The Burger Court Opinion Writing Database

Touche Ross & Co. v. Redington

442 U.S. 560 (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 26, 1979

Dear Bill:

Re; 78-309 Touche Ross v. Redington

I join.

Regards,

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 23, 1979

Re: No., 78-309, Touche Ross & Co. v. Redington.

Dear Bill,

I am not inclined to dissent in this case and may be able to join your opinion. I am concerned, however, that the phra "grant private rights" in the sentence beginning with the wor "Here" on line 11 of page 15 may be confused with the phrase "grant private rights of action." Would you consider revisin the sentence to read as follows?:

"Here, the statute by its terms 'create[s no] federal right i favor of' any identifiable class, Cort v. Ash, supra, 422 U.S at 78, and proscribes no conduct as unlawful."

Sincerely,

Bill

Mr. Justice Rhenquist
cc: Mr. Justice Marshall

1st Draft

SUPREME COURT OF THE UNITED STATES

No. 78-309

Touche Ross & Co., Petitioner, v. Edward S. Redington, Etc., et al.) On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May __, 1979]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. The Court of Appeals implied a cause of action for damages under § 17(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78q(a), in favor of respondents, customers of a bankrupt brokerage firm, against petitioner accountants, who allegedly injured respondents by improperly preparing and certifying the reports on the brokerage firm required by § 17(a) and the rules promulgated thereunder. Under the tests established in our prior cases, no cause of action should be implied for respondents under § 17(a). Although analyses of the several factors outlined in Cort v. Ash, 422 U.S. 66 (1975) may often overlap, I agree that when, as here, a statute clearly does not "create a federal right in favor of the plaintiff," Id., at 78, and when there is also in the legislative history no "indication of legislative intent, explicit or implicit . . . to create such a remedy," ibid, the remaining two Cort factors cannot by themselves be a basis for implying a right of action.

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

Circulated: 6/6/79

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-309

Touche Ross & Co., Petitioner, v. Edward S. Redington, Etc., et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1979]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. The Court of Appeals implied a cause of action for damages under § 17 (a) of the Securities and Exchange Act of 1934, 15 U. S. C. § 78q (a), in favor of respondents, customers of a bankrupt brokerage firm, against petitioner accountants, who allegedly injured respondents by improperly preparing and certifying the reports on the brokerage firm required by § 17 (a) and the rules promulgated thereunder. Under the tests established in our prior cases, no cause of action should be implied for respondents under § 17 (a). Although analyses of the several factors outlined in *Cort* v. *Ash*, 422 U. S. 66 (1975) may often overlap, I agree that when, as here, a statute clearly does not "create a federal right in favor of the plaintiff," *Id.*, at 78, and when there is also in the legislative history no "indication of legislative intent, explicit or implicit . . . to create such a remedy," *ibid*, the remaining two *Cort* factors cannot by themselves be a basis for implying a right of action.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6-8-79

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–309

Touche Ross & Co., Petitioner,
v.
Edward S. Redington, Etc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1979]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. The Court of Appeals implied a cause of action for damages under § 17 (a) of the Securities and Exchange Act of 1934, 15 U. S. C. § 78q (a), in favor of respondents, who purport to represent customers of a bankrupt brokerage firm, against petitioner accountants, who allegedly injured ~~respondents~~ by improperly preparing and certifying the reports on the brokerage firm required by § 17 (a) and the rules promulgated thereunder. Under the tests established in our prior cases, no cause of action should be implied for respondents under § 17 (a). Although analyses of the several factors outlined in *Cort* v. *Ash*, 422 U. S. 66 (1975), may often overlap, I agree that when, as here, a statute clearly does not "create a federal right in favor of the plaintiff," *id.*, at 78, *i. e.*, when the plaintiff is not "'one of the class for whose *especial* benefit the statute was created.'" *ibid.*, quoting *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916), and when there is also in the legislative history no "indication of legislative intent, explicit or implicit . . . to create such a remedy," 422 U. S., at 78, the remaining two *Cort* factors cannot by themselves be a basis for implying a right of action.

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 14, 1979

Re: 78-309 - Touche Ross & Co. v. Redington

Dear Bill:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 16, 1979

Re: No. 78-309 - Touche Ross & Co. v. Redington, etc., et al

Dear Bill,

I agree.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

cmc

No. 78-309

Touche Ross & Co. v. Redington

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: 14 JUN 1979

Recirculated: _____

MR. JUSTICE MARSHALL, dissenting.

In determining whether to imply a private cause of action for damages under a statute that does not expressly authorize such a remedy, this Court has considered four factors:

> "First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one. Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted).

Applying these factors, I believe respondents are entitled to bring an action against accountants who have allegedly breached duties imposed under § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a).

Since respondents seek relief on behalf of brokerage

p 2

15 JUN 1979

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-309

Touche Ross & Co., Petitioner,
v.
Edward S. Redington, Etc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1979]

MR. JUSTICE MARSHALL, dissenting.

In determining whether to imply a private cause of action for damages under a statute that does not expressly authorize such a remedy, this Court has considered four factors:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort* v. *Ash*, 422 U. S. 66, 78 (1975) (citations omitted).

Applying these factors, I believe respondents are entitled to bring an action against accountants who have allegedly breached duties imposed under § 17 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78q (a).

Since respondents seek relief on behalf of brokerage firm customers, the first inquiry is whether those customers are the intended beneficiaries of the regulatory scheme. Under § 17 (a), brokers must file such reports "as the [SEC] by its rules and regulations may prescribe as necessary or appropriate . . .

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 17, 19

Re: 78-309 - Touche Ross & Co. v. Edward S. Redington

Dear Bill:

Please join me.

