

# The Burger Court Opinion Writing Database

## *Bateman Eichler, Hill Richards, Inc. v. Berner*

472 U.S. 299 (1985)

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

June 6, 1985

Re: No. 84-679 - Bateman Eichler v. Berner

Dear Bill:

I have concluded to file my writing in the "Deathless Prose" file and show me as joining the judgment.

Regards,



Justice Brennan

Copies to the Conference

82 11-1 10 25

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

CHAMBERS OF  
THE CHIEF JUSTICE

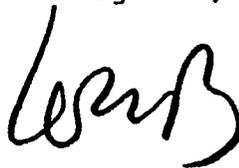
June 6, 1985

RE: 84-679 - Eichler v. Berner

Dear Bill:

This case can come down Tuesday unless there are  
some problems on your end.

Regards,



Justice Brennan

Copies to the Conference  
Henry Lind  
Al Stevas  
Roland Goldstraw

.02 74-3 6108

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 26, 1985

No. 84-679

Bateman Eichler, etc.  
v. Berner, et al.

Dear Chief,

I'll undertake the opinion for the  
Court in the above case.

Sincerely,



The Chief Justice

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

From: Justice Brennan

Circulated: MAY 21 1985

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

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-679

BATEMAN EICHLER, HILL RICHARDS,  
INCORPORATED, PETITIONER *v.*  
CARL F. BERNER ET AL.

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

[May —, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the common-law *in pari delicto* defense bars a private damages action under the federal securities laws against corporate insiders and broker-dealers who fraudulently induce investors to purchase securities by misrepresenting that they are conveying material nonpublic information about the issuer.

### I

The respondent investors filed this action in the United States District Court for the Northern District of California, alleging that they incurred substantial trading losses as a result of a conspiracy between Charles Lazzaro, a registered securities broker employed by the petitioner Bateman Eichler, Hill Richards, Inc. (Bateman Eichler), and Leslie Neadeau, President of T. O. N. M. Oil & Gas Exploration Corporation (TONM), to induce them to purchase large quantities of TONM over-the-counter stock by divulging false and materially incomplete information about the company on the pretext that it was accurate inside information.<sup>1</sup> Specifi-

<sup>1</sup>The investors named Lazzaro, Neadeau, TONM, and Bateman Eichler as defendants. Complaint ¶¶ 5-8, App. 7-8. The investors charged that Neadeau and TONM had "directly and indirectly participated with, aided and abetted, and conspired with" Lazzaro in the scheme. *Id.* ¶9, App. 8;

*Brent*

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 28, 1985

32:59 95 YPM 18\*

No. 84-679 -- Bateman Eichler v. Berner

Dear Byron,

Thank you for your letter in the above. As I told you in our phone talk, I am revising the standard set forth on page 11 to read as follows:

"Accordingly, a private action for damages in these circumstances may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not measurably interfere with the effective enforcement of the securities laws and protection of the investing public."

I have incorporated this change, along with some related ones, in a draft to circulate tomorrow.

Sincerely,

*Bill*

Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 28, 1985

No. 84-679

Bateman Eichler v. Berner

Dear Lewis:

Thank you for your join letter in the above and for your very helpful suggestions. In my second draft, I have sought to clarify at several points--particularly at pp. 14-15--that we are simply accepting the respondents' allegations as true and are not deciding the parties' actual degrees of culpability. With respect to your second point, I have omitted former footnote 25 in order to avoid any potential for confusion as to the scope of our opinion. The draft should circulate tomorrow.

Sincerely,

*Bill*

Justice Powell

94 JUN 58 61 32  
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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

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

Recirculated: MAY 29 1985

WJD  
Please show we are  
not participating in the decision of this case  
stylistic changes throughout.  
SEE PAGES: 2, 11, 14-15, 18  
Footnotes renumbered

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-679

BATEMAN EICHLER, HILL RICHARDS,  
INCORPORATED, PETITIONER *v.*  
CARL F. BERNER ET AL.

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

[May —, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the common-law *in pari delicto* defense bars a private damages action under the federal securities laws against corporate insiders and broker-dealers who fraudulently induce investors to purchase securities by misrepresenting that they are conveying material nonpublic information about the issuer.

