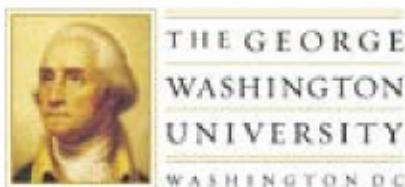


The Burger Court Opinion Writing Database

*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,

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

CHAMBERS OF
THE CHIEF JUSTICE

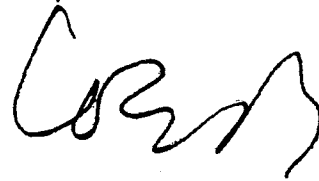
November 3, 1979

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

32/ Supreme Court of the United States

Memorandum

October 26, 1978

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 their draft.

Supreme Court of the United States

Memorandum

October 26, 1978

Dear Harry,

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

P.S.

77-1645

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 Advi- sors, Inc. (TAMA), et al., Petitioners, v. Harry Lewis. | } | On Writ of Certiorari to the United States Court of Ap- peals 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.¹

¹ 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:

SEE PAGES: 9

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1645

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

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¹ 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

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 Abrahamson 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,

A handwritten signature in dark ink, appearing to be 'Byron' or 'Byrm', written in a cursive style.

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

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1645

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

[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.¹ By resurrecting

¹ 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

Hyphatic
Ex p. 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 Advi- sors, Inc. (TAMA), et al., Petitioners, v. Harry Lewis. | } | On Writ of Certiorari to the United States Court of Ap- peals 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.¹ By resurrecting

¹ 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

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

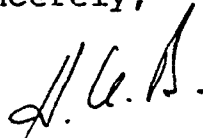
November 5, 1979

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

Dear Potter:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to be "H. G. B.", written in a cursive style.

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,

A handwritten signature in cursive script, appearing to read "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

Circulated: **6 NOV 1979**

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Submitted: _____

No. 77-1645

Transamerica Mortgage Advi-
sors, Inc. (TAMA), et al.,
Petitioners,
v.
Harry Lewis.

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

[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

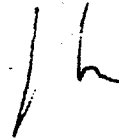
October 30, 1979

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

Dear Potter:

I will await the dissent in this case.

Respectfully,

A handwritten signature, likely of Justice Stewart, consisting of a stylized 'J' followed by a cursive 'h'.

Mr. Justice Stewart

Copies to the Conference

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

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