ORAL ARGUMENT - 03/19/96
MINNESOTA MINING V. NISHIKA LTD
94-1124

LAWYER: Your honor in this case the Beaumont CA has extended the reach of warranty liability under Uniform Commercial Code §2.318 further than any court in the country. But I want to start with the choice of law point that your honors granted writ on on Point 14, because the choice of law point in this case is dispositive. Had the choice of law been correctly determined below we would never have had to decide the outer reach of UCC warranty liability under alternative C of §2.318

GONZALEZ: Do we say Nevada has the most significant contact? That's the end of the story. Let's go home. Forget about the UCC and options A, B, and C?

LAWYER: You want be able to forget about option A, because option A is the law in Nevada. And under option A, even the plaintiffs don't dispute that the camera manufacturer and the camera distributor who are outside the chain of distribution cannot recover these pure economic losses. And that's why I want to start with choice of law.

You remember what happened here is that 3M sold one product, the new emulsion to the plaintiff LenTec in Georgia who resold it to plaintiff Nishika in Nevada. 3M sold the second product, the backcoat sauce to plaintiff Nishika in Nevada; Nishika in Nevada puts the two together and processes the film and the photographs fade. But the issue here is not whether these folks in the distributive chain whoever acquired the products can get pure economic losses. The issue is whether the camera manufacturer and the camera distributor who claim that there was a decline in consumer confidence in their cameras because the photographs faded can get there under UCC §2.318.

Now let me show you why we think Nevada law should govern. As we mentioned the backcoat sauce is made in Minnesota. That's true. I should say a component of the backcoat sauce, component Part A comes in a can. It's marked Component A. That's shipped into and delivered in Nevada, and Nishika in Nevada mixes it up with some other stuff and creates the backcoat sauce. And then puts the backcoat sauce together with the new emulsion. The new emulsion comes from Italy, not Minnesota.

Now the whole case here, the whole breach of warranty case here was based on the fact that these two things, the new emulsion and the backcoat sauce were incompatible, that they didn't work together. Here is Mr. Bainbridge, he's the plaintiff who owns 3 of the plaintiff companies I should say. He said the only crucial thing is that the two products didn't work together. Here's Mr. Susman, the plaintiff's counsel, the reason that there was a breach of warranty is because these 2 products that only came together in Nevada didn't work together. And here is Mr. Susman's closing argument where he skillfully convinces the jury to find a breach of warranty because these two products that were supposed to work together were supposed to be used together couldn't work together.

Now the only place they came together was in Nevada. And restatement 188 of the Conflict of Laws, that this court has adopted for contracts in the Duncan case, provides that the contacts have to be evaluated according to their significance to the issues in the case. If the whole issue in the case is breach of warranty, and the only way you get a breach is if the two things don't work together, and the only place they come together is Nevada, we think that's a pretty significant contact. And it's exactly what our trial counsel told the trial court as to why Nevada law should control. He said the two things only came together in Nevada. The sun never shined on this product. If you look at it as the two things together in Minnesota remember the new emulsion never was in Minnesota. So we think that if you

look at the location of the subject matter, which for example is one of the restatement 188 contacts, the location of subject matter, here would clearly be Nevada. But what did the plaintiffs say? The plaintiffs say that the contract 3M performed the contract in Minnesota because a part of a part, that that component part A came out of Minnesota, but the emulsion came out of Italy. And Restatement 188 says in the comments: if the performance is divided between 2 jurisdictions, here Minnesota and Italy, that have different laws, the contact or the place of performance doesn't count.

Now what about the place of negotiations? The plaintiffs have repeatedly said this contract was negotiated in Minnesota. The truth of the matter is remember only face-to-face negotiations count under restatement 188, and there were some initial face-to-face meetings in Minnesota before the new emulsion was ever developed, before the stuff at issue in this case was ever developed, the only face-to-face meeting concerning the new emulsion took place in LenTec in Georgia. And remember Georgia also has alternative A. The Restatement provides that if 2 states have the same law, in this case Georgia and Nevada, you cumulate their contacts. So the location of the subject matter, the place where the two things came together is Nevada, that's alternative A. The place of negotiations, the only place by the way where 3M allegedly made the express warranty for which we got hit with liability, that 3M allegedly expressly said: the new emulsion will work with the backcoat sauce. That was at the meeting in Georgia at LenTec. So the express warranty was made in Georgia, that's an alternative A state. So all the contacts point to alternative A.

