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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-619

TITLE MERRELL DOW PHARMACEUTICALS, INC., Petitioner
v. LARRY JAMES CHRISTOPHER THOMPSON, ET UX., ET AL.

PLACE Washington, D. C.

DATE April 28, 1986

PAGES 1 thru 36

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IN THE SUPREME COURT OF THE UNITED STATES

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MERRELL DOW PHARMACEUTICALS, INC., :

Petitioner, :

V. : No. 85-619

LARRY JAMES CHRISTOPHER THOMPSON, ET UX., ET AL. :

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Washington, D.C.

Monday, April 28, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 o'clock a.m.

APPEARANCES:

FRANK C. WOODSIDE, III, ESQ., Cincinnati, Ohio; on behalf of the petitioner.

STANLEY M. CHESLEY, ESQ., Cincinnati, Ohio; on behalf of the respondents.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
FRANK C. WOODSIDE, III, ESQ., on behalf of the petitioner	3
STANLEY M. CHESLEY, ESQ., on behalf of the respondents	22
FRANK C. WOODSIDE, III, ESQ., on behalf of the petitioner - rebuttal	31

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Merrell Dow Pharmaceuticals against Larry James Christopher Thomas.

Mr. Woodside, you may begin whenever you are ready.

ORAL ARGUMENT OF FRANK C. WOODSIDE, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WOODSIDE: Mr. Chief Justice, and may it please the Court, in order to understand the pendent and federal question jurisdictional issues involved in this matter, it is first necessary to briefly understand the history of this litigation.

Bendectin was a medicine manufactured by Merrell Dow Pharmaceuticals in the United States which was for the treatment of morning sickness in pregnant women. There are several counterparts. There is Canadian bendectin. There was Debendox, which is an equivalent product manufactured in Scotland. In this particular instance the petitioners are Scottish and Canadian individuals.

The litigation involving the American claims was originally consolidated pursuant to a -- before the Honorable Carl Ruben in Cincinnati, Ohio. At approximately the same time there were a series of cases

filed by foreign plaintiffs which had originally been filed in the United States District Court for the Southern District of New York. Those cases were transferred to 1404 transfer, Judge Briotz to Judge Ruben, after the cases had been -- after the foreign cases had been transferred to the Southern District of Ohio, a motion to dismiss on the basis of forum non conveniens was renewed. That motion was granted and subsequently approved by the United States Court of Appeals for the Sixth Circuit in a case called Ballen versus Richardson Merrell, Inc. Richardson Merrell, Inc., is a predecessor corporation to Merrell Dow Pharmaceuticals, and for all intents and purposes they are the same company.

After Judge Ruben had dismissed the foreign cases -- there were a series of approximately 12 on a forum non conveniens basis -- the instant cases were filed. And they were filed in state court on September 1st, 1983. As I have indicated previously, one of the plaintiffs is from Scotland, took Debendox, the other plaintiff was from Canada and took Canadian Bendectin.

In the complaints which these two plaintiffs filed, and by the way they are virtually identical and were filed by the same counsel, there are six causes of action asserted. In these complaints there is

implication that the drug which was used was the American version of Bendectin, and the American defendant, Merrell Dow Pharmaceuticals, Inc., the American company was the defendant.

The fourth cause of action states that the petitioner in the instant action is liable for violations of a breach of the Food, Drug, and Cosmetic Act, and that as a result it is presumptively negligent. When those cases were filed, a removal petition was placed of record, and the cases were transferred to Judge Ruben in the Southern District of Ohio for the filing in Hamilton County, Ohio, in the Court of Common Pleas.

After they had been removed, two things happened. One, the respondents filed a motion to remand, and the petitioner filed a motion to dismiss based upon the document and forum non conveniens. Judge Ruben ruled that the right to relief asserted by the plaintiffs in their fourth cause of action depended upon application of the laws of the United States, and he then determined there was federal question jurisdiction, therefore overruled the motion of the respondent to remand the cases and then dismissed the cases on the basis of formula and convenience.

After that dismissal, the cases were then

appealed by the respondents to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit ruled that -- actually, what the Sixth Circuit did is, they did not take issue -- I am not saying they agreed with it -- they did not take issue with Judge Ruben's determination that there was a federal question.

Instead what they did was, they stated that the various causes of action, of which there were six, should be considered collectively. Now, the first cause of action in these particular cases is a regular negligence cause of action which alleged that Merrell Dow was negligent in the design, manufacture, sale, and distribution of the product.

The Court of Appeals ruled that since the fourth cause of action stated -- strike that.

The Court of Appeals ruled that the sixth -- excuse me -- the fourth cause of action was a negligence action, a negligence per se action in which the respondents had stated that there was negligence per se because of violation of the Food, Drug, and Cosmetic Act of this country. The Court of Appeals said that since the first cause of action was also a negligence action, that -- and since the respondents could recover fully and completely for negligence on that first cause of action, that because of this parallel pleading, it was

not necessary for there to be a resolution of the substantial federal -- question of federal law in order for the plaintiffs below to prevail on a negligence theory, and therefore it determined that there was no federal question of jurisdiction, and reversed the decision of Judge Ruben and remanded the cases back to the state court, and then we filed the petition for writ of certiorari.

Now, it is our position in this litigation that the plaintiff's right to relief under the fourth cause of action necessarily depends on the resolution of a substantial question of federal law.

QUESTION: Why do we have to decide that if all the Court of Appeals held, as you have said, is that we do not need to decide anything about the fourth cause of action because of the first, because they could recover on a state cause of action?

MR. WOODSIDE: Yes, sir, that --

QUESTION: Apparently you wouldn't be satisfied with our just reversing that holding.

MR. WOODSIDE: Well, let me respond this way. In point of fact, the situation is, one way to respond would be to say that the consideration by the Court of Appeals that pleading alternative causes of action creates a situation where there is no federal

jurisdiction is not in accord with the Franchise Tax Board decision. See, what the Court of Appeals --

QUESTION: Well, suppose it isn't. What if we just reversed the Court of Appeals insofar as it held that just because there was a state cause of action stated, they didn't need to determine if there was a federal one?

MR. WOODSIDE: Your Honor, in all candor, I am not certain I understand the question. If you do that, then the action would be, if the Court of Appeals reversed --

QUESTION: Well, we would just tell the Court of Appeals it should have decided whether the fourth cause of action stated a federal question.

MR. WOODSIDE: Oh, I understand.

QUESTION: Which it didn't decide, did it?

MR. WOODSIDE: Well, we don't know for certain. I think they probably had to to have done that, although they didn't say so in their opinion, because, Your Honor, if they hadn't done that, then it would not have been necessary to determine that there were parallel claims -- for instance, if they had determined that the fourth cause of action did not state a federal claim, if they had so ruled, they would not have gotten to the basis for their decision. They would

have -- so that there was implied in the decision --

QUESTION: I just don't understand that at all. They could easily say, even if the fourth cause of action states a federal question, the fact that there is a first cause of action stated in the complaint means that there is no federal jurisdiction.

MR. WOODSIDE: But you see, Your Honor, under the Franchise Tax Board decision, the court has to consider each of the individual claims for relief.

QUESTION: I agree with you.

MR. WOODSIDE: Maybe you and I agree. I think the situation is, if that happened, then the case would be reversed and the dismissal on the basis of forum non conveniens would be reinstated, which would be fine -- the forum non conveniens decision was never appealed to the Court of Appeals. See, but more importantly, I think, the federal question involved here -- there are several federal questions involved. In this particular situation, where faced with a set of facts wherein the drug which was allegedly ingested by the two mothers, the drug which allegedly caused the problem, was not manufactured, was not distributed, was not sold by the defendant. It was sold by independent subsidiaries.

While the plaintiffs below allege that the activities of companies in the United Kingdom, Scotland,

and the activities of companies in Canada are subject to the regulations and the statutes of the Food, Drug, and Cosmetic Act, that, the federal question there is whether or not there is then an extraterritorial imposition on companies abroad of the safety statutes of this country.

QUESTION: Mr. Woodside.

MR. WOODSIDE: Yes, sir.

QUESTION: It seems to me I can remember as long ago as I was in law school, which is a long time ago, reading a case involving some sort of a maritime collision, but it wasn't an admiralty case, it was a diversity case in a federal court, and the claim was that the operator of the boat hadn't steered the boat well, and also that it violated a Coast Guard standard. And there was no thought in that case that there was any federal jurisdiction other than by diversity.

You plead negligence and you say the want of due care, and you say violation of a state statutory standard, you say violation of a federal statutory standard. Is your position that every time you invoke the violation of a federal statutory standard to prove negligence you have stated a federal claim?

MR. WOODSIDE: Absolutely not, Your Honor. In point of fact, we submit that there are very, very few

situations in which an allegation of negligence based upon a violation of a saftey statute would create federal question jurisdiction. What we state is that the plaintiff's right to relief must necessarily depend on resolution of a substantial question of federal law. Now, if you take the situation you have talked about, or if you talk about the numerous decisions of trial courts and courts of appeals and even this Court to some extent, in which there are allegations in the complaint of negligence based upon violations of the Safety Appliances Act.

Now, you see, the Safety Appliances Act, for instance, it usually comes up, of course, in FELA cases, it is only a factual question. The statutes are simply -- there is a -- the law concerning them is well settled, so the question simply is, did the person violate that statute. We don't have that situation here.

QUESTION: So federal question jurisdiction depends on whether the federal statute to which you refer in your negligence claim has a settled construction or an unsettled construction?

MR. WOODSIDE: Well, to some extent. What I believe the case law says is this. If you have a situation where there is settled construction, so that

really there is left to the jury simply a factual determination as to whether or not the statute was violated, then in that situation we would not take the position that there is federal question jurisdiction, but in this particular situation here you do not get to that question very easily. You do not get to the question of what the court should charge the jury on because first of all you have got to determine several federal questions. First of all, is there an extraterritorial application of the Food, Drug, and Cosmetic Act. Second of all, are foreign citizens, citizens in this case of Canada or Scotland, are they within the zone of individuals who are protected? At best their position in that regard would be tenuous.

QUESTION: May I interrupt you there for a moment? How does that bear on the case? You do not claim there is a private cause of action.

MR. WOODSIDE: Absolutely not, but you see, in this particular situation, it is alleged that Merrell Dow Pharmaceuticals, Inc., violated the provisions of the Food, Drug, and Cosmetic Act, and as a result of those violations the company is presumed to be negligent, a rebuttable presumption, and that as a result of that violation, the plaintiffs have sustained damages. So the first question that must be addressed --

QUESTION: How is that different from the case Justice Rehnquist asked you about?

MR. WOODSIDE: Oh, because in the case that he asked me about, the law is settled. Let me go back and pose a little bit different situation, if I may, but it is right on point. In some of the railroad cases involving the Safety Appliances Act, it is alleged in the complaints there are violations of those Acts, and as a result of that the defendant is liable.

Now, some of those alleged violations are because the railroad cars don't have the appropriate coupling devices, and so the judge merely charges the jury -- didn't violate this -- we don't have that situation, because here it has to be a judicial determination as to whether or not the provisions of the Food, Drug, and Cosmetic Act even apply --

QUESTION: But even if you assume they do apply, where does that get you? Doesn't that just get you to the threshold of your safety appliance cases where everybody acknowledges the statute applies, but proving a violation doesn't establish a right to relief.

MR. WOODSIDE: Well, Your Honor, the problem is, you can't just presume it applies. That is the federal question. The federal question is whether or

not that statute or the provisions of that statute were applied. It is not a mere factual situation where the trial court can charge the jury. This is a situation that they violated the Safety Appliances Act dealing with couplers, they are negligent because that would be an American case with American companies. This is a situation where we are alleged to be liable for a drug we didn't make, we didn't distribute, and we didn't sell. And what the plaintiffs have really done is export federal statutes to situations involving foreign countries, and in essence import foreign litigation and then take the position that Merrell Dow, the petitioner in this matter, is liable for violation of a statute which it didn't have anything to do with.

QUESTION: It is not liable for violation of the statute. It is liable for negligence if it is liable at all. Isn't that right?

MR. WOODSIDE: Your Honor --

QUESTION: I thought you agreed a moment ago there is no private cause of action for a violation of the federal statute.

MR. WOODSIDE: That is absolutely correct. In response to your question, or your statement, let me compare the first and the fourth cause of action. The first cause of action is very simple. It does say we

are alleged to be negligent in the manufacture, sale, design, and distribution of drugs. Classic negligence. In the fourth cause of action, it is stated that we, Merrell Dow has violated the provisions of the Food, Drug, and Cosmetic Act. As a result, it is alleged that injury occurred because of the violation of the Act. It doesn't say that because we were negligent in manufacture, sale, and distribution. Negligence per se is not the same as negligence in the ordinary sense, and therein lines --

QUESTION: Yes, but if they prove a violation of the Act and they fail to prove negligence, they cannot recover unless there is a cause of action under the Act, can they?

MR. WOODSIDE: No, sir, I don't believe that that's --

QUESTION: You concede they can recover for a violation of the statute --

MR. WOODSIDE: No.

QUESTION: -- without proving negligence?

MR. WOODSIDE: No, but let me tell you why. We don't -- I don't mean to be sarcastic, but it is our position that the regulations don't govern this -- excuse me, that the Food, Drug, and Cosmetic Act does not govern this situation, and that since it is not our

drug, we couldn't be liable under any circumstances. Nevertheless, there are significant federal questions raised by the complaint, and it is because of the questions that are raised by the complaint that federal question jurisdiction is proper.

Now, our position would be, if this matter has to be tried somewhere, that we are not liable, and that there is no presumption of negligence, and we didn't violate the statute. Nevertheless, the situation in which we presently find ourselves is, we have to deal with the allegations which are raised in the complaint, and under the well proved complaint rule there is in fact --

QUESTION: Why would this be any different than if you had a Canadian railroad or something like that, and they said you have violated the Federal Safety Appliance Act, and we allege the federal statute applies in Canada, and that is a federal question, and as a result of that violation we are going to recover for negligence? Why is that case different?

MR. WOODSIDE: It might not be, but let me go back and respond to the first part of your question, that first, where there would be the federal question would be, is the Canadian railroad subject to the FELA Act. Now, if they are operating in the United States,

they might be, but this is -- we are not in an analogous situation. We are not operating in Canada. We are not operating in Scotland. The question is whether or not there is going to be a federal question raised, and the --

QUESTION: Mr. Woodside, is your answer to Justice Stevens hypothetical about the Canadian railroad that there is or is not federal question jurisdiction?

MR. WOODSIDE: It depends on whether the railroad was operating in the United States. If the railroad was operating in the United States --

QUESTION: No, he says the railroad was operating in Canada, and it is pleaded that the federal law applies in this particular situation in Canada, as I understood it.

MR. WOODSIDE: If that were the situation, I would say there is also a federal question created there because in order for the plaintiffs in that case to recover they would have to demonstrate that the FELA or whatever the federal statutes would be would be applicable to a Canadian railroad doing things in Canada. It is that first question, which would be the federal question.

QUESTION: In my example earlier about the boating accident, I suppose if it was pleaded that the

coast guard regulation applies even though it is doubtful whether these waters are navigable, if one can conceive of a pleading like that, that that would make it a federal question jurisdiction.

MR. WOODSIDE: Your Honor --

QUESTION: You are turning the whole thing just into a case by case analysis, it seems to me.

MR. WOODSIDE: Well, to some extent I am, but the point I want to make is, it is a small number of cases. This is not a situation where we would be opening the federal courts to a floodgate of litigation. This type of situation is not going to arise very often.

Now, let's assume in your Coast Guard situation the question will be whether the Coast Guard regulations apply to something that happened in South America. That might be a federal question. This doesn't happen very often. For instance, in the Bendectin -- lots of cases -- this is the only time that I know of where these particular claims have been made.

QUESTION: Well, Mr. Woodside, if it doesn't happen very often, then isn't that a good reason to steer away from saying it is a federal question under the assumption that we could resolve a serious federal question by way of certiorari review from the state

court?

MR. WOODSIDE: In point of fact, Justice, that is probably a good point, except for one thing. If we do it on a state by state basis, we don't know what the individual states are going to do. Before it would get reviewed, it may well be that a good number of plaintiffs determine that they want to file cases in various state courts in this country.

Without being too sarcastic, the United States has become a haven for foreign plaintiffs. We have lots of situations, even in the Bendectin litigation, they filed lots of cases here, and so that what happens is, we allow it to be determined on a state by state basis. Some of them may never get to the Supreme Court, or if it is, it may be several years down the road, and during that period of time the floodgates of the state court may have been opened.

QUESTION: But it is also true you may have 50 different state decisions, and in this country you have probably 12 different circuit decisions. It is not as if every federal court case gets reviewed by this Court.

MR. WOODSIDE: Your Honor, that is quite correct, but in point of fact we are now before this Court, and it seems to me that this is now the time to rectify the situation and determined that based upon the

Franchise Tax Board, that we have a situation where there is in fact a significant federal question involved, and there is in this circumstance federal jurisdiction, because when that happens, then the cases, the forum non conveniens decision of the trial court will be upheld, and the cases will be transferred back to either Canada or Scotland.

QUESTION: Mr. Woodside, how do you reconcile the different approaches, or can you, taken by this Court in the Moore decision and in the Smith decision and the language subsequently in Franchise Tax Board? Is there some way to reconcile all those cases, in your view?

MR. WOODSIDE: I believe there is, Justice O'Connor. The situation is this. In Moore, for instance, you had -- both a federal and a state statute were alleged to be violated. And the situation there is that you do not end up having a situation where the right to relief necessarily depends on resolution of a substantial federal question. The most -- I didn't write down too many quotes, but I will refer to one in a minute. In Franchise Tax Board, the following language appears. "Under our interpretations, Congress has given the lower federal courts jurisdiction to hear originally or by removal from the state court only those cases in

which a well pleaded complaint establishes either, one" -- the one is mine -- "that federal law creates a cause of action, or, two, that the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law."

If you look at Moore, and if you look at an innumerable number of Court of Appeals and District Court decisions, most of them involving allegations of railroad liability, we very seldom, if ever, have the situation where the plaintiff's right to relief on one of the claims relies necessarily on resolution of the basic substantial federal question.

In point of fact, most of those cases are the situation where you have the question of whether or not there is a -- there is a factual question, was the statute violated, so they never get to the issue.

QUESTION: Well, you put a great deal of load bearing weight on the word "substantial" in your argument.

MR. WOODSIDE: Yes, ma'am.

QUESTION: And as Justice Rehnquist says, that would require a case by case review just to answer that question. It certainly wouldn't provide any very clearcut lines for the practitioners, would it?

MR. WOODSIDE: There are a number of cases,

some from this Court, dealing with what the definition of substantial is. If something is substantial, that means it is not obviously without merit, or not foreclosed by Supreme Court precedent, or not made solely to obtain jurisdiction, for instance. It is, in fact, true that you may have to look at this on a case by case basis with certain exceptions.

For instance, most of the instances in which this question arises are on the railroad litigation, and I mean, I am not a railroad lawyer, but reviewing the cases, it becomes obvious that the courts have determined through a period of time that there are virtually always only factual questions.

You don't have to reach the question of whether there is a substantial federal question, because the law is well settled. I notice that my little light is on. With the permission of the Court, I will reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Chesley.

ORAL ARGUMENT OF STANLEY M. CHESLEY, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CHESLEY: Mr. Chief Justice, and may it please the Court, I believe that Justices Rehnquist and Powell have put the finger on the issue. There is no way to surgically excise two Bendectin cases out from

the well established standard that there need to be either a private cause of action, and both sides admit that there is no private cause of action. As a matter of fact, the legislative history shows that that was one of the options, to give a private cause of action to FDAC, Federal Drug and Cosmetic cases, and that was deleted by Congress.

So then the question is, is there a federal question, and while my worthy opponent would like to surgically excise two Bendectin cases, we cannot take case by case, because historically there is presently sitting a stay order on 235 American cases in which the Honorable Judge Ruben, after the Bendectin trial, took the 235 cases that could not be removed because they were residents of Ohio, Merrell Dow being a resident of Ohio, it's a 1441(b) scenario. The court took these 235 American cases and put them back to the state court, remanded them to the state court, and has withheld his order pending the determination of this issue.

QUESTION: And all those cases, have they gone to judgment?

MR. CHESLEY: No, Your Honor, they have not. What happened was, they had gone to judgment in the federal court, and after the verdict, Judge Ruben held sua sponte that the 235 of them, there was inappropriate

jurisdiction, and sent them back --

QUESTION: But they had gone to a verdict for the defendant.

MR. CHESLEY: They had gone -- but he said these are exempted from the verdict. He has exempted them from the verdict, but has not put his order on pending the outcome of this case.

QUESTION: Kind of a lucky strike, isn't it?

MR. CHESLEY: Very lucky. No question, Your Honor. As a plaintiff, I would say to you that it is more than a lucky strike. The point that I am making is that Mr. Woodside, my opponent, was talking historically, and I am indicating here that it isn't an issue of two or three foreign cases. There is an inconsistency. If the position is that the FDAC does not apply to Canadian cases and Scottish cases, then I think it is inappropriate to come before this bench and state categorically that it is a federal issue because there was a pleading of negligence. I would agree totally with Justice Powell that it is a negligence case, and that you are talking about a standard of conduct and a violation of the FDA is at best a violation of a standard which can be introduced in evidence by experts, and is done all the time.

In response to a question by Justice

Rehnquist, I would say as a plaintiff's counsel there is no way but to open the floodgates of litigation, and just as an example, the following cases would then become all federal issues.

The Safety Appliances Act, which is more. Federal Civil Aeronautics Act, the Rivers and Harbors Appropriation Act, ERISA, just the simple Flammable Fabrics Act. In other words, everyone, we are very familiar with the flammable fabrics. There is a federal statute. Therefore every flammable fabrics case which would mention whether or not there was a violation of the Act, whether it met the standard, would then be a federal case.

Packers and Stockyards Act, United States Warehouse Act, Federal Meat Inspection Act, Urban Mass Transportation Act, the Ladman Trademark Act, Emission Standards Act for automobiles, and recently in the agent orange, the Second Circuit, a case I am familiar with, 635 Fed 2nd 987, held that the bend rule, it is FIFRA, which is the Federal Fungible Insecticide Act, was not an issue for federal, or a federal substantial law issue.

Quite simply, I think that the Sixth Circuit addresses the issue, I think, very clearly. Clearly there is agreed no private right of action by those

injured by violations of the FDCA, and that, two, the plaintiff's right to relief does not depend necessarily upon a finding of a violation of the FDCA, and you could still find negligence, and this is consistent with the rulings by all other circuits and the Supreme Court.

I believe circuits have already addressed, most circuits have already addressed -- I know the Seventh Circuit has, and other circuits, and we indicate that on Page 13 and 14 of our brief, and I don't want to track our brief before this Court.

I believe that at best this Court would have to take a position, because I don't believe that the Court would ever want to take the position that all of these are federal Acts -- pardon me, are federal issues of law, every one of these, because that would be an impossible floodgate of litigation.

The next question that this Court would have to address is, does this Court want to take FDAC and make it a private cause of action, and I do not see anything in the preceding cases, whether it be franchise or more, that would lead one to believe that it is the intent of this Court to make the FDAC a private cause of action, and of course this Court can change it, can change that rule and make it a private cause of action.

I advocate that it should not. I advocate

that the state courts, whether it be Ohio or Kentucky, can clearly apply the law, and it does not take only the wisdom of a federal district court to apply the law. Simply stated, the FDAC is a very simple statute. Misbranding is misbranding, and the best example I can give you is that Ohio has an exact parallel statute on misbranding which is word for word.

I would suggest or submit that not only would it open the floodgates, as we have indicated, but it would, I believe, create an impression that of course Merrell would like. It would create an impression that any and all federal drug cases must or become dominanted by a federal court. I suggest that from the recent cases I have had an opportunity to review, the intention, because of the backlog of the federal judiciary, is not to encumber federal trial judges with more litigation, what with Title 7, Social Security cases, Speedy Trial Act cases, not to encumber the federal court with more cases, because I think as succinctly stated on the last page of our brief, and I would indicate that I think it is very well stated by Ms. Smith, who wrote that portion, on the point that you would have a situation whereby every time there was an allegation of a federal violation or a federal statute, then the defendants could remove it to federal court if

they didn't have diversity, and likewise, every plaintiff could dress up a federal violation and make it a federal case.

QUESTION: If there is no private cause of action in this case for misbranding, which I guess both sides agree that there is not, may a plaintiff nevertheless just go into a state court and sue for misbranding?

MR. CHESLEY: What would happen, Your Honor, the only place they could sue for misbranding as a practical consideration would be in the state of Ohio, because they would remove the person.

QUESTION: There is no private cause of action, and if it were brought in a federal court, there just wouldn't be any private cause of action. Isn't that right?

MR. CHESLEY: I am sorry, Justice White. I don't --

QUESTION: Well, what does it mean that there is no private cause of action for violation of this misbranding provision?

MR. CHESLEY: What it means, as I understand it, is that an individual plaintiff cannot address that -- does not have a right, a private right of litigation based upon a violation of that statute.

QUESTION: So if he goes into state court and says, the defendant has violated this federal statute, this misbranding provision, and I want relief, he will get dismissed in the state court.

MR. CHESLEY: Well, he may use it as a piece of evidence.

QUESTION: No, that is all he says.

MR. CHESLEY: I believe that he would, Your Honor, under the --

QUESTION: He would be dismissed.

MR. CHESLEY: I believe if that is the only thing you have, that I am here because they violated, you are not protected. In other words, myself as an individual, Ms. Smith as an individual does not have a right to sue on that alone, but you certainly would have a right to sue on negligence.

QUESTION: Yes, which -- you would have a right under state law to sue for negligence.

MR. CHESLEY: Yes, Your Honor, and the question is, was it the negligence of the misbranding that was the proximate cause, and in using this evidence, your experts or whatever, you could utilize as a standard of conduct the misbranding statute under 301 et. sec. of the --

QUESTION: Well, suppose in the state cause of

action for negligence based on this misbranding, it becomes clear that the misbranding that is claimed has been held by a federal court in an action by the Food and Drug Administration that this is not misbranding at all. One circuit has held that it is misbranding, and another circuit has held that it isn't, and obviously then a construction of the federal statute was involved.

MR. CHESLEY: If I understand your question, yes, there is a construction of the federal statute which is part of the evidence mechanism, but as I can give a real true analogy, a case cited by the plaintiff -- pardon me, by the defendants is a case that we had, which is the best example of what happens relative to private right. It is the Griffin case. It is the E. Farrell. There was a total breakdown in the system of the FDA. How that could even have been put on the marketplace without it even being looked at by the FDA is the best example I could give this Court of the total breakdown of the system. Yet our trial judge, Judge Spiegel, in -- and it cited the Griffin case in the defendant's brief, held that there was no right to come into the federal court because there was no private right to utilize the FDA.

While I disagreed with Judge Spiegel, being on

the other side of that case, that decision, I happen to concur with him, and that is my understanding of what is meant by private right. That in no way precludes me from bringing the case against the defendant in the state court on the same allegations of negligence as Justice Stevens indicated.

I have nothing further in my argument. I guess I am supposed to -- I don't think I have to wait for the white light, and unless the Court has any questions of me, I think -- it is seldom that I am in a position to support -- come as an appellee, but I would support the decision as written by the Sixth Circuit and indicate that I believe that that is appropriate.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Woodside?

ORAL ARGUMENT OF FRANK C. WOODSIDE, III, ESQ.,
ON BEHALF OF THE PETITIONER - REBUTTAL

MR. WOODSIDE: I have only one or two brief remarks.

On the federal -- or the private cause of action issue, while we do not believe that there is a private cause of action, and Mr. Chesley apparently now also so believes, nevertheless, in the fourth and fifth causes of action of the complaint, it has asserted that there is in fact a private cause of action.

Now, I think the law is -- I think this is accurate -- jurisdiction is not defeated by the possibility that the affirmance might fail to state a cause of action. What happens is, the Court has to first say, yes, we have jurisdiction, and then dismiss the private right claims. Now, in the Griffin case about which Mr. Chesley spoke, that is, the E. Farrell case in Cincinnati, what happens is, the Court had jurisdiction and then struck those claims.

In the Bendectin situation, involving the use of foreign products by foreign plaintiffs, the trial court, in this case Judge Ruben, bypassed the necessity of striking the claims and simply dismissed the actions based upon the forum non conveniens doctrine. He had jurisdiction to do that because of the fact that the plaintiff's complaints in these -- do in fact allege a private cause of action.

It would not ultimately withstand a motion to dismiss. Nevertheless, it was not necessary for the court to do that because the court dismissed these cases based upon the doctrine of forum non conveniens.

QUESTION: Mr. Woodside, would your Bell v. Hood argument go so far as to say every time a plaintiff alleges that there is a private cause of action on some federal statute, even though it was pretty clear there

was not, that there nevertheless would be jurisdiction to decide whether or not that was a good plan? I mean, if we agree here there isn't any private cause of action, you are saying, even though we know what the answer is, there was jurisdiction over the whole case.

MR. WOODSIDE: I believe the situation is that if that allegation is made, the Court then has jurisdiction to determine that there is in fact no cause of action stated. Yes, sir, I believe that is correct.

QUESTION: So you could always defeat removal by -- I mean, as long as that kind of allegation is in the complaint, a plaintiff could always sustain federal jurisdiction.

MR. WOODSIDE: Well, let's look at it the other way around. The defendant could always remove on that basis.

QUESTION: If the plaintiff is foolish enough to have such an allegation in the complaint.

MR. WOODSIDE: Yes, sir.

QUESTION: Yes.

MR. WOODSIDE: So I think that is another reason why there is in fact federal jurisdiction here.

QUESTION: Even though if the suit had been brought in the federal court here, the federal court

would have dismissed it on what ground?

MR. WOODSIDE: Forum non conveniens, as it did many before and several since.

QUESTION: Well, forget forum non conveniens for a moment. You just go into federal court and sue for misbranding, and you are going to get dismissed, aren't you --

MR. WOODSIDE: Yes, sir.

QUESTION: -- because there is no private cause of action.

MR. WOODSIDE: Yes, sir.

QUESTION: But not because there isn't jurisdiction.

MR. WOODSIDE: Well, it would depend upon what all the allegations of the complaint were.

QUESTION: Well, that is the only allegation there is, that there was misbranding, and I want relief.

MR. WOODSIDE: If that were the only allegation in the complaint, what in fact would happen would be, a motion to dismiss for failure to state a cause of action would be granted and the entire case would be dismissed.

QUESTION: And the reason is because there is no private cause of action.

MR. WOODSIDE: Correct, and the court always --

QUESTION: That is not a jurisdictional ruling, you say.

MR. WOODSIDE: The Court always has jurisdiction to determine whether or not --

QUESTION: Yes.

MR. WOODSIDE: -- there is a cause of action stated.

QUESTION: Yes.

MR. WOODSIDE: And so the Court would have jurisdiction to say, there is no private cause of action, therefore the lawsuit is dismissed.

QUESTION: But you say that this case should not be remanded to the state court because even though there is no private cause of action there was jurisdiction to entertain this suit on removal.

MR. WOODSIDE: Correct. That is correct. And that is because of the substantial nature of the federal question presented, which is the application of the Food, Drug, and Cosmetic Act to a situation involving a drug which is manufactured by a company other than defendant, sold by a company other than defendant, in a country where it was manufactured and sold by other companies who themselves were subject to their own regulatory scheme, and not to the regulatory scheme of the United States, and the plaintiffs themselves were

foreign consumers of that product.

Therefore one of the substantial federal questions is, does the federal Food, Drug, and Cosmetic Act apply to Merrell Dow Pharmaceuticals in this particular situation. That is not a factual question. That is a significant federal question to be determined in the first instance by the Court.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:46 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#85-169 - MERRELL DOW PHARMACEUTICALS, INC., Petitioner V.

LARRY JAMES CHRISTOPHER THOMPSON, ET UX., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)