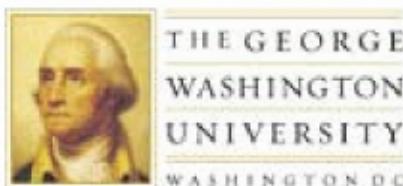


The Burger Court Opinion Writing Database

Burks v. Lasker

441 U.S. 471 (1979)

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

May 8, 1979

Re: 77-1724 - Burks v. Lasker

Dear Bill:

I join.

Regards,



Mr. Justice Brennan

Copies to the Conference

*3
2
R*

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

From: Mr. Justice Brennan

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1724

Harry G. Burks, Jr., et al.,
Petitioners,
v.
Howard M. Lasker et al. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[April —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the disinterested directors of an investment company may terminate a stockholders' derivative suit brought against other directors under the Investment Company and Investment Advisers Acts, 15 U. S. C. § 80a-1 *et seq.*; 15 U. S. C. § 80b-1 *et seq.* To decide that question, we must determine the appropriate roles of federal and state law in such a controversy.

Respondents, shareholders of Fundamental Investors, Inc., an investment company registered under the Investment Company Act, brought this derivative suit in February 1973 in the District Court for the Southern District of New York. The action was brought against several members of the company's board of directors and its registered investment advisor, Anchor Corporation. The complaint alleged that the defendants had violated their duties under the Investment Company Act (ICA),¹ the Investment Advisers Act (IAA),² and the common law in connection with the 1969 purchase by the corporation of \$20 million in Penn Central Transportation Company

¹ § 13 (a)(3), 15 U. S. C. § 80a-13 (a)(3), and former § 36, 15 U. S. C. § 80a-35 (1964 ed.), 54 Stat. 841.

² § 206, 15 U. S. C. § 80b-6.

Stylistic Changes

pp 3, 4, 6, 9, 14, 15

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

From: Mr. Justice Brennan

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1724

Harry G. Burks, Jr., et al.,
Petitioners,
v.
Howard M. Lasker et al. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[April —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the disinterested directors of an investment company may terminate a stockholders' derivative suit brought against other directors under the Investment Company and Investment Advisers Acts, 15 U. S. C. § 80a-1 *et seq.*; 15 U. S. C. § 80b-1 *et seq.* To decide that question, we must determine the appropriate roles of federal and state law in such a controversy.

Respondents, shareholders of Fundamental Investors, Inc., an investment company registered under the Investment Company Act, brought this derivative suit in February 1973 in the District Court for the Southern District of New York. The action was brought against several members of the company's board of directors and its registered investment advisor, Anchor Corporation. The complaint alleged that the defendants had violated their duties under the Investment Company Act (ICA),¹ the Investment Advisers Act (IAA),² and the common law in connection with the 1969 purchase by the corporation of \$20 million in Penn Central Transportation Company

¹ § 13 (a)(3), 15 U. S. C. § 80a-13 (a)(3), and former § 36, 15 U. S. C. § 80a-35 (1964 ed.), 54 Stat. 841.

² § 206, 15 U. S. C. § 80b-6.

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

From: Mr. Justice Stewart
30 APR 1979
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1st DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 77-1724

Harry G. Burks, Jr., et al.,
Petitioners,
v.
Howard M. Lasker et al. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[May —, 1979]

MR. JUSTICE STEWART, concurring in the judgment.

The Investment Company Act and the Investment Advisers Act are silent on the question whether the disinterested directors of an investment company may terminate a stockholders' derivative suit. The inquiry thus must turn to the relevant state law. I cannot agree with the implications in the Court's opinion, *ante*, at 8, 9-10, 14, that there is any danger that state law will conflict with federal policy.

The business decisions of a corporation are normally entrusted to its board of directors. A decision whether or not a corporation will sue an alleged wrongdoer is no different from any other corporate decision to be made in the collective discretion of the disinterested directors. *E. g., Swanson v. Traer*, 354 U. S. 114, 116; *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U. S. 261, 263; *McKee v. Rodgers*, 18 Del. Ch. 81, 156 A. 191 (Ch. 1931); *Rice v. Wheeling Dollar Savings & Trust Co.* (Ohio App.), 130 N. E. 2d 442 (1954); *Goodwin v. Castleton*, 19 Wash. 2d 748, 144 P. 2d 725 (1944).

On remand, the issue will be whether the state law here applicable recognizes this generally accepted principle and thereby empowers the directors to terminate this stockholder suit. Since Congress intended disinterested directors of mutual funds to be "independent watchdogs," *ante*, at 12, I can see no possible conflict between this generally accepted principle of state law and the federal statutes in issue.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 9, 1979

Re: 77-1724 - Burks v. Lasker

Dear Bill,

It took a little time, but please
add my name to your list in this case.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 24, 1979

Re: No. 77-1724 - Burks v. Lasker

Dear Bill:

Please join me.

Sincerely,

J.M.
T.M.

Mr. Justice Brennan

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: 7 MAY 1979

Recirculated: _____

77-1724 - Burks v. Lasker

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment. In so doing, I read that opinion to hold that on remand the Court of Appeals is free to determine and, indeed, should determine what the state law in this area requires, and, then, whether that state law is consistent with the policies of the Investment Company and Investment Advisors Acts. This reading, of course, is at odds with the absolutist position taken by the concurring opinion, but it seems to me that a situation could very well exist where state law conflicts with federal policy. The effectuation of that federal policy should not then be foreclosed, as the concurring opinion implies it would be.

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 8 MAY 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1724

Harry G. Burks, Jr., et al.,
Petitioners,
v.
Howard M. Lasker et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit.

[May —, 1979]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment. In so doing, I read that opinion to hold that on remand the Court of Appeals is free to determine and, indeed, should determine what the state law in this area requires, and then whether that state law is consistent with the policies of the Investment Company and Investment Advisors Acts. This reading, of course, is at odds with the absolutist position taken by the opinion concurring in the judgment, but it seems to me that a situation could very well exist where state law conflicts with federal policy. The effectuation of that federal policy should not then be foreclosed, as the concurring opinion implies it would be.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 1, 1979

77-1724 Burks v. Lasker

Dear Potter:

Please join me in your concurring opinion.

Sincerely,



Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 18, 1979

Re: No. 77-1724 Burks v. Lasker

Dear Bill:

Please note at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

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

April 19, 1979

Re: 77-1724 - Burks v. Lasker

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Brennan

Copies to the Conference