The Burger Court Opinion Writing Database

G.D. Searle & Co. v. Cohn

455 U.S. 404 (1982)

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 28, 1982

Re: No. 80-644, G.D. Searle & Co. v. Cohn

Dear Lewis:

I join your opinion. I hope you will consider adding a brief observation concluding that the tolling provision violates the Commerce Clause under Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974), because it penalizes corporations conducting wholly interstate businesses unless they do not subject themselves to state licensure.

Regards,

WEB

Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 6, 1982

RE: No. 80-644 G.D. Searle & Co. v. Cohn

Dear Harry:

I agree.

Sincerely,

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 9, 1982

Re: 80-644 - Searle & Co. v. Cohn

Dear Harry,

I join and thus do not insist that the Commerce Clause issue be decided now. I note, however, your statement on page 10 that the "analysis of the Commerce Clause issue most likely will be affected by the extent of the registration or appointment burden imposed upon interstate commerce by New Jersey law. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)." This may infer that this is a cantaloupe case and not a discrimination case, thereby coming close to deciding part of the Commerce Clause issue.

Sincerely yours,

Byron

Justice Blackmun

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 29, 1982

Re: No. 80-644 - G. D. Searle & Company v. Susan Cohn and Walter Cohn

Dear Harry:

Please join me.

Sincerely,

T.M.

T.M.

Justice Blackmun

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice [illegible]
Justice [illegible]
Justice [illegible]
Justice [illegible]
Justice [illegible]

From: Justice Blackmun

Circulated: JAN 5 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–644

G. D. SEARLE & COMPANY, PETITIONER, *v.*
SUSAN COHN AND WALTER COHN

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

[January ——, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

A New Jersey statute, N. J. Stat. Ann. § 2A:14–22 (West) (1952), tolls the limitation period for an action against a foreign corporation that is amenable to jurisdiction in New Jersey courts but that has in New Jersey no person or officer upon whom process may be served. The United States Court of Appeals for the Third Circuit in this case held that the statute does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. We agree, but we vacate the Court of Appeals' judgment and remand the case for consideration of petitioner's Commerce Clause challenge to the statute.

I

Respondents, Susan and Walter Cohn, are husband and wife. In 1963, Susan Cohn suffered a stroke. Eleven years later, in 1974, the Cohns sued petitioner, G. D. Searle & Co., in the Superior Court of New Jersey, Essex County, alleging that Susan Cohn's stroke was caused by her use of an oral contraceptive manufactured by petitioner.[1] Petitioner was

[1] Petitioner is a Delaware corporation with principal place of business in Illinois. At all times pertinent to this case, petitioner was engaged in the business of manufacturing and selling pharmaceutical products.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 7, 1982

Re: No. 80-644 - G. D. Searle & Co. v. Cohn

Dear Lewis:

Thank you for your letter of January 6.

While I must agree that the respondents "put up" a lot of "smoke" as to New Jersey law, and that you are probably right about the ultimate resolution of the Commerce Clause issue, I feel strongly that we should not decide it on the present record. The Court can only profit, not lose, from Third Circuit guidance when they reconsider the case on remand. As to this, I mention two things:

1. The Third Circuit opinion was written by Judge Leonard I. Garth. He is from New Jersey. While I do not know Judge Garth well, I have gained the impression he is a good solid judge and should have a feel for the law of his State. The panel undoubtedly will continue to rely on him.

2. The situation as to the "Holds for Searle" also persuades me. Among these holds are two cases from the New Jersey state courts. One is Valmohos itself with its opaque footnote. (In the opinion I should have noted the pendency of the appeal, and I shall do so on the next draft.) If and when Searle is decided, I shall recommend that we vacate and remand Valmohos for reconsideration in the light of Searle. If the Conference follows this recommendation, the remand, of course, will be a few days after the decision in Searle, but it surely will take place before the Third Circuit gets around to reconsidering Searle. The Circuit will note the Valmohos remand -- or that fact will be called to its attention -- and will probably withhold action in Searle until the New Jersey Court moves once again in Valmohos. In fact, this is precisely what happened in the Searle case itself; the Third Circuit waited for the Valmohos decision.

Another hold for Searle comes from the New Jersey Appellate Division. It is No. 80-2003, Honda Motor Co. v. Coons. I shall recommend that we dismiss that appeal for want of jurisdiction.

The presence of the two New Jersey cases on our docket indicates to me that the issue on the state side is an active one. It seems clear to me that we have nothing to lose by letting the answer to the Commerce Clause question first come from the state courts.

