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2016]

HICKORY DICKORY DOCK, THE NEW JERSEY SUPREME COURT  
STOPS THE CLOCK: LEGISLATURE MUST REFORM THE  
SPILL ACT FOLLOWING *MORRISTOWN*  
*ASSOCIATES v. GRANT OIL*

MARIA SALVEMINI\*

“Account must also be taken of the pollution produced by residue, including dangerous waste present in different areas. . . . The earth, our home, is beginning to look more and more like an immense pile of filth.”<sup>1</sup>

I. ONCE UPON A TIME: A LOOK AT THE DEVELOPMENT OF THE  
NEW JERSEY SPILL ACT

In 2010, the Department of Environmental Protection (DEP) identified over 20,000 sites in New Jersey that require remediation due to contamination.<sup>2</sup> Estimates suggest over 53,000 sites have been remediated from 1979 to 2010 in New Jersey.<sup>3</sup> Despite remediation efforts, the number of contaminated sites increased.<sup>4</sup> The DEP attributed the rise to factors including “increasing population, a growing industrial base that relies on the use of hazardous materials, as well as increased awareness of the risk posed by certain chemicals, and new technologies that are able to detect these chemicals.”<sup>5</sup>

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\* J.D. Candidate, 2017, Villanova University Charles Widger School of Law; B.A. 2014, Villanova University. I would like to thank my family, especially my parents, Pasquale and Martha Salvemini, and brother, Corrado Salvemini, for their love and encouragement throughout my academic career, and Joseph Schiazza for his constant support. The inspiration for the title comes from the nursery rhyme “Hickory Dickory Dock” and David Edelstein and Craig Huber’s article, *Tick, Tock: Appellate Court Starts the Clock on Spill Act Contribution Claims*, N.J. L.J., Nov. 21, 2013, available at <http://www.njlawjournal.com/id=1202629127153/Tick-Tock-Appellate-Court-Starts-the-Clock-on-Spill-Act-Contribution-Claims?srreturn=20160230000732> [<http://perma.cc/27JY-ZQCH>].

1. Pope Francis, Encyclical Letter *Laudato Si* of the Holy Father Francis on Care for Our Common Home 1, 17 (2015), available at [http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si\\_en.pdf](http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf) [<https://perma.cc/3LKK-N7KQ>] (quoting thoughts on pollution and climate change).

2. See *Site Remediation*, N.J. DEP’T ENVTL. PROT. 1, 1 (2014), available at <http://www.nj.gov/dep/dsr/trends/pdfs/site.pdf> [<https://perma.cc/ZA9W-MXTP>] (discussing potential site contamination in New Jersey).

3. See *id.* at 2 (estimating number of remediated sites from 1970 to 2010).

4. See *id.* at 1–2 (explaining increase in contaminated sites in New Jersey).

5. See *id.* at 2 (explaining possible factors causing increase in number of contaminated sites).

The New Jersey legislature passed the New Jersey Spill Compensation and Control Act (Spill Act) in 1976.<sup>6</sup> The Spill Act allows parties who engage in remediation of contaminated property to collect from responsible parties via contribution claims.<sup>7</sup> The legislature originally passed the Spill Act due to concerns over offshore oil spills, but later amended the law to extend to land contamination.<sup>8</sup> Under the Spill Act, the available defenses were amended to include only those due to “war, sabotage, or God.”<sup>9</sup> The Spill Act also added a private right of contribution, so parties paying for the remediation can recover from other responsible parties.<sup>10</sup> Despite previous amendments to refine and clarify the Spill Act, the legislature never explicitly added a statute of limitations for contribution claims.<sup>11</sup> The Spill Act’s perceived silence as to whether a statute of limitations applies to contribution claims caused disagreement among the New Jersey state and district courts.<sup>12</sup> Specifically, the New Jersey courts disagreed about whether a six-year statute of limitations applied to contribution claims.<sup>13</sup>

In the highly anticipated *Morristown Associates v. Grant Oil Co.*<sup>14</sup> decision, the New Jersey Supreme Court addressed whether a statute of limita-

6. See N.J. STAT. ANN. § 58:10-23.11 (West 2015). The Spill Act was the “first program in the [United States] to cleanup, or remediate, contaminated sites that posed a danger to human health and the environment.” See *Site Remediation*, *supra* note 2, at 1 (discussing history of Spill Act).

7. See N.J. STAT. ANN. § 58:10-23.11f(a)(2)(a) (“In resolving contribution claims, a court may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate.”); see also 1991 N.J. Laws 316–17 (amending Spill Act to include contribution provision).

8. See, e.g., *Buonviaggio v. Hillsborough Twp. Comm.*, 583 A.2d 739, 739–40 (N.J. 1991) (discussing fear about contamination caused by offshore spills). The Spill Act went through two notable amendments, the first in 1979 and the second in 1991. See 1991 N.J. Laws 307 (amending Spill Act); 1979 N.J. Laws 1412 (same).

9. See N.J. STAT. ANN. § 58:10-23.11g(d)(1) (stating defenses available under contribution claims).

10. See *id.* § 58:10-23.11f(a)(2)(a) (“In an action for contribution, the contribution plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable pursuant to [other provisions].”); see also 1991 N.J. Laws 307 (adding right of contribution under Spill Act).

11. See, e.g., *Reichhold, Inc. v. U.S. Metals Ref. Co.*, 655 F. Supp. 2d 400, 446 (D.N.J. 2009) (“The Spill Act does not contain a statute of limitations for private contribution actions.”). See generally N.J. STAT. ANN. § 58:10-23.11 (remaining silent on statute of limitations for contribution claims).

12. See *infra* note 13.

13. See, e.g., *Reichhold*, 655 F. Supp. 2d at 447 (holding six-year statute of limitations applies to contribution claims under Spill Act); *Champion Labs., Inc. v. Metex Corp.*, No. 02-5284 (WHW), 2005 WL 1606921, at \*5 (D.N.J. July 8, 2005) (holding six-year statute of limitations applies to contribution claims under Spill Act); *Mason v. Mobil Oil Corp.*, No. A-885-98T1, 1999 WL 33605936, at \*4 (N.J. Super. Ct. App. Div. June 8, 1999) (per curiam) (holding six-year statute of limitations does not bar contribution action under Spill Act); *Pitney Bowes, Inc. v. Baker Indus., Inc.*, 649 A.2d 1325, 1328 (N.J. Super. Ct. App. Div. 1994) (holding statute of repose does not bar contribution action under Spill Act).

14. (*Morristown Assocs. II*), 106 A.3d 1176 (N.J. 2015).

tions applies to contribution claims under the Spill Act.<sup>15</sup> The New Jersey Supreme Court overruled two lower courts and held no statute of limitations applies to contribution claims under the Spill Act.<sup>16</sup> Focusing on the legislative intent and the plain text of the statute, the court invited the legislature to take action if it disagreed with its ruling, indicating the court's ruling may not be the final word on the matter.<sup>17</sup>

This Note agrees that the *Morristown Associates* ruling was correct, but argues the legislature should add a statute of limitations to the Spill Act.<sup>18</sup> A statute of limitations would be beneficial to prevent the Spill Act from unfairly favoring plaintiffs while making it more difficult for defendants to dismiss contribution claims.<sup>19</sup> Part II of this Note provides an overview of the Spill Act and its amendments and describes the state and federal case law that preceded *Morristown Associates*.<sup>20</sup> Part III sets out the facts, holding, and analysis of the *Morristown Associates* decision.<sup>21</sup> Part IV contends

15. See Lawrence E. Bradford, *Environmental News Flash: New Jersey Supreme Court Rules That Six-Year Statute of Limitations Does Not Apply to Spill Act Claims*, COLE SCHOTZ P.C. ENVTL. & ENERGY L. MONITOR (Jan. 26, 2015), <http://www.environmentalandenergylawmonitor.com/2015/01/articles/environmental-litigation/new-jersey-supreme-court-rules-that-six-year-statute-of-limitations-does-not-apply-to-spill-act-claims/> [https://perma.cc/69K3-NWTV] (emphasizing anticipation over supreme court decision). Environmental attorneys considered the court's decision in *Morristown Associates* critical to plaintiffs' ability to bring contribution claims and defendants' means to defeat them. See, e.g., Bruce Katcher, Nicole Moshang & Diana Silva, *The New Jersey Supreme Court Holds Spill Act Contribution Claims Are Not Subject to a Statute of Limitations Defense*, SPECIAL ALERT (Manko, Gold, Katcher & Fox, Phila., Pa.), Feb. 3, 2015, available at <http://www.mankogold.com/pp/alert-504.pdf> [https://perma.cc/9KM8-9E7R] (calling *Morristown v. Associates* "landmark decision"). Attorneys were also concerned that a ruling imposing a statute of limitations could result in numerous malpractice lawsuits. See Martin Bricketto, *NJ High Court Mulls Time Limit in Spill Act Suits*, LAW360 (Oct. 6, 2014), <http://www.law360.com/articles/584459/nj-high-court-mulls-time-limit-in-spill-act-suits> [https://perma.cc/BSM9-55M6] (discussing tension concerning threat of malpractice litigation following ruling that imposed statute of limitations). "Defendants hoping the New Jersey Supreme Court will bless a six-year window for private contribution actions under the state's Spill Compensation and Control Act fought back Monday against arguments that such a ruling would represent a sea change and unfairly expose attorneys to malpractice claims." *Id.*

16. See generally *Morristown Assocs. II*, 106 A.3d at 1189 ("In sum, the plain text supports that the Legislature intended to include no statute of limitations defense for contribution defendants.").

