The Burger Court Opinion Writing Database

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

429 U.S. 477 (1977)

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 22, 1977

RE: 75-904 - Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., et al.

Dear Thurgood:

I join.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 6, 1977

RE: No. 75-904 Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., et al.

Dear Thurgood:

This is a particularly fine opinion and I am happy to join.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 6, 1977

No. 75-904, Brunswick Corp.
v. Pueblo Bowl-O-Mat, Inc.

Dear Thurgood,

I agree with both Lewis' and John's suggestions and hope you will adopt them. If so, I shall be glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

P. S. - In the interest of strict accuracy, should not the word "additional" be inserted before the word "income" in the 8th line on page 4, the 4th line from the bottom on page 5, and perhaps elsewhere in the opinion?

√

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 13, 1977

Re: No. 75-904 - Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.

Dear Thurgood:

Please join me.

Sincerely,

Mr. Justice Marshall

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 18, 1977

Re: No. 75-904 - Brunswick Corporation v. Pueblo Bowl-O-Mat Inc.

Dear Thurgood:

I am still with you.

Sincerely,

Mr. Justice Marshall

Copies to Conference

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

From: Mr. Justice Marshall

Circulated: JAN 5 19[illegible]

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–904

Brunswick Corporation, Petitioner, *v.* Pueblo Bowl-O-Mat, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises important questions concerning the interrelationship of the antimerger and private damage action provisions of the Clayton Antitrust Act.

I

Petitioner is one of the two largest manufacturers of bowling equipment in the United States. Respondents are three of the 10 bowling centers owned by Treadway Companies, Inc. Since 1965, petitioner has acquired and operated a large number of bowling centers, including six in the markets in which respondents operate. Respondents instituted this action contending that these acquisitions violated various provisions of the antitrust laws.

In the late 1950's, the bowling industry expanded rapidly, and petitioner's sales of lanes, automatic pinsetters, and ancillary equipment rose accordingly.[1] Since this equipment requires a major capital expenditure—$12,600 for each lane and pinsetter, Ex. P. 1A, J. A. 1576—most of petitioner's sales were for secured credit.

In the early 1960's, the bowling industry went into a

[1] Sales of automatic pinsetters, for example, went from 1,890 in 1956 to 16,228 in 1961. Ex. D. 1, J. A. 1866.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 12, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-904, Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.

I am most reluctant to adopt Lewis' suggested revision in my proposed opinion, and set forth my reasons in the hope that I can persuade at least a majority that the proposed change is ill-advised.

Although at one time the question of whether § 4 suits may be predicated on §7 violations was hotly disputed, that is no longer true. The lower courts -- including at least five circuit courts -- now unanimously agree that they can be. The commentators also are unanimously in accord, even though some wish a contrary result were possible. See, e.g., Symposium, 31 Record of the Ass'n of the Bar of the City of New York 239, 241-42 (1976) (Prof. Turner); Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv. L. Rev. 1127, 1130 n. 20 (1976). And while we have never decided this question, in Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 381 U.S. 311 (1965), we did resolve a statute of limitations issue in a § 4-§ 7 action without expressly reserving the question of whether the violation was actionable.

In drafting my opinion, I carefully attempted to follow Minnesota Mining in neither expressly deciding nor expressly reserving the question of whether a § 4 action lies. It seemed to me that to do otherwise, as Lewis suggests, might convey to the lower courts the impression that we are dissatisfied with the conclusion they have reached. I am not. In my view, the language of § 4 is unambiguous: an action lies for injury caused by "anything forbidden in the antitrust laws," a term defined in 15 U.S.C. § 12 to include § 7. The legislative history is equally clear; on several

occasions the sponsors of the bill stated during the debates that the bill was intended to provide a private remedy for violations of any section of the Clayton Act, including § 7. See, e.g., 51 Cong. Rec. 9486-87; id. at 16318 (Rep. Floyd). Indeed, Congress' very purpose in enacting § 4 was to make treble damages available to remedy violations of the prophylactic prohibitions of the Clayton Act, of which § 7 is just one example; otherwise, § 4 would have been unnecessary since § 7 of the Sherman Act already had made treble damages available for violation of §§ 1 and 2 of the Sherman Act. Finally, I can see no persuasive policy justification for denying recovery to a plaintiff who suffers antitrust injury (as defined in my opinion) on account of a § 7 violation -- for example a manufacturer foreclosed from competing for part of the wholesale market as a result of a competitor's vertical integration forward.

