

In the

ORIGINAL

Supreme Court of the United States

G. D. SEARLE & COMPANY,

Petitioner,

v.

SUSAN COHN AND WALTER COHN

NO. 80-644

Washington, D. C.

December 7, 1981

Pages 1 thru 43

ALDERSON  REPORTING

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 G. D. SEARLE & COMPANY, :

4 Petitioner, :

5 v. : No. 80-644

6 SUSAN COHN AND WALTER COHN :

7 - - - - -:

8 Washington, D. C.

9 Monday, December 7, 1981

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:03 o'clock a.m.

13 APPEARANCES:

14 WILLIAM P. RICHMOND, ESQ., Chicago, Illinois;

15 on behalf of the Petitioner.

16 WALTER R. COHN, ESQ., South Orange, New

17 Jersey; on behalf of the Respondents.

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1	<u>C O N T E N T S</u>	
2	<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
3	WILLIAM P. RICHMOND, ESQ.,	
4	on behalf of the Petitioner	3
5	WALTER R. COHN, ESQ.,	
6	on behalf of the Respondents	18
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1 discriminatory fashions.

2 QUESTION: There is no question, Mr. Richmond, is
3 there, that Searle does business in New Jersey, and is
4 subject to the long arm statute?

5 MR. RICHMOND: There is no dispute in this case,
6 Your Honor, that New Jersey does have long arm jurisdiction
7 over G. D. Searle and Company. That is correct. There is
8 also no dispute in this case that Searle does not do
9 business within the state for purposes of its qualification
10 statute.

11 Tolling statutes exist in many states, but their
12 purpose is to protect a plaintiff against having his cause
13 of action lost as a result of not being able to serve the
14 defendant within the state, but the New Jersey statute has a
15 unique and critical difference. In New Jersey, the only way
16 a foreign corporation may get the benefit of a statute of
17 limitations is by registering to do business within the
18 state. This means that New Jersey denies the statute of
19 limitations to all corporations that may be served by long
20 arm jurisdiction.

21 QUESTION: Mr. Richmond, does your opposition
22 agree with that? I take it it is your position that to
23 appoint an agent for service, you must qualify to do
24 business within the state of New Jersey.

25 MR. RICHMOND: Yes, sir. Our position is that

1 there is simply no procedure under New Jersey law by which a
2 corporation could appoint an agent for service of process
3 without more. The plaintiffs--

4 QUESTION: Does your opposition agree with that?

5 MR. RICHMOND: No, but the opposition's position
6 is based upon a footnote in the Velmohos case from the New
7 Jersey Supreme Court. The court was not considering in that
8 footnote the extent of the qualification which would be
9 necessary in order to appoint an agent for service of
10 process. All the court was doing was addressing the
11 question of whether a corporation could terminate the
12 running of the statute of limitations by appointing an
13 agent, and the body of the Velmohos case makes it obvious
14 that the court was considering that only two kinds of
15 defendants could be exempted from the statute of
16 limitations. One was the domestic corporation and the other
17 one was the one that was licensed within the state. As I
18 say --

19 QUESTION: If there is any question about the New
20 Jersey law here, certainly we can't determine it, can we?

21 MR. RICHMOND: No, sir. We agree entirely that
22 the New Jersey Supreme Court has the right to interpret its
23 statute. However --

24 QUESTION: What about the court of appeals,
25 though? Did the court of appeals have anything to say about

1 it? The Third Circuit?

2 MR. RICHMOND: The court of appeals, as a matter
3 of fact, adopted obviously the interpretation of the New
4 Jersey law by the Supreme Court of New Jersey. However, the
5 New Jersey Supreme Court was not addressing the point that
6 the respondent here is arguing. The New Jersey Supreme
7 Court in Velmohos was not stating that in fact the New
8 Jersey statutes permitted a designation of agents for
9 service of process without more.

10 As I say, it was merely that footnote. The body
11 of the case makes it obvious that what they were addressing
12 was the question of only two exemptions. One was for the
13 domestic corporation, and the other was for the corporation
14 license in the state, that is, qualified. Now, many
15 companies, like Searle, may not be sued in New Jersey except
16 under long arm jurisdiction. All they do in New Jersey is
17 send their products into the state for eventual sale, and
18 they promote the products. They don't have offices there,
19 other facilities, and they are not doing business there.

20 These companies are subject, however, to product
21 liability suits for -- in instances where citizens of New
22 Jersey claim that the products have caused them some harm.
23 Then, long arm jurisdiction is available. As a matter of
24 fact, in this case, long arm jurisdiction was in fact used
25 to serve process on Searle. This happened ten years after

1 the event which gives rise to the cause of action here, and
2 four years after the plaintiffs concede that they realize
3 that they had a cause of action, or discovered it.

4 The New Jersey tolling statute therefore has the
5 effect of never foreclosing the plaintiff's case on
6 limitations against corporations which may be sued under
7 long arm jurisdiction.

8 QUESTION: Counsel, there would still be some kind
9 of a ~~Latchees~~ defense, I suppose, eventually.

10 MR. RICHMOND: Yes, Your Honor, there would
11 perhaps be a ~~Latchees~~ defense, although that is an equitable
12 remedy. This is a law case. But ~~Latchees~~ would certainly be
13 an inadequate substitute for the certainty and
14 predictability of a statute of defense based -- a statute of
15 limitations defense. There is simply no comparison between
16 the two defenses on the basis of planning opportunities for
17 the corporation or its ability to have a reliable defense
18 against liability.

19 QUESTION: What would be the other effects on the
20 company if it went ahead and appointed a statutory agent in
21 New Jersey for service?

22 MR. RICHMOND: If it were compelled to appoint a
23 statutory agent for a service of process, the corporation
24 would thereby be subject to the requirements of the New
25 Jersey law which are applicable to domestic corporations.