Now what about the policy factors? I mean this court has said in Duncan and in Maxus that the contacts in §188 have to be informed by the policy. Well one of the policy factors in §6 is the justified expectations of the parties. And there is a very interesting thing in that regard. When LenTec in Georgia resold the new emulsion to Nishika in Nevada, they put a choice of law clause in their contract. This is in the record. And they selected Nevada law. Because that's where the stuff was going to be used. So the justified expectations of these plaintiffs would have been, we believe with respect to our contract, that since the stuff was going to be used in Nevada, that Nevada law would control.

Now what about the interest of the jurisdictions the states in question? Nevada and Georgia of course are the states where the plaintiffs are domiciled, where they do business, and where they use the goods. Those states you would think would have the most appropriate interest in what their consumers should recover. But those states have limited their consumer's recovery. So Georgia and Nevada don't have any interest in applying the more expansive Minnesota law to their consumers because if they did have such an interest they wouldn't have adopted alternative A.

Now what about the interest of Minnesota in having its more expansive liability law apply? If you look at the cases that we cited in our brief, and we cited 1/2 dozen cases where the courts have recognized that the state where the manufacturer is domiciled, the state of domiciled manufacturer doesn't have any interest in having its more expansive liability law apply to stick its manufacturers with more liability than they would have under the law of the state where the consumer lives and the goods are going to be used. And so we say that the contacts, the way they formulated the warranty issue, the way the plaintiffs formulated the warranty issue, the policy factors everything points to alternative A. And if this case had been decided under alternative A, there would be no need for the Beaumont court or for this court to decide what is the outer reach, what is the outer limit of UCC warranty law? But instead the Beaumont court was down here at the outer reaches under alternative C. And what did the Beaumont court say: Anybody who's reasonably expected to be affected, because that's what the statute says on its face, no need to construe it, anybody that's affected. And the Beaumont court was led into error in that regard.

ABBOTT: I am going to presume that the other side is going to get up here and give us some reasons why Minnesota law should apply. If there were some reasons why Minnesota law should apply, but let's say there is more reasons why Nevada law should apply, my question is what is the standard of

review?

LAWYER: It's de novo your honor. This is a question of law. This court said this repeatedly in your choice of law cases. Look at Maxux, look at Duncan. It's a question of law for this court to decide. There is no deference to the court's below on that issue. Now they led the Beaumont court into error on warranty because they repeatedly told the Beaumont court that this was a family of companies related to the buyer. This is page 3 of their brief appellee if you don't believe me look at this. Six times on page 3 they said: Family of companies; family of companies. But your honor this was never a family of companies at the time these goods were sold. These are the plaintiffs that were submitted in the jury charge and these are the entities that existed at the time 3M sold the goods in question. Now what's wrong with this picture. What's wrong with this picture is that Nishika manufacturing in Honk Kong, the camera manufacturer that they submitted to the jury didn't even exist when the goods were sold. And the camera manufacturer that did exist Quantronics was not in Mr. Bainbridge's family of companies because at that time it wasn't owned at all by Mr. Bainbridge.

BAKER: Don't they say that Hong Kong got an assignment ____________________ ______________________________ applied warranty _________.

LAWYER: They do your honor and it's very interesting. They ran out in the middle of trial and they got a faxed in assignment that was never put before the jury. There was no evidence of this jury...

BAKER: That's your second point that they didn't prove an assignment.

LAWYER: That's right.

BAKER: But assume that there was an assignment, can't somebody buy a breach of warranty claim from somebody else just for business purposes, whether they were in existence or not when the breach occurred?

LAWYER: Perhaps they can your honor. But there is no evidence in this record about...

BAKER: That's a different entity. Your argument keeps saying they were never in existence therefore, they can't sue. But that's not technically correct is it?