In sum, I believe that the lower courts have correctly resolved the issue to which Lewis refers, and it seems to me most unlikely that we will ever need to or want to review their unanimous conclusion. I think studied silence -- which does not bind the Court should my prediction prove wrong -- is preferable to an express reservation, which can only produce confusion in the lower courts, and generate needless litigation.

J.M.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 13, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-904, Brunswick Corporation v. Pueblo Bowl-O-Mat Inc.

My friend Lewis misunderstands my memorandum of January 12. It is my view that we should not express an opinion on the question of whether a § 7 violation is actionable in a § 4 suit. I fear that an opinion expressly reserving the question, especially when contrasted with our silence in Minnesota Mining (decided at a time when this issue was in dispute in the lower courts), would convey a misleading impression. By leaving the opinion as is, we would not foreclose litigants from raising the issue if they so choose, nor would we be foreclosed from deciding it.

Although I do not advocate deciding this issue, I should note that petitioner devotes several pages of its brief to setting forth the reasons it believes the answer to the issue is "open to serious doubt." Brief pp. 22-27. Indeed, the footnote to which Lewis refers in his memorandum of January 12 begins "For the reasons stated at pp. 22-24 supra, the validity of the Gottesman conclusion [that a § 4 action does lie] is open to serious doubt." The Brief of the Purex Corporation as Amicus Curiae contains a lengthy response, at pp. 8-16. Thus it seems to me we would be justified, if we desired, in resolving the issue here, even though it is not necessary to do so. Cf. Electrical Workers v. Robbins & Myers, Inc. I do not recommend this, however; I recommend only following the course chosen in Minnesota Mining.

T.M.

T. M.

3,4,8,9,12

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–904

Brunswick Corporation, Petitioner, *v.* Pueblo Bowl-O-Mat, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises important questions concerning the interrelationship of the antimerger and private damage action provisions of the Clayton Antitrust Act.

I

Petitioner is one of the two largest manufacturers of bowling equipment in the United States. Respondents are three of the 10 bowling centers owned by Treadway Companies, Inc. Since 1965, petitioner has acquired and operated a large number of bowling centers, including six in the markets in which respondents operate. Respondents instituted this action contending that these acquisitions violated various provisions of the antitrust laws.

In the late 1950's, the bowling industry expanded rapidly, and petitioner's sales of lanes, automatic pinsetters, and ancillary equipment rose accordingly.[1] Since this equipment requires a major capital expenditure—$12,600 for each lane and pinsetter, Ex. P. 1A, J. A. 1576—most of petitioner's sales were for secured credit.

In the early 1960's, the bowling industry went into a

[1] Sales of automatic pinsetters, for example, went from 1,890 in 1956 to 16,228 in 1961. Ex. D. 1, J. A. 1866.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 19, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-904, Brunswick Corporation v. Pueblo-Bowl-O-Mat Inc.

In response to Lewis' latest circulation, I would be willing to make the following change in the second paragraph of note 14 (page 12), if it is agreeable to those who have joined:

> This does not necessarily mean, as the Court of Appeals feared, 523 F. 2d at 272, that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short term effect of certain anti-competitive behavior -- predatory below cost-pricing, for example -- may be to stimulate price competition. But competitors may be able to prove antitrust injury before they are actually driven from the market and competition is thereby lessened.

T.M.

11, 12

JAN 24 1977

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-904

Brunswick Corporation, Petitioner, *v.* Pueblo Bowl-O-Mat, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January —, 1977]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises important questions concerning the interrelationship of the antimerger and private damage action provisions of the Clayton Antitrust Act.

I

Petitioner is one of the two largest manufacturers of bowling equipment in the United States. Respondents are three of the 10 bowling centers owned by Treadway Companies, Inc. Since 1965, petitioner has acquired and operated a large number of bowling centers, including six in the markets in which respondents operate. Respondents instituted this action contending that these acquisitions violated various provisions of the antitrust laws.