I

The respondent investors filed this action in the United States District Court for the Northern District of California, alleging that they incurred substantial trading losses as a result of a conspiracy between Charles Lazzaro, a registered securities broker employed by the petitioner Bateman Eichler, Hill Richards, Inc. (Bateman Eichler), and Leslie Neadeau, President of T. O. N. M. Oil & Gas Exploration Corporation (TONM), to induce them to purchase large quantities of TONM over-the-counter stock by divulging false and materially incomplete information about the company on the pretext that it was accurate inside information.<sup>1</sup> Specifi-

<sup>1</sup>The investors named Lazzaro, Neadeau, TONM, and Bateman Eichler as defendants. Complaint ¶¶ 5-8, App. 7-8. The investors charged that Neadeau and TONM had "directly and indirectly participated with, aided and abetted, and conspired with" Lazzaro in the scheme. *Id.* ¶ 9, App. 8;

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

June 3, 1985

JUN 3 1985  
7:59 AM '85

No. 84-679

Bateman Eichler v. Berner

Dear Bill:

Thanks so much for your letter of today in the above. I will adopt both of your suggestions in my next draft, which should circulate tomorrow.

In consequence of the second change, I shall also change the last sentence in note 30 to read as follows: "Because there is no basis at this stage of the litigation for concluding that the respondents bore substantially equal responsibility for the violations they seek to redress, we need not address the circumstances in which preclusion of suit might otherwise significantly interfere with the effective enforcement of the securities laws and protection of the investing public."

Sincerely,

Bill

Justice Rehnquist

Copies to the Conference

REHNQUIST  
LIBRARY OF CONGRESS

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

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 7, 11, 18

From: Justice Brennan

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

Recirculated: JUN 04 1985

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-679

BATEMAN EICHLER, HILL RICHARDS,  
INCORPORATED, PETITIONER *v.*  
CARL F. BERNER ET AL.

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

[June —, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the common-law *in pari delicto* defense bars a private damages action under the federal securities laws against corporate insiders and broker-dealers who fraudulently induce investors to purchase securities by misrepresenting that they are conveying material nonpublic information about the issuer.

### I

The respondent investors filed this action in the United States District Court for the Northern District of California, alleging that they incurred substantial trading losses as a result of a conspiracy between Charles Lazzaro, a registered securities broker employed by the petitioner Bateman Eichler, Hill Richards, Inc. (Bateman Eichler), and Leslie Neadeau, President of T. O. N. M. Oil & Gas Exploration Corporation (TONM), to induce them to purchase large quantities of TONM over-the-counter stock by divulging false and materially incomplete information about the company on the pretext that it was accurate inside information.<sup>1</sup> Specifi-

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 7, 1985

No. 84-679

Eichler v. Berner

Dear Chief,

I'll plan to bring down the above  
on Tuesday.

Sincerely,

*Bill*

The Chief Justice  
The Conference  
cc: Henry Lind  
Al Stevas  
Roland Goldstraw

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 19

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

From: Justice Brennan

Circulated: \_\_\_\_\_  
Circulated: JUN 7 1985

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 84-679

BATEMAN EICHLER, HILL RICHARDS,  
INCORPORATED, PETITIONER *v.*  
CARL F. BERNER ET AL.

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

[June 11, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the common-law *in pari delicto* defense bars a private damages action under the federal securities laws against corporate insiders and broker-dealers who fraudulently induce investors to purchase securities by misrepresenting that they are conveying material nonpublic information about the issuer.

### I

The respondent investors filed this action in the United States District Court for the Northern District of California, alleging that they incurred substantial trading losses as a result of a conspiracy between Charles Lazzaro, a registered securities broker employed by the petitioner Bateman Eichler, Hill Richards, Inc. (Bateman Eichler), and Leslie Neadeau, President of T. O. N. M. Oil & Gas Exploration Corporation (TONM), to induce them to purchase large quantities of TONM over-the-counter stock by divulging false and materially incomplete information about the company on the pretext that it was accurate inside information.<sup>1</sup> Specifi-

<sup>1</sup>The investors named Lazzaro, Neadeau, TONM, and Bateman Eichler as defendants. Complaint ¶¶ 5-8, App. 7-8. The investors charged that Neadeau and TONM had "directly and indirectly participated with, aided and abetted, and conspired with" Lazzaro in the scheme. *Id.* ¶ 9, App. 8;

