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Transfer of Venue in Adulteration Seizures under the Food, Drug, and Cosmetic Act

JACK R. BIERIG

INTRODUCTION

The Federal Food, Drug, and Cosmetic Act establishes the statutory framework for regulation of foods, drugs, medical devices and cosmetics in interstate commerce. It begins by defining various terms and then sets forth a list of prohibited acts and available remedies. These sections are followed by various provisions which regulate foods, drugs and devices, and cosmetics, respectively.

For a product to be deemed adulterated, it must have deficiencies in safety, wholesomeness, quality or effectiveness. Misbranding, on the other hand, comp

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2. Id. § 321.
3. Among others, these acts include the introduction or delivery for introduction into interstate commerce of a product violative of the statute, 21 U.S.C. § 331(a) (1970), the receipt in interstate commerce of such product and the delivery or proffered delivery thereof, id. § 331(c); and the doing of any act with respect to a food, drug, device or cosmetic if such act is done while the article is held for sale after shipment in interstate commerce and results in such article being in violation of the statute, id. § 331(k).
4. These include injunctions, 21 U.S.C. § 332 (1970); criminal penalties, id. § 333; and seizure and condemnation proceedings, id. § 334.
5. Id. §§ 341-48.
6. Id. §§ 351-60.b.
7. Id. §§ 361-63.
prehends inadequacies in the accuracy or informativeness of packaging and labeling. With two exceptions, a product cannot be in violation of the Act unless it is either adulterated or misbranded.

When a product is thought to be in violation of the law, the remedial procedure most often relied upon by the FDA is seizure of the product pursuant to section 304 of the Act. Under section 304(a), the United States Attorney, upon the recommendation of the FDA, files a complaint in federal district court for the condemnation and forfeiture of a particular lot of the allegedly offending goods found within the jurisdiction of the court. Upon the filing of the complaint, the clerk issues a warrant for the arrest of the goods and delivers it to the United States Marshal for service. Interested persons are given notice of the action and have 10 days from the date of execution of process to file a claim to the seized articles unless the time is extended by the court. Within 20 days of entering such a claim, the claimant must serve its answer.

Once the answer is served, although the goods themselves are cast as nominal defendant, the government and the claimant proceed to litigate whether or not the seized goods contravene the Act. If the claimant prevails, the goods are released to its custody. If the government prevails, a decree of condemnation is entered and the goods are disposed of pursuant to section 304(d).

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10. The exceptions are for food that is subject to an emergency permit but is manufactured, processed or packaged without such permit, 21 U.S.C. § 344 (1970); and for new drugs which are marketed without the prior approval of the Food and Drug Administration, id. § 355. 11. See Developments in the Law—The Federal Food, Drug, and Cosmetic Act, 67 Harv. L. Rev. 632, 683 (1954). 12. The section numbers used in the text are the section numbers of the Federal Food, Drug and Cosmetic Act. Section 304 is codified at 21 U.S.C. § 334 (1970). Subparagraph (a)(1) of section 304 provides in pertinent part as follows: Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 344 or 355 of this title, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States or United States court of a Territory within the jurisdiction of which the article is found. 13. FED. R. CIV. P. SUPPLEMENTAL RULES C(3). 14. FED. R. CIV. P. SUPPLEMENTAL RULES C(6). 15. Id. 16. 21 U.S.C. § 334(d) (1970). Disposal under this section generally involves destruction of the condemned articles. The court in its discretion may, however, permit the release of the articles to the claimant in order for the claimant to bring these articles into compliance with the Act. This “reconditioning” process under bond must be supervised by an FDA official. Additionally, in certain circumstances involving articles which were imported into the United States, the court in its discretion may allow the claimant to export these articles.
The result of a seizure action against a particular shipment of a product is res judicata both in subsequent seizures of similar products and in injunctive actions against the manufacturer. As noted, a seizure may be instituted wherever an allegedly adulterated or misbranded product is found. Thus, in the case of nationally distributed food, drugs, devices or cosmetics in which the alleged defect characterizes all units of the product, the FDA has a wide latitude in determining where to seize the product. This latitude allows the FDA to seek to force a manufacturer to litigate the lawfulness of the continued marketing of a product in any forum in the United States. The manufacturer may be and often is located at a great distance from the jurisdiction chosen by the FDA and may have no contacts with that jurisdiction except that it ships merchandise there. Moreover, the usual safeguard of service of personal process on the manufacturer is unavailing because technically the action is not brought against the manufacturer but against a shipment of goods.

