

The Burger Court Opinion Writing Database

Great Atlantic & Pacific Tea Co. v. FTC
440 U.S. 69 (1979)

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

February 1, 1979

Re: 77-654 - Great A&P Tea Co., Inc. v. Fed. Trade Comm'n.

Dear Potter:

I join.

Regards,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 22, 1979

RE: No. 77-654 Great A & P Tea Co. v. F.T.C.

Dear Potter:

I agree.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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

From: Mr. Justice Stewart
Circulated: 5 JAN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-654

Great Atlantic & Pacific Tea Company, Inc., Petitioner,
v.
Federal Trade Commission. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[January --, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether the petitioner, the Great Atlantic and Pacific Tea Company (A&P), violated § 2 (f) of the Robinson-Patman Act, as amended, 15 U. S. C. § 13 (f).¹ by knowingly inducing or receiving illegal price discriminations from the Borden Company (Borden).

¹ Title 15 U. S. C. § 13 (f) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Title 15 U. S. C. §§ 13 (a) and (b), provide in pertinent part:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale,

7-18
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: _____

9 JAN 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-654

Great Atlantic & Pacific Tea Company, Inc., Petitioner,
v.
Federal Trade Commission. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[January —, 1979]

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 10 JAN 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-654

Great Atlantic & Pacific Tea
Company, Inc., Petitioner,
v.
Federal Trade Commission. } On Writ of Certiorari to the
United States Court of Ap-
peals for the Second Circuit.

[January —, 1979]

Mr. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether the petitioner, the Great Atlantic and Pacific Tea Company (A&P), violated § 2 (f) of the Robinson-Patman Act, as amended, 15 U. S. C. § 13 (f),¹ by knowingly inducing or receiving illegal price discriminations from the Borden Company (Borden).

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

4
From: Mr. Justice Stewart

Circulated: _____

Recirculated: 12 JAN 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-654

Great Atlantic & Pacific Tea
Company, Inc., Petitioner, } On Writ of Certiorari to the
v. } United States Court of Ap-
Federal Trade Commission. } peals for the Second Circuit.

[January —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether the petitioner, the Great Atlantic and Pacific Tea Company (A&P), violated § 2 (f) of the Robinson-Patman Act, as amended, 15 U. S. C. § 13 (f),¹ by knowingly inducing or receiving illegal price discriminations from the Borden Company (Borden).

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 18, 1979

Re: No. 77-654 - A&P v. FTC

Dear Potter,

I have no enthusiasm for dissenting from Parts I, II and III of your circulating opinion. I could acquiesce to that extent, but as presently advised, I would remand with respect to the meeting-competition defense. This probably requires facing the cost-justification issue. I shall file the attached paragraph or two summarily stating these views.

Sincerely yours,



Attachment

Mr. Justice Stewart

Copies to the Conference

To: The ~~various~~ Justice
Mr. Justice Brennan
Mr. Justice Stewart
~~Mr. Justice~~ Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White
18 JAN 1979
Circulated: _____

Recirculated: _____

No. 77-654 - Great A & P Co., Inc. v. FTC

MR. JUSTICE WHITE, concurring in part and dissenting
in part.

I concur in Parts I, II and III of the Court's opinion but dissent from Part IV. Because it was thought the issue was irrelevant where the buyer knows that the price offered is lower than necessary to meet competition, neither the Commission nor the Court of Appeals decided whether Borden itself would have had a valid meeting-competition defense. The Court should not decide this question here but should remand to the Commission whose job it is initially to consider such matters.

For the reason stated by the Commission and the Court of Appeals, I am also convinced that the United States made a sufficient, unrebutted showing that Borden would not have a cost-justification defense to a Robinson-Patman Act charge.

Great Atlantic & Pacific Tea Co. v. FTC

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: 6 FEB 1979

Recirculated: _____

MR. JUSTICE MARSHALL, dissenting in part.

I agree with the Court that the Federal Trade Commission and the Court of Appeals applied the wrong legal standard in assessing A&P's liability under the Robinson-Patman Act. However, I cannot join the Court's interpretation of § 2(f) as precluding buyer liability under this Act unless the seller could also be found liable for price discrimination. Neither the language nor the sparse legislative history of § 2(f) justifies this enervating standard for the determination of buyer liability. To the contrary, the Court's construction disregards the Congressional purpose to curtail the coercive practices of chain stores and other large buyers. Having formulated this new standard, the Court then applies it here in the first instance rather than remanding the case to the

8 FEB 1979

Printed
1st / DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-654

Great Atlantic & Pacific Tea
Company, Inc., Petitioner, } On Writ of Certiorari to the
v. } United States Court of Ap-
Federal Trade Commission. } peals for the Second Circuit.

[February —, 1979]

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I

Section 2 (f) provides that "[i]t shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price *which is prohibited by this section.*" (Emphasis added.) The Court interprets the italicized language as "plainly meaning" that a buyer ~~can~~ be found liable for knowingly inducing price discrimination only if his seller is first proved liable under §§ 2 (a) and 2 (b). *Ante*, at 6, 11. Under

cont'd

PP. 2, 4

9 FEB 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-654

Great Atlantic & Pacific Tea Company, Inc., Petitioner, v. Federal Trade Commission. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit,

[February --, 1979]

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Section 2 (f) provides that "[i]t shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price *which is prohibited by this section.*" (Emphasis added.) The Court interprets the italicized language as "plainly meaning" that a buyer can be found liable for knowingly inducing price discrimination only if his seller is first proved liable under §§ 2 (a) and 2 (b). *Ante*, at 6, 11. Under

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 9, 1979

Re: No. 77-654 - Great Atlantic & Pacific Tea Co.
v. FTC

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 8, 1979

No. 77-654 A & P v. FTC

Dear Potter:

Please join me.

Sincerely,

Lewis

Mr. Justice Stewart

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 11, 1979

Re: No. 77-654 A&P v. FTC

Dear Potter:

Please join me. I have some minor suggestions with respect to the opinion, which I shall send along to you, but my join is not in any way conditioned upon your adopting them.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 5, 1979

Re: 77-654 - Great Atlantic & Pacific Tea Co.
v. Federal Trade Commission

Dear Potter:

Please show that I took no part in the consideration
or decision of this case.

Respectfully,



Mr. Justice Stewart

Copies to the Conference