The Burger Court Opinion Writing Database

Rubin v. United States

449 U.S. 424 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

From: The Chief Justice

Circulated: JAN 7 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1013

William Rubin, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether a pledge of stock to a bank as collateral for a loan is an "offer or sale" of a security under § 17 (a) of the Securities Act of 1933, 15 U. S. C. § 77q (a).

I

Late in 1972, petitioner became vice president of Tri-State Energy, Inc., a corporation holding itself out as involved in energy exploration and production. At the time, Tri-State was experiencing serious financial problems. Petitioner approached Bankers Trust Company, a bank with which he had frequently dealt while he had been affiliated with an accounting firm. Bankers Trust initially refused a $5 million loan to Tri-State for operating a mine. Nevertheless, it lent Tri-State $50,000 on October 20, 1972, for 30 days with the understanding that if Tri-State could produce adequate financial information and sufficient collateral, additional financing might be available.

Petitioner assisted other officers of Tri-State in preparing a financial statement for submission to the bank. The balance sheet, which listed a net worth of $7.1 million, was false and misleading in several respects.[1] Tri-State also submitted

[1] The balance sheet listed an account receivable of $7.5 million and included a copy of a contract that purportedly formed the basis of this account. No such item existed, and the signature on the contract had

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

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1981

RE: No. 79-1013, Rubin v. United States

Dear Bill:

In regard to your memo of today:

(1) As to your suggestion for page 5, I see no real difference between our two forms but will change the opinion to read:

> and obtained the inchoate but valuable interest . . . .

(2) As to page 6, I will change the beginning of Part III to read:

> When we find the terms of a statute unambiguous, judicial inquiry is complete, except in "'rare and exceptional circumstances.'" Tennessee Valley Authority v. Hill, 437 U.S. 153, 187 n. 33 (1978) (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). See Aaron v. SEC, ___ U.S. ___, ___ (1980); Ernst & Ernst v. Hochfelder, supra, at 214, n. 33.

(3) As to page 7, I will change the sentence to read "similar in important respects to . . . ."

Also, I am changing the first sentence of footnote 8 to read:

> To the extent that petitioner argues there was no need to protect pledgees, the very fact that Congress saw fit to afford such protection under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, ends our inquiry, absent a contention, not present here, that the Constitution otherwise prohibits the means selected.

Regards,

WED

Mr. Justice Brennan
Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1981

RE: No. 79-1013, Rubin v. United States

Dear Lewis:

Your first suggestion really challenges the 1963 holding, but I do not need it and so will be glad to drop the first sentence of Part IV.

As to page 5--You fire too easily! And "from the hip"! The collateral, of course, is a chief factor. I would fire the loan officer who did not place the value of the collateral ahead of everything because, at that stage, the bank has not yet parted with dollars. The collateral is what assures payment or the alternative. Nevertheless, my change set out in today's memo to Bill Brennan will take care of your point.

As to your final point, we are dealing with § 17(a) of the 1933 Act and nothing else. I do not think it wise or indeed possible to anticipate how someone may read a 1934 Act case.

Finally, I am changing the first sentence of footnote 8 to read:

> To the extent that petitioner argues there was no need to protect pledgees, the very fact that Congress saw fit to afford such protection under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, ends our inquiry, absent a contention, not present here, that the Constitution otherwise prohibits the means selected.

Regards,

WEB

Mr. Justice Powell
Copies to the Conference

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

pp. 3, 5, 6, 7

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

Circulated: _____

No. 79-1013

Recirculated: JAN 9 1981

William Rubin, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1981]

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Late in 1972, petitioner became vice president of Tri-State Energy, Inc., a corporation holding itself out as involved in energy exploration and production. At the time, Tri-State was experiencing serious financial problems. Petitioner approached Bankers Trust Company, a bank with which he had frequently dealt while he had been affiliated with an accounting firm. Bankers Trust initially refused a $5 million loan to Tri-State for operating a mine. Nevertheless, it lent Tri-State $50,000 on October 20, 1972, for 30 days with the understanding that if Tri-State could produce adequate financial information and sufficient collateral, additional financing might be available.

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

CHAMBERS OF
THE CHIEF JUSTICE

January 20, 1981

MEMORANDUM TO THE CONFERENCE

RE: Case held for No. 79-1013, Rubin v. United States

We have been holding only one case for Rubin: No. 79-1426, Bankers Trust Co. v. Mallis. We granted but then "DIG'd" an earlier petition in this case during the 1977 Term. 431 U.S. 928; 435 U.S. 381.

The issue in Mallis is whether a pledge of stock as collateral is a "purchase or sale" of a security under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j; the omission underlying the action was not made by the pledgor, however. Respondents, two dentists, lent money to Arnold to enable Arnold to purchase stock from Kates. Resps were to take the stock as collateral security for the loan. The shares were subject to an escrow agreement that grew out of a previous transaction between Kates and the issuer; petitioner, a bank, held the restricted stock as collateral security for a loan to Kates. (Ironically, petitioner is the same bank defrauded in Rubin. Note to Lewis: They need a new loan officer.)

