The Burger Court Opinion Writing Database

Federated Department Stores, Inc. v. Moitie

452 U.S. 394 (1981)

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

See my note below 10/7

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

CHAMBERS OF
THE CHIEF JUSTICE

October 3, 1980

RE: 79-1517 - Federated Dept. Stores, Inc. v. Moitie

MEMORANDUM TO THE CONFERENCE:

I have decided to "let this one go."

Regards,

WEB

I voted to Grant as CA9 misapplied res judicata principles.

At Sept. Cf. this was relisted for Byron. If he changes to a Grant, this will be granted.

Otherwise, I'll simply be recorded. I won't write.

10/7

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

CHAMBERS OF
THE CHIEF JUSTICE

November 6, 1980

RE: No. 79-1517 - Federated Dept. Stores, Inc. v. Moitie and Brown

Dear Bill,

I join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1981

79-1517 - Federated Department Stores, Inc. v. Moitie

Dear Bill:

I join.

Regards,

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 6, 1980

RE: No. 79-1517 Federated Department Stores, Inc. v. Marilyn Mottie and Floyd R. Brown, etc.

Dear Bill:

I also, like Byron, would like to have noted at the foot of your opinion that Mr. Justice Brennan dissents from the Court's summary disposition and would give the case plenary consideration.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 4, 1981

RE: No. 79-1517 Federal Department Stores v. Moitie

Dear Bill:

In due course I will be circulating a dissent in the above.

Sincerely,

Justice Rehnquist

cc: The Conference

Federated Department Stores, Inc. v. Moitie

No. 79-1517

JUSTICE BRENNAN, dissenting.

In its eagerness to correct the decision of the Court of Appeals for the Ninth Circuit, the Court today disregards statutory restrictions on federal court jurisdiction, and, in the process, confuses rather than clarifies long-established principles of res judicata. I therefore respectfully dissent.

I

Respondent Floyd R. Brown[1] filed this class action lawsuit (Brown II) against petitioners in California State court. The complaint stated four state law causes of action: (1) fraud and deceit, (2) unfair business practices, (3) civil conspiracy, and (4) restitution. Plaintiffs' Complaint, ¶¶ 11-14, JA 99-101. It alleged "at least $600" damages per class member, and in addition sought "appropriate multiple damages," exemplary and punitive damages, interest from date of injury, attorneys' fees and costs, and other relief. JA 101-102. All four of the causes of action rested wholly on California statutory or common law; none rested in any fashion on federal law.

Nonetheless, petitioners removed the suit to the United States District Court for the Northern District of California,

[1]Since the action by respondent Moitie has been voluntarily dismissed, the only remaining issues concern the claims of respondent Brown.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

JUN 12 19

No. 79-1517

Federated Department Stores, Inc., et al., Petitioners, *v.* Marilyn Moitie and Floyd R. Brown, etc.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1981]

JUSTICE BRENNAN, dissenting.

In its eagerness to correct the decision of the Court of Appeals for the Ninth Circuit, the Court today disregards statutory restrictions on federal court jurisdiction, and, in the process, confuses rather than clarifies long-established principles of res judicata. I therefore respectfully dissent.

I

Respondent Floyd R. Brown [1] filed this class action lawsuit (*Brown II*) against petitioners in California state court. The complaint stated four state law causes of action: (1) fraud and deceit, (2) unfair business practices, (3) civil conspiracy, and (4) restitution. Plaintiffs' Complaint, ¶¶ 11–14, JA 99–101. It alleged "not less than $600" damages per class member, and in addition sought "appropriate multiple damages," exemplary and punitive damages, interest from date of injury, attorneys' fees and costs, and other relief. JA 101–102. *All four* of the causes of action rested wholly on California statutory or common law; *none* rested in any fashion on federal law.

Nonetheless, petitioners removed the suit to the United States District Court for the Northern District of California,

[2] Since the action by respondent Moitie has been voluntarily dismissed, the only remaining issues concern the claims of respondent Brown.

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 6, 1980

Re: No. 79-1517, Federated Dept. Stores v. Moitie

Dear Bill,

I agree with your proposed per curiam.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 30, 1981

Re: No. 79-1517, Federated Dept. Stores, Inc.
v. Moitie

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 6, 1980

Re: 79-1517 - Federated Department Stores, Inc.
v. Moitie and Brown

Dear Bill,

Please note at the foot of your opinion that Mr. Justice White dissents from the Court's summary judgment and would give the case plenary consideration.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 5, 1981

Re: 79-1517 - Federated Department Stores, Inc. v. Moitie and Brown.