17. See *id.* at 1190 (indicating legislature can "fix any interpretive misunderstanding" by court); see also *infra* notes 162–67 and accompanying text (emphasizing impact of *Morristown Associates* decision). The New Jersey Supreme Court actually invited the legislature to take action to amend the Spill Act if it disagreed with its interpretation of the Act. See *id.*

18. For a further discussion of the need to reform the Spill Act, see *infra* notes 125–56 and accompanying text.

19. For a further discussion of the need for a legislative amendment of the Spill Act, see *id.*

20. For a further discussion of the Spill Act and relevant case law, see *infra* notes 25–76 and accompanying text.

21. For a further discussion of the facts, procedural history, and holding in *Morristown Associates*, see *infra* notes 77–123 and accompanying text.

that the legislature should amend the Spill Act to include a statute of limitations.<sup>22</sup> Part V provides advice for practitioners, focusing on how attorneys should advise their clients in light of *Morristown Associates*.<sup>23</sup> Part VI explores the impact of the decision.<sup>24</sup>

## II. WINDING BACK THE CLOCK: THE LAWS LEADING UP TO *MORRISTOWN ASSOCIATES*

The New Jersey legislature enacted the Spill Act in 1976 to ensure the safe handling of hazardous substances and establish liability in the event such substances are discharged and cause damage.<sup>25</sup> Over the next few decades, the legislature amended the Spill Act to expand liability and limit available defenses, allow for contribution claims, and extend liability over owners of real property for discharge on their lands.<sup>26</sup> Despite these amendments, confusion over whether the Spill Act is silent as to a statute of limitations led state and federal courts to reach contradictory holdings.<sup>27</sup>

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22. For a further discussion of the need for legislative reform, see *infra* notes 124–56 and accompanying text.

23. For a further discussion of advice for attorneys following the *Morristown Associates* decision, see *infra* notes 157–61 and accompanying text.

24. For a further discussion of the impact of *Morristown Associates*, see *infra* notes 162–67 and accompanying text.

25. See N.J. STAT. ANN. § 58:10-23.11a (West 2015) (stating legislative intent behind Spill Act).

The Legislature intends by the passage of this act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharges, and to provide for the defense and indemnification of certain persons under contract with the State for claims or actions resulting from the provision of services or work to mitigate or clean up a release or discharge of hazardous substances.

*Id.*

26. See 1993 N.J. Laws 567 (amending Spill Act to extend liability); 1991 N.J. Laws 307 (amending Spill Act); 1979 N.J. Laws 1412 (same); see also Michael D. Sirota, Michael S. Meisel & Gerard M. Giordano, *New Jersey Spill Compensation and Control Act ("Spill Act")*, 44 N.J. PRAC., DEBTOR–CREDITOR L. & PRAC. § 9.13 (discussing 1993 amendment to Spill Act making “any person who owns real property that was acquired after September 14, 1993 at which there has been a discharge, a person responsible for that discharge”).

27. For a further discussion of the division between New Jersey state and federal court, see *infra* notes 42–76 and accompanying text.

A. *New Jersey Spill Act Provides Around-the-Clock Protection for the State's Most Valuable Resources*

The Spill Act was born out of fear that offshore drilling would harm New Jersey's environment and tourist industry.<sup>28</sup> The state legislature created the Spill Act to protect and preserve land and water resources and to promote the "health, safety and welfare" of New Jersey's residents.<sup>29</sup> The Spill Act was the first program in the country to clean up contaminated

28. See N.J. STAT. ANN. § 58:10-23.11a ("[H]azardous substances . . . whether onshore or offshore[ ] [are] a hazardous undertaking and impose[ ] [a] risk of damage to persons and property . . . "); Marsh v. N.J. Dep't of Envtl. Prot., 703 A.2d 927, 930 (N.J. 1997) (illustrating inspiration behind creation of Spill Act and explaining "The Spill Act was adopted in 1975 to deal with potential contamination from off-shore oil shore oil spills . . . "); Francis E.P. McCarter, *New Jersey Clean up Your "Act": Some Reflections on the Spill Compensation and Control Act*, 38 RUTGERS L. REV. 637, 643 (1986) (explaining events leading up to and influencing creation of Spill Act). In 1967, the Torrey Canyon oil spill seeped 100,000 tons of crude oil off the coast of Cornwall in British waters, severely damaging beaches and harming wildlife. See *id.* at 642 (noting important supertanker accidents prior to commencement of New Jersey oil drilling); Patrick Barkham, *Oil Spills: Legacy of the Torrey Canyon*, GUARDIAN (June 24, 2010), <http://www.theguardian.com/environment/2010/jun/24/torrey-canyon-oil-spill-deepwater-bp> [https://perma.cc/9RGQ-CHPN] (discussing impact of Torrey Canyon oil spill and damage caused to beaches and reporting "[a]n estimated 15,000 birds were killed [and] [s]eal and other marine life also perished"); Reuters, *Britain Faulted on Oil-Spill Damage Estimates*, N.Y. TIMES, Feb. 27, 1996, <http://www.nytimes.com/1996/02/27/world/britain-faulted-on-oil-spill-damage-estimates.html> [https://perma.cc/N7QU-8RPN] (discussing extent of damage caused by Torrey Canyon oil spill and reporting).

29. See N.J. STAT. ANN. § 58:10-23.11a (noting purpose of Spill Act). The legislature emphasized the state's land and water resources are very important. See *id.* ("The Legislature finds and declares: that New Jersey's lands and waters constitute a unique and delicately balanced resource . . . "). In particular the legislature stressed, "that the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of [New Jersey] . . . ." See *id.*; see also *Buonviaggio v. Hillsborough Twp. Comm.*, 583 A.2d 739, 740 (N.J. 1991) ("The New Jersey tourist industry dreaded a massive oil spill that could seriously damage the beaches and waterways of the state."). The Act was originally adopted because of concerns surrounding expected development of gas and oil reserves off New Jersey's coast. See Elga A. Goodman, Kristina K. Pappa, Brent A. Olson, Susanne Peticolas & Paul M. Hauge, *Hazardous Discharge Prevention and Liability—The Spill Compensation and Control Act*, 50A N.J. PRAC., BUS. L. DESKBOOK § 27:12 ("Originally adopted in 1976 to address concerns about the anticipated development of oil and gas reserves off the New Jersey coast, the Spill Act was later amended to address other hazardous substance issues." (footnote omitted)). The legislature articulated its concern for the negative impact petroleum products could have on New Jersey, and emphasized how the Spill Act was supposed to alleviate such concerns. See 1976 N.J. Laws 622 (emphasizing intent behind Spill Act).

The Legislature finds and declares the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State. The Legislature intends by the passage of this act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a

sites.<sup>30</sup> The New Jersey legislature articulated the importance of remediating contaminated lands, which often go unused or underutilized and become an “economic drain” on the state and local government.<sup>31</sup> Remediation restores the utility of contaminated sites.<sup>32</sup> The Spill Act also created a Spill Fund to pay for costs associated with prevention and remediation, which was an important component of the law.<sup>33</sup>

### 1. 1979 Revision

Following the tragedy at Love Canal, the New Jersey legislature made substantial changes to broaden the scope of the Spill Act.<sup>34</sup> The Spill Act’s liability section was amended to hold an owner or operator “jointly

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fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge.

*Id.*

30. See *Site Remediation*, *supra* note 2 (discussing history and progressiveness of Spill Act).

The federal government passed the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) in 1980. See generally 42 U.S.C. §§ 9601–9628 (2012). Comparisons have been made between the Spill Act and CERCLA, but there are important differences. See, e.g., *New Jersey Has No Time Limit on Cleanup-Contribution Actions, State High Court Rules: Morristown Assocs. v. Grant Oil Co.*, WESTLAW J. ENVTL., Feb. 18, 2015, at 2, \*1 (“The Spill Act is New Jersey’s equivalent to the federal Superfund law—the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601—which has similar contribution provisions to enable polluters that voluntarily clean up spills to recoup costs from other responsible parties.”). The most significant difference between the two pieces of legislation, for the purposes of this Note, is that CERCLA has an explicit statute of limitations for contribution claims and the Spill Act does not. See *Morristown Assocs. II*, 106 A.3d 1176, 1188 n.7 (N.J. 2015) (noting important distinction between CERCLA and Spill Act); *N.J. Dep’t of Env’t. Prot. v. Dimant*, 51 A.3d 816, 831–33 (N.J. 2012) (distinguishing CERCLA from Spill Act). Another important difference between the Spill Act and CERCLA is that the former includes petroleum in its definition of “hazardous substances,” whereas CERCLA does not. See Robert B. McKinstry, Jr., *The Role of State “Little Superfunds” in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, 5 VILL. ENVTL. L.J. 83, 98 (1994) (discussing differences between CERCLA and Spill Act).

31. See N.J. STAT. ANN. § 58:10-23.11a (explaining contaminated sites must be cleaned up and “returned to productive use” to benefit public interest).

32. See *id.* (discussing importance of cleaning contaminated sites).

33. See *id.* § 58:10-23.11g; see also *Buonviaggio*, 583 A.2d at 740. The court in *Buonviaggio* explains “[t]he purpose of the Spill Fund is to finance the prevention and cleanup of oil spills and hazardous-waste discharges and to compensate resort businesses and other people damaged by such discharges.” See *id.*

34. See 1979 N.J. Laws 1412 (amending Spill Act); see also *Marsh v. N.J. Dep’t of Env’t. Prot.*, 703 A.2d 927, 930 (N.J. 1997) (discussing inspiration for 1979 Spill Act Revision). Love Canal was an unfinished waterway in New York that had been used as a chemical dumping site before it was covered with dirt and sold to the local school district. See Andrew C. Revkin, *Love Canal and Its Mixed Legacy*, N.Y. TIMES, Nov. 25, 2013, [http://www.nytimes.com/2013/11/25/booming/love-canal-and-its-mixed-legacy.html?\\_r=0](http://www.nytimes.com/2013/11/25/booming/love-canal-and-its-mixed-legacy.html?_r=0) [<https://perma.cc/PFB7-C9TB>]. Following Love Canal, the severely contaminated land had a devastating impact on the health of nearby residents and the environment. See *id.*

and severally” liable if a discharge resulted from “gross negligence, willful misconduct,” or “a gross or willful violation.”<sup>35</sup> Most importantly, the defenses available under the Spill Act were changed.<sup>36</sup> Governmental negligence or third-party defenses were removed from the Spill Act so that “an act or omission caused solely by war, sabotage, or God, or a combination thereof” were the only available defenses.<sup>37</sup>

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35. See N.J. STAT. ANN. § 58:10-23.11g(b) (adding joint and several liability); *Morristown Assocs. II*, 106 A.3d at 1185–86 (discussing amendment to subsection (b) of Act’s liability section).

The original text of the statute capped recoverable damages against the owner or operator of a major facility or vessel at a maximum of \$50,000,000.00, unless the discharge resulted from “(1) gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge, or (2) a gross or willful violation of applicable safety, construction or operating standards or regulations.” See *id.*; see also 1976 N.J. Laws 627. The text of the Act previously stated that “such maximum limitation shall not apply and the owner or operator shall be liable for the full amount of such damages.” See *id.* However, the 1979 amendment altered the provision such that the maximum limitation no longer applies and “the owner or operator shall be liable, *jointly and severally*, for the full amount of such damages.” See 1979 N.J. Laws 1419 (emphasis added).

When two or more parties are *jointly and severally liable* for a tortious act, each party is independently liable for the full extent of the injuries stemming from the tortious act. Thus, if a plaintiff wins a money judgment against the parties collectively, the plaintiff may collect the full value of the judgment from any one of them. That party may then seek contribution from other wrong-doers. See *Joint and Several Liability*, CORNELL U. L. SCH. LEGAL INFO. INST. (Nov. 15, 2015), [https://www.law.cornell.edu/wex/joint\\_and\\_several\\_liability](https://www.law.cornell.edu/wex/joint_and_several_liability) [<https://perma.cc/ZW46-3H5W>].

Further, the class of potentially liable people was expanded. See 1979 N.J. Laws 1419 (expanding who can be held liable under Act). The amended section included the requirement of joint and several liability. See *id.* at 1419–20 (discussing amendment). The amended section reads:

Any person who has discharged a hazardous substance or is any way responsible for any hazardous substance which the department has removed or is removing pursuant to subsection b. of section 7 of this act shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.

*Id.* at 1420.

36. See 1979 N.J. Laws 1419 (discussing change to available defenses under Spill Act).

37. See N.J. STAT. ANN. § 58:10-23.11g(d)(1) (listing defenses available under contribution claims); see also 1979 N.J. Laws 1419–20 (discussing change to available defenses under Spill Act). The Act as it was passed in 1976 originally read:

An act or omission caused solely by war, sabotage, governmental negligence, God, or a third party or a combination thereof shall be the only defenses which may be raised by an owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act. For the purposes of this act, no employee or agent of such owner or operator shall be considered as a third party. Any other person shall have available to him any defense authorized by common or statutory law.

1976 N.J. Laws 627. Notably, the 1979 amendments also deleted the sentence in the original text of Section (d) permitting common law and statutory defenses. See 1979 N.J. Laws 1419. The amended Section (d) reads:



## 2. 1991: Amendment and Inclusion of Contribution Provision

The Spill Act did not originally contain a contribution provision, but popularity of private party remediation actions alerted the legislature to this need.<sup>38</sup> The development of joint and several strict liability under the Spill Act holds parties liable for the entire cost of the cleanup, regardless of the party's level of responsibility.<sup>39</sup> As a result, more remediation actions were brought by private parties, alerting the legislature to the problem that a right of contribution existed in tort law but not under the Spill Act.<sup>40</sup> In 1991, amendments to the Spill Act included a contribution provision allowing those who clean up contaminated sites to seek contribution from liable parties.<sup>41</sup>

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An act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for discharge in any action arising under the provisions of this act.

1979 N.J. Laws 1420.

38. See *infra* notes 39–41 (discussing 1991 addition of contribution provision).

39. See *Magic Petroleum Corp. v. Exxon Mobil Corp.*, 95 A.3d 175, 182 (N.J. 2014) (describing joint and several liability structure of Spill Act).

40. See *Morristown Assocs. II*, 106 A.3d 1176, 1187 (N.J. 2015) (discussing increase in private party actions and legislature's awareness of disparity); see also S. 2657 & Gen. Assemb. 3659, 204th Leg. (N.J. 1991) (Sponsor's Statement) (recognizing "[i]n the normal course of tort law, this person would have a right of contribution, the right to collect money from others jointly responsible for the costs" and Spill Act lacked this). "The prevalence of private party actions by remediating parties, which include demands for contribution by other responsible parties not subject to an agreement with the DEP, revealed to policy makers an ambiguity in the Spill Act." *Morristown Assocs. II*, 106 A.3d at 1187.

41. See N.J. STAT. ANN. § 58:10-23.11f(a)(2)(a) (listing provisions of Spill Act). The Spill Act was amended to "allow [ ] those parties who enter into an agreement with [DEP] to remove a hazardous discharge to seek contribution from those responsible parties who have not entered into such an agreement." *Morristown Assocs. II*, 106 A.3d at 1187 (alterations in original). The contribution provision reads:

Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance. In an action for contribution, the contribution plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable pursuant to [N.J.S.A. 58:10-23.11g(c)], and the contribution defendant shall have only the defenses to liability available to parties pursuant to [N.J.S.A. 58:10-23.11g(d)]. In resolving contribution claims, a court may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate.

N.J. STAT. ANN. § 58:10-23.11f(a)(2)(a); see also 1991 N.J. Laws 316–17 (amending Spill Act to include contribution provision).

C. *Different Time Zones: State and Federal Court Divided  
on Statute of Limitations Issue*

The New Jersey state and federal court were divided on whether a statute of limitations applied to contribution claims under the Spill Act.<sup>42</sup> State courts, relying on precedent that dealt with the statute of limitations question and legislative intent, concluded no statute of limitations applied.<sup>43</sup> Conversely, the federal court relied on precedent that interpreted the statute's silence differently and applied a standard six-year statute of limitations.<sup>44</sup>

1. *State Case Law*

The New Jersey state court used a textual approach to conclude no statute of limitations applied to contribution claims under the Spill Act.<sup>45</sup> The court interpreted the Spill Act's list of defenses as explicit and conclusive; therefore, the court held the only available defenses were those listed in the Spill Act.<sup>46</sup> Based on this interpretation, the state court continuously refused to dismiss a contribution claim based on a statute of repose or statute of limitations defense.<sup>47</sup>

In *Pitney Bowes, Inc. v. Baker Industries, Inc.*,<sup>48</sup> the New Jersey Superior Court held a statute of repose could not be used to defeat a Spill Act

42. Compare *Pitney Bowes, Inc. v. Baker Indus., Inc.*, 649 A.2d 1325, 1328 (N.J. Super. Ct. App. Div. 1994) (holding no statute of limitations applies), with *Reichhold, Inc. v. U.S. Metals Ref. Co.*, 655 F. Supp. 2d 400, 447 (D.N.J. 2009) (holding six-year statute of limitations applies to contribution claims under Spill Act).

43. See, e.g., *Mason v. Mobil Oil Corp.*, No. A-885-98T1, 1999 WL 33605936, at \*4 (N.J. Super. Ct. App. Div. June 8, 1999) (per curiam) (holding statute of limitations does not bar contribution action under Spill Act).

44. See *Champion Labs., Inc. v. Metex Corp.*, No. 02-5284(WHW), 2005 WL 1606921, at \*5 (D.N.J. July 8, 2005) (applying six-year statute of limitations and holding plaintiff's contribution claim under Spill Act was time barred); *Montells v. Haynes*, 627 A.2d 654, 655 (N.J. 1993) (imposing statute of limitations on silent statute); *Pitney Bowes*, 649 A.2d at 1328 (holding ten-year statute of repose did not bar contribution action under Spill Act). See generally *Montells*, 627 A.2d at 655 (holding general statute of limitations applies to Law Against Discrimination claims where it was silent on such limitation); *Reichhold*, 655 F. Supp. 2d at 447 (holding six-year statute of limitations should apply to contribution claims under Spill Act).

45. See *Pitney Bowes*, 649 A.2d at 1326 (considering text of Spill Act).

46. See *Mason*, 1999 WL 33605936, at \*4 (holding statute of limitations does not bar contribution action under Spill Act); *Pitney Bowes*, 649 A.2d at 1325 (holding statute of repose does not bar contribution action under Spill Act).

47. See, e.g., *Pitney Bowes*, 649 A.2d at 1325 (deciding not to apply statute of repose or statute of limitations). One New Jersey practitioner claims the majority of attorneys in the state did not believe there was a statute of limitations. See *Bricketto*, *supra* note 15 ("Before an appellate decision in the case last year, there was almost no environmental practitioner in New Jersey who thought there was a statute of limitations for such actions . . .").

48. 649 A.2d 1325 (N.J. Super. Ct. App. Div. 1994).

contribution claim.<sup>49</sup> The court stressed that the legislature's intent in enacting the contribution provisions "was to encourage prompt and effective remediation by any responsible party who might otherwise be disinclined to do so because of the risk and burden of bearing the entire cost despite the responsibility of others for the creation and continuation of the problem."<sup>50</sup> The court determined that allowing the statute of repose to permit individuals covered under the Spill Act to escape liability would undermine legislative intent.<sup>51</sup> The court made it clear there was not a temporal defense available to defendants under the Spill Act.<sup>52</sup>

The New Jersey Superior Court directly addressed the statute of limitations question in *Mason v. Mobil Oil Corp.*<sup>53</sup> In *Mason*, the court held the

49. See *id.* at 1328 (holding statute of repose does not bar contribution action under Spill Act). A statute of repose is defined as "[a]ny law that bars claims after some action by the defendant, even if the plaintiff has not yet been injured." See *Statute of Repose*, CORNELL U. L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/statute\\_of\\_repose](https://www.law.cornell.edu/wex/statute_of_repose) [<https://perma.cc/FU9N-LMAE>] (last visited Mar. 30, 2016) (defining *statute of repose*); see also *Morristown Assocs. v. Grant Oil Co. (Morristown Assocs. I)*, 74 A.3d 968, 974 (N.J. Super. Ct. App. Div. 2013) ("A statute of repose is strictly applied to bar a claim without any regard to when the claimant discovered or could reasonably have discovered the harm."), *rev'd*, 106 A.3d 1176 (N.J. 2015).

In *Pitney Bowes*, the plaintiff subleased land that it discovered was contaminated by seepage of heating oil from improperly installed underground tanks. See *Pitney Bowes*, 649 A.2d at 1325–26. The plaintiff paid to clean and remediate the land and then sued for reimbursement in May 1991. See *id.* at 1326. The plaintiff amended its complaint, in 1992, after the legislature amended the Spill Act, "affording to those who pay for the remediation of a discharge of hazardous substances a private right of contribution against those who are also responsible for the discharge." See *id.*; see also N.J. STAT. ANN. § 58:10-23.11f (West 2015) (adding right of contribution to Spill Act).

50. See *Pitney Bowes*, 649 A.2d at 1326 (discussing legislative intent in enacting contribution provision of Spill Act). The court remarked, "[i]t is therefore self-evident that the statutory purpose and policy would be defeated by excluding from contribution liability the primarily responsible party because of the general and prior enacted statute of repose." See *id.* at 1327 (discussing importance of holding responsible parties accountable to preserve statutory intent). The court goes on to emphasize "the obviously overriding purpose of the Spill Act was to respond to the grave public consequences of hazardous-substance discharges that threaten the health and safety of everyone." See *id.* at 1328.

51. See *id.* (explaining how imposing statute of repose to contribution claims undermines legislative intent).

52. See *id.* at 1327 (indicating no time defense exists under Spill Act). The *Pitney Bowes* court is often cited for its stance that "[t]here is no provision of any defense available either to a direct or a contribution defendant based on the passage of time." See *id.*

53. See *Mason v. Mobil Oil Corp.*, No. A-885-98T1, 1999 WL 33605936, at \*4 (N.J. Super. Ct. App. Div. June 8, 1999) (*per curiam*) (addressing statute of limitations). The plaintiffs purchased land on which there was once an abandoned gasoline station and claimed they were told the underground tank were removed. See *id.* at \*1 (explaining plaintiffs' knowledge concerning underground tanks on property). When the plaintiffs tried to sell the property, the buyer hired an environmental consultant to examine the property and significant gasoline contamination was discovered. See *id.* The plaintiffs wanted contribution for remediation costs. See *id.* at \*2.

state's general six-year statute of limitations for trespass or injury to property did not apply to contribution claims under the Spill Act.<sup>54</sup> The court reasoned the only defenses available were those listed under the liability section of the Spill Act.<sup>55</sup> The court found the reasoning in *Pitney Bowes* "applies in full force, if not *a fortiori*, to a statute of limitations."<sup>56</sup> However, because *Mason* was unpublished, the court's opinion was not given precedential weight by other courts ruling on the statute of limitation issue.<sup>57</sup>

## 2. Federal Case Law

The New Jersey District Court equated the lack of a statute of limitations provision in the Spill Act to silence.<sup>58</sup> Turning to other state precedent for guidance, the federal court decided the statute of limitations applied to contribution claims.<sup>59</sup>

To determine if a statute of limitations could be applied, the federal court looked to New Jersey Supreme Court precedent that applied a statute of limitations to a silent statute in *Montells v. Haynes*.<sup>60</sup> Notably, the *Montells* court applied the statute of limitations prospectively rather than

54. *See id.* at \*4 (holding six-year statute of limitations does not apply to contribution claims under Spill Act).

55. *See id.* (finding only defenses available are those explicitly afforded by Spill Act); *see also* N.J. STAT. ANN. § 58:10-23.11g(d)(1) (listing defenses available under Spill Act).

56. *See Mason*, 1999 WL 33605936, at \*4 (finding *Pitney Bowes* reasoning applies).

57. *See, e.g., Morristown Assocs. I*, 74 A.3d 968, 973 (N.J. Super. Ct. App. Div. 2013) (declining to follow unpublished opinion, which lacked precedential value), *rev'd*, 106 A.3d 1176 (N.J. 2015).

58. *See Reichhold, Inc. v. U.S. Metals Ref. Co.*, 655 F. Supp. 2d 400, 446 (D.N.J. 2009) (applying six-year statute of limitations to contribution claims under Spill Act); *see also* *New W. Urban Renewal Co. v. Westinghouse Elec. Corp.*, 909 F. Supp. 219, 228 (D.N.J. 1995) (discussing application of limitations period to actions seeking similar relief at common law). In *Reichhold*, the plaintiff sought damages from the defendant, a metal refining company for past and future costs to clean up the plaintiff's land, which was contaminated by chlorinated volatile organic compounds (CVOCS). *See Reichhold*, 655 F. Supp. 2d at 404. The plaintiff brought its claims under the federal CERCLA and Spill Act. *See id.*

59. *See, e.g., Reichhold*, 655 F. Supp. at 447 (holding six-year statute of limitations applies to contribution claims under Spill Act); *Champion Labs., Inc. v. Metex Corp.*, No. 02-5284 (WHW), 2005 WL 1606921, at \*5 (D.N.J. July 8, 2005) (holding six-year statute of limitations applies to contribution claims under Spill Act). The decision to apply a statute of limitations to Spill Act claims is arguably consistent with the federal CERCLA legislation, which imposes a statute of limitations. *See Morristown Assocs. I*, 74 A.3d at 974 (referring to CERCLA, court reasoned "[a]pplying a statute of limitations to Spill Act claims for contribution is consistent with comparable remedies under federal law," because CERCLA contains six-year and three-year limitations periods); *cf. Montells v. Haynes*, 627 A.2d 654, 662 (N.J. 1993) (holding general statute of limitations applies to Law Against Discrimination claims where statute was silent on such limitation).

60. *See Montells*, 627 A.2d at 657-62 (providing guidance concerning silent statutes).

retroactively.<sup>61</sup> In *Montells*, the court addressed a claim under the New Jersey Law Against Discrimination (LAD), which did not have an explicit statute of limitations.<sup>62</sup> The court held that “[t]he state of the law on the applicable statute of limitations under LAD was sufficiently murky,” so it applied a statute of limitations prospectively.<sup>63</sup> The federal court gave significant weight to the New Jersey Supreme Court’s reasoning in *Montells* when deciding to apply a six-year statute of limitations to Spill Act contribution claims.<sup>64</sup>

State precedent concerning the New Jersey discovery rule provided further insight for the federal court to decide when to start the statute of limitations clock.<sup>65</sup> The discovery rule established in *Lopez v. Swyer*,<sup>66</sup> stated that the statute of limitations started “from the moment of the wrong.”<sup>67</sup> The court in *Kemp Industries v. Safety Light Corp.*<sup>68</sup> held a six-year statute of limitations applied and discussed New Jersey’s discovery rule as it related to the limitations period.<sup>69</sup> The court acknowledged the discovery rule was often applied in environmental tort cases because of the difficulty in discovering an injury and determining responsibility.<sup>70</sup>

The leading federal decision concerning the application of a statute of limitations to contribution claims under the Spill Act is *Reichhold, Inc., v. U.S. Metals Refining Co.*<sup>71</sup> The court in *Reichhold* determined the Spill Act “d[id] not contain a statute of limitations for private contribution actions.”<sup>72</sup> Under the reasoning in *New W. Urban Renewal Co. v. Westinghouse Electric Corp.*,<sup>73</sup> courts must choose a limitations period from actions requesting comparable relief at common law.<sup>74</sup> The court applied the six-

61. *See id.* (providing court’s holding).

62. *See id.* at 655 (holding general statute of limitations applies to Law Against Discrimination claims when statute was silent on such limitation).

63. *See id.* at 662 (providing court’s holding).

64. *See, e.g., Reichhold*, 655 F. Supp. 2d at 446 (applying six-year statute of limitations to contribution claims under Spill Act); *Champion Labs., Inc. v. Metex Corp.*, No. 02-5284 (WHW), 2005 WL 1606921, at \*5 (D.N.J. July 8, 2005) (applying six-year statute of limitations and held plaintiff’s contribution claim under Spill Act was time barred); *Kemp Indus. v. Safety Light Corp.*, No. 92-95 (AJL), 1994 WL 532130, at \*17 (D.N.J. Jan. 25, 1994) (applying six-year statute of limitations from N.J. STAT. ANN. § 2A:14-1 to contribution claims under Spill Act).

65. For a further discussion of the discovery rule, see *infra* notes 66–70 and accompanying text.

66. 300 A.2d 563 (N.J. 1973).

67. *See id.* at 566 (explaining when statute of limitations begins).

68. No. 92-95 (AJL), 1994 WL 532130 (D.N.J. Jan. 25, 1994).

69. *See Kemp Indus.*, 1994 WL 532130, at \*33 (discussing holding).

70. *See id.* at \*17–18 (discussing application of discovery rule in environmental tort cases).

71. 655 F. Supp. 2d 400, 447 (D.N.J. 2009) (discussing statute of limitations).

72. *Id.* at 446.

73. 909 F. Supp. 219 (D.N.J. 1995).

74. *See Reichhold*, 655 F. Supp. 2d at 447 (holding six-year statute of limitations should apply to contribution claim under Spill Act); *see also New W. Urban Renewal Co. v. Westinghouse Elec. Corp.*, 909 F. Supp. 219, 228 (D.N.J. 1995) (dis-

year statute of limitations “for trespass to real property[,] and [for any] tortious injury to real [or personal] property . . . .”<sup>75</sup> However, the court held that the statute of limitations did not start to run until remediation measures started.<sup>76</sup>

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cussing application of limitations period to actions seeking similar relief at common law). In *Reichhold*, the plaintiff sought damages from defendant, a metal refining company, for past and future costs to clean up the plaintiff’s land, which was contaminated by chlorinated volatile organic compounds (CVOCS). See *Reichhold*, 655 F. Supp. 2d at 404. The plaintiff brought its claims under the federal CERCLA and Spill Act. See *id.*

75. *Id.* at 446 (internal quotation marks omitted) (explaining application of another statute of limitations to Spill Act); see also N.J. STAT. ANN. § 2A:14-1 (West 2015) (providing six-year statute of limitations for trespass and tortious injury to property). The state statute states:

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by section 12A: 2-725.

*Id.*

The court in *Champion Labs*, echoed the same reasoning for applying a six-year statute of limitations. See *Champion Labs, Inc. v. Metex Corp.*, No. 02-5284(WHW), 2005 WL 1606921 (D.N.J. July 8, 2005) (applying six-year statute of limitations and holding plaintiff’s contribution claim under Spill Act was time barred). In *Champion Labs*, the plaintiff discovered a holding tank containing sludge was cracked and had contaminated groundwater on the property. See *id.* at \*1. The court acknowledged the Spill Act did not provide a statute of limitations, and so it turned to the reasoning in *Montells* to select a limitations period from “statutes of limitation for actions seeking comparable relief at common law.” See *id.* at \*5; see also *Montells v. Haynes*, 627 A.2d 654, 659 (N.J. 1993) (providing guidance on what to do when statute is silent as to statute of limitations). The court in *Champion Labs* followed the reasoning in *New West Urban Renewal Co.* that “[a] private cause of action for contribution under the Spill Act is most analogous to a common law environmental tort claim, for which the period of limitations is six years.” See *Champion Labs*, 2005 WL 1606921, at \*5; see also *New W. Urban Renewal*, 909 F. Supp. at 223 (analogizing Spill Act contribution claim to common law environmental tort claim).

76. See *Reichhold*, 655 F. Supp. 2d at 447 (explaining statute of limitations does not begin to run until remediation efforts commence); see also David Edelstein & Craig Huber, *Tick, Tock: Appellate Court Starts the Clock on Spill Act Contribution Claims*, N.J. L.J., Nov. 21, 2013, available at <http://www.njlawjournal.com/id=1202629127153/Tick-Tock-Appellate-Court-Starts-the-Clock-on-Spill-Act-Contribution-Claims?slreturn=20160230000732> [<http://perma.cc/27JY-ZQCH>] (distinguishing *Reichhold* decision from *Morristown Associates* based on when statute of limitations begins). The court in *Reichhold* clarifies that actions like “visiting the Site, taking soil and water samples, and making engineering surveys are preliminary steps” and are not considered initiating remediation for the purposes of starting the limitations period. See *Reichhold*, 655 F. Supp. 2d at 447.

### III. NEW JERSEY SUPREME COURT'S HOLDING ALLOWS CONTRIBUTION CLAIMS TO AVOID THE TEST OF TIME

*Morristown Associates* presented the opportunity for the New Jersey Supreme Court to finally decide the contested Spill Act statute of limitations question.<sup>77</sup> However, the court's decision extended beyond mere precedent.<sup>78</sup> The court was aware the decision would have numerous implications for both civilian and legal communities.<sup>79</sup> In addition to examining precedent and the language of the Spill Act, the court turned to the amici to understand the repercussions of upholding the lower courts' decisions and imposing a statute of limitations.<sup>80</sup>

#### A. Facts and Procedure

"In 1979, plaintiff, Morristown Associates, purchased commercial property," which included a strip-mall shopping center called Morristown Plaza, in Morristown, New Jersey.<sup>81</sup> Prior to Morristown Associates' purchase, one of the tenants, Plaza Cleaners, "installed a steam boiler . . . and an underground storage tank (UST)" to hold fuel oil to operate the boiler.<sup>82</sup> In 1993, Giorgio Engineering, P.C., conducted an "environmental audit of the Morristown Plaza property" and "incorrectly reported there were no USTs" on the property.<sup>83</sup>

In August 2003, the plaintiff was notified that a well "installed near" the shopping center was contaminated by fuel and "that the UST used by Plaza Cleaners might be the source."<sup>84</sup> The UST was "severely deterior-

77. For further discussion about the contested statute of limitations question, see *supra* notes 42–76 and accompanying text.

78. For further discussion of the weight behind court's decision as highlighted by the amici, see *infra* notes 103–07 and accompanying text.

79. For further discussion about implications of court's decision as highlighted by the amici and the NJSBA, see *infra* notes 103–07, 153–56 and accompanying text.

80. For further discussion about the points raised by the amici, see *infra* notes 103–07 and accompanying text.

81. See *Morristown Assocs. II*, 106 A.3d 1176, 1178–79 (N.J. 2015).

82. See *id.* at 1179. The United States Environmental Protection Agency defines a UST as "a tank (or combination of tanks) and connected piping having at least 10 percent of their combined volume underground. The tank system includes the tank, underground connected piping, underground ancillary equipment, and any containment system." See *Frequent Questions About Underground Storage Tanks*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/ust/frequent-questions-about-underground-storage-tanks> [<https://perma.cc/9LCQ-66X7>] (last updated Dec. 15, 2015) (defining *underground storage tank*). The Plaza Cleaners owner who installed the UST sold the business to Edward and Amy Hsi, who "owned the business until 1998, when it was sold to" Byung Lee, the "current owner and third-party defendant." See *Morristown Assocs. II*, 106 A.3d at 1180.

83. See *Morristown Assocs. II*, 106 A.3d at 1179–80 (explaining environmental audit); see also *Morristown Assocs. I*, 74 A.3d 968, 972 (N.J. Super. Ct. App. Div. 2013) (same), rev'd 106 A.3d 1176 (N.J. 2015).

84. See *Morristown Assocs. II*, 106 A.3d at 1179–80 (describing discovery of contamination and notification of contamination source to plaintiff).

rated” and replete with holes, which had led to the discharge.<sup>85</sup> The oil company defendants allegedly delivered varying amounts of fuel oil to Plaza Cleaners on a monthly basis between 1988 and 2003.<sup>86</sup> The plaintiff denied knowing there was a UST on the property before 2003.<sup>87</sup> The plaintiff’s liability expert estimated “between 9,400 and 14,670 gallons of heating oil were spilled from 1988 to 2003.”<sup>88</sup>

Shortly after the August investigation, remediation of the contaminated property began and the plaintiff brought a contribution claim against the heating companies who delivered fuel oil to the UST and the dry cleaners owners.<sup>89</sup> In July 2006, the plaintiff filed a complaint and named Grant Oil Company (Grant Oil) as a defendant.<sup>90</sup> The plaintiff brought a claim under the Spill Act “seeking contribution for costs related to the cleanup and removal of the fuel oil.”<sup>91</sup>

The state trial court held “the general six-year statute of limitations for damage to property applie[d] to [ ] private claim[s] for contribution [under the Spill Act].”<sup>92</sup> The trial court also held that Morristown Associates “should have discovered its claims when the other leaking UST was found in 1999 on the [ ] property.”<sup>93</sup> The trial court dismissed claims for damage that happened over a six-year period before a particular defendant was brought into the case.<sup>94</sup> The plaintiff alleged that the trial court committed an error “because the six-year statute of limitations . . . d[id]

85. *See id.* (describing physical condition of UST).

86. *See id.* (explaining defendants’ role and liability in contamination of plaintiff’s property).

87. *See id.* at 1180 (denying knowledge of UST prior to 2003).

88. *See Morristown Assocs. I*, 74 A.3d 968, 971 (N.J. Super. Ct. App. Div. 2013) (estimating damage caused by UST), *rev’d*, 106 A.3d 1176 (N.J. 2015).

89. *See Morristown Assocs. II*, 106 A.3d at 1180 (providing procedural history). “At the time of lower court arguments, Morristown Associates, which owns Morristown Plaza, had spent roughly \$1 million cleaning up contamination from an underground fuel oil storage tank . . . .” *See* Samantha Marcus, *Environmentalists Cheer N.J. Supreme Court Ruling on Pollution Lawsuits*, NJ.COM (Jan. 27, 2015), [http://www.nj.com/politics/index.ssf/2015/01/environmentalists\\_cheer\\_nj\\_supreme\\_court\\_ruling\\_on.html](http://www.nj.com/politics/index.ssf/2015/01/environmentalists_cheer_nj_supreme_court_ruling_on.html) [https://perma.cc/9TWB-F4JJ] (updated Mar. 4, 2016) (quoting Steven Singer, Attorney for Morristown Associates).

90. *See Morristown Assocs. I*, 74 A.3d at 970 (describing procedure).

91. *See Morristown Assocs. II*, 106 A.3d at 1180 (discussing plaintiff’s Spill Act contribution claim).

92. *See Morristown Assocs. I*, 74 A.3d at 972 (citation omitted).

93. *See Morristown Assocs. II*, 106 A.3d at 1181 (discussing trial court’s reasoning why *Lopez* discovery rule did not apply). “Accordingly, the court granted motions of summary judgment by Spartan Oil, Petro, Johnson Oil, Meenan Oil doing business as Region Oil, and the Hsis on statute of limitations grounds.” *Id.* at 1181 (discussing trial court’s decision to grant summary judgment motions).

94. *See Morristown Assocs. I*, 74 A.3d at 972 (explaining trial court’s decision to time-bar claims against defendants).



not apply,” and thus “its claims were not untimely.”<sup>95</sup> The appellate court affirmed.<sup>96</sup>

B. *New Jersey Supreme Court Throws out the Clock and Declares No Statute of Limitations for Spill Act Contribution Claims*

The court considered a series of viewpoints, both from the parties in litigation and the amici.<sup>97</sup> The plaintiff contended the Spill Act explicitly stated the available defenses in a contribution action, and a statute of limitations was not included.<sup>98</sup> Pointing to numerous Spill Act amendments that did not create a statute of limitations, the plaintiff argued that the legislature’s inaction was evidence of intent.<sup>99</sup>

The defendant argued that because there was no “explicit statute of limitations, the court should apply the limitations period for actions seeking comparable relief at common law, focusing on the nature of the injury, not the legal theory of the individual claim.”<sup>100</sup> The defendant contended the six-year statute of limitations for trespass or tortious injury to real property must apply because the plaintiff’s injury was damage to

95. See *Morristown Assocs. II*, 106 A.3d at 1181 (alleging trial court’s error at issue on appeal).

96. See *id.* (explaining appellate court’s holding and highlighting *Pitney Bowes*). The appellate court acknowledged that there was an unpublished New Jersey state court decision “that [held] no statute of limitations appli[ed]” to the Spill Act. See *Morristown Assocs. I*, 74 A.3d at 973. Recognizing that the unpublished opinions are not precedential, the court did not give much weight to the state court’s decision. See *id.* The court distinguished the case at bar from *Pitney Bowes*, declaring *Pitney Bowes* to be non-controlling because it dealt with a “statute of repose rather than a statute of limitations.” See *id.* at 974. The court found this difference significant because “the *Lopez* discovery rule is not available to relax application of a statute of repose,” but it is with a statute of limitations. See *id.* The court reasoned that a statute of limitations, unlike a statute of repose, “does not prevent a [ ] plaintiff from recovering” from another party under the Spill Act because “[i]t merely requires that a claimant file a timely action after it discovered or should have discovered the grounds for its claim.” See *id.* The court then pointed out that “general statutes of limitations have been applied to” other statutory claims that do not explicitly possess a statute of limitation. See *id.*

97. For further discussion of the insight provided by the parties and amici, see *infra* notes 98–107 and accompanying text.

98. See *Morristown Assocs. II*, 106 A.3d at 1182 (“Plaintiff points out that the Spill Act itself contains no statute of limitations on filing contribution claims and maintains that there is no ‘hard and fast rule’ requiring the application of a statute of limitations when a statute is silent.”).

99. See *id.* (highlighting plaintiff’s argument of relying on *Montells v. Haynes* which applied statute of limitations despite statute silence).

100. See *id.* at 1182–83 (quoting defendant’s argument which also relied on the *Montells* case, cited by plaintiffs).

real property.<sup>101</sup> The court took a textual approach to determine legislative intent and held a statute of limitations did not apply.<sup>102</sup>

Six groups submitted amicus curiae briefs.<sup>103</sup> Overall, “the amici provide[d] practical insight into the implications of imposing a statute of limitations on Spill Act contribution claims.”<sup>104</sup> The amici pointed to possible repercussions of imposing a statute of limitations on these claims.<sup>105</sup> The majority of amici contended “the Appellate Division incorrectly held that a six-year statute of limitations applies to Spill Act contribution claims.”<sup>106</sup> They “echo[ed]” the sentiment that imposing a statute of limitations would be detrimental for New Jersey and the success of the Spill Act.<sup>107</sup>

101. *See id.* at 1183 (stating defendants’ reasoning to apply N.J.S.A. § 2A:14-1); *see also* N.J. STAT. ANN. § 2A:14-1 (West 2015) (providing six-year statute of limitations for trespass to real property or tortious injury to real or personal property). The defendant relied on the “[l]egislature’s failure to expressly prohibit a statute of limitations” to bolster its argument. *See Morristown Assocs. I*, 106 A.3d at 1183.

102. For further discussion of the court’s approach for interpreting the Spill Act, *see infra* notes 109–23 and accompanying text.

103. *See Morristown Assocs. II*, 106 A.3d at 1181–82 (discussing court’s decision to grant “leave to appear” as amici to six groups in case). The six groups were the Innocent Landowners Group, Environmental Amici, New Jersey Department of Environmental Protection (NJDEP), New Jersey State Bar Association (NJSBA), Municipal Amici, and Passaic River Coalition. *See id.* Environmental Amici was collectively made up of Ironbound Community Corporation, The Association of New Jersey Environmental Commissions, NY/NJ Baykeeper, Environment New Jersey, The Delaware Riverkeeper Network, and the New Jersey Work Environment Council. *See id.* The New Jersey State League of Municipalities and New Jersey Institute of Local Government Attorneys together make up the Municipal Amici group. *See id.* at 1182. In New Jersey, a court must grant a motion to appear as amicus curiae “if it is satisfied under all the circumstances that the motion is timely, the applicant’s participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.” N.J. CT. R. 1:13-9.

104. *See Morristown Assocs. II*, 106 A.3d at 1183–84 (discussing contribution of amici and summarizing amici comments).

105. *See id.* at 1183 (discussing amici’s contribution to case). For example, Innocent Landowners argued “a six-year statute of limitations would subject innocent owners . . . to de facto liability . . . [and] permit dischargers of hazardous material to avoid liability.” *Id.* at 1184. The amici mirrored plaintiff’s argument and expanded on the reason why a statute of limitations is not applicable to Spill Act claims. *See id.* at 1183 (“The amici largely echo plaintiff’s argument and offer further support for concluding that no statute of limitations applies to Spill Act claims.”).

106. *See id.* (discussing amici’s support for no application of statute of limitations). The NJSBA argued that if the court imposes a statute of limitations it “should have [a] prospective effect” and “not begin to run at the time of discovery.” *See id.* n.4. The court decided not to address the NJSBA’s arguments in its opinion because it found the statute of limitations did not apply. *See id.* (“Because we find the statute of limitations inapplicable, we do not address those arguments.”).

107. *See id.* at 1183 (explaining amici’s contribution). Innocent Landowners focused on how “the remedial investigation phase of [ ] site contamination” takes a long time, and a filing limit would not expedite the process. *See id.* at 1183–84. A statute of limitations would hurt innocent landowners while permitting dischargers to escape liability. *See id.* Innocent Landowners emphasized, “imposing a six-year

The New Jersey Supreme Court issued its unanimous decision on January 26, 2015.<sup>108</sup> Beginning with a plain language analysis of the Spill Act, the court noted that the Act did not state the existence or applicability of a statute of limitations.<sup>109</sup> The court emphasized the restrictive language of the contribution provision, which stated, “[a] contribution defendant shall have *only* the defenses to liability available to parties pursuant to [the Spill Act’s section on liability for cleanup and removal costs].”<sup>110</sup> Because the

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limit will interpose tremendous turmoil into Spill Act contribution claims already filed in the trial courts.” *See id.* at 1184.

The Department of Environmental Protection (DEP) highlighted how a statute of limitations undermines legislative intent and hinders the agency’s “ability to enforce the Spill Act.” *See id.* The DEP emphasized that the success of remediation efforts depends on the ability of private parties to bring forth private contribution claims, as an estimated “seventy-two percent of the sites currently in the Site Remediation Program are being remediated by private entities.” *See id.* However, a statute of limitations makes it more difficult to collect from responsible parties. *See id.* (“DEP also contends that the Appellate Division’s opinion frustrates its ability to enforce the Spill Act by raising uncertainty as to what other defenses not explicitly provided by the statute may be added by the courts.”).

Municipal Amici acknowledged taxpayers are negatively impacted by a limitation on contribution claims by a statute of limitation, because New Jersey municipalities use the Spill Act to get money “for remediating contaminated properties.” *See id.* The amici also highlighted the Industrial Site Recovery Act (ISRA), “passed the same year that the contribution provision was added to the Spill Act,” does not have a statute of limitations. *See id.*; *see also* N.J. STAT. ANN. § 13:1K-6 (West 2015). The ISRA states:

If a municipality undertakes a remediation of an industrial establishment, the title to which the municipality acquired pursuant to a foreclosure action pertaining to a certificate of tax sale, all expenditures incurred in the remediation shall be a debt of the immediate past owner or operator of the industrial establishment.

N.J. STAT. ANN. § 13:1K-9.3. The Municipal Amici argue that it would “be illogical for a municipality to be able to recover without a time limitation under ISRA, if a property was acquired through foreclosure pertaining to a certificate of tax sale, but not under the Spill Act, when a property was acquired through purchase or eminent domain.” *See Morristown Assocs. II*, 106 A.3d at 1184.

Environmental Amici argued implementing a statute of limitations would make it more difficult to obtain contribution from responsible parties and negatively impact New Jersey’s “ability to ensure that its citizens can drink clean water, take their children to chemical-free playgrounds and build their homes on uncontaminated land.” *See id.* (internal quotation marks omitted).

Passaic River Coalition (PRC) contended a statute of limitations would produce “unnecessary litigation” and negatively impact “cooperation between potentially responsible parties.” *See id.* PRC explains this “would be a waste of judicial resources” and parties’ resources would be redirected away from investigation and cleanup, two of the Spill Act’s main goals. *See id.*

108. *See generally Morristown Assocs. II*, 106 A.3d at 1176.

109. *See id.* at 1188 (“Neither this provision, nor any other provision in the Spill Act, sets forth a statute of limitations applicable to such contribution actions or states that a statute of limitations is not applicable.” (citing N.J. STAT. ANN. § 58:10-23.11f(a)(2))).

110. *See id.* at 1189 (first alteration in original) (quoting N.J. STAT. ANN. § 58:10-23.11f(a)(2)(a)).

list “d[id] not include a statute of limitations defense,” the court found this indicative that no time constraint applied.<sup>111</sup>

The court distinguished *Montells* and declared its reasoning inapplicable because “the Spill Act is not silent.”<sup>112</sup> Rather, it determined the Spill Act explicitly lists all the available defenses for contribution claims.<sup>113</sup> The court pointed out that because it found *Montells* irrelevant for the *Morristown Associates* decision, it would not discuss federal case law that relied on the reasoning in *Montells*.<sup>114</sup> The court concluded “[a] common-sense reading of the plain language chosen by the Legislature” implied the legislature did not intend to include a statute of limitations defense.<sup>115</sup>

The court then briefly analyzed the “wide net” of coverage intended by the Spill Act.<sup>116</sup> It suggested it was unlikely the legislature intended to allow responsible parties to escape liability based on a time defense.<sup>117</sup> The court referred to the Spill Act’s section concerning the filing of claims, which includes a one-year statute of limitations, to support its assertion that the legislature included a statute of limitations in the Spill Act where it intended.<sup>118</sup> On this basis, the court refused to impose a statute of limitations for contribution claims merely because it is not explicitly permitted or forbidden.<sup>119</sup>

Following this analysis, the court concluded that, even if the language of the Spill Act was ambiguous, extrinsic evidence supported its interpretation.<sup>120</sup> The 1979 amendment that removed the language in the Spill Act

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111. *See id.* (“The language of the statute expressly restricting the defenses available under the Spill Act provides significant support for a conclusion that no statute of limitations applies.”).

112. *See id.* (“[H]ere the Spill Act is not silent. The Spill Act enumerates the only defenses specified as available to contribution defendants and a statute of limitations defense is not included.”).

113. *See id.*

114. *See id.* n.8 (“In light of our rejection of *Montells*’s applicability in our analysis, we find it unnecessary to further discuss federal case law that relied on *Montells* when determining to apply a statute of limitations to Spill Act claims.”).

115. *See id.* at 1189 (recognizing “[t]he only defenses available to contribution claims were to be the ones to which the Legislature specifically referred.” (internal quotation marks omitted)).

116. *See id.* (discussing intent of Spill Act to “cast a wide net over those responsible for hazardous substances and their discharge on the land and waters of this state”).

117. *See id.* at 1190 (“The Legislature could not have intended to permit its imposition of contribution liability on culpable dischargers to be frustrated by the imposition of a general and prior enacted, but unreferenced, statute of limitations.”).

118. *See id.*; *see also* N.J. STAT. ANN. § 58:10-23.11k (West 2015) (establishing one-year statute of limitations for claims filings).

119. *See Morristown Assocs. II*, 106 A.3d at 1190 (noting legislature included statute of limitations in Spill Act where it wanted and court’s unwillingness to impose statute of limitations).

120. *See id.* The court noted that precedent permits it to look at extrinsic evidence to determine legislative intent “[w]hen the plain language of a statute is

that permitted certain available defenses and the accompanying Sponsor's statement suggested "a specific legislative intent to eliminate other otherwise available defenses."<sup>121</sup> The court concluded by inviting the legislature to correct "any interpretive misunderstanding" if its intent contradicted the court's interpretation.<sup>122</sup> Nevertheless, without such legislative intervention permitting a statute of limitations defense, the court "decline[d] to handicap the Spill Act's intentionally broad effect in such manner."<sup>123</sup>

#### IV. TIME FOR A CHANGE: LEGISLATURE MUST AMEND SPILL ACT TO ENSURE FAIR TREATMENT OF DEFENDANTS

The New Jersey Supreme Court appropriately used a plain text analysis of the Spill Act to reach its holding.<sup>124</sup> Had the court upheld a statute of limitations, the effectiveness of the Spill Act would have undoubtedly been hindered and the repercussions on various groups would have been substantial.<sup>125</sup> Interpretations beyond the plain language of the text are jobs for legislatures, not courts.<sup>126</sup> Despite the reasonable judicial approach of *Morristown Associates*, it would unfairly prejudice defendants to allow the Spill Act to stand without a statute of limitations.<sup>127</sup>

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ambiguous or open to more than one plausible meaning . . . ." *See id.* (quoting *State v. Marquez*, 998 A.2d 421, 430 (N.J. 2010)) (internal quotation marks omitted).

121. *See id.* (discussing 1979 Spill Act amendment); *see also* 1976 N.J. Laws 627 (amending available defenses under Spill Act).

122. *See Morristown Assocs. II*, 106 A.3d at 1190 ("If the Legislature intended something other than what we perceive to be a broad approach to holding parties responsible for their role in polluting the land and waters of New Jersey, then legislative correction can fix any interpretive misunderstanding.").

123. *See id.* (asserting its stance that no statute of limitations apply).

124. *See id.* at 1189 (explaining plain text supports court's interpretation). "We add only that our holding does not negatively affect responsible parties under the Spill Act any more than the Act already has by virtue of its imposition of contribution liability." *Id.*

125. For further discussion of the ramifications for imposing a statute of limitations on Spill Act contribution claims, *see supra* note 107 and accompanying text; *see also* Martin Bricketto, *NJ High Court Could Turn up the Heat on Spill Act Plaintiffs*, LAW360 (Oct. 2, 2014), <http://www.law360.com/articles/583565/nj-high-court-could-turn-up-the-heat-on-spill-act-plaintiffs> [https://perma.cc/3C6Q-HARC] (stressing decision by New Jersey Supreme Court to uphold appellate division's decision retroactively would have "sideswipe[d] property owners that were playing by the rules").

126. *See Morristown Assocs. II*, 106 A.3d at 1190 ("Our role is simply to discern as best we can legislative intent and to implement that intent.").

127. For further discussion of how statute of limitations unfairly prejudices defendants, *see infra* notes 128–32 and accompanying text.

A. *The Danger of Letting Time Stand Still: Why the Legislature Must Amend the Spill Act to Include a Statute of Limitations*

The Spill Act currently tips the scales of justice in favor of plaintiffs while making it more difficult for defendants to dismiss remediation claims potentially years after contamination is discovered.<sup>128</sup> The holding in *Morristown Associates* reaffirms plaintiffs' ability to bring contribution claims under the Spill Act with no concern about time constraints.<sup>129</sup> However, this flexibility inadvertently cripples defendants' ability to fairly defend against expensive remediation claims.<sup>130</sup> This places defendants at a legal disadvantage, subjecting them to a constant state of litigation limbo where defendants remain vulnerable to potential lawsuits decades after remediation efforts have ceased.<sup>131</sup> Allegedly responsible parties might no longer have the funds to pay a contribution bill if the remediating party postpones bringing a claim until years after remediation efforts have ended.<sup>132</sup>

It is clear from *Morristown Associates* that a mere imposition of a statute of limitations without any further changes to the Spill Act would do more harm than good to parties outside litigation.<sup>133</sup> The New Jersey Supreme Court dismissed the New Jersey State Bar Association's (NJSBA) amicus

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128. For further discussion of how the Spill Act favors plaintiffs and hurts defendants, see *infra* notes 129–32 and accompanying text.

129. See Richard F. Ricci & Sean Collier, *NJ High Court Lays Down the Law on Spill Suit Limits*, LAW360 (Jan. 28, 2015), <http://www.law360.com/articles/615737/nj-high-court-lays-down-the-law-on-spill-suit-limits> [<https://perma.cc/Y9W9-6QNM>] (“Claimants may now fully engage in the often lengthy process of investigating and remediating contaminated sites and identifying other responsible parties before initiating contribution litigation, and need not race to the courthouse to beat a statute of limitations deadline.”).

130. See Katcher et al., *supra* note 15 (noting burden placed on defendants in contribution claims by limiting the number of available defenses).

131. See, e.g., Lanny S. Kurzweil & Amanda G. Dumville, *New Jersey Supreme Court: No Statute of Limitations for Private Claims for Contribution Under Nj Spill Act*, ENV'T & ENERGY ALERT (McCarter & English, Newark, N.J.), Jan. 2015, at 1, 2, available at [http://www.mccarter.com/files/Uploads/Documents/Website/Jan2015\\_EnvironmentEnergyAlert\\_Print.pdf](http://www.mccarter.com/files/Uploads/Documents/Website/Jan2015_EnvironmentEnergyAlert_Print.pdf) [<https://perma.cc/R3EX-XYBG>] (“Contribution plaintiffs that otherwise might have accelerated their claims and rushed to the state courthouse can take their time and proceed more strategically; contribution defendants have lost a (short-lived) defense absent legislative revision, with the added risk that evidence and witnesses may be lost during the period of delay.”); see also David Restaino, *High Court's Spill Act Statute of Limitations Ruling Alters New Jersey's Cleanup Landscape*, LEGAL OP. LETTER, Apr. 10, 2015, at 1, 2 available at [http://www.wlf.org/upload/legalstudies/legalopinionletter/RestainoLOL\\_041015.pdf](http://www.wlf.org/upload/legalstudies/legalopinionletter/RestainoLOL_041015.pdf) [<https://perma.cc/B7FY-Y7KL>] (“Defendants, on the other hand, now know that they can be subject to suit for many years and perhaps even decades.”).

132. See, e.g., Katcher et al., *supra* note 15 (highlighting importance of filing litigation sooner because of possibility third parties will no longer have funds to pay for remediation costs).

133. For further discussion of amici's input on imposing a statute of limitations, see *supra* notes 103–07 and accompanying text.

brief without giving appropriate weight to the unique points raised.<sup>134</sup> In deciding to apply a statute of limitations to the Spill Act, the legislature should look to the NJSBA's amicus brief for insight on using a CERCLA model to start the statute of limitations clock and the importance of a prospective application.<sup>135</sup>

B. *Legislation Is Necessary to Amend the Spill Act, It's Now or Never*

In its amicus brief, the NJSBA provides invaluable insight into how the legal community and its clients would be impacted if a statute of limitations were imposed.<sup>136</sup> Furthermore, the NJSBA's amicus brief provides guidance for creating improved legislation that minimizes a potentially negative impact on attorneys and their clients.<sup>137</sup> The NJSBA focuses its attention first on when the statute of limitations clock would begin to run and second on ensuring that the application is prospective.<sup>138</sup>

The NJSBA emphasizes the importance of deciding when a statute of limitations clock will begin to run and how the constructs of environmental litigation favor a CERCLA model approach over the discovery rule.<sup>139</sup> In *Morristown Associates v. Grant Oil*, the superior court emphasized the New Jersey discovery rule would avoid a stringent application of a statute of limitations by taking into account when a claimant "discovered or could reasonably have discovered the harm."<sup>140</sup> However, the NJSBA notes that the discovery rule is not practical for quick remediation or fair for remediating parties.<sup>141</sup>

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134. See *Morristown Assocs. II*, 106 A.3d 1176, 1183 n.4 (N.J. 2015) (explaining omission of NJSBA amicus brief from court opinion).

135. For further discussion of the NJSBA's push for the CERCLA model, see *infra* notes 136–56 and accompanying text.

136. See generally Brief of Amicus Curiae New Jersey State Bar Ass'n at 17–19, *Morristown Assocs. II*, 106 A.3d 1176 (N.J. 2015), available at <http://tms.njsba.com/PersonifyEbusiness/images/content/1/0/1007423.pdf> [<https://perma.cc/JF4H-SVZM>] (providing insight on imposing statute of limitations).

137. See *id.* at 1 (explaining burden placed on courts, attorneys, and clients if supreme court affirmed lower court decisions). The NJSBA emphasized that if the supreme court affirmed the appellate court's decision, courts would be burdened by attorneys compelled "to file lawsuits seeking Spill Act contribution prematurely or file claims that may never have been filed, solely to protect their clients' rights and themselves from claims of malpractice." See *id.*

138. For further discussion of the NJSBA's arguments concerning the application of a statute of limitations, see *infra* notes 139–56 and accompanying text.

139. See Brief of Amicus Curiae New Jersey State Bar Ass'n, *supra* note 136, at 2–4 (providing arguments about imposing statute of limitations).

140. See *Morristown Assocs. I*, 74 A.3d 968, 974 (N.J. Super. Ct. App. Div. 2013) (explaining how discovery rule prevents harsh statute of limitations application), *rev'd*, 106 A.3d 1176 (N.J. 2015).

141. See Brief of Amicus Curiae New Jersey State Bar Ass'n, *supra* note 136, at 17–19 (explaining use of discovery rule to start clock on statute of limitations is more harmful than good).

In its brief, the NJSBA highlights three significant problems that arise by using the discovery rule to start the limitations period.<sup>142</sup> First, the discovery rule would discourage parties from engaging in remediation efforts, resulting in an increase in claims being filed earlier to avoid losing the opportunity to recover from contributing parties.<sup>143</sup> Parties who discover contamination, but find themselves time-barred because of the discovery rule, will likely delay remediation efforts.<sup>144</sup> Second, the discovery rule is not feasible on large properties.<sup>145</sup> For example, a party who discovers one underground storage tank but does not check the remainder of the property can find themselves running out the clock under the discovery rule.<sup>146</sup> Third, and most importantly, “responsible parties who are strictly liable under the Spill Act” can escape liability because of the discovery rule.<sup>147</sup> As the NJSBA points out, if this happens, “the purpose of the Spill Act, to have responsible parties strictly liable for cleaning up contamination, is lost.”<sup>148</sup>

Instead, the NJSBA suggests using the CERCLA model as an alternative to using the discovery rule to start the statute of limitations clock.<sup>149</sup> Currently, plaintiffs have a right to contribution, yet that right does not vest until remediation efforts have commenced.<sup>150</sup> The federal CERCLA

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142. *See id.* at 17–20 (highlighting significant problems that can arise through use of discovery rule).

143. *See id.* at 11 (stating imposing discovery rule “[w]ould have the effect of discouraging parties from voluntarily investigating and remediating contamination, and would cause parties to file lawsuits before they are ready, and often times unnecessarily”).

144. *See id.* at 17 (discussing possible negative effect of discovery rule).

145. *See id.* at 18 (“The ‘discovery rule’ as applied by the trial court and Appellate Division in this case simply is not practical in the real world.”).

146. *See id.* (discussing problem that can arise for owners of large properties).

147. *See id.* at 19 (explaining danger of responsible parties being released from liability because of discovery rule).

148. *See id.* at 20 (explaining how intent of Spill Act is undermined by imposing discovery rule).

149. *See id.* at 3 (noting superiority of CERCLA method).

150. *See* Bricketto, *supra* note 125 (restating remarks by Kevin Bruno, Chair, Blank Rome LLP, Env’l, Energy, & Natural Res. Grp., concerning right of plaintiffs to obtain contribution). The NJSBA sheds light on why the discovery rule does not work along with the vesting of a plaintiff’s right to sue for contribution:

[I]n order to sue for contribution under N.J.S.A. 58:10-23.11f(a)(2), a person must first receive written approval for the incurrence of those costs from the NJDEP, or now from a Licensed Site Remediation Professional (“LSRP”), the statutory agent of the NJDEP, in accordance with N.J.S.A. 58:10C-1 et. seq. And, that is exactly why the “discovery rule” cannot be the starting point for the commencement of the running of the statute of limitations, because until “cleanup and removal costs” are incurred with the written approval of the NJDEP or the LSRP, the right to seek contribution under N.J.S.A. 58:10-23.11f(a)(2) has [sic] not yet ripened. Thus, the date of discovery of contamination or when contamination should have been discovered is irrelevant to when the right to contribution under the Spill Act accrues.

Brief of Amicus Curiae New Jersey State Bar Ass’n, *supra* note 136, at 13.



model has a better approach.<sup>151</sup> CERCLA, which has an explicit three-year statute of limitations, starts the limitation period based on the date of a judgment, administrative order, or judicially approved settlement.<sup>152</sup>

Moreover, to protect claimants and attorneys, the NJSBA advocates for a prospective rather than a retroactive application of a statute of limitations.<sup>153</sup> There is a legitimate concern that retroactive application of a statute of limitations would leave environmental attorneys vulnerable to malpractice lawsuits.<sup>154</sup> The NJSBA acknowledges that this would be unfair to those attorneys who, believing that they were correctly advising their clients, relied “in good faith” on both *Pitney Bowes* and *Mason* in their decision to wait to file.<sup>155</sup> Additionally, claimants who voluntarily engaged in lengthy and expensive litigation with the expectation of bringing a contribution claim could be prevented by a retroactive statute of limitations application.<sup>156</sup>

#### V. KEEPING UP WITH THE TIMES: ADVICE FOR PRACTITIONERS IN LIGHT OF *MORRISTOWN ASSOCIATES*

Attorneys need to adjust their client advice following *Morristown Associates* and in anticipation of possible action by the legislature in order to safeguard themselves and their clients.<sup>157</sup> In particular, attorneys must warn clients about the possibility of environmental litigation years after a company or property is sold.<sup>158</sup> This is important for commercial real estate counsel, “especially if the client is an owner or prospective purchaser

151. See Brief of Amicus Curiae New Jersey State Bar Ass’n, *supra* note 136, at 2 (suggesting CERCLA as model for when to start limitations clock).

152. See *id.* (discussing structure of limitations period clock under CERCLA).

153. See *id.* at 2–4, 9–10, 20 (advocating for prospective rather than retroactive application of statute of limitations). Notably, the NJSBA’s brief was not written in support of the supreme court applying a statute of limitations. See *id.* at 1–2 (stating the NJSBA “believes the interpretation of the Spill Act in New Jersey State courts for these last twenty (20) years that there is no statute of limitations for Spill Act contribution claims has worked without problem”). Rather, the NJSBA brief says that if one were to be applied, it should be done prospectively rather than retroactively. See *id.* at 2.

154. See Martin Bricketto, *NJ High Court Prevents Rush to Courthouse on Spill Suits*, LAW 360 (Jan. 27, 2015), <http://www.law360.com/articles/615446/nj-high-court-prevents-rush-to-courthouse-on-spill-suits> [<https://perma.cc/G3M9-XUWB>] (emphasizing concern of NJSBA members that “retroactive application of the statute of limitations could generate unfair malpractice litigation against attorneys who properly advised their clients based on the current state of the law”).

155. See Brief of Amicus Curiae New Jersey State Bar Ass’n, *supra* note 136, at 4 (explaining unfair effects of retroactive application on attorneys).

156. See *id.* (discussing potential unfair effect of retroactive application on potential claimants).

157. See Practical Law Real Estate, *No Six-year Statute of Limitations for NJ’s Spill Contribution Act*, LEGAL UPDATE (WestlawNext, N.J.), Feb. 5, 2015, at 1, 2 (discussing need to adjust attorney advice to clients).

158. See Restaino, *supra* note 131 (emphasizing important considerations for attorneys when advising clients in light of *Morristown Associates*). David Restaino highlights the importance for attorneys to consider the implications of the New

of a property where potential environmental hazards are likely.”<sup>159</sup> Real estate attorneys should stress to clients the importance of “the discovery and inspection of underground storage tanks when performing environmental due diligence.”<sup>160</sup> Also, deciding to “pursue and defend contribution claims early in the remediation process” can be extremely beneficial and make it more likely for parties to defend and recover under the Spill Act.<sup>161</sup>

#### VI. ONLY TIME WILL TELL: THE IMPACT OF *MORRISTOWN ASSOCIATES*

Remediation of contaminated property in New Jersey significantly depends on cleanup efforts by private parties.<sup>162</sup> With the number of contaminated sites increasing, the ability for parties to easily recover contribution costs from responsible parties is imperative to ensuring quick and efficient cleanup measures.<sup>163</sup> Environmental groups praised the ruling in *Morristown Associates* as monumental, claiming an opposite ruling by the supreme court would have severely handicapped the Spill Act.<sup>164</sup> Although the court’s hands were tied, the legislature should take action to

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Jersey Supreme Court’s decision as it stands in advising clients about the potential for environmental litigation in the future:

One can expect that the potential for unending environmental liabilities will become an even more important topic for consideration during property and corporate transactions. Those practitioners who fail to consider environmental liabilities that will follow a company decades after a property or a business has been sold will do so at their own peril.

*Id.*

159. See Practical Law Real Estate, *supra* note 157 (stating importance of advising clients concerning future environmental liability).

160. See *id.* (providing advice to real estate attorneys when advising clients).

161. See Katcher et al., *supra* note 15, at 2 (explaining benefit of early remediation litigation).

Aside from potential future Legislative action, there are other factors to consider in deciding whether to pursue and defend contribution claims early in the remediation process, including: the preservation of evidence; less risk that potentially responsible parties, including additional third-parties, will no longer be viable or financially able to contribute to the cleanup; the potential for buy-in and agreement on the selected remedy; and the potential for reaching a resolution outside of costly litigation.

*Id.*

162. For further discussion of the importance of private-party contribution actions for the success of remediation efforts, see *supra* notes 6–10 and accompanying text.

163. For further discussion of the increase in contaminated sites, see *supra* note 4–5 and accompanying text; see also *Morristown Assocs. II*, 106 A.3d 1176, 1184 (N.J. 2015) (estimating 72% of sites are remediated by private parties).

164. See, e.g., Marcus, *supra* note 89 (reporting on impact of Spill Act according to environmentalists). “Jeff Tittel, director of the New Jersey Sierra Club, called the decision a victory for environmental protection. ‘Had the lower court decision been upheld, it would have gutted the Spill Act and made it virtually impossible to clean up contaminated sites,’ he said. ‘With 20,000 contaminated sites in New Jersey this is an important victory. . . . It will ma[ke] sure these sites get cleaned up and that polluters do not allow the clock to run out.” *Id.*

ensure the Spill Act is fair for both plaintiffs and defendants dealing with contribution claim litigation.<sup>165</sup> In the meantime, attorneys should adjust their communications with clients accordingly to account for the court's decision and the looming uncertainty about legislative action.<sup>166</sup> It remains to be seen whether the legislature will take action to amend the Spill Act, or if the legislature's prolonged silence will imply agreement with the court's decision in *Morristown Associates*.<sup>167</sup>

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165. For further discussion of why the legislature must take action, see *supra* notes 124–56 and accompanying text.

166. For further discussion about attorney advice, see *supra* notes 157–65 and accompanying text.

167. See, e.g., *Morristown Assocs. II*, 106 A.3d at 1190 (inviting legislature to fix any misunderstanding); see also Kurzweil & Dumville, *supra* note 131 (noting possibility legislature may react to fix any misunderstanding “when and if it sees fit”).