

February 28, 1992

The Honorable Herb Carlson
Idaho State Senate
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: House Bill 593; Product Disparagement

Dear Senator Carlson:

You have requested our opinion concerning the constitutionality of H.B. 593, which creates a statutory cause of action for agricultural food product disparagement. It is the opinion of this office that H.B. 593 probably violates the first amendment of the United States Constitution. The bill's negligence standard, its broad terms and its provision for treble damages all raise serious constitutional concerns.

This letter will first address the elements of H.B. 593 and how the bill relates to traditional product disparagement law. The relevant constitutional principles will then be examined to provide a framework for a first amendment analysis. Finally, this letter will discuss some specific constitutional vulnerabilities of H.B. 593.

I.

H.B. 593 AND PRODUCT DISPARAGEMENT LAW

H.B. 593 creates a statutory action for agricultural food product disparagement. Such an action already exists at common law. H.B. 593 codifies this action, but significantly alters certain elements of the common law tort.

Traditional product disparagement is a tort in which the plaintiff must prove that a false statement concerning the nature or quality of plaintiff's product was made by the defendant. The tort of product disparagement is closely associated with the more familiar tort of defamation. *See Zerpel Corp. v. DMP Corp.*, 561 F. Supp. 404 (E.D. Penn. 1983). However, the two torts protect different interests. An action for defamation protects reputation or character from false statements directed at the moral character of an individual. *Zerpel* at 408. The cause of action for product disparagement, on the other hand, "protects economic interests by providing a remedy to one who suffers pecuniary loss from slurs affecting the marketability of his goods." *Id.*

The two torts, while closely aligned, contain different elements. One who publishes a defamatory statement "of and concerning" another person can be held liable in damages if: (1) the statement is false; (2) the publication is not privileged; and (3) the publication results from fault which at least amounts to negligence. RESTATEMENT (SECOND) OF TORTS § 588. In contrast, the elements for common law product disparagement are stricter. The publication of a disparaging statement "of and concerning" the product of another is only actionable where: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize the publication will result in pecuniary loss; (3) the statement is not privileged; (4) measurable pecuniary loss does in fact occur; and (5) the statement is made with malice; that is, the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity. Zerpol at 409.

H.B. 593 modifies the common law tort of product disparagement. Under the bill, a defendant may be liable for civil damages if he disseminates to the public, in any manner, "false information" not based upon "reliable" scientific facts and data "which the disseminator knows or should have known to be false, and which casts doubt upon the safety of any perishable agricultural food product" Additionally, if the statement was made with the intent to harm the producer, treble damages are available.

The most obvious modification is that the traditional malice standard has been replaced with the lower standard of negligence. As noted, at common law, the plaintiff has to show the defendant knew the statement was false or acted with reckless disregard of its falsity—a malice requirement. Under H.B. 593, the plaintiff now need only demonstrate negligence; that is, the defendant "should have known" the statement was false. Additionally, the statute contains no express provision that the false statement be "of and concerning" the particular plaintiff's product. Finally, the statute includes a treble damage scheme not found in common law disparagement suits. Thus, while H.B. 593 is, in essence, a codification of the common law disparagement action, a number of the stringent common law requirements have either been relaxed or omitted altogether.

II.

RELEVANT CONSTITUTIONAL BACKGROUND

Having discussed the elements of H.B. 593, we now turn to the relevant constitutional doctrines against which this bill must be measured. It is important, at this point, to bear in mind that H.B. 593 affects speech—generally considered both the most valuable and the most fragile of our constitutional rights. Consequently, unlike the deference accorded most statutes, this bill will not be presumed to be constitutional if it is challenged. Rather, it will be held invalid if it either (1) encompasses within its scope

protected speech or (2) is so vague that it has a chilling effect on expression shielded by the first amendment. See NAACP v. Button, 371 U.S. 415 (1963).