In the late 1950's, the bowling industry expanded rapidly, and petitioner's sales of lanes, automatic pinsetters, and ancillary equipment rose accordingly.[1] Since this equipment requires a major capital expenditure—$12,600 for each lane and pinsetter, Ex. P. 1A, J. A. 1576—most of petitioner's sales were for secured credit.

In the early 1960's, the bowling industry went into a

[1] Sales of automatic pinsetters, for example, went from 1,890 in 1956, to 16,228 in 1961. Ex. D. 1, J. A. 1866.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 15, 1977

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 75-904, Brunswick Corp. v. Pueblo Bowl-O-Mat

The only case held for Brunswick is the cross-petition by the plaintiffs below, No. 75-770, Treadway Companies, Inc. v. Brunswick Corporation. Only one question raised in the cross-petition is controlled by our opinion: the appropriateness of the district court's instructions on damages. Since we have held that Brunswick was entitled to judgment notwithstanding the verdict on the damage claim, the question of whether the jury was properly instructed with respect to damages is now academic.

The other issues raised in the cross-petition are, in my view, without merit. I agree with the Court of Appeals that the district court erred in instructing the jury to focus on the market shares acquired by Brunswick in determining whether Brunswick had violated § 7; since market foreclosure was not alleged the size of the centers acquired was greatly overemphasized. I also agree with the Court of Appeals that the district court's instructic on the "in commerce" requirement is inconsistent with United States v. American Building Maintenance Industries, 422 U.S. 271 (1975); indeed the district court all but removed this issue from the jury. Finally, I do not believe the Court of Appea abused its discretion in determining that on the facts of this case divestiture was not an appropriate equitable remedy, nor do I believe this issue is worthy of the Court's attention. Accordingly I will vote to deny the petition.

T.M.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 10, 1977

Re: No. 75-904 - Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

Dear Thurgood:

Like Potter, I too agree with the suggestions made by Lewis and John, and hope that you will adopt them. I also hope that you will find some substitute for that word "viable" appearing in the 7th line on page 3. (You recall my announcement at the first conference in October 1975 that I was with Henry Putzel in outright warfare against this word and "parameter.") With these minor changes, I am happy to join your very instructive opinion on what appeared to be an elusive issue.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 17, 1977

Re: No. 75-904 - Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

Dear Thurgood:

Please join me.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 21, 1977

Re: No. 75-904 - Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

Dear Thurgood:

The change proposed in your letter of January 19 is all right with me.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 6, 1977

No. 75-904 Brunswick v. Pueblo Bowl-O-Mat

Dear Thurgood:

I think you have circulated a fine opinion and, subject to my comment below, I will be happy to join you.

This Court has never resolved the question whether a § 4 suit may be predicated on a § 7 violation. This is a question of considerable importance, and the way your opinion is written - quite properly - it is unnecessary for us to express or intimate how the question should be resolved.

I think we should make clear that this question is left open. This can be done easily by additions in the first paragraph of Part II, as I have indicated in the attached draft. The additional language is underscored.

The second paragraph in note 14 (p. 12), as now written, implies an affirmative answer to the question that I think we should leave open. Accordingly, if a change to this effect is adopted in the text some conforming editing will be necessary in the footnote.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

The issue for decision is a narrow one. Petitioner does not presently contest the Court of Appeals' conclusion that a properly instructed jury could have found the acquisitions unlawful. Nor does petitioner challenge here the contention that a § 4 suit may be predicated on a § 7 violation, or the Court of Appeals' determination that the evidence would support a finding that had petitioner not acquired these centers, they would have gone out of business and respondents' income would have increased. On these issues we express no opinion. Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 13, 1977

No. 75-904 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

MEMORANDUM TO THE CONFERENCE:

This is a reply to Thurgood's memorandum of January 12, in which he reaffirms his belief that we should express or imply a view on an issue that was not argued, not briefed, not discussed in Conference, and is quite unnecessary to our decision in the above case.*

My suggestion, quite simply, was that we not express or intimate any opinion as to whether a § 4 suit could be based on a violation of § 7 absent proof of an actual lessening of competition. See p. 12, n. 14 of Thurgood's opinion. His memorandum argues, in effect, that because five Circuit Courts and the commentators are in agreement as to the answer, we are justified in expressing accord sufficiently to foreclose "needless litigation."