LAWYER: Let me say about that point of error. That is our point that we are making that goes with respect to whether you ought to determine that those people are reasonably expected to be foreseeable when you are talking about folks outside the chain of distribution. That's really what we are going to when we say they didn't exist. Even if they are writing you make some kind of ad hoc determination on a case by case basis of who's reasonably within law foreseeable. You wouldn't say Nishika manufacturing that didn't even exist and that we didn't know about was foreseeable. That's really where we intend...

BAKER: That's if you get stuck with the alternative C?

LAWYER: Right. Exactly, which we don't even think we should be looking at. So they were never a family of companies. So what are we left with? We are left with the Beaumont CA saying: if you're reasonably expected to be affected, you can get there under alternative C. And it's interesting because the Beaumont court says: This is a broad expansive far-reaching holding. And it sure is. Because look at the Bridge(?) case. This is from the Nebraska Innkeeper's case that we cite in our brief. If I am the manufacturer of the steel and I sell the steel to make the bridge, when I sell the steel I know that there is businesses up and down the river that are going to be economically dependent on the bridge. Those folks

are reasonably expected to be affected if my steel is no good and the bridge fails. Under their theory everybody up and down the river recovers in breach of warranty. Now I am sure Mr. Powers is going to say oh, no, no, no we are not everybody up and down the river. There are only 4 of us and we told 3M about the four of us. They didn't tell us about Nishika manufacturing. We didn't know about that one. And that's one of the ones that recovered. But then the plaintiffs say: Well you knew there had to be a camera manufacturer out there. Well if I knew there had to be a camera manufacturer out there, and if that's enough to stick me with warranty liability, then what about the company that makes the batteries for the camera. I know somebody has to be out there making batteries for the camera. I know somebody has to be making accessories for the camera. The ripple effect within the economy of construing the statute to mean that anybody that's reasonably expected can get there is enormous.

HECHT: If they shut down ahead of time and said: Look for reasons that don't have anything to do with you we've split this up 4 ways; but this is all one enterprise, and if something goes wrong we don't know which one of us it's going to effect, but we're all going to look to you for the consequences; would that be enough to get you there?

LAWYER: No sir it would not.

HECHT: Why not?

LAWYER: Well legally there is no such thing as all one enterprise. These are separate corporations. Each one is a separate legal juridical entity. And just because they want to call themselves an enterprise does not mean that in law they can turn themselves into one entity.

BAKER: What if they had a joint venture agreement?

LAWYER: Well there was none in this case.

BAKER: But what if they did?

LAWYER: I don't think that that would make any difference.

BAKER: It would make them a joint enterprise wouldn't it connected to Judge Hecht's question?

LAWYER: Could conceivably make them a joint enterprise. But I am getting ready to argue to you that the place where we think the court should draw the line on warranty law is determined by whether you're inside or outside the chain of distribution. So we would argue that even if there was a joint venture, that you should draw the line at pure economic losses. Now I am not talking about personal injury. I am not talking about property damage. But if it's pure economic losses, the proper place to draw the line for breach of warranty under 2.318 is it pure economic losses for people who are outside the chain of distribution.

PHILLIPS: Opposing counsel says this arguments all well and good and _______ but you didn't preserve below.

LAWYER: Your honor I don't know where that's coming from. Because we have from the get go in the TC we have complained about these two entities outside the chain couldn't recover. We repeatedly, it was our point of error in the CA, it was everything we argued in our brief of appellant. I think it's clearly preserved.

ABBOTT: Another thing they argue is that this argument is all well and good but it's not the law that applies in Minnesota. So if we were to find Minnesota law applies wouldn't we follow alternative C?

