

FILE

In re Clarke Corporation

MacKenzie, Asp & Norman LLP
Attorneys at Law
550 Enterprise Blvd., Suite 2500
Cypress, Franklin 33337

INTEROFFICE MEMORANDUM

TO: Applicant
FROM: Margaret MacKenzie
DATE: July 26, 2005
SUBJECT: *In re Clarke Corporation*

Our client, Clarke Corporation (Clarke), has been threatened with a products liability action. The specific allegations against Clarke concern an X-ray enhancing contrast dye substance known as "PureView" originally manufactured by Santoy Enterprises and then, briefly, by Clarke following Clarke's acquisition as an asset purchaser of Santoy's Drug Manufacturing Division. Mary Regan alleges her husband's death was caused by doses of PureView administered to him more than two decades ago.

As a general rule, there is no corporate successor liability in this situation. There are, however, four traditional exceptions to the general rule. I have determined that none of them applies here, so do not address them. A fifth, more recently created exception, called the product line successor rule, does give me some concern.

Please draft for my signature an opinion letter to Jasmine Clarke, Clarke's president, explaining whether the product line successor rule can be invoked to impose liability on Clarke Corporation for Mr. Regan's death. You need not be concerned with whether PureView was in fact defective because those facts have not yet been developed.

I'm attaching a memorandum regarding our firm's practice in writing opinion letters. Please follow these guidelines in preparing your letter.

MacKenzie, Asp & Norman LLP
Attorneys at Law
550 Enterprise Blvd., Suite 2500
Cypress, Franklin 33337

INTEROFFICE MEMORANDUM

TO: Associates
SUBJECT: Opinion Letters
DATE: July 8, 1995

The firm follows these guidelines in preparing opinion letters to clients:

- Begin the letter with a brief introductory statement of the question.
- Provide a concise one-sentence answer to the question.
- Write a brief statement of the facts relevant to the question.
- Identify and analyze all issues raised by the question. Be sure to discuss the relevant facts and authorities that support your conclusion. Because this is an opinion letter, analyze each theory or issue and all elements or factors of each issue.

Remember to write in a way that clearly addresses the legal issues but also allows the client to follow your reasoning and the logic of your conclusions.

MacKenzie, Asp & Norman LLP
Attorneys at Law
550 Enterprise Blvd., Suite 2500
Cypress, Franklin 33337

INTEROFFICE MEMORANDUM

TO: File
FROM: Margaret MacKenzie
SUBJECT: Interview of Jasmine Clarke, President of Clarke Corporation
DATE: July 25, 2005

- Clarke Corporation (Clarke) is a family-owned pharmaceutical company founded by Ms. Clarke's father, Benjamin Clarke, approximately 30 years ago. Ms. Clarke has been president of the company since her father's retirement in 2002.
- For the first 10 or so years of operation, Clarke specialized in the development and manufacture of blood-thinning medications. In approximately 1985, the company began exploring options for expanding its operations to include other product lines. To that end, it entered into discussions with several unrelated entities, including Santoy Enterprises, concerning a possible merger or acquisition. Ultimately, Clarke decided to acquire Santoy's Drug Manufacturing Division (DMD).
- Prior to the negotiations concerning DMD, Clarke and Santoy had never done any business together or, for that matter, been business competitors, since they manufactured different types of medical and pharmaceutical products.
- DMD comprised approximately 80% of Santoy's manufacturing operations. The other 20% consisted of a fledgling Industrial Chemicals Division that manufactured certain chemical solvents.
- "PureView," a contrast dye material used for enhancing medical X-rays, was one of five pharmaceutical products manufactured by DMD. PureView was DMD's least profitable product, accounting for less than 5% of DMD's total sales.
- Clarke's acquisition of DMD was accomplished through an Asset Purchase Agreement dated September 1, 1990 (copy attached), whereby Clarke purchased certain assets from and assumed certain liabilities of Santoy in exchange for cash consideration of \$2.5 million. No stock of either corporation was transferred in connection with the transaction. None of Santoy's officers, directors or shareholders became affiliated with Clarke, although Clarke hired most of DMD's existing employees.

- The \$2.5 million purchase price was the subject of intense arm's-length negotiations and constituted adequate consideration for the assets purchased. In retrospect, Ms. Clarke believes that Clarke paid more than it should have for DMD, since the DMD products have never been as profitable as initially projected.
- Following the sale of DMD, pursuant to the terms of the Asset Purchase Agreement, Santoy changed its corporate name to "Sentinel Enterprises."
- Sentinel invested the proceeds from the sale of DMD into its fledgling Industrial Chemical Division, which never took off. Having sold its other assets to Clarke, Sentinel was forced to shut down its operations. In 1992, two years after the DMD transaction, Sentinel filed for bankruptcy and its assets were liquidated.
- After acquiring DMD, Clarke initially continued to manufacture the five former Santoy products using identical manufacturing processes and the same product names that had been used by Santoy. Although Clarke solicited former Santoy customers for business, Clarke informed all existing and prospective customers that it, not Santoy, was now the manufacturer of those products.
- In March 1991, just six months after the DMD acquisition, Clarke discontinued production of PureView. The market just wasn't there for the product; sales had declined precipitously due to the introduction of new X-ray technology that eventually rendered contrast dye products such as PureView virtually obsolete.
- Since then, Clarke has not manufactured or sold PureView or any similar product. Clarke does, however, continue to manufacture the four other unrelated pharmaceutical products that it purchased from Santoy, which collectively account for about 15% of Clarke's total business.
- Three months ago, a report appeared in the *Journal of American Medicine* linking PureView exposure to certain forms of cancer. The report was based on a study that tracked 100 individuals who received doses of PureView more than two decades ago. The study found that within the past few years several of those individuals had developed rare, life-threatening cancerous tumors caused by their exposure to PureView.
- This is the first time that PureView has been linked to any serious medical illness. Before the study, only occasional minor complications (such as mild swelling and soreness) had been known to result from its use.
- Last week Ms. Clarke received a letter from a law firm representing the widow of a man who received doses of PureView more than two decades ago and who recently died from a malignant tumor. (See attached demand letter.)
- Ms. Clarke is very concerned about her company's potential liability for injuries that may have been caused by Santoy-manufactured PureView over the nearly 20 years that Santoy produced the substance. She wants our legal advice on whether Clarke could be held liable for these claims by virtue of its acquisition of DMD.

ASSET PURCHASE AGREEMENT
BETWEEN SANTOY ENTERPRISES, INC. ("Seller")
AND CLARKE CORPORATION ("Purchaser")

* * * *

ARTICLE II
THE ASSET PURCHASE

2.1 Upon the terms and subject to the conditions of this Agreement, Seller sells, assigns, and transfers to Purchaser, free and clear of all encumbrances, Seller's Drug Manufacturing Division (the "Business") and all assets, licenses, permits, contracts, operations and rights owned by Seller and constituting the Business (the "Purchased Assets"), including:

- (i) All manufacturing facilities, machinery, and equipment;
- (ii) All items of inventory;
- (iii) All laboratory supplies and related research materials;

* * * *

- (vi) All customer lists and mailing lists used in the Business;

* * * *

- (viii) All trade secrets, royalty rights, work notes, market studies, consultants' reports, and similar property used in the Business;

- (ix) All goodwill associated with the Business;

- (x) All rights, title and interest in the names "Santoy," "Santoy Drugs," . . . and "PureView," and any variants thereof, and any related logos, trademarks, trade names or service marks incorporating such names;

* * * *

2.3 Purchase Price. In consideration of the transfer to Purchaser of the Purchased Assets, Purchaser agrees to deliver to Seller the sum of \$2,500,000.

* * * *

2.5 Assumption of Liabilities.

(a) General Limitation on Liabilities. Seller shall transfer the Purchased Assets to Purchaser free and clear of all encumbrances, and Purchaser shall not, by virtue of its purchase of the Purchased Assets, assume or become responsible for any liabilities or obligations of Seller except liability for leases, contracts, and other agreements entered into by Seller in the ordinary course of business prior to this Agreement.

(b) Offer of Employment. Purchaser shall offer employment as of the date hereof to all of Seller's active employees in the Business ("Transferred Employees"). Purchaser shall keep on its payroll all Transferred Employees who accept Purchaser's offer of employment except for those who may resign or be terminated for cause, for at least 90 days after the date of this Agreement.

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ARTICLE V

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5.5 Change of Name. Seller will amend its Articles of Incorporation within ten (10) business days after the date of this Agreement to change its corporate name to a name dissimilar to the name by which Seller is presently known.

* * * *

5.9 Noncompetition Agreement of Seller. For a period of five (5) years, Seller shall not, directly or indirectly, (i) engage in the manufacture, sale or distribution of products similar in type or performing the same general purpose as those manufactured in the Business, or (ii) own, manage, operate or control, or participate in the ownership, management, operation or control of, any business which directly or indirectly competes with the Business.

* * * *

IN WITNESS WHEREOF, the Parties have executed this Agreement as of September 1, 1990.

SANTOY ENTERPRISES, INC.

By:

Name: Daniel Santoy

Title: President

CLARK CORPORATION

By:

Name: Benjamin Clarke

Title: President

BENTLEY, PABLO & SUMMER LLP
ATTORNEYS AT LAW

July 21, 2005

Ms. Jasmine Clarke, President
Clarke Corporation
800 Robinson Blvd.
Cypress, Franklin 33337

Dear Ms. Clarke:

We are writing on behalf of our client, Mary Regan, concerning the death of her husband, Thomas Regan, resulting from a malignant tumor caused by his exposure to PureView, a contrast dye material used for X-ray purposes.

As you know, PureView was manufactured by Clarke Corporation's predecessor, Santoy Enterprises, from 1970 to 1990. In 1983, Mr. Regan received several doses of PureView in connection with the treatment of an injury. He developed a fatal malignant tumor as a result of his exposure to PureView and died on November 29, 2004.

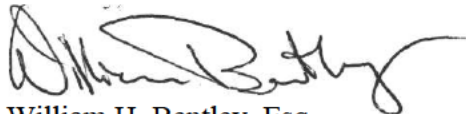
In 1990, Clarke Corporation purchased Santoy Enterprises. Clarke, as the successor to the original manufacturer of PureView, is liable for all damages resulting from Mr. Regan's exposure to PureView. *Gray v. Ballard* (Franklin Supreme Court 1987).

We expect Clarke Corporation, as a respectable family-run business, to take responsibility for its liability and fully compensate Mrs. Regan for her husband's untimely demise.

Should you wish to resolve this matter without resort to litigation and thereby avoid the substantial time and expense as well as negative publicity entailed by a lengthy court action, please contact me immediately.

Please be advised that we will pursue any and all legal recourse available on behalf of our client, including the filing of a civil action for products liability against Clarke Corporation, if we do not hear from you within 10 days of the date of this letter.

Sincerely,



William H. Bentley, Esq.

Managing Partner

405 TIMBERDELL DRIVE • PURCELL, FRANKLIN • 33331
PHONE: (832) 555-7220 • FAX: (832) 555-7225

July 2005