At the closing, Arnold inquired whether the escrow agreement had been satisfied. Kates stated that it had and signed an affidavit to that effect. Correspondence between petitioner and the issuer, however, which was kept in the files of the attorney who represented petitioner at the closing, indicated that Kates may have defaulted on the terms of the escrow agreement and thus the restrictions had not been lifted; the attorney for petitioner did not mention this correspondence when Arnold inquired about the restriction. In fact, the escrow agreement still restricted the shares, and they thus were worthless. Respondents lost $106,000.

Respondents filed this action against, inter alia, the petitioner. After the earlier appeal and petition

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 8, 1981

RE: No. 79-1013 Rubin v. United States

Dear Chief:

I am happy to join your opinion in the above. I do, however, offer the following suggestions:

1. On p. 5, you write, "Bankers Trust parted with substantial consideration -- specifically, a total of $475,000 -- to obtain the inchoate but valuable interest under the pledges and concomitant powers." I read this sentence to mean that the reason Bankers Trust gave consideration was for the purpose of obtaining a security interest. In fact, Bankers Trust also expected that its loan would be repaid, and repaid with interest. Might it not be preferable to say, "Bankers Trust parted with substantial consideration -- specifically a total of $475,000 -- and as part of the transaction obtained the inchoate," etc.

2. On p. 6, your first sentence in Part III seems to me somewhat too emphatic, since "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). Holy Trinity remains good law in appropriate circumstances. See TVA v. Hill, 437 U.S. 153, 187, n. 33 (1978); Philbrook v. Glodgett, 421 U.S. 707,714 (1975). Ought not,therefore, the word "ordinarily" be added before the word "complete" at the end of the sentence?

3. On p. 7, line 5, I suggest substitution of the words "not significantly different from" for the words "similar in important respects to."

Sincerely,

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 9, 1981

RE: No. 79-1013 Rubin v. United States

Dear Chief:

Thank you for your changes in the above. Of course, I am still with you.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 8, 1981

Re: No. 79-1013, Rubin v. United States

Dear Chief,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 8, 1981

Re: 79-1013 - Rubin v. U.S.

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 9, 1981

Re: No. 79-1013 - William Rubin v. United States

Dear Chief:

Please join me.

Sincerely,

T.M.

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 12, 1981

Re: No. 79-1013 - Rubin v. United States

Dear Chief:

I have sent to the Print Shop a very brief concurrence along the lines of my remarks at Conference. It should be circulated within a day or so.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

SUPREME COURT OF THE UNITED STATES

No. 79-1013

William Rubin, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1981]

JUSTICE BLACKMUN, concurring in the judgment.

While I agree that a pledge of stock to a bank as collateral for a loan is an "offer or sale" of a security within the meaning of § 17 (a) of the Securities Act of 1933, 15 U. S. C. § 77q (a), I reach that conclusion by a slightly different route than does the Court. The Court holds that a pledge confers "an interest in a security," and that therefore a pledge of shares of stock as collateral for a loan constitutes a "disposition of . . . [an] interest in a security, for value" within the meaning of § 2 (3) of the Act, 15 U. S. C. § 77b (3). *Ante*, at 5. I would hold simply that a pledge of stock as collateral is a type of "disposition" within the meaning of § 2 (3). See *United States* v. *Gentile*, 530 F. 2d 461, 466 (CA2), cert. denied, 426 U. S. 936 (1976) (interpreting § 2 (3) of the 1933 Act). Cf. § 3 (a)(14) of the Securities Exchange Act of 1934, 15 U. S. C. § 78c (a)(14) ("[t]he terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of"); *Mansbach* v. *Prescott, Ball & Turben*, 598 F. 2d 1017, 1029 (CA6 1979) (interpreting § 3 (a)(14) of the 1934 Act).

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 8, 1981

79-1013 Rubin v. United States

Dear Chief:

I will be happy to join your opinion in this case if you omit the first sentence in Part IV.

This sentence cites the 1963 case of SEC v. Capital Gains Research Bureau, quoting language to the effect that federal security laws must be construed "not technically and restrictively but flexibly to effectuate [their] remedial purposes."

A number of more recent decisions, for example, Hochfelder relied on by your opinion, have looked primarily to the plain language of the securities acts. These are highly technical and well drawn statutes, and as you make clear by the remainder of your opinion this case falls within the explicit language of §§2(3) and 17(a). Thus, the quote from Capital Gains Research Bureau is unnecessary and perhaps could be viewed as undercutting to some extent your reliance on the statutory language itself.

On page 5, your draft states:

> "Banker's Trust parted with substantial consideration - specifically a total of $475,000 - to obtain the inchoate but valuable interest under the pledges and concomitant powers."

Although you are speaking broadly and I can "live with" this language if you decide to leave it in the opinion, I do not think it is accurate. Any bank officer who makes a loan for the purpose of obtaining an inchoate interest in collateral should be fired. Collateral may be indispensable to the extension of credit, but lending

officers of the bank I represented were instructed never to make a loan on the assumption that it probably could be repaid only by liquidating the borrower's collateral.

Finally, I wonder whether it wouldn't be helpful to say in a footnote that our interpretation of the 1933 Act in this case would not be controlling in a case arising under the related but different language of the 1934 Act.

Sincerely,

L Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 9, 1981

79-1013 Rubin v. United States

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 12, 1980

Re: No. 79-1013 Rubin v. United States

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 8, 1981

Re: 79-1013 - Rubin v. United States

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

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