

GLOBAL ACTION

A Newsletter of the **International Law Section** of the Cleveland Metropolitan Bar Association

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EDITOR'S NOTES

Mark J. Sundahl

This issue marks the beginning of a new year for the International Law Section. A new team of officers have stepped up with a new Chairman, Tony Konkoly, at the helm of the section. In this issue, Tony sets the course for the year, which will continue a tradition of high quality programs for the international practitioner. This issue of Global Action also continues the tradition of presenting quality articles from Cleveland's international lawyers. The first article, by Pingshan Li, explains recent developments in China's product recall regulations. The second article, written by George Carr, addresses the unintended consequences of changes to federal law that deem a resident alien to be a U.S. party, thus destroying diversity jurisdiction.

As always, members of the section are invited to submit an article for future issues of Global Action. Please email your submission directly to me or Reginald Russell at the addresses below. Submissions should be brief pieces (500-800 words) on a topic of interest to members of our section. If you would like to view previous issues of Global Action, a link to previous newsletters can be found on the International Law Section homepage.

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A MESSAGE FROM THE CHAIR

Anthony D. Konkoly

This issue of Global Action is the first issue for the new 2009-2010 CMBA fiscal year, and provides me with an opportunity to introduce myself as the new Chairman of the International Law Section. Many thanks to Bob Spira of Benesch, Friedlander, Coplan and Aronoff for his dedicated leadership and enthusiasm during his service as Chairman of the International Law Section during the past two years. Since the ILS was "reactivated" four years ago, we have been fortunate to have had strong leadership from Bob and from his predecessor, Steve Petras of Baker & Hostetler. It is my hope that I will be able to serve the ILS in as strong a fashion going forward as they have done over the past four years.

Looking forward, those of us involved in the ILS are hopeful for another year of growth and of active service to section members, the CMBA and the Northeast Ohio community in general. Although we are one of the smallest sections of the CMBA, we will continue to strive to provide useful activities and vibrant programming for Section Members and other constituencies.

Once again, we expect that our activities in the coming year will be centered on (a) this Global Action newsletter, (b) our Global Forums (where interested parties meet at lunchtime at the CMBA offices to discuss topics of general interest to those involved in the practice of international law in Northeast Ohio) and (c) our annual continuing education seminar held in the spring of each year.

I encourage all members to become more active in the Section and to participate in its activities to keep it vibrant and active. I also encourage others who are interested in or involved in the practice of international law to join the Section. We are always interested in having new members and in having existing members participate in developing the Section's programming and shaping its future direction.

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RECENT DEVELOPMENTS IN CHINA'S PRODUCT RECALL SYSTEM

China's faulty products have attracted many rounds of international attention. Chinese consumers, as well as consumers around the globe, have suffered from those products. Last year's Sanlu Dairy melamine contamination case was a particularly tragic incident since the victims of the poisonous "Sanlu" infant milk powder were helpless babies. The public was furious about the Chinese government's inability to protect them from defective products. The "Sanlu Scandal" has highlighted the urgent need for an effective product recall system. Due to the lack of a centrally enforced, mandatory recall system, the melamine contaminated 700 tons of infant powder could not be recalled soon enough.

China has a developing consumer protection law system which imposes contractual, tortious, administrative and/or criminal liabilities on manufacturers or suppliers of defective products. These product liabilities are mostly strict liabilities where consumers need not prove actual knowledge or negligence to establish liability. Officers of a defective product manufacturer or supplier could face criminal prosecutions. However, China's current product liability system does not contain a centralized and comprehensive product recall system like most western countries have.

Since 2004, China has started implementing several specific product recall regulations including the 2004 Defective Automobile Product Recall Management Regulation, the 2007 Toys Recall Management Regulation and the 2007 Food Recall Management Regulation. The recently enacted 2009 Food Safety Law also includes specific provisions with respect to food product recalls. These patchy recall systems are ineffective and share similar problems, such as ineffectiveness in enforcement caused by the overlapping of enforcement agencies and a lack of sufficient detail in the regulations to allow for proper implementation. Unlike the U.S. recall system which is mostly centrally controlled by the Consumer Product Safety Commission, the current recall systems in China are administered by various agencies. The overlapping jurisdictions of various agencies often prevent a recall from prompt deployment. It is also generally believed that the current punishments for noncompliance with the recall requirements are not severe enough to deter future violations. Usually, the fines imposed for non-compliance are less than the cost to implement a recall.

To respond to the increasing public cry for an effective and unified recall system, the General Administration of Quality Inspection, Supervision and Quarantine of China ("AQISQ") has prepared several drafts of the "Defective Products Recall Management Rules" (the final draft, hereinafter, as the "Draft Rules"). The Legislative Office of the State Council of China has just completed its solicitation of public comments on the Draft Rules and is finalizing a bill for the National People's Congress's approval.

The Draft Rules consist of seven chapters and 63 articles covering all types of products except drugs and military products. The Draft Rules try to clarify the definition of defective products, investigation procedures, recall procedures, manufacturer's or supplier's responsibility for recall, government agencies' supervision of product safety and recall and the legal liabilities for violations.

The Draft Rules apply to any products manufactured or sold in China. Foreign manufactured products, if sold in China, will be subject to the Draft Rules

as well. Under the current economic and political climate, it should not be surprising if foreign manufacturers are targeted for the enforcement of the Draft Rules. Foreign manufacturers, such as automakers, have had problems incorporating China into their global product recalls because of China's lack of enforceable recall regimes. After the enactment of the Draft Rules, all products, regardless the product type or the national origin of the manufacturer, are subject to this one system. Unlike before, under the Draft Rules, it would be hard for a foreign manufacturer to find excuses for not implementing recalls if its products fall into any of the recall categories. Because of the broad application of the Draft Rules, any manufacturer who wants to enter the Chinese market selling products should pay attention to its product safety strategies in China. Importers of Chinese products should re-examine their contracts and insurance policies to take advantage or avoid pitfalls of the changes implemented by the Draft Rules.

Under the Draft Rules, AQISQ and the Ministry of Health will maintain a central information system to monitor, collect and analyze information for the recall system. For future product recall information in China, hopefully, this central location will be the final and only stop.

There are other requirements under the Draft Rules that a foreign manufacturer should pay attention to:

The Draft Rules require that within five working days of a recall order, the manufacturer submit a Product Recall Plan to the AQISQ for approval. During the implementation of the Plan, the manufacturer is also required to submit status reports.

All manufacturers are required to keep records of their product design, manufacture and sales information. These records shall be kept as long as the products' safety (warranty) period. Manufacturers are also required to keep the records of their defect control and defect elimination (programs), if any, for no less than three years.

All manufacturers are required to report (to AQISQ) any information about defective products or a possible defect and any damage caused. If such information is discovered outside of China, the manufacturer still has to report to AQISQ.

Violation of the Draft Rules carries a possible fine of no more than 200,000 Yuan RMB (about USD \$29,412). If a crime is involved, criminal liability could be imposed under the Draft Rules. A fine of three times of the value of the product could be imposed if a manufacturer refuses to correct defects or comply with the law.

The Draft Rules are expected to become law before the end of 2009. If the Draft Rules become law without material changes, it still remains to be seen how they are to be enforced. In China, the enforcement of a particular law can always make a dramatic difference. Like many other areas of China's laws, one has to pay close attention to the continuing evolution of the law in order to successfully manage the many challenges of doing business in China.

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www.zimmerdesign.net

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ALIENS AS CITIZENS: THE UNINTENDED CONSEQUENCES AND UNRESOLVED INTERPRETATION OF THE 1988 AMENDMENT TO DENY DIVERSITY JURISDICTION TO RESIDENT ALIENS

Of the twelve to fifteen million permanent resident aliens in the United States, an estimated 140,000 live in Ohio. Additionally, hundreds of alien corporations are currently registered to conduct business in Ohio, and some of them have their principal places of business here.

When disputes involving such non-citizens lead to civil litigation, jurisdictional questions can be vexing. Congress has granted jurisdiction over two categories of alien litigation to the federal district courts, in 28 U.S.C. §1332. Specifically, federal courts may hear suits between “citizens of a State and citizens or subjects of a foreign state,” and suits between “citizens of different States and in which citizens or subjects of a foreign state are additional parties.” Thus, federal diversity jurisdiction generally exists (assuming that the \$75,000 minimum is met) when citizens litigate against aliens.

Over the years, alien individuals and corporations took advantage of this law to remove civil cases to federal court. In response to concerns that the federal courts were becoming unnecessarily clogged with “run of the mill” civil cases that belonged in state court, Congress amended the statute in 1988 to indicate that “[f]or the purposes of this section ... an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled,” thus destroying “diversity” between permanent residents and any domestic entity in the same State. This amendment also made the diversity requirements for individuals more analogous to those for corporations: 28 U.S.C. § 1332(c) has long deemed a corporation to be a citizen of the State where its principal place of business is located, regardless of its state or country of incorporation.

But the 1988 amendment had an unintended side effect: by deeming resident aliens to be citizens, it now arguably permits resident aliens to sue non-resident aliens in

U.S. courts for the first time. This introduced a trend of uncertainty and confusion into diversity jurisdiction that is also analogous to the current situation involving alien corporations headquartered in the United States. Alien jurisdictional diversity was described twenty years ago as “complicated and as yet unsettled” by the Second Circuit, in *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 393 (Pratt, J., dissenting), and remains so today. In *Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire Co., Ltd.*, 509 F.3d 271 (6th Cir. 2007), the Court reversed a highly esteemed District Judge in Ohio for misapplying the law of diversity jurisdiction to a case involving litigation between two alien corporations headquartered in Texas.

The courts have split on how to apply the amended statute: whether to read the amendment’s language plainly, or to advance the amendment’s “intent,” by construing the amendment to limit claims of diversity jurisdiction by resident aliens. Compare *Singh v. Daimler-Benz AG*, 9 F.3d 303 (3d Cir. 1993) (finding jurisdiction for permanent resident alien plaintiffs to sue both a domestic and an alien corporation), with *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997) (finding no jurisdiction for permanent resident alien plaintiff to sue nonresident alien defendants). Decisions continue to issue frequently that recognize, but do not resolve, this split. See, e.g., *Van Der Steen v. Sygen Int’l, PLC*, 464 F. Supp. 2d 931 (N.D. Cal. 2006) (following *Saadeh*), *Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire Co., Ltd.*, 2008 U.S. Dist. LEXIS 7642 (same, after remand).

Continued attention to this developing area of law should prove interesting to both scholars and litigators.

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UPCOMING EVENTS

The schedule of events for the coming year is under development and members will be alerted by email as soon as the calendar takes shape.

To join the section, to be placed on our mailing list, or to make inquiries regarding section activities please contact Samantha Pringle, Director of CLE & Sections, at springle@clemetrobar.org or Jessica Paine, Asst. Director of Sections & Community Programs, at jpaine@clemetrobar.org.