

# The Burger Court Opinion Writing Database

## *Foremost-McKeeson, Inc. v. Provident Securities Co.*

423 U.S. 232 (1976)

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

January 9, 1976

Re: 74-742 - Foremost-McKesson, Inc. v. Provident  
Securities Co.

Dear Lewis:

I join your proposed opinion.

Regards,

WHRB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 31, 1975

RE: No. 74-742 Foremost-McKesson, Inc. v. Provident  
Securities Company

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Dear Lewis:

I agree.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

December 22, 1975

No. 74-742, Foremost-McKesson, Inc.  
v. Provident Securities Co.

Dear Lewis,

I am glad to join your opinion for  
the Court in this case.

Sincerely yours,

PS,  
/

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 7, 1976

Re: No. 74-742 - Foremost-McKesson, Inc. v.  
Provident Securities Co.

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Dear Lewis:

I join your very good opinion in this case except for Part IV C. Would you please add an appropriate note to this effect at the bottom of your opinion?

Sincerely,



Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 8, 1976

Re: No. 74-742 -- Foremost-McKesson, Inc. v. Provident  
Securities Company

Dear Lewis:

Please join me.

Sincerely,



T. M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 22, 1975

Re: No. 74-742 - Foremost-McKesson v. Provident  
Securities Co.

Dear Lewis:

Please join me.

Sincerely,

*Harry*

Mr. Justice Powell

cc: The Conference

✓  
 To: The Chief Justice  
 Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 ✓ Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist

From: Powell, J.

Circulated: 12/19/75

1st DRAFT

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

## SUPREME COURT OF THE UNITED STATES

No. 74-742

Foremost-McKesson, Inc.,	} On Writ of Certiorari	
Petitioner,		to the United States
v.		Court of Appeals for
Provident Securities Company.		the Ninth Circuit.

[January —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents an unresolved issue under § 16 (b) of the Securities Exchange Act of 1934 (the Act), 48 Stat. 896, 15 U. S. C. § 78p (b). That section of the Act was designed to prevent a corporate director or officer or "the beneficial owner of more than 10 per centum" of a corporation<sup>1</sup> from profiteering through short-swing transactions on the basis of inside information. It provides that a corporation may capture for itself the profits realized on a purchase and sale, or sale and purchase, of its securities within six months by a director, officer, or beneficial owner.<sup>2</sup> Section 16 (b)'s last sentence, how-

<sup>1</sup> The corporate "insiders" whose trading is regulated by § 16 (b) are defined in § 16 (a) of the Act, 15 U. S. C. § 78p (a), as "[e]very person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78l of this title, or who is a director or an officer of the issuer of such security."

<sup>2</sup> Section 16 (b), 15 U. S. C. § 78p (b), reads in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit



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

From: Mr. Justice Powell

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

Recirculated: JAN 7 1976

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 74-742

Foremost-McKesson, Inc.,  
 Petitioner,  
 v.  
 Provident Securities Company. } On Writ of Certiorari  
 to the United States  
 Court of Appeals for  
 the Ninth Circuit.

[January —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents an unresolved issue under § 16 (b) of the Securities Exchange Act of 1934 (the Act), 48 Stat. 896, 15 U. S. C. § 78p (b). That section of the Act was designed to prevent a corporate director or officer or "the beneficial owner of more than 10 per centum" of a corporation<sup>1</sup> from profiteering through short-swing securities transactions on the basis of inside information. It provides that a corporation may capture for itself the profits realized on a purchase and sale, or sale and purchase, of its securities within six months by a director, officer, or beneficial owner.<sup>2</sup> Section 16 (b)'s last sentence,

<sup>1</sup> The corporate "insiders" whose trading is regulated by § 16 (b) are defined in § 16 (a) of the Act, 15 U. S. C. § 78p (a), as "[e]very person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78l of this title, or who is a director or an officer of the issuer of such security."

<sup>2</sup> Section 16 (b), 15 U. S. C. § 78p (b), reads in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit

*Stylistic changes throughout  
 See 7, 10, 15, 16, 19, 24*

22, 23, 27

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 ✓ Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

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

Recirculated: 1/8/76

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 74-742

Foremost-McKesson, Inc.,	} On Writ of Certiorari
Petitioner,	
v.	
Provident Securities Company.	to the United States Court of Appeals for the Ninth Circuit.

[January —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents an unresolved issue under § 16 (b) of the Securities Exchange Act of 1934 (the Act), 48 Stat. 896, 15 U. S. C. § 78p (b). That section of the Act was designed to prevent a corporate director or officer or "the beneficial owner of more than 10 per centum" of a corporation<sup>1</sup> from profiteering through short-swing securities transactions on the basis of inside information. It provides that a corporation may capture for itself the profits realized on a purchase and sale, or sale and purchase, of its securities within six months by a director, officer, or beneficial owner.<sup>2</sup> Section 16 (b)'s last sentence,

<sup>1</sup> The corporate "insiders" whose trading is regulated by § 16 (b) are defined in § 16 (a) of the Act, 15 U. S. C. § 78p (a), as "[e]very person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78l of this title, or who is a director or an officer of the issuer of such security."

<sup>2</sup> Section 16 (b), 15 U. S. C. § 78p (b), reads in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit

January 15, 1976

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 74-742 Foremost-McKesson, Inc.  
v. Provident Securities Co.

Two petitions for certiorari have been held for this case.

No. 75-580 Allis-Chalmers Manufacturing Co. v.  
Gulf & Western Industries, Inc.

Pursuant to a tender offer, Gulf & Western (GW) acquired sufficient holdings in Allis-Chalmers (AC) to become a beneficial owner of AC. GW had not previously held AC stock. Subsequently GW purchased a second block of AC shares. Within 6 months of both purchases, GW sold all of its shares to White Consolidated Industries for White shares, \$20 million in cash, and a 6-month note in the face amount of \$93 million dollars.

AC sued GW for profits under § 16(b). The District Court, applying the construction of § 16(b) rejected by us in No. 74-742 (Foremost-McKesson), held GW accountable for profits realized on the purchase and sale of both blocks of stock. The Seventh Circuit, following the Ninth Circuit decision affirmed in No. 74-742,

held that GW was liable only for the profits realized on the purchase and sale of the second block of securities. At the same time, however, the Seventh Circuit adjusted the calculations of profits in such a way that GW's liability actually was increased even though fewer shares were involved. (The District Court had valued the \$93 million note at its discounted value as of the day of the transaction; the Seventh Circuit required it to be valued at face because GW eventually received full payment.)

The issue in No. 75-580 is AC's contention that GW is liable for its profits on both blocks of securities purchased and sold. Since the result below anticipated our decision in No. 74-742, the Seventh Circuit reached the correct result on this point. Although we reserved judgment in No. 74-742 on some of the Seventh Circuit's language, the case need not be taken on that score.

\*  
This should be denied.

\* \* \* \* \*

No. 74-758 Provident Securities Co. v.  
Foremost-McKesson Inc.

This is a cross-petition by respondent in the case we decided, apparently filed as a precautionary measure. It raises alternative arguments which we did not reach.

The cross-petition should be denied.

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\* GW's objection to the valuation principle utilized by the Seventh Circuit on the second block of stock has been presented in a cross-petition for certiorari, No. 75-890 (filed December 23, 1975). Denying No. 75-580 will not prejudice our taking No. 75-890 should it appear certworthy on its own merits.

L.F.P., Jr.

LFP/gg

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 23, 1975

Re: No. 74-742 - Foremost-McKesson v. Provident Securities

Dear Lewis:

Please join me.

Sincerely,

*Wm*

Mr. Justice Powell

Copies to the Conference