LAWYER: Right, alternative C. But what we are talking about is how do you properly construe alternative C? What does alternative C mean? And Beaumont says that alternative C means anybody that's reasonably expected because that's what the statute says on its face. And we are saying that if the Beaumont court had done what you are supposed to do under the Uniform Commercial Code, which for example go to the official comment, look at the official comments to alternative C, that tell you that you should follow Restatement of Torts 402A. Now that means something. The Beaumont court said: Well we are going to disregard that comment because this isn't a 402a case. But the reason that that comment is in there is to give the courts a hint. It's a red flag about where is the right place to draw the line. And indeed the 5th circuit has said in the Keith case that this is where you would draw the line if you were drawing it for Texas. That you would say it's okay to recover pure economic losses if you are in the chain of distribution. But if you go outside the chain of distribution you should draw the line at pure economic losses. And that's what we think that comment was intended to tell you. That's what the commentators say the comment was intended to go to. That the permanent, the editorial board writers that were working on the restatement intended to draw a line at pure economic losses. And that's a good place to draw the line because it's a bright line, it's a bright line workable task as opposed to an ad hoc determination in every case of whether particular plaintiffs are going to be deemed to be legally foreseeable. And that's what they have to argue for. You see they can't stand up here and say it's the bridge. They can't claim that everybody recovers. So what they've got to argue for is that there is an ad hoc determination on a case-by-case basis and we don't think that's the right place to draw the line.

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RESPONDENT

POWER: May it please the court. Before getting into the choice of law issue, which I do intend to address, and the meaning of §2.318, I would like to clarify if I may the nature of this business transaction. 3M tries to paint this as a buyer and a seller over here and a totally unrelated purchaser or plaintiff over here. In fact the reality of this business transaction is very different from that. Jim Bainbridge is an entrepreneur who acquired the world-right rights to 3D camera technology. To make this technology work he needed a specialized film emulsion and specialized backcoating to make the prints. So in 1988 he personally went to Minnesota and met with 3M Vice President Roger ______. He explained to _______ that he was going to make printers and print material. He explained personally to _______ that he was going to process 3D photographs. He explained personally to _______ that he was going to manufacture and sell 3D cameras. And he explained personally to _______ that he was going to manufacture these cameras in Hong Kong.

Now none of these individual projects could work alone. No one would process the film if there aren't cameras. No one will buy cameras if there isn't any film. Bainbridge couldn't do any of these things alone. And he couldn't do any of them unless he had the right emulsions and the right backcoat. And he explained that to 3M. In fact Bainbridge was 3M's only customer for the specific product so 3M sales depended upon the interrelationship of these different enterprises.

Now if Bainbridge had done this all in one company there would be no privity problem at all. He can recover for the camera sales but he had a different internal business organization. He had different companies process the film from sale of the cameras. And 3M now claims that internal business decision makes all the difference in the world in his relationship with 3M. 3M's position here just exalts form over substance. It's contrary to the whole idea behind the Uniform Commercial Code. When Carl Lewellyn(?) and the other drafters of the Uniform Commercial Code put it together they were fighting

against Willowston's(?) formalistic contract theory. A formalistic contract theory that exalted the form of transactions over the substance of transactions.

This is especially true for the problem of privy. Ever since the McPherson case the problem of privity was to overcome the problem that in modern business transaction people always don't deal face-to-face.

HECHT: But when they got to this point they weren't sure which way to go. When they got to 2.318 they weren't sure which way to go.

POWER: Well there is a difference as to how far the privity requirement goes. But the one thing that the privity requirement was not intended to do was be a defense against somebody you are sitting across the table from arguing or negotiating face-to-face. And that's what happened in this case. Jim Bainbridge and Roger _______ negotiated face-to-face with all of these projects in mind.

HECHT: If they weren't, if one of these companies...if the manufacturer for example were a totally unrelated entity how would that affect your argument?

POWER: If it was a totally unrelated entity then we would get into the 2.318 argument. Our position would be that under 2.318 in Minnesota if they were reasonably expected to be affected they would not be denied a privity argument. But that does not mean they would get to recover. 3M comes in and acts like the CA went off the deep end, that they're having unlimited liability. The only way to prevent unlimited liability is to draw the line with the privity requirement. That wasn't the intent of the privity requirement even in jurisdictions that have a narrow privity requirement.

The place the Code limits consequential damages to keep them from going on forever is in §2.715. That's the damages section to the Code. Question 13 in our case was submitted under the language of §2.715. Section 2.715 does not permit recovery of consequential economic damages unless the seller has reason to know of the particular business purposes of the plaintiff.