1 It would have to have an office for service of process. It
2 would have to file reports. It would have to pay franchise
3 taxes. Furthermore, and at the heart of --

4 QUESTION: Has that been resolved in any
5 particular New Jersey case? It is not possible to merely
6 designate some statutory agent there, without more?

7 MR. RICHMOND: I don't believe it has been
8 resolved in any New Jersey case, and I believe the reason is
9 that there is no New Jersey statute which authorizes such a
10 procedure. It is the position of the New Jersey Secretary
11 of State and our position in this case that there is simply
12 no provision in the law which permits that. If you examine
13 the corporation law, it has only provisions which provide
14 for full scale qualification, not simply for designation of
15 an agent for service of process.

16 Furthermore, even if you could only appoint an
17 agent for service of process, it would still create the
18 problem of the burden that we are talking about, because the
19 corporation would therefore be forced to make itself
20 available for lawsuits which would be filed and would not
21 necessarily satisfy the standard of minimum contacts or
22 fairness.

23 QUESTION: Is it your position that that doctrine
24 would then no longer be applicable?

25 MR. RICHMOND: I am sorry, Your Honor. Which

1 doctrine? Our position is that --

2 QUESTION: The minimum contacts requirement.

3 MR. RICHMOND: No, our position is that minimum
4 contacts are the touchstone and should be the basis upon
5 which any attempted requirement for licensing or other
6 impact on these foreign corporations is made. What would
7 happen if you submitted yourself to registration of an agent
8 is that lawsuits could be brought in New Jersey which would
9 not necessarily satisfy the minimum contacts requirement.

10 In New Jersey, there is a case to that effect, and
11 in this Court there is a case to that effect. Now, whether
12 that line of cases is correct or not is another matter, but
13 as it presently stands, I believe we would be subjecting
14 ourselves to the risk of cases which would not satisfy the
15 standard that we believe is at the heart of this type of
16 attempt at regulation.

17 QUESTION: Well, Mr. Richmond, isn't there also
18 inherent in your argument the claim that a state must have a
19 statute of limitations?

20 MR. RICHMOND: We believe that a state can have a
21 statute of limitations, but that it would not be
22 unconstitutional for it not to have one. What we say is
23 that whatever statute of limitations it decides to adopt, it
24 must do so evenhandedly.

25 QUESTION: So it is an equal protection.

1 MR. RICHMOND: It must be evenhanded, Your Honor.
2 It cannot discriminate as this one does merely on the basis
3 of whether or not you are a foreign corporation, and in this
4 instance we believe that the statute of limitations which is
5 here, that is, with the tolling provision as part of it,
6 definitely does discriminate. The state of New Jersey is
7 perfectly free to adopt a two-year, four-year, ten-year,
8 whatever statute of limitations or none at all if it
9 chooses, but it must do so evenhandedly, and that is our
10 position.

11 QUESTION: Under what provision?

12 MR. RICHMOND: Under what provision?

13 QUESTION: Yes.

14 MR. RICHMOND: Well, under --

15 QUESTION: Does the due process -- equal
16 protection or the commerce clause?

17 MR. RICHMOND: This is all three, Your Honor.
18 This is a commerce clause case. We contend that adoption of
19 a discriminatory statute of limitations burdens --

20 QUESTION: Did the court of appeals reject all of
21 those?

22 MR. RICHMOND: The court of appeals did not
23 address the commerce clause argument. It was certainly
24 presented to the district court in our memorandum. The
25 district court referred to it in a footnote in its opinion.

1 It found on equal protection but said that even aside from
2 this it would also violate the commerce clause.

3 We briefed it to the Third Circuit court of
4 appeals. Ten pages of our brief there were devoted to it.

5 QUESTION: So they necessarily rejected it, though.

6 MR. RICHMOND: They did not necessarily reject it.

7 QUESTION: Why?

8 MR. RICHMOND: They just didn't address it.

9 QUESTION: Well, I know, but you presented it, you
10 claim.

11 MR. RICHMOND: I don't believe that they --

12 QUESTION: And they sustained the statute over
13 your objection.

14 MR. RICHMOND: Yes, sir. They did so on equal
15 protection grounds.

16 QUESTION: What do you mean, they did so on equal
17 protection grounds?

18 MR. RICHMOND: They sustained the statute and
19 addressed their --

20 QUESTION: Well, I know, but they can't sustain
21 the statute unless they reject all of your constitutional
22 arguments.

23 MR. RICHMOND: To the extent that they rejected
24 it, Your Honor, they were, we feel, incorrect, and we are
25 asking here that they be reversed on the commerce clause

1 argument and on the other constitutional bases as well.
2 Now, what happens in connection with the commerce clause is
3 that this does indeed constitute a heavy burden on
4 interstate commerce because the defendants are placed in a
5 position of having the added expense and the possibility of
6 adverse judgments when New Jersey defendants would not be
7 subjected to those risks. There is no justification for
8 this discrimination, and every one of the legitimate state
9 interests can be fully accomplished by less discriminatory
10 means.

11 The justification for the tolling statute has been
12 basically on the ground that it makes it easier to serve
13 process, or that there are purported difficulties in service
14 of process for New Jersey residents against unrepresented
15 foreign corporations. However, when you look at the
16 justifications, we believe that it is clear that they are
17 either fictional or that they are in themselves improper.

18 The first of these is that it said that it is
19 harder to locate perhaps the out of state defendant.
20 However, in this case Searle is a Fortune 500 company.
21 There was never any question in this case as to whether or
22 not the defendant could be located.

23 Furthermore, the tolling statute really goes too
24 far in that it permits the plaintiff to avoid the statute of
25 limitations indefinitely, even though he does indeed find

1 out the location of the defendant. Decades could pass
2 during which the plaintiff knew the location of the
3 defendant, and yet he would not be subject to the statute of
4 limitations.