With this heightened level of judicial scrutiny in mind, there are two bodies of first amendment case law which are directly implicated by H.B. 593. Because the bill creates a statutory disparagement action so closely aligned with defamation, the first amendment restrictions imposed by the United States Supreme Court on defamation suits must be examined. Moreover, as product disparagement actions may arise in the commercial setting, the Court's commercial speech doctrine is also relevant. Each of these bodies of law will be discussed before being applied to H.B. 593.

A. Defamation and the First Amendment

In the last 20 years, the United States Supreme Court has placed significant first amendment restrictions on the law of defamation and has established a complex set of rules governing when defamatory false speech is actionable. In its leading opinion, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court determined that public figures cannot prevail on a defamation action without proving "actual malice," defined as intentional falsity or reckless disregard for the truth. The Court reasoned that, in open public discussion, false statements about public figures are inevitable and that worthwhile contributions to the flow of information might be deterred without the insulation from liability provided by the actual malice rule.

Subsequently, in Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), the Court declined to extend the malice requirement to defamation suits brought by private figures. The Court did, however, require that private figures prove some degree of fault, at least negligence, to recover actual damages. The Court went on to hold that malice would be required for private parties to recover presumed or punitive damages. *Id.* at 349-50. While the Court has not directly addressed the issue, the prevailing view is that, under the Court's reasoning, public figures can never recover punitive damages. Moreover, the Court also concluded in Gertz that a private party could, in some instances, become a "limited purpose" public figure and subject to the malice standard for any recovery. *Id.* at 351.

The United States Supreme Court has also provided other first amendment protections in the defamation area. For example, only factual assertions or opinions which "imply an assertion of objective fact" are actionable. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2705 (1990). Pure opinions, statements that do not imply facts capable of being true or false, remain absolutely protected. Milkovich at 2708 (Brennan, J., dissenting).

Additionally, lower courts have displayed an increased unwillingness to entertain defamation actions when the defamatory statement is addressed to a large group rather than an individual. Again, the concern has been avoiding interference with "public discussion of issues, or groups, which are in the public eye." Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981).

These are some of the constitutional limits imposed on defamation suits in the struggle to balance the interest in open discussion against the interest in compensating defamation plaintiffs for their injury. These restrictions are beginning to be applied by a handful of courts as they address product disparagement cases raising similar concerns.

B. Commercial Speech

While the United States Supreme Court has jealously guarded the first amendment in the area of defamation law, the same is not true when commercial speech is examined. Commercial speech is generally profit-motivated speech contained in advertisements. See Bolger v. Young Drug Products Corp., 463 U.S. 60 (1983). In other words, it is the speech which businesses or individuals use to sell their products.

For many years, commercial speech was wholly unprotected under the first amendment. See Valentine v. Chrestensen, 316 U.S. 52 (1942). Today, the Court grants commercial speech some protection on the basis that society has a "strong interest in the free flow of commercial information" and that consumers' decisions should be "intelligent and well informed." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764-65 (1976). Nevertheless, the protection is limited and the Court has consistently emphasized that false or misleading commercial speech enjoys no right to first amendment protection. *Id.*

III.

APPLYING CONSTITUTIONAL DOCTRINES TO H.B. 593

Because H.B. 593 implicates both the constitutional body of law surrounding defamation and the commercial speech doctrine, the first step in addressing the bill's constitutionality is distinguishing between the potential defendants who fall within its scope. Noncommercial defendants will be entitled to the heightened protections provided by New York Times. For example, their disparaging statements may not be actionable unless "actual malice" is proved. Commercial defendants will enjoy only minimal first amendment protection under the commercial speech doctrine.

A. Commercial Defendants

H.B. 593 is likely constitutional as applied to commercial defendants. As noted, commercial speech must be true before it is accorded any first amendment protection. Virginia State Bd., *supra*. Consequently, H.B. 593's threshold requirement that the disseminated information be false before it is actionable appears to preclude commercial defendants who disparage their competitors' products from successfully raising a first amendment shield. Certainly, there is a push now, at least by academics, to increase the protection granted commercial speech and even perhaps shield some misleading statements. See M.H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433 (1990). Regardless, under current United States Supreme Court precedent requiring that commercial speech be truthful before it is protected, it appears that if a commercial defendant falsely disparages a competitor within the terms of H.B. 593, the defendant will not be protected by the Constitution. See People ex rel. Dunbar v. Gym of America, Inc., 493 P.2d 660 (Colo. 1972) (holding that product disparagement provisions in the state's Consumer Protection Act do not violate the first amendment); and Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 465 A.2d 953, 960 n.4 (N.J. Super. Ct. Law Div. 1983), *aff'd on other grounds*, 516 A.2d 220 (N.J. 1986) (noting that the New York Times privilege may not apply to disparagement actions arising in the commercial context).

B. Noncommercial Defendants

While H.B. 593 may be constitutional if applied solely to commercial speech, the analysis does not end here. H.B. 593, by its terms, addresses any false disparaging information. Therefore, it encompasses statements made by nonbusiness defendants. These statements do not constitute commercial speech, and a higher standard of first amendment protection is given to them.

Because product disparagement is so closely linked to defamation, the few courts that have addressed the constitutional implications of noncommercial disparaging speech have routinely applied the first amendment protections surrounding defamation law. See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3rd Cir. 1980); Dairy Stores, Inc., 465 A.2d at 953. The two torts are not identical and, consequently, the overlay of defamation case law onto disparagement suits is sometimes a rough fit. The remaining question, then, is: What protections are applicable when comparing defamation and disparagement, and how are these protections likely to affect the constitutionality of H.B. 593?

1. Malice. The primary first amendment protection which needs to be addressed is the New York Times malice standard. As noted, malice is traditionally required to prove a claim of common law product disparagement. However, H.B. 593

has created only a negligence requirement. This departure from the traditional malice standard probably renders the bill unconstitutional.

The United States Supreme Court has only examined product disparagement and the first amendment once. In Bose, *supra*, the Court addressed a critic's disparaging review of loudspeakers. On appeal to the Court, the producer did not challenge the trial court's characterization of him as a "public figure" for first amendment purposes. Consequently, the Court was not called upon to determine whether malice was in fact the proper standard to apply. Nevertheless, the Court did apply the malice standard as it analyzed its only product disparagement suit. *Id.* at 513.

Lower courts have addressed the malice issue head-on. While there is not complete accord, a number of courts have concluded that product disparagement requires malice. *See, e.g.,* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3rd Cir. 1980); Bose Corp. v. Consumers Union of U.S., Inc., 508 F. Supp. 1249 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 446 U.S. 485 (1984); F & J Enterprises, Inc. v. Columbia Broadcasting Sys. Inc., 373 F. Supp. 292 (N.D. Ohio 1974); and Steak Bit of Westbury, Inc. v. Newsday Inc., 334 N.Y.S.2d 325 (N.Y. App. Div. 1972). *But see* Golden Bear Distr. Systems v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983) (protections depend upon the circumstances of each case). These courts' reasoning is usually premised upon the need for public discussion and free information regarding consumer products.

Perhaps the most cogent analysis of this issue can be found in Dairy Stores, *supra*, which involved a newspaper's critical remarks about the quality of springwater. The court examined the societal values requiring malice in certain individual defamation suits and determined these same values demanded a malice standard in product defamation suits as well.

Relying on United States Supreme Court precedent, the court in Dairy Stores initially recognized that consumers have a first amendment interest in obtaining information regarding products and services they purchase and that this interest "is comparable . . . to being informed about political and social issues." *Id.* Second, the court emphasized that a producer voluntarily exposes its products to public criticism, much in the same fashion as does a public figure, by placing its product into the marketplace. *Id.* at 960. The court noted that "a business which makes representations about the content, quality or safety of its products . . . invites attention and comment." *Id.* Finally, the court stressed that like public figures, businesses have greater access to channels of effective communication and "hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* The court concluded that when a consumer product has been placed into the public marketplace, a malice standard must be applied.

First amendment scholars generally support judicial determinations that information regarding the health and safety of consumer products deserves a high level of constitutional protection. See *Product Health Claims, supra*, and Note, *The Tort of Disparagement and the Developing First Amendment*, 1987 Duke L.J. 727 (1987). For example, M.H. Redish, in *Product Health Claims*, emphasizes the urgent need to release emerging scientific theories to the public without chilling scientific and health debates with the threat of litigation. In his article, Redish points out that early studies on cigarettes indicated they were healthy, and that if emerging scientific theory revealing the hazards of smoking had been excessively burdened during that period, the consequences could have been devastating. *Id.* at 1443.

In sum, there is little case law on whether disparagement suits require malice and courts are not in complete accord on the issue. Nevertheless, it appears that a significant portion, if not all, noncommercial disparaging speech will not be actionable unless it is based on "actual malice." This judicial position has received wide support by legal scholars. Moreover, because of the underlying public concerns, if speech involves health or safety issues, the likelihood that malice will be required is enhanced. H.B. 593 directly burdens speech addressing safety, yet contains only a negligence standard. Consequently, this portion of H.B. 593 is probably unconstitutional.

2. Opinion vs. Fact. The next issue involves the protection of pure opinion. As noted, false factual assertions or opinions premised upon facts are actionable. *Milkovich, supra*. However, expressions of theories and ideas have generally been held to be protected by the first amendment.

H.B. 593 provides no express protection of theories and ideas. Rather, the bill makes actionable disparaging "information." This term is broader than that contained, for example, in the product disparagement provision of Idaho's Consumer Protection Act. That provision restricts only false assertions of "fact." Idaho Code § 48-603(8). The issue then is whether "information" is either so broad or so vague that it potentially chills protected expression.

Perhaps the most sensitive area here is, again, emerging scientific information regarding the health and safety of products. In *Product Health Claims, supra*, Redish convincingly argues that scientific expression and debate should be granted the same constitutional protections as political discourse. He draws a distinction between "basic fact" and assertions of scientific fact; the latter, he argues, should be treated as protected expressions of ideas. *Product Health Claims* at 1435. Redish emphasizes the changing nature of scientific belief, arguing that any attempt by the government to impose "a national scientific orthodoxy would undermine or inhibit the advance of scientific knowledge, thus undermining a key value of the first amendment." *Id.* See also Moore

v. Gaston County Board of Education, 357 F. Supp. 1037 (W.D. N.C. 1973) for an interesting discussion on stifling scientific inquiry.

Our research has not disclosed a recent disparagement opinion directly addressing scientific expression and the first amendment; thus, it is speculative to attempt to discern precisely what protections a court might provide scientific expression. However, because emerging scientific inquiry and debate is so clearly essential to public health concerns, a court reviewing H.B. 593's broad language would likely conclude the terms of H.B. 593 excessively burden open debate on important public issues and thus are unconstitutional.

3. The "Of and Concerning" Requirement. The next issue to be analyzed is the traditional requirement in both defamation and disparagement that the false statement be "of and concerning" the individual or product. H.B. 593 does not expressly contain this requirement. Consequently, a disparaging statement not directly aimed at a particular producer, but rather at a generic product at large, is conceivably actionable under H.B. 593 if the producer is damaged. Under recent case law constitutionally limiting group defamation and disparagement suits, this may pose another constitutional hurdle for the bill.

As mentioned earlier, a number of courts have constitutionalized the "of and concerning" element of defamation by limiting group defamation actions. The interest protected by these decisions is open discourse on issues or groups "which are in the public eye." Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900 (W.D. Mich. 1980). Moreover, the California Supreme Court has held that in product disparagement suits, just as in defamation suits, the first amendment requires that the falsehood specifically refer to or be "of and concerning" the plaintiff. Blatty v. New York Times Co., 728 P.2d 1177 (Cal. 1986). Blatty was not a group disparagement case *per se*, but rather involved the omission of plaintiff's product from a best-seller list. Nevertheless, the California Supreme Court concluded that because the plaintiff was not specifically referred to, the first amendment precluded recovery.

The same public policy concerns that limit group defamation suits also apply to group disparagement actions. The larger and more general the group involved—whether it be a group of individuals or a group of products—the more likely an issue of public concern is implicated, and the less likely the falsehood was intended to harm a particular individual or producer. The reputation of an individual or the pecuniary interest of a producer can, of course, be harmed by a general falsehood directed at a group. However, at some point, group defamation or disparagement suits must be limited so that the public discourse so essential to the core of the first amendment can be protected.

By failing to expressly include an "of and concerning" element, H.B. 593 allows little accommodation for this concern. Rather, under this bill, general health assertions

about widely used food products which do not name a particular producer could be actionable if the statements were ultimately deemed false and producers were damaged by the credibility initially given the assertions. It is likely that a court would find this potentially broad and chilling sweep of H.B. 593 troubling.

4. Punitive Damages. H.B. 593 provides treble damages if a falsehood was made with the intent to harm the producer. This treble damage scheme far surpasses the damages provided at common law. At common law, malice as to falsehood and intent to harm the producer must be demonstrated simply to recover proven pecuniary loss. Zerpol, supra, at 409. While punitive damages are not precluded under common law theory, there is certainly no set automatic treble damage scheme.

More importantly, due to first amendment concerns, punitive damages are now disfavored in defamation lawsuits. While the case law is again unclear, the United States Supreme Court has concluded a private figure must show actual malice to recover punitive damages. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). Because this is also the standard a public figure must prove just to recover actual damages, it is generally believed that public figures simply cannot recover punitive damages.

Although the court has not yet explicitly ruled that a public official or public figure could not collect punitive damages, a contrary conclusion would be surprising. The court has condemned the inhibiting effect of damage awards in excess of an actual injury, so one should expect it to hold that any punitive damage awards for libels against public officials or public persons interfere with the "breathing space" required in the exercise of robust first amendment debate.

R.D. Rotunda, J.E. Nowak, J.N. Young, Volume 3, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE, AND PROCEDURE, ch. 20 § 20.33(e) (1986).

By analogy, if a court determines that a producer has so inserted himself or his product into public discourse that a malice standard applies for recovery of mere pecuniary loss, it is unlikely the producer could also recover punitive damages. *See Note, The Tort of Disparagement* at 756. For these producers, H.B. 593's entitlement to treble damages upon a showing of intent probably violates the first amendment.

IV.

CONCLUSION

House Bill 593 is designed to protect agricultural food producers from the harm caused by negligent falsehoods which disparage their products. The goal of this bill is

understandable. Agriculture is important to Idaho and deserving of protection. However, because this bill affects speech, it will have to meet stringent requirements if it is challenged. While the body of case law applicable to a bill such as this is only now emerging, what precedent exists reveals some shortcomings in this proposed legislation. The absence of a malice requirement, coupled with broad terms which conceivably encompass protected expression and discourse, create serious first amendment concerns. The punitive damage scheme is also of concern. It is our opinion that these concerns are of sufficient magnitude that a reviewing court would likely find H.B. 593 unconstitutional.

Important to note, however, is that the constitutional vulnerability of this bill does not foreclose legal protection for agricultural producers. Idaho Code § 48-603(8) already protects producers from product disparagement by competitors. Moreover, a common law tort claim may be brought if a noncommercial defendant disparages a product. Thus, there are already legal protections in place for agricultural producers. To the extent the legislature determines more protection is necessary, this office recommends that H.B. 593 be more narrowly tailored to account for the constitutional concerns discussed above.

Yours very truly,

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