Dear Bill,

I shall await the dissent in this case.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1981

Re: 79-1517 - Federated Department Stores, Inc. v. Moitie and Brown

Dear Bill,

Please join me.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 10, 1980

Re: No. 79-1517 - Federated Department Stores, Inc. v. Moitie and Brown

Dear Bill:

Please note in your opinion that I dissent and would give the case plenary review.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 10, 1981

Re: No. 79-1517 - Federated Department Stores v. Moitie and Brown

Dear Harry:

Please join me.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 30, 1980

Re: No. 79-1517 - Federated Department Stores, Inc. v. Moitie

Dear John:

If there are not four votes to grant in this case, will you please have the public record show the following:

"MR. JUSTICE BLACKMUN would grant certiorari and give this case plenary consideration."

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 6, 1980

Re: No. 79-1517 - Federated Department Stores v. Moitie, et al.

Dear Bill:

Would you please note that I am in the same position as Byron, that is, I dissent from the summary judgment and would give the case plenary consideration.

Sincerely,

HAB

Mr. Justice Rehnquist

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: MAY 6 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-1517

Federated Department Stores, Inc., et al., Petitioners, *v.* Marilyn Moitie and Floyd R. Brown, etc.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1981]

JUSTICE BLACKMUN, concurring in the judgment.

While I agree with the result reached in this case, I write separately to state my views on two points.

First, I, for one, would not close the door upon the possibility that there are cases in which the doctrine of res judicata must give way to what the Court of Appeals referred to as "overriding concerns of public policy and simple justice." 611 F. 2d 1267, 1269 (CA9 1980). Professor Moore has noted: "Just as res judicata is occasionally qualified by an overriding, competing principle of public policy, so occasionally it needs an equitable tempering." 1B Moore's Federal Practice ¶ 0.405 [12], at 791 (1974) (footnote omitted). See also *Reed* v. *Allen*, 286 U. S. 191, 209 (1932) (Cardozo, J., joined by Brandeis and Stone, JJ., dissenting) ("A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity"). But this case is clearly not one in which equity requires that the doctrine give way. Unlike the nonappealing party in *Reed*, respondents were not "caught in a mesh of procedural complexities." *Ibid.* Instead, they made a deliberate tactical decision not to appeal. Nor would public policy be served by making an exception to the doctrine in this case; to the contrary, there is a special need for strict application of res judicata in complex multiple party actions of this sort so as to discourage "break-away" litigation. Cf.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 30, 1980

No. 79-1517 Federated Department Stores, Inc. v. Moitie and Brown

Dear Bill:

Please join me in your dissent.

Sincerely,

Lewis

Mr. Justice Rehnquist

Copies to the Conference

LFP/lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 6, 1980

79-1517 Federated Dept. Stores v. Moitie and Brown

Dear Bill:

I agree with your Per Curiam in the above case.

Sincerely,

L. Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 1, 1981

79-1517 Federal Department Stores v. Moitie

Dear Bill:

Please join me.

Sincerely,

L.F.P.

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

May 1, 1981

79-1517 Federal Department Stores v. Moitie

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Bill: I wonder about the last two sentences in fn. 2, beginning: "In addition . . ." These sentences could be read to say that a defendant may remove to federal court where the federal issue supporting removal, here res judicata, is raised in the answer. I doubt you intend this meaning since a case may be removed only the basis of the allegations of the complaint.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

FEDERATED DEPARTMENT STORES, INC., ET AL. *v.* MARILYN MOITIE AND FLOYD R. BROWN, ETC.

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

No. 79-1517. Decided November —, 1980

MR. JUSTICE REHNQUIST, dissenting.

This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and the matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Traveling Men's Association*, 283 U. S. 522, 525 (1931). In this case the Court of Appeals declined to apply res judicata to bar respondents' relitigation of a settled matter solely because other litigants in separate cases had successfully appealed, although respondents had not. Because this decision ignores the compelling needs served by the doctrine of res judicata and threatens to undermine its efficacy, and is in direct conflict with decisions of this Court, I would grant certiorari.

In the wake of an antitrust suit filed by the United States, seven parallel civil actions were filed seeking treble damages on behalf of proposed classes of retail purchasers of women's clothing from petitioners' stores. The actions were transferred to a single federal judge who dismissed them on the ground that plaintiffs had not alleged an injury to their business or property under the Clayton Act. 426 F. Supp. 880 Five of the cases were appealed, but the single counsel representing plaintiffs in both *Moitie I* and *Brown I* decided not to appeal, await expiration of the time in which to appeal, and then refile the two actions, in substantially the same form, in state court. Petitioners removed these new actions, *Moitie II* and *Brown II*, to federal court and successfully moved, on July 8, 1977, to have them dismissed on the

P. 1, 5

...he Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqui

Circulated: _____

...culated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

FEDERATED DEPARTMENT STORES, INC., ET AL. *v.* MARILYN MOITIE AND FLOYD R. BROWN, ETC.

