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VIA TELEFAX

Re: Nevada Power Co. v. Monsanto, et al

Dear Chuck:

Per our telephone conversation today, here's some initial research I hope your folks might be able to work on. Based on my research thus far, my general confidence level of winning on the three claims for relief that we argued on appeal range from most confident on the indemnity claim to least confident on the failure to warn claim.

A. Can our claims based on fraud and failure to warn accrue later than our claims not involving active wrongdoing? Our opening argument was that they could because we did not discover that the wrongs were intentional until 1988. Defendants' argument, based primarily on the Iowa Sparks case, is that when a statute starts running on one legal theory for recovery of damages, it begins running on all other legal theories for the same damages. Defendants also cite some other cases standing for their same proposition. I reviewed all abstracts on Limitations of Actions in the 10th Decennial Digest. All I found were three or four more cases that agree with the defendants.

However, the Sparks decision itself states that the principle may not apply in a case involving fraudulent concealment, citing an earlier Iowa decision. Id. at pp. 352-53, citing Koppes v. Pearson, 380 N.W.2d 381 (Iowa, 1986). Sparks therefore stands for the proposition that regardless of whether we might have earlier filed some claim, the defendants' fraudulent concealment prevented us from discovering "facts supporting a [particular] legal theory of action." Sparks, 408

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N.W.2d at 352-53. We could argue that this is in line with N.R.S. 190(3)(d), which provides that a fraud claim "shall be deemed to accrue [only] upon the discovery by the aggrieved party of the facts constituting the fraud or mistake." See also Massey v. Litton, 669 P.2d 248, 250-51 (Nev. 1983) (to trigger the running of a statute, plaintiff must become aware of facts constituting "all essential elements" of the particular cause of action); Sierra Pacific Power Company v. Nye, 389 P.2d 387, 392 (Nev. 1964) (quoting annotation to same effect for both fraud and fraudulent concealment).

After filling in a few holes, I think we can cite the above as authority for precisely the proposition we argued in our opening brief, that defendants fraudulently concealed their active wrongdoing, which prevented us from learning "all essential elements" of the particular causes of action.

I would also suggest that your folks look at the discussion of the interpretation of the Nevada statute of limitations for fraud claims in Sierra Diesel Injection Service v. Burroughs Corp., 648 F. Supp. 1148, 1150-51 (D. Nev. 1986). The case clearly stands for the proposition that early knowledge of a product defect neither equates with discovery of a fraudulent misrepresentation claim, nor bars its later prosecution upon later discovery, as defendants are arguing.

Moreover, Hercules v. Stevens Shipping Co., 698 F.2d 726, 733 (5th Cir. 1983) (quoted in our brief at pg. 30) clearly holds that the indemnity action remains available "even though the statute may have run on any claim by plaintiff directly against the third party." Based on the general theory of indemnity actions and Hercules, I am satisfied with our timeliness arguments on indemnity.

I am still not satisfied with our authority on the timeliness of the fraud and failure to warn actions. If we can not find more clear-cut authority contrary to their proposition, we may still be able to bolster with two alternative arguments:

(i) we can argue that the statute had still not run on the earlier claims by 1988 because we have

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continuously exercised due diligence in investigating those claims. Based on their own position below and in their brief, defendants should be estopped from asserting that Nevada Power discovered anything other than mere "allegations" about the hazards of PCBs until 1988, when we saw their own internal documents confirming the allegations (if successful, this theory would allow us to pursue damages for all equipment replaced, plus punitive damages);

or, (ii) we can argue, based on our due diligence and on defendants' position that the evidence will show no more than "alleged" hazards of PCBs, they should be estopped from asserting that we discovered enough to file suit until some of the equipment was unquestionably rendered defective by the compliance deadlines established for EPA's regulations, in line with the Indiana decision in Monsanto Co. v. Miller, 455 N.E.2d 392 (1983). On this theory, accrual of the legal injury is predicated on the regulatory action, rather than on actual hazard. If successful on this alternative theory, we would only be able to pursue damages for the equipment required to be replaced by the EPA regulations (i.e., coextensive with the indemnity action), but would be fairly certain of still being able to pursue punitive damages.

The latter argument is somewhat inconsistent with our opening brief's stipulation that the trial court was correct in throwing out our other legal theories, because they would still be alive if this logic were adopted. I am also concerned that the latter theory would lack any excitement -- since the potential damages are coextensive with the indemnity claim -- unless we can find some authority holding that a punitive damage claim can not be tacked onto an indemnity claim alone (I don't know whether that's true or not, but see Willcutt v. Union Oil Co. of California, 432 So.2d 1217, 1221 (Ala. 1983) (where claim for fraud was time-barred, plaintiff could not pursue punitive damages even though equitable remedy of rescission of contract on basis of fraud was still timely)). If that is the case, then we have a stronger emotional appeal for letting us pursue not only the indemnity action but also the direct claims. I am concerned that the panel

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might decide if they give us the indemnity claim, we don't need anything else.

As you can tell, the alternative arguments are somewhat complex and sticky. I think it would be much simpler to cut across the issues with authority holding that we can pursue the fraud and/or failure to warn claims regardless of whether we should have sued earlier on the other direct claims, i.e., that we should be able to pursue the intentional wrong claims because we didn't know the wrongs were intentional until 1988.

Are we stuck with separate accrual dates for each separate replacement of individual pieces of equipment? See e.g., their argument on pg. 48. I think we are o.k. on our theory so far as it applies to the indemnity action, but the theory defendants argue would apply equally to the other causes of action (indeed, I suspect that they are arguing only non-indemnity caselaw) and we should therefore address it that way.

To accomplish this, I see two possible theories: (i) we were acting diligently until 1988, or alternatively until EPA's orders became effective, and all damages should run from the claim discovery dates rather than the replacement dates; (ii) we were faced with a continuing wrong, therefore the statute should not run until the last overt act (and I'm still not clear on what constitutes a last overt act under this doctrine and whether we are in fact qualified). I found one case under this doctrine before my eyeballs quit on me last night. Pace Industries v. Three Phoenix Co., 813 F.2d 234, 327 (9th Cir. 1987); see also interpretation of statute under similar rule in Morrill v. Becton, Dickinson & Co., 564 F.Supp. 1099, 1108-09 (D. Mo. 1983); affirmed in pertinent part 747 F.2d at 1224 (sorry I somehow didn't copy the rest of the case and lack the rest of the citation). David also sent an Indiana case that contains some "continuing wrong" analysis, Fradley v. Hedgcock, 497 N.E. 2d 620 (Ind. 1986).

Would your firm please continue the research on: (1) whether we can pursue a later-discovered intentional wrong action even if the statute had run for the same damages in a strict liability or negligence set-

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emphasize that we are diligently trying to predict Nevada law.

When we get to the rewrite stage, I already see two areas for major cuts and/or compression. The 2-1/2 page summary is obvious, since it's all repeated later. Section II(A) is another. The first three subsections under that section now address the "linkage" problem separately for each of the legal theories. An alternative way of organizing the section would be to first rely on Oak Grove as standing for the broad proposition that the discovery rule is the same in Nevada for each of the three claims for relief, followed by a short discussion with key citations explaining what that means for this case. I don't think we need three subsections that are largely repetitive, and that should allow us to dramatically compress that section.

Another method of compression might be to take more of a catalogue approach: (i) for each point, a section number and a couple of key words in bold face giving the subject matter; (ii) very briefly summarize and reference the defendants' point; and (iii) far more briefly discuss our response, referencing where it was discussed in the opening brief, and giving a fairly minimal discussion of any new points and authorities.

Under this approach, the table of contents in the reply brief becomes the appellate index of relevant material for the entire record (the only one out there), which would probably make it the primary research and writing tool for the court.

I'll be here all afternoon and evening, writing away. Call if you want to talk.

Sincerely,



PAUL E. MERRELL

PEM: pem