52.50 8/20/69

Memorandum 69-90

Subject: Study 52.50 - Sovereign Immunity (Ultrahazardous Activities)

You have previously received the consolidated recommendation relating to sovereign immunity. Contained in that recommendation at pages 29-36 and 71-74 is the portion relating to ultrahazardous activities that was distributed for comment. Somewhat surprisingly, to date, only one person or group has commented on this material. The comment was contained in a letter from the Committee on Administration of Justice of the Bar Association of San Francisco. The complete letter is attached to Memorandum 69-89; the portion relating to this subject is set forth in its entirety below:

> Recommendation number 12, relating to ultra-hazardous activities by governmental entities, was approved in principle unanimously by those members of our Committee present at the meeting at which this Recommendation was considered. While it was felt that essentially the same imposition of liability for ultra-hazardous activities should apply to a governmental body as are applicable to private concerns, it is recognized that governmental bodies may have specific problems which would not be applicable to private entities. For example, the question was raised whether or not broader immunity than is available to private persons in connection with hazardous activities, such as spraying with DDT to combat a locust plague or similar outbreak, should be available to public entities. Thus, it is felt that further study is required on this Recommendation to delimit specific areas in which governmental agencies may require broader immunity protection.

With respect to the specific example given, it might be noted that no California case has yet characterized the agricultural use of pesticides as an ultrahazardous activity. (An approach close to strict liability is permitted under Section 12972 of the Agricultural Code and the portion of the consolidated recommendation relating to pesticides makes this section applicable to public entities in the course of stating the general rule that "a public entity is liable for injuries caused by the use of a pesticide to the

same extent as a private person. . . ." In short, the example might more appropriately be considered in connection with that portion of the recommendation.) Perhaps more important, the staff believes that a California court today, required to determine whether an activity should be characterized as ultrahazardous, would take into consideration the value of the activity to the community and the appropriateness of the activity to the place where it is carried on. See Clark v. Di Prima, 241 Cal. App.2d 823, 51 Cal. Rptr. 49 (1966); Restatement Torts, Second § 520 (Tentative Draft). This will limit the effect of the rule provided. Finally, if any specific limitations are needed--cases where a public entity should be immune but a private person engaged in the same activity liable--those limitations should be suggested by the interested persons and organizations.

Respectfully submitted,

Jack I. Horton
Associate Counsel