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

No. 79-1517. Decided November —, 1980

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and the matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Traveling Men's Association*, 283 U. S. 522, 525 (1931). In this case the Court of Appeals declined to apply res judicata to bar respondents' relitigation of a settled matter solely because other litigants in separate cases had successfully appealed, although respondents had not. Because this decision ignores the compelling needs served by the doctrine of res judicata and threatens to undermine its efficacy, and is in direct conflict with decisions of this Court, I would grant certiorari.

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

FEDERATED DEPARTMENT STORES, INC., ET AL. *v.* MARILYN MOITIE AND FLOYD R. BROWN, ETC.

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

No. 79-1517. Decided November —, 1980

PER CURIAM.

This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Traveling Men's Association*, 283 U. S. 522, 525 (1931). In this case the Court of Appeals declined to apply res judicata to bar respondents' relitigation of a settled matter solely because other litigants in separate cases had successfully appealed, although respondents had not. Because this decision ignores the policy needs served by the doctrine of res judicata and threatens to undermine its efficacy, and is in direct conflict with decisions of this Court, we grant certiorari and reverse.

In the wake of an antitrust suit filed by the United States, seven parallel civil actions were filed seeking treble damages on behalf of proposed classes of retail purchasers of women's clothing from petitioners' stores. The actions were transferred to a single federal judge who dismissed them on the ground that plaintiffs had not alleged an injury to their business or property under the Clayton Act. 426 F. Supp. 880. Five of the cases were appealed, but the single counsel representing plaintiffs in both *Moitie I* and *Brown I* decided not to appeal, await expiration of the time in which to appeal, and then refile the two actions, in substantially the same form, in state court. Petitioners removed these new actions, *Moitie II* and *Brown II*, to federal court and successfully moved, on July 8, 1977, to have them dismissed on the

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

From: Mr. Justice Rehnq
APR 3 0 8
Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1517

Federated Department Stores, Inc., et al., Petitioners, v. Marilyn Moitie and Floyd R. Brown, etc.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata. The court held that res judicata does not bar relitigation of an unappealed adverse judgment where, as here, other plaintiffs in similar actions against common defendants successfully appeal the judgments against them. We disagree with the view taken by the Court of Appeals for the Ninth Circuit and reverse.

I

In 1976 the United States brought an antitrust action against petitioners, owners of various department stores, alleging that they had violated § 1 of the Sherman Act, 15 U. S. C. § 1, by agreeing to fix the retail price of women's clothing sold in Northern California. Seven parallel civil actions were subsequently filed by private plaintiffs seeking treble damages on behalf of proposed classes of retail purchasers, including that of respondent Moitie in state court (*Moitie I*) and respondent Brown (*Brown I*) in the United States District Court for the Northern District of California. Each of these complaints tracked almost verbatim the allegations of the Government's complaint, though the *Moitie I*

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 1, 1981

Re: 79-1517 Federated Department Stores v. Moitie

Dear John:

In response to your letter of April 30, 1981, it certainly was not my intention to foreclose the pursuit of state law claims. Indeed, I had thought that my discussion on the bottom of page 8 expressly left open that possibility. In any event, I am willing to make whatever changes are necessary in order to clarify the point.

With respect to your suggestion that I omit some of the description of the facts of Reed v. Allen, I am certainly willing to consider that suggestion. I confess, however, that I do not know what impact that would have on the overall result. The doctrine of res judicata as espoused in Reed has been reaffirmed many times.

Sincerely,

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 4, 1981

Re: No. 79-1517 Federated Department Stores v. Moitie

Dear John:

I will make the change in footnote 2 which you suggest.

Sincerely,

WHR

Justice Stevens

cc: Copies to the Conference

STYLISTIC CHANGES THROUGHOUT

P.3

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

1st DRAFT

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1517

Federated Department Stores, Inc., et al., Petitioners, *v.* Marilyn Moitie and Floyd R. Brown, etc.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1981]

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I

In 1976 the United States brought an antitrust action against petitioners, owners of various department stores, alleging that they had violated § 1 of the Sherman Act, 15 U. S. C. § 1, by agreeing to fix the retail price of women's clothing sold in Northern California. Seven parallel civil actions were subsequently filed by private plaintiffs seeking treble damages on behalf of proposed classes of retail purchasers, including that of respondent Moitie in state court (*Moitie I*) and respondent Brown (*Brown I*) in the United States District Court for the Northern District of California. Each of these complaints tracked almost verbatim the allegations of the Government's complaint, though the *Moitie I*

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 79-1517 Federated Department Stores, Inc. v. Moitie & Brown

Since I think, mirabile dictu, that Bill Brennan's dissen- does raise some legitimate undecided questions with respect to the second basis for federal jurisdiction set forth in fn. 2, p. 3, of my opinion for the Court circulated May 6th, and since I do not believe that it is necessary to decide this question in order to support the opinion as it presently stands, I propose deleting from fn. 2 all of the language beginning with the sentence which begins on the eighth line from the bottom of the page: "In addition ... etc.".