5 The problem of --

6 QUESTION: But he would be subject to Latchess in
7 those circumstances.

8 MR. RICHMOND: Yes, sir, to the extent that
9 Latchees can be considered any kind of adequate substitute
10 for the statute of limitations.

11 The problem of locating a defendant, were one to
12 exist, would also apply to in state and out of state
13 corporations alike, and there wouldn't be any basis for
14 discriminating only against out of state corporations. As a
15 matter of fact, a fly by night local corporation may often
16 be much more difficult to locate than a national corporation
17 which is of the size and visibilty of a G. D. Searle and
18 Company.

19 Now, there are alternates in the New Jersey law
20 which could be adopted in order to accomplish the legitimate
21 purpose and those include the notion that since New Jersey
22 now has a statute of limitations which applies only when the
23 plaintiff could reasonably be said to have discovered this
24 cause of action, it might be said that the plaintiff would
25 not be subject to limitations until the plaintiff reasonably

1 discovered the location of the defendant.

2 Also under existing law, as a matter of fact, the
3 toll -- the statute is tolled by the filing of the lawsuit,
4 and time is given after that within which to file the -- to
5 serve the defendant. As a practical matter, cases are not
6 dismissed in New Jersey when the plaintiff reports that he
7 is trying to find the defendant but has been unable to do so.

8 Finally, I suppose the state could adopt the
9 statute which tolls only when the defendant cannot be
10 located.

11 A second justification of the three -- there are
12 three justifications basically which have been used -- is
13 that the statute relieves the plaintiff of his burden under
14 New Jersey rules of satisfying the court that long arm
15 jurisdiction may not -- or that long arm service may not be
16 made within a state and of filing an affidavit to that
17 effect, but the alternative obviously is to ease access to
18 the use of long arm jurisdiction and service of process.

19 This would lift any burden that the plaintiff has
20 without continuing the discrimination against interstate
21 commerce. For example, the requirement for an affidavit at
22 all could be eliminated, and that would lift some of the
23 burden of the plaintiff. It could be adopted, a provision
24 could be adopted whereby elimination of proof to the court
25 at all that service of process by long arm jurisdiction

1 isn't possible would be an alternative.

2 I think few, if any, states have this affidavit
3 provision, probably because its only purpose is -- or the
4 only purpose it really serves is to facilitate harassment of
5 the plaintiff by the defendants in connection with service.

6 The third and last justification for the tolling
7 statute is that it relieves plaintiff of the burden of
8 satisfying the court that long arm jurisdiction or service
9 is consistent with due process. Respondent is apparently
10 saying that New Jersey has some interest in forcing the
11 defendant to waive its right to due process or in
12 simplifying litigation by eliminating the jurisdictional
13 questions.

14 This is too heavy a burden on interstate
15 commerce. The burden can't be justified on the basis that
16 the state is relieving the plaintiff of satisfying minimum
17 contact requirements. This Court in Shaffer v. Heitner said
18 that cost is just too high.

19 None of the justifications raised to support the
20 tolling statute based on the alleged difficulty of services
21 justifies the indefinite tolling of the statute of
22 limitations only against out of state corporations.
23 Requiring plaintiffs to utilize long arm jurisdiction is a
24 far less burdensome alternative to the present tolling
25 statute, but there, the respondents contend that this is not

1 a burden on interstate commerce at all, this tolling
2 statute. That is just plain wrong. It is a very heavy
3 burden, because the corporations are subjected to having
4 their assets and -- placed under constant jeopardy, being
5 subjected to suits and possibly judgments with local or in
6 state defendants would be able to have dismissed on summary
7 judgment or preliminarily.

8 The lower courts never relied on this
9 justification, presumably because they recognized, as this
10 Court has held in cases like *Allenburg*, that interstate
11 businesses may not be compelled to register, but the statute
12 effectively requires a registration by the corporation.
13 Indeed, the plaintiff argued in the district court that one
14 of the purposes of the tolling statute was to compel
15 registration by the interstate corporation.

16 The defendant is faced with choices under this
17 tolling statute which we believe to be improper. On the one
18 hand, it can fail to register, in which case it continues to
19 suffer the burden that has been imposed upon it, and may be
20 paying judgments when other corporations would not have to.

21 On the other hand, it can qualify in New Jersey,
22 but by qualifying, and nothing short of qualification is
23 available, by qualifying, it therefore gives up its right
24 not to be treated as a domestic corporation, and is
25 consenting to any and every suit, whether or not it

1 satisfies the minimum contacts requirement.

2 It is subjected also by compulsion to a licensing
3 scheme with all the attendant requirements for maintaining
4 an office, a registered office, filing reports, and paying
5 franchise taxes.

6 We also believe this statute violates --

7 QUESTION: Mr. Richmond, how is the franchise tax
8 computed in New Jersey? Do you know?

9 MR. RICHMOND: I do not know, Your Honor, how it
10 is computed. We also believe that the tolling statute
11 violates the Fourteenth Amendment, and it is a problem in
12 that it requires the corporation to give up its fundamental
13 right under due process not to be sued in the state unless
14 minimum contacts are met, that there is no substantial
15 relationship between this discrimination and any legitimate
16 state goal.

17 I might add that it is important to realize that
18 even if one were to qualify today, it would not cure the
19 harm caused by the tolling statute, because for two years,
20 the statute of limitations period, the corporation would
21 continue to be subject to suits which may have arisen many
22 years in the past and are still viable because of the prior
23 applicability of the tolling statute.

24 We respectfully submit on the basis of the
25 foregoing facts that the decision of the Third Circuit court

1 of appeals should be reversed. Thank you.

2 CHIEF JUSTICE BURGER: Mr. Cohn?

3 ORAL ARGUMENT OF WALTER R. COHN, ESQ.,

4 ON BEHALF OF THE RESPONDENTS

5 MR. COHN: Mr. Chief Justice, and may it please
6 the Court, the graveman of counsel's argument today appears
7 to have shifted greatly from a constitutional argument to a
8 burden because they have to register in New Jersey, and I
9 submit to this Court that that is not a proper statement of
10 the law of New Jersey.

11 QUESTION: Well, if it is a burden on interstate
12 commerce, that is a constitutional question, isn't it?

13 MR. COHN: Yes, Mr. Chief Justice, but it isn't a
14 burden, I submit to this Court, because of the fact that
15 just because they have representation in New Jersey, there
16 is nothing in the law and nothing before this Court which
17 says that they must register and become domesticated and
18 become subject to the franchise taxes.

19 The franchise taxes, Mr. Justice, are based upon
20 our gross income of the amount of business done in New
21 Jersey. It is a minimum tax. And they can be exempt from
22 that. There is another section of the New Jersey
23 Corporation Business Act, part of the Act quoted by both
24 counsel and myself, which gives a reporting section, and I
25 know it is not before the Court, but it is the same Act that

1 is before the Court.

2 And in the reporting section, a foreign
3 corporation has the option of exempting itself from any
4 franchise taxes by reporting and by having a representative
5 in New Jersey and by filing a form with the Secretary of
6 State. It is an amendment to the Act which was passed in
7 1973, and will you indulge me by mentioning it, and permit
8 me to, because of the question raised by the Court today?

9 The Searle Company, just as every other foreign
10 corporation, can report to the Secretary of State filing the
11 name of their agent, filing the name of their principal
12 office. The graveman of counsel's argument forgets the fact
13 that the purpose of this tolling statute is so that the
14 plaintiff can find the out of state defendant. There is no
15 problem on the in state defendant, as counsel says. They
16 must register with the Secretary of State to file a
17 certificate of incorporation in New Jersey, and they do, and
18 it is a simple procedure to find out the name and the
19 registered agent of an in state corporation. Just write to
20 the Secretary of State.

21 It is a simple procedure to find out the name and
22 address of the representative of the foreign corporation if
23 there is a representative available, and the very purpose of
24 this tolling statute is to have that representative
25 available so you can find your defendant.

1 QUESTION: Is there some provision in the New
2 Jersey statutes that permits designating an agent for
3 service without registering as a foreign corporation?

4 MR. COHN: We submit there is, sir, and we submit
5 that Justice --

6 QUESTION: Can you give me the citation?

7 MR. COHN: Under 14(a), there is a provision for a
8 trade name certificate of a corporation. It has to be
9 renewed every five years. Counsel for appellant has
10 submitted to the Court a reply brief with a letter for the
11 Secretary of State, and I have submitted to the Court a
12 letter refuting that argument. I think there are two
13 provisions --

14 QUESTION: Does the Secretary of State agree with
15 you?

16 MR. COHN: We have not had the opportunity to
17 present that to this Court, because the --

18 QUESTION: Well, you sound as though there were a
19 question about it.

20 MR. COHN: I don't think that there is, and I
21 didn't know that there was a question, Your Honor. I
22 thought that it was clear.

23 QUESTION: Well, the Court of Appeals didn't
24 mention it either way.

25 MR. COHN: No, sir, and I did not think that was a

1 question. I thought it was clear even as a result of
2 Justice Pashman's Footnote Number 10 in the Velmohos --

3 QUESTION: It wasn't even presented in the
4 Velmohos case.

5 MR. COHN: No, sir, so I thought that wasn't
6 before this Court, and I did not think it an issue to
7 present to this Court. I do not think it is a fact issue.
8 It is not part of your record. It is in nothing in any of
9 the documents in this Court except for the reply brief,
10 which brought in a letter which was not new material. If
11 the question had arisen below, we would have presented to
12 the Court not only Title 14(a) but the trade name
13 certificate provision of New Jersey in Title 56.

14 QUESTION: Well, let's assume you are right, that
15 they wouldn't have to register, they would just have to
16 designate an agent for service of process. Then you are
17 arguing there that, well, that is an additional burden that
18 they have to go through, but it is not much?

19 MR. COHN: Well, if the burden is filing a form
20 with the Secretary of State for a representation --

21 QUESTION: You are saying it is a trivial burden.

22 MR. COHN: It does require a \$15 filing fee, and I
23 think the question of \$15 is not a burden under our commerce
24 clause and a burden upon the defendant.

25 QUESTION: What if you designate the agent, as you

1 suggest, and pay your \$15. Then you have an agent for
2 service of process in the state.

3 MR. COHN: Yes, sir, and I --

4 QUESTION: And with respect to what kind of suits
5 could the registering corporation, could the designating
6 corporation be sued in New Jersey then?

7 MR. COHN: Any suit where there was a basis for
8 the bringing of the action in New Jersey, bearing in mind
9 the International Shoe versus Washington with a minimum
10 contact.

11 QUESTION: Well, you would say, though, that
12 suppose there are two corporations. One is fully
13 registered, fully registered, qualified -- and then the
14 other one has just designated an agent for service of
15 process, as you suggest. Now, could those two corporations
16 be sued in New Jersey on precisely the same kind of cases,
17 or would there be a difference?

18 MR. COHN: I think there might be a difference if
19 the corporation raised the defense of minimum contacts and
20 for non-convenience, because that is a defense to any
21 defendant, even if -- even, Your Honor, if the domesticated
22 corporation was sued in New Jersey. That corporation can
23 sue if the accident was in Florida with the New Jersey
24 corporation being a defendant, New Jersey being the
25 domesticator, and a New Jersey plaintiff. Under the form

1 non-convenience of the minimum contacts, it could be
2 dismissed. The Volkswagen case that this Court decided
3 recently would be extremely applicable to respond to Your
4 Honor's question.

5 QUESTION: Well, I don't know, if you have
6 designated an agent for service of process.

7 MR. COHN: That agent is there so that --

8 QUESTION: What if you have registered to do
9 business?

10 MR. COHN: You are registered to do business.
11 Even a domestic corporation could have that as a defense,
12 much less a foreign corporation domesticated. If the
13 lawsuit was not properly brought in New Jersey, it could be
14 at least the plaintiff's option to find the defendant by
15 having someone in New Jersey upon whom service can be
16 processed. The distinction is enormous between that and the
17 long arm statute. I think that Justice Garth made it in the
18 Third Circuit opinion where he talked about the fact that
19 there are agents under the long arm and registered or
20 representation under the statute. There is a difference in
21 the type of person.

22 If there is a domesticated corporation, then you
23 have the ability to serve, but that doesn't mean that the
24 suit can be maintained. You still have the minimum contacts
25 rule.

1 Now, this Court is asked by the appellants to --

2 QUESTION: Mr. Cohn, I don't really quite
3 understand your argument. Putting aside for one moment the
4 form non-convenience argument, which I understand would be a
5 different -- just the jurisdictional argument, supposing
6 this plaintiff, living in New Jersey, had been in Florida
7 and had an accident with one of the defendant's vehicles.
8 If Searle were registered, would not the plaintiff be able
9 to obtain jurisdiction over Searle?

10 MR. COHN: Of course, sir, but then in the
11 situation --

12 QUESTION: Then that is a different situation,
13 isn't it?

14 MR. COHN: Well, then the situation is identical
15 that you hypothesized to me as in the Worldwide Volkswagen
16 versus the Richardson.

17 QUESTION: There they could have the case
18 dismissed because there was no jurisdiction over the
19 defendant. The defendant had not registered in the forum
20 state.

21 MR. COHN: But they had the jurisdiction over the
22 defendant. The suit was brought in Oklahoma, even though
23 neither the plaintiff nor the defendant were in Oklahoma.

24 QUESTION: Well, they purported to exercise
25 jurisdiction through the long arm statute.

1 MR. COHN: Yes, sir, but then you ought not
2 distinguish between the long arm and the purpose of this
3 statute of New Jersey, which is to find the defendant. It
4 was fortunate that I could find the defendant here, because
5 it is a well known company. What about the companies, Your
6 Honor, that are not well known, that are not worldwide, and
7 Fortune 500, as counsel argues? The small company, which
8 can secrete itself intentionally or not. The company from
9 out of state that has no identification on its product.

10 Counsel argues that the tolling of the statute is
11 a detriment to a company because there is no repose. There
12 are so many exceptions that have been carved by the courts
13 into that argument at the present time that I present to the
14 Court the fact that even with a two-year statute, the
15 discovery rule. In New Jersey, we have many cases on this
16 today which permits the filing of the lawsuit and
17 maintaining it. When the event is discovered, that can be
18 ten years after the two years, and has been maintained by
19 the New Jersey Supreme Court.

20 We have insanity. We have minors. You have the
21 stream of commerce theory. Suppose the product is sold by
22 the manufacturer, kept on the shelf of the store for ten
23 years, purchased by the ultimate consumer. Five years later
24 the event occurs. There certainly would be a maintaining of
25 that lawsuit in spite of the statute of limitations in New

1 Jersey.

2 The fact that we have this fixed and fast rule of
3 two years is not unique in New Jersey. We have statute of
4 limitations in the 50 states, and every one is different.
5 New Jersey happens to be one that has a distinction between
6 foreign and domestic corporations with respect to the
7 statute, and the legislature made that distinction, and I
8 submit to the Court that is a decision for the state court
9 to determine, as it has in Velmohos, and Justice Pashman's
10 decision that that is a proper distinction.

11 As a result, we have four types of corporations in
12 New Jersey when it comes to the tolling statute. You have
13 your domestic corporation, you have your foreign corporation
14 that is authorized to do business in New Jersey by
15 domesticating. You have your foreign corporation that is
16 not domesticated but has a representative, as Justice
17 Pashman says they must have, and you have the foreign
18 corporation such as Searle that has not domesticated and
19 does not have a representative and thus is subject to this
20 tolling statute.

21 The legislature has made that decision, and we can
22 presume that Searle must have known about it since 1949, the
23 last time the tolling statute was amended by the New Jersey
24 legislature. The legislature did that at the time for a
25 specific purpose, and I maintain to this court that that

1 reason still remains. The burden upon Searle or any out of
2 state corporation for registering is one burden. The burden
3 for having a representative, which is all that is required
4 to stop the tolling of the statute, is another burden so
5 minimal that I maintain that that has not in any way
6 affected the stream of commerce.

7 QUESTION: Mr. Cohn, would you make the same
8 argument if New Jersey said that an unrepresented foreign
9 corporation may not have the defense of contributory
10 negligence, say? Would have the same -- all they would have
11 to do is the same thing, comply with the --

12 MR. COHN: Well, New Jersey has not made it, sir.
13 I submit to the Court that they --

14 QUESTION: I am just asking you, how would you
15 deal with -- would that statute also be constitutional on
16 the same theory that this one is?

17 MR. COHN: I don't think so, because I think Your
18 Honor has posed an entirely different question. We have a
19 statute which I have quoted in the brief on Page 3,
20 14(a):13-3, Subpoaragraph 2, where the New Jersey
21 Corporation Act specifically provides that the
22 non-registered, non-domesticating corporation in New Jersey
23 can do many things. It can maintain. It can defend. It
24 can participate in any action, any proceeding, whether it is
25 judicial, administrative, arbitrative, or otherwise. It can

1 hold meetings of its directors.

2 QUESTION: I understand all that, but it may not
3 assert one defense that all other defendants can assert,
4 namely, the statute -- I am just asking, why wouldn't the
5 same reasoning apply to a second offense, contributory
6 negligence?

7 MR. COHN: Because the reason, Your Honor, that
8 this defense is excluded is for a purpose. It is to permit
9 the New Jersey plaintiff to find that corporation, and if
10 you exclude the contributory negligence argument, I think it
11 may be unconstitutional. Yes, Your Honor. But that is not
12 the purpose of the tolling statute. If you said that the
13 contributory negligence was tied into the tolling statute, I
14 submit yes, it would be unconstitutional, but that --

15 QUESTION: Yes, but your case allows tolling. Say
16 it takes five years to find a defendant, and you spend the
17 five years finding him, and then you say, well, I will wait
18 another ten years to sue. He may wait much longer than the
19 time required to find the defendant.

20 MR. COHN: Latchees would be a perfect defense in
21 that instance, again. We can only say that the purpose of
22 the statute is to -- very explicit that the --

23 QUESTION: Is it clear that Latchees is a defense
24 in an action at law?

25 MR. COHN: Absolutely, because in this very case

1 after Judge Pashman issued his decision in Velmohos, Searle
2 amended its pleadings to plead the defense of Latchees.
3 They filed a specific motion to do so, and it is part of
4 this case now under the --

5 QUESTION: Does that make Latchees proper?

6 MR. COHN: I am sorry, sir?

7 QUESTION: Does that make Latchees proper?

8 MR. COHN: It makes it a defense.

9 QUESTION: It makes it a defense which Searle
10 conceived of. That doesn't mean it would be sustained by
11 the New Jersey courts, does it?

12 MR. COHN: No, sir. It is a fact question then as
13 to what the trier of the fact determines as to whether it is
14 a proper defense.

15 QUESTION: Ordinarily, you don't think of Latchees
16 as being a defense to an action at law.

17 MR. COHN: Oh, yes. We have in our court rules
18 and I think there isn't any problem on this, that we have
19 specific defenses which must be pleaded in pleadings by our
20 court rules, and one of them is Latchees. But if you don't
21 raise it, you can't plead it.

22 QUESTION: But ordinarily in an action on the law
23 side where you are seeking damages, you have statutes of
24 limitations, not Latchees. Latchees, at least to my mind --
25 perhaps I am wrong -- is an equitable defense.

1 MR. COHN: Under our court rules, it is a law
2 defense as well, and under our cases it is a law defense as
3 well. There is no question on that. It may be traditionally
4 an equitable defense, but it is certainly a defense, Your
5 Honor, in a lawsuit, in the law side of our courts.

6 QUESTION: You plead Latchees and the statute of
7 limitations in New Jersey?

8 MR. COHN: Yes, sir.

9 QUESTION: You plead them both?

10 MR. COHN: Yes, sir, and you must by court rule
11 affirmatively --

12 QUESTION: And if there is a statute of
13 limitations, you still can say Latchees?

14 MR. COHN: Yes, sir. You must affirmatively --

15 QUESTION: For example, if the statute of
16 limitations is five years, and you filed in four years,
17 somebody could still raise Latchees?

18 MR. COHN: It always can be raised. Now, the
19 statute of limitations is a defense to that raising of the
20 defense, Your Honor. If you are within the statute of
21 limitations, then Latchees would not apply, but if you are
22 without the statute of limitations, then it would apply.

23 QUESTION: You said Latchees always applies.

24 MR. COHN: If you are without the defense of a
25 statute of limitations.

1 QUESTION: I see.

2 MR. COHN: I don't know whether I answered your
3 previous question. I was cut off.

4 QUESTION: I heard what you said.

5 MR. COHN: I say that Latchees applies in the law
6 side of our courts. Yes, sir.

7 QUESTION: Do you think the district court -- the
8 district court invalidated the statute, didn't it?

9 MR. COHN: The district court did under the equal
10 protection theory.

11 QUESTION: And didn't -- wasn't its assumption, at
12 least, that the -- that there was no provision for just
13 filing a name, designating an agent?

14 MR. COHN: I don't think that was the district
15 court's assumption. I don't think that came up, Your Honor,
16 until --

17 QUESTION: Well, it's awful close to it in
18 Footnote 17 of its opinion.

19 MR. COHN: I think that the real reason for the
20 district court's, if I may submit, holding that the statute
21 was unconstitutional was under the equal protection. The
22 trial judge in the district court dealt solely in his
23 decision -- the thrust of it was the equal protection
24 argument, thus finding the statute unconstitutional. He
25 thought that the defense was valid where you have the long

1 arm jurisdiction, but I --

2 QUESTION: Let me ask you, what would your
3 position be -- I suppose it would be the same -- that there
4 is under New Jersey -- the only way you could get the
5 benefit of the statute of limitations would be to fully
6 register.

7 MR. COHN: No, sir.

8 QUESTION: Well, suppose that was the only way
9 that a foreign corporation could do it. Suppose you had to
10 make a choice either between the statute of limitations or
11 registering. You just couldn't designate an agent. Suppose
12 that.

13 MR. COHN: All right.

14 QUESTION: You still would argue for the statute?

15 MR. COHN: Yes, sir, because without admitting,
16 but for the sake of --

17 QUESTION: I understand.

18 MR. COHN: -- responding to Your Honor's question,
19 the domestication of the foreign corporation in New Jersey
20 is not as burdensome as counsel would have this Court
21 believe. If you do become domesticated in New Jersey and
22 are subject to franchise taxes, those cannot be duplicative
23 taxes. If Searle files in Illinois, and I don't know
24 whether or not they do -- they are a Delaware corporation
25 with a home office in Illinois -- wherever they file they

1 must pay taxes on their income.

2 QUESTION: Well, do you think a state could say to
3 a corporation that is engaged only in interstate commerce in
4 New Jersey, that is the only kind of business it does in New
5 Jersey, do you think the state could say, well, we wish you
6 would register, and if you don't we are going to charge you
7 \$10 a year?

8 MR. COHN: I think the state under this statute
9 can say you must have a representative in the state, and
10 even if that representative requires registration to the point
11 of domestication, Your Honor, I think that is not a
12 burdensome event in interstate commerce, because if it is
13 really filing a form, and because of that form this
14 defendant and any other state defendant can obtain the
15 benefit of the tolling statute, then that is a minimum
16 burden that the defendant must bear if they wish to raise
17 this defense.

18 They are not prevented from doing business in New
19 Jersey. Their argument is that this is a burden. There
20 isn't a scintilla of evidence in the record or before this
21 Court that it is a burden. They have done business to this
22 date and continue to do business, and there is no indication
23 of any loss of business because to our knowledge there
24 hasn't been.

25 QUESTION: Well, one way it is a burden is that

1 they don't have the benefit of the statute of limitations.

2 MR. COHN: There are many reasons that people
3 don't have benefits in a state, and if this benefit doesn't
4 burden interstate commerce, then it is not a burden under
5 the theory of the defendant. This burden is so miniscule,
6 if it is, and I only say if it is because of Your Honor's
7 question, because I don't admit under any theory that they
8 must domesticate in order to have the benefit of this
9 statute, they must have a representative, and Justice
10 Pashman in Velmohos is quite clear about that. The
11 representative can be many types of representatives. It is
12 only so that you can write some place where everyone knows
13 and find that person who is authorized to accept service.

14 If you write to the Secretary of State, albeit for
15 a registered agent, for a representative, for the person
16 trading as, you can determine that person who can accept
17 process, and thus the defendant will be able to avoid the
18 argument that they have today and avoid the problem they are
19 in.

20 Presuming that there is any burden, it is so
21 miniscule that I submit to this Court that it is not such
22 that you can overturn a statute which can easily be complied
23 with.

24 QUESTION: Mr. Cohn, was there any attempt to
25 institute litigation for this injury other than this

1 particular suit?

2 MR. COHN: I couldn't hear the beginning. I am
3 sorry, sir.

4 QUESTION: Was this New Jersey litigation the only
5 one attempted against Searle for the injury that Mrs. Cohn
6 sustained?

7 MR. COHN: Yes. Yes, sir.

8 QUESTION: There was no attempt to sue them
9 elsewhere?

10 MR. COHN: No, sir. No. A New Jersey
11 plaintiff --

12 QUESTION: Why did you wait so long?

13 MR. COHN: Well, in the first place, the event
14 occurred in 1963. It was not until 1969-70 that there was
15 any causal connection between the ingestion of the birth
16 control pill and any trauma that could have occurred, the
17 thrombosis that eventually resulted. We have presented to
18 the district court, and that issue really has not been
19 determined on appeal -- it was determined in a second
20 opinion of Judge Meaner in the district court -- as to
21 whether there was a discovery rule exception.

22 If you take from mid-July, 1970, which Judge
23 Meaner, the trial judge, found as the discovery date, and
24 you take two years from that, there is only approximately 12
25 months, 12 and a half months until suit was started. There

1 was a valid reason. We have raised that in the district
2 court. It is not before this Court, because Judge Garth of
3 the Third Circuit said, I do not have to get to the question
4 of whether or not insanity, quote, end quote, constitutes a
5 disability under the tolling provision of a statute.

6 We argued that the emotional bar of the plaintiff,
7 Susan Cohn, was sufficient so that we could not start this
8 lawsuit until psychiatric treatment was complete in 1974,
9 and that was when we started suit, as soon as we knew that
10 we were able to psychologically and psychiatrically.

11 Now, that period happened to be very short in this
12 case, but that is not the real reason that this statute
13 could be argued as constitutional or unconstitutional.
14 Searle still has that defense of Latchees, which they even
15 brought in within the last year. And if we ever get to
16 trial -- we haven't had a trial in this case, as Your Honor,
17 I am sure, knows. If we get to trial I would presume I have
18 to meet that defense at the time, and am prepared to, for
19 the reasons I have just stated.

20 The question as to whether or not this is an
21 incident that harms in the stream of commerce to prevent the
22 doing of business of Searle in New Jersey is one which is so
23 minimal that I submit to the Court that the commerce clause
24 cannot apply. This Court has held that the stream of
25 commerce is just as natural a force as a stream of water,

1 even though it was in Justice Brennan's dissent where the
2 language came from, but that is so true. If this defendant
3 is a multi-billion dollar company, worldwide operations, as
4 it claims in its briefs, then this is a miniscule,
5 absolutely minute, inconsequential event that we ask for,
6 merely the --

7 QUESTION: You wouldn't make the question turn on
8 the net worth of the company, would you?

9 MR. COHN: Oh, absolutely not, because this must
10 be a broad, general principle. There are small companies
11 which can secrete themselves intentionally or not throughout
12 the entire world where a New Jersey plaintiff might want to
13 sue that defendant. The principle can certainly not be
14 designated as that which applies to this case only, because
15 it happens that I was able to find Searle in Illinois, a
16 Delaware corporation. I couldn't even have found them if I
17 wrote to the Illinois Secretary of State.

18 The very purpose of this is so that the
19 legislatures determine that any New Jersey plaintiff can
20 find its defendant.

21 Now, it is quite significant, I think, that the
22 New Jersey statute has said that this is very different than
23 any other situation where there is a foreign corporation.
24 The defendant must be found, and the only way to find it is
25 to have some place where an agent is in New Jersey, very

1 distinct from the company doing business, as counsel argues,
2 where they have to have an office. They don't have to have
3 an office in New Jersey in order to comply with this
4 statute. They don't have. And there is no one, in spite of
5 what counsel says, no place in any case, no place in any
6 argument, no place in any statute which says they have to be
7 in New Jersey at all, except to have a representative.

8 Now, that representative can even be in Illinois.
9 A trade name certificate provides for the service upon the
10 Secretary of State. If I write to the Secretary of State
11 for the trade name G. D. Searle, and they have a trade name
12 certificate with someone in Illinois, I can serve the
13 Secretary of State. These cases that Searle cites are
14 idiosyncrata when they talk about the motor vehicle cases.
15 In every motor vehicle case there is an official in a state
16 where you can serve. They are distinct. There is no
17 majority-minority rule on this issue.

18 In the cases that have upheld the tolling of a
19 statute even where you have long arm, you have an official
20 in the state in the motor vehicle cases.

21 QUESTION: Mr. Cohn --

22 MR. COHN: Yes, sir.

23 QUESTION: -- was any effort to review Velmohos
24 sought here?

25 MR. COHN: Oh, yes. That is before this Court.

1 QUESTION: Now?

2 MR. COHN: Yes, sir. There is a petition for
3 certification on Velmohos. Or a motion for argument. I
4 don't know which. That is before the Court. And my
5 understanding is, it is being held pending the decision in
6 this case, but that is just what I was told.

7 There are several cases, Your Honor, before this
8 Court on the same issue. There is a companion case --

9 QUESTION: All involving the New Jersey statute?

10 MR. COHN: Yes, sir. There is a companion case
11 that Judge Garth decided in the Third Circuit, the
12 Hopkins-Kelsey-Hayes. There is the Cumbs Honda case which
13 is before this Court. They all involve the same issue. And
14 they are all pending the decision in this case.

15 QUESTION: And do all of them sustain the statute?

16 MR. COHN: So far, this Court is asked to overturn
17 the Third Circuit on the issue, the New Jersey Supreme Court
18 on the issue, the U. S. District Court, Judge Brockman in
19 the Kelsey-Hayes case on the issue, all cases upholding the
20 statute. And the only one who did not uphold the statute is
21 my trial judge in my case, and he did it for a different
22 reason. He stated that the long arm was sufficient to
23 obtain jurisdiction so the statute should not toll.

24 QUESTION: Now, I submit that is a very different
25 thing. The long arm is a court rule. The statute is a

1 legislative enactment. One has nothing to do with the
2 other. ² The long arm rule, enacted in 1958 in New Jersey,
3 was certainly known, but that is only where you can find the
4 defendant. The very purpose of the statute is to obviate
5 the situation in the long arm rule instance, where you can't
6 find the defendant, where the defendant must come to New
7 Jersey, at least have somebody for process, and that is what
8 we are after here, the maintaining of the ability to find
9 the defendant, big corporation, little corporation,
10 regardless of the incident. That is the penalty the
11 defendant has to pay for not having some representative in
12 New Jersey.

13 QUESTION: Do you think there is any filing with
14 the Secretary of State in all the years that New Jersey has
15 been in business just designating an agent for service of
16 process?

17 MR. COHN: Whether there isn't or there has been,
18 I am not aware of any statistics to give to you, Your Honor,
19 but whether there has or there hasn't is immaterial --

20 QUESTION: Have you ever tried to find one?

21 MR. COHN: No, sir. The occasion has not --

22 QUESTION: Have you ever tried to serve a foreign
23 corporation based only on its trade name certificate?

24 MR. COHN: I have not had occasion, but I have
25 written to --

1 QUESTION: In all the years that --

2 MR. COHN: In 30 years, I have had occasion to
3 write to the Secretary of State as to whether the foreign
4 corporation had a trade name certificate, whether the
5 foreign corporation had any kind of person in New Jersey.

6 QUESTION: Did they ever answer, yes, it has a
7 trade name, and then you tried to serve them?

8 MR. COHN: The occasion hasn't arisen. It just
9 hasn't. But I have been able to serve by long arm, as I did
10 in this instance.

11 QUESTION: Oh, yes.

12 MR. COHN: Pardon me, sir?

13 QUESTION: I understand.

14 MR. COHN: Now, it just happens I could find the
15 defendant. That was a fortuitous circumstance. But that
16 should not make an exception to the rule to make this
17 statute invalid. The principle remains as to the fact that
18 you have to have somebody in New Jersey, and Justice Pashman
19 is so clear about that. The fact that it hasn't occurred
20 before, I can only answer Your Honor with the fact that this
21 issue hasn't appeared before this Court, although our
22 statute was passed in 1820. Why it has come up now, a
23 matter of circumstance.

24 QUESTION: Well, doesn't this letter that the
25 petitioner appends to the reply brief suggest that at least

1 the Department of State --

2 MR. COHN: I don't know the question that
3 petitioner asked.

4 QUESTION: Well, the statement is pretty flat,
5 isn't it? Please be advised it is the view of the
6 Department of State that unless a foreign corporation has
7 qualified to do business in New Jersey, they are unable to
8 designate a registered agent for service of process.

9 MR. COHN: I don't know the question asked, Your
10 Honor. I can ask a question and I am sure I can get
11 different answers from witnesses. If I had asked the
12 question, is there a procedure, and can I file a name as an
13 out of state defendant, if given the opportunity, I might
14 get a different answer. This did not come up at any point
15 in the proceedings until a week ago today when I received
16 that reply brief of the appellant. There has never been an
17 issue in this case as to whether the defendant, Searle, can
18 merely file a registration and have a registered agent or a
19 person to designate service. My time is up.

20 CHIEF JUSTICE BURGER: Your time has expired now.

21 MR. COHN: Thank you.

22 CHIEF JUSTICE BURGER: Do you have anything
23 further, counsel?

24 MR. RICHMOND: No, Your Honor.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen. The

1 case is submitted.

2 (Whereupon, at 10:55 o'clock a.m, the case in the
3 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

G. D. SEARLE & COMPANY v. SUSAN COHN AND WALTER COHN # 80-644

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Lynn Connelly

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