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Dear Randall and Mr. Morse:

Enclosed is a copy of a recent decision of the Ninth Circuit Court of Appeals in Nevada Power Co. v. Monsanto Company 92 Los Angeles Daily Journal D.A.R. 5010. This case discusses Nevada law re statutes of limitations and equitable indemnity.

Yours truly,

SANDLER AND ROSEN

Charles L. Birke

CLB:dr
Enc.
cc: David Lyman, Esq. (w/enc.)

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DATE 4/22/92

decision' has been made to act on the development." *Id.* (quoting *Sierra Club v. Hathaway,* 579 F.2d 1162, 1168 (9th Cir. 1978)). Similarly, in *Conner v Burford,* 848 F.2d 1441 (9th Cir. 1988), *cert. denied,* 489 U.S. 1012 (1989) we held that an EIS for the sale of "no surface occupancy" leases was not required because the government retained the authority to decide whether any activity would ultimately occur and could examine the effects of any proposed activity at a later stage. *Id.* at 1447.

In the instant matter, the Park Service has not authorized or recommended approval of any mining operations. No "critical decision" has been made to approve any mining operation application for any site in the three parks. As discussed above, Alternative D requires the Park Service to deny a future application for a permit to conduct a mining operation in the parks if it would harm the environment in violation of existing state and federal regulatory requirements. Thus, the detailed analysis of mitigation measures and cumulative and synergistic effects demanded by the Sierra Club is unwarranted at this stage. *See California v. Block,* 690 F.2d at 761.

[5] The alleged failure of the EISs to consider mitigation measures as well as certain potential cumulative and synergistic effects does not foreclose later analysis of these factors. Indeed, each EIS expressly provides that the Park Service will, consistent with NEPA, make an environmental assessment regarding any future application for a permit that may be submitted for approval. In its records of decision, in its briefs filed in this court, and at oral argument, the Park Service has represented that it will fully comply with the strictures of NEPA in evaluating future applications for mining operations. Having persuaded the district court that it understands its duty to follow NEPA in reviewing future applications for permits to conduct mining operations, judicial estoppel precludes the Park Service from later arguing that it has no further duty to consider mitigation measures or the cumulative impact of mining in the three parks. *See Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied,* —U.S.—, 111 S. Ct. 2915 (1991) (judicial estoppel bars party from making legal assertion which directly contradicts a position taken in the same proceeding or a prior one); *Stevens Technical Services, Inc. v. SS Brooklyn,* 885 F.2d 584, 588 (9th Cir. 1989) ("Judicial estoppel precludes a party from asserting a position in a current legal proceeding which is contrary to the position that party previously asserted in another.").

If the Park Service determines that the cumulative impact of a proposed mining operation is not significant, the Park Service has committed itself to issue an EA and a finding of no significant impact as required by NEPA. 40 C.F.R. § 1508.13. If the impact on the environment is significant, the Park Service will be required to prepare an EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11. Whether an EA or an EIS is issued, the Sierra Club will have an opportunity to comment and seek judicial review if NEPA has been violated.

The Sierra Club argues that because future EAs and EISs will be "tiered" to the present EISs, they will inevitably incorporate the EISs' alleged methodological errors. The EISs, however, expressly state that mitigation measures and the cumulative effects of specific mining operations will be considered in further detail when a specific application for a permit to conduct mining operations is submitted for approval. "We cannot assume that government agencies will not comply with their NEPA obligations in later stages of development." *Conner,* 848 F.2d at 1448.

Under the rule of reason, we conclude that the EISs demonstrate that the Park Service has complied with NEPA "to the fullest extent possible" in dealing with hypothetical actions that may or may not be taken in managing future attempts to exercise mining rights in the park. Accordingly, the district court did not abuse its discretion in dissolving the injunction.

AFFIRMED.

AMENDED OPINION

CIVIL PROCEDURE

Limitations Period Doesn't Begin Even if Fraud Could Be Discovered

Cite as 92 Daily Journal D.A.R. 5010

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NEVADA POWER CO., a Nevada corporation, *Plaintiff-Appellant,* v. MONSANTO COMPANY, a foreign corporation; GENERAL ELECTRIC CORPORATION, a foreign corporation; WESTINGHOUSE ELECTRIC CORPORATION, a foreign corporation; and DOES I through XXV, inclusive, *Defendants-Appellees.*	No. 90-16179 D.C. No. CV-89-00555-LDG ORDER AMENDING OPINION, DENYING PETITION FOR REHEARING, AND REJECTING SUGGESTION FOR REHEARING EN BANC

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
October 10, 1991—San Francisco, California

Filed February 5, 1992
Amended April 14, 1992

Before: Otto R. Skopil, Jr., Harry Pregerson, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain; Concurrence by Judge Skopil

COUNSEL

Paul Merrell and Charles H. McCrea, Bloomington, Indiana, for the plaintiff-appellant.

