

The Burger Court Opinion Writing Database

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran

456 U.S. 353 (1982)

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

November 16, 1981

PERSONAL

Re: 80-203 - Merrill Lynch, Pierce, Fenner & Smith, Inc.
v. Curran

(80-757 - New York Merchantile Exchange v. Leist

(

(80-895 - Clayton Brokerage Co. of St. Louis, Inc.

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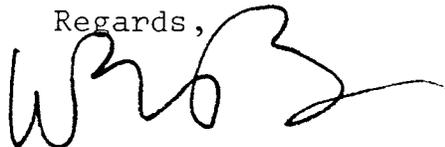
v. Leist

(80-936 - Heinold Commodities, Inc. v. Leist

Dear Lewis:

Are you inclined to do a dissent on this case?

Regards,



yes

Justice Powell

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

CHAMBERS OF
THE CHIEF JUSTICE

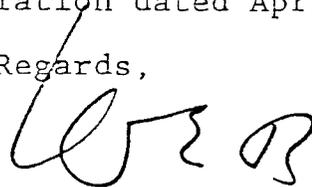
April 29, 1982

Re: No. 80-203 - Merrill Lynch, Pierce, Fenner & Smith, Inc.
v. Curran

Dear Lewis:

I join your dissenting circulation dated April 27.

Regards,

A handwritten signature in dark ink, appearing to be 'W. P.', written over the typed word 'Regards,'.

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 5, 1981

RE: No. 80-203 Merrill Lunch, etc. v. Curran
No. 80-757 New York Mercantile v. Leist
No. 80-895 Clayton Brokerage v. Leist
No. 80-936 Heinold Commodities v. Leist

Dear Chief:

John has agreed to undertake the opinions for the
Court in the above.

Sincerely,



The Chief Justice
cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 25, 1982

RE: Nos. 80-203, 757, 895 & 936 Merrill Lynch v. Curran, et al.

Dear John:

I agree.

Sincerely,

Bill

Justice Stevens

cc: The Conference

2/10

Harry

As per our conversation

HW

February 9, 1982

Re: 80-203, 80-757, 80-895, 80-936 -
Merrill Lynch, Pierce, Fenner & Smith Inc. v. Curran, etc.

Dear John,

My vote to affirm in this case was on the assumption that there was sufficient evidence in the 1974 legislative history to indicate an affirmative intention on the part of Congress to preserve the private remedy that the lower courts had supplied. You indicate, however, that the history is in equipoise--that there is evidence both that Congress intended to save the remedy and evidence that it intended to eliminate it. You do not resolve the ambiguity and instead rely on the presumption against implied repeal.

I am somewhat bothered by this approach. As your own survey of pre-Cort v. Ash practice indicates, the resolution of the private remedy issue was a matter of a court providing a remedy for a right. It was not a question of statutory construction other than to determine whether Congress had affirmatively intended to foreclose the courts from providing such a remedy. The most, then, that the pre-1974 decisions meant is that the statute did not preclude the implication of a private remedy. They did not construe the statute as providing a private remedy. I am not at all sure, therefore, that the implied repeal analogy is an apt one. Even if it be true that Congress had no affirmative intention to disturb the remedy that the courts had provided--and in view of the new remedies provided in the 1974 amendments, this may itself be questionable--it does not necessarily follow that Congress intended to prevent this Court from disagreeing with the lower courts and addressing the private cause of action question in light of the 1974 amendments and the factors set out in Cort v. Ash. This is especially true since Congress did not merely re-enact prior law in 1974 but substantially amended the remedial provisions of the Act.

If I am to affirm, perhaps I shall have to find more in the legislative history than you do. As of now, I shall await other writing in the cases.

Sincerely yours,

BW

Justice Stevens

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 26, 1982

Re: 80-203, 80-757, 80-895 & 80-936

Merrill Lynch v. Curran, etc.

Dear John,

Your third draft satisfies me. It will bear on Patsy v. Board of Regents of Florida to be argued this next week.

Sincerely yours,



Justice Stevens

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 22, 1982

Re: Nos. 80-203,757,895 and 936 - Merrill Lynch v.
Curran, etc.

Dear John:

Please join me.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

HAB

February 11, 1982

Re: No. 80-203) - Merrill Lynch v. Curran
No. 80-757) - N.Y. Mercantile Exchange v. Leist
No. 80-895) - Clayton Brokerage Co. v. Leist
No. 80-936) - Heindl Commodities, Inc. v. Leist

Dear John:

I am still inclined to affirm in these cases. I had thought, however, that there was more supportive material in the legislative history than your opinion indicates. Perhaps I am wrong as to this. As least as of the moment, unless you are able to expand on the legislative history favorably (in which case I would be more apt to join the opinion), I am inclined to devote some time to this and write in separate concurrence. I shall, of course, be with you on the judgment.