To illustrate the inequities inherent in this system, take the case of a Chicago corporation which manufactures a nationally distributed cosmetic alleged to contain a poisonous and deleterious substance which may render the product harmful to its users in violation of section 601(a) of the Act and to bear a label which fails to disclose the potential hazards associated with use of the product in violation of section 602(a) of the Act. The alleged adulteration and misbranding in such a case are not unique to one particular batch but will be present in all articles of this cosmetic shipped by the company. In all likelihood, the individuals responsible for making decisions with respect to the marketing of the product reside in Chicago. The laboratory which runs tests on the product and the technical personnel employed by the corporation are situated in Chicago. The factory in which the alleged adulteration and misbranding took place is located in Chicago. The local FDA officials responsible for regulating the

19. See note 13 supra.
20. 21 U.S.C. § 361(a) (1970), which provides: "A cosmetic shall be deemed to be adulterated . . . [i]f it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual . . . ."
21. 21 U.S.C. § 362(a) (1970), which provides: "A cosmetic shall be deemed to be misbranded . . . [i]f its labeling is false or misleading in any particular."
corporation and inspecting the factory live in Chicago. The FDA experts who will be called upon to testify at trial live either in the Chicago or Washington, D.C. areas. The combination of these factors makes the Northern District of Illinois the logical forum in which to litigate the adulteration and misbranding issues. And yet simply by seizing a shipment of the cosmetic in Los Angeles, for example, the FDA can establish the Central District of California as the jurisdiction in which the lawfulness of continued sale of the cosmetic is litigated. California may have no connection with the product other than being one of 50 states in which the product is sold. Transporting witnesses and documents from Chicago and Washington to Los Angeles may be a waste of resources. Hiring local counsel in addition to the company's general counsel may be a needless drain on the corporation's finances. Notwithstanding these considerations and the fact that a shipment of the product could just as easily have been seized in Illinois or an adjacent state, the formalities of the seizure mechanism and the res judicata effects of a judgment combine to produce the absurd result suggested here.

In view of the ability of the FDA to utilize the seizure mechanism to force a manufacturer to litigate the status of its product under the Food, Drug, and Cosmetic Act in an inconvenient and illogical forum, it would be expected that the Act would provide liberal procedures for transfer of venue. In fact, under section 304(a), in any single

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22. Perhaps not from the FDA's tactical point of view. Faced with a lawsuit which may be twice as expensive to try in the jurisdiction in which it is brought than it would be in the most convenient jurisdiction, in marginal cases, the prospective claimant will be more likely to capitulate without a struggle. At least in this author's view, however, discouraging the manufacturer of a product from exercising his right to a day in court by bringing suit in a distant forum does not make the result any more logical from the point of view of an equitable legal system.

23. Theoretically, by not filing a claim to the seized goods, the manufacturer could forfeit the goods by default and thus avoid the res judicata effects of a trial on the merits. This alternative is unrealistic, however, both because the value of the seized goods is often substantial and because the FDA will be free to seize other shipments in equally inconvenient jurisdictions.

24. The scenario would be even more ridiculous if the FDA were to exercise its right to make the seizure in Alaska or Hawaii.

25. See text accompanying notes 12 through 15 supra.

26. See notes 17 through 18 supra.

27. The result may not be absurd where the alleged adulteration or misbranding is unique to the shipment seized. In such a case, the forum state has a greater interest in the litigation than does any other jurisdiction. More significantly, since only one batch is involved, there is no problem of res judicata. This article deals, however, with situations in which the same violations of the Act, if they exist at all, are found in all units of a product.


[No libel for condemnation shall be instituted under this chapter, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under the chapter based upon the same alleged misbranding, and]
seizure action in which only misbranding is alleged,29 the court in whose jurisdiction the goods were seized is required, upon the motion of the claimant, to transfer the case to a district of reasonable proximity to the claimant's principal place of business.30 Moreover, under section 304(b),31 in the case of seizures pending in two or more jurisdictions where the same claimant and the same issues of adulteration or misbranding are involved, the court of one such jurisdiction is required, upon motion of the claimant, to consolidate the cases for trial in a district selected by the claimant in which one of the seizures is pending, a district agreed upon by the parties, or a district of reasonable proximity to the claimant's principal place of business.

Thus the Act explicitly authorizes transfer of venue in single seizures not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (A) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (B) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

29. See, e.g., Ridd Laboratories v. United States, 203 F.2d 217 (5th Cir. 1953) and United States v. 84 Cartons . . . Femicin, 186 F. Supp. 324 (N.D. Ohio, 1960), for instances in which misbranding cases have been transferred under this section.

30. The phrase “district of reasonable proximity to the claimant's principal place of business” has been interpreted to exclude the district in which such place of business is actually located. See United States v. 91 Packages . . . Nutrile, 93 F. Supp. 763 (D.N.J. 1950) and cases cited therein.