HECHT: Well but you began the argument by saying surely you know there's a camera manufacturer out there somewhere.

POWER: That's enough under 2.715. It's not that you should have known or could have known. This is the famous rule of Hadley v. _______ in contracts. That is the buyer, the plaintiff has to actually disclose information to the seller in order to recover economic consequential damages under 2.715.

HECHT: But if the buyer came in and said, well of course you understand we are going to use this film, we are going to manufacture cameras, we are going to sell cameras, we are going to sell batteries, we are going to sell stands to put the camera on, we are going to sell bags to put the camera in, and it just goes without saying that it's all hinging on whether this product works...

POWER: These are our business purposes. No Kodak's business purposes.

HECHT: Well but we can't sell what we...we want to take what you give us and sell it to other people to sell to the public. And we are going to get cut out if the people on the end aren't making sales.

POWER: If we disclose our business purposes, then under 2.715 we can recover. Now that doesn't mean that 3M is in a hopeless position. The Code has disclaimers of warranties; 2.719 has remedy limitations. All they have to do is have a remedy limitation for consequential damages. The key here is that

we have to disclose our business purposes so they know whether or not they need to limit against consequential damages. But under 2.715 the people on the other side of the bridge couldn't recover because they didn't disclose their business purposes. Kodak or the other battery manufacturers could not recover. It's simply not the case that the Beaumont CA has gone off the deep end here. The authors of the Code weren't stupid. They understood that there was extensive liability under 2.318, but the backup is there's limited liability. It's not just foreseeability, but it's disclosed business purposes under 2.715. That's the way our case was submitted to the jury, they tracked the language of 2.715 as you can see on the chart, that's the limitation. Now of course under that standard we easily recover. We disclosed our business purposes. Not only did 3M have reason to know of our business purposes, they actually knew of our business purposes.

But if I could your honor I would like to come back to this idea of what 3M is doing with privity generally.

GONZALEZ: Before you move on would you speak to the choice of law issue of why Nevada and Georgia are not the state's most significant contacts and option A should apply?

POWER: Minnesota clearly does have the most significant contact in this situation. Not just counting them up as 3M says we are doing. But given the particular issues in the case. Now they have a fundamentally flawed view of what choice of law analysis __________. They think we are going to compare Minnesota to the rest of the world. The task is to compare Minnesota to other individual states. That's why in the TC when the trial judge asked them whose law applies, they said: We don't have to tell you. Now that puts the trial judge in an intolerable situation. How can the trial judge identify the content(?) of people's law...

GONZALEZ: You argue that here; you argue that in the brief, but they put up some references to the statement of facts where they clearly argued that the Nevada law applied.

POWER: They are now arguing that Nevada law applies.

GONZALEZ: Eastwood here was it correct? They purported to be from the statement of facts matters that they argued at the TC.

POWER: They argued that Alternative A applied. But when asked why alternative A applied, they didn't say: We think Nevada law is applying. They didn't make a motion under Texas rules of evidence 202 to have the judge take judicial notice of Nevada law. They just said we think A applies. And A's out there a lot. And therefore it's Minnesota against the rest of the world. Another fundamental flaw in their choice of law analysis is that they assume that Georgia law and Nevada law because of adopted A are the same. That's simply not true. Alternative A in Comment 3 ___________ specifically states that the rule in alternative A is a minimum and it is not to discourage courts from going further maybe even all the way out to C even without the legislature adopting Alternative A. For example: Pennsylvania lets employees of the purchaser recover. Even though they have adopted alternative A. So we don't know that Georgia and Nevada have the same rule. They've never brought that to our attention or to the trial judge's attention so the trial judge could make a choice of law analysis. Again, they've got an obligation under Rule 202 to move the trial judge to take notice of Nevada's law or Georgia's law if they want Nevada's law.

ABBOTT: They did not comply with Rule 202?

POWER: They didn't comply with Rule 202, and 202 does say that the trial judge can take judicial notice on his own motion. But the good and wellborn treatise on this is very clear on it and they

cite cases. And that is whether the trial judge takes judicial notice on its own motion is within the trial judge's discretion. And they say: "The party who does not make a motion cannot complain."

