

# The Burger Court Opinion Writing Database

*Transamerica Mortgage Advisors, Inc. v.  
Lewis*  
444 U.S. 11 (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

October 6, 1979

✓

Re: 77-1645 - Transamerica Mortgage Advisors, Inc. v.  
Lewis

MEMORANDUM TO THE CONFERENCE:

My vote is to reverse. I would not go so far as to say we will never find a private right of action implicit in a statute, but I think the time has come that in this area of legislation Congress should take the responsibility for affirmative clarification.

Regards,

W.B.

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

CHAMBERS OF  
THE CHIEF JUSTICE

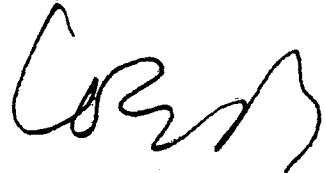
November 3, 1979

Re: 77-1645 - Transamerica Mortgage Advisors,  
Inc. v. Lewis

Dear Potter:

I join.

Regards,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

October 30, 1979

RE: No. 77-1645 Transamerica Mortgage Advisors v.  
Lewis

Dear Potter:

I will await the dissent in the above.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 9, 1979

RE: No. 77-1645 Transamerica Mortgage Advisors  
v. Lewis

Dear Byron:

Please join me in the dissent you have prepared in the above.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States

77-1645

Memorandum

October 26, 1928.

Harry -

As you will note,  
I have made a minor  
editorial change on page 13.  
I think this wording is  
preferable. P.S.

\* And in the meantime shall  
not circulate this draft.

Supreme Court of the United States

Memorandum

October 26, 1928.

Dear Harry,

In accord with our  
conversation this morning, there  
are enclosed two copies of a  
proposed Opinion in the TAMA  
case. I'd appreciate your letting  
me have your views at your  
convenience. \* P.S.

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

From: Mr. Justice Stewart

Circulated: 29 OCT 1979

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

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

**No. 77-1645**

Transamerica Mortgage Advisers, Inc. (TAMA), et al.,  
 Petitioners,  
 v.  
 Harry Lewis. } On Writ of Certiorari to the  
 } United States Court of Appeals for the Ninth Circuit.

[October —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Investment Advisers Act of 1940, 15 U. S. C. § 80b-1 *et seq.*, was enacted to deal with abuses that Congress had found to exist in the investment advisers industry. The question in this case is whether that Act creates a private cause of action for damages or other relief in favor of persons aggrieved by those who allegedly have violated it.

The respondent, a shareholder of petitioner Mortgage Trust of America (Trust), brought this suit in a federal district court as a derivative action on behalf of the Trust and as a class action on behalf of the Trust's shareholders. Named as defendants were the Trust, several individual trustees, the Trust's investment adviser, Transamerica Mortgage Advisers, Inc. (TAMA), and two corporations affiliated with TAMA, Land Capital, Inc. (Land Capital), and Transamerica Corporation (Transamerica), all of which are petitioners in this case.<sup>1</sup>

<sup>1</sup> Hereinafter "the petitioners" refers to the petitioners other than the Trust. The Trust is a real estate investment trust within the meaning of §§ 856-858 of the Internal Revenue Code. TAMA, in addition to advising the Trust, managed its day-to-day operations. Transamerica is the sponsor of the Trust and the parent of Land Capital. Land Capital is the parent of TAMA, through a subsidiary, and sold the Trust its initial

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

From: Mr. Justice Stewart

Circulated: \_\_\_\_\_ 2 NOV 1979

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

2nd DRAFT

SEE PAGES: 1

**SUPREME COURT OF THE UNITED STATES**

No. 77-1645

Transamerica Mortgage Advisers, Inc. (TAMA), et al.,  
 Petitioners,  
 v.  
 Harry Lewis. } On Writ of Certiorari to the  
 United States Court of Appeals for the Ninth Circuit.

[October —, 1979]

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HAB

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

CHAMBERS OF  
JUSTICE POTTER STEWART

November 15, 1979

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 77-1645 - Transamerica Mortgage Advisers, Inc. v. Lewis

Two cases have been held for Transamerica:

No. 77-1717, First Houston Investment Corp. v. Wilson, and  
No. 78-463, Chestnutt Management Corp. v. Miller.

