

The Burger Court Opinion Writing Database

Daily Income Fund, Inc. v. Fox

464 U.S. 523 (1984)

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

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SUPREME COURT U.S.
JUSTICE WILLIAMS

January 12, 1984

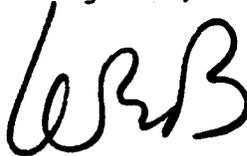
'84 JAN 13 A9:53

Re: 82-1200 Daily Income Fund, Inc. v. Fox

Dear Bill:

I join.

Regards,



Mr. Justice Brennan

Copies to the Conference

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

From: Justice Brennan

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1200

DAILY INCOME FUND, INC. AND REICH & TANG,
INC., PETITIONERS *v.* MARTIN FOX

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

[January —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether Rule 23.1 of the Federal Rules of Civil Procedure requires that an investment company security holder first make a demand upon the company's board of directors before bringing an action under § 36(b) of the Investment Company Act of 1940 (ICA or Act) to recover allegedly excessive fees paid by the company to its investment adviser. The Court of Appeals for the Second Circuit held in this case that the demand requirement of Rule 23.1 does not apply to such actions. *Fox v. Reich & Tang, Inc.*, 692 F. 2d 250 (CA2 1982). Two other Courts of Appeals have reached a contrary conclusion.¹ We granted certiorari to resolve the conflict, — U. S. — (1983), and now affirm.

I

Respondent is a shareholder of petitioner Daily Income Fund, Inc. ("Fund"), an open-end diversified management investment company, or "mutual fund," regulated by the Investment Company Act of 1940 ("ICA" or "Act"), 15 U. S. C. § 80a-1 *et seq.* The Fund invests in a portfolio of short-term money market instruments with the aim of achieving high

¹ *Weiss v. Temporary Investment Fund, Inc.*, 692 F. 2d 928 (CA3 1982), cert. pending, No. 82-1592; *Grossman v. Johnson*, 674 F. 2d 115 (CA1), cert. denied, — U. S. — (1982).

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 3, 1984

No. 82-1200

Daily Income Fund v. Fox

Dear Lewis,

It will be done.

Sincerely,

Justice Powell

Stylistic + 11-12

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

From: Justice Brennan

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2d
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1200

DAILY INCOME FUND, INC. AND REICH & TANG,
INC., PETITIONERS *v.* MARTIN FOX

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

[January —, 1984]

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HAB

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 18, 1984

MEMORANDUM TO THE CONFERENCE

Re: Daily Income Fund, Inc. v. Fox, No. 82-1200

The only hold for this case is No. 82-1592, Weiss v. Temporary Investment Fund, Inc., 692 F. 2d 928 (CA3 1982). In Weiss, the district court dismissed an action brought under §36(b) of the Investment Company Act for failure to comply with the demand requirement of Rule 23.1. The Court of Appeals affirmed, relying on arguments we have rejected in Daily Income Fund. Accordingly, I will vote to grant, vacate, and remand for reconsideration in light of Daily Income Fund.

Sincerely,

W.J.B., Jr.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 3, 1984

Re: 82-1200 - Daily Income Fund, Inc.
and Reich & Tang v. Fox

Dear Bill,

Please join me.

Sincerely,



Justice Brennan

Copies to the Conference

cpm



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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1984

Re: No. 82-1200-Daily Income Fund v. Fox

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

W

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 4, 1984

Re: No. 82-1200 - Daily Income Fund, Inc. v. Fox

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 30, 1983

82-1200 Daily Income Fund v. Fox

Dear Bill:

I think your opinion is excellent, and expect to join you.

On page 12 when to address the "implied right of action" issue, you identify the "factors" from which legislative intent may be discerned. I would appreciate your adding one factor that our cases clearly have established, namely, whether Congress has provided other remedies that are adequate to serve the legislative purpose. This is fully supported by Middlesex County, 453 U.S. 1, 13, that you joined. To the same effect is TransAmerica Mortgage Advisors, 444 U.S. 11, 15, that we cited in Middlesex.

Sincerely,

Lewis

Justice Brennan

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 3, 1984

82-1200 Daily Income Fund v. Fox

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

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

W
CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 3, 1984

Re: No. 82-1200 Daily Income Fund v. Fox

Dear Bill:

You have persuaded me. I join.

Sincerely,

Wm

Justice Brennan

cc: The Conference

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2-3

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

From: Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1200

DAILY INCOME FUND, INC. AND REICH & TANG,
INC., PETITIONERS *v.* MARTIN FOX

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

[January —, 1984]

JUSTICE STEVENS, concurring in the judgment.

There are two petitioners in this case, the Mutual Fund and its investment adviser, both represented by the same attorney. Even if the former could properly assert an action against the latter under § 36(b) of the Investment Company Act of 1940, 84 Stat. 1428, 15 U. S. C. § 80a-35(b)—an action which in turn could be “derivatively” brought by a security holder—in my opinion it would nevertheless remain clear that respondent, as a shareholder of the Fund, could maintain this action without first making a demand on the directors of the Fund to do so.

The rule that sometimes requires a shareholder to make an appropriate demand before commencing a derivative action has its source in the law that gives rise to the derivative action itself. Rule 23.1 of the Federal Rules of Civil Procedure merely requires that the complaint in such a case allege the facts that will enable a federal court to decide whether such a demand requirement has been satisfied; Rule 23.1 is not the source of any such requirement. The plain language of the rule makes that perfectly clear; the rule does not require a demand, it only requires that the complaint allege with particularity what demand if any has been made on the corpora-

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 3, 1984

No. 82-1200 Daily Income Fund, Inc. v.
Fox

Dear Bill,

Please join me.

Sincerely,



Justice Brennan

Copies to the Conference