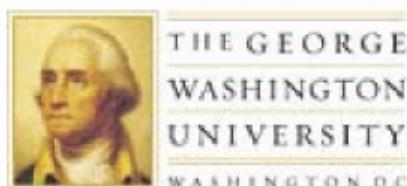


The Burger Court Opinion Writing Database

Gardner v. Westinghouse Broadcasting Co.
437 U.S. 478 (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

June 7, 1978

Dear John:

Re: 77-560 Gardner v. Westinghouse Broadcasting C

I join.

Regards,

W E B.
jk

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1978

RE: No. 77-560 Gardner v. Westinghouse Broadcasting Co.

Dear John:

I am content to join although I had a different view
at conference.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 14, 1978

RE: No. 77-560 Gardner v. Westinghouse Broadcasting

Dear John:

I have decided not to write separately in the
above.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1978

Re: No. 77-560, Gardner v. Westinghouse
Broadcasting Co.

Dear John,

I am glad to join your opinion for
the Court.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1978

Re: 77-560 - Gardner v. Westinghouse
Broadcasting Company

Dear John,

Please join me.

Sincerely yours,



Mr. Justice Stevens
Copies to the Conference

② Brennan 77

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1978

Re: No. 77-560 - Gardner v. Westinghouse Broadcasting Co.

Dear John:

Please join me.

Sincerely,

JM

T.M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1978

Re: No. 77-560 - Gardner v. Westinghouse Broad-
casting Co.

Dear John:

Please join me.

Sincerely,
H. A. B.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 1, 1978

No. 77-560 Gardner v. Westinghouse Broadcasting Co.

Dear John:

Please join me.

I may possibly write a brief concurrence, but
this is by no means certain.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 2, 1978

Re: No. 77-560 Gardner v. Westinghouse Broadcasting Co.

Dear John:

I will probably join your opinion whether you make the change I am about to suggest or not, but I am a little bit bothered by the second full sentence on the xerox page 5 of the present draft reading:

"The exception exists for orders, such as those denying or granting an injunction, that may have a direct and irreparable impact on the merits of the controversy."

The exception exists, strictly speaking, as you recognize in your opinion, because Congress has provided for it in § 1292(a)(1). I fear that in trying to summarize the presumed motive of Congress in enacting that section, you might be opening the door to orders which do not in terms fall within the language of § 1292(a)(1), but which counsel may plausibly argue will, in the words of your draft sentence "have a direct and irreparable impact on the merits of the controversy."

I have a somewhat similar fear about your stress on the distinction between pretrial orders and orders touching on the "merits of the claim". I think that was a perfectly proper distinction in Switzerland Cheese because of the reasoning of that case, which spoke of a fear of opening the flood gates for appeal of many pretrial orders. But while it is quite true that most pretrial orders are not within the terms of § 1292(a)(1), I do not think it follows by any

means that orders which "touch on the merits of the claim" are necessarily within the language of that section. The basic test, as we would obviously both agree, is whether the language used by Congress authorizing the appeal does or does not cover a particular order. Could you see your way clear to change the second and third sentences on page 5 to read in substance as follows:

"The exception exists for orders, such as those denying or granting an injunction, which are encompassed within the language of § 1292(a)(1). The order in this case obviously does not fit within that exception.⁹⁷ A holding . . . etc.".

Sincerely,

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 5, 1978

Re: No. 77-560 Gardner v. Westinghouse Broadcasting Co.

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

Copies to the Conference

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens
77-560 - Gardner v. Westinghouse Broadcasting Co. Circulated MAY 31 '78

Recirculated:

MR. JUSTICE STEVENS delivered the opinion of the Court.

The United States Court of Appeals for the Third Circuit held that the denial of a class certification could not be appealed immediately under 28 U.S.C. § 1292(a)(1)^{1/} as an order refusing an injunction. 559 F.2d 209. Because there is a conflict among the circuits on the question whether such orders are appealable,^{2/} we granted certiorari.

U.S. _____. We affirm.

Petitioner unsuccessfully applied for employment as a radio talk show host at a station owned by respondent. She then brought this civil rights action on behalf of herself and

1/ "§ 1292. Interlocutory decisions

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court"

2/ Compare Williams v. Wallace Silversmiths, Inc., 566 F.2d 364 (CA2 1977); Williams v. Mumford, 511 F.2d 363 (CA DC 1975), cert. denied, 423 U.S. 828, (holding that such orders are not immediately appealable under § 1292), with Jones v. Diamond, 519 F.2d 1090 (CA5 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177 (CA9 1974); Yaffe v. Powers, 454 F.2d 1362 (CA1 1972); Brunson v. Board of Trustees of School District 1, 311 F.2d 107 (CA4 1962), cert. denied, 373 U.S. 933 (holding that such orders are appealable).

Arg. 5
Please give me
All

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

From: Mr. Justice Stevens

Circulated

Recirculated: 2/2

77-560 - Gardner v. Westinghouse Broadcasting Co.

MR. JUSTICE STEVENS delivered the opinion of the Court.

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U.S. _____. We affirm.

Petitioner unsuccessfully applied for employment as a radio talk show host at a station owned by respondent. She then

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pp. 1-2

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

From: Mr. Justice Stevens

Circulated:

Recirculated: JUN 5 1978

PRINTED
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-560

Jo Ann Evans Gardner,
Petitioner,
v.
Westinghouse Broadcasting
Company.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Third Circuit.

[June —, 1978]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The United States Court of Appeals for the Third Circuit held that the denial of a class certification could not be appealed immediately under 28 U. S. C. § 1292 (a)(1)¹ as an order refusing an injunction. 559 F. 2d 209. Because there is a conflict among the circuits on the question whether such ~~orders are appealable~~², we granted certiorari. — U. S. —. We affirm.

S 1292(a)(1)
authorizes

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¹ "§ 1292. Interlocutory decisions.

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² Compare *Williams v. Wallace Silversmiths, Inc.*, 566 F. 2d 364 (CA2 1977); *Williams v. Mumford*, — U. S. App. D. C. —, 511 F. 2d 363 (1975), cert. denied, 423 U. S. 828, (holding that such orders are not immediately appealable under § 1292), with *Jones v. Diamond*, 519 F. 2d 1090 (CA5 1975); *Price v. Lucky Stores, Inc.*, 501 F. 2d 1177 (CA9 1974); *Yaffe v. Powers*, 454 F. 2d 1362 (CA1 1972); *Brunson v. Board of Trustees of School District 1*, 311 F. 2d 107 (CA4 1962), cert. denied, 373 U. S. 933 (holding that such orders are appealable).

Smith v. Merchants
and Farmers Bank
F.2d (CA
May 4, 1978);