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 28, 1985

84-679 - Bateman Eichler, Hill Richards, Inc. v. Berner

Dear Bill,

I have some problem with your draft, primarily because you allow less room for the in pari delicto defense than I would. On page 11, you set down what appears to be a two-part governing rule: substantial equality in responsibility and allowing the defense would be more consistent with enforcement policies. I agree with the first part but think the second leans too heavily against ever allowing the defense. I would rather put it the other way: allow the defense if there is substantial equality in delicto, unless it can fairly be said that doing so would measurably interfere with effective enforcement. It may be that you ride both horses later in the opinion, but I would think that under your analysis the defense would rarely, if ever, be upheld. As it now stands, I shall concur in the judgment.

Sincerely,



Justice Brennan  
Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 4, 1985

84-679 -

Bateman Eichler, Hill Richards, Inc.

v. Berner

Dear Bill,

I appreciate the changes you have made  
and now join your opinion for the Court.

Sincerely,



68 JUN 20 10 05

Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 30, 1985

Re: No. 84-679-Eichler v. Berner

Dear Bill:

Please show me as not participating in the  
decision of this case.

Sincerely,

*J.M.*  
T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 24, 1985

Re: No. 84-679, Bateman Eichler v. Berner

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath it.

Justice Brennan

cc: The Conference

EX-107 MAY 31 1985

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 24, 1985

84-679 Eichler, et al v. Berner

Dear Bill:

Please join me in your opinion for the Court.

I do have a couple of suggestions. As stated on p. 4 of the opinion, the District Court dismissed the complaint for failure to state a claim. Thus, we do not have any decision on the facts. Of course, we are entitled to assume that the facts averred could be proved, but we really do not know whether they will be. Your opinion states several times that the complaint does not reveal that respondents were equally culpable with petitioners. See pp. 14, 15. The complaint, however, hardly would reveal the degree of culpability of the plaintiffs (respondents here). The complaint understandably is framed in a way that makes the tippers seem more culpable.

Your opinion affirms the judgment of CA9 reinstating the complaint, and it will be open to petitioners on remand to prove a different case. My point is that the text of the opinion, as I read it, does not make entirely clear that we are assuming - without deciding - the degrees of culpability averred in the complaint.

My second point concerns footnote 25 that refers to the "shingle theory" of the SEC. My impression is that the contours of this theory are quite unclear and may be the subject of ongoing litigation. Moreover, the SEC might view note 25 as at least an implicit approval of its theory. As it is unnecessary to mention the shingle theory, I suggest that note 25 be omitted.

In all other respects, I think your opinion is excellent.

84 WJ 58 WJ WJ  
Sincerely,

*Lewis*

Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 3, 1985.

No. 84-679 Bateman Eichler v. Berner

Dear Bill,

I have held off joining your circulation because of views similar to those expressed by Byron. Your letter to him of May 28th goes a long way towards solving my problem, and I would be happy to join if you could make two additional minor changes on page 11:

(1) In the first full sentence on the page, could you substitute the phrase "views expressed in the Perma Life opinions" for the phrase "the principles of Perma Life"? They may mean the same thing, but I would like it made clear that it is not just the Court's opinion which is referred to, but the five concurrences.

(2) In your reformulation of the standard in your letter of May 28th, the second part speaks of the defense of in pari delicto being allowed only where its use "could not measurably interfere" with the effect of enforcement of the securities laws...." To me the word "measurably" as an adverb in a sentence dealing with legal matters barely modifies a verb at all; would you be willing to substitute the adverb "significantly" for "measurably"?

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 4, 1985

Re: No. 84-679 Bateman Eichler v. Berner

Dear Bill,

Please join me.

Sincerely,

*WRM*

Justice Brennan

cc: The Conference

57 10 30 1985

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 22, 1985

Re: 84-679 - Eichler v. Berner

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

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84 MAY 25 11 42

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 4, 1985

84-679 Eichler, Richards, Inc. v. Carl F. Berner, et al.

Dear Bill,

Please join me.

Sincerely,

*Sandra*

Justice Brennan

Copies to the Conference

JUN 10 1985