Sincerely,

HAB

Justice Stevens

bcc: Justice White

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



CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 25, 1981

Re: No. 80-203) - Merrill Lynch v. Curran
No. 80-757) - N.Y. Mercantile Exchange v. Leist
No. 80-895) - Clayton Brokerage Co. v. Leist
No. 80-936) - Heinold Commodities, Inc. v. Leist

Dear John:

I am glad to join your third draft circulation of
February 24.

Sincerely,

Justice Stevens

cc: The Conference

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November 17, 1981

80-203 Merrill Lynch v. Curran
80-757 New York Mercantile v. Leist
80-895 Clayton v. Leist
80-936 Heinold Commodities, Inc. v. Leist

Dear Chief:

I will be glad to undertake a dissent in these cases.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 1, 1982

80-203, 80-757, 80-895, 80-936 Merrill Lynch v. Curran

Dear John:

In due time I will prepare a dissent.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: APR 21 1982

Recirculated: _____

FIRST DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-203, 80-757, 80-895, AND 80-936

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., PETITIONER

80-203 *v.*
J. J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

NEW YORK MERCANTILE EXCHANGE, ET AL.,
PETITIONERS

80-757 *v.*
NEIL LEIST, PHILIP SMITH AND INCOMCO

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
PETITIONER

80-895 *v.*
NEIL LEIST, PHILIP SMITH AND INCOMCO

HEINHOLD COMMODITIES, INC., ET AL.,
PETITIONERS

80-936 *v.*
NEIL LEIST, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[April —, 1982]

JUSTICE POWELL, dissenting:
The Court today holds that Congress intended the federal

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stylistic changes throughout

pgs. 6, 7, 9, 12, 15

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: APR 30 1982

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SUPREME COURT U.S.
JUSTICE POWELL

'82 APR 30 P 3:34

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-203, 80-757, 80-895, AND 80-936

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., PETITIONER

80-203

v.

J. J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

NEW YORK MERCANTILE EXCHANGE ET AL.,
PETITIONERS

80-757

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
PETITIONER

80-895

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO

HEINHOLD COMMODITIES, INC. ET AL.,
PETITIONERS

80-936

v.

NEIL LEIST ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[May —, 1982]

JUSTICE POWELL, dissenting:

The Court today holds that Congress intended the federal

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 22, 1982

Re: Nos. 80-203, 80-757, 80-895 & 80-936 Merrill
Lynch v. Curran

Dear Lewis:

Please join me in your dissenting opinion.

Sincerely,



Justice Powell

Copies to the Conference

Justice White
Justice Marshall
Justice Brennan
Justice Stevens
Justice O'Connor
Justice Souter
Justice Ginsburg
Justice Breyer
Justice Alito
Justice Kagan
Justice Thomas
Justice Gorsuch
Justice Kavanaugh
Justice Barrett

U.S. Supreme Court
Washington, D.C. 20543
JAN 29 1982

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-203, 80-757, 80-895, AND 80-936

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., PETITIONER
80-203 v.
J. J. CURRAN AND JACQUELYN L. CURRAN
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

NEW YORK MERCANTILE EXCHANGE, ET AL.,
PETITIONERS
80-757 v.
NEIL LEIST, PHILIP SMITH AND INCOMCO

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
PETITIONER
80-895 v.
NEIL LEIST, PHILIP SMITH AND INCOMCO

HEINHOLD COMMODITIES, INC., ET AL.,
PETITIONERS
80-936 v.
NEIL LEIST ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[January —, 1982]

JUSTICE STEVENS delivered the opinion of the Court.
The Commodity Exchange Act (CEA), 7 U. S. C. §1 *et*
seq. (1976 ed. and Supp. III),¹ has been aptly characterized

¹The history of the CEA includes six major legislative enactments.

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SEE PAGES: 13, 23, 27, 28, 33

From Justice Stevens

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Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-203, 80-757, 80-895, AND 80-936

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., PETITIONER

80-203

v.

J. J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

NEW YORK MERCANTILE EXCHANGE, ET AL.,
PETITIONERS

80-757

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
PETITIONER

80-895

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO

HEINHOLD COMMODITIES, INC., ET AL.,
PETITIONERS

80-936

v.

NEIL LEIST ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[February —, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

The Commodity Exchange Act (CEA), 7 U. S. C. § 1 *et seq.* (1976 ed. and Supp. III),¹ has been aptly characterized

¹The history of the CEA includes six major legislative enactments.