For what it may be worth, I am not sure the Commerce Clause issue was raised in the District Court in Searle. It was argued in the Court of Appeals. This is why I added the phrase "if it was properly raised below" at the very end of the opinion.

Sincerely,

Larry

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 11, 198

Re: No. 80-644 - G. D. Searle & Co. v. Cohn

Dear Byron:

Thank you for your note of January 9. You have a point. I am therefore eliminating the last two paragraphs of the opinion and replacing them with the following, which, I believe, will satisfy your concern:

> "The lone sentence in the Velmohos footnote by itself does not clearly demonstrate the correctness of either view or lucidly inform us as to what the state law is. We consider it unwise for us to pass upon the constitutionality of this aspect of New Jersey law when we are uncertain of the critical footnote's meaning, particularly in light of the fact that the lower courts in this case did not address the Commerce Clause or the state law issue. Consequently, we vacate the Court of Appeals' judgment and remand the case, so that the Court of Appeals may determine whether petitioner's Commerce Clause argument, if it was properly raised below, has merit."

Sincerely,

Harry

Justice White

cc: The Conference

pp. 3+10

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

From: Justice Blackmun

Circulated: _____

Recirculated: 1/14/82

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–644

G. D. SEARLE & COMPANY, PETITIONER, *v.*
SUSAN COHN AND WALTER COHN

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

[January ——, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

A New Jersey statute, N. J. Stat. Ann. §2A:14–22 (West) (1952), tolls the limitation period for an action against a foreign corporation that is amenable to jurisdiction in New Jersey courts but that has in New Jersey no person or officer upon whom process may be served. The United States Court of Appeals for the Third Circuit in this case held that the statute does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. We agree, but we vacate the Court of Appeals' judgment and remand the case for consideration of petitioner's Commerce Clause challenge to the statute.

I

Respondents, Susan and Walter Cohn, are husband and wife. In 1963, Susan Cohn suffered a stroke. Eleven years later, in 1974, the Cohns sued petitioner, G. D. Searle & Co., in the Superior Court of New Jersey, Essex County, alleging that Susan Cohn's stroke was caused by her use of an oral contraceptive manufactured by petitioner.[1] Petitioner was served under New Jersey's long-arm rule, N. J. Ct. Rule

[1] Petitioner is a Delaware corporation with principal place of business in Illinois. At all times pertinent to this case, petitioner was engaged in the business of manufacturing and selling pharmaceutical products.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 22, 198

Re: No. 80-644 - G. D. Searle & Co. v. Cohn

Dear Lewis:

I have reflected on our telephone conversation about the Commerce Clause. I have now decided to change footnote 7 to read as follows:

> [7]Petitioner also presses a due process claim. In the Court of Appeals, petitioner argued that the tolling statute violates due process "by unfairly and irrationally denying certain foreign corporations the benefit of the Statute of Limitations without furthering any legitimate societal interest." Brief of Defendant-Appellee and Cross-Appellant in Nos. 79-2406 & 79-2605 (CA3), p. 29. The Court of Appeals rejected petitioner's due process challenge to the statute at the same time that it rejected petitioner's equal protection contention. See 628 F.2d, at 808-809. Indeed, this due process argument is nothing more than a restatement of petitioner's equal protection claim. See Velmohos, 83 N.J., at 297, 416 A.2d, at 381.
>
> In this Court, petitioner has attempted to put forward a new due process argument. Petitioner notes that it can obtain the benefit of the statute of limitation by appointing an agent to accept service. See Velmohos, 83 N.J., at 293 n.10, 416 A.2d, at 378 n. 19; see also infra, at ____. Fearing that appointment of an agent might subject it to suit in New Jersey when there otherwise would not be the minimum contacts required for suit in that State under the Due Process Clause, see International Shoe Co. v. Washington, 326 U.S. 310 (1945), petitioner insists that New Jersey law violates due process by conditioning the benefit of the limitation period upon the appointment of a New Jersey agent. Because petitioner did not present this argument to the Court of Appeals, we do not address it. See United States v. Ortiz, 422 U.S. 891, 898 (1975).

This may or may not meet with your satisfaction.

Sincerely,

Justice Powell

cc: The Conference

pp. 2-9

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–644

G. D. SEARLE & COMPANY, PETITIONER, *v.*
SUSAN COHN AND WALTER COHN

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

[January ——, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

A New Jersey statute, N. J. Stat. Ann. § 2A:14–22 (West) (1952), tolls the limitation period for an action against a foreign corporation that is amenable to jurisdiction in New Jersey courts but that has in New Jersey no person or officer upon whom process may be served. The United States Court of Appeals for the Third Circuit in this case held that the statute does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. We agree, but we vacate the Court of Appeals' judgment and remand the case for consideration of petitioner's Commerce Clause challenge to the statute.

I

Respondents, Susan and Walter Cohn, are husband and wife. In 1963, Susan Cohn suffered a stroke. Eleven years later, in 1974, the Cohns sued petitioner, G. D. Searle & Co., in the Superior Court of New Jersey, Essex County, alleging that Susan Cohn's stroke was caused by her use of an oral contraceptive manufactured by petitioner.[1] Petitioner was served under New Jersey's long-arm rule, N. J. Ct. Rule

[1] Petitioner is a Delaware corporation with principal place of business in Illinois. At all times pertinent to this case, petitioner was engaged in the business of manufacturing and selling pharmaceutical products.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 24, 1982

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 80-644 - G. D. Searle & Co. v. Cohn

1. No. 80-629, Maren Engineering Corp. v. Velmohos. This appeal is from the New Jersey Supreme Court's decision with the opaque footnote that caused a majority of us to remand Searle on the Commerce Clause issue. The case is an interlocutory appeal of a pretrial motion to dismiss and thus presents a finality problem under Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). There are three possible dispositions: (1) We could simply dismiss for want of jurisdiction, because of the Cox problem. (2) We could dismiss, citing Cox. The citation would be somewhat unusual, but it would serve to eliminate any confusion for the Third Circuit in its further consideration of Searle. (3) We could vacate and remand for reconsideration in light of Searle. In so doing, we could ignore the possibility of the Cox problem. Or, we could implicitly fit this case into the fourth Cox exception, because "refusal immediately to review the state-court decision might seriously erode federal policy." 420 U.S., at 483. Although it is debatable whether refusal to vacate would "seriously" erode federal policy, by vacating we provide the New Jersey Supreme Court a chance to pass upon the meaning of its tolling provision and the Commerce Clause issue as soon as possible.

I favor the third option. On remand, the New Jersey Supreme Court could supply a definitive explanation of the Velmohos footnote before the Third Circuit decides the Searle remand.

2. No. 80-663, Kelsey-Hayes, Inc. v. Hopkins. In this case, a New Jersey Federal District Judge reached a conclusion opposite from that reached by the New Jersey Federal District Judge in Searle. The former rejected equal protection and due process challenges to the tolling provision. Both cases were appealed to the Third Circuit. The Court of Appeals consolidated them for hearing, reversed Searle, and affirmed Kelsey-Hayes in a single judgment. See the Searle Joint Appendix, at pp. 74a-75a. I suppose that when we vacated the judgment in Searle, technically we vacated the judgment in both cases. I suggest, however, that we err on the side of caution by granting, vacating, and remanding Kelsey-Hayes in light of Searle.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 6, 1982

80-644 G. D. Searle & Co. v. Cohn

Dear Harry:

A majority at Conference voted as you have written the opinion: to hold that the New Jersey statute does not violate the Equal Protection Clause, and to vacate and remand on the Commerce Clause question.

My vote, however, was to reverse on the Commerce Clause as I think it is properly here and a federal court on remand is unlikely to know any more about state law than we do. I did say that possibly I could join a remand, but I am now inclined to dissent. The respondent, Mr. Cohn, put up a lot of "smoke" as to New Jersey law. But on close examination, I concluded that none of his arguments is sound and his assertions of fact are questionable.

The New Jersey statute provides that registration requires a corporation to state that its agent is "an agent of the corporation upon whom process against the corporation may be served". There is no other provision in state law (that I could find) that authorizes appointment of an agent, and registration requires a foreign corporation to qualify to do business. In light of this, I would not read the New Jersey footnote you cite as creating an ambiguity.

We also have the categoric opinion of the Secretary of State, the responsible official, stating "that unless a foreign corporation has qualified to do business in New Jersey, they are unable to designate a registered agent for service of process".

Finally, if the Court is to remand on the Commerce Clause issue, should it not also leave open the Terry v.

Burke due process issue? It seems to me that this "unconstitutional condition" theory parallels the Commerce Clause analysis. As qualification to do business in New Jersey would constitute a waiver of minimum contacts defenses, this - it seems to me - would present both due process and Commerce Clause issues.

Sincerely,

Lewis

Justice Blackmun

lfp/ss

cc: The Conference

January 22, 1982

81-644 G.D. Searle & Co. v. Cohn

Dear Harry:

In accord with my Conference vote, I am circulating an opinion concurring in your dispositon of the equal protection isssue, but dissenting from the remand on the Commerce Clause.