ABBOTT: So you are saying that since they didn't perfect a motion under 202 they have no right to complain now?

POWER: That's correct. But also it would make choice of law analysis in the trial court totally unworkable. The trial judge would have to be one of the advocates. We come in and say Minnesota law applies. They literally said we don't have to tell you. So the trial judge would have to go around, find the other laws, and if the trial judge found it wrong it would be reversed on appeal. Now it's true that choice of law is de novo once the issue is joined. But they should have to come in and put the material before the trial judge.

ENOCH: I understand the buyer has disclosed the business purpose. It seems to me that this is more than simply a form over substance. If a buyer could go to 3M, say 3M I'm going to be developing cameras and I am going to be developing film, and I am going to be selling those cameras; and 3M says: Okay I understand what you're planning on doing. It seems to me your argument would permit the buyer then to go away and form the manufacturer and then a distributor for West California and a distributor for East California and a distributor from West Nevada and a distributor for East Nevada and bring all those people in there who I assume each of those enterprises would tack on an additional profit over and above the cost. So I manufacture the camera and then I sell it to myself at a profit and then myself sells the camera to the public for an additional profit. It seems to me that the rationale you apply here would permit a buyer to basically create any number of business organizations all performing the same essential function, but each one claiming for itself an additional profit over and above the original profit from the original manufacturer of the camera.

POWER: Well if we go in and disclose that we are going to market cameras in California, then we can't tack on marketing cameras in England or Massachusetts or some place else. We haven't disclosed our business purposes. But it's clear here we were going to be the worldwide sellers of these cameras. So we haven't expanded our business _______.

ENOCH: It's true, but you would claim a profit for the worldwide sale of cameras just from the manufacturing and initial sale of the camera. But over here you also have an American distributor of that camera who I assume would claim a profit on top of the cost of the camera to the distributor, which included a profit to the manufacturer?

POWER: That's assuming we could do it economically in the marketplace. We are going to be tested on the marketplace as to whether we can sell cameras.

ENOCH: But under the UCC you're saying all I have to do is disclose my business concept and then that covers this concern. And I'm saying would the UCC really anticipate a seller would be responsible for the individual business enterprise profits that the buyer might ultimately set up just internally for the purposes of selling cameras and marketing and the manufacturing?

POWER: Well a couple of points. First each part of this enterprise was disclosed. Now it wasn't called Nishika at the time. It was called Quantronics. But the possibility of these enterprises taking place were disclosed. There wasn't layering going on beyond which 3M had reason to know. If we came in and simply layered in a way to up the damages there are rules on mitigation of damages, but if we've upped the damages in an artificial way then we really haven't been damaged. The UCC has cover requirements and substitute requirements. We can't simply artificially up the damages by some artificial marketing process. It does take effort to get the cameras out on the market from the manufacturer. So

the profit to American 3d is a legitimate profit here and we disclosed that and explained it to 3M.

SPECTOR: A moment ago you said this meeting or meetings were in Minnesota. And I thought opposing counsel said there was some meeting in Georgia?

POWER: There were contacts all over the country. We can get up, they can get up, and we can list contacts. The important contacts took place in Minnesota. And I would like to explain why. Even if we are now comparing Nevada and Minnesota it is clear that if you look at the issues involved in this case, they took place in Minnesota. The two issues in this case are the privity requirement, that relies on a judgment as to whether Bainbridge and _________, that is 3M, were dealing face-to-face. How that business relationship was established? What was disclosed? Whether the privity requirement is going to apply? All that took place in Minnesota.

The damages under 2.715, the rule that we're just going through as to whether we've disclosed our business purposes. Whether we can recover under 2.715, that is under the submission as it was submitted to the jury, whether we can recover under that depends on what we disclose about our business purposes. All that took place in Minnesota. On top of that, there is an implied warranty of fitness for particular purpose here. Under 2.315 that's one of the 3 warranties that we recovered under. The implied warranty of fitness for particular purpose requires the seller to be aware that the buyer has a particular purpose, requires the seller to be aware that the buyer is depending on the seller's judgment, that depends on what information was given from the buyer to the seller. And all that took place in Minnesota.