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

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 16, 1982

Re: 80-203) - Merrill Lynch v. Curran
80-757) - N.Y. Mercantile v. Leist
80-895) - Clayton v. Leist
80-936) - Heinold Commodities v. Leist

Dear Harry:

Thank you for your note of February 11, 1982, suggesting that my draft opinion needs to incorporate a more complete discussion of the legislative history. Byron has also made a similar criticism. Upon reflection, I think the point is well taken and I shall undertake to draft such a discussion. It will take a few days, but I thought I should let you know that it will be forthcoming and that it may not be necessary for you to write separately.

Respectfully,



Justice Blackmun

cc: Justice White

To: The Chief Justice
The Associate Justices
The Clerk of the Court
The United States
The United States
The United States
The United States
The United States

From: [unclear]
Circulation
Recircular

FEB 1

Footnotes renumbered

PP 11, 12, 24, 25, 27-33, 35-39

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-203, 80-757, 80-895, AND 80-936

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., PETITIONER

80-203

v.

J. J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

NEW YORK MERCANTILE EXCHANGE, ET AL.,
PETITIONERS

80-757

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
PETITIONER

80-895

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO

HEINHOLD COMMODITIES, INC., ET AL.,
PETITIONERS

80-936

v.

NEIL LEIST ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[February —, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

The Commodity Exchange Act (CEA), 7 U. S. C. § 1 *et seq.* (1976 ed. and Supp. III),¹ has been aptly characterized

¹The history of the CEA includes six major legislative enactments.

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JUSTICE STEVENS

'82 APR 27 AM 10

Footnotes renumbered
CHARGES THROUGHOUT

Substantive charges pp 14, 15, 18, 26

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: APR 27 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 80-203, 80-757, 80-895, AND 80-936

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., PETITIONER

80-203

v.

J. J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

NEW YORK MERCANTILE EXCHANGE, ET AL.,
PETITIONERS

80-757

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
PETITIONER

80-895

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO

HEINHOLD COMMODITIES, INC., ET AL.,
PETITIONERS

80-936

v.

NEIL LEIST, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[April —, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

The Commodity Exchange Act (CEA), 7 U. S. C. § 1 *et seq.* (1976 ed. and Supp. III),¹ has been aptly characterized

¹The history of the CEA includes six major legislative enactments.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 5, 1982

MEMORANDUM TO THE CONFERENCE

Re: Holds for 80-203 - Merrill Lynch,
Pierce, Fenner & Smith, Inc. v. Curran

80-1542, Rivers v. Rosenthal & Co. On facts similar to those in 80-203--a fraud claim by an investor against his broker--the Fifth Circuit held that there was no implied cause of action under the Commodity Exchange Act. The proper disposition is to grant, vacate, and remand for reconsideration in the light of Merrill Lynch.

80-108, First Pennsylvania Bank v. Zeffiro. The question presented is whether there is an implied cause of action in favor of debenture holders to enforce trust indenture provisions required by the Trust Indenture Act of 1939. A divided panel of the Third Circuit recognized such an implied private remedy. We originally held this petition for Coutu, and then we held it for Merrill Lynch. In my opinion, nothing that we say in Merrill Lynch would change the Third Circuit's analysis of the implication question in this case. The fact that distinguishes Merrill Lynch from most other implication cases--that Congress comprehensively reexamined the statutory scheme of federal regulation of futures trading under which the federal courts had recognized an implied cause of action--is not present in this case. In October of 1980, Potter, Lewis and Bill Rehnquist voted to grant cert. Nevertheless, because I do not believe the Court must grant cert. in every private cause of action case--indeed, I think we take too many of them--and because

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

October 19, 1981

No. 80-203 Merrill Lynch, Pierce, Fenner & Smith v. Curran,
Scheduled for argument on Nov. 2, 1981

Dear Chief,

On September 30, 1981, I notified you that I would disqualify myself in the referenced matter.

On checking further into the identity of the parties, I have learned that there is no necessity for me to be disqualified in this matter and I would ask you to disregard my memo of September 30.

Sincerely,

Sandra

The Chief Justice

cc: The Conference
Mr. Alexander L. Stevas

Brown 8/

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 8, 1982

No. 80-203 Merrill Lynch v. Curran
No. 80-757 N. Y. Mercantile Exchange v. Leist
No. 80-895 Clayton Brokerage Co. v. Leist
No. 80-936 Heinhold Commodities, Inc. v. Leist

Dear John,

I shall await the dissent on these cases.

Sincerely,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 22, 1982

No. 80-203 Merrill Lynch v. Curran
No. 80-757 New York Mercantile Exchange
v. Leist, Smith and Incomco
No. 80-895 Clayton Brokerage Co. of
St. Louis v. Leist, Smith and Incomco
No. 80-936 Heinhold Commodities v. Leist

Dear Lewis,

Please join me in your dissenting opinion.

Sincerely,



Justice Powell

Copies to the Conference