

The Burger Court Opinion Writing Database

Randall v. Loftsgaarden

478 U.S. 647 (1986)

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



5
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

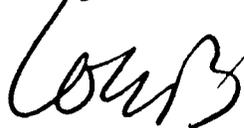
June 18, 1986

RE: 85-519 - Randall, Austin, Anderson
and Neumann v. Loftsgaarden

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

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

From: **Justice Brennan**

JUN 30 1986

Circulated: _____

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-519

WILLIAM C. RANDALL, ROGER E. AUSTIN, TOM W.
 ANDERSON AND MYREL A. NEUMANN, PETI-
 TIONERS *v.* B. J. LOFTSGAARDEN ET AL.

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

[July —, 1986]

JUSTICE BRENNAN, dissenting.

Section 12(2) of the Securities Act of 1933 provides that an investor may sue a seller of securities for misrepresentation of material facts in the prospectus or offering memorandum "to recover the consideration paid for any such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U. S. C. § 77f(2). I agree with the Court that § 12(2) prescribes the remedy of rescission and restitution for investors who still own the securities. Unlike the Court, however, I believe that § 12(2) requires that restitution to the plaintiff be reduced by any tax benefits that a purchaser has bargained for and received from a tax shelter investment.

I too begin with the language of the statute. We know that Congress intended to establish rescission and restitution as the remedy for prospectus misrepresentation, not because it said so directly, but because that is the relief Congress describes in § 12(2). Given this intent, I would look for guidance in interpreting the word "income" in the theory and goals of common-law and equitable restitution, rather than in the Internal Revenue Code, as the Court does. L. Loss, *Fundamentals of Securities Regulation* 1022 ("Section 12(2) can perhaps best be analyzed and evaluated by comparing it

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

STYLISTIC CHANGES THROUGHOUT

From: Justice Brennan

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SUPREME COURT OF THE UNITED STATES

No. 85-519

WILLIAM C. RANDALL, ROGER E. AUSTIN, TOM W. ANDERSON AND MYREL A. NEUMANN, PETITIONERS *v.* B. J. LOFTSGAARDEN ET AL.

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

[July 2, 1986]

JUSTICE BRENNAN, dissenting.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1986

85-519 - Randall, Austin, Anderson
and Neumann v. Loftsgaarden

Dear Sandra,

Please join me.

Sincerely yours,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 27, 1986

Re: No. 85-519-Randall, Austin, Anderson and
Neumann v. B.J. Loftsgaarden

Dear Sandra:

Please join me.

Sincerely,

J.M.

T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1986

Re: No. 85-519, Randall v. Loftsgaarden

Dear Sandra:

Please join me. I shall probably be writing a few paragraphs in separate concurrence. They will be around in a day or two.

Sincerely,



Justice O'Connor

cc: The Conference

Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Blackmun

Circulated: JUN 26 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-519

WILLIAM C. RANDALL, ROGER E. AUSTIN, TOM W.
 ANDERSON AND MYREL A. NEUMANN, PETI-
 TIONERS *v.* B. J. LOFTSGAARDEN ET AL.

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

[June —, 1986]

JUSTICE BLACKMUN, concurring.

I join the Court's well-reasoned opinion. As the Court recognizes, this case concerns the proper measure of damages under two distinct statutory schemes—§ 12(2) of the Securities Act of 1933, 15 U. S. C. § 77l(2), and §§ 10(b) and 28(a) of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78j(b) and 78bb(a). See *ante*, at 1. The Court correctly concludes that under the specific remedial formula set out in § 12(2), the tax benefits generated by an investment provide no basis for reducing a defrauded investor's recovery. *Ante*, at 7-12. Since petitioners prevailed on their § 12(2) claim as well as on their § 10(b) claim, they are entitled to select the damages remedy more favorable to them. I write separately merely to explain why it may be proper to take tax benefits into account in a case brought solely under § 10(b) and Rule 10b-5 of the SEC, 17 CFR § 240.10b-5, a question the Court leaves open. *Ante*, at 18.

The measure of damages in a § 12(2) case brought by an investor who still owns the security involved is rescissionary: the statute permits the defrauded investor "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security . . ." I agree with the Court that tax benefits cannot be considered either "income" or "consid-

STYLISTIC CHANGES

p. 4

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

From: Justice Blackmun

Circulated: _____

Recirculated: JUN 27 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-519

WILLIAM C. RANDALL, ROGER E. AUSTIN, TOM W.
ANDERSON AND MYREL A. NEUMANN, PETI-
TIONERS v. B. J. LOFTSGAARDEN ET AL.

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

[June —, 1986]

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WJ

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1986

85-519 Randall v. Loftsgaarden

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference



CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

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

June 10, 1986

Re: 85-519 - Randall v. Loftsgaarden

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference



CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

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

June 2, 1986

Re: 85-519 - Randall v. Loftsgaarden

Dear Sandra:

Please join me.

Respectfully,

Justice O'Connor

Copies to the Conference

JUN 15 1986

TO: The Chief Justice

- Justice Brennan
- Justice White
- Justice Marshall
- Justice Blackmun
- Justice Powell
- Justice Rehnquist
- Justice Stevens

From: Justice O'Connor

Circulated: JUN 2 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-519

WILLIAM C. RANDALL, ROGER E. AUSTIN, TOM W. ANDERSON AND MYREL A. NEUMANN, PETITIONERS v. B. J. LOFTSGAARDEN ET AL.