In No. 77-1717, the respondent brought an action for damages in a federal district court against the petitioner, a registered investment adviser, alleging that the petitioner had fraudulently induced the respondent to enter an advisory contract and had failed to make certain material disclosures, in violation of § 206 of the Investment Advisers Act of 1940 and § 10(b) of the Securities Exchange Act of 1934. The District Court held that a private cause of action is not to be implied under the Investment Advisers Act, and that the respondent had failed to state a claim under § 10(b) of the 1934 Act. Accordingly, the District Court dismissed the complaint and amended complaint. The Court of Appeals reversed (CA 5) (Godbold, Tjoflat; Hill, diss'g), finding that a private right of action is implied under the Investment Advisers Act.

In No. 78-463, the petitioner, an investment adviser, was held liable to the respondent for \$53,000 in damages, found to have resulted from material misstatements made in violation of § 206 of the Advisers Act. The Court of Appeals affirmed (CA 2) (Waterman, Timbers, Van Graafeiland), relying on Abrahamsen v. Fleschner, 568 F.2d 862 (CA 2 1977).

In each case, I would grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand for further proceedings in light of Transamerica Mortgage Advisers, Inc. v. Lewis, \_\_\_ U.S. \_\_\_ (November 13, 1979).

P.S.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

October 30, 1979

Re: No. 77-1645 - Transamerica Mortgage  
Advisors, Inc. v.  
Harry Lewis.

Dear Potter,

In due course, I shall circulate a  
dissent in this case.

Sincerely yours,



Mr. Justice Stewart  
Copies to the Conference  
cmc

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

From: Mr. Justice White

Circulated: 7 NOV 1979

1st DRAFT

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

**SUPREME COURT OF THE UNITED STATES**

No. 77-1645

Transamerica Mortgage Advisors, Inc. (TAMA), et al.,  
 Petitioners, } On Writ of Certiorari to the  
 v. } United States Court of Appeals for the Ninth Circuit.  
 Harry Lewis.

[November —, 1979]

MR. JUSTICE WHITE, dissenting.

The Court today holds that private rights of action under the Investment Advisers Act (Act) of 1940 are limited to actions for rescission of investment advisers contracts. In reaching this decision, the Court departs from established principles governing the implication of private rights of action by confusing the inquiry into the existence of a right of action with the question of available relief. By holding that damages are unavailable to victims of violations of the Act, the Court rejects the conclusion of every Circuit Court of Appeals that has considered the question. *Abrahamson v. Fleschner*, 568 F. 2d 862 (CA2 1977); *Wilson v. First Houston Investment Corp.*, 566 F. 2d 1235 (CA5 1978); *Lewis v. Transamerica Corp.*, 575 F. 2d 237 (CA9 1978). The Court's decision cannot be reconciled with our decisions recognizing implied private actions for damages under securities laws with substantially the same language as the Act.<sup>1</sup> By resurrecting

<sup>1</sup> The provisions of § 206 of the Investment Advisers Act of 1940, 15 U. S. C. § 80b-6, are substantially similar to § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and Rule 10b-5, 17 CFR § 240.10b-5, both of which have been held to create private rights of action for which damages may be recovered. *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U. S. 6, 13, n. 9 (1971); *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 730 (1975). The provisions of § 215 (b) of the Act, 15 U. S. C. § 80b-15, are substantially similar to

*Lehman*  
E.O. 1.2.7.8.9

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

From: Mr. Justice White

Circulated: \_\_\_\_\_

Recirculated: 9 NOV 1979

**2nd DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 77-1645

Transamerica Mortgage Advisers, Inc. (TAMA), et al.,  
Petitioners,  
v.  
Harry Lewis. } On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit.

[November —, 1979]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN,  
MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join,  
dissenting.

The Court today holds that private rights of action under the Investment Advisers Act (Act) of 1940 are limited to actions for rescission of investment advisers contracts. In reaching this decision, the Court departs from established principles governing the implication of private rights of action by confusing the inquiry into the existence of a right of action with the question of available relief. By holding that damages are unavailable to victims of violations of the Act, the Court rejects the conclusion of every Circuit Court of Appeals that has considered the question. *Abrahamson v. Fleschner*, 568 F. 2d 862 (CA2 1977); *Wilson v. First Houston Investment Corp.*, 566 F. 2d 1235 (CA5 1978); *Lewis v. Transamerica Corp.*, 575 F. 2d 237 (CA9 1978). The Court's decision cannot be reconciled with our decisions recognizing implied private actions for damages under securities laws with substantially the same language as the Act.<sup>1</sup> By resurrecting

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 8, 1979

Re: No. 77-1645 - Transamerica Mortgage  
Advisors v. Lewis

Dear Byron:

Please join me in your dissent.

Sincerely,

T.M.  
T.M.

