

The Burger Court Opinion Writing Database

Monsanto Co. v. Spray-Rite Service Corp.
465 U.S. 752 (1984)

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

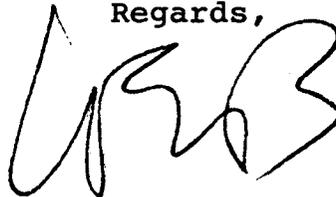
February 15, 1984

Re: 82-914 - Monsanto Company v. Spray-Rite Serv. Corp.

Dear Lewis:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'JP', written over the typed word 'Regards,'.

Justice Powell

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**

Circulated: MAR 1 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-914

**MONSANTO COMPANY, PETITIONER v. SPRAY-RITE
SERVICE CORPORATION**

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

[February —, 1984]

JUSTICE BRENNAN, concurring.

As the Court notes, the Solicitor General has filed a brief in this Court as *amicus curiae* urging us to overrule this Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911). That decision has stood for 73 years and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to overrule the interpretation of the Sherman Act adopted in that case. Under these circumstances, I see no reason for us to depart from our longstanding interpretation of the Act. See *Jefferson Parish v. Hyde*, — U. S. —, — (1984) (BRENNAN, J., concurring). Because the Court adheres to that rule and, in my view, properly applies *Dr. Miles* to this case, I join the opinion and judgment of the Court.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 14, 1984

Re: 82-914 - Monsanto Company v.
Spray-Rite Service Corporation

Dear Lewis,

Please note at the bottom of your
opinion that I took no part in the
consideration or judgment in this case.

Sincerely,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 23, 1984

Re: No. 82-914-Monsanto v. Spray-Rite Service

Dear Lewis:

Please join me.

Sincerely,

Jm.
T.M.

Justice Powell
cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 14, 1984

Re: No. 82-914 - Monsanto Co. v. Spray-Rite Service Corp.

Dear Lewis:

Please join me. My joinder holds however you and John work out the suggestions he has made.

Sincerely,

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

Justice Powell

cc: The Conference

1-0 Joe

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 15, 1984

Re: No. 82-914 - Monsanto Co. v. Spray-Rite Service Corp.

Dear Lewis:

I have one minor inquiry which I did not wish to put in my joinder letter circulated yesterday. On page 9 of your opinion, near the bottom, when the Moore Drug Exchange case is cited, there is a reference to "(Mansfield, J.)." Perhaps there is a reason why you have designated the author of the Second Circuit opinion. My experience on the Court of Appeals was that when the Court did this, the other members of the panel resented it somewhat. I would not have regarded Walter Mansfield as a greater antitrust expert than Ed Lumbard, who sat on the panel with Walter. I therefore wonder whether it would not be better to omit the name?

I realize we do a lot of this so far as Brandeis, Holmes, and Learned Hand are concerned, but my feeling is that we do too much of that, too.

Sincerely,



Justice Powell

02/07

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

From: **Justice Powell**

Circulated: **FEB 8 1984**

Recirculated: _____

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-914

**MONSANTO COMPANY, PETITIONER v. SPRAY-RITE
SERVICE CORPORATION**

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

[February —, 1984]

JUSTICE POWELL delivered the opinion of the Court.

This case presents a question as to the standard of proof required to find a vertical price-fixing conspiracy in violation of Section 1 of the Sherman Act.

I

Petitioner Monsanto Company manufactures chemical products, including agricultural herbicides. By the late 1960's, the time at issue in this case, its sales accounted for approximately 15% of the corn herbicide market and 3% of the soybean herbicide market. In the corn herbicide market, the market leader commanded a 70% share. In the soybean herbicide market, two other competitors each had between 30% and 40% of the market. Respondent Spray-Rite Service Corporation was engaged in the wholesale distribution of agricultural chemicals from 1955 to 1972. Spray-Rite was essentially a family business, whose owner and president, Donald Yapp, was also its sole salaried salesman. Spray-Rite was a discount operation, buying in large quantities and selling at a low margin.

Spray-Rite sold Monsanto herbicides from 1957 to 1968. In October 1967, Monsanto announced that it would appoint distributors for one-year terms, and that it would renew distributorships according to several new criteria. Among the criteria were: (i) whether the distributor's primary activity

February 18, 1984

82-914 Monsanto v. Sprav-Rite

Dear John:

The suggestions in your letter of the 13th are helpful.

The changes written in the margins of the enclosed amended first draft of my opinion will - I hope - satisfy your concerns. With these changes, I believe we will be entirely together except possibly as to your inquiry whether I would be agreeable to omitting all or a part of the paragraph that begins on page 7. As the author of Sylvania, I view the paragraph as important, and I also think that it helps explain why the standard that CA7 appeared to endorse is erroneous. I therefore prefer not to omit it.

I have suggested, however, limiting word changes that I think assure that the paragraph will not be misunderstood. If you can join, I will be happy to include these changes in a draft to the Conference.

