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May 23, 1989

VIA FEDERAL EXPRESS

Thomas E. Kotoske, Esq.
540 University Avenue
Third Floor
Palo Alto, CA 94301

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

Dear Tom:

I am enclosing herewith the following:

1. Memorandum dated May 22, 1989 to me from Nik Skrinjaric, together with attachments.

2. Memorandum dated May 23, 1989 from me to Mr. Skrinjaric.

This all wants a bit of explanation. Trying to fashion claims for relief cognizable under Nevada law turned out to be more complex and time consuming than originally anticipated, but my experience is that many things of this nature do.

Nevada being one of the smaller states in the Union from the standpoint of population, there is no great abundance of precedents. There are enough cases to reveal the general topography of the area in which we must maneuver, yet few enough cases so that we have room to argue where necessary to establish or expand upon a precedent. Under the circumstances this is good; Nevada courts are generally hospitable to plaintiffs. I now feel sufficiently comfortable with what we have found to conclude that we can state claims for relief which will survive the inevitable motion to dismiss and will not be defeated by the statute of limitations.

I will redraft our complaint to conform to our Nevada forms of claims for relief whenever you want this done; I don't see it as being particularly time consuming. We want also to probe more deeply into the possibility of stating claims for relief under RICO.

Sincerely yours,

JONES, JONES, CLOSE
& BROWN, CHARTERED

Chuck

CHARLES H. McCREA, SR.

CHM:imj:0788H

cc: w/encls.
David S. McCrea, Esq.

# MEMORANDUM

TO: NIK SKRINJARIC

FROM: CHARLES H. McCREA, SR.

RE: NEVADA POWER COMPANY v. MONSANTO COMPANY, ET AL.
FILE NO. 11927.2

DATE: MAY 23, 1989

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The following are some observations on your memorandum of May 22 on this subject.

You have taken, I think, a very conservative approach, and I can't criticize that. We need to know what our worst possible case scenario is. Nonetheless, we also want to put together a complaint in this action which may reasonably be expected to stand up, and in doing so we cannot discard promising theories even though they may also have some liabilities. It is with this objective in mind that I make the observations which follow. My reference to page numbers relates to your May 22 memorandum.

Products Liability. (Pages 6-7.)

You hypothesize at page 6 that "a strict liability or negligence based product liability claim may not be available," and perhaps you are right. The hypothesis concedes, however, that such claims also may be available, and this is what I want to explore.

That the PCB capacitors and transformers are "dangerous" within the meaning of the case law I think is certainly arguable and perhaps even conclusive. The U.S. Government has made the finding that these products are so dangerous that they must be removed from use. More, there is no question that the defect in the capacitors and transformers which made them dangerous--their use of PCB ~~dialectic~~ dielectric fluids--was present when they left the manufacturers' or distributors' hands.

In Nevada, a plaintiff may not recover strictly for economic loss under theories of strict product liability or negligence. However, under Local Joint Executive Board v. Stern, which you cite, injury to property is explicitly acknowledged as a claim for which recovery may be had under both negligence and strict tort liability theories. It is certainly arguable that Nevada Power's "property" was damaged by the installation of the defective transformers and capacitors. All of Nevada Power's utility plant is its "property" and a very good argument can be made for the proposition that it is real property, if that is necessary. The damage suffered by Nevada Power may also be "economic damage," but the damage is nonetheless damage to "property" and the measure of the damage to its property is the amount which Nevada Power was forced by law to spend to restore its property to a legally acceptable and functional condition.

Warranty. (Pages 7-8.)

At first blush, it appears that the implied warranty theory would fit. From all appearances, Nevada Power purchased the PCB equipment from the suppliers under circumstances that fit within the ambit of NRS 104.2315.

You say that in order to take advantage of an implied warranty theory, the plaintiff must be a buyer. Since Nevada

Power was a buyer from the manufacturers of the equipment, I do not see the relevance of the discussion on horizontal privity.

You note the significance of the fact that a warranty claim may be brought in cases where there is only economic damage. The implied warranty theory therefore fits this requirement also.

Finally, you note that breach of warranty with respect to a defective product occurs when tender of delivery is made, "except that where warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

Any warranty relating to a piece of electrical equipment must necessarily relate to its performance, it seems to me. Failure of that "performance" arguably occurs when the government proscribes use of the equipment because it is excessively dangerous, irrespective of the fact that it may be operating as intended at the time when its use is proscribed. And the fact that it is operating as intended at the time its use is proscribed is the strongest possible argument in support of the proposition that the breach of warranty was not "discovered" until the government proscribed the equipment.

<u>The Asbestos Litigation</u>. (Pages 11-12.)

At the top of page 12, you state your conclusion with respect to the asbestos litigation as precedent:

"The successful asbestos argument seems not be applicable here. The PCBs, which are the defective material in this case, are contained within various sealed transformers and capacitors." Let me turn this around. I would argue that the PCBs themselves are not defective. Like gasoline or gunpowder, they are exceedingly dangerous when misused, but they are not defective. The transformers and capacitors containing PCBs apparently cannot be sealed so securely during manufacture that under no circumstances will they malfunction or leak. Accordingly, their use is proscribed and their removal ordered.

Approaching the problem from this angle, it seems to me that the asbestos removal cases are relevant. At page 11 of your memorandum you state, "in the successful asbestos removal cases, the common argument was that the asbestos contained in the various buildings deteriorated and that the dust therefrom damaged the walls and other parts of the buildings. This, of course, was argued as real property damage and not purely economic damage."

If the transformers and capacitors which were supposed to be successfully sealed against any escape of PCBs in fact are unable to prevent the escape of the PCBs and their use is forbidden for this reason, then it is the presence of these PCB transformers and capacitors themselves which damage Nevada Power's property. That they do "damage" Nevada Power's property is conclusive; the government has declared them unsafe and mandated that they be removed.

<u>Conclusions</u>.

If the foregoing analyses are not hopelessly flawed, it seems to me that the claims for relief which Nevada Power might reasonably assert include all of the following:

1. Negligence for injury to property.

2. Strict products liability for injury to property.

3. Implied warranty of fitness.

4. Fraud.

5. Punitive damages (dependent upon at least one of the other claims being successful).

6. RICO (which depends upon our being able to show the necessary two predicate acts such as mail or wire fraud).

Please give this some thought and let us discuss it at an early hour.

0786H

# MEMORANDUM

TO: CHARLES H. McCREA, SR.

FROM: NIK SKRINJARIC N.S.

RE: NEVADA POWER COMPANY V. MONSANTO COMPANY, et al.
OUR FILE NO. 11927.2

DATE: MAY 22, 1989

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In your memo dated April 26, 1989, you asked that I research into possible claims for relief in the above-entitled case. The claims identified by you are (A) indemnity, (B) nuisance, (C) fraud and misrepresentation and (D) punitive damages. For each of the foregoing claims you asked that I answer the following questions:

1. What is the statute of limitations?
2. What is the rule in Nevada regarding discovery of injury?
3. What are the elements of the claim complained of?
4. What is the statute of repose with respect to products liability?
5. Whether Nevada has a fraudulent concealment rule tolling the statute of limitations?

I have conducted the necessary research on the aforementioned claims as well as a bit of preliminary research into potential claims for relief based on strict products liability and warranty. The following are the results of that research.

A. Indemnity. (For applicable statutes and cases, see Exhibit "1".)

Generally indemnity shifts the burden of the entire loss from the defendant tort feasor to another who should bear it instead. Reid v. Royal Insurance Company, 80 Nev. 137, 390 P.2d 45 (1964). Central Telephone Company v. Fixtures Manufacturing Corporation, ___ Nev. ___, 738 P.2d 510 (1987). Indemnity is not available in a case involving joint or concurrent tort feasors having no legal relation to one another and each owing a duty of care to the injured party. Furthermore, there must be some sort of special relationship between the party seeking to recover on an indemnity theory and the party from which such recovery is sought. Id. Usually such special relationship is created by contract.

After conducting my research I have come to the conclusion that indemnity is not a separate claim for relief per se. It appears that an indemnity type action must be based upon an independent claim for relief such as contract. In this case, it may be necessary to review some of the sales contracts between Nevada Power and the sellers such as Westinghouse in order to see whether there are any indemnity provisions within the contracts. Absent such provisions, it will be difficult if not impossible to bring an indemnity type action.

If an indemnity action is founded on a written contract the statute of limitations is six years (NRS 11.190(1)). If the indemnity action is not based upon a written contract, the statute of limitations is four years (NRS 11.190(2)).

B. Nuisance. (For applicable statutes and cases, see Exhibit "2".)

The elements of nuisance in Nevada can be found in NRS 40.140. NRS 40.140 provides in pertinent part:

> 40.140 Nuisance defined; action for abatement and damages.
> 1. Except as otherwise provided in subsection 2, anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. The action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Implicit in a traditional nuisance action is that the activity which constitutes the nuisance is the result of the defendant's use of property to which he or she has rightful possession. See, for example, Bliss v. Greyson, 24 Nev. 422, 56 P 231 (1899), Jezowski v. City of Reno, 71 Nev. 233, 286 P.2d 257 (1955); Lied v. County of Clark, 94 Nev. 275, 579 P.2d 171 (1978); Brisco v. Harper Oil Company, 802 P.2d, 33 (Okl. 1985). Graber v. City of Peoria, 753 P.2d 1209 (Ariz. App. 1988).

In this case a nuisance theory seems to be ill-fitting. While it is certainly arguable that the equipment containing PCBs sold to Nevada Power is an obstruction to the full use of the Nevada Power property, there is an ownership problem. If Nevada Power purchased the defective equipment, it is difficult to see how the implicit requirement that the defendant own or be in rightful possession of the nuisance causing property could be met. While some sort of artful argument may be made, a more direct claim for relief should be utilized in order to minimize the complexity and difficulty that could be faced by the use of an ill-fitting theory.

The applicable statute of limitations on a nuisance action is NRS 11.220. NRS 11.220 provides: "An action for relief, not before provided for, must commence within four years after the cause of action shall have accrued."

C. Fraud. (For applicable statutes and cases, see Exhibit "3".)

The elements of fraud are:

1. A false representation by the defendant.

2. Knowledge or belief on the part of the defendant that representation is false or that defendant has not a sufficient basis or information to make it.

3. Intention by defendant that plaintiff act or refrain from acting in reliance upon the misrepresentation.

4. Justifiable reliance on the part of plaintiff, and

5. Damage to the plaintiff from the reliance on the defendant's statement.

Lubbe v. Barba, 91 Nev. 596, 540 P.2d, 115, (1975). Sanguinetti v. Strecker, 94 Nev. 200, 577 P.2d 404 (1978).

The statute of limitations applicable to a fraud or misrepresentation claim is NRS 11.190(3)(d), which provides in pertinent part:

> 11.190 Periods of limitation. Actions other than those for the recovery of real property, unless further limited by specific statute, can only be commenced as follows:
>
> . . .
>
> 3. Within 3 years:
>
> . . .
>
> (d) Except as otherwise provided in NRS 112.230, an action for relief on the ground of fraud or mistake, but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake.

It is clear from the language of NRS 11.190(3)(d) that the statute of limitations does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. This discovery rule is also found in case law. See Hartford Accident and Indemnity Company v. Rogers, 96 Nev. 576, (1980), 613 P.2d 1025; Shupe v. Ham, 96 Nev. 61, 639 P.2d 540 (1982). Golden Nugget, Inc. v. Ham, 98 Nev. 311, 646 P.2d 1221 (1982). Additionally, there is a requirement of reasonable diligence on the part of the injured party. This requirement is generally construed as meaning that the statute of limitations begins to run when the plaintiff knew or reasonably should have known of facts giving rise to his claim. See Shupe v. Ham, (supra); Golden Nugget, Inc. v. Ham, (supra).

There is also a fraudulent concealment rule which is a restatement of the above discovery rule. However, fraudulent concealment must be alleged with particularity and the plaintiff must show the means by which previously unknown information was acquired within the statutory period which led to the discovery of the concealment and underlying breach of duty. See Golden Nugget, Inc. v. Ham, (supra).

D. Products Liability. (For applicable statutes and cases, see Exhibit "4".)

Unfortunately in this case, a strict liability or negligence based product liability claim may not be available.

Generally, in order to recover for defective products it must be shown that the defect made the product unreasonably dangerous and unsafe for its intended use. A product is unreasonably dangerous if it is dangerous to the extent beyond that which would be contemplated by the ordinary consumer who purchases with the ordinary knowledge common to the community as to the product's characteristics. Ward v. Ford Motor Company, 657 P.2d 95 (Nev. 1983); Van Duzer v. Shoshone Coca Cola Bottling Company, 741 P.2d 811 (Nev. 1987). Such liability applies to a manufacturer or distributor of a product if the defect in a product was present when the product left the manufacturer's or distributor's hands. Id.

Unfortunately, in Nevada a plaintiff may not recover for economic loss under theories of strict products liability or negligence. Local Joint Exec. Bd. v. Stern, 98 Nev. 409, 651 P.2d 637 (1982); Central Bit Supply Inc. v. Waldrop Drilling & Pump, Inc., ___ Nev. ___, 717 P.2d 35 (1986). In this case Nevada Power had to pay monies in order to remove and replace certain equipment containing PCB's. This, of course, is only economic damage and as such a products liability claim is probably not available.

Aside from the probable unavailability of a products liability claim, the pertinent statues of limitations are as follows:

(a) Action for injury of personal property: 3 years (NRS 11.190(3)(d)).

(b) Action for personal injury: 2 years (NRS 11.190(4)(e).

(c) Action for injury of real property: 4 years (NRS 11.220.) See also Oak Grove Investors v. Bell & Gossett Co., 99 Nev. 616, 668 P.2d 1075 (1983).

E. Warranty. (For applicable statutes and cases, see Exhibit "5".)

In Nevada the Uniform Commercial Code governs claims of warranty. In this case, NRS 104.2315 applies. It provides in pertinent part:

> 104.2315 Implied warranty: Fitness for particular purpose.
> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.
>
> (NRS 104.2315)

In order to take advantage of an implied warranty theory, plaintiff in essence has to be a buyer. What this means is that while vertical privity between buyer, seller and manufacturer is not necessary, horizontal privity is. Hiles Company v. Johnston

Pump Company, 93 Nev. 73, 560 P.2d 154 (1977). For example, an employer who buys a defective ladder may bring suit under warranty, but an employee who is injured by the defective ladder cannot. Long v. Flannigan Warehouse Company, 79 Nev. 241, 382 P.2d 399 (1963). Most significantly a warranty claim may be brought in cases where there is only economic damage. Central Bit supply Inc., v. Waldrop Drilling and Pump Inc., ___ Nev. ___ 717 P.2d 35 (1986).

NRS 104.2725 is the statute of limitations for implied warranty. Specifically, NRS 104.2725 requires that an action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. Unfortunately,

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. Breach of warranty occurs when tender of delivery is made, except that where warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Hiles Company v. Johnston Pump Company of Pasadena, California, (supra F.2).

F. Punitive Damages. (For applicable statutes and cases, see Exhibit "6".)

NRS 42.010 governs punitive damages. It provides in pertinent part:

> . . .[c]ases in which exemplary and punitive damages may be awarded. An action for a breach of an obligation not arising from contract, where the defendant: (1) has been guilty of oppression, fraud or malice, express or implied;. . . the plaintiff, in addition to the

> actual damages, may recover damages for the sake of example and by way of punishing the defendant.

The term malice as used in the above statute means malice in fact and denotes ill will, or a desire to do harm for the mere satisfaction of doing it. It also contemplates willful and intentional conduct done in reckless disregard of possible results. Bader v. Cerri, 96 Nev. 352, 609 P.2d 314 (1980). The proper end of punitive damages is to punish and deter culpable conduct. Ace Truck & Equipment Rentals, Inc. v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987). The amount of punitive damages for the purpose of punishment and deterrence lies in discretion of the fact finder. Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blame and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of a tort feasor under the circumstances of a given case. Id. Since punitive damages are not an independent claim for relief, the various statutes of limitations previously discussed are applicable depending upon the underlying claim.

G. Delayed Discovery Rule.

While this subject was discussed earlier in the context of fraud, in order to determine the viability of any of the aforementioned potential claims for relief, a more generalized discussion of the "delayed discovery" rule in Nevada is necessary.

In essence, the delayed discovery rule holds that the applicable statute of limitations does not begin to run until plaintiff either knows or in the exercise of proper diligence should have know the facts constituting the elements of its cause of action. See, for example, Oak Grove Investors v. Bell & Gossett Company, 99 Nev. 616, 668 P.2d 1075 (1983). A plaintiff who relies upon the delayed discovery rule must plead facts justifying the delayed discovery of his action. Specifically, the plaintiff must allege: (1) the time and manner of discovery and (2) the circumstances excusing delayed discovery. Prescott v. United States, 523 F. Supp. 918 (D.Ct.Nev. 1981).

While the above seems to be the general rule, it is not clear in exactly what context it applies. As is often the case, there are very few Nevada decisions on the matter. The few that exist, link the applicability of the delayed discovery rule to the use of the term "accrued" in various statutes of limitations. For example, the delayed discovery rule applies to the statute of limitations contained in NRS 11.220, NRS 11.190, Subds. 3, (3)(b)-d), 11.207, 41A.097, and 41A.097, Subd. 1. See Oak Grove Investors v. Bell & Gossett Company, (supra); Nuggett Inc. v. Ham; Shupe v. Ham. The fraudulent concealment rule as found in Golden Nuggett, Inc. v. Ham, (supra) seems to be only a variation of the delayed discovery rule. While the names of the two doctrines are different, the requirements are essentially the same.

Conclusion.

The foregoing provides a thumbnail sketch of the possible claims for relief in this case. Copies of the applicable cases and statutes are attached hereto as exhibits. A reading of these cases and statutes is suggested.

(Addendum--5/18/89)

Since the original date of this memo, I have conducted a bit more research into asbestos removal litigation and have spoken to Mr. David McCrea in Indiana. Based partly on the subsequent research and partly on the original research as found supra, I have come to the following conclusions with regards to the proper or at least most likely successful claims for relief.

As must be clear from the previous text of this memo, we face significant problems in bringing a successful claim in this case. As I have explained earlier, strict product liability and negligence based product liability seems to be unavailable in this instant due to the "economic damage" barrier to such actions. While in the asbestos litigation the economic damage barrier has been overcome, this was due to circumstances not present in this case. In the successful asbestos removal cases, the common argument was that the asbestos contained within the various buildings deteriorated and that the dust therefrom damaged the walls and other parts of the buildings. This, of course, was argued as real property damage and not purely economic damage.

The successful asbestos argument seems not to be applicable here. The PCBs, which are the defective material in this case, are contained within various sealed transformers and capacitors. These transformers and capacitors were sold to Nevada Power as a unit. As far as the cost of removal of these faulty pieces of equipment, there appears to be no evidence that the PCBs leaked and damaged other improvements on Nevada Power property. In this respect, the Nevada Power case is different than the successful asbestos removal cases based on strict products liability.

In addition to products liability, indemnity, nuisance and implied warranty theories are also not available in this case. The indemnity theory is probably unavailable because of a lack of any sort of contractural provisions providing for a special relationship as is required. The nuisance theory will probably be unsuccessful because of a lack of control by the defendant over the nuisance causing property. The warranty theory will probably fail due to the statute of limitations which begins to run as of date of delivery. According to Mr. McCrea, the last transformers and capacitors containing PCBs were delivered in 1978. This would mean that the last year than an action on warranty could have been brought would be 1982.

At this time the most likely successful claim for relief is fraud and misrepresentation. However, this claim also may contain significant problems.

As far as the fraud theory is concerned, we of course will have the initial problem of being able to plead with particularity facts sufficient to show the aforementioned elements of fraud. To state it again, we will have to show that Westinghouse or Monsanto specifically represented to Nevada Power that the transformers and capacitors containing PCBs were safe for use. The mere fact that Monsanto and Westinghouse may have lied to the government will probably not be enough to give us standing in the fraud action. Additionally, we will of course have to show justifiable reliance by Nevada Power to its detriment. Assuming that we can show the necessary elements, a fraud action could be especially powerful since we will have available to us punitive damages. Also, a RICO claim may be available if we can show two acts of mail or wire fraud.

In addition to the problem of pleading with particularity facts sufficient to show the elements of fraud, we will also have to overcome possible statute of limitation problems. As was stated earlier, the three (3) year statute of limitation begins to run upon the discovery by the aggrieved party of the facts constituting the fraud. Here there are two possible arguments for when the fraud was discovered. One of the arguments that can be made is that Nevada Power did not find out about Monsanto and others' fraud until you informed them of it. Alternatively, we can argue that the statute begins to run at the point that the EPA set down the schedules mandating that PCB containing equipment be removed. This second option falls under the damage portion of the delayed discovery rule. At this time, the author of this memo does not know when exactly the EPA ordered the removal of PCB containing equipment and when Nevada Power found out about the order. From materials in the file, it would appear that it was sometime in 1985 or 1986. Under either theory we should not delay but file suit before the end of the year, if at all.

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