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1995]

MORTON INTERNATIONAL V. GENERAL ACCIDENT INSURANCE CO.: THE NEW JERSEY SUPREME COURT DEFINES THE SCOPE OF THE QUALIFIED POLLUTION EXCLUSION CLAUSE IN COMPREHENSIVE GENERAL LIABILITY POLICIES

I. INTRODUCTION

In *Morton International v. General Accident Insurance Co.*,¹ the New Jersey Supreme Court settled controversial and frequently litigated issues of insurance coverage for environmental pollution.² Specifically, the *Morton* court addressed, *inter alia*, the issue of the scope of the standard qualified pollution exclusion clause in Comprehensive General Liability ("CGL")³ policies. This decision will

1. 629 A.2d 831 (N.J. 1993).

2. In attempting to predict the New Jersey Supreme Court's holding in *Morton*, two Federal Circuit Courts of Appeals arrived at conflicting interpretations of New Jersey law. Compare *CPC Int'l Inc. v. Northbrook Excess & Surplus Ins. Co.*, 962 F.2d 97 (1st Cir. 1992) ("This court predicts that the New Jersey Supreme Court would adopt the sound reasoning advanced . . . in *Broadwell Realty* and construe the term 'sudden' to mean unexpected and unintended.") with *Liberty Mutual Ins. Co. v. Triangle Indus.*, 957 F.2d 1153 (4th Cir. 1992) (predicting the New Jersey Supreme Court would not follow the interpretation of the term "sudden" in *Broadwell Realty*).

3. Since the enactment of federal and state superfund laws, businesses across the country increasingly are held responsible for the cost of remediating polluted sites. In order to protect themselves, most businesses have purchased comprehensive general liability insurance ("CGL"). See David W. Steuber, Michael A. Rossi and Timothy M. Toyama, *Toxic & Environmental Coverage Litigation*, 455 PLI/lit 223 (Mar.-Apr. 1993) ("A standard form CGL policy has been the mainstay of commercial liability protection for more than forty years."); Nancy Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 612 (1990).

CGL policies implicated in environmental coverage disputes are standardized third-party policies, under which the insurer agrees to indemnify the insured against third-party claims. Kristin A. Kolesar, *Insurance Coverage for CERCLA Under Comprehensive General Liability Policies: Cleaning Up Hazardous Waste in the Legal Environment*, 68 NOTRE DAME L. REV. 549 (1993). These policies are promulgated on an industry-wide basis by the Insurance Service Office ("ISO"). Ballard & Manus, *supra*, at 622.

CGL policies prior to October, 1964 provided coverage for property and personal injury caused by an "accident." *Morton*, 629 A.2d at 876. Although standard forms did not define accident, many courts defined the term as an "unintended, sudden, unexpected event." Ballard & Manus, *supra*, at 623 (citations omitted).

In 1964, the phrase "caused by accident" was replaced by the words "resulting from an occurrence." Occurrence was defined as:

an unexpected event or happening which results in injury to or destruction of tangible property during the policy period, or a continuous or repeated exposure to conditions which result in injury to or destruction of tangible property during the policy period provided the insured did

affect insurers of the nation's largest industrial companies which "have been named as potentially responsible parties at approximately seventy-five percent of the superfund sites in New Jersey."⁴ The standard pollution exclusion clause⁵ states:

This insurance does not apply . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalides, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental*.⁶

There has been a significant amount of litigation over the interpretation of this exclusion.⁷ Courts disagree over the meaning

not intend or anticipate that injury or destruction of property would result.

Morton, 629 A.2d at 876. In October 1966, occurrence was redefined as: an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Id.

In addition, standard-form policies that were issued between 1973 and 1985 included a qualified pollution exclusion clause. For a discussion of the qualified pollution exclusion clause, see *infra* notes 5-15 and accompanying text. Since 1986, standard form policies have added an absolute exclusion clause which precludes coverage for all pollution-remediation costs. *Policyholder's Clean Up May be Insured if Discharge Unintended*, N.J. High Court Rules, 24 Env't Rep. (BNA) 551 (July 30, 1993). For a discussion of the absolute pollution exclusion clause, see *Special Insurance Coverage Issues Arising Out of Hazardous Waste/Environmental Clean-up Litigation*, 855 ALI-ABA 1005, 1024-26 (June 21, 1993).

4. *Policyholder's Cleanup May be Insured if Discharge Unintended*, N.J. High Court Rules, 24 Env't Rep. (BNA) 551 (July 30, 1993). New Jersey has the largest number of superfund sites in the country. *Id.* The state spent over \$1,000,000,000 to clean up polluted sites in the period from 1987 to 1991. *Id.* Presently, there are over 600 polluted sites in New Jersey. *Id.*

5. For the purposes of this casebrief, "standard pollution exclusion clause" refers to the qualified pollution exclusion clause found in CGL policies between 1973 and 1985. See *supra* note 3.

6. *Morton*, 629 A.2d at 846 (emphasis added). The pollution exclusion clause was drafted "[i]n [an] apparent response to a major and dramatic oil spill off the California coast in 1967." Kenneth H. Mack, *Insurance Coverage of Environmental Claims*, 459 PLI/lit 261 (Apr.-May 1993). Most CGL policies issued between 1973 and 1985 contain some variation of this exclusion. Ballard & Manus, *supra* note 3, at 612.

7. The New Jersey Supreme Court in *Morton* explained:

This court recognizes that there is a plethora of authority from jurisdictions throughout the United States which, depending on the facts presented and the allegations of the underlying complaints, go 'both ways' on the issues presented today. The cases swim the reporters like fish in a lake. The Defendants would have this Court pull up its line with

of the word "sudden" in the phrase "sudden and accidental."⁸ Some courts have taken the position that "sudden" has a temporal connotation, meaning "abrupt" or "instantaneous."⁹ These courts would thus exclude coverage for pollution caused by gradual contamination.¹⁰

Other courts have construed "sudden" non-temporally to mean "unexpected" or "unintended."¹¹ Different justifications have been

a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish, too.

Morton, 629 A.2d at 855 (quoting *Pepper's Steel & Alloy's v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541, 1549-50 (S.D. Fla. 1987)).

8. For a discussion of the various definitions of "sudden" adopted by the courts, see *infra* notes 9-16 and accompanying text.

9. Several state supreme courts have ruled that in the insurance context "sudden" is unambiguous and has a temporal connotation. See *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 1993 WL 241520 (Fla. July 1, 1993); *Monsanto v. Aetna Casualty & Sur. Co.*, 1993 WL 563253 (Del. Super. 1993) (interpreting Missouri state law); *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 597 N.E.2d 1096 (Ohio), *reh'g denied*, 600 N.E.2d 686 (1992), *cert. denied*, 113 S. Ct. 1585 (1993); *Lumbermens Mut. Casualty Co. v. Industry Inc.*, 555 N.E.2d 568 (Mass. 1990), *reh'g denied*, 938 F.2d 1423 (1991), *cert. denied*, 112 S. Ct. 969 (1992); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392 (Mich. 1991), *reh'g denied*, 503 N.W.2d 442 (1992); *Technicon Elec. Corp. v. American Home Assurance Co.*, 542 N.E.2d 1048 (N.Y. 1989); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, *reh'g denied*, 346 S.E.2d 134 (N.C. 1986).

A number of state appellate courts have also held that "sudden" is unambiguous in the insurance context. See, e.g., *Dakhue Landfill, Inc. v. Employers Ins. of Wausau*, 508 N.W.2d 798, 803 (Minn. Ct. App. 1993) ("[S]udden . . . has a temporal connotation, requiring that the incident occurs relatively quickly rather than gradually over a long period of time."); *O'Brien Energy Sys. v. American Employers Ins. Co.*, 629 A.2d 957 (Pa. Super. Ct. 1993) (finding gradual discharge of polluting gases was not "sudden" within the meaning of the pollution exclusion clause); *County of Fulton v. United States Fidelity & Guar. Co.*, 600 N.Y.S.2d. 972, 973 (N.Y. App. Div. 1993) ("To be considered 'sudden' within the meaning of the pollution exclusion clause, a release or discharge must occur abruptly or quickly."); *Shell Oil v. Winterhur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 841 (Cal. Ct. App., 1st Dist. 1993) ("'[S]udden' necessarily contains a temporal element in addition to its connotation of the unexpected."); *Greenville County v. Insurance Reserve Fund*, 427 S.E.2d 913, 917 (S.C. Ct. App. 1993) ("sudden is unambiguous and must be defined in its temporal sense"); *Farm Bureau Mut. Ins. Co. v. Laudick*, 859 P.2d 410, 412 (Kan. Ct. App. 1993) ("'[S]udden and accidental' should be given a temporal meaning, that it is unambiguous, and the meaning of the word 'sudden' combines both the elements of without notice or warning and quick or brief in time."); *Gridley Assoc. Ltd. v. Trans Am. Ins. Co.*, 828 P.2d 524, 527 (Utah Ct. App. 1992) ("'[S]udden' within the 'sudden and accidental' clause cannot be defined without reference to a temporal element, specifically immediacy, abruptness, and quickness.").

10. See, e.g., *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.*, 22 Cal. Rptr. 2d 206, 216 (Cal. Ct. App., 4th Dist. 1993) (sudden never means both unexpected and gradual).

11. See *Outboard Marine v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991); *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1991); *Claussen v. Aetna Casualty &*

offered in support of this interpretation of "sudden."¹² Some of these courts reason that "sudden" is ambiguous and should be construed against the insurer to mean unexpected and unintended.¹³ These courts emphasize that "sudden" is undefined in standard CGL policies and dictionary definitions of "sudden" are not uniform.¹⁴

Other courts are guided by the regulatory history of the pollution exclusion clause.¹⁵ The insurance industry represented the clause as a clarification of the existing coverage under occurrence-based policies.¹⁶ The clause, however, if enforced as written, severely restricts coverage for environmental pollution.¹⁷ Therefore, these courts have held the industry to its representation of the clause, construing "sudden and accidental" as a restatement of the "occurrence" definition.¹⁸

Sur. Co., 380 S.E.2d 686 (Ga. 1989); *Queen City Farms, Inc. v. Aetna Casualty & Sur. Co.*, 827 P.2d 1024 (Wash. App. Ct. 1992).

12. See *infra* notes 13-14 and accompanying text.

13. As a general rule, courts construe ambiguous insurance contract terms in accordance with the reasonable expectations of the insured. Ballard & Manus, *supra* note 3, at 621. See, e.g., *Meier v. New Jersey Life Ins. Co.*, 503 A.2d 862, 869 (1986) ("[New Jersey courts] have adopted the principle giving effect to the 'objectively reasonable expectations' of the insured for the purpose of rendering a 'fair interpretation' of the boundaries of insurance coverage.").

14. For example, in *Hecla*, the Colorado Supreme Court found:

Webster's Third New International Dictionary 2284 (1986) attaches a number of definitions to 'sudden.' Webster's first defines 'sudden' as 'happening without previous notice . . . occurring unexpectedly . . . not foreseen.' . . . Random House Dictionary of the English Language 1900 (2d ed. 1987) defines the word 'sudden' in a temporal sense as 'happening, coming, made, or done quickly.' Black's Law Dictionary 1284 (5th ed. 1979) defines 'sudden' as 'happening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for.'

811 P.2d at 1091.

15. See, e.g., *Joy Technologies v. Liberty Mut. Ins.*, 421 S.E.2d 493 (W. Va. 1992); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1991); *Claussen v. Aetna Casualty & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989).

16. See, e.g., *Joy Technologies*, 421 S.E.2d at 500 ("Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved . . . even if it resulted over a period of time and was gradual, so long as it was not expected or intended.").

17. For a discussion of the extent to which the pollution exclusion clause restricts coverage provided by prior occurrence-based policies, see *infra* note 55 and accompanying text.

18. *Joy Technologies*, 421 S.E.2d at 498-500; *Just*, 456 N.W.2d at 578; *Claussen*, 380 S.E.2d at 689-90. For the definition of "occurrence" in standard CGL policies, see *supra* note 3.

In *Morton*, the New Jersey Supreme Court found that “sudden” necessarily encompassed a temporal element.¹⁹ However, the court followed the rationale adopted by the highest courts in Wisconsin,²⁰ Georgia,²¹ and West Virginia²² and refused to enforce the clause as written.²³ Rather, the *Morton* court construed the clause in accordance with the reasonable expectations of the regulatory authorities, based on the insurance industry’s representations during the clause’s approval process.²⁴

II. FACTS

In March 1976, the New Jersey Department of Environmental Protection (“DEP”) sued Ventron Corporation (“Ventron”) and other defendants for the cost of remediating pollution in Berry’s Creek in Bergen County.²⁵ The pollution was caused by untreated waste discharges from a mercury processing plant operated by the defendants.²⁶

19. *Morton*, 629 A.2d at 847.

20. *See Just*, 456 N.W.2d. at 570.

21. *See Claussen*, 380 S.E.2d at 686.

22. *See Joy Technologies*, 421 S.E.2d at 493.

23. *Morton*, 629 A.2d at 874-75.

24. *Id.*

25. *See* New Jersey Dep’t of Evtl. Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983). The suit was originally predicated on violations of the New Jersey Water Quality Improvement Act of 1971, N.J. STAT. ANN. § 58:10-23.1 to 23.10, 23:5-28, which compelled any party responsible for discharging petroleum and hazardous substances to undertake clean-up of those substances or finance a removal authorized by DEP. *Ventron*, 468 A.2d at 161. The Act imposed strict liability on all responsible parties, unless the discharges were caused by acts of war or acts of God. *Id.*

In 1976, the Legislature enacted the Spill, Compensation & Control Act (“Spill Act”), N.J. STAT. ANN. § 58:10-23.11 to 23-11z (West 1992 & Supp. 1994), which repealed and supplanted the Water Quality Improvement Act. *Ventron*, 468 A.2d at 154. Subsequently, DEP amended its complaint, originally filed in 1976, to allege violations of the Spill Act. *Id.*

26. For over forty years, the defendants in the *Ventron* suit operated a mercury producing plant located on a 40-acre tract west of Berry’s Creek. *Morton*, 629 A.2d at 834. From 1929 to 1960, F.W. Berk & Co. (“Berk”) operated the plant. *Id.* at 834. During this period, Berk dumped untreated waste material which resulted in mercury-laden effluent draining onto the land. *Ventron*, 468 A.2d at 155. In 1960, Berk sold the plant to Wood Ridge Chemical Corporation (“Wood Ridge”), a wholly-owned subsidiary of Velsicol Chemical Corporation (“Velsicol”). *Id.* Wood Ridge continued to operate the plant, as well as dump untreated mercury waste into Berry Creek. *Id.* In 1968, Ventron Corporation (“Ventron”) bought all of Wood Ridge’s capital stock. *Id.* Ventron continued plant operations until 1974, when it sold the operating assets to a chemical company and the 7.1 acre tract on which the plant was located to Robert and Rita Wolf. *Id.* at 156.

The continual dumping of toxic waste into Berry’s Creek resulted in extensive environmental damage. The New Jersey Supreme Court explained:

The New Jersey Supreme Court imposed strict liability on all the defendants pursuant to the Spill, Compensation and Control Act ("Spill Act")²⁷ and common law principles of nuisance.²⁸ The court also held Ventron liable to the Wolfs, the subsequent purchasers of the plant property, for fraudulently concealing the tract's polluted condition.²⁹

Following the DEP litigation, Morton International ("Morton"), the successor in interest to Ventron, brought a declaratory judgment action against the insurers³⁰ of the plant operators.³¹ Morton sought indemnification for remediation costs and reimbursement for the expense of defending the DEP suit and the Wolfs' cross-claim.³²

The New Jersey Superior Court, Chancery Division, dismissed Morton's claims for indemnification for remediation costs.³³ The Chancery Division further ruled that only the General Accident Insurance Company of America ("General Accident") was liable for

Beneath its surface, the tract is saturated by an estimated 268 tons of toxic waste, primarily mercury. For a stretch of several thousand feet, the concentration of mercury in Berry's Creek is the highest found in fresh water sediments in the world. The waters of the creek are contaminated by the compound methyl mercury, which continues to be released as the mercury interacts with the other elements. Due to depleted oxygen levels, fish no longer inhabit Berry's Creek, but are present only when swept in by the tide and, thus irreversibly toxified. The contamination at Berry's Creek results from mercury processing operations carried on at the site for almost fifty years.

Ventron, 468 A.2d at 154.

27. N.J. STAT. ANN. § 58:10-23.11 (West 1992 & Supp. 1994). For a discussion of the Spill Act, see *supra* note 25.

28. *Ventron*, 468 A.2d at 160.

29. *Morton*, 620 A.2d at 835.

30. Twenty-one insurance companies were named in the declaratory judgment action. *Morton*, 629 A.2d at 898. The Superior Court, Appellate Division summarized the insurance coverage of all the various owners and operators of the plant:

General Accident, Reserve and Liberty Mutual provided primary general liability insurance coverage for the plaintiff between 1961 and 1976. General Accident insured the plaintiff for the longest period of time, between 1961 and 1972. Reserve insured plaintiff for about the next two years; Liberty Mutual, for about one year. The remaining defendant insurance companies (London Market, American Home, Continental Casualty, INA, First State and FM Affiliated) provided excess coverage.

Id. at 899. For a summary of the policies used by the insurers, see *Morton*, 629 A.2d at 835-38.

31. *Morton*, 629 A.2d at 834.

32. *Id.* at 835. When DEP commenced suit against Ventron, the insurers of the various owners and operators of the plant disclaimed coverage. *Id.* As a result, Ventron financed its own defense. *Id.*

33. *Id.* at 834. The cost to remediate Berry's Creek remains undetermined. *Id.*

part of Morton's costs in defending the DEP action.³⁴ The Appellate Division affirmed the dismissal of Morton's indemnification claims, but reversed the judgment against General Accident for damages and counsel fees.³⁵

On certification, the New Jersey Supreme Court affirmed the decision of the Appellate Division and held: 1) remediation costs are "damages" within the meaning of CGL policies;³⁶ 2) the standard pollution exclusion clause shall be enforced only to the extent it precludes coverage for the intentional release of known pollutants;³⁷ and 3) an insured's intent under an occurrence-based CGL policy shall be determined by an objective standard.³⁸

III. THE NEW JERSEY SUPREME COURT'S ANALYSIS

A. "As Damages"

The court first addressed the issue of whether the policy term "as damages" encompasses the remediation costs imposed by the *Ventron* judgment.³⁹ The standard CGL policy states:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damages to which this policy applies, caused by an occurrence⁴⁰

The insurers contended that the phrase "as damages" is uniformly understood in the context of insurance coverage to refer only to "traditional third-party compensatory awards."⁴¹ Accordingly, coverage should be precluded for equitable relief such as environmental remediation costs.⁴²

34. *Id.* Morton was awarded judgment against General Accident for \$100,429.07 and \$40,000 in attorneys' fees. *Id.* The actual cost of defense was in excess of \$1,000,000. *Id.* at 898.

35. *Morton*, 629 A.2d at 898.

36. *Id.* at 846-47.

37. *Id.* at 870-74.

38. *Id.* at 873-74.

39. *Morton*, 629 A.2d at 843.

40. *Id.* at 843 (emphasis added). The court noted that although variation existed, this provision in the Liberty Mutual CGL policy was typical. *Id.* Accordingly, the court used this Liberty Mutual provision in its analysis. *Id.*

41. *Id.* at 844.

42. *Id.* at 843-44. In support of their position, the insurers emphasized the trial court's observation that the state sought and received an order for cleanup of the land now owned by plaintiff; money damages were not awarded. *Id.* The insurers also asserted that the Spill Act distinguishes "cleanup and removal costs" from "damages." *Id.* at 844.

The court observed that several state and federal courts have held that remediation costs do not constitute “damages.”⁴³ A clear majority of courts, however, have interpreted the undefined policy term “damages” in accordance with its common, nontechnical meaning, which encompasses environmental remediation costs.⁴⁴ Therefore, the New Jersey Supreme Court adopted the majority view and held “damages” includes environmental clean-up costs.⁴⁵

B. The Pollution Exclusion Clause

The court next examined the effect of the standard pollution exclusion clause.⁴⁶ The court’s analysis focused on the proper interpretation of the phrase “sudden and accidental.”⁴⁷

The court initially explained that the phrase “sudden and accidental” does not describe the damage caused by pollution.⁴⁸ Rather, the phrase “narrowly limits the kind of ‘discharge, dispersal, release or escape’ of pollutants for which coverage is provided.”⁴⁹ Based on the court’s findings that “sudden” has a temporal connotation and that the definition of “accidental” is generally undisputed, the *Morton* court concluded that “sudden and ac-

43. *Morton*, 629 A.2d at 844. Three Circuit Courts of Appeals and several federal district courts, applying state law, have ruled that response costs are not “damages” within the meaning of CGL policies. *Id.* at 844-45. These courts rely on the rationale that the term “damages” is unambiguous in the insurance context and therefore refers only to legal damages. *Id.*

44. *Id.* at 845. For a list of cases in accord with the majority view, see *id.* at 845-46.

45. *Id.* at 845-46. The Supreme Court adopted the analysis of Justice O’Hern’s dissent in *New Jersey Department of Environmental Protection v. Signo Trading International, Inc.*, 612 A.2d 932, 944 (N.J. 1992). Justice O’Hern emphasized the plain meaning of “damages” and the reasonable expectations of the insured. He wrote:

‘Damages’ means money to most people. Money is what DEP wants from Springer. One United States District Court in New Jersey has perhaps stated it best: In assessing what an insured would reasonably expect from a CGL policy, it reasoned that “the average person would not engage in a complex comparison of legal and equitable remedies in order to define . . . ‘damages,’ but would conclude based on the plain meaning of words that the cleanup cost imposed on [the insured] . . . would constitute an obligation to pay damages.

Morton, 629 A.2d at 846 (citations omitted).

46. *Morton*, 629 A.2d at 846. Although some of the policies used by the excess carriers contained non-standard pollution exclusion clauses, the court confined its analysis to the standard clause. *Id.* For the language of the standard pollution exclusion clause, see text accompanying *supra* note 6.

47. *Morton*, 629 A.2d at 846.

48. *Id.* at 847.

49. *Id.*

cidental” refers only to discharges that “occur abruptly or unexpectedly and are unintended.”⁵⁰

The court next sought to ascertain the extent to which the standard pollution exclusion clause should be given effect.⁵¹ First, the court looked at the circumstances surrounding the approval and adoption of the clause.⁵² The court noted that when the insurance industry sought approval from state regulatory authorities to add the pollution exclusion clause to standard CGL policies, the industry presented the clause as a mere clarification and continuation of existing coverage for pollution-caused property damage.⁵³ However, the court found this presentation to be grossly misleading.⁵⁴ Instead of clarifying and continuing coverage, the pollution exclusion clause, if given literal effect, severely *restricts* coverage for pollution damage.⁵⁵

50. *Id.* The New Jersey Supreme Court overruled the Appellate Division’s decision in *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987). *Morton*, 629 A.2d at 847. In *Broadwell*, the court held that “sudden” is ambiguous and should be construed against the insurer to mean unexpected and unintended. 528 A.2d at 85-86.

51. *Morton*, 629 A.2d at 848.

52. *Id.* at 848-55. The court explained that the pollution exclusion clause was added to CGL policies in response to the insurance industry’s concern about increased claims for environmental pollution damage. *Id.* at 849. “The insurer’s primary concern was that the occurrence-based policies, drafted before large scale industrial pollution attracted wide public attention, seemed tailor-made to extend coverage to most pollution situations.” *Id.* at 850 (quoting E. Joshua Rosenkranz, Note, *The Pollution Exclusion Through the Looking Glass*, 74 *Geo. L.J.* 1237, 1251 (1986)).

53. *Morton*, 629 A.2d at 851. When the Insurance Rating Board (“IRB”) and the Mutual Insurance Rating Bureau (“MIRB”) sought state regulatory approval to add the pollution exclusion clause to standard CGL policies, it submitted an explanatory memorandum which read in pertinent part:

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion *clarifies* this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused by injuries when the pollution or contamination results from an accident.

Id. (emphasis added).

In May 1970, the IRB filed the same memorandum with the New Jersey Department of Insurance. *Id.* This memorandum was the only explanation of the clause offered to New Jersey insurance authorities. *Id.*

54. *Id.* at 852. “[T]he first two sentences of the explanatory memorandum to state regulators are, to say the least, paradigmatic of understatement.” *Id.* “[T]o characterize so monumental a reduction in coverage as one that ‘clarifies the situation’ simply is indefensible.” *Id.* at 852-53.

55. *Id.* at 848. The *Morton* court found that the IRB’s explanatory memorandum misstated the actual effect of the pollution exclusion clause. *Id.* at 852. The court explained that “the 1966 version of the CGL policy offered broad coverage; it covered property damage resulting from gradual pollution and imposed no restriction on the ‘suddenness’ of the pollutant discharge.” *Id.* Therefore the first sen-

Significantly, the *Morton* court found that the insurance industry's representation of the pollution exclusion clause to state regulators "constituted virtually the only opportunity for arms-length bargaining by interests adverse to the industry."⁵⁶ In addition, the court asserted that as presented, the actual effect of the pollution exclusion clause, the elimination of all coverage for pollution-related claims except where discharges were abrupt and accidental, was not obvious to the regulatory authorities.⁵⁷

Second, the court examined the divergent judicial approaches to interpreting the standard pollution exclusion clause.⁵⁸ The New Jersey Supreme Court found that other courts tended to construe "sudden" most restrictively in cases where insureds intentionally and routinely discharged known contaminants.⁵⁹ Conversely, where the insured was less culpable, courts were more likely to consider non-temporal interpretations of "sudden and accidental."⁶⁰

The New Jersey Supreme Court chose not to join the controversy over the interpretation of "sudden." Rather, the court framed the issue as whether literal effect should be given to an exclusionary clause that severely reduces the coverage previously available for pollution-caused property damage, under circumstances in which misrepresentation by the insurance industry induced state regulatory authorities to approve the clause.⁶¹ The court concluded that to enforce the clause as written would contravene New Jersey's "strong public policy requiring regulation of the insurance business in the public interest, and would reward the industry for its misrepresentation and nondisclosure to state regulatory authorities."⁶²

tence of the explanatory memorandum which states, "[c]overage for pollution or contamination is *not provided in most cases under present policies . . .*" is not true. *Id.* (emphasis added).

Also, the second sentence of the memo which states that "[t]he above exclusion 'clarifies' this situation . . ." is false and misleading. *Id.* The insurance industry contended that the pollution exclusion clause denies coverage for all pollution damage, irrespective of the insured's intent, unless the discharge was "sudden" (defined as abrupt) and "accidental." *Id.* at 853. In contrast, CGL policies previously extended coverage to most pollution situations. *Id.* at 850. Therefore, rather than clarify the scope of coverage, the pollution exclusion clause severely restricts coverage provided by prior occurrence-based policies. *Id.* at 853.

56. *Id.* at 848.

57. *Morton*, 629 A.2d at 848.

58. *Id.* at 855-70.

59. *Id.* at 870.

60. *Id.* at 871. For a summary of cases in which courts have considered nontemporal interpretations of "sudden and accidental," see *id.* at 861.

61. *Morton*, 629 A.2d at 872.

62. *Id.* at 873.

Despite having never applied the estoppel doctrine in a regulatory context, the court found that the doctrine was applicable in these circumstances.⁶³ Relying on principles of equity and fairness, the court ruled that the insurance industry was bound by the Insurance Regulatory Board's ("IRB") statements to state authorities regarding the effect of the pollution exclusion clause.⁶⁴

The court ruled that the pollution exclusion clause must be construed in a manner consistent with the objectively reasonable expectations of state regulatory authorities.⁶⁵ Accordingly, the court held that the scope of coverage under the clause is identical to coverage provided under previous occurrence-based policies, with one exception.⁶⁶ The clause "preclude[s] coverage in cases in which the insured *intentionally* discharges a known pollutant, irrespective of whether the resulting property damage was intended or expected."⁶⁷

C. The Definition of "Occurrence"

Finally, the *Morton* court turned to the issue of whether the pollution in Berry's Creek and the adjacent tract was the result of an "accident" or an "occurrence" within the meaning of the various CGL policies.⁶⁸ The court began by summarizing its analysis in *Voorhees v. Preferred Mutual Insurance Co.*⁶⁹ which addressed analogous issues, although in a different context.⁷⁰ *Voorhees* involved a

63. *Id.* at 874.

64. *Id.*

65. *Morton*, 629 A.2d at 875.

66. *Id.* For a discussion of previous occurrence-based policies, see *supra* note 3.

67. *Morton*, 629 A.2d at 875 (emphasis added). The court emphasized that its decision does not preclude the insurance industry from promulgating restrictive coverage provisions in CGL policies. *Id.* Rather, the decision stands for the proposition that when the industry restricts coverage of risks, it must fully disclose the scope of the restrictions. *Id.* at 876.

68. *Id.* The court explained that CGL policies prior to October 1964 provided coverage for "all sums which the insured shall become legally obligated to pay . . . for damages because of injury to or destruction of property . . . caused by accident." *Id.* (emphasis added). In 1964, the phrase "caused by accident" was replaced by the words "resulting from an occurrence." *Id.* For the definition of "occurrence," see *supra* note 3 and accompanying text.

69. 607 A.2d 1255 (N.J. 1992).

70. *Morton*, 629 A.2d at 877-79. In *Voorhees*, the insured was sued for damages resulting from her statements made at a public meeting regarding the incompetency of her child's teacher. *Id.* at 877. The homeowner's policy at issue provided coverage for liability caused by an occurrence (defined as an accident). *Id.* The insurance company disclaimed coverage on the basis that the insured's intentional act caused the injury. *Id.*

claim under an occurrence-based homeowner's policy.⁷¹ The *Voorhees* court held that an injury is caused by an "occurrence" if the injury is unintended and unexpected. It is irrelevant whether the act that caused the injury is intended or expected.⁷² The court also held that "absent exceptional circumstance," a subjective intent standard should be used to determine intent to injure.⁷³

The court then applied its rationale in *Voorhees* to the issue in *Morton*.⁷⁴ Explaining that "[a]bsent 'smoking gun' testimony from a disgruntled employee, proof of subjective intent to cause environmental harm will rarely be available in coverage litigation,"⁷⁵ the court declined to adopt a subjective intent standard to determine coverage for environmental pollution.⁷⁶ The court also refused to adopt a general rule that an insured's knowing discharge of pollutants will justify a presumption that injury was intended.⁷⁷ Instead, the court held "that in environmental-coverage litigation a case-by-case analysis is required in order to determine whether, in the context of all the available evidence, 'exceptional circumstances [exist] that objectively establish the insured's intent to injure.'"⁷⁸ In *Morton's* case, the court held that because *Morton's* predecessors had

71. *Id.* at 877.

72. *Id.* at 878.

73. *Id.* The court also discussed its holding in *SL Indus., Inc. v. American Motorists Ins. Co.*, 607 A.2d 1266 (N.J. 1992). In that coverage case, the underlying suit was predicated on allegations of age discrimination and fraud. *Morton*, 629 A.2d at 878. The issue before the court was "whether any intent to injure will render the resulting injury intentional, whether the wrongdoer must intend the specific injury that results, or whether there is some middle ground between the approaches." *Id.* at 879. The court held that if the insured intends or expects to cause some type of injury, then coverage is precluded. *Id.* If the severity of the injury is improbable, however, then the court must determine whether the insured subjectively intended or expected to cause the actual injury. *Id.*

74. *Morton*, 629 A.2d at 879.

75. *Id.*

76. *Id.* at 879-80.

77. *Id.* at 879. The court distinguished an environmental pollution coverage claim from a claim in which an insured is sued for sexual molestation of children in a day-care center. *Id.* In the latter situation, the "reprehensible conduct justifies a presumption that injury was intended." *Id.* In the former case, the presumption is unjustified because insureds "vary significantly in their degree of culpability." *Id.*

78. *Morton*, 629 A.2d at 880. (quoting *Voorhees*, 607 A.2d at 265).

Those circumstances include the duration of the discharges, whether the discharges occurred intentionally, negligently, or innocently, the quality of the insured's knowledge concerning the harmful propensities of the pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility of likelihood of harm.

Id.

intentionally and routinely discharged known pollutants, Morton was not entitled to indemnification.⁷⁹

III. CONCLUSION

In a unanimous decision, the New Jersey Supreme Court in *Morton* ruled that insurance companies must provide coverage to insureds under standard form CGL policies⁸⁰ for unintentional pollution, even if the pollution occurs gradually. Although the decision appears to be a victory for policyholders, it does not leave the insurance industry completely defenseless. The decision constitutes a broader interpretation of the qualified pollution exclusion clause than had previously existed under New Jersey law.⁸¹

Morton's significance extends beyond its resolution of coverage disputes between corporate polluters and the insurance industry. First, the decision affects New Jersey's 567 municipalities, each of which face potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")⁸²

79. *Id.* In support of its holding, the court listed several instances, beginning in April 1956, in which the Department of Health warned Morton's predecessors that the plant's effluent was "unacceptable by reason of a high suspended solids content and a high [Biological Oxygen Demand]." *Id.* In addition, the court recalled a consulting firm's reports in 1959 and 1960 which revealed that the plant's discharges contained "deleterious characteristics." *Id.* The court also emphasized the plant owners' "evasive conduct from 1956 to 1970, involving a series of unfulfilled representations and undertakings to remediate the quality of the emissions." *Id.* at 880-81.

80. Actually, The New Jersey Supreme Court's construction of the standard pollution exclusion clause only applies to liability policies in effect from 1973 to 1985. Since 1986, liability policies have eliminated coverage for all pollution. Thus, insurers are not liable for pollution caused since these new policies have come into use. See *supra* note 3.

The *Morton* decision is significant, however, because CGL policies offer "prospective coverage." Ballard & Manus, *supra* note 3, at 612 n.6. In other words, insurers are obligated to provide protection against liability arising during the policy period, irrespective of the date a claim is filed against the insured. *Id.*

81. Prior to the *Morton* decision, New Jersey courts consistently construed the pollution exclusion clause as a restatement of the definition of "occurrence." The courts interpreted "sudden and accidental" to mean "unexpected and unintended." See *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co. of New York*, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987); *Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co.*, 451 A.2d 990, 992 (N.J. Super. Ct. Law Div. 1982); *CPS Chem. Co., Inc. v. Continental Ins. Co.*, 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *rev'd on other grounds*, 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985); *Lansco, Inc. v. Dep't of Envtl. Protection*, 350 A.2d 520, 524 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 372 A.2d 322 (N.J. 1977).

82. Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-75 (1988 & Supp. IV 1992). Municipalities are not exempt from CERCLA liability. *B.F. Goodrich Co. v. Murtha*, 958

and the New Jersey Spill Act⁸³ for the administration and disposal of solid waste.⁸⁴

Second, *Morton* may influence other jurisdictions to consider insurers' admissions or representations to state regulatory authorities in interpreting insurance policy language. Under the traditional approach to interpretation of insurance contracts, a court first must determine that the questionable language is ambiguous before considering extrinsic materials regarding the parties' intent and understanding of the contract.⁸⁵ However, the New Jersey Supreme Court found the insurers' representations to be relevant in interpreting the scope of standard CGL policies independent of the ambiguity issue.

Third, and finally, *Morton* affects out-of-state corporations whose waste is ultimately disposed of in New Jersey waste sites. In a companion case handed down on the same day as *Morton*, the court in *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Ass'n Insurance Co.*⁸⁶ held that when parties to an insurance contract can reasonably foresee that New Jersey waste sites will receive the insured's waste, New Jersey law will be applied to construe the insurance pol-

F.2d 1192 (2d Cir. 1992); *Transportation Leasing Co. v. California*, No. 89-7368, 1990 U.S. Dist. LEXIS 18,193 (C.D. Cal. Dec. 5, 1990).

83. For a discussion of the Spill Act, see *supra* note 25.

84. *Policyholder's Cleanup May be Insured if Discharge Unintended*, N.J. High Court Rules, Env't Rep. (BNA) at 55 (July 30, 1993). The majority of municipalities are unintentional polluters and thus, will likely benefit from the *Morton* decision. *Id.* For a general discussion of municipal liability under federal and state environmental enforcement regulations, see David V. Van Slyke, *Municipalities and CERCLA: the Clean Up Cost Allocation Conundrum*, 5 VILL. ENVTL. L.J. 53 (1994); see also Lynne Reinders, *Municipal Liability Under Superfund as Generators of Municipal Waste: Addressing the Plight of Local Governments*, 43 WASH. U. J. URB. & CONTEMP. L. 419 (1993); Rena Steinzor, *Local Government and Superfund: Who Will Pay the Tab?*, 22 URB. LAW 79, 105-13 (1990); Steinzor and Lintner, *Should Taxpayers Pay the Cost of Superfund?*, 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,089 (Feb. 1989); Robert Tomsho, *Pollution Ploy: Big Corporations Hit by Superfund Cases Find Way to Share Bill*, WALL ST. J., Apr. 2, 1991, at A1.

85. Mathias and Shugrue, *Emerging Issues: The Policyholder Perspective*, 477 PLI/Lit 9 (1993); see, e.g. *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So.2d 700, 705 (Fla. 1993) ("Because we conclude that the policy language is unambiguous, we find it inappropriate and unnecessary to consider the arguments pertaining to the drafting history of the pollution exclusion clause."). *ACL Technologies*, 22 Cal. 2d at 217 ("the drafting history argument is inconsistent with the rules of insurance contract interpretation").

86. 629 A.2d 885 (N.J. 1993).

icy.⁸⁷ As a result, the *Morton* decision will heavily impact litigants both within and outside of New Jersey state lines.

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87. *Id.* at 892. In *Spruance*, the New Jersey Supreme Court addressed the issue of whether New Jersey law should be applied to construe a CGL policy issued by an out-of-state insurer which covered an out-of-state defendant's operations. *Id.* at 886. The court utilized the "dominant significant relationship" test and found that New Jersey law applied. *Id.* at 893. In support of its holding, the court emphasized that New Jersey has strong interests in remediating in-state toxic-waste sites and compensating victims of in-state pollution, while Pennsylvania has virtually no interests regarding this particular policy. *Id.*