Sincerely,

Justice Stevens

lfp/ss

February 21, 1984

82-914 Monsanto v. Spray-Rite

Dear John:

I enclose a copy of note 8 that I revised this afternoon in line - I believe - with your suggestion.

If this is agreeable, I will make the changes and recirculate.

Sincerely,

Justice Stevens

lfp/ss
Enc.

lfp/ss 02/21/84 MON8 SALLY-POW

8. The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

02/22

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

From: Justice Powell

Circulated: _____

Recirculated: FEB 23 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-914

**MONSANTO COMPANY, PETITIONER v. SPRAY-RITE
SERVICE CORPORATION**

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

[February —, 1984]

JUSTICE POWELL delivered the opinion of the Court.

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Petitioner Monsanto Company manufactures chemical products, including agricultural herbicides. By the late 1960's, the time at issue in this case, its sales accounted for approximately 15% of the corn herbicide market and 3% of the soybean herbicide market. In the corn herbicide market, the market leader commanded a 70% share. In the soybean herbicide market, two other competitors each had between 30% and 40% of the market. Respondent Spray-Rite Service Corporation was engaged in the wholesale distribution of agricultural chemicals from 1955 to 1972. Spray-Rite was essentially a family business, whose owner and president, Donald Yapp, was also its sole salaried salesman. Spray-Rite was a discount operation, buying in large quantities and selling at a low margin.

Spray-Rite sold Monsanto herbicides from 1957 to 1968. In October 1967, Monsanto announced that it would appoint distributors for one-year terms, and that it would renew distributorships according to several new criteria. Among the criteria were: (i) whether the distributor's primary activity

1p. 5, 7-10, 14 &

Stylistic changes

Comments on p. 7

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 21, 1984

82-914 Monsanto Co. v. Spray-Rite Service Corp.

MEMORANDUM TO THE CONFERENCE

After the opinion in this case was handed down on Tuesday, two errors of a formal nature were brought to our attention. I have had the following changes made in the slip opinions.

Page 4, n. 5. The 2d draft contained the following language: "Both opinions were affirmed by an equally divided en banc court. Battle v. Watson, 712 F.2d 1238 (CA8 1983) (en banc); Roesch, Inc. v. Star Cooler Corp., 712 F.2d 1235 (CA8 1983) (en banc). Accordingly, neither has precedential value. See id., at 1236." Since an en banc court does not "affirm" panel opinions, this language has been deleted and the following inserted in its place:

On rehearing en banc, the Court of Appeals was equally divided between the two positions. Compare Roesch, Inc. v. Star Cooler Corp., 712 F.2d 1235 (CA8 1983) (en banc), with Battle v. Watson, 712 F.2d 1238, 1240 (CA8 1983) (en banc) (McMillian, J., dissenting).

Page 9, line 4. For the same reason, the language "aff'd by an equally divided court, 712 F.2d 1235 (CA8 1983) (en banc)" after the cite to Roesch has been deleted. In its place, the following has been inserted:

on rehearing en banc, 712 F.2d 1235 (CA8 1983) (affirming District Court judgment by an equally divided court).

L. F. P.

L.F.P., Jr.

71K
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 21, 1984

82-848 Service Merchandise Co. v. Amana Refrigeration Inc.

MEMORANDUM TO CONFERENCE

This case was held for No. 82-914 Monsanto Co. v. Spray-
Rite Service Corp.

In this case, petr alleged that Amana had instituted price stabilization and a group boycott among its distributors in response to complaints about petr's pricing policies. The DC granted summary judgment for Amana on the per se claims, and CA6 affirmed. The court held that evidence of complaints alone would not allow the jury to infer an agreement between the complaining distributors and Amana.

CA6's decision is entirely consistent with Monsanto. I recommend denial.

L. F. P.

L.F.P., Jr.

7AB

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 21, 1984

82-1787 Buckingham Corp. v. Odom Corp.

MEMORANDUM TO CONFERENCE

This case was held for No. 82-914 Monsanto Co. v. Spray-Rite Service Corp.

In this distributor-termination case, CA9 reversed a directed verdict for the manufacturer. The court held that in addition to complaints from a competing distributor about the discounter's prices, there was an internal memorandum that focused on pricing reasons for the termination and there was an offer by the competing distributor to make a "commitment" in exchange for an exclusive distributorship. CA9 thought a reasonable jury could have interpreted the offer as a promise to let the manufacturer have some control over prices.

This case contains evidence of more than mere distributor complaints, but I find the evidence of a conscious commitment to a joint scheme to fix prices to be still very thin. This is a close case, and it is possible that the result may change in light of Monsanto's new evidentiary standard. I recommend GVR on Monsanto.

OK

L.F.P.

L.F.P., Jr.

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7AB

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

8

March 21, 1984

83-412 Roesch Inc. v. Star Cooler Corp.

MEMORANDUM TO CONFERENCE

This case was held for No. 82-914 Monsanto Co. v. Spray-Rite Service Corp.

In this distributor-termination case, petr was terminated after the manufacturer received two complaints from other distributors about petr's price-cutting. Neither distributor requested that petr be terminated or threatened other action. The DC gave a directed verdict for the manufacturer. A panel of CA8 affirmed. On rehearing en banc, an equally divided court left the DC's judgment standing. The majority and dissent disagreed over whether a conspiracy could be inferred from evidence of complaints.

The DC's decision is entirely consistent with Monsanto. I recommend denial.

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 21, 1984

83-431 Battle v. Lubrizol Corp.

MEMORANDUM TO CONFERENCE

This case was held for No. 82-914 Monsanto Co. v. Spray-Rite Service Corp.

In this distributor-termination case, the manufacturer terminated a price-cutting distributor in response to complaints by other distributors. The DC, considering evidence that was later held inadmissible by CA8, found sufficient evidence to infer concerted action, but dismissed the complaint because it found no evidence that the manufacturer was motivated by a desire to protect price. A panel of CA8 reversed, but an equally divided en banc court left the DC's judgment standing. The majority and dissent disagreed over whether a conspiracy could be inferred from evidence of complaints.

The DC's decision, coupled with CA8's exclusion of the additional evidence, is entirely consistent with Monsanto. I recommend denial.

L. F. P.

L.F.P., Jr.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 16, 1984

Re: No. 82-914 Monsanto Co. v. Spray-Rite Service Corp.

Dear Lewis:

Please join me in your opinion. On balance I prefer it as is rather than as modified by the suggestions contained in John's letter.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 13, 1984

Re: 82-914 - Monsanto v. Spray-Rite

Dear Lewis:

Your opinion does an excellent job of formulating the correct standard and explaining why the evidence in this case meets that standard. In short, insofar as you state our holding, I am prepared to join you. I am, however, concerned about the possibility that some of the comments in your opinion will be read too broadly. I wonder therefore if you would be willing to consider changes or deletions at these points:

Page 5, n. 6, paragraph 3: Your parenthetical sentence implies that you think the assumption may be incorrect, but I believe it is well settled that conduct that is normally perfectly lawful may be forbidden when it is carried out in furtherance of an unlawful conspiracy. This is not just true of conspiracies that violate the antitrust laws, but of conspiracies generally. I hope you can delete the sentence.

Page 6, paragraph 1: Should you not insert the words "Section 1 of" at the beginning of the third sentence and perhaps also at the end of the fourth sentence?

Page 6, paragraph 2, 1st sentence: It seems to me that you should insert the words "between a manufacturer and its distributor" after the words "concerted action."

Page 7: The paragraph that begins on page 7 and runs over onto page 8 seems to imply that "constant communication about prices" would

not be probative of a price-fixing conspiracy. The paragraph also suggests that the manufacturer will probably police his distributors' prices "to ensure that its distributors earn sufficient profit." The case before us does not involve the kind of hypotheticals referred to in the paragraph. I wonder therefore if you might not omit the entire paragraph, or at least the portion beginning with the words "For example ..."?

Page 9-10, n. 8: You refer to a manufacturer who "has announced its resale prices", whereas I assume you intend to refer to one who has suggested the prices that it believes its distributors should charge. If such a suggestion were answered with a memorandum saying: "I acquiesce", I think the memorandum would tend to prove an agreement to resell only at the suggested price. Even if I am wrong, however, the hypothesis in the footnote is sufficiently different from the evidence in this case that I hope you can omit it.

Page 13, in the second sentence of part IV: Should you not insert the words "the possibility of" between "exclude" and "independent."

Page 8, in the second sentence of the last paragraph: You suggest that an inference of agreement based on evidence of complaints is always impermissible. Perhaps the sentence should read "Permitting antitrust liability to be imposed on the basis of complaints, without more, could deter or penalize perfectly legitimate conduct." You also might consider dropping a footnote at that point stating that you are not suggesting that evidence of complaints has no probative value at all but only that additional evidence is required before the record is sufficient to support a finding of an unlawful contract, combination or conspiracy.

If you can accommodate these concerns, I will join your opinion.

Respectfully,

A handwritten signature in cursive script, appearing to read "John F. Powell".

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1984

Re: 82-914 - Monsanto v. Spray-Rite

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



February 21, 1984

Re: 82-914 - Monsanto v. Spray-Rite

Dear Lewis:

Please join me.

Respectfully,

A handwritten signature, likely of Justice Powell, is written below the word "Respectfully,".

Justice Powell

Copies to the Conference

P.S. to LFP: I really appreciate your taking the time to accommodate my suggestions.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 10, 1984

Re: No. 82-914 Monsanto Company v. Spray-Rite
Service Corporation

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference