

# The Burger Court Opinion Writing Database

## *Merrell Dow Pharmaceuticals Inc. v. Thompson*

478 U.S. 804 (1986)

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

h3

CHAMBERS OF  
THE CHIEF JUSTICE

June 18, 1986

RE: 85-619 - Merrell Dow Pharmaceuticals v.  
Thompson

Dear John:

I join.

Regards,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 5, 1986

Dear Byron, Thurgood and Harry,

We four are in dissent in No. 85-  
619, Merrell Dow Pharmaceuticals v.  
Thompson. I'll try my hand at it.

Sincerely,

*Bill*

Justice White

Justice Marshall

Justice Blackmun

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 3, 1986

No. 85-619

Merrell Dow Pharmaceuticals  
v. Thompson

Dear John,

In due course, I shall circulate a  
dissent in the above.

Sincerely,

*Bill*

Justice Stevens

Copies to the Conference

No. 85-619

MERRELL DOW PHARMACEUTICALS, INC. v. THOMPSON

JUSTICE BRENNAN, dissenting.

Article III, §2 of the Constitution provides that the federal judicial power shall extend to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." We have long recognized the great breadth of this grant of jurisdiction, holding that there is federal jurisdiction whenever a federal question is an "ingredient" of the action, Osborn v. Bank of the United States, 9 Wheat. 738, 823 (1824), and suggesting that there may even be jurisdiction simply because a case involves "potential federal questions," Textile Workers v. Lincoln Mills, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting); see also, Osborn, supra, at 824; Martin v. Hunter's Lessee, 1 Wheat. 304 (1816); Pacific Railroad Removal Cases, 115 U.S. 1 (1885); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492-493 (1983).

28 U.S.C. §1331 provides, in language that parrots the language of Article III, that the district courts shall have original jurisdiction "of all civil actions arising under the Constitution, laws or treaties of the United States." Although this language suggests that Congress intended in §1331 to confer upon federal courts the full breadth of permissible "federal question" jurisdiction (an inference that is supported by the contemporary evidence, see Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 8, n. 8 (1983); Forrester,

Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Brennan**

Circulated:       JUL 3 1986      

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

      No. 85-619      

MERRELL DOW PHARMACEUTICALS INC., PETI-  
 TIONER *v.* LARRY JAMES CHRISTOPHER  
 THOMPSON, ET UX., ET AL.

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

[July —, 1986]

JUSTICE BRENNAN, dissenting.

Article III, § 2 of the Constitution provides that the federal judicial power shall extend to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." We have long recognized the great breadth of this grant of jurisdiction, holding that there is federal jurisdiction whenever a federal question is an "ingredient" of the action, *Osborn v. Bank of the United States*, 9 Wheat. 738, 823 (1824), and suggesting that there may even be jurisdiction simply because a case involves "potential federal questions," *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 471 (1957) (Frankfurter, J., dissenting); see also, *Osborn, supra*, at 824; *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816); *Pacific Railroad Removal Cases*, 115 U. S. 1 (1885); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U. S. 480, 492-493 (1983).

28 U. S. C. § 1331 provides, in language that parrots the language of Article III, that the district courts shall have original jurisdiction "of all civil actions arising under the Constitution, laws or treaties of the United States." Although this language suggests that Congress intended in § 1331 to confer upon federal courts the full breadth of permissible "federal question" jurisdiction (an inference that is supported

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 2, 1986

85-619 -

Merrell Dow Pharmaceuticals, Inc. v. Thompson

Dear John,

I await the dissent in this case.

Sincerely yours,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

July 3, 1986

85-619 - Merrell Dow Pharmaceuticals,  
Inc. v. Thompson

Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

Copies to the Conference

85-619-2-105

7/3/86

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 3, 1986

Re: No. 85-619-Merrell Dow Pharmaceuticals v.  
Thompson

Dear John:

I await the dissent.

Sincerely,

*J.M.*

T.M.

Justice Stevens

cc: The Conference

*M*

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

July 3, 1986

Re: No. 85-619 - Merrell Dow Pharmaceuticals, Inc.  
v. Thompson

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

*JM*

T.M.

Justice Brennan

cc: The Conference

82 77 -3 615:14

707  
2

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

July 3, 1986

Re: No. 85-619, Merrell Dow Pharmaceuticals, Inc.  
v. Thompson

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,



Justice Brennan

cc: The Conference

71-3-110:11

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 3, 1986

85-619 Merrell Dow v. Thompson

Dear John:

Please join me.

Sincerely,

Justice Stevens

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 3, 1986

619  
Re: No. 85-16 Merrell Dow Pharmaceuticals v. Thompson

Dear John,

I agree with all of your circulating opinion in this case except the paragraph carrying over from page 6 to 7 and dealing with the absence of a private right of action. That paragraph says in effect that since both parties agree that there is no private right of action in this case, we must assume that none of the four factors traditionally examined to determine whether there is a private right of action would support the existence of such a right. I think this is too sweeping a statement of our case law: I have never understood that if any one of the four "factors" in Cort v. Ash, 422 U.S. 66 (1975) were "positive," there was ipso facto a private right of action.

I also think that your restatement of factors (2) and (3) are not strictly in accord with the way those factors are stated in Cort, though they may conform to the statement in some other case. For your (2) you say "the indicia of legislative intent reveals a congressional purpose to preclude a private cause of action"; Cort states the factor this way: "there is no indication whatever in the legislative history...which suggests a congressional intention to vest in corporate shareholders a federal right of damages...." Your (3) is phrased that "a federal cause of action would be inconsistent with the underlying purposes of the legislative scheme"; in Cort, the third factor is stated to be "the remedy sought would not aid the primary congressional goal." 422 U.S., 84 (emphasis supplied throughout).

At the risk of being accused of breaking a butterfly on the wheel, I think the last sentence of the carryover paragraph reading "Congress must be understood to have intended that there be no private federal remedy for violations of the statute that it enacted" reverses the test set forth in California v. Sierra Club, 451 U.S. 287, 293 (1981), cited in footnote 7 at the bottom of page 7 of your

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circulating draft. California v. Sierra Club says that "[c]ases subsequent to Cort have explained that the ultimate issue is whether Congress intended to create a private right of action..." (emphasis supplied).

In sum, by suggesting that all four of these factors must be resolved against the private action claimant in order to defeat his claim, by loosening the statement of two of the factors, and by reversing the congressional intent which is relevant, I think this paragraph ends up considerably out of harmony with our case law in this area. Since the absence of a private right of action seems to be pretty much conceded in this case, couldn't you deal with the point more summarily than you do?

Sincerely,



Justice Stevens

cc: The Conference



CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

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

June 9, 1986

Re: 85-619 - Merrell Dow Pharmaceuticals Inc.  
v. Thompson

Dear John:

Please join me.

Sincerely,

Justice Stevens

cc: The Conference

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

From: Justice Stevens

Circulated: JUN 2 1986

Recirculated: \_\_\_\_\_

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-619

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER *v.* LARRY JAMES CHRISTOPHER THOMPSON, ET UX., ET AL.

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

[June —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the incorporation of a federal standard in a state law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States," 28 U. S. C. § 1331.

I

The Thompson respondents are residents of Canada and the MacTavishes reside in Scotland. They filed virtually identical complaints against petitioner, an Ohio corporation, that manufactures and distributes the drug "Bendectin." The complaints were filed in the Court of Common Pleas in Hamilton, Ohio. Each complaint alleged that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. In five of the six counts, the recovery of substantial damages was requested on common law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. In Count IV, respondents alleged that the drug Bendectin was "misbranded" in violation of the Federal Food, Drug and Cosmetic Act (FDCA), 21 U. S. C. § 301 *et seq.*, because its labeling did not provide adequate warning that its use was

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 3, 1986

Re: 85-619 - Merrell Dow Pharmaceuticals  
v. Thompson

Dear Bill:

Your criticism is well taken. I will try to satisfy your concerns in my next draft.

Respectfully,



Justice Rehnquist

Copies to the Conference

Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice O'Connor

STYLISH CHANGES THROUGHOUT  
 SEE PAGE 6, 7, 13

From: **Justice Stevens**

Circulated: \_\_\_\_\_

Recirculated: JUN 6 1986

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-619

MERRELL DOW PHARMACEUTICALS INC., PETI-  
 TIONER *v.* LARRY JAMES CHRISTOPHER  
 THOMPSON, ET UX., ET AL.

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

[June —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States," 28 U. S. C. § 1331.

### I

The Thompson respondents are residents of Canada and the MacTavishes reside in Scotland. They filed virtually identical complaints against petitioner, a corporation, that manufactures and distributes the drug Bendectin. The complaints were filed in the Court of Common Pleas in Hamilton County, Ohio. Each complaint alleged that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. In five of the six counts, the recovery of substantial damages was requested on common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. In Count IV, respondents alleged that the drug Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.* (1982 ed., Supp. II), because its labeling did not provide adequate

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

July 3, 1986

Re: 85-619 - Merrell Dow Pharmaceuticals  
v. Thompson

Dear Chief:

Because I will not be here on Monday, I would be most grateful if you could announce the Merrell Dow opinion for me.

Respectfully,



The Chief Justice

Copies to the Conference

JUL 11 1986

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 2, 1986

No. 85-619 Merrell Dow Pharmaceuticals v.  
Thompson

Dear John,

Please join me.

Sincerely,



Justice Stevens

Copies to the Conference