31. 21 U.S.C. § 334(b) (1970) provides in pertinent part:
When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.
involving misbranding alone, in multiple seizures involving misbranding, and in multiple seizures involving adulteration. The Act is silent, however, with respect to single seizures in which adulteration is alleged—either as the sole offense or in conjunction with a charge of misbranding. Until recently, it was well settled that regardless of the convenience of the parties and witnesses and the interests of justice, the federal courts were without power to order a transfer of venue in such cases.32

LONG NAILS CASE

The line of authority holding that the federal courts do not have jurisdiction to order a transfer of venue in seizure actions involving adulteration is based on the principle that a court may transfer a case only when expressly authorized by statute to do so.33 In United States v. 11 Cases . . . Ido-Pheno-Chon,34 the court held itself to be without power to order the transfer of a seizure action in which it was alleged that an article was adulterated and misbranded under the Food, Drug, and Cosmetic Act. As Judge James Alger Fee noted:

[T]he transfer of any cause from one district to another is a question of power. No District Court has such inherent authority.

There must be an express statutory grant as a condition precedent to the initiation of the transfer.35

Neither section 304(a), section 304(b), nor any other section of the Food, Drug, and Cosmetic Act specifically provides for the transfer of single seizures involving adulteration. And the general transfer of venue provision in federal courts36 was held to be unavailing because section 1404(a) requires transfer to a district in which the action might have been brought at the time it was instituted.37 The courts have reasoned that a seizure is an action against a particular lot of goods which, at the time of the seizure, was found only in the jurisdiction

33. See cases cited note 32 supra.
34. 94 F. Supp. 925 (D. Ore. 1950).
35. Id. at 926.
36. 28 U.S.C. § 1404(a) (1970): “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”
in which the seizure was effectuated. Consequently, the action against the defendant, the seized goods, could have been brought in no other jurisdiction for purposes of section 1404(a).

The reasoning on which this line of cases is based was stated by Judge Fee:

Title 21 U.S.C.A. § 334(a) gives the power to transfer a single libel action where the charge is misbranding. But the charge here is adulteration and misbranding. There is no authority here for transfer.

Title 28 U.S.C.A. § 1404(a) gives power to transfer any civil action to any district where it might have been brought. This action could only have been brought in Oregon, because here alone was the res "found."

... Since no statutory provision exists, this Court is without power to initiate the transfer. 38

Under this line of cases manufacturers of foods, drugs, devices and cosmetics were forced to litigate the lawfulness of the continued sale of their product throughout the United States in inconvenient and illogical forums wherever adulteration was alleged in a single seizure action.

A recent case, however, has for the first time found the requisite statutory authority for transfer of adulteration seizures under the Food, Drug, and Cosmetic Act. In United States v. An Article of Cosmetic Consisting of 1227 Packages, 39 a shipment of cosmetics was alleged to be adulterated in that the cosmetic contained a poisonous or deleterious substance which rendered it injurious to users under normal conditions of use. The claimant moved to have the action transferred from the District of Oregon, where the shipment had been seized, to the Northern District of Illinois, where the claimant's principal place of business was located. Although all parties agreed that the transfer to Illinois would be for the convenience of the parties and witnesses and in the interests of justice, the FDA took the position that such transfer was not authorized by statute and therefore could not lawfully be accomplished.

The court, however, ordered the transfer—finding the requisite authority in the first sentence of section 304(b), which provides that:

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38. 94 F. Supp. 925, 927 (citations omitted).
40. In an unreported decision on January 29, 1975, Judge Decker of the United States District Court for the Northern District of Illinois refused a government motion to retransfer the case back to Oregon.
The article, equipment, or other thing proceeded against shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury.  

Judge Solomon's reasoning can be summarized as follows. Section 304(b) requires procedure in seizure actions to conform to procedure in admiralty. Current admiralty procedure, as incorporated into the Food, Drug, and Cosmetic Act by section 304(b), provides authority for transfer of venue in food and drug seizures. Judge Solomon relied on admiralty rule F(9). The rule dispenses with the requirement that transfer be made only to a jurisdiction in which the case might originally have been brought and permits transfer to any district in which trial would be for the convenience of parties and witnesses and in the interests of justice. Hence, the court reasoned that even if the absence of the seized goods from the Northern District of Illinois at the time the action was brought precluded transfer under 28 U.S.C. § 1404(a), transfer was authorized by rule F(9) as incorporated by section 304(b) since it was for the convenience of parties and witnesses and in the interests of justice.

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42. The court rejected the government's contention that the reference to "procedure in admiralty" incorporated such procedure as it existed in 1938 when the Act was passed rather than as it existed in 1974 when the case was heard. As Judge Solomon noted, when a statute adopts by specific reference the provisions of another enactment, such provisions are incorporated in the form in which they exist when the incorporating statute was passed and not as the incorporated enactment has subsequently been modified. When the reference in the incorporating statute is general, however, such as a reference to a system or body of laws, the referring statute takes the incorporated system as it changes over time. Somermeier v. District Director of Customs, 448 F.2d 1243, 1244 (9th Cir. 1971); Professional and Business Men's Life Insurance Co. v. Bankers Life Co., 163 F. Supp. 274, 294 (D. Mont. 1958); Seale v. McKennon, 215 Ore. 562, 567, 336 P.2d 340, 345 (1959). Judge Solomon ruled that the reference to "procedure in admiralty" in section 304(b) incorporated a system of law rather than a specific statute and therefore incorporated procedure in admiralty as it continuously evolves.

43. FED. R. CIV. P. SUPPLEMENTAL RULES F(9). Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

45. It should be noted that the opinion in Long Nails as reported at 372 F. Supp.
For the reasons suggested above, the result reached in *Long Nails* is a desirable one in that it allows a single libel for adulteration to be tried in the most convenient forum. The court's opinion, however, while superficially appealing, glosses over three conceptual difficulties inherent in its analysis. Had the Court come to grips with these issues, it would have found it much more difficult to reach the same result—if it could have done so at all.

**SECTION 304(b) ANALYSIS**

The first problem overlooked by the court in *Long Nails* is that the apparently broad incorporation of admiralty procedure in section 304(b) has been severely restricted by the courts. In an early case, the Supreme Court held that language in the Food and Drug Act of 1906, almost identical to that found in section 304(b) of the current Act, was not “intended to liken the proceedings to those in admiralty beyond the seizure of the property by process in rem.” Subsequent decisions, such as *Alberty Food Products Co. v. United States*, have similarly tended to restrict the application of admiralty procedure in seizure actions to the initial seizure.

The question avoided by the court in *Long Nails* is whether transfer of venue should be considered as “beyond the seizure of the property

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302, 303 quotes rule F(9) as including the “where it might have been brought” requirement. It must be assumed that this was an inadvertent error in transcription. Otherwise, the court's efforts to bring rule F(9) into play would be meaningless since the analysis with this clause added would be the same as that under 28 U.S.C. § 1404(a). Judge Solomon's entire effort was directed at eliminating the "where it might have been brought" requirement that defeated transfer in the earlier cases. See note 32 supra.

46. See pp. 4-7 supra.
48. Section 10 of the Food and Drug Act, Act of June 30, 1906, ch. 3915, § 10, 34 Stat. 771-72, the predecessor of the current statute, provided in part:
   The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case and all such proceedings shall be at the suit of and in the name of the United States.
49. 226 U.S. at 183. At issue in *Frozen Egg Product* was whether in an appeal of a seizure action tried without jury, the appellate court would make an independent determination of the facts, as was the prevailing practice in admiralty, or would reverse on the facts only if it held the trial court's findings "clearly erroneous," as was the practice at law. See *Baer, Admiralty Law of the Supreme Court* 25 n.32 (1963). "The Supreme Court held that the standard of review by the appellate court should be limited to that found in cases at law, noting: "we do not think it [§ 10] was intended to liken the proceedings in admiralty beyond the seizure of the property by process in rem, then giving the case the character of a law action, with trial by jury if demanded and with the review already obtaining in actions at law." 226 U.S. at 183.
50. 185 F.2d 321 (9th Cir. 1950) (holding that summary judgment could be entered in seizure actions pursuant to FED. R. CIV. P. 56(a) despite the reference in section 304 (b) to procedure in admiralty); accord, United States v. 935 Cases . . . Tomato Puree, 136 F.2d 523 (6th Cir. 1943).
by process *in rem*" within the meaning of *Frozen Egg Product* and subsequent cases or whether it should be considered subject to procedure in admiralty. It is submitted that transfer of venue is a procedure which should be viewed as within the scope of the initial seizure and therefore as subject to the admiralty rules. The legislative history of the 1906 Act does not reveal why admiralty procedure was incorporated into food and drug practice.\(^51\) It can be surmised, however, that this was done because admiralty offered the most familiar process for bringing in rem actions before the courts. Once the case was ready for trial, traditional practice at law was more than adequate to resolve the issues raised. But law was not nearly as advanced as admiralty with its well developed system governing the institution of suits technically against objects. Thus, the real need for reliance on admiralty procedure was to cover the conduct of a seizure action prior to the time that it was before the court for trial.