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

[June —, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether the recovery available to a defrauded tax shelter investor, entitled under § 12(2) of the Securities Act of 1933 or § 10(b) of the Securities Act of 1934 to rescind the fraudulent transaction or obtain rescissionary damages, must be reduced by any tax benefits the investor has received from the tax shelter investment.

HAB?

I

In 1973, petitioners purchased interests in Alotel Associates (Associates), a limited partnership organized by respondent B. J. Loftsgaarden to build and operate a motel in Rochester, Minnesota. Loftsgaarden was the president and sole shareholder of respondent Alotel, Inc. (Alotel), which, together with Loftsgaarden, was to be a general partner in the venture.

Loftsgaarden marketed this \$3.5 million project as a "tax shelter," which would result in "significantly greater returns for persons in relatively high income tax brackets." *Austin v. Loftsgaarden (Austin I)*, 675 F. 2d 168, 173 (CA8 1982). As a partnership, Associates would not be taxed as an entity. Rather, its taxable income and losses would pass through to the limited partners, who would then be entitled to claim their individual shares of the partnership's deductible losses

Stylistic Changes Throughout

SLO
 Please [unclear] me
 [unclear]

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 24 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-519

WILLIAM C. RANDALL, ROGER E. AUSTIN, TOM W. ANDERSON AND MYREL A. NEUMANN, PETITIONERS *v.* B. J. LOFTSGAARDEN ET AL.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Re: Salcer v. Envicon Equities Corp., No. 84-1447
(Case Held for Randall v. Loftsgaarden, No. 85-519)

201R
In 1977 and 1978 petitioners purchased partnership interests in a limited partnership from respondents, the general partners; the partnership was formed to build an apartment complex. The city of Houston soon annexed the part of the county in which the apartment complex was being built, thereby increasing the cost of the venture, and the complex was sold in 1981. Petitioners received \$30,000 per partnership unit; they had paid \$77,500 per unit when they invested. Petitioners sued under §10(b) and Rule 10b-5, alleging that respondents knew or should have known, and failed to disclose, the impending annexation and its consequences. Petitioners sought a rescissionary measure of damages, namely, the difference between the purchase price and what they received from the forced sale.

Respondents, in answering the complaint, set up as an affirmative defense that each petitioner had realized tax benefits from the investment in excess of the alleged rescissionary damages. Petitioners moved for an order to strike this affirmative defense. The DC denied the motion to strike, but the CA2 reversed and remanded. First, the CA2 noted that even when a defense presents a purely legal question, courts generally should not rule on such questions on a motion to strike, especially before discovery. The legal question was substantial and unsettled, and further facts were necessary before that question could "definitively be resolved in this case." 744 F.2d, at 939. Hence, the CA2 ruled that it was error to grant the motion to strike.

The CA2 then proceeded to discuss the question whether §28(a) of the Securities Exchange Act, 15 U.S.C. §78bb(a), which limits damages in a civil suit based on violations of the Act to "actual damages," required that petitioners' tax benefits be offset against their claimed rescissionary damages. The CA2

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Re: Freschi v. Grand Coal Venture, No. 85-377
(Case Held for Randall v. Loftsgaarden, No. 85-519)

GUR
Petitioner, the trustee of a trust, invested the trust corpus in a coal lease venture marketed by respondents as a tax shelter. Although respondents had been barred by a TRO issued by the CD Cal from marketing unregistered coal leases to the public, they formed a new company and made a new offering in which petitioner invested \$266,500. The trust did not receive any profits on its investment, which apparently became worthless. Petitioner's father, as sole beneficiary of the trust, claimed some \$520,000 in tax deductions, but these were ultimately disallowed by the IRS. However, the IRS did allow petitioner's father to claim the amount invested as a deduction, but petitioner's father was also required to pay the IRS interest and back taxes totalling about \$924,000.

Petitioner sued for violations of Rule 10b-5 and for state law fraud, and a jury found respondents liable on both the state and federal claims. The jury awarded damages of \$926,346.07 plus costs and interest due the IRS. The TC reduced that part of the damages award based on increased tax liability, and offered remittitur of the remaining damage award to \$266,500, the amount of the original investment.

On appeal and cross-appeal, the CA2 affirmed respondents' liability on both the state and 10b-5 claims. Relying on its earlier decision in Salcer, however, the CA2 reversed and remanded on the issue of damages. The \$266,500 deduction allowed by IRS yielded tax savings of \$188,682, and hence "the trust's actual loss was only \$77,818. Application of Salcer requires that this actual net loss constitute [petitioner's] recovery on behalf of the trust." App. to Pet. for Cert. A-19. The CA2 also rejected petitioner's cross-claim that damages should be increased to reflect the tax savings the

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1986

No. 85-519 Randall v. Loftsgaarden

Dear Chief,

I believe all the writing is now in on this case and I do not plan to respond to Bill Brennan's dissent. I believe the case could be scheduled for announcement any day you see fit.

Sincerely,



The Chief Justice

Copies to the Conference

Stylistic Changes Throughout

JUL 1 1986

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. 85-519

WILLIAM C. RANDALL, ROGER E. AUSTIN, TOM W.
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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[July 2, 1986]

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