LIVINGSTON & MATTESICH

Rec'd SB 67

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LEGISLATIVE ADVOCATE

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The Honorable Pete Wilson
Governor of California
State Capitol Building
Sacramento, CA 95814

Re: Enrolled Bills SB 67 (Kopp) and SB 340 (Sher)
Request for Veto of Both Bills

Dear Governor Wilson:

I am writing on behalf of our client, the Miller Brewing Company, to re-state its opposition to SB 67 and, in addition, to urge your veto of SB 340.

In our previous letter regarding SB 67, we urged you to veto the measure because it irrationally singles out one inherently unsafe consumer product – tobacco – and would set a precedent for attacking the immunity extended by statute and case law to other consumer products listed under comment i to Section 420A of the Restatement (Second) of Torts, including beverage alcohol. We wish to reiterate that argument and raise a new problem with SB 67 that may alter the scope of immunity granted by case law to manufacturers and sellers of inherently unsafe products other than tobacco.

During the past week it has been brought to our attention that a subtle change in the wording of subdivision (a) of section 1714.45 of the Civil Code could be interpreted by the courts to limit substantively the scope of the immunity currently enjoyed by manufacturers and sellers of alcoholic beverages by reason of the decision in *American Tobacco v. Superior Court* (208 Cal.App.3d 480). That decision gave manufacturers and sellers of all five products listed in comment i – sugar, tobacco, alcohol, castor oil, and butter – "nearly complete immunity" from product liability lawsuits. In most instances, a defendant to such a lawsuit can, under current California law, merely demur to the complaint. The defendant is not required to plead and prove separately that the product is inherently unsafe and known to be so by the ordinary consumer with ordinary knowledge.

Changes to the structure of the conjunctive wording in subdivision (a)(1) and (2) of section 1714.45, as amended by SB 67, may appear at first glance to be non-substantive. However, for some years opponents of tort reform have pursued identical language changes to the same statute with the single-minded purpose of overturning the central holding of the *American Tobacco* decision. By making the conditions of paragraphs (1) and (2) more explicit, it will undoubtedly be argued that *American Tobacco* no longer gives manufacturers and sellers of any of the comment i products unqualified immunity from product liability lawsuits. Instead, the defendant manufacturer must also plead and prove, or have the other parties stipulate, that the product is inherently unsafe and known by the ordinary consumer with ordinary knowledge to be unsafe. Additionally, if the courts ultimately conclude that section 1714.45, as amended by SB 67, no longer gives unqualified immunity to comment i products, then retailers and distributors of those products will find the scope of their immunity eroded and the cost of mounting a defense against a product liability lawsuit will soar. This outcome is contrary to your stated intent, and the apparent intent of Senator Kopp, to hold retailers and distributors of tobacco products harmless under the revised bill.

In short, SB 67 still sets a dangerous precedent of concern to manufacturers of alcohol and other comment i products. More importantly, the "new" SB 67 does not sufficiently address your concerns about protecting retailers and distributors of tobacco or the other four comment i products from frivolous product liability lawsuits that clearly waste the time of the courts and unnecessarily burdens the business community.

For these reasons SB 67 still deserves your veto.

SB 340 presents similar difficulties for Miller and other segments of the alcoholic beverage industry.

Although the measure purports to extend liability only to tobacco manufacturers and tobacco research organizations, we are puzzled by subdivision (d) of section 1714.455 where it is asserted that *American Tobacco* "misinterpreted legislative intent as it relates to tobacco products by construing section 1714.45 as providing an unqualified immunity and as altering or amending California law existing on January 1, 1988." We cannot understand – nor will any court understand – how the Legislature could have had one intent with respect to the scope of immunity extended to tobacco

products, and different intent with regard to the immunity extended to the four other comment i products. In fact, the legislative history of the bill that enacted section 1714.45 makes it clear that the Legislature intended to provide an unqualified immunity to each of the comment i products without distinction. The only rational sense a court could make out of subdivision (d) is that the Legislature never intended to extend unqualified immunity to any of the comment i products, including alcohol.

We therefore believe that subdivision (d) of SB 340 is an open invitation for the plaintiffs bar to undermine the holding of *American Tobacco* and force manufacturers and seller of comment i products to plead and prove that the product is inherently unsafe and known by the ordinary consumer with ordinary knowledge to be so. Again, for the reasons stated above with respect to SB 67, such an outcome is complete waste of scarce judicial resources. Moreover, it would force manufacturers asserting immunity under section 1714.45 to prove in open court that such common consumer products as beer, wine, butter, dairy products, sugary foods, red meat, etc. are inherently unsafe when, in fact, it is only the abuse of these products that makes them unsafe.

Given the confusing situation presented by these bills, we respectfully urge you to veto both SB 67 and SB 340 and forward a message requesting the Legislature to correct the ambiguities and inconsistencies with regard to these bills.

Sincerely,

PARKE D. TERRY

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