If correct, this analysis supports the conclusion that admiralty procedure was intended to govern seizure actions until the case was properly before the trial court, while practice at law was deemed adequate to regulate the trial and subsequent stages in the proceedings. Transfer of venue is precisely the sort of pre-trial procedure that was intended to be governed by the rules of admiralty. Moreover, unless transfer of venue is governed by admiralty procedure, the reference to such procedure in the Food, Drug, and Cosmetic Act would serve no purpose. If admiralty were held to govern only the actual apprehension of the property, as a literal reading of *Alberty Food* would suggest, then the procedure in seizure actions would in all but the most technical\(^52\) respects be the same as in any civil in rem action. Under such a restrictive reading, the entire reference to procedure in admiralty would have essentially no effect.\(^53\)

Finally, it is noteworthy that in the one decision to face the question,\(^54\) admiralty procedure was viewed as applicable to transfer of venue—although unavailing to the claimant since at the time the case arose admiralty did not permit transfer. The court ruled:

The act is silent with respect to the authority of a district court to

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\(^51\) And the reference to admiralty procedure was incorporated into section 304(b) without much consideration since it had appeared in the 1906 Act.  
\(^52\) See, e.g., United States v. 935 Cases . . . Tomato Puree, 136 F.2d 523 (6th Cir. 1943).  
\(^53\) This result would conflict with the basic rule of statutory construction that "there is a presumption against a construction which would render a statute ineffectual or inefficient." 82 C.J.S. *Statutes* § 316 n.3 (1953).  
transfer a single libel based upon an adulteration charge . . . .

Section 304(b) of the Act requires that the procedure in cases arising under this section “conform, as nearly as may be, to the procedure in admiralty.” In Re Thames Towboat Co., D.C.D. Conn., 1927, 21 F.2d 573, a motion was made . . . to remove an admiralty case from the District of Connecticut to the Eastern District of New York. The court denied this motion and said, “. . . there are no such proceedings in admiralty as motions . . . to remove from one district to another.”

While the failure of admiralty procedure to provide for transfer precluded reliance on section 304(b) in 1944, it is significant that the court viewed the section as applicable to the transfer issue. The court might have held under Frozen Egg Product that admiralty did not govern beyond the seizure itself. Instead, the court looked to then current admiralty procedure as determinative of the transfer issue.

Assuming then that section 304(b) does incorporate admiralty practice respecting transfer, the second question is whether rule F(9) is applicable in food and drug cases. Since the rule covers only one particular class of admiralty cases, limitation of liability actions, it could be contended that rule F(9) does not constitute such “procedure in admiralty” as is incorporated in section 304(b). A simple answer to this contention is that section 304(b) does not make any distinction between general admiralty procedures and those more limited in scope. The statute refers to “procedure in admiralty,” and the transfer provision in rule F(9) is precisely such procedure. The more compelling answer, however, is that the transfer provision of rule F(9) should be deemed to be incorporated by section 304(b) because limitation of liability actions to which it applies present the same potential for unfairness to defendants as do seizure actions under the Food, Drug, and Cosmetic Act; namely, unrestricted discretion by the plaintiff to institute proceedings anywhere in the United States.

Limitation of liability actions regulated by rule F are intended to enable a shipowner to assert against all potential claimants a right to have his liability arising out of a collision or other accident restricted to the value of his ship. Under rule F(9), the petitioning shipowner in many cases has a right to bring the action in any jurisdiction in which his ship may be. The shipowner is free to sue in any jurisdiction

55. Id. at 746-47.
56. See text accompanying notes 48 through 49 supra.
57. See generally Baer, Admiralty Law of the Supreme Court, ch. 10 (2d ed. 1969); Benedict, Admiralty § 474 et seq. (6th ed. 1940).
to which ships can sail. In the ability of the plaintiff to institute suit in virtually any jurisdiction, limitation of liability actions are most analogous to seizures under the Food, Drug, and Cosmetic Act.

In view of this analogy the court, in *New Jersey Barging Corp. v. T.A.D. Jones & Co.*,\(^5^9\) effectively articulates the reasons that the transfer provision of rule F(9) should be applied through section 304(b) to food and drug seizures.

The language and history of the provision indicate that its purpose is to permit the district judge to place a discretionary check on the petitioner's wide choice of forum in order to protect the other parties. Although this discretionary power is most appropriately exercised where petitioner has the widest choice of forum, that is, where he can bring his proceeding in any district, it may find some application where his choice is less broad if the forum he chooses is clearly inconvenient for most of the parties and a substantially more convenient forum is available.\(^8^0\)

Assuming that the problems caused by the restrictive reading given to section 304(b) and the limited applicability of rule F(9) are overcome, a third major issue arises. The court in *Long Nails* transferred the case to the jurisdiction in which the claimant's principal place of business was located. Under section 304(a), which specifically addresses itself to misbranding libels, transfer may be made only to a district of reasonable proximity to claimant's principal place of business.\(^6^1\) Thus the anomaly arises that the provision of the Food, Drug, and Cosmetic Act which deals with procedure generally is interpreted to give claimants more advantageous treatment than that to which they are entitled under the provision of the Act which specifically authorizes transfer in certain classes of cases.\(^6^2\)

Although concededly not an answer to this problem, the fact that in similar dilemmas courts have overlooked specific statutory procedures in favor of a liberal construction of more general provisions lends some support to the result in *Long Nails*. In the securities area,


\(^{61}\) Id. at 101.