If and when the issue is properly presented in this Court and we have the benefit of the customary briefing, arguments, and Conference discussion, it is possible that I will agree with Thurgood. But until the customary procedures of the adversary process are followed, I do not think we should anticipate a Court view on an important issue of substantive antitrust law.

The opinion, at pages 6-7, carefully and properly specifies certain other questions that are not presented,

*Petitioner's Brief refers to the issue in a note and states that the answer is "open to serious doubt" but that it "need not [be] address[ed] in this case." Br. p. 27, n. 26.

and as to which we express no opinion. I can conceive of no justification for selecting this non-issue for different treatment.

L. F. P.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 18, 1977

No. 75-904 Brunswick v. Pueblo

Dear Thurgood:

Maybe we have been operating at cross purposes without a full understanding.

Your latest circulation (January 13) states that "we should not express an opinion on the question of whether a § 7 violation is actionable in a § 4 suit". This is precisely my position.

I would make this explicit, as you have with respect to other issues not contested by petitioner. See the first paragraph in Part II of your opinion (pp. 6-7). While a change in that paragraph would be preferable, my principal concern is that your note 14 (p. 12) is inconsistent with your rule of "silence". In my view it clearly implies - at least in some circumstances - an answer to the unresolved question whether a § 4 suit ever may be predicated on a § 7 violation. The first three sentences of the second paragraph of the note read as follows:

> "This does not mean, as the Court of Appeals feared, 523 F.2d, at 272, that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short term effect of certain anti-competitive behavior made possible by a § 7 violation - below-cost pricing, for example - may be to stimulate price competition. But competitors need not wait until they are driven from the market (and competition is thereby lessened) to seek compensation for losses caused by such anticompetitive behavior.

The foregoing language seems to answer - or at least strongly to imply how we will answer - the very question as to which your memorandum of January 13 states "we should not express an opinion".

If we are really to avoid implying an answer to a question that is not in this case, it seems to me that note 14 should be omitted or substantially modified.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 21, 1977

No. 75-904 Brunswick v. Pueblo

Dear Thurgood:

The change in note 14 (p. 12) proposed in your memorandum of January 19, and your prior assurance of no intent to express in this case an opinion on the question that concerned me (memorandum of January 13), enable me to join your opinion.

Thank you for your patience and cooperation.

Sincerely,

Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 13, 1977

Re: No. 75-904 - Brunswick Corp. v. Pueblo Bowl-O-Mat

Dear Thurgood:

Please join me. I would prefer to see you adopt Lewis' suggestion with respect to the availability of a private action, but your refusal to do so would not cause me to dissociate myself from the opinion. Love and kisses.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

J

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 6, 1977

Re: 75-904 - Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., et al.

Dear Thurgood:

Please join me in what I regard as a particularly lucid opinion. I have two minor suggestions which I hope you will consider.

First, I wonder if it might be desirable to omit the first full sentence on the top of page 8. I believe the contrast between section 7 and section 4 would be somewhat more pointed if that sentence were omitted. Moreover, I am fearful that it might be misinterpreted in certain contexts.

Second, would you insert the word "predatory" immediately before the words "below-cost pricing" in the 7th line of the portion of footnote 14 which carries over onto page 12. Again, this change is probably not critical, but I am afraid the footnote as now written might be read to suggest that all below-cost pricing is unlawful.

Respectfully,

JPS

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 12, 1977

Re: 75-904 - Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.

Dear Thurgood:

For the reasons stated in your letter, I would also prefer not to adopt Lewis' suggested revision.

Respectfully,

John

Mr. Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 19, 1977

Re: 75-904 - Brunswick Corp. v. Pueblo-Bowl-O-Mat

Dear Thurgood:

Your proposed change is agreeable to me.

Respectfully,

JP

Mr. Justice Marshal

Copies to the Conference