It doesn't matter where the product was delivered. But by the way some of the product was delivered FOB Minnesota. It wasn't all delivered in Nevada.

GONZALEZ: Where was it mixed?

POWER: I believe and I am not absolutely sure of this your honor, some of it was delivered to Oklahoma. It was either some of it mixed there or mixed in Nevada. But the mixing of it and let's suppose it all got mixed in Nevada, the mixing of it isn't what this case turns on.

OWEN: If the contacts were in Mexico would you be standing here arguing that Mexico law applies? If the contacts that you've discussed if that occurred in Mexico as opposed to Minnesota would you be arguing that we don't apply the UCC at all, that Mexico law governs?

POWER: We would have to look at Mexico law. Choice of law analysis isn't just counting contacts it's looking at their underlying law. If they have an underlying law that depended upon where the disclosures were being made and frankly I don't know what Mexican law is on the issue of damages under what we would call 2.715, or the implied warranty of merchanibility(?) under 2.350, I don't know what there law is, if their law only created the warranties or only permitted damages, if the business purposes were disclosed then yes Mexican law would apply to that transaction.

OWEN: What if they had no UCC no breach of warranty?

POWER: Well have they contract law though. They do have a code. They have a contract code.

OWEN: You're ________ it down to the individual elements as opposed to stepping back and saying does the UCC provision does it govern this transaction. Now you're saying that you don't think the individual legal disputes within each category to determine category by category?

POWER: That is clearly the way interest analysis and choice of law was designed to work. It might very well be in a case that Texas law applies to the damage issues and Nebraska law applies to some others. You look at the particular issue, the particular policies of each jurisdiction.

OWEN: We decide liability under Nevada law and damages under Minnesota law possibly?

POWER: That's possible. Now that's what's called deposage(?), that's taking part of one law and part of another law. It is cumbersome. One of the elements under §6 of the Restatements of Second is to look at the workability, and so the trial court might take workability into account and decide that they don't want to split it up. But yes it's an issue by issue analysis. And I think that's just standard choice of law analysis. Generally will come into issue of damages for remedy limitations or things of that sort might be from one state's law and the actual conduct let's say the negligent standard would be from another state's law.

HECHT: If Minnesota law applies and it was applied correctly below, then judgment can be rendered. If Nevada law applies what should the result be?

POWER: Judgment should be rendered for Nishika. And here's the reason I would like to come back to what I opened up with. These people dealt face-to-face. The whole point of the UCC was to not exalt the form of a business transaction over the substance of a business transaction. And that's especially true as I pointed out on privity. The whole point of privity under McPherson was to relax the privity requirement because sometimes people don't always deal face to face. 3Ms turning this on its head. They are arguing that people that dealt face-to-face should be precluded on the ground of privity. Again that turns the whole development in the UCC right on its head.

GONZALEZ: Aren't you overlooking the fact that we have 4 different legal entities involved here? You just gloss over that fact and say they are one in the same.

POWER: I don't gloss over it. What I am saying is in the relationship between 3M and Bainbridge, Bainbridge went in there and said here are my business plans I need this stuff or it's going to ruin me. Whether he did it in one company or four companies doesn't alter this relationship. Again it's exalting form over substance which is exactly what the UCC was designed to prevent. If Carl Lewellyn saw this argument that 3M is making I guarantee you your honors he would turn over in his grave.

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REBUTTAL

LAWYER: Your honor Justice Gonzalez hits the nail right on the head. They're _____________ here is that Quantronics is part of this group that allegedly sat across the table when Mr. Bainbridge was across the table from us telling us their business plan. At the time these goods were sold Mr. Bainbridge had no ownership interest whatsoever in Quantronics. And at the time these goods were sold Nishika Manufacturing which is a company he created later did not even exist. They never told us about Nishika Manufacturing. And Mr. Bainbridge who sat across the table from us had no ownership interest whatsoever in Quantronics.

He keeps talking about a buyer and he cites to you 2.715 of the UCC that talks about the limitations on a buyers' damages. Because he's trying to treat all of these folks as if they were the buyer. But as Judge Gonzalez points out they are separate legal entities and they are not even all Bainbridge entities. You can't even throw a Bainbridge net over this and claim that it's all Mr. Bainbridge because it wasn't.

ENOCH: If I understood Mr. Power's argument though it was that Bainbridge tells 3M: I am going to create this enterprise, this is the enterprise I am going to create; a part of that enterprise is the manufacturing of 3d camera. And he argues that 3M didn't manufacture this emulsion and backsauce, but 3M was saying we will manufacture a emulsion and backsauce for this enterprise. So doesn't that really go against your argument well he didn't own it. His whole point was I'm going to get one.

LAWYER: But he didn't get one. At the time we were selling the goods whatever he told us he was going to do he hadn't done. Mr. Fingerette was the fellow that owned Quantronics at the time we sold the goods. So if it's all based on Mr. Bainbridge who by the way is not a plaintiff here, I mean there is such a thing as durritical(?) persons and the plaintiff here is not Mr. Bainbridge. We don't have some alter ego finding here. We are faced with separate corporate plaintiffs and they didn't sit across the table from us. And certainly Quantronics didn't because Mr. Bainbridge didn't have anything to do with Quantronics when we sold the goods. So his whole thesis is based on the flawed(?) assumption.

HECHT: If they had set across the table would it be different?

LAWYER: It would not be different in our view because you see it's different under Mr. Power's analysis, because Mr. Powers wants you to draw the line of legal recoverability under 2.318 based on who the buyer happens to tell the manufacturer about. And we are saying that's not the proper place to draw the line. If sellers, if manufacturers have to believe when they sell their goods that a court is going to determine after the fact on an ad hoc basis case-by-case where are we going to draw the line on these pure economic losses? Well this group might be foreseeable, this other group might be foreseeable. As you said Judge maybe it's the camera manufacturer, maybe its the camera accessory seller. I can't limit that exposure. I would have to disclaim Mr. Powers is right. If the UCC was construed the way they want it construed on an ad hoc case-by-case basis on whether these people for pure economic losses outside the chain are going to be foreseeable I would have to disclaim. That's right. And even direct purchasers, even direct buyers won't be able to get a warranty because sellers are always going to have to disclaim because they can't take a chance on owing a warranty to the world based on a court's determination after the fact on an ad hoc basis as to where the liability stops.

HECHT: But it seems like the bigger the industry, the less liability. And that seems to be total ____________, that if this were just a little camera operator who was doing the whole thing in-house, then he would have a claim. But because the industry is big enough that it's got to be separated out among different owners, then they don't have a claim.

LAWYER: Judge if he was a buyer, he was in the chain of distribution someone who had directly or indirectly acquired the produce he would have a claim. But our whole position is that the right way to construe alternative C is that if he's not a buyer, if he's outside the chain of distribution regardless of the size of the industry, that that's the appropriate place to draw the bright line test is that economic loss. If you noticed Mr. Powers didn't say anything about that Comment 3 to the UCC §2.318. You didn't hear anything about that. And keep in mind that no court in the country, no court except for Beaumont, has ever held that somebody outside the chain of distribution can recover pure economic losses. No court. And if this opinion is not changed by this court it will be in the case books, Mr. Powers can teach it in law school if he teaches UCC, because it will be the only case that holds that somebody outside the chain of distribution can recover pure economic losses. And it's incorrect. It's not your honors what this court would say the law is for Texas.

According to the 5th Circuit Panel there were 2 Texas judges: Judge Higginbotham and Judge Goldberg, and they looked at your cases and they said: This court would draw the line at pure economic losses for people outside the chain of distribution. Now that's what you would do...

HECHT: But we've got to draw it where Minnesota might have.

LAWYER: Well you've got to construe a uniform statute, UCC §2.318. And every time you go look at a uniform provision you would look at the official comments. Why do they ignore the official comments? Because they don't have a good answer to that reference to 402A that tells you to draw the line at pure economic losses.