\(^{62}\) This has been held to exclude the district in which claimant's principal place of business is actually located. See note 31 supra.

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for example, the restrictions on private actions explicitly imposed by Congress in the Securities Act of 1933 have been discarded in private actions brought by buyers under the general provisions of rule 10b-5.

More convincingly, resolution of the dilemma in favor of transfer of adulteration cases to a claimant's principal place of business can be justified on the theory that in establishing admiralty as the governing procedure Congress indicated its endorsement of subsequent changes in admiralty procedure even where these changes went beyond the specific provision of the Food, Drug, and Cosmetic Act. In 1938, when the Act was passed, admiralty did not provide for transfer of venue. Establishment of specific procedures for transfer of misbranding actions was, therefore, designed to liberalize transfer to some degree. Nothing in the statute or legislative history indicates congressional unwillingness to incorporate further liberalizations in transfer procedures should these be made possible by subsequent liberalization of "procedure in admiralty." On the contrary, the reference to the general system of admiralty, which, as has been shown, incorporates all later developments in that system, manifests a congressional preference for flexible and adaptable procedure under the Food, Drug, and Cosmetic Act. In sum, the superficially appealing approach of transferring venue under section 304(b) upon closer examination presents serious problems. While these problems may not be insurmountable, at a minimum they render questionable any transfer pursuant to section 304(b).

It is submitted, however, that despite these difficulties the result reached in *Long Nails* was correct. Even if not warranted under section 304(b), transfer of adulteration actions is arguably permitted by the general transfer of venue provision, 28 U.S.C. § 1404(a). Decisions holding that transfer under section 1404(a) is precluded by the in rem nature of seizures have, on this theory, failed correctly to analyze the real nature of such actions.

**Section 1404(a) Analysis**

The reasoning of the cases which have denied transfer under section 1404(a) can be expressed as follows: under section 1404(a), transfer can be made only to districts in which the action could have been

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64. See text accompanying notes 53 through 54 supra.
65. See note 38 supra.
66. See text accompanying notes 35 through 36 supra.
brought at the time it was instituted. Seizure is an action in rem which, at the time proceedings were instituted, could only have been brought in the district in which the seized res was located. Therefore, the seizure cannot be transferred under section 1404(a) to any other district.

The fallacy in the above analysis lies in the notion that seizures are actions in rem which do no more than adjudicate rights in the particular lot of goods seized. In fact, where the alleged defect in the goods is not unique to the batch seized, the action is really an action for a judgment declaring the rights of the claimant in all goods with the same alleged defect. The action is not one merely against a single batch of goods because, as has already been pointed out, the result of the suit against the res in question is res judicata against all similar articles.

The point has been most cogently stated by Judge Weinstein in *United States v. Article of Drug . . . Sudden Change*.

The issue in *Sudden Change* was whether the New York court had jurisdiction to decide whether certain articles, seized in Florida and never present in New York, were misbranded under the Food, Drug, and Cosmetic Act. In holding that it had jurisdiction, the court observed:

> As the courts have recognized, an action such as this, commenced by seizure under the Federal Food, Drug, and Cosmetic Act, is not a true in rem action.

> To hold that the presence of the res is a jurisdictional necessity would be to disregard the principle that "[t]he character of the remedy sought should be determinative" in delineating the boundary between transitory and in rem actions. 1 Moore, Federal practice ¶0.142 [2-1]. For all practical purposes, both parties having appeared, this is an action for a declaratory judgment to define Sudden Change as a drug. Although a judgment of condemnation purports to affect only the article actually seized, the findings in a seizure case—as in the usual civil action—have been said to be res judicata in a latter injunction action brought against the same claimant. *United States v. Nysco Laboratories, Inc.*, 318 F.2d 817 (2d Cir. 1963).

Resort to admiralty and in rem fictions serves only to obscure substantive policies of statutes the courts are called upon to interpret. Since adoption of the Federal Rules of Civil Procedure thirty

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67. In the remainder of this article, seizures in which the alleged defect in the goods is common to all similar goods will be referred to as "declaratory judgment seizures."
68. *United States v. Diapulse Corp. of America*, 457 F.2d 25 (2d Cir. 1972); see cases cited note 17 supra.
years ago, a major theme in American practice has been the elimination of procedural distinctions based upon the nature of a cause of action. Particularly in view of the 1966 integration of admiralty and civil rules, procedure in admiralty and other in rem cases should be the same as in cases in law and equity unless a strong policy or statute prevents this uniformity of treatment. . . .

We hold that we have jurisdiction of this action. The fact that the seized goods have never been in New York is not significant in this case.70

So viewed, the seizure is for all practical purposes an action for a judgment declaring the rights of the parties in all the claimant's articles having the same alleged defect as the articles seized. If the seized goods are condemned, the product will be removed from the marketplace throughout the United States.71 If they are vindicated, the product will be everywhere marketable. In view of the res judicata implications of any judgment, to hold that an adulteration libel against goods is an action in rem merely because the nominal defendants are the goods themselves is to exalt form above substance.

In declaratory judgment seizures, the actual seizure mechanism takes on a different function from that for which it was originally designed. When limited to an adjudication of the lawfulness of one particular shipment,72 seizure served two purposes. First, it enabled the regulatory authority summarily to remove a potentially dangerous product from the market. Secondly, it enabled the court in the district to which a quantity of goods had been shipped to decide the lawfulness of the marketing of these goods in the district even though personal jurisdiction over the distributor had not been and could not be obtained. Thus one important purpose of the seizure mechanism was to allow an action against goods where the distributor of these goods could not be served personally.73

When used in the declaratory judgment context, however, the seizure takes on a somewhat different character. First, the purpose of summary removal from the market in many instances74 becomes less
critical. Although the seized goods are sequestered for purposes of the lawsuit, goods identical in all material respects to those seized continue to be distributed pending a final adjudication in the seizure action. McGovern. More significantly for present purposes, the purpose of vesting jurisdiction in a district court far from the manufacturer's place of business becomes unnecessary. Since the alleged defect in the goods runs through all like products, jurisdiction need not be asserted in a distant forum but rather can be had in any district in which any of the allegedly defective goods can be found. Moreover, since the remedy sought is a declaration that no goods materially similar to those seized may be marketed at all, personal jurisdiction over the distributor should be asserted. Such jurisdiction is available in any forum in which the distributor is amenable to service of process, for example, the district in which his principal place of business is located.

In the declaratory judgment seizure action, then, the actual seizure mechanism has in large measure lost its two original functions of ensuring immediate removal of a potentially dangerous article from the market place and conferring jurisdiction upon the only court with an interest in determining the lawfulness of a particular batch of goods where personal jurisdiction is unavailable. Rather, the seizure mechanism has become a fiction—a stylized ritual mandated by history serving only to obscure the real nature of the action; but a fiction which must be honored in order to bring the real defendant into court to vindicate his right to market his product thereafter.

Reliance on the in rem fiction to deny the transfer of what is in essence a declaratory judgment action contravenes the principles of a judicial system which looks to substance rather than form. A case involv-


75. Unless, of course, the government makes multiple seizures of the product or obtains an injunction pendente lite.

76. To some extent, of course, the need for summary removal of a product exists even in the declaratory judgment context. But once this need is met by seizure, the action becomes one for a declaratory judgment and should be viewed as such for transfer of venue purposes. Moreover, where the threat to health posed by an article is serious or immediate, the government will make multiple seizures. Transfer of multiple seizures is explicitly governed by section 304(b) of the Act and is not at issue in this article. What we are here concerned with is the single seizure designed to contest the lawfulness of continued sale of a product.

77. To illustrate, a warrant for the arrest of the offending articles is issued and the local United States Marshal goes out to arrest these outlaws of commerce within the territory of the court's jurisdiction. Shades of the Wild West!
ing a similar fiction, Continental Grain Company v. Barge FBL-585,\textsuperscript{78} involved the in rem fiction that an inanimate object is a person for purposes of filing a lawsuit. The Supreme Court indicated that the real question is whether the fiction serves the interests of justice. The Court wrote:

> A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still. We are asked here, however, to transplant this ancient saltwater admiralty fiction into the dry-land context of \textit{forum non conveniens}, where its usefulness and possibilities for good are questionable at best. In fact, the fiction appears to have no relevance whatever in a District Court's determination of where a case can most conveniently be tried. \textit{A fiction born to provide convenient forums should not be transferred into a weapon to defeat that purpose}.\textsuperscript{79}

While the in rem fiction is most effective to confer jurisdiction in seizures in which the alleged defect is unique to the batch of product seized and is also effective in declaratory judgment seizures to bring the manufacturer into court, it has no relevance to the issue of where the case can most conveniently be tried. Where, as is frequently the case, both the convenience of the parties and witnesses and the interests of justice would be served by trying a declaratory judgment seizure in the district in which the manufacturer's principal place of business is located, the in rem fiction should not bar transfer to the more convenient forum pursuant to 28 U.S.C. § 1404(a).

On the foregoing analysis, the declaratory judgment seizure is really an action quasi-in rem. While purporting to be against a particular batch of goods, it is in reality a suit against the manufacturer—with seizure simply a means of commencing the lawsuit. Several cases have held that quasi-in rem actions may be transferred under section 1404(a) to a district in which jurisdiction exists for reasons apart from

\textsuperscript{78} 364 U.S. 19 (1960). In \textit{Continental Grain}, a barge sank in Tennessee, damaging both the vessel and its cargo. The owner of the cargo brought an action for damages against both the barge-owner and the barge in the Eastern District of Louisiana where the barge was located at the time of suit. Defendant barge-owner moved to have the entire action transferred to the Western District of Tennessee where his action against the cargo-owner was already pending. Plaintiff cargo-owner objected to transfer on the ground that since the defendant barge was located in Louisiana at the time suit was brought, the action could not originally have been brought against the barge in Tennessee and hence could not be transferred there pursuant to 28 U.S.C. § 1404(a). In a 5-4 decision, the Supreme Court upheld the power of the Louisiana court to transfer the action against the barge even though the barge had not been present in the transferee jurisdiction when the action was commenced.

\textsuperscript{79} 364 U.S. at 23 (emphasis added).
In adulteration libels, the location of the manufacturer's principal place of business as well as the presence of other lots of merchandise with the same alleged defect as that found in the seized goods would provide ample alternative basis of jurisdiction to support transfer under a quasi-in rem approach.

Conceptually, transfer of adulteration libels pursuant to 28 U.S.C. § 1404(a) has several advantages over transfer under section 304(b) of the Food, Drug, and Cosmetic Act. First, it does not depend on what is essentially statutory happenstance, but rather takes into account the real nature of the proceedings. Secondly, it does not involve the tortuous and perhaps ultimately unpersuasive reasoning required to overcome the arguments that section 304(b) has been restricted to the initial seizure of the res and that rule F(9), even if incorporated in the Act by section 304(b), applies only to limitation of liability actions. Finally, it avoids the difficulties inherent in using a general section of a statute to achieve a more favorable result than that possible under a more specific provision. In enacting section 304, Congress was thinking not of declaratory judgment seizures but of real in rem seizures. Omission of a transfer of venue provision from the other remedial sections of the Act indicates that had it considered the problem, Congress would have relied upon the general transfer of venue doctrine to govern actions, such as the declaratory judgment seizure, in which more is involved than an adjudication of the lawfulness of one particular lot of food, drugs, devices or cosmetics.

CONCLUSION

Although technically against only one lot of merchandise, a single seizure procedure is, because of the res judicata effect of a decision on the merits, an action for a judgment declaring whether or not such product may lawfully be sold in the United States. The ability to institute a seizure proceeding anywhere the product is sold gives the FDA unlimited discretion to determine the jurisdiction in which such judgment will be rendered. Since the FDA's choice of forum often involves a judicial district which is unnecessarily burdensome to the

80. See, e.g., Kellner v. Saye, 306 F. Supp. 1041 (D. Neb. 1969). The court transferred a suit on a promissory note that had been commenced by attachment of a stock certificate. The case was transferred to the district in which all operative facts had arisen. It was transferred despite the fact that the stock certificate, the jurisdictional basis of the suit, had not been in the transferee district at the time the action was instituted. See also Ladson v. Kibble, 307 F. Supp. 11 (S.D.N.Y. 1969).

claimant, inconvenient for witnesses, and inconsistent with fair procedure, the courts should be free to transfer venue whenever transfer would be for the convenience of parties and witnesses and in the interests of justice.

While courts have long held that they have no statutory authority to order transfer of a seizure action in which adulteration is alleged, a recent decision has found the requisite authority in section 304(b) of the Food, Drug, and Cosmetic Act. In so doing, however, the court overlooked several difficulties in its analysis, difficulties which cast doubt on the precedential value of the case. A more persuasive approach conceptually is to recognize that in situations in which the alleged violation of the Food, Drug, and Cosmetic Act characterizes all units of the product wherever sold, the action is really one for a declaratory judgment regarding the lawfulness of the continued marketing of the product. Viewed as a quasi-in rem action for a declaratory judgment, a seizure action should be transferable, pursuant to 28 U.S.C. § 1404(a), to any district in which personal jurisdiction over the claimant is available whenever equitable considerations warrant.