

B. **SELECTION OF PROPER STATUTES OF LIMITATIONS.** The parties agree that the fraudulent misrepresentation and failure to warn claims are governed by N.R.S. 11.190(3)(d) and 11.220, respectively. See Def. Br., pg. 14 n. 14. As to the indemnity claim, however, the District Court held and defendants continue to argue that the applicable statute is N.R.S. 11.190(3)(a), which governs actions based "upon a liability created by statute." Def. Br., pp. 42-46. Defendants are wrong. The correct statute is either N.R.S. 11.190(2)(c) or 11.220, as discussed in Nevada Power's opening brief, pp. 37-39, either of which provide a period of four years for commencement of suit.

The short answer to defendants' argument is that Nevada Power's relevant claim for relief is based on equitable indemnity, not on any statutory cause of action; therefore, this is plainly not an "action upon a liability created by statute." Defendants err by focusing on the duty owed by Nevada Power to EPA, rather than on the claim of a breached duty to Nevada Power. "An action on an implied contract of indemnity is wholly independent as a cause of action from the transaction or situation which gave rise to the right of indemnity." Annot., What Statute of Limitations Covers Action for Indemnity. 57 A.L.R.3d 833, 839-40 (emphasis added).

Apparently, the Nevada Supreme Court has never decided what statute of limitations applies to the equitable indemnity action; however, it has ruled that an action under the closely-related concept of contribution is subject to the predecessor statute of

limitations for actions "upon a contract, obligation or liability not founded upon an instrument in writing." Stephens v. McCormack, 263 P. 774, 776 (Nev. 1928). Likewise, actions in equitable indemnity are "very generally" held to be governed by the statute for implied contracts. Annot., supra, 57 A.L.R.3d at 838-39.

Considering its precedent in Stephens and the various jurisdictions' broad agreement on the subject, the Nevada Supreme Court almost unquestionably would hold that the appropriate statute of limitations is the present N.R.S. 11.190(2)(c), which allows four years from accrual in which to commence an action "upon a contract, obligation or liability not founded upon an instrument in writing." Its only alternative would be the "catch-all" statute, N.R.S. 11.220, which allows an identical period. The District Court should be reversed on this issue.

*CHUCK, PLEASE ASK NIK IF HIS NEW NEVADA SUPREME COURT DECISION ON INDEMNITY ACCRUAL ANSWERED THE QUESTION; IF IT DID, WE COULD CUT EVERYTHING AFTER THE FIRST PARAGRAPH AND SIMPLY ADD THE NEW CITATION TO THE END OF THAT PARAGRAPH WITH A SHORT PARENTHETICAL SUMMARY OF THE HOLDING, BEING SURE TO CITE THE PARTICULAR STATUTE AND ITS COMMENCEMENT PERIOD.