Sincerely,

P.S. Naturally, if any of you who have already joined object to this change, I will reconsider.

P.3

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUN 11 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1517

Federated Department Stores, Inc., et al., Petitioners, *v.* Marilyn Moitie and Floyd R. Brown, etc. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata. The court held that res judicata does not bar relitigation of an unappealed adverse judgment where, as here, other plaintiffs in similar actions against common defendants successfully appeal the judgments against them. We disagree with the view taken by the Court of Appeals for the Ninth Circuit and reverse.

I

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1981

MEMORANDUM TO THE CONFERENCE

Re: Hold Memo in No. 79-1517 Federated Department Stores, Inc. v. Moitie

The only case held for Moitie is No. 80-1491 Teletronics Services, Inc. v. LM Ericsson Telecommunications, Inc. In return for guaranteeing bank loans for petr, resp took a security interest in certain rental agreements between petr and its customers. When petr defaulted on the loans, resp paid the debt and brought suit in state court to recover against petr. Petr responded by bringing suit in federal court, alleging violations of the securities laws and various restraints of trade under the Sherman Act. The District Court (Knapp) dismissed the complaint for failure to state a claim. No appeal was filed. Petr then secured new counsel and filed a second complaint alleging different violations of the Sherman Act. Although the District Court (Lasker) initially denied resp's motion to dismiss--he relied on various equitable considerations such as Judge Knapp's failure to discuss the merits of the antitrust claim--he subsequently granted the motion to dismiss on grounds of res judicata. He cited Fed. Rule Civ. Pro. 41(b) and held that petr had ample opportunity to plead its antitrust claims in the first action.

The Court of Appeals of the Second Circuit affirmed. A judgement on the merits, such as Judge Knapp's decision, is res judicata not only to all matters pleaded, but to all that might have been pleaded. The CA rejected petr's contention that because its first counsel was inexperienced, it should be excused from the application of res judicata. It also rejected petr's argument that the public policy

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 6, 1980

Re: 79-1517 - Federated Department Stores
v. Moitie

Dear Bill:

Please join me.

Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 30, 1981

Re: 79-1517 - Federated Department Stores
v. Moitie

Dear Bill:

Your footnote 2 on page 3 gives me some problems. If the complaint filed in the State court properly stated a cause of action under State law, it does not seem to me that the federal court could characterize the claim as "federal in nature." Moreover, if the defect in the federal claim is merely the fact that a consumer was not considered to be a person who could suffer an injury to his business or property within the meaning of § 4 of the Clayton Act, it is difficult to see why the disposition of the federal claim on that ground should have any bearing on the viability of the State claim.

I also wonder if it is necessary to take such a strong position endorsing the majority position in Reed v. Allen, 286 U.S. 191. I think the dissent in that case by Justice Cardozo, joined by Justice Brandeis and Justice Stone, had by far the better of the argument.

In sum, I would like to join your opinion because I agree with most of what you say, but wonder if you would consider omitting the description of the facts of Reed in the text on page 6 and modifying footnote 2 in a way that would not foreclose the plaintiff from maintaining his State law claim, if in fact there is any validity to it. In final analysis, if this is not done, the Court will hold that the State law antitrust claim has been foreclosed by a failure to appeal an erroneous interpretation of § 4 of the Clayton Act which surely had nothing to do with the merits of the State litigation.

Respectfully,

Justice Rehnquist
Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 1, 1981

Re: 79-1517 - Federated Dept. Stores v. Moitie

Dear Bill:

With respect to the description of the facts in Reed v. Allen, I suppose I should simply defer to your discretion as author of the opinion.

With respect to the possible foreclose of the pursuit of State law claims, it seems to me that the problem is presented by the extensive discussion in footnote 2 on pages 3 and 4. If you could change the second sentence which now merely says "we agree" to read something like this: "we agree that at least some of the claims had a sufficient federal character to support removal" I could join your opinion.

Respectfully,

J.P.S.

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 8, 1981

Re: 79-1517 - Federated Department Stores
v. Moitie

Dear Bill:

Please join me.

Respectfully,

JPS

Justice Rehnquist

Copies to the Conference