Mr. Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

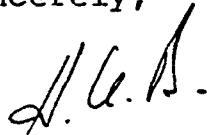
November 5, 1979

Re: No. 77-1645 - Transamerica Mortgage Advisors v. Lewis

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

cc: The Conference

October 30, 1979

7  
No. 76-1645 TAMA v. Lewis

Dear Potter:

You have written a fine opinion, and I expect to join it.

I do have, however, a question or two. At the bottom of page 7, in what in effect is a "holding" sentence, the opinion states that §215 authorizes a suit for "rescission or for an injunction against continued operation of the contract, and for restitution". I take this to mean that the contract with an investment adviser would be voided and that at least all fees paid to the adviser would be restored.

But the term "restitution" could be read as meaning considerably more.

Do you think the term, for example, could be construed to entitle an investor to recover the full amount of capital placed in the hands (or at the disposal of) the advisor to invest? If this view were taken, an investor who had lost 50% of his original capital in reliance upon the adviser's advice, would be entitled to recover the original 100%. In effect, this would be a recovery of damages.

I have the same question with respect to the use of the term "status quo" on page 13 of the opinion.

Normally, an investor is not deemed to have suffered any damages (i.e., any recoverable damages) if the person entrusted with investment of capital conserves the

principal. Investment advisers, bankers and brokers (indeed, even trustees) do not guarantee preservation of capital or profits. If an investor had turned \$100,000 over to an adviser a month ago, and if the adviser had invested in quality blue chips, there could have been a shrinkage in the original capital of 15 to 25% - depending on which "chips" were purchased. Of course, if the original capital were stolen, or if fraud were practiced, rescission would include, I suppose, recovery of the original capital.

If, however, there were only negligence, I would assume that normally rescission - as an equitable remedy - would not be available.

Respondents argue that equitable remedies may be inferred under the Investment Advisors Act. These might be indistinguishable from ordinary damages if rescission is construed broadly to allow recovery for negligent as well as fraudulent conduct. I am not sure, as you and I have discussed, that even an action to recover monies lost through fraud may be inferred. Every complaint will aver fraud, and thus - as a practical matter - unless rescission is defined narrowly we may have opened the door widely to private suits.

In any event, shouldn't we try to clarify this situation.

One minor point relates to the first sentence on page 9. I would appreciate your considering changing the word "would" in the first line to "could", and adding before the word "evidence" in the second line the qualifying word "persuasive". I would think that settled rules of construction would not yield unless there were rather conclusive evidence of a contrary legislative intent.

I would prefer not to cite Borak at all. An anomaly when decided, and in light of more recent cases (especially Touche, Ross, and your opinion in this case), I view Borak as a "dead cock in the pit".

As I believe my dissenting opinion in Cannon is the single most detailed documentation of the extent to which Congress has failed to be explicit as to the right to sue, and the tendency (if not eagerness) of federal courts to imply causes of action, I may add a one sentence concurring opinion substantially as follows:

"As I view the Court's opinion to be compatible with my dissent in Cannon v. University of Chicago, U.S., at \_\_\_\_ (ante, at 8, 9), I join the Court's opinion."

Sincerely,

Mr. Justice Stewart

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 2, 1979

77-1645 Transamerica Mortgage Advisors v. Lewis

Dear Potter:

Please join me in the 2nd draft of your opinion,  
circulated today.

Sincerely,

*Lewis*

Mr. Justice Stewart

Copies to the Conference

LFP/lab

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

From: Mr. Justice Powell

6 Nov 1979

Circulated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

\_\_\_\_\_  
No. 77-1645  
\_\_\_\_\_

Transamerica Mortgage Advis- }  
sors, Inc. (TAMA), et al., }  
Petitioners, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
peals for the Ninth Circuit.  
Harry Lewis.

[November —, 1979]

MR. JUSTICE POWELL, concurring.

I join the Court's opinion, which I view as compatible with my dissent in *Cannon v. University of Chicago*, — U. S., at —. *Ante*, at 8, 9.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 30, 1979

Re: No. 77-1645 Transamerica Mortgage Advisors (TAMA) v. Lewis

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

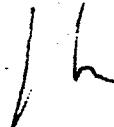
October 30, 1979

Re: 77-1645 - Transamerica Mortgage  
Advisors v. Lewis

Dear Potter:

I will await the dissent in this case.

Respectfully,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20530

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 8, 1979

Re: 77-1645 - Transamerica Mortgage Advisors  
v. Lewis

Dear Byron:

Please join me in your excellent dissent.

Respectfully,



Mr. Justice White

Copies to the Conference