#72 12/30/74

First Supplement to Memorandum 75-4

Subject: Study 72 - Liquidated Damages

Attached hereto is a letter from Mr. Richard Agay concerning the draft liquidated damages recommendation.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

First Supplement to
Memorandum 75-4

EXHIBIT I

RICHARD D. AGAY
ATTORNEY AT LAW
1900 AVENUE OF THE STARS - SUITE 800
LOS ANGELES, CALIFORNIA 90067

CRestview 7-3595
TRemont 8-1791

IN REPLY PLEASE REFER TO:

RDA - Legislation

December 18, 1974

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Staff Draft December 7, 1974
Liquidated Damages Recommendation

Dear Mr. DeMoully:

I offer the following comments with respect to the draft of recommendation enclosed with memorandum 75-4.

1. The first full paragraph on page 3 of the introduction accurately reflects that a liquidated damage provision can be used as a tool of oppression by a party who is able to dictate the terms of an agreement and that this is especially true in the consumer area. In the following section, dealing with recommendations, item 4 on page 4 reflects that the exception to the newly proposed rule concerning liquidated damages, should apply where there is a consumer contract or where there is a party with an inferior bargaining position. I suggest that the conjunction in the recommendation which has been carried out in the proposed language of Section 3319b does not follow from the paragraph referred to in the introduction and, moreover, is not a logical solution.

A. The introduction makes clear that the current law, which imposes a burden upon the party seeking to enforce a liquidated damage clause, makes the use of such clauses so difficult as to be seldom used or to be worthwhile when used. When tested under Section 3319(b), such clauses fall into virtually the same testing pattern as now exists. The difference is very small. The principal characteristic is the plaintiff would still have the burden of showing that the clause was fair, which as noted in the recommendation, makes the use of such clause of little value.

B. Therefore, it seems wholly unreasonable to exclude household, personal or family contracts merely because they are such contracts. It is well conceivable that such contracts can be thoroughly negotiated and/or produced from an atmosphere where there is not an unfair bargaining position on the opposite party's part. I would, therefore, suggest that reference to the purpose of the contract should be wholly deleted from subdivision (b) of Section 3319. The only real purpose of the exception in subdivision (b) is to protect those who cannot protect themselves at the time of the entering into of the contract from an unfair advantage taken of them.

C. I would, therefore, suggest that the language of subdivision (b) be changed to provide the exception where there is both a showing of inferior bargaining position and a showing that the contract was one of adhesion. If the party in the inferior bargaining position has a reasonable alternative to dealing with his opposite party, then that opposite party should be entitled to provide for liquidated damages and not have to meet the burdens presently imposed, or which would be imposed under subdivision (b). Only where there are contracts of adhesion, which necessarily imply that the creator of such contracts has a superior bargaining position, should the provisions of subdivision (b) come into play.

D. Turning back for a moment to the question of household, personal or family, I should note that as written, such words are broad enough (there is no limitation to personal property contracts) to include the purchase of residential real estate. The thrust of the comments applicable to real estate contracts has most recently been that they should be treated merely under the general provisions of Section 3319 without any special rule which establishes prima facie, whether it be 10% or 5%, that the liquidated damage clause would be valid. Certainly no one was anticipating that real estate contracts could not fall under Section 3319(a). Yet, the use of the words "personal, family or household" certainly would have to be construed to include the purchase of residential real estate. While I would prefer the total deletion of the language, it appears that the draftsmen had in mind the definitions under the Unruh Act. The notation at the bottom of page 8 and top of page 9 would so indicate. However, the Unruh Act pertains only to personal property and the Act contains appropriate definitions which so limit the words "personal, family or household purposes".

2. As I indicated in my May 2, 1973 letter, pertaining to the initial tentative recommendation, I feel that some of the major considerations which are included within the phrase "circumstances existing at the time the contract was made" should not be left to a mere comment by the Law Revision Commission but rather should be incorporated within the legislation itself. As a possible example, I suggest the following be added as subparagraph (c): a provision in a contract liquidating the damages for breach of the contract shall be deemed reasonable under the circumstances existing at the time the contract was made if (1) the maximum amount of all reasonably anticipatable damages, including non-recoverable costs or expenses which might reasonably be incurred in order to prove such damages, was equal to or greater than the amount liquidated in the contract or (2) the amount of all reasonably anticipatable damages under more than a minimal number of possible circumstances would not be easily and clearly determinable in the absence of incurring non-recoverable costs or expenses to prove such damages.

Again, I thank you for the privilege of submitting these comments.

Sincerely yours,

RICHARD AGAY

RDA:jm