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March 16, 1972

Mr. David H. Henderson
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Suite 400 - Law Building
Charlotte, North Carolina 28202

Re: Austin v. Monsanto Company

Dear Mr. Henderson:

This will confirm our telephone conversation of March 16, 1972. As I told you, this law firm represents Monsanto Company with regard to Mr. Austin's claim. I briefly discussed that claim with you in the absence of McNeill Smith, who has been in court for several days in Rockingham, North Carolina, defending a medical malpractice case. Mac will be in touch with you by telephone not later than Monday, March 20, to discuss whether this matter can be resolved without litigation.

As you requested, I will set forth below some authority which in our opinion conclusively demonstrates that any claim that Mr. Austin may have against Monsanto arising from the constituent parts of a silo constructed in 1963 has long since been barred by the three-year statute of limitations. N. C. G. S. §1-52(1), (5).

As you know, the North Carolina Supreme Court has consistently held that the single cause of action for damages resulting from an allegedly defective product, whether based upon a theory of tort or breach of warranty, accrues from the time of sale of the product to the purchaser, because the first injury to the purchaser, however slight, was sustained by him at the moment of sale. In Thurston Motor Lines, Inc. v. General Motors Corporation, 258 N. C. 323 at 326, 128 S. E. 2d 413 (1962), the court said:

> "Assuming, as alleged by plaintiff, the truck-tractor was equipped with a faulty and dangerous carburetor, likely to cause said truck-tractor to be 'ignited with fire,' when

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> sold and delivered to plaintiff, and that defendants knew or by the exercise of due care should have known of such defective condition, and failed to warn plaintiff thereof, we are of opinion and hold that plaintiff suffered injury and his rights were invaded in the latter part of June, 1955, immediately upon the sale and delivery of the truck-tractor to plaintiff, and that a cause of action in favor of plaintiff and against defendants then accrued for which plaintiff was entitled to recover nominal damages at least. Hence, the judgment of the court below, based on the ruling that plaintiff's action is barred by the three-year statute of limitations, is affirmed."

When the rights of the injured party are first invaded, the cause of action accrues and the statute of limitations begins to run, even though the defect or injury is latent. Therefore, where a bank rented a house infected with tuberculosis without warning the lessee, a tort cause of action accrued in favor of the lessee at the moment the house was rented without warning, not when the lessee was stricken with tuberculosis and discovered the injury. Powers v. Planters National Bank & Trust Company, 219 N. C. 254, 13 S. E. 2d 431 (1941). In Shearin v. Lloyd, 246 N. C. 363, 98 S. E. 2d 508 (1957), it was alleged that a surgeon negligently failed to remove a piece of his equipment from his patient's body before closing a surgical incision. The North Carolina Supreme Court held that "it is inescapable that plaintiff's cause of action accrued on 20 July 1951 when the defendant closed the incision without first removing the lap pack from the plaintiff's body." The court so held even though ill effects resulting from the negligent act did not appear until some weeks after the operation. In Jewell v. Price, 264 N. C. 459, 142 S. E. 2d 1 (1965), the defendant had defectively installed a furnace in Jewell's home on November 15, 1958 and the furnace caused a fire burning the house on January 18, 1959. Finding this case indistinguishable from Thurston Motor Lines and Shearin, the court held that:

> "[p]laintiffs here sustained an invasion of their rights on November 15, 1959, [when the faulty furnace was installed] . . . . The fire which destroyed their home on January 18, 1959, 'the whole injury,' resulted proximately from defendant's original breach of duty.
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> 264 N. C. at 463.

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The cause of action accrued when the furnace was installed and was barred by the three-year statute of limitations.

For other cases as to the accrual of the cause of action and the running of the statute of limitations, see Matthieu v. Piedmont Natural Gas Co., 269 N. C. 212, 152 S. E. 2d 336 (1967), Hocutt v. Wilmington and Western Railroad Co., 124 N. C. 214, 32 S. E. 681 (1899), Mast v. Sapp, 140 N. C. 533, 53 S. E. 350 (1906), Land v. Neill Pontiac, Inc., 6 N. C. App. 197, 169 S. E. 2d 537 (1969).

You are also probably aware of the case of State v. Cessna Aircraft Corporation, 9 N. C. App. 557 (1970). This case clearly demonstrates the North Carolina Court of Appeals' position as to the accrual of a cause of action and the running of the statute of limitations. In Cessna the State alleged that because of a defective aircraft engine, an airplane manufactured by the defendant crashed into a building which the State owned. The State was not a purchaser of the airplane and had absolutely no connection with it prior to the crash. Even though the State was a stranger to the sale of the aircraft, the Court of Appeals held that its cause of action accrued at the time of the sale to the actual purchasers of the defective aircraft engine, even though the sale had taken place some years prior to the crash.

Prior to the 1971 session of North Carolina General Assembly, the legislature had left entirely to the courts the question of when a cause of action accrues to begin the running of a statutory period of limitations against that cause of action. An examination of the cases cited above demonstrates that the North Carolina courts have refused to change the method by which that determination has been made. Applying that method, as stated in the above cases, to Mr. Austin's claim, it is clear that any cause of action he may have had against Monsanto Company arising out of an alleged defect in a component part of the silo sold to him in 1963 has been barred by the three-year statute since sometime in 1966. If Mr. Austin has been injured by the presence of PCB in a component part of the silo and if the presence of PCB constituted a defect in the silo, Mr. Austin sustained his first injury as a result of that defect in 1963 and the statute began to run at that time.

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Of course, the 1971 session of the North Carolina General Assembly amended N. C. G. S. §1-15 to change the rules governing the accrual of a cause of action having as an essential element bodily injury to the person or a defect in or damage to property, where the defect or damage was not readily apparent to the claimant at the time of its origin. I am enclosing for your information a copy of the Senate bill effecting that amendment, ratified July 21, 1971. This amendment is apparently designed to change the common law rules governing the accrual of cause of action. Indeed, on its face at least, it appears designed to take care of a claim such as Mr. Austin's, as you have described it to me. Thus, the legislature found it necessary to amend the statute to delay the accrual of a cause of action based upon a latent defect until such time as that defect or damage resulting from it ought reasonably to be discovered. It seems to me that in order to avoid the bar of the statute of limitations as to Mr. Austin's claim, you would be forced to seek adoption by the court of the very rule that has apparently been enacted by the legislature only after the rule had been repeatedly rejected over many years by North Carolina's appellate courts.

It is also clear upon examination of relevant authorities that the July 21, 1971 amendment can have no effect whatsoever upon causes of action that had been barred by the running of the statute of limitations prior to that date. In Wilkes County v. Forester, 204 N. C. 163 at 169, 167 S. E. 691 (1933), the North Carolina Supreme Court said:

> "One who has become released from a demand by the operation of the statute of limitations is protected against its revival by a change in the limitation law, the defense in such case being considered a vested right or property, which cannot be taken away by legislation, or even by the action of the constitutional convention, attempting to revive the cause of action either by repeal of the statute or by affirmative act."
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> * * *
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> "In most jurisdictions it is held that after a cause of action has become barred by the statute of limitations, the defendant has a vested right to rely on that statute as a defense, and neither a constitutional convention nor the legislature has power to divest that right and revive the cause of action."

In the Jewell v. Price case, supra, the court succinctly stated the applicable principle as follows:

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> "Plaintiffs rightly allow that subsection (5) of G. S. 1-50, enacted in 1963, after the institution of this suit, has no application. If this action was already barred when it was brought on January 12, 1962, it may not be revived by an act of the legislature, although that body may extend at will the time for bringing actions not already barred by an existing statute."

For another case in which the North Carolina Supreme Court adhered to the same principle, see Waldrop v. Hodges, 230 N. C. 370, 53 S. E. 2d 263 (1949), and for a general statement of the rule, see 5 Strong's North Carolina Index, Limitations of Action, Section 3.

It is thus clear that the General Assembly lacked the power, under applicable constitutional principles, to make its amendment retroactive. The only statement in the act as to its application provides that it "shall not affect pending litigation." The question of whether a legislative enactment affecting vested rights is to be applied retroactively was discussed in the recent case of Smith v. Mercer, 276 N. C. 329, 172 S. E. 2d 489 (1970), in which the North Carolina Supreme Court dealt with the retroactive effect of the 1969 Wrongful Death Act. The court held that damages in a wrongful death action could not be measured under the 1969 amendment where the death occurred prior to the effective date of the act. The court stated the following general principles:

> "Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt should be resolved against such operation. It is especially true that the statute or amendment will be regarded as operating prospectively only, where it is in derogation of a common-law right, or where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction, invalidate a defense which was good when the statute was passed, or, in general, render the statute or amendment unconstitutional."
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> Id. at 337, citations omitted.

In view of the long standing of the North Carolina common-law rule as to the accrual of causes of action and the running of the statute of limitations, the repeated rejection of more liberalized rules by the North Carolina appellate courts, and the fact that a change has now apparently been effected by the legislature, I do not believe that the North Carolina Court of Appeals or the North Carolina Supreme Court will undertake to alter the applicable common-law

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principles at this time as to an alleged cause of action that had been barred for approximately five years when the new statute took effect. Thus, we feel that we would be in an excellent position to defend Mr. Austin's claim in court based upon the statute of limitations. Furthermore, as you know, there are other very substantial questions upon which we could vigorously and successfully defend this claim.

As I promised, McNeill Smith will talk with you by telephone not later than Monday, March 20.

Very truly yours,

SMITH, MOORE, SMITH, SCHELL & HUNTER

David M. Moore, II

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Enclosure

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