

TO: Chuck McCrea

FROM: Paul Merrell

DATE: 3/15/92

RE: Nevada Power v. Monsanto et al research needs

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Dear Chuck:

I understand Bill has talked to you about the defendants' pending motion for reconsideration. I'd very much like to write the reply (assuming it's necessary), but I'm on a rocket docket for trial May 11 in my pulp mill class action. Therefore, my ability to do the writing will depend on the pretrial schedule at the time we need to do the briefing, if we need to at all. Furthermore, I'll unquestionably need to pass the legal research tasks to your shop.

Under those circumstances, I think it would be wise to assume that we will have to do a brief and get started on the legal research early. Then, regardless of who has to write the brief, we should be able to focus on the writing. At the very least, I should have time to help on outlining and rewrite.

We should focus on the fraudulent misrepresentation/fraudulent concealment cause of action. Defendants have now altered their argument slightly, and at its essence they now argue that once a statute runs on any misrepresentation cause of action (i.e., innocent or negligent misrepresentation), the statute must run as a matter of law on fraudulent misrepresentation as well. Our factual argument in response is aptly demonstrated by the metaphor used at hearing:

"You buy a boat from someone. And a little while after you buy it, you discover it's got a hole in it. Well, you could go back and sue that guy for strict product liability; you could sue him for negligence; you could sue him for all kinds of things. But that's your option. You don't have to sue the man. But then you find out a few years later that he deliberately drilled that hole in an attempt to kill you; then you have a whole different situation, a whole different motivation. And in terms of damages, you're going to be entitled to more extensive damages."

Hearing Transcript at 14. (I repeat the metaphor here because I believe it will help the people working on the legal research.)

We have focused on when we discovered that defendants knew at the time of sale that they had sold us defective products. Our response must focus on reasons we could not have filed a fraud action at any earlier time than when we discovered that defendants'

misrepresentations at the time of sale were intentionally false.

To that end, I suggest the following areas of research:

-- Federal Rule 11 cases where attorneys were sanctioned for filing fraud cases without evidence of scienter. (This allows us to construct an argument that pre-1983 cases were impliedly overruled by the amendments to Rule 11.)

-- Cases showing that we are entitled to broader relief in fraud cases than in cases involving only innocent or negligent misrepresentations; not just punitive damages, but broader consequential damages as well. For example, in a simple breach of warranty case (strict liability), I assume we are only entitled to recover the price of the product. Where the misrepresentation was fraudulent, I assume we would be entitled to consequential damages as well, such as replacement value, cost of disposal of PCB-contaminated equipment, etc. Primary focus should be on Nevada cases, but it would be helpful to show that the proposition has broad applicability. U.C.C. perhaps?

-- Cases where courts have held that the statute of limitations for fraudulent misrepresentation causes of action runs separately from other causes of action. (I recall seeing such a case recently in one of the Carolinas; I'll see if I can dig it out when I get back to Tennessee early this week.) I vaguely recall that one of the Nevada cases we cited relied upon an Am.Jur.2d article that made that point. I believe it was Sierra Pacific v. Nye, but am not sure. I'll also look at the earlier research binder when I get back to Tennessee and see if I can pin this down. On this point, we should bear in mind the Ninth Circuit's admonition that what constitutes a jury question on discovery of a fraud cause of action is a federal, rather than state, question. A favorable law review article or treatise on the topic would be extremely helpful. This is precisely the issue raised by defendants, hence the major research effort should come in this area.

-- Defendants cite several key cases. They should be shepardized to see if they've been distinguished. Jablon v. Dean Witter, Stitt v. Williams, EPB v. Monsanto, Jones v. Ford Motor Co., and Ohio v. Peterson et al. See Def. Br. pp. 9-12.

-- We need to check Nevada cases to see if there have been any new statute of limitations decisions under either NRS 11.190(3)(d) or NRS 11.220. If there's time, it wouldn't hurt to see if there have been any new Nevada statute of limitations decisions.

-- I don't think it's worth a special research effort, but folks might keep their eyes open for a case holding that arguments not raised before the original appellate panel can not be raised on a motion for reconsideration.