

LAW OFFICES
THORNDAL, BACKUS, MAUPIN & ARMSTRONG
A PROFESSIONAL CORPORATION
POST OFFICE DRAWER 2070
1100 EAST BRIDGER AVENUE
LAS VEGAS, NEVADA 89125-2070
(702) 366-0622 FAX (702) 366-0327

RECEIVED FEB - 9 1989

JOHN L. THORNDAL
LELAND EUGENE BACKUS
A. WILLIAM MAUPIN
JAMES G. ARMSTRONG
CRAIG R. DELK
PEGGY A. LEEN
PAUL F. EISINGER
NANCY M. SOMERS
BRIAN K. TERRY
ERIC R. OLSEN

RENO OFFICE:
STEVEN R. KOSACH
STEPHEN C. BALKENBUSH
CHARLES L. BURCHAM

February 2, 1989

Charles H. McCrea Sr., Esq.
Jones, Jones, Close & Brown
Seventh Floor - Valley Bank Plaza
300 South Fourth Street
Las Vegas, NV 89101-6026

Thomas E. Kotoske, Esq.
540 University Avenue
Suite 325
Palo Alta, CA 94301

David S. McCrea, Esq.
McCrea & McCrea
119 South Walnut Street
P.O. Box 1310
Bloomington, IN 47402

Gentlemen:

We have been retained by Westinghouse Electric Corporation as a result of the claim made by Nevada Power Company against Westinghouse and others in Mr. McCrea's letter dated July 28, 1988. After a careful review of the pertinent facts, regulations, and case law, we find that your clients' attempt to impose upon the manufacturers the cost of replacing or retrofilling electrical equipment which allegedly contains PCBs is completely groundless. This letter highlights merely a few of the reasons such claims lack merit.

First, as a result of the Toxic Substances Control Act of 1976 ("TOSCA"), Westinghouse stopped accepting orders for equipment designed to contain or use PCBs as of December 31, 1976, and the last piece of equipment was shipped in June of 1978. The last such piece of PCB-filled equipment of which we are aware which was sold by Westinghouse directly to Nevada Power was in

2/6/89 - Spoke with D. McCrea. He says not to worry; I will get copy of Kotoske's reply in a week or 2.

McCrea, Kotoske, McCrea
Re: Westinghouse/Nevada Power
February 2, 1989
Page 2

1973. The alleged hazards of PCBs in electrical equipment have been a matter of public knowledge at least since the early 1970's, and certainly no later than the enactment of TOSCA in 1976. Accordingly, we are aware of no basis on which any of your clients' claims can survive the bar of the applicable Nevada statute of limitations. By statute, the beginning date for all of the applicable limitations is the date on which "the cause of action shall have accrued." N.R.S. 11.010. Your two and three year tort claims have therefore long since expired. N.R.S. 11.190(3)(c) and N.R.S. 11.190(3)(d). Similarly, negligence and strict liability claims must be commenced within four years, and N.R.S. 11.220 is not only Nevada's "catch-all" statute of limitations, but the applicable statute for suits concerning tortious damage to real property. Express or implied contract based claims are barred by the provisions of N.R.S. 11.190(1) and (4). Any UCC warranty claims are barred by N.R.S. 104.2725.

Second, because your clients' claims purport to seek recovery for the cost of replacing and retrofilling their equipment based solely on the mere presence of PCBs in such equipment, these claims are merely for economic loss. Courts throughout the country, including the Nevada Supreme Court, have repeatedly held that under the doctrine of economic loss, the costs of replacing or repairing a product are not recoverable in tort absent personal injury or physical damage to other property. See, e.g., East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986); Sanco, Inc. v. Ford Motor Co., 579 F.Supp. 893 (S.D. Ind. 1984). In Local Joint Ex. Bd. v. Stern, 98 Nev. 409, 651 P.2d 637 (1982), the Nevada Supreme Court clearly held the doctrine of strict products liability is unavailable for purely economic loss. Thus, since it appears your clients have sustained neither personal injury nor damage to other property in connection with the equipment at issue, all of your clients' potential negligence and strict liability claims would also be barred under this doctrine.

Your claims appear to be almost identical to the unsuccessful claims filed by the plaintiffs in Electrical Power Board of Chattanooga, et al. v. Monsanto Company, et al., Civ. Action No. 1-85-634 (E.D. Tenn.). In that case two public utilities brought claims against many of the same entities against whom your clients now assert they have claims, including Monsanto, General Electric and Westinghouse. Those claims, like the claims of your clients, were based on the alleged presence of PCBs in electrical

McCrea, Kotoske, McCrea
Re: Westinghouse/Nevada Power
February 2, 1989
Page 3

equipment purchased many years ago, and they sought recovery of the replacement costs of the equipment based upon the EPA regulation. Defendants in that case challenged the claims on the grounds cited above, and were awarded summary judgment on all of the claims which were not otherwise withdrawn voluntarily by the plaintiffs. The district court in that case concluded that the plaintiffs' claims as to virtually all the equipment containing any quantities of PCBs were time-barred pursuant to pertinent statutes of repose and limitations, and were defective and subject to dismissal on numerous other grounds.

Based on the information you have provided us to date, we believe you have not conducted a sufficient pre-filing inquiry required by Rule 11 of both the Federal Rules of Civil Procedure and the Nevada Rules of Civil Procedure. As you know, Rule 11 imposes on all counsel filing claims in federal court or state court in Nevada a duty to conduct a "reasonable inquiry" prior to the filing of a claim to assure that the claim is "well grounded in fact" and "warranted by existing law." Violation of either the state or federal rule may result in the imposition of sanctions on both counsel and their clients. We strongly believe that any litigation filed on behalf of Nevada Power, based on the facts you have presented to us, would be a violation of Rule 11.

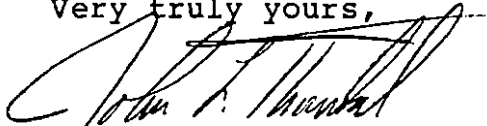
In light of the foregoing, we trust that you will convey this letter to your clients and discuss with them the apparent deficiencies in your claims and the risks of liability that will exist if you elect to pursue litigation based on these claims. We believe it will be clear that your claims are groundless once you and your clients have undertaken the necessary pre-filing investigation of such matters as (a) the date of sale of each piece of allegedly actionable equipment; (b) the concentration of PCBs in each piece of equipment; (c) the serial number and location of each item allegedly replaced or retrofilled; and (d) the record of health and safety measures previously taken by your clients with respect to each item of equipment or property located near the subject equipment consistent with the allegation that the presence of PCBs in electrical equipment is dangerous.

To the extent that your investigation identifies any equipment which you maintain is not time-barred or otherwise precluded by the federal regulations and legal doctrines discussed above, please provide us with the particulars for each such piece of equipment and we will give appropriate consideration to your claims. Based on the current state of the facts and law, how-

McCrea, Kotoske, McCrea
Re: Westinghouse/Nevada Power
February 2, 1989
Page 4

ever, please be advised that if you elect to litigate such claims, we intend to vigorously pursue all available legal remedies, including sanctions, at the earliest possible time.

Very truly yours,



John L. Thorndal

JLT/ad