

Study B-700

April 10, 1996

## First Supplement to Memorandum 96-23

### Unfair Competition (Mansfield comments)

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Attached to this supplement is a letter from Alan M. Mansfield concerning unfair competition. Mr. Mansfield forwards an article from *Spray Technology & Marketing* that he contends provides information relevant to the Commission's study.

The staff has a few comments on statements made in the letter that do not accurately characterize the course of the unfair competition litigation study:

1. Mr. Mansfield states that the Commission decided to go forward with the study "based on" the submission by the Coalition of Manufacturers for the Responsible Administration of Proposition 65. The staff does not know what each Commissioner bases his or her vote upon, and we would hesitate to guess. But it is inaccurate to suggest that the Coalition letter is *the* basis — in fact, it may have played no role at all, since as Mr. Mansfield points out it was received only two days before the January meeting. (The staff cannot resist the temptation to note that the attached letter suffers from the same defect.)

2. Mr. Mansfield states that "over 15 letters were submitted ... explaining that there was no problem." This overstates the case. While we have not gone back and reread all the letters received in the course of this study, in general the letters have been from environmental or consumer groups who understandably do not want to see any change that might impose any burden or limitation on the open-ended rules currently in place. These letters do not "explain" that there is no problem. They argue and assert that there is no problem. The defense bar has not written to explain that there is no problem.

3. Mr. Mansfield's attempts to hinge the Commission's continued study of unfair competition litigation on the Coalition's submissions and his evaluation of whether there is some special quality to the disputes between the Coalition and *As You Sow* in the Proposition 65 arena. This does not accurately characterize the history or focus of this study.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

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ADMITTED IN NY

April 10, 1996

VIA FACSIMILE

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Law Revision Commission
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File: \_\_\_\_\_

Re: Study B-700 -- Unfair Competition Revisions

Dear Stan:

I enclose a copy of an article from the January 1996 issue of Spray Technology & Marketing for the Law Revision Commission's consideration and review. While possibly an obscure reference, it brings new evidence to the question whether the Law Revision Commission needs to proceed with proposed major revisions to Business & Professions Code §17200 which would substantially alter the "delicate balance" that exists in §17200 litigation.

As you and the Commission members may remember, after hearings in which Senator Kopp expressed the position that it appeared there was no problems to fix, a notice was sent asking for evidence or statements explaining whether there were systemic problems in the litigation and settlement of Business & Professions Code §17200 actions. While over 15 letters were submitted to the Commission, both from the public and private sector, explaining that there was no problem, only one submission was provided from a defense group known as the Coalition of Manufacturers for the Responsible Administration of Proposition 65 ("Coalition of Manufacturers") by Stanley Landfair -- a belated submission sent just two days before the Commission's January meeting. Based upon that submission the Commission decided that there was sufficient evidence to go forward, despite what appeared to be an isolated argument between a number of Mr. Landfair's clients and a group known as "As You Sow," which specializes in Proposition 65 litigation. The Commission voted to proceed, but with the express understanding

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that it would later revisit the question as to whether there was a need to go forward.

In the intervening two months, other than an occasional anecdote from defendants' counsel, there has been no evidence of any systemic problem with litigation under Business & Professions Code §17200. However, what is now available is an article describing the purpose of the Coalition for Manufacturers. According to this industry publication:

"an industry group was formed to counter [As You Sow] actions. We contacted the Coalition of Manufacturers for Responsible Administration of Proposition 65 to learn what was being done. Stanley W. Landfair, an attorney with McKenna & Cuneo law firm in Los Angeles . . . is administrating the legal needs of the Coalition."

In April 1995, the Coalition of Manufacturers filed a petition with OSHA "seeking to cut off such [Proposition 65] actions." The goal of such a submission, according to Mr. Landfair, was to "effectively foreclose the enforcement of Proposition 65 in the workplace, at least insofar as Proposition 65 presently is enforced by private party bounty hunters to impose warning requirements on products that are distributed into California in interstate commerce."

The article goes on to state that the Coalition "will file further comments essentially telling OSHA that bounty-hunter enforcement is mainly motivated more for financial gain than for effective, uniform enforcement of the law, is deleterious and that in order to stop such actions, the Coalition may file suit to prevent enforcement of Prop. 65 in the workplace." According to Mr. Landfair, "Such a suit, if successful, would preclude further bounty-hunter suits regarding workplace warnings and for industrial products intended exclusively for the workplace" -- potentially contravening the intent of Proposition 65.

This article concludes: "Heard enough? Stanley Landfair says the Coalition needs support to carry its efforts forward. If your company is interested in participating in the Coalition, or supporting it, or if you would like more information, contact Stanley Landfair."

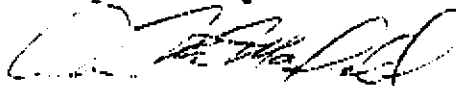
This article is significant for this Commission to consider. Mr. Landfair and As You Sow apparently have a long-running dispute. Mr. Landfair is attempting to litigate that dispute in as many forums as possible, obtaining more clients for his Coalition in the process. Thus, his submissions to the Commission must be

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considered in the light in which they were intended -- as part of an isolated, albeit multi-faceted, dispute between Mr. Landfair and As You Sow, where the express goal of Mr. Landfair is to stop the use of Proposition 65 in the workplace and, to the extent that Business & Professions Code §17200 is also involved, such claims as well. Their dispute has nothing to with the interplay between the public and private sector in §17200 actions or the res iudicata impact of a §17200 settlement.

We urge that this article be submitted to the Commission, and that the Commission take up the invitation of Professor Fellmuth to undertake a study of whether and to what extent actual problems exist, and again take a serious look whether continued efforts at revision should go forward in light of the dearth of any substantive evidence of a problem. While we believe that the most recent efforts of the Commission are a step forward, the res iudicata and public prosecutor priority provisions are still very controversial and problematic, and from my brief communications with numerous public interest groups will be actively opposed. However, such comments will be submitted to the Commission separately.

Respectfully submitted,



ALAN M. MANSFIELD

AMM/jms

Enclosure

cc: Thomas Papageorge, Esq.  
Earl Lui, Esq.

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JANUARY 1996

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## Sprays Under Pressure

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*A compilation of issues of immediate interest to the spray packaging industry...*

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### **As You Sow...** *A special report*

Our November issue carried a report on an activist group called As You Sow (AYS). We noted that this group, whose main goal was bounty hunter suits against industry, was prolific in the lawsuits it brought on behalf of California's Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986.

We also mentioned that an industry group was formed to counter AYS actions. We contacted the Coalition of Manufacturers for the Responsible Administration of Proposition 65 to learn what was being done.

Stanley W. Landfair, an attorney with McKenna & Cuneo law firm in Los Angeles, was kind enough to bring us up to date. McKenna & Cuneo is administering the legal needs of the coalition. As you know, most of the work is in the form of petitions to state and federal agencies.

Landfair said that AYS, which is based in San Francisco, "has issued hundreds of 60-day Notices of Intent to Sue [under Proposition 65]. The majority of its

recent actions are directed against manufacturers of products intended for use in the workplace, including institutional and industrial cleaners and sanitizers; automotive coatings and cleaning products; adhesive products and coating products. The manufacturers and distributors of these products have placed 'appropriate hazard warnings' on their labels and Material Safety Data Sheets in compliance with the Hazard Communication Standard promulgated under the Occupational Safety and Health Act. The principal legal question raised in the *As You Sow* actions is whether the OSHA HazCom warnings are sufficient to satisfy the requirements of Proposition 65."

In April 1995, the Coalition of Manufacturers filed a petition with OSHA, "seeking to cut off such actions. The petition, referred to formally as a Complaint About State Plan Administration, or 'CASPA,' notes that California's State HazCom Plan never has been approved by OSHA, and argues," said Landfair, "that the California Standard does not meet the criteria for approval under 29 U.S.C. § 667 (c)(2). In

this regard, Proposition 65 is inconsistent with the prohibition of private rights of action under OSHA."

The petition also argued that Prop. 65 is "inconsistent with the prohibition of private rights of action under OSHA," and that "any requirement for a special Proposition 65 warning on Material Safety Data Sheets and labels on products whose warnings are governed by the federal HazCom standard presents a forbidden burden on interstate commerce and is thus preempted by OSHA."

OSHA, said Landfair, took a long, hard look at the CASPA and basically indicated that it would initiate proceedings which are "tantamount to a federal rulemaking" in order to determine whether the incorporation of Prop. 65 into the California Hazard Communication Standard should be approved.

He said OSHA, in a November 1995 letter, indicated it would seek comment from California's Department of Occupational Safety and Health, and then seek public comment. "If OSHA responds favorably to the CASPA, its ruling could effectively foreclose the enforcement of Proposition 65 in the workplace, at least insofar as Proposition 65 presently is enforced by private party bounty hunters to impose warning requirements on products that are distributed into California in interstate commerce."

He added that the Coalition intends further action. It

will file further comments essentially telling OSHA that bounty-hunter enforcement is mainly motivated more for financial gain than for effective, uniform enforcement of the law, is deleterious and that in order to stop such actions, the Coalition may file suit to prevent enforcement of Prop. 65 in the workplace unless its incorporation into California's HazCom Standard is approved by OSHA. "Such a suit, if successful, would preclude further bounty-hunter suits regarding workplace warnings and for industrial products intended exclusively for the workplace."

If you're wondering just how important AYS bounty-hunter actions are, the group, incorporated in 1982, issued over one hundred Prop. 65 "Notices of Intent to Sue" in its first month of existence and has issued over one thousand more since. The principal focus of AYS has been toluene, which is used as a solvent in myriad consumer products from nail polish to spray paint to adhesives.

Landfair says AYS "has reached settlements in most of its toluene cases, with payments ranging from a few thousand to over a hundred thousand dollars per company. Where companies have not settled voluntarily, AYS has not hesitated to bring suit. Its most notorious case was brought under the caption *As You Sow v. The Sherwin-Williams Company, et al.* (Super. Ct., San Francisco, No. 952433) in which

we were lead defense counsel. AYS sued over one hundred manufacturers, distributors and retailers of aerosol paint products, and ultimately won settlements which, including its attorneys' fees and costs, may have totaled nearly one million dollars.

"More recently," adds Landfair, "AYS has turned its attention to bulk chemical products, industrial use products and products manufactured to military specifications. Its litigation tactics have grown even more aggressive. AYS appears to collect MSDSs from the workplace until it identifies a product that contains toluene, or another Proposition 65 chemical. Seizing on the absence of a Proposition 65 warning for any such product on the product label, or any variation from the State's safe harbor warning language on the MSDSs, AYS issues a notice of Intent to Sue. Where the manufacturer responds, AYS demands copies of MSDSs and labels for all products sold in California. If the manufacturer resists, AYS threatens to file a complaint and demand discovery for the same information.

"If the manufacturer fails to respond or continues to resist, AYS files a complaint, and indeed demands discovery. In the face of such demands, which are expensive and burdensome to resist or respond to, most defendants negotiate to settle, regardless of the merits of the claims against them."

Landfair noted that smaller companies tend to settle quickly. Against larger companies, AYS "has used the threat of protracted, high-profile Proposition 65 litigation (in which the manufacturer must reimburse AYS all of its attorneys' fees and costs, if AYS prevails) to extract 'global' settlements, extending to their entire product lines. In a flurry of recent cases, AYS has obtained out of court settlements from four major manufacturers, in amounts ranging from approximately \$100,000 to \$250,000 each."

Heard enough? Stanley Landfair says the Coalition needs support to carry its efforts forward. If your company is interested in participating in the Coalition, or supporting it, or if you would like more information, contact Stanley W. Landfair at (213) 243-6277 or Carol R. Brophy at (213) 243-6105.

Or E-mail Spray Technology at [spraytec@aol.com](mailto:spraytec@aol.com). —MLS