Sincerely,

HAB

Mr. Justice Rehnquist

cc: The Conference

78-309 - Touche Ross & Co. v. Redington

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 11, 1979

78-309 Touche Ross v. Redington

Dear Bill:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: 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: 11 MAY 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-309

Touche Ross & Co., Petitioner, v. Edward S. Redington, Etc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no less than five times in cases in which we have granted certiorari.[1] Here we decide whether customers of securities brokerage firms that are required to file certain financial reports with regulatory authorities by § 17 (a) of the Securities Exchange Act of 1934 (1934 Act), 15 U. S. C. § 78q (a), have an implied cause of action for damages under § 17 (a) against accountants who audit such reports based on misstatements contained in the reports.[2]

[1] *See, e. g., Chrysler Corp.* v. *Brown*, — U. S. — (1979); *Cannon* v. *University of Chicago*, — U. S. — (1979); *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, No. 77-1645, cert. granted, 439 U. S. 952 (1978); *Touche Ross & Co.* v. *Redington*, No. 78-309, cert. granted, 439 U. S. 979 (1978); *Southeastern Community College* v. *Davis*, No. 78-711, cert. granted, 439 U. S. — (1979).

[2] In 1972, the date relevant to the instant case, § 17 (a), 15 U. S. C. § 78q (a), read as follows:

"(a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78o of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memo-

RP 15+18

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 Rehnq

Circulated: _____

Recirculated: 15 MAY 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–309

Touche Ross & Co., Petitioner, v. Edward S. Redington, Etc., et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no less than five times in cases in which we have granted certiorari.[1] Here we decide whether customers of securities brokerage firms that are required to file certain financial reports with regulatory authorities by § 17 (a) of the Securities Exchange Act of 1934 (1934 Act), 15 U. S. C. § 78q (a), have an implied cause of action for damages under § 17 (a) against accountants who audit such reports based on misstatements contained in the reports.[2]

[1] *See, e. g., Chrysler Corp.* v. *Brown*, — U. S. — (1979); *Cannon* v. *University of Chicago*, — U. S. — (1979); *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, No. 77–1645, cert. granted, 439 U. S. 952 (1978); *Touche Ross & Co.* v. *Redington*, No. 78–309, cert. granted, 439 U. S. 979 (1978); *Southeastern Community College* v. *Davis*, No. 78–711, cert. granted, 439 U. S. — (1979).

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pg 6-7

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: _____

Recirculated: 21 MAY

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–309

Touche Ross & Co., Petitioner, v. Edward S. Redington, Etc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no less than five times in cases in which we have granted certiorari.[1] Here we decide whether customers of securities brokerage firms that are required to file certain financial reports with regulatory authorities by § 17 (a) of the Securities Exchange Act of 1934 (1934 Act), 15 U. S. C. § 78q (a), have an implied cause of action for damages under § 17 (a) against accountants who audit such reports based on misstatements contained in the reports.[2]

[1] *See, e. g., Chrysler Corp.* v. *Brown*, — U. S. — (1979); *Cannon* v. *University of Chicago*, — U. S. — (1979); *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, No. 77–1645, cert. granted, 439 U. S. 952 (1978); *Touche Ross & Co.* v. *Redington*, No. 78–309, cert. granted, 439 U. S. 979 (1978); *Southeastern Community College* v. *Davis*, No. 78–711, cert. granted, 439 U. S. — (1979).

[2] In 1972, the date relevant to the instant case, § 17 (a), 15 U. S. C. § 78q (a), read as follows:

"(a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78o of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memo-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 23, 1979

Re: No. 78-309 - Touche Ross v. Redington

Dear Bill:

Thank you for your letter of May 23rd, suggesting the change on page 15. If there is indeed the possibility of confusion between the phrase "grant private rights" and "grant private rights of action" I would certainly like to clear it up. The possibility of confusion is not immediately apparent to me, but if you could spell it out in more detail perhaps it would be. I am not, at any rate, inclined to change the sentence to read in haec verba as you suggest in the last sentence of your letter.

Sincerely,

Mr. Justice Brennan

Copy to Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1979

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 78-309 - Touche Ross & Co. v. Redington

There are three petitions held for Touche Ross, two of which are connected with that litigation: (1) No. 78-493, Redington v. Touche Ross & Co.; (2) No. 78-526, Securities Investor Protection Corp. v. Touche Ross & Co.; (3) No. 78-1398, Shiffrin v. Bratton.

(1) No. 78-493. In addition to the § 17(a) claim petitioner Redington's lawsuit against Touche Ross included several common-law counts. Petitioner argued that the DC had jurisdiction over these counts, first, under principles of pendent jurisdiction and second, under the Bankruptcy Act, various provisions of which are incorporated by reference into the Securities Investor Protection Act (SIPA). Petitioner's bankruptcy theories were as follows: (1) that SIPA gave the DC supervising a SIPA liquidation the broad jurisdiction of a Ch. X court, rather than the more limited jurisdiction of a court in straight bankruptcy; and (2) that Touche Ross had "consented" to bankruptcy-court jurisdiction by filing proof of claims in the Weis liquidation. The DC rejected the pendent jurisdiction argument because it found no right of action under § 17(a), and it rejected the bankruptcy arguments as well. Accordingly, it dismissed all of the common-law claims for want of jurisdiction. The CA 2 expressed no opinion "as to the scope of bankruptcy jurisdiction in SIPA-receivership cases," given its view that petitioner could maintain a private cause of action under § 17(a). As to pendent jurisdiction, the CA 2 remanded to the DC for determination of that issue in light of the appellate court's ruling on § 17(a) and for determination whether the DC should abstain on the common-law counts in light of a pending state court action.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 15, 1979

RE: No. 78-309 - Touche Ross v. Redington

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference