

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT  
CASE TYPE: Other Civil

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State of Minnesota, by its Attorney  
General Lori Swanson, its Commissioner  
of Pollution Control, John Linc Stine, and  
its Commissioner of Natural Resources,  
Tom Landwehr,

Plaintiffs,

v.

3M Company,

Defendant.

Court File No.: 27-CV-10-28862

Judge: Kevin S. Burke

## **JUDICIAL SUGGESTION**

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Experienced trial lawyers will tell you to be cautious about reading too much into a judge's reaction. Sometimes a judge may probe an attorney to confirm a tentative position the judge has arrived at. Sometimes a judge really has reached an immovable position. And sometimes reading anything into the reaction of a judge is useless. The bottom line is neither party nor their attorneys should believe that they know what this Court might ultimately decide in this case and clearly cannot safely predict what the Court of Appeals might do if the aggrieved party decides to appeal. Clearly neither party can accurately predict whether or not the Minnesota Supreme Court might have an interest in the legal issues they are litigating. The stakes in this case are significant enough to at least not discount the Supreme Court's ultimate interests in the case.

On March 24, 1989, the Exxon Valdez supertanker went aground causing serious environmental damages. The Exxon Valdez was considered the biggest U.S. oil-spill disaster; it still is a yardstick used to measure spills around the world. In the Prince William Sound environment, where the oil lingered before floating into the Gulf of Alaska and along the Kenai and Alaska peninsulas, it was particularly damaging to fish and wildlife, with a toll estimated to include

250,000 seabirds and thousands of marine mammals. Twenty-four years later, the case finally ended.

The question to State of Minnesota is this: Does the State want to continue to engage in a legal battle that could last decades? Or does the State want to problem-solve and find a solution that, while not perfect, protects the environment and brings closure to this litigation?

The legal issues before this Court are not trivial. Assuming that this case goes forward, at a minimum the State risks years of appeal on the statute of limitations issue. There is the possibility a jury could find that the lawyers for the State waited too long to bring the suit. That finding may well damage both parties. The State will have egg on its face and 3M will be perceived as getting away with environmental murder. There is the possibility that the 2007 agreement—while not precluding the State’s quest for billions of dollars in damages—at a minimum precludes introduction of evidence to support their theory of damages.

This case will go forward. Perhaps as an appeal based upon summary judgment, and perhaps to trial. Assuming that this case goes forward to trial, there is no doubt that with the caliber of trial lawyers on both sides, lots of issues will develop that will create a plethora of potential issues for appeal. And, the bottom line is juries can be unpredictable. Neither side in this case should discount the possibility that the other side will achieve a resounding victory before a jury.

For 3M there is a similar question: Do you want to engage in a legal battle with the State of Minnesota that could last several decades, during which you will continue to accrue significant legal fees? Or does 3M want to find a mutually acceptable solution that allows the company to move forward?

3M has sought to attain the image of a good corporate citizen of Minnesota. There is little doubt the corporation feels aggrieved by the State’s accusation. But, there are two salient facts: First, the present leadership of 3M largely had nothing to do with the decisions made years ago; and more importantly, 3M’s shareholders clearly had nothing to do with those decisions. To repeat what I

previously wrote, “the effect on stock performance of publicly traded defendants who do not prevail in litigation is serious. Stock performance tends to decline after a jury verdict is reached – and even when defendants state their intent to appeal the jury's verdict, the unfavorable decision and uncertainty of any appellate court ruling tends to keep a company’s stock prices depressed.<sup>1</sup> There is, on the other hand, no research which indicates that settlements cannot be presented in a positive light or that settlements necessarily have an appreciable impact on stock prices.”

Although I would like to think that I am wise, I am more realistic than wise. A District Court order and a jury verdict are not necessarily going to bring closure to this case. This Court has seen parties litigate cases like this forever, or—as in the Exxon Valdez case—for at least 24 years. This is clearly not in the best interest of either party. It is not in the best interests of the environment, the citizens affected, nor that shareholders of 3M. This case cries out for problem-solving.

My “Judicial Suggestion” is this: I do not want a reaction to this suggestion. I expect the attorneys to give a copy of this document to their clients. This document shall be given to the Governor of Minnesota, who I assume has ultimate executive branch authority, and to the Attorney General. This document shall be given to the 3M Chairman of the Board, Mr. Thulin, and to Mr. Fong, the General Counsel. I suggest the parties attempt to work something out. I know this was tried unsuccessfully in the past. And perhaps there are discussions I am unaware of. My suggestion is the parties try harder to find a mutually acceptable solution to this problem. If this suggestion is accepted neither side will get the “deal” they want.

As illustrated by the oral arguments yesterday, the parties are represented by very good lawyers. Good lawyers are good advocates, but great lawyers excel at problem solving. Trial lawyers can at times become so embroiled in the battle that they fear that suggesting a return to negotiation is a sign of weakness on

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<sup>1</sup> Eric Rudich, PhD, *Wall Street’s Reaction to Jury Verdicts Involving Publicly-Traded Litigants* (2010), available at The Jury Verdict, <http://www.thejuryexpert.com/2010/07/wall-streets-reaction-to-jury-verdicts-involving-publicly-traded-litigants/>.

their part as opposed to wisdom. In this case, a negotiated agreement may be the wisest suggestion that a very good civil litigator can make to their client.

Perhaps the parties feel that they or the other party has become so entrenched in their positions that compromise is not possible. I understand why that feeling might exist. Several years ago I had a major multi-million dollar class action. The defendant brought in a new attorney to attempt to resolve the case while the rest of the lawyer's team continued to get ready for trial. I do not suggest that either party do that, but merely mention it as a warning that becoming intractable is not the sign of a good advocate. After seven years of litigation thus far—during which there have been accusations of unprofessional conduct leveled by lawyers on both sides—it is quite understandable that the lawyers have become intractable.

In the final analysis, this is not about the lawyers, it is about trying to achieve what is right. The State of Minnesota is led by smart people and a smart Governor. 3M has smart corporate leadership. Smart people intuitively understand that controlling your own destiny is far preferable than letting other people dictate it.

Judge Kevin S. Burke