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February 5, 1991

John L. Thorndal, Esq.
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HAND DELIVER

Dear John:

The accompanying letter pointing out the estoppel problem only hints at a concomitant and extremely delicate problem of obvious concern to counsel for Monsanto and Westinghouse as defendants in this case and to counsel for Monsanto and Westinghouse as plaintiffs in the insurance litigation. Legal arguments advanced in one case that compromise the integrity of a litigant's claims in other pending actions have the potential to expose counsel to embarrassment or worse. This is a problem for counsel, not clients; hence, this separate letter.

I have not sent either this letter or the one that accompanies it to any other counsel in this case, leaving to your good judgment whether or how to distribute either of them to co-counsel and/or clients.

Very truly yours,

JONES, JONES, CLOSE
& BROWN, CHARTERED



Charles H. McCrea, Sr.

CHM:jlq
Enclosures

Thorndal.ltr

task is normally limited to determining the intent of the parties to the agreement. Equitable indemnity, however, is premised on the implied contractual liability of one who negligently or tortiously causes another to be "exposed to liability" or compelled to pay "damages." 42 C.J.S. Indemnity § 21, pg. 596. ^{13/} Fairness, rather than a technical definition of "damages," is the outer restraint on the terms of the equitable indemnity contract a court may imply.

11-12 13. Defendants suggest that their own written agreements executed years ago indemnifying each other for PCB-related losses, (Opening Br. at *1), should not apply by analogy because Nevada Power seeks tort indemnity. Def. Br. at 34 n. 35. Defendants apparently do not understand that equitable indemnity is implied contractual liability, i.e., that where it is fair to do so and where there is a sufficient relationship established to support an implied contract arising out of a breached duty owed by the guilty indemnitor to the more innocent indemnitee, the courts will imply the terms of a contract requiring indemnification. The "action is not changed from one for a breach of contract to one for a tort," as defendants contend, simply because recovery may turn upon the breach of a duty established in tort. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 100 L.Ed. 133, 142 (1956).

Defendants have adopted a contrary position in their litigation against their insurance carriers, where they argue that expenses of the type involved in this case are within the reach of indemnity. Defendants are judicially estopped from asserting a contrary position in this litigation. See e.g., R. Boyers, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Northwestern Univ. L. Rev. 1244 (1987).

Defendants appear heedless of the danger to their own litigation against their insurers of prevailing in this case on the issue of the availability of the indemnity remedy.^{12/} In those cases, defendants contend that indemnity provides a remedy for "damages" of the same sort involved here. [Indeed, defendants in their insurance litigation seek a declaration that their insurers must defend them and indemnify their losses in cases such as this. Should they prevail in this case, defendants will undoubtedly face vigorous arguments from their insurers that they are judicially estopped in those cases from asserting the inconsistent positions.

Defendants' argument that the expense inflicted upon Nevada Power is beyond the reach of equitable indemnity is not well taken. There is no reason why an equity courts' powers to imply terms should be broader in express contractual indemnity than in equitable indemnity. Indeed, in the former context, the court's

12. Whether defendants win or lose this case, this Court's decision will endanger defendants' likelihood of success in their insurance litigation. Defendants may be caught in a double bind of their own manufacture. Should Nevada Power ultimately prevail on its fraud claims, defendants insurers will likely use the evidence and verdict in this case to argue an estoppel against insurance coverage because of defendants' intentional, rather than negligent wrongs, which undoubtedly are not covered.

3. DAMAGES vs. LIABILITY. There is no merit to defendants' contention that the monetary liability inflicted upon Nevada Power does not constitute "damages" available from a court exercising powers of equitable indemnity. The expenses Nevada Power incurred as a result of the EPA rules/orders can clearly be regarded as "damages" for purposes of express contractual indemnity. Chesapeake Utilities Corp. v. American Home Assurance Co., 704 F. Supp. 551, 558-61 (D. Del. 1989); see also Avondale Industries v. Travelers Indemnity Co., 697 F. Supp. 1314, 1319 (D. N.Y. 1988) (analogizing from "damages" available under chemical nuisance/trespass theories to property clean-up costs imposed by pollution control agencies). There is no reason a court of equity should feel its powers more limited in equitable implied indemnity than in express contractual indemnity, where the courts have had no difficulty implying that the term "damages" encompasses liability of the type involved here. See Chesapeake Utilities, supra.

statute in professional malpractice action). Likewise, actions in equitable indemnity are "very generally" held to be governed by the statute for implied contracts. Annot., supra, 57 A.L.R.3d at 838-39.

Considering its precedent in Stephens and the various jurisdictions' broad agreement on the subject, the Nevada Supreme Court unquestionably would hold that the appropriate statute of limitations is the present N.R.S. 11.190(2)(c), which allows four years from accrual in which to commence an action "upon a contract, obligation or liability not founded upon an instrument in writing." Its only alternative would be the "catch-all" statute, N.R.S. 11.220, which allows an identical period. The District Court should be reversed on this issue.^{2/}

C. THE DISCOVERY RULE IN NEVADA. Defendants' argument has two major elements: (i) Nevada Power's abandoned claims for relief accrued long ago because Nevada Power became aware of the "alleged" hazards of PCBs during the 1970's; and (ii) being time-barred on the other claims, Nevada Power can not pursue later-acquired claims for the same relief (i.e., the expired claims and the newly-discovered claims are "linked" for purposes of accrual. Def. Br. pp. *___-___. Defendants are wrong even were their erroneous premise regarding accrual of the abandoned claims accepted.^{3/} In

3. Beyond denying they knew of the hazards of PCBs before the sale of equipment to Nevada Power, defendants still insist that the