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File
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OF COUNSEL:
WILLIAM N. WOODSON, III
MICHAEL J. ACKERMAN

June 6, 1989

No Power
11927.2

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

Re: Memorandum

Dear Chuck:

Enclosed is the memo I promised you. After you have had a chance to review it, let's talk.

Sincerely,

Thos. E. Kotoske

THOMAS E. KOTOSKE

TEK:rry
Enclosure
cc: David S. McCrea

MEMORANDUM

TO: Chuck McCrea
From: Thomas E. Kotoske
RE: Nevada Power Co.
Date: June , 1989

I. OVERVIEW

I've reviewed the material that you sent to me. I would like to make the following comments generally and then add some specific comments with respect to cause of action that should be added to the complaint or the alleged in light of prevailing caselaw.

Basically, the structure of the complaint should be:

- A. General Allegations
- B. Claims for Relief:
 - 1. Indemnity
 - 2. Nuisance
 - 3. Fraud
 - 4. Products Liability
 - 5. Negligence
 - 6. Breach of Warranty
 - 7. Punitive damages

II. THE GENERAL ALLEGATIONS

With respect to fraudulent concealment, our present allegations should be redrawn in light of the particularity requirements of Golden Nugget ,Inc. (1224).

With respect to the discovery rule (para. 21 of proposed complaint) our present allegations should be redrawn

with particularity as required by Oak Grove Investors (1079); Prescott (940)

We must allege property damage. We should allege "mixed" damages (ie. economic loss and property damage) such that we can come within the holdings of Oak Grove Investors (1080-1081); City of Greenville v. W.R. Grace, 827 F.2d 975 (4th Cir. 1987); Ales-Peratis Foods v. American Can Co., 164 CA3d 277 (1985); Pisano v. American Leasing, 146 CA3d 194 (1983).

III. THE CLAIMS FOR RELIEF

What follows are some specific comments about the proposed claims for relief.

1. INDEMNITY

I think this claim should remain in the complaint. This client was (and is) liable for civil and criminal penalties had this PCB equipment not been removed by October, 1990. 50 FR 29170 (7-85) amended 40 CFR 761.1 (7-87) amended 53 FR 27322 (7-88)

Recall that this liability arose through no fault, at all, of the this client. The liability arose solely because of the fault of the prospective defendants.

Indeed, the liability came about as a result of Congress' (EPA) legislation.

The theory of liability was first addressed in Monsanto v. Miller, 455 NE2d 392 (Ind. App. 1983).

As to liability by operation of law (EPA Regs.). See McClish v. Niagara Mach. & Tool Works, 266 F.Supp. 987 (S.D. Ind. 1967); Bd of Education of City of Chicago v. A,C&S, Inc., _____ Ill. App. _____ (1st Dist. No. 86-817, 6-1-88).

2. NUISANCE

I think this claim should remain in the complaint. However, I think we should redraw the allegations in light of the standard (ie. the interference must be substantial and unreasonable) of Lied.

In Merry v. Westinghouse, 684 F.Supp. 847 (M.D. Pa. 1988), summary judgment was denied on plaintiff's nuisance claim involving water wells contaminated with toxins. See: Mowrer v. Ashland Oil, 518 F2d 659 (7th Cir. 1975) [re nuisance generally].

3. FRAUD

I think we all agree that this claim should remain in the complaint. However, I think the allegations should be re drawn to conform to the clear and convincing test of Lubbe (117-118) and Sanguinetti (408).

4. PRODUCTS LIABILITY

I think a claim of products liability should be added to the complaint.

It is recalled that PCBs have been found to be a "hazardous substance". US v. Ward, 618 F.Supp. 885, 894 (1985); indeed, the presence of PCB transformers in a building may constitute "ultra hazardous activity". Ahrens v. Superior Court, 197 CA3d 1134 (1988).

The EPA's regulation concerning PCBs are interlarded with findings concerning the hazardous effects that PCBs have on the environment and humans.

Again, the damage allegations must include property damage allegations.

5. NEGLIGENCE

I also think we should add a standard claim of negligence to the complaint with appropriate property damage allegations as well as our other damage claims.

6. WARRANTY

I think a claim for breach of warranty should be added to the complaint. We have no privity problems - our client was a direct purchaser of this electrical equipment from the prospective defendants.

The warranty claim is the implied warranty for fitness for a particular purpose.

Purely economic losses are recoverable under this claim.

7. PUNITIVE DAMAGES

Finally, I think punitive damages should remain in the complaint; but, those allegations should be recast in light of Bader (318) and Ace Truck (135-137).