As I mentioned in our telephone talk, I hope you will consider changing footnote 7 with respect to the due process argument of the petitioner. It is so closely related to Commerce Clause analysis that if one is remanded, I would think both should be. If you prefer to retain the note in its present form, I will not be able to concur fully in your Part II and will make an appropriate change in my opinion.

Sincerely,

Justice Blackmun

lfp/ss

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

From: Justice Powell

Circulated: JAN 26 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-644

G. D. SEARLE & COMPANY, PETITIONER, *v.*
SUSAN COHN AND WALTER COHN

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

[January ——, 1982]

JUSTICE POWELL, concurring in part and dissenting.

I concur in Parts I and II of the Court's opinion. In Part III of its opinion, the Court addresses the Commerce Clause question and "decline[s] to resolve" it because "neither the District Court nor the Court of Appeals addressed the question directly." A further reason assigned by the Court for remanding on this issue is that one sentence in a footnote to *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 293, n. 10, 416 A. 2d 372, 278, n. 10 (1980), is "ambiguous".

The Commerce Clause question was not presented to the District Court by petitioner,[1] and normally this would fully justify a remand. It was, however, presented and argued to the Court of Appeals for the Third Circuit. Petition for Cert., 6–7.[2] Curiously, that court did not mention the question in its opinion. Petitioner continued, as it had a right to do, to rely on the ground. Its petition for certiorari expressly included the question whether New Jersey's tolling statute "constitutes the imposition of a burden on interstate

[1] The District Court, apparently *sua sponte*, suggested that the tolling provision would violate the Commerce Clause but did not decide the question. See *ante*, at 9.

[2] Petition's assertion that it argued the Commerce Clause issue before the Court of Appeal is confirmed by its Third Circuit brief. See Brief of G. D. Searle & Co. in Nos. 79-2406 and 79-2605 (CA3), pp. 2, 33–38.

1, 3, 4, 6

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

From: Justice Powell

Stylistic Changes Throughout

Circulated: _____

Recirculated: FEB 1 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-644

G. D. SEARLE & COMPANY, PETITIONER, *v.*
SUSAN COHN AND WALTER COHN

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

[January ——, 1982]

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. In Part III of its opinion, the Court addresses the Commerce Clause question and "decline[s] to resolve" it because "neither the District Court nor the Court of Appeals addressed the question directly." A further reason assigned by the Court for remanding on this issue is that one sentence in a footnote to *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 293, n. 10, 416 A. 2d 372, 278, n. 10 (1980), is "ambiguous".

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 6, 1982

Re: No. 80-644 G. D. Searle & Co. v. Cohn

Dear Harry:

Please join me in your proposed opinion circulated January 5th.

Sincerely,

WHR

Justice Blackmun

cc: The Conference

Draft #3--DWD [0$0644i,0$0644if]

80-644 - G. D. Searle & Company v. Cohn

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

From: Justice Stevens

Circulated: [illegible]

Recirculated: _____

JUSTICE STEVENS, dissenting.

The equal protection question in this case is novel. I agree with the Court that there is a rational basis for treating unregistered foreign corporations differently from registered corporations because they are somewhat more difficult to locate and to serve with process. Thus, a tolling provision that merely gave plaintiffs a fair opportunity to overcome these difficulties, a longer period of limitations for suits against such corporations, or a tolling provision limited to corporations that had not filed their current address with the Secretary of State would unquestionably be permissible. But does it follow that it is also rational to deny such corporations the benefit of any statute of limitations? Because there is a rational basis for some differential treatment, does it automatically follow that any differential treatment is constitutionally permissible? I think not; in my view the Constitution requires a rational basis for the special burden imposed on the disfavored class as well as a reason for treating that class differently.

The Court avoids these troubling questions by noting that

1st PRINTED DRAFT

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The Court avoids these troubling questions by noting that the New Jersey Supreme Court has stated that an unrepresented foreign corporation may plead the defense of laches in an appropriate case. *Ante*, at 7. But there are material differences between laches—which requires the defendant to

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-644

G. D. SEARLE & COMPANY, PETITIONER *v.*
SUSAN COHN AND WALTER COHN

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

[January ——, 1982]

JUSTICE STEVENS, dissenting.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 6, 1882

No. 80-644 G. D. Searle & Co. v. Cohn & Cohn

Dear Harry,

Please join me in your opinion in the referenced case.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference