

1.2
1 of 5

PAUL E. MERRELL
Lawyer
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Tidewater, Oregon 97390
Telephone: (503) 528-7131 Telefax: Via Voicemail

February 5, 1991

Chuck McCrea, Sr.

Re: Nevada Power settlement letter

Dear Chuck:

My efforts to pass this project off onto you last night weren't entirely successful. Enclosed are new drafts of both letters, incorporating changes Bill and David suggested.

Also, they concur with the idea of sending the separate malpractice letter.

I'm heading to bed for a few hours, been up all night. Call anyway if it's urgent. If I haven't heard from you by the time I get up, I'll check in as soon as I get my blood moving.

-- Paul

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MESSAGE VIA PANAFAX
UF-600 TELECOPIER:

DATE: FEB 4 1991 CLIENT/MATTER: AN Power V Monsanto
TO: Paul Merrell 11927.2
TELECOPY #: 503/528-7151 VERIFICATION #: same (voice line)
FROM: Charles McCrea
NUMBER OF PAGES (INCLUDING COVER PAGE): 7
COMMENTS: Suggested changes on
letter and draft of brief.

If you do not receive all of the message, please call:

(702) 385-4202

TRANSMISSION COMPLETED: DATE: _____ TIME: _____

OPERATOR: _____

To Chuck F. Crea
Fm Paul Merrell

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2nd

~~REPLY~~ PAUL MERRELL 2/4/91 DRAFT OF LETTER

(Addressees)

Re: Nevada Power Co. v. Monsanto, et al
cause number, etc.

Dear Counsel:

You may want to consider

suggestion

~~We suggest~~ immediate settlement discussions in this matter, before Nevada Power's reply brief must be filed on February 11. The reason for this unusual ~~request~~ is that defendants' brief leaves us with little choice but to suggest in our reply brief that the Ninth Circuit solicit amici curiae briefs from the insurance carriers for Monsanto and Westinghouse. Time is thus of the essence.

The problem we face is defendants' position in their brief that the EPA-imposed expenses Nevada Power seeks to recover are beyond the scope of the "damages" available in indemnity. See Defendants' brief at *_. This position is blatantly inconsistent with the position of Monsanto and Westinghouse in their litigation against their insurance carriers, @ where they must prove that identical expenses suffered by these defendants impliedly fall within the meaning of "damages" in the insurance indemnification agreements. See e.g., Chesapeake Utilities Corp. v. American Home Assurance Co., 704 F. Supp. 551, 558-61 (D. Del. 1989).

Doubtless

it ~~While~~ this inconsistency ~~may have been~~ ^{is} unintentional, but the result necessarily is a bad faith posture in one suit or the other, and ^{is} likely to result in an estoppel ruling in at least one of the cases. See generally, R. Boyers, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Northwestern Univ. L. Rev. 1244 (1987); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (offensive non-mutual collateral estoppel following prior inconsistent judgment, notwithstanding present interpretation of the law).

Insert 1 ~~The situation also unfortunately raises the spectre that defendants' counsel in at least one of the cases may later find itself subject to a malpractice action to recover damages lost as a result of the estoppel position. We therefore respectfully suggest for~~

@ Case citations, noting that complaints are in record.

Insert 1

If the estoppel argument is made in any court, it becomes an issue in every court where relevant litigation is pending, irrespective of whether it succeeds. Necessarily this makes the position of counsel extremely delicate. Legal arguments which place a litigant with numerous claims pending in circumstances where it must forfeit any opportunity to recover damages in some of them surely will find counsel awkwardly counterposed beneath the spectre of malpractice. Your clients and their counsel in the insurance litigation might offer guidance on this.

your own sakes that you transmit this letter or its subject matter to your clients and to their counsel in the insurance litigation, and that you secure their written guidance on your response to this offer to negotiate.

Defendants' unexpected argument in this case unfortunately aligns Nevada Power's interests with those of defendants' insurance carriers, leaving us little ethical choice but to solicit the participation of the insurance carriers in this litigation, in order that the Ninth Circuit be fully ~~aware of the potential ramifications of its ruling.~~ informed.

We frankly would prefer to avoid such a move, but our professional obligations to our client must control our position on February 11. Moreover, as attorneys we are not ~~extremely uncomfortable with the potential conflict presented by representing the insurance carriers' interests in this litigation~~ without their direct participation.

Finally, it appears that defendants now occupy a no-win position; thus there is no reason to prolong the litigation. If defendants should win this case on the arguments now advanced, they would only slit their own throats in the insurance litigation. On the other hand, should defendants lose this case, the verdict of fraud would undoubtedly be asserted ~~offensively~~ aggressively by the insurance carriers to deny coverage for intentional infliction of damages. Defendants have only the comparatively minor sums sought by Nevada Power to gain through obtaining a published opinion from the Ninth Circuit in this case, and everything to lose in the higher-stake insurance litigation. victory or

In order to avoid this ~~regrettable~~ impossible situation, we suggest that it might be expedient to settle this litigation now, before our hands are tied by the position we must take in our reply brief. (Relevant portions of our draft reply brief are attached.) You may wish to discuss settling

Therefore, we offer to meet on an expedited basis, with counsel for all defendants and with key executives of all companies to discuss prompt settlement of all issues on Saturday, February 9, 1991, at a location convenient to all counsel and company officials. at a mutually convenient location

We would of course appreciate an early indication of your probable response so that travel arrangements might be made if necessary.

Sincerely,

litigation against their insurers, of prevailing in this case on the issue of the availability of the indemnity remedy. In those cases, defendants contend that indemnity provides a remedy for "damages" of the sort involved here. Indeed, defendants in the insurance litigation seek a declaration that their insurers must defend them in cases such as this and indemnify them for losses should they lose cases of this type. Should they prevail in this case, defendants will undoubtedly face even more determined arguments from their insurers that they ^{are} ~~should be~~ judicially estopped in those cases from asserting ~~the~~ inconsistent position. ~~Were this litigation to unravel in that fashion, defendants' victory on Nevada Power's comparatively miniscule claim might prove to be a pyrrhic victory, indeed.~~

[all in single footnote]
⑥ Defendants may be caught in a double bind of their own manufacture. Should Nevada Power ultimately prevail on its fraud claims, their insurers will undoubtedly use the evidence and verdict ⁱⁿ from this case to argue an estoppel against coverage because of defendants' intentional, rather than negligent wrongs, which ^{often} ~~likely~~ are not covered ~~under their policies~~. Thus, ~~regardless of~~ whether defendants win or lose this case, this Court's decision will endanger defendants' likelihood of success in their insurance litigation.

Defendants' argument that the harm inflicted upon Nevada Power is beyond the reach of equitable indemnity is not well-taken. There is no ^{basis for contending} ~~reason~~ that the courts' powers are broader in express contractual indemnity than in equitable indemnity, which 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.®

® Defendants suggest that their own written agreements executed years ago indemnifying each other for PCB-related losses, Opening Br. at *___, 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 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). NOTE CHANGE OF DATE ON THIS CASE DECISION FROM JONES & JONES DRAFT.

It is frankly troubling to see these defendants, maintaining to this day that PCBs are not hazardous, come before this Court suggesting that innocent Nevada Power should have suspected their fraudulent sales and their duty to warn, when they still attempt to obscure PCB hazards in their briefs by unfailingly characterizing such hazards as merely "alleged." This defense position is inconsistent with far more than their burdens of persuasion and proof in this litigation; in fact, for defendant Westinghouse it must be a bad faith position either in this case or in its lawsuit filed against its insurers, where it steadfastly maintains that PCB hazards are real and their own similar damages are recoverable. @FN

@FN See e.g., S.E.R. *___ (Westinghouse complaint in case against its insurers where it seeks indemnification for its costs of cleaning up its own PCB-contaminated properties; in that case, Westinghouse consistently asserts, as it must, the hazards of PCBs. Should this Court remand, Westinghouse should be judicially estopped from asserting its inconsistent factual position in this litigation. (Alternatively, should this Court be inclined to rule against Nevada Power in this case, Nevada Power requests an express finding by this Court on Westinghouse's duplicity.) Ironically, defendant Monsanto apparently expects somehow to win its similar case against its insurers based on a position consistent with this litigation that PCBs are only "allegedly" hazardous. S.E.R. *___ (Complaint). The source of Monsanto's confidence is unknown.

While they persist to this day in denying the hazards of PCBs, unfailingly characterizing such hazards as merely "alleged" in their briefs, these defendants nonetheless suggest to this Court that Nevada Power should have suspected their fraudulent sales and their fraudulent duty to warn.

Add suggestion that 9th Circuit
solicit amici briefs.

3. DAMAGES vs. LIABILITY. There is no merit to defendants' contention that the monetary liability inflicted upon Nevada Power does not constitute "damages" ~~within the powers~~ ^{available to} of a court exercising powers of equitable indemnity ~~to award~~. 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.

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) ~~should simply be~~ 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). ^(a)

Furthermore, Nevada Power sincerely questions whether these defendants have seriously examined the consequences, in their own

all of this should go
into a single footnote

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February 4, 1991

Chuck McCrea
David McCrea
Bill Snyder

Guys:

Following this page is the third draft settlement proposal. It incorporates changes suggested by Chuck, Bill, and Carol.

Please note that I have deleted the language about being aligned with the interests of the insurance carriers and have substituted other language. Fortunately, I realized in time that the insurance carriers would be arguing for Defendants' present position and the defendants would thus be forced to abandon it at hearing. We obviously would be opposing the insurance carrier's position. Sorry, guys! If anyone can suggest some refinements to this argument that would make it more effective, bring 'em on.

Chuck, I appreciate your substitute approach to the malpractice issue. It's much more sensitive and far less confrontive. I did embellish on it a little bit, and left you with a quick bit of research if you want to use the embellishment.

It occurred to me that it might be wise to delete the malpractice paragraph from this letter and put it into a short covering letter, thereby leaving the defense lawyers perhaps more willing to show the main letter to their clients. It's one thing to ask attorneys to admit to their clients that they screwed up; it's another thing entirely to ask them to show their clients a letter suggesting there's a malpractice cause of action. I've enclosed suggested language for the malpractice letter following the main letter, from which the malpractice paragraph should be pulled if you select that option. Query whether the malpractice letter should go to all opposing counsel or just to one, and if the latter which one?

Because of the time factor, I suggest that Chuck take the lead on the letter from this point forward. One