

Study B-700

January 18, 1996

Third Supplement to Memorandum 96-3**Unfair Competition: Status of Study (Comments from
David Roe, Environmental Defense Fund)**

We have received a letter from David Roe, Environmental Defense Fund, which is attached. The letter disputes several points raised in the letter attached to the Second Supplement to Memorandum 96-3, and is keyed to the staff summary set out in that supplement. For the purposes of the main issue before the Commission at this meeting — whether to proceed with the unfair competition litigation study — it is not necessary to explore the details of this controversy.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary



January 18, 1996

Members, Law Revision Commission
c/o Stan Ulrich

VIA FAX: 415-494-1827

Dear Members:

Late this afternoon we received a copy of a 13-page submission to you from Mr. Stan Landfair of McKenna & Cuneo, on behalf a "Coalition" of unnamed companies opposed to enforcement of *Health and Safety Code* Section 25249.5 *et seq.* (Proposition 65).

Quick review of this submission shows a number of distorted assertions about the state of litigation under Proposition 65. EDF is unable to attend your meeting tomorrow, and there is not sufficient time to submit factual materials for your consideration tomorrow. However, we request

(a) that this letter be considered in conjunction with the McKenna & Cuneo submission, and

(b) that if the Commission chooses to proceed further with its Business & Professions Code project, it provide EDF the opportunity to submit full factual materials on the subjects raised in the McKenna and Cuneo submission, for your consideration.

Taking the points of the McKenna & Cuneo submission as summarized in Stan Ulrich's Second Supplement to Memorandum 96-3, in order:

1. There has been no "explosive growth" in Proposition 65 enforcement in recent years. There has been attention directed recently to toxic chemical exposures in the workplace, which affects Mr. Landfair's clients. It is, of course, understandable that enforcement attention under a relatively new statute will expand from one area to another, and that to each new group of potential defendants affected, that attention will appear to be substantial relative to previous experience.

2. Proposition 65 explicitly provides that its enforcement and remedies are cumulative to other relevant statutes and that "[n]othing in [Proposition 65] shall alter or diminish any [other] legal obligation . . . [or] create or enlarge any defense in any action to enforce such [other] legal obligation." *Health & Safety Code* Sec. 25249.13. It would be flatly contrary to the statute and to the intent of the voters, who passed Proposition 65 by approximately a 2:1 margin, to diminish the applicability of any other provision of law, such as the Business & Professions Code, because of the applicability of Proposition 65. *Id.*

3. It is not surprising that a coalition of defendants should claim that "most" Proposition 65 actions are "nuisance suits." The facts, however, are to the contrary. A primary focus of

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Proposition 65 enforcement actions has been on major, nationally distributed consumer products that are responsible for substantial exposure to dangerous chemicals (as well as other major exposure sources and water contamination sources), and the primary outcome of those actions has been major reformulations that eliminate or greatly reduce the relevant toxic chemical exposures on a permanent basis, typically not just in California but nationwide and even worldwide. EDF can thoroughly document these facts, which have repeatedly demonstrated success in reducing and eliminating major toxic chemical exposures where federal controls have failed.

4. See discussion of point 2. above.

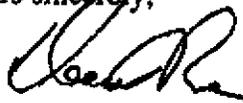
5. See discussion of point 2. above.

6. Only very rarely has any private party sought to intercede in a prosecution by the Attorney General or a district attorney against that prosecutor's wishes, and in those few instances the private party's efforts have been unavailing. The Attorney General's apparent policy is to seek a stay of the private party action when necessary, and it has succeeded in doing so.

7. The California courts have definitively held that Proposition 65 applies in the workplace, California Labor Federation v. Occupational Safety & Health Standards Board (1990) 221 Cal. App. 3d 1547, thus affirming a private right of action in that context. The "Coalition" that Mr. Landfair represents has sought to have that decision nullified by federal regulatory action; indeed, the Coalition's first public appearance to EDF's knowledge came in that effort, in the form of a submission to the U.S. Department of Labor. The Coalition has repeatedly refused to identify any of its members, most recently in a hearing before the Proposition 65 lead agency in December 1995 in which McKenna & Cuneo testified on behalf of the Coalition.

Thank you for including these points in your consideration. EDF's position on the question before continues to be properly reflected in its written and oral submissions to you.

Yours sincerely,



David Roe
Senior Attorney