Bruce A. Featherstone, Kirkland & Ellis, Denver, Colorado, for Monsanto; Jeffrey Klein, Weil, Gotshal & Manges, New York, New York, for Westinghouse; John Thorndal, Thorndal, Backus, Maupin & Armstrong, Las Vegas, Nevada, for Monsanto and Westinghouse.

ORDER

The majority opinion in this matter, filed February 5, 1992, is amended as follows:

The caption is revised to reflect the addition of Westinghouse Electric Corporation.

slip op. at 1181, first paragraph, first line, after "fraud" insert the following: and failure to warn

slip op. at 1181, first paragraph, third line, replace "such claims." with the following: the fraud claim.

slip op. at 1181, before paragraph beginning "Nevada Power filed suit . . ." insert the following:

> The parties also agree that section 11.220 of the Nevada Revised Statutes applies to the failure to warn claim. The Supreme Court of Nevada has expressly held that "the term 'accrued,' as used in NRS 11.220, incorporates the same 'diligent discovery' rule that is present in NRS 11.190(3)." *Oak Grove Investors v. Bell & Gossett Co.*, 668 P.2d 1075, 1079 (Nev. 1983); *accord Tahoe Village Homeowners Ass'n v. Douglas Cty.*, 799 P.2d 556, 558 (Nev. 1990). Thus, as with the fraud claim, the failure to warn action accrues "[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action." *Oak Grove*, 668 P.2d at 1079.

slip op. at 1182, replace paragraph starting "The Manufacturers do not dispute . . ." with the following:

> The Manufacturers argue that Nevada Power's action accrued no later than 1979, when it concededly knew of the dangers of PCB's. The falsity of a representation is only one of the facts that make up a fraud or failure to warn claim, however. One of the facts constituting a fraud or failure to warn claim is the defendant's state of mind. Only if the defendant's misrepresentation is intentional has the defendant acted fraudulently. *See Lubbe v. Barba*, 540 P.2d 115, 117 (Nev. 1975). Similarly, liability for failure to warn cannot arise where the defendant did not reasonably know of the hazard. *See Oak Grove*, 668 P.2d at 1080.

slip op. at 1182, second full paragraph, fourth line, following "constitute a fraud" insert the following: or failure to warn

slip op. at 1184, immediately before the sentence beginning "'Because our precedent . . .", as part of the same paragraph, insert the following:

> Very recently, this court has reaffirmed that under federal law, "when the plaintiff discovered or could have discovered the fraud with the exercise of reasonable diligence . . . is usually a question for the trier of fact." *General Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1397 n.2 (9th Cir. 1991).

The dissent opinion is amended as follows:

slip op. at 1188, second paragraph, line one and line seven: replace "statute with "statutes"

The panel has voted to deny the petition for rehearing. Judges Pregerson and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Skopil has so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Appellees' motion to file a transcript of oral argument is DENIED.

OPINION

O'SCANNLAIN, Circuit Judge;

Nevada Power seeks to recover the costs of replacing electrical generating equipment that contained polychlorinated biphenyls ("PCB's"). We must determine whether Nevada Power's claims for fraud and failure to warn against its vendors are time-barred, and whether Nevada Power has stated a claim for implied equitable indemnification.

I

During the 1960's and 1970's Nevada Power purchased electrical equipment from General Electric and Westinghouse. Much of that equipment contained PCB's as a cooling agent. Monsanto was the supplier of PCB's to General Electric and Westinghouse during this period.

In the early 1970's, Congress began to investigate the dangers to humans of exposure to PCB's. In 1976, Congress passed the Toxic Substances Control Act, which, inter alia, outlawed the manufacture, sale or distribution of PCB's unless used in a "totally enclosed" setting. *See* 15 U.S.C. § 2605(e)(2). The Environmental Protection Agency ("EPA") promulgated regulations pursuant to this act, which permitted the use of PCB's in most electrical equipment, because such use was found by the EPA to be "totally enclosed," but the District of Columbia Circuit struck down these regulations as unsupported by substantial evidence. *See Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1286 (D.C. Cir. 1980). In 1982, the EPA issued new regulations allowing electrical equipment containing PCB's to be used only in restricted access areas, and in 1985, the EPA ordered more restrictions on such equipment. *See* 40 C.F.R. § 761.30 (1990).

As early as the early 1970's, the then-chairman of Nevada Power became aware of the dangers of PCB's. In 1976, Nevada Power's safety director sent a memorandum to all company personnel discussing the hazards of PCB exposure, and in 1979 he began giving lectures on this subject. Also in that year, Nevada Power issued a company manual on the dangers of PCB's. During 1978 and 1979, Nevada Power also began a program of removing equipment using PCB's from service before its useful life had been completed.

Nevada Power filed suit in Nevada state court on July 7, 1989. Nevada Power alleged, inter alia, that General Electric, Monsanto, and Westinghouse (the "Manufacturers") had knowledge of the dangers of PCB's in the 1960's and 1970's when they sold Nevada Power equipment with PCB's, but represented to Nevada Power that such equipment was safe. Nevada Power sought damages from the Manufacturers under theories of fraud and misrepresentation, failure to warn (collectively the "fraud claims"), and implied equitable indemnity.[1] Nevada Power alleged that although it was aware of the dangers of PCB's by 1979, it only learned in 1988 that the Manufacturers had willfully misrepresented their knowledge about PCB's when they sold equipment to Nevada Power in the 1960's and 1970's. That is, Nevada Power contends that although it realized by 1979 that the Manufacturers' representations in the 1960's and early 1970's about the safety of

PCB's had been false, it was only in 1988 that Nevada Power discovered that such false statements had been made *intentionally* by the Manufacturers, and not out of ignorance.

The Manufacturers removed the case to federal court based on diversity of citizenship, and filed a motion for summary judgment, contending that Nevada Power's claims were barred by the applicable statutes of limitations. The district court granted the Manufacturers' motion, concluding that all of Nevada Power's claims were time-barred, and further that Nevada Power had failed to state a claim for equitable indemnity. Nevada Power timely filed notice of appeal.

II

This matter was before the district court under its diversity jurisdiction, and hence state substantive law applies. *See Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Specifically, federal courts exercising diversity jurisdiction are to use state statutes of limitation. *West v. Conrail*, 481 U.S. 35, 39 n.4 (1987). The Nevada Supreme Court is controlling authority on questions of Nevada law. *See Commissioner v. Bosch*, 387 U.S. 456, 465 (1967).

As in questions of federal law, a district court's interpretation of state law is reviewed de novo. *See In re McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc) (abandoning prior rule of "a deferential standard of review to a district judge's construction of the law of the state in which he or she sits"). A grant of summary judgment presents an issue of law reviewed de novo. *Kruso v. International Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). In determining whether any genuine issue of material fact exists, this court must view the evidence in the light most favorable to the nonmoving party, here Nevada Power. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

III

A

Nevada Power contends that its fraud and failure to warn claims are not barred by the statute of limitations. There is no disagreement that a three-year statute of limitations applies to the fraud claims. *See* Nev. Rev. Stat. § 11.190.3(d) (1989) (actions for "fraud or mistake" must commence within 3 years). Such actions are "deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.* The Nevada Supreme Court, however, has interpreted this statute to mean not that an action in fraud accrues only when the plaintiff has *all* the facts needed to constitute a fraud claim, but rather that "the statute of limitation commence[s] to run from the date of the discovery of facts which in the exercise of proper diligence would have enabled the plaintiff to learn of the fraud." *Howard v. Howard*, 239 P.2d 584, 589 (Nev. 1952). *Accord Sierra Pacific Power Co. v. Nye*, 389 P.2d 387, 390 (Nev. 1964) ("mere ignorance of the existence of . . . the facts which constitute the cause will not postpone the operation of the statute of limitations ... if the facts may be ascertained by inquiry or diligence").

The parties also agree that section 11.220 of the Nevada Revised Statutes applies to the failure to warn claim. The Supreme Court of Nevada has expressly held that "the term 'accrued,' as used in NRS 11.220, incorporates the same 'diligent discovery' rule that is present in NRS 11.190(3)." *Oak Grove Investors v. Bell & Gossett Co.*, 668 P.2d 1075, 1079 (Nev. 1983); *accord Tahoe Village Homeowners Ass'n v. Douglas Cty.*, 799 P.2d 556, 558 (Nev. 1990). Thus, as with the fraud claim, the failure to warn action accrues "[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action." *Oak Grove*, 668 P.2d at 1079.

Nevada Power filed suit on July 7, 1989. Hence if its cause of action accrued before July 7, 1986, its action is barred. The uncontested facts are that Nevada Power knew of the dangers of PCB's no later than 1979, but that it only discovered in 1988 that the Manufacturers' misrepresentations to it were intentional. Between 1979 and 1988, Nevada Power apparently did not investigate the possibility of fraud by the Manufacturers.

Nevada Power contends that between 1979 and 1988, although it knew that the Manufacturers' representations had been false, it had no reason to believe that such misrepresentations were anything other than innocent mistakes caused by the general lack of scientific understanding during the 1960's and early 1970's of the effects on humans of PCB exposure. In 1988, Nevada Power discovered internal documents of the Manufacturers which Nevada Power contends show that the Manufacturers' understanding of the dangers of PCB's in the 1960's and early 1970's was much more advanced than the general state of knowledge in the scientific community. Hence, Nevada Power argues that only in 1988 did it discover the fact of the Manufacturers' willful state of mind in making misrepresentations about the safety of PCB's.

The Manufacturers argue that Nevada Power's action accrued no later than 1979, when it concededly knew of the dangers of PCB's. The falsity of a representation is only one of the facts that make up a fraud or failure to warn claim, however. One of the facts constituting a fraud or failure to warn claim is the defendant's state of mind. Only if the defendant's misrepresentation is intentional has the defendant acted fraudulently. *See Lubbe v. Barba*, 540 P.2d 115, 117 (Nev. 1975). Similarly, liability for failure to warn cannot arise where the defendant did not reasonably know of the hazard. *See Oak Grove*, 668 P.2d at 1080.

Thus whether Nevada Power's suit was timely turns on whether its knowledge of the dangers of PCB's in 1979 was sufficient that, with proper diligence, it could have uncovered the rest of the facts necessary to or failure to warn claim. Under federal law, this kind of determination is generally inappropriate for resolution on summary judgment.[2] In determining when an action has accrued under a discovery-based statute of limitations, "[t]he question of when [the alleged wrongdoing] was or should have been discovered is a question of fact. It may be decided as a matter of law only when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) (internal citations and quotations omitted). "Where the cause of action was belatedly discovered, the issue whether the plaintiff exercised reasonable diligence is a question of fact." *Timmel v. Moss*, 803 F.2d 519, 521 (9th Cir. 1986).

In a case quite similar to the one before us, the defendant installed an inadequate computer system in the plaintiff's office. *See Sierra Diesel Injection Serv. v. Burroughs Corp. (Sierra Diesel I)*, 648 F. Supp. 1148, 1149 (D. Nev. 1986). As in the instant case, the plaintiff knew early on that the defendant's representations about the equipment made at the time of sale had been inaccurate. *Id.* at 1151. The question faced by the court was whether, under the Nevada limitations rule, such knowledge was sufficient that, with proper diligence, the plaintiff should have discovered that such misrepresentations were not innocent mistakes but willful fraud. The court stated that "the question of what constitutes sufficient knowledge to place a party under an affirmative duty to discover the fraud or mistake is normally a jury question." *Sierra Diesel Injection Serv. v. Burroughs Corp. (Sierra Diesel II)*, 651 F. Supp. 1371, 1373 (D. Nev. 1987) (denying motion to reconsider *Sierra Diesel I*).

The nonmovant, here Nevada Power, is entitled to have inferences drawn from the evidence in the light most favorable to it on a motion for summary judgment. *Tzung*, 873 F.2d at 1339-40. One reasonable inference from the facts is that, although Nevada Power knew of the dangers of PCB's by 1979, it had no reason to think that the Manufacturers were any less in the dark about such dangers than the government and scientific community generally were in the 1960's. Between the 1960's and late 1970's the level of knowledge of scientists and the government regarding PCB's increased dramatically. Before its 1988 discoveries, Nevada Power may have plausibly believed that the Manufacturers' knowledge had similarly increased during the 1960's and 1970's, and that their earlier representations, while clearly false given the knowledge base today, were innocent mistakes rather than part of the willful cover-up that Nevada Power now alleges.

Very recently, this court has reaffirmed that under federal law, "when the plaintiff discovered or could have discovered the fraud with the exercise of reasonable diligence . . . is usually a question for the trier of fact." *General Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1397 n.2 (9th Cir. 1991). "Because our precedent dictates that the question of notice of fraud is for the trier of fact, the party seeking summary disposition has an extremely difficult burden to show that there exists no issue of material fact regarding notice." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1309-10 (9th Cir. 1982). We conclude that such burden has not been met here.

B

In the alternative, the Manufacturers contend that even if the facts of a fraud claim could not have been uncovered through proper diligence by Nevada Power, a per se rule should apply barring fraud claims whenever a negligence claim based on the same incident would be barred. Since Nevada Power has conceded that its strict liability and negligence claims connected with the sale of the PCB equipment are barred by the statute of limitations, if the per se rule urged by the Manufacturers were adopted, Nevada Power's fraud claims would be barred as a matter of law, despite the existence of a genuine issue of material fact regarding the "proper diligence" rule.

The Manufacturers argue that "once a plaintiff has a suspicion of some wrongdoing, the statute of limitations begins to run on *all* claims relating to that wrongdoing, including fraud — regardless of whether the plaintiff has knowledge of the facts supporting a particular theory of action." They provide no Nevada authority for this proposition, but cite an Iowa case that does apparently hold that the statute of limitations begins to run on a fraud claim as soon as a party has facts sufficient to make out a strict liability or negligence claim regarding the same transaction. *See Sparks v. Metalcraft, Inc.*, 408 N.W.2d 347, 352 (Iowa 1987). But that court added that "[o]ne exception to this holding might be a fraudulent concealment by the defendant resulting in a claimant's failure to discover facts supporting a legal theory of action." *Id.* at 352-53. Since Nevada Power indeed alleges just such concealment here, the persuasiveness of this case, even as noncontrolling authority, is weak.

It would appear that Nevada case law has carved out an exception to the statutory limitations rule where, although the party does not know all the facts constituting his cause of action, he could discover such facts through the exercise of proper diligence. *See Howard*, 239 P.2d at 589. Such rule might apply when the party knows facts sufficient to make out a negligence claim. That is, the facts constituting the negligence claim might be enough that, with proper diligence, the facts showing willfulness, and hence a fraud claim, would come out. In that situation, of course, the Nevada courts would apply their well settled rule that at the time the plaintiff "in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action," the statute begins to run. *See Oak Grove*, 668 P.2d at 1079.

We see no indication that the Nevada Supreme Court would go further and, as the Manufacturers urge, adopt a per se rule that whenever the facts of a negligence claim are present, the statute begins to run on fraud actions regardless of whether the facts of such fraud could be discovered through proper diligence. It may be that in most cases where the facts of a negligence claim are known, the "proper diligence" rule would start the limitations period running. But in those cases where, even with knowledge of the facts of a negligence claim, proper diligence could not uncover the facts regarding state of mind needed for a fraud claim, it would be unduly harsh and inequitable to hold that the fraud action always accrues at the time of the negligence action. We are not persuaded that the Nevada Supreme Court would adopt such a rule.

IV

The district court rejected Nevada Power's claim for implied equitable indemnity against the Manufacturers because under Nevada law, the indemnitee and the indemnitor must have "common liability." The court noted that the EPA regulations impose no liability on the Manufacturers for their acts of supplying equipment to Nevada Power twenty or more years ago. Only *current* use or manufacture of PCB equipment runs afoul of the EPA regulations, and hence no liability common to both Nevada Power and the Manufacturers exists here.

The Nevada Supreme Court has spoken recently and clearly that under Nevada law, "[t]he right of indemnity rests upon a difference between the . . . liability of two persons, *each of whom is made responsible by the law to an injured party*." *Black & Decker, Inc. v. Essex Group*, 775 P.2d 698, 699 (Nev. 1989) (emphasis added). As Judge Learned Hand has stated, it is an essential prerequisite for the existence of indemnification liability that, regarding the indemnitor and the indemnitee, "both parties are liable to the same person for the joint wrong." *Santisteven v. Dow Chemical Co.*, 506 F.2d 1216, 1219 n.10 (9th Cir. 1974) (quoting *Slattery v. Marra Bros.*, 186 F.2d 134, 139 (2d Cir.), *cert. denied*, 341 U.S. 915 (1951)).

Nevada Power, in an effort to support its position, cites to authority stating that the indemnitee and the indemnitor need not be joint tortfeasors. *See Hydro-Air Equip. v. Hyatt Corp.*, 852 F.2d 403, 405 (9th Cir. 1988) (interpreting Nevada law). But this misses the point. Nobody has claimed that Nevada Power and the Manufacturers must be joint tortfeasors. Rather, the Nevada Supreme Court has stated that for an indemnity action to arise, there must be a "legal obligation owed by each of the wrongdoers to the injured person." *Black & Decker*, 775 P.2d at 699.

Even accepting, arguendo, Nevada Power's contention that the EPA is an "injured person," only Nevada Power has a legal obligation to the EPA with respect to the electrical equipment the Manufacturers sold it. The Manufacturers have no obligations or liabilities to the EPA connected with equipment they sold in the 1960's and early 1970's. No common liability exists here.

protection limitation rules are intended to provide. The rules are grounded on twin policies of protecting defendants from defending stale claims and promoting repose. *Nevada State Bank v. Jamison Fam. Part.*, ___ Nev. ___, 801 P.2d 1377, 1381 (1990); *Ohio*, 651 F.2d at 694. Both policies are eroded by a rule that necessarily makes the statute of limitations a jury question. *See Ohio*, 651 F.2d at 694. Unless the court bifurcates the trial, both the defendant and the court will be burdened by the trial of a stale claim, even if the defendant is vindicated. *Id.* Furthermore, any repose from the statute would be illusory if the defendant still faces "the cost and vexation of protracted litigation and the uncertainty of contingent liability." *Id.*

I would affirm the district court.

TAXATION

President's Preference to Pay Creditors Over Government Shows 'Willfulness'

Cite as 92 Daily Journal D.A.R. 5015

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAN O. DAVIS,
Plaintiff-counter-claim-defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-counter-claimant-Appellee.

No. 90-16209
D.C. No. CV-88-20759-RPA
OPINION

Appeal from the United States District Court for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

Argued and Submitted
October 10, 1991—San Francisco, California

Filed April 14, 1992

Before: Richard H. Chambers, Thomas Tang and Stephen S. Trott, Circuit Judges.

Opinion by Judge Tang

COUNSEL

David M. Kirsch, San Jose, California, for the appellant.

Bruce R. Ellisen, Tax Division, United States Department of Justice, Washington, D.C., for the appellee.

OPINION

TANG, Circuit Judge:

Dan Davis, the president and major shareholder of ITAC Corporation, appeals a jury verdict finding him liable for willfully failing to pay withholding and social security taxes for ITAC's employees for the last quarter of 1981 and the first two quarters of 1982. Davis had argued that he was not a responsible officer and that his subsequent preference of other creditors over the Internal Revenue Service ("IRS") did not evince "willfulness." The district court refused to instruct the jury on Davis's definition of willfulness. The jury subsequently found Davis liable for the employee taxes owed the government. The district court also denied Davis's motion to reduce the assessment for the last quarter of 1981. Davis appeals. We affirm.

BACKGROUND

A. *Statutory Framework*

The Internal Revenue Code requires employers such as ITAC Corporation ("ITAC") to withhold federal social security and individual income taxes from the wages of their employees. 26 U.S.C. §§ 3102(a), 3402(a).[1] Although an employer collects this money each salary period, payment to the federal government takes place on a quarterly basis. In the interim, the employer holds the collected taxes in trust for the government. 26 U.S.C. § 7501(a). These taxes accordingly are known as "trust fund taxes." *Slodov v. United States*, 436 U.S. 238, 243 (1978). Other taxes, such as those directly owed by the business, are referred to as "non-trust fund taxes."

Once net wages are paid to an employee, the government credits that employee with the tax payments, regardless of whether the taxes are ultimately paid over by the employer. *Id.* In order to protect against revenue losses, the tax code offers the IRS a variety of means of recovering from employers who fail to pay over collected employee taxes. In addition to tax liens, 26 U.S.C. § 6321, and criminal penalties, 26 U.S.C. §§ 7202, 7215, the IRS may assess a civil penalty against responsible corporate officials equal to the amount of delinquent trust fund taxes ("100% penalty"), 26 U.S.C. § 6672. Section 6672 provides, in relevant part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

A "person," for purposes of section 6672, includes "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 6671(b). The recovery of a penalty under section 6672 entails showing that the individual both was a "responsible person" and acted willfully in failing to collect or pay over the withheld taxes. *Maggy v. United States*, 560 F.2d 1372, 1374 (9th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

B. *Factual History*

Dan Davis helped to organize ITAC in the mid-1970s. During the time in question, Davis was ITAC's president, a member of its board of directors, and its major shareholder.

ITAC failed to pay its employees' withheld social security and income taxes during the last quarter of 1981 and the first two quarters of 1982. Davis claims that he did not learn of