Second Circuit reversed, holding that respondents were "purchasers [of securities] by virtue of their acceptance of [a] pledge" of stock and that petitioner was "a seller by virtue of its release of [a] pledge." 564 F. 2d — (1977). We granted certiorari to consider the correctness of these rulings of the Court of Appeals. 431 U. S. 928 (1977).

We find ourselves initially confronted, however, by a difficult question of federal appellate jurisdiction. As the Court of Appeals noted in its opinion, a search of the District Court record fails to uncover "any document that looks like a judgment." Because both the parties and the District Court "proceeded on the assumption that there was an adjudication

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White

2nd DRAFT

MAR 15 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1359

Bankers Trust Company, Petitioner, v. Samuel Mallis and Franklyn Kupferman.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
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[March —, 1978]

PER CURIAM.

Respondents sued petitioner Bankers Trust Co. under § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), for allegedly fraudulent statements. The District Court for the Southern District of New York dismissed the action on the ground that the fraud alleged had not occurred "in connection with the purchase or sale" of a security, as required by § 10 (b). 407 F. Supp. 7 (1975). The Court of Appeals for the Second Circuit reversed, holding that respondents were "purchasers [of securities] by virtue of their acceptance of [a] pledge" of stock and that petitioner was "a seller by virtue of its release of [a] pledge." 564 F. 2d — (1977). We granted certiorari to consider the correctness of these rulings of the Court of Appeals. 431 U. S. 928 (1977).

We find ourselves initially confronted, however, by a difficult question of federal appellate jurisdiction. As the Court of Appeals noted in its opinion, a search of the District Court record fails to uncover "any document that looks like a judgment." Because both the parties and the District Court "proceeded on the assumption that there was an adjudication

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 20, 1977

Re: 76-1359 - Bankers Trust Co. v. Mallis

Dear Bill:

Your suggestion that we hold the "separate document" provision of Rule 58 to be waivable by the appellant seems to me to make good sense. I could join an opinion adopting that rationale.

Respectfully,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 13, 1978

Re: 76-1359 - Bankers Trust Co. v. Mallis

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference