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Polymer Advisory

A PUBLICATION OF BENESCH POLYMER LAW GROUP FOR THE POLYMER, PLASTICS AND PACKAGING INDUSTRIES

Welcome to our new *Polymer Advisory*!

Well, it is actually only the "look" that is new. We have not changed our goal of providing you with insight into the latest legal, governmental, and business issues affecting the polymer industry.

As our *Polymer Advisory* newsletter enters its third year of publication, we hope you agree that it is more helpful than ever. We always welcome your feedback and suggestions for topics you think we should cover. We hope you enjoy this issue and look forward to future issues.

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A Tale of Two Polymer Litigants

Not long ago, a case was decided in a St. Louis federal court that in many ways is a paradigm of contract litigation in the polymer trade. The suit was brought in 2005 by a company called Structural Polymer Group, Limited ("Structural") against Zoltek Corporation. Structural claimed that Zoltek failed to supply it with two carbon fiber products, PANEX 33 and PANEX 35, under an exclusive requirements contract between them. Zoltek, in turn, countersued Structural, claiming that Structural breached that contract by buying carbon fibers from other sellers without good reason.

Zoltek, it seems, manufactures large filament-count carbon fibers, which Structural uses to manufacture "prepregs" (ready-to-mold material impregnated with resin) and fiber-reinforced composites, which it sells to manufacturers of wind turbine blades. In 2000, they entered into an exclusive requirements contract – they called it a "Supply Agreement" – by which Zoltek agreed to supply all of Structural's carbon fibers needs through December 31, 2010.

The lawsuit essentially boiled down to a dispute over the meaning of the term "Large Filament Count Carbon Fibers (the 'Carbon Fibers') as defined by Zoltek PANEX 33 specifications."

Those fifteen words ignited a solid year of litigation in federal court. By last count, 99 filings had been entered on the docket, with more likely to follow. The full gamut of discovery, including interrogatories, document production requests, and depositions ensued. So did discovery disputes, marked by motions to compel discovery and opposition briefs. Injunction requests, too. Early in the case, Structural asked the court to issue a preliminary injunction requiring Zoltek to supply it with PANEX 35, but the court declined to do so.

Zoltek eventually moved for summary judgment, asking the court to find that the Supply Agreement obligated it to supply Structural only with PANEX 33, not PANEX 35. Structural opposed that motion. It wanted the court to rule that the Supply Agreement required Zoltek to meet all of its PANEX 35 needs since PANEX 35 is more suitable than PANEX 33 for wind energy applications. Experts were hired. Affidavits were

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drafted. Lawyers wrote and filed briefs supporting their client's positions in the several months that followed.

The court ruled with admirable speed. It denied Zoltek's motion within three months after the final brief had been filed. The court dissected the parties' contract, analyzed their business relationship, weighed their competing arguments, and held that the Supply Agreement was ambiguous, and that the term "Large Filament Count Carbon Fibers (the 'Carbon Fibers') as defined by Zoltek PANEX 33 specifications" was "reasonably susceptible to more than one interpretation so that reasonable persons may disagree over their meaning," and that a trial would therefore be necessary to resolve these issues. In short, it held that there were too many unresolved factual issues present to allow it to dispose of the case on a motion for summary judgment.

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It might have been tempting, upon receiving that decision, for the parties to have thought to themselves, "All that work – all those conference calls and emails and depositions and document reviews and weekend strategy sessions – and for what? We're back where we started when the lawsuit began."

And that would be a perfectly natural reaction. But it would be wrong.

This case, like many others in the polymer arena, was more a business dispute than a purely legal one. Of course, legal issues are undeniably implicated; they are, to be sure, implicated in almost every business dispute. But what happened here, in its most basic form, is that Structural needed a product from Zoltek and Zoltek, according to Structural, couldn't meet Structural's demand. Customer, supplier, product. What did the litigation do for them? Plenty.

First, it forced them to confront head-on a contract that was sufficiently vague that neither party could agree on what it meant. Language is a great tool for conveying human intention, but it's not perfect. What might make perfect sense when a contract is negotiated may become murkier with the passage of time, as new players enter the mix and previously unforeseen situations arise. Having the parties go through the arduous exercise of examining their contracts in microscopic detail and justifying their interpretations of those contracts often yields better, sharper and more carefully-crafted contracts going forward. Parties may not feel that way while they're in the throes of litigation, but they almost invariably do when the sun rises the next morning.

Second, it forced them to better evaluate their relationship with each other. Structural and Zoltek developed a business relationship because they needed each other. That relationship obviously went through some bumps. Pitting them against each other in a federal lawsuit might not have been as soothing as a serene day on the golf course, but it undoubtedly forced them to examine their relationship with the kind of heightened scrutiny that might, in the end, prove beneficial for both parties. Will they maintain their relationship? End it? Alter it? Who knows. But one thing's for sure: When all is said and done, they'll know each other a whole lot better, and their relationship with each other – whatever that may be – will be more focused and better defined.

Third, it probably taught them lessons that they could never have learned elsewhere. Lessons about their supply chain; about their internal controls; about information management, contract administration and dispute resolution. Litigation, though hardly fun and often expensive, takes its participants to a heightened state of awareness. And in business, that's not always a bad place to be.

For more information, contact Jeremy Gilman at jgilman@bfca.com or 216.363.4565.

Pressure to Innovate Carries its Own Risks

Every company feels the pressure to put new products on the market, to be an innovator. However, the race to innovate should be tempered with a competent clearance opinion of patent counsel. There are no absolute guarantees, but an opinion of counsel will lessen the risk of an unforeseen patent infringement suit and a finding of willful infringement.

Even unintentionally infringing the patent rights of another may subject a company to the possibility of a patent infringement suit.

A United States patent provides the owner the right to exclude others from making, using, offering to sell, selling, or importing into the United States any patented invention during the term of the patent. There is no intent requirement. Therefore, even unintentionally infringing the patent rights of another may subject a company to the possibility of a patent infringement suit. If a company is found liable for infringing the patent rights of another, the company may be enjoined from using or selling the patented invention, have to pay for the lost profits of the patentee, have to pay a reasonable royalty to the patentee, and may also have to pay the attorney fees of the patentee. If the infringement is found to be willful, the court may increase the damages award up to three times. This is true even if the patentee does not have a product on the market.

The cost of a patent infringement suit is staggering. The American Intellectual Property Law Association's *"Report of the Economic Survey 2005"* shows that, depending on the complexity of the case, a patent infringement suit may cost between $350,000 and $3,000,000 in attorney fees before the case even goes to trial. By the end of trial, the cost may rise to between $650,000 and $4,500,000. This does not include any damages that may be awarded. Recently, the Associated Press reported that a United States medical device company was found liable for $64.5 million in damages for patent infringement. This amount represented a $43.5 million jury award and a court increase of $21 million for willfulness and attorney fees.

One of the best ways for a company to protect itself from the cost and embarrassment of a patent infringement lawsuit is to obtain a clearance opinion of patent counsel before the launch of a new product. The two main reasons to obtain the advice of counsel are to reduce risk and to provide a defense to willful infringement. Blindly launching a new product without first performing an investigation exposes the company to a great deal of risk. An injunction can damage market position and reputation. In addition, redesigning an existing product to avoid another's patent can be difficult and costly. Finally, the cost of patent litigation and possible liability for damages will likely negate any profits earned on the infringing sales.

Performing a pre-launch investigation can provide a company with insight into its ability to sell the new product without infringing the rights of others. A company may know its competitors' products and its market. However, there may be existing patents without corresponding products currently in the market that a company would not have discovered without performing an investigation. The up-front investigation provides a company with several options. A company may discover potential infringement problems before a significant investment in the new product. In addition, knowing the patent landscape allows a company to design around the patents that have been discovered. If patents are discovered that may present an infringement problem, a company may seek a license from the patentee. Finally, the company may later choose to rely on the opinion of patent counsel to defend against a charge of willful infringement.

Beware, not all clearance opinions are created equal. A company should look for indicia of competency in the opinion. The opinion should set forth the factual background for why the investigation was conducted. In addition, the opinion should discuss the search methodology and the patents discovered. Depending on the patents discovered in the search, the opinion should also explain the relevant patent infringement, validity, or enforceability law. Finally, the opinion should apply the relevant case law to the unique factual situation of the particular investigation.

By initially spending the relatively small amount of money to investigate existing patents, a company can minimize the risk of spending millions of dollars and years in court defending a patent infringement lawsuit. In addition, the patents returned in the search may provide the company's inventors with further insight into the state of the art in their field and provide new avenues for innovation.

For more information, please contact Steve Auvil (216.363.4686 or sauvil@bfca.com) or Matt Jupina (216.363.4491 or mjupina@bfca.com).

Hit that "Delete" Button and you may Pay…Millions

Your company has been sued and you realize that company computer records may reflect favorably on your case. Unfortunately, you learn that those records were deleted four years ago as part of a consolidation of operating groups. While you may mourn the loss of favorable data, your woes may be nothing compared to the torrent you may face if the opposing party seeks the production of those very same records in discovery. Your adversary may claim that such data would have assisted in their case, and that you destroyed the data willfully, resulting in injury to the adversary. Under such circumstances, your adversary will seek massive monetary sanctions, which courts have been willing to grant in specific cases.

Key to a court's determination is the company's record retention policy. Whether the retention policy is reasonable considering the relevant facts and circumstances and whether the policy was instituted in bad faith are matters of interest to the court in awarding sanctions.

Some authorities argue that absent specific circumstances (such as a threat of pending litigation), organizations should not have to preserve deleted or residual data. One organization of the nation's finest lawyers, consultants, academics and jurists, known as the "Sedona Conference Working Group on Electronic Document Production" notes that if a company's deleted and residual data are not accessed by employees in the ordinary course of business, there is no reason to require the routine preservation of such data. This Sedona Conference Working Group recommends that "decisions regarding preserving electronic documents and data are typically a team effort, involving counsel (inside and outside), information system professionals…" and others.

…it is vital that the routine destruction of all data, including electronic data, is halted once one has reason to believe that such information may be relevant in a lawsuit.

In addition to establishing reasonable document retention policies, it is vital that the routine destruction of all data, including electronic data, is halted once one has reason to believe that such information may be relevant in a lawsuit. This means the immediate suspension of deletion, overwriting, or any other possible destruction of electronic information.

The courts have recognized a cause of action for interference with, or destruction of evidence, also known as "spoliation of evidence." Such a claim typically arises where there is: (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of the defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of plaintiff's case and, (5) damages proximately caused by defendant's acts.

Organizations must establish and implement a retention policy to avoid legal mishaps and appropriately control relevant business documents. In the developing e-document retention area, companies and their counsel need to have a working knowledge of recent case law as well as proposed amendments to the Federal Rules of Civil Procedure, and guidelines proposed by a group of experts at the Sedona Conference.

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Ohio Technology Industry to Receive a $200 Million Boost for R&D

Up to $200 million from the state of Ohio could be available in the near future for technology research and development projects. Continuing the efforts to foster economic development and jobs in Ohio, on January 4, 2006 Governor Taft signed Senate Bill 236 ("Act"), which authorizes and appropriates funding for two key components of the Jobs for Ohio Bond Issue: the Third Frontier Research and Development Project and Job-Ready Site Development. Provisions of SB 236 of the Act become effective mid-spring 2006.

Governor Taft stated during the bill signing that, "We have the people, the location, the innovation and the support to help every business grow. Ohio is beginning 2006 as an even better place to locate and expand a company." New technology areas are vital to the future of manufacturing, product research and development, and Ohio's economy. The Act strengthens Ohio's technology industry, making Ohio globally competitive and providing an atmosphere for companies to expand and develop in Ohio.

As a result of the passage of the Bond Issue by Ohio voters in November 2005, legislation has been crafted that would encompass a broad range of possible participants eligible to receive state funding. The Act authorizes the issuance of $100 million of obligations in both fiscal years 2006 and 2007 for Third Frontier Research and Development Projects. It also expands the Third Frontier Commission to nine members, of which six will be regional representatives based on county groupings to ensure statewide balance.

…funds are available (for activities such as)…developing and commercializing products and processes; promoting, developing, and securing intellectual property matters and rights such as copyrights and patents…

The maximum number of applicants receiving new Third Frontier funds is an achievable goal when noting that funds are available to individuals, public and private entities, agencies, institutions, private companies or organizations, partnerships, business trusts or other business entities or ventures, research organizations (whether for profit or not-for-profit), or combinations or consortiums of any of these for the purpose of supporting research and development projects. When determining what constitutes a "research and development project," the definition recognizes the intricacies involved in new technology development and encompasses projects or activities in support of Ohio's industry, commerce, and business including: research and product innovation, development, and commercialization efforts. Projects and activities may include: attracting researchers and research teams by endowing chairs; developing and commercializing products and processes; promoting, developing, and securing intellectual property matters and rights such as copyrights and patents; promoting, developing, and securing property interests or securing financial rights and matters such as royalties, licensing, and other financial gain or sharing resulting from research and development.

Acknowledging the many job creation and retention success stories of companies, inventors, and institutions of higher education throughout Ohio's technology industry, the Act provides opportunities for collaboration between entities; however, the state is prohibited from having an ownership interest in any group or entity that receives support for a project and cannot assume any shared risk or liability.

To address concerns raised during the legislative process of entities acquiring funding then moving the technology and jobs out-of-state, the Act requires award recipients to meet two conditions: the project must primarily benefit Ohio and, if the recipient of the award is not an in-state entity, it must become an in-state entity not later than six months after entering into an agreement with Ohio for the award.

Support from the funding may be any one or a combination of grants, loans, subsidies, contributions, advances, or guarantees, by payment or reimbursement from available money, or by providing staffing or other support (including computer or other technology capacity) or equipment or facilities.

To further encourage economic growth, the Act authorizes the issuance of $30 million of obligations in fiscal year 2006 for the Job-Ready Site Development Program which will provide grants to pay for projects that, upon completion, will be sites and facilities intended for commercial, industrial, or manufacturing use. Any political subdivision or non-profit economic development organization may apply, and, with prior approval of the Director of Development, private, for-profit entities may apply. Grants may be used for acquisition of land and buildings, building construction, making improvements to land and buildings, planning or determining feasibility or practicability, indemnity or surety bonds and premiums on insurance, remediation, and infrastructure improvements.

The State hopes these new grants and loans will expand Ohio's high-tech research capabilities and promote innovation and company formation to create high-paying jobs for generations to come. The $200 million provides a stable funding resource for Ohio's technology industry and encourages new and existing business opportunities for Ohio.

For more information on this subject, contact Billie Fiore (614.223.9316 or bfiore@bfca.com) or Tom Washbush (614.223.9317 or twashbush@bfca.com).

Benesch Web Site Now Featuring Podcasts

Benesch has recently launched podcasts, known as "The Benesch Beat." The podcasts feature wide-ranging legal issues addressed by the firm's attorneys. The podcasts will be sent directly to individuals who subscribe to the free service, and are also posted on Benesch's web site, **www.bfca.com**. You can go to the web site and listen to a specific program, or you can download it onto your MP3 player and listen to it at your convenience.

Check out the eight podcasts that are currently online, including **"Doing Business in China,"** which features Benesch attorneys Allan Goldner, Peter Shelton, and Megan Mehalko. New podcasts will be published at least once a month and whenever breaking legal decisions and issues of interest arise.

Current Events

Plastics News Executive Forum 2006

March 5-8, 2006 | Tampa, Florida

This executive-level conference features top-name speakers from the industry's leading companies. Benesch and Plante & Moran will present at a 3-hour bonus strategy session.

Benesch Polymer Seminar

April 27, 2006 | Chicago, IL

Sponsored by Benesch's Polymer Group, Plante & Moran PLLC, and the Society of the Plastics Industry, this conference will focus on how polymer companies can maximize shareholder value through operational techniques, unique infrastructure, and transaction positioning.

2006 Ohio Polymer Summit

May 23, 2006 | Columbus, Ohio

Save the date for this annual meeting that brings together leaders from Ohio's government and the plastics industry.

For more information on events, contact Megan Thomas at 216.363.4174 or mthomas@bfca.com.

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