DUNGEONS AND DRAGONS®: THE ENVIRONMENTAL INSURANCE GAME OF THE 1990s†

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INTRODUCTION

In recent years, New Jersey courts have been the site of a major battle between policyholders and insurance companies over liability for environmental cleanup. This is not surprising, considering that New Jersey has more Superfund sites than any other state in the country,[1] as well as an extensive environmental property transfer law[2] and strict underground storage tank monitoring requirements.[3]

These environmental cleanup disputes present a tremendous challenge to the New Jersey court system. They sometimes involve one hundred or more sites—and an equal number of defendants—spread across the country, and staggering amounts of money. Estimated remediation costs nationally range from $150 to $750 billion.[4]

Despite the diversity of these suits, they tend to present common questions of law and public policy. Most of the policyholders are seeking coverage under standard-form comprehensive general

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† Editor's note: On January 13, 1994, while this Article was being printed, the New Jersey Supreme Court denied the motions for reconsideration in *Morton International.*

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1 E.P.A., Background Information: National Priorities List, Proposed Rule, Pub. No. 9320.7-041, Intermittent Bulletin vol. 3, no. 2 (June 1993).

2 *See* Industrial Site Recovery Act, 1993 N.J. Sess. Law Serv. Ch. 139 (West), amending the Environmental Cleanup Responsibility Act, N.J. STAT. ANN. § 13:1K-6 to -13 (West 1991).

3 N.J. ADMIN. CODE tit. 7, § 14B-6.1 to -6.6 (1990).

4 Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 79, 629 A.2d 831, 876 (1993) (citing Thomas Reiter, *The Pollution Exclusion Under Other Law: Staying the Course,* 59 U. CIN. L. REV. 1165, 1171 (1991)).

liability (CGL) policies. The insurance policy provisions are the same regardless of the policyholder.

These cases are slowly winding their way up to the New Jersey Supreme Court. Up until now, the court has looked at an insurance policy provision here and there as these environmental coverage cases reached its doorstep. *Morton International, Inc. v. General Accident Insurance Company of America*[5] presented the court with its first opportunity to take a broader view.

In deciding *Morton*, the New Jersey Supreme Court was well aware that it was reaching a landmark decision dealing with environmental insurance coverage within the State of New Jersey. In a 95-page well-reasoned decision, the court set out to resolve some of the basic questions in environmental insurance contracts and to establish guidelines for lower courts.

The decision examined certain key questions that arise frequently within the context of environmental coverage litigation. These questions included: What is an occurrence? Are clean-up costs properly included as damages? What does the sudden and accidental pollution exclusion mean and when does it apply? When does a carrier have the duty to defend in an environmental insurance case? While the decision addressed these issues, it left open a number of questions.

In order to understand *Morton*, one must look behind the actual result. In point of fact, Morton, the policyholder, lost and the carriers won. In actuality, however, the clear victors of the *Morton* case were policyholders in general.

In analyzing the *Morton* case, certain themes emerge very quickly. The overarching theme was the question of intent, which pervades the entire opinion. Whether it was the definition of occurrence, the sudden and accidental pollution exclusion or the duty to defend, the question of intent repeatedly arose.

The issue of intent presented the court with certain thorny questions. First, whose intent is important? The policyholder's? The carrier's? The entire insurance industry's?

Second, what intended actions are at issue? Do the courts look to intent to discharge pollutants? Intent to cause environmental injury? Intent in changing policy terms? Intent in marketing the insurance policies?

Third, and perhaps most intriguing, how is intent proven? Is the standard objective? Subjective? Somewhere in between? The

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[5] 134 N.J. 1, 629 A.2d 831 (1993).

court looked at all of these issues in determining when insurance companies must provide coverage to their policyholders.

A second theme emerges as a result of the court's extensive review of cases from around the country which involved the sudden and accidental pollution exclusion. The *Morton* court noted that courts tend to award coverage to those policyholders perceived to be less culpable and deny coverage to those perceived as more culpable.[6]

When one looks at the issue of intent as the New Jersey Supreme Court addressed it in *Morton*, as well as its "good guy/bad guy" analysis, how the courts will apply the *Morton* decision in the future becomes more predictable. This Article will examine the *Morton* decision, what it resolved, and what to expect from courts when they address the remaining open issues.

SUMMARY OF *MORTON*

In *Morton*, the policyholder, Morton International (Morton), brought a declaratory judgment action against its insurers seeking a declaration that the insurers had a duty to defend and indemnify the company for environmental claims lodged against it. Those claims derived from an underlying case, *Department of Environmental Protection v. Ventron Corp.*,[7] in which New Jersey successfully sued Morton's predecessor, Ventron, for remediation costs in connection with mercury pollution of state waters. Morton's insurers refused to defend or indemnify Morton for the *Ventron* claims, and Morton thereafter sued.

For forty years, three of Morton's predecessors operated a mercury processing plant and discharged large quantities of mercury into Berry's Creek, an estuary of the Hackensack River. As early as 1956, officials from the State Health Department (Health Department) warned S.W. Berk & Company (Berk), the first relevant predecessor owner, that effluent from the plant contained an unacceptable level of pollutants.[8] Two years later, when a Health Department official revisited the plant, waste handling procedures had not changed. The official outlined a course of action to reduce the pollution, which was agreed to by Berk's vice-president.[9]

Over a year went by, and in February 1960 Health Department

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[6] *Id.* at 70, 629 A.2d at 870-71.

[7] 94 N.J. 473, 468 A.2d 150 (1983).

[8] Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 266 N.J. Super. 300, 311, 629 A.2d 895, 901 (App. Div. 1991), *aff'd*, 134 N.J. 1, 629 A.2d 831 (1993).

[9] *Id.* at 312, 629 A.2d at 901.

officials discovered that the company had not yet made any decisions regarding the development of a treatment facility. They issued a written report threatening legal action if Berk took no treatment action.[10] Thereafter, Velsicol Chemical Corporation purchased the plant and, in the process, learned of the Health Department's inspection report. The new company, Wood-Ridge Chemical Corporation, informed the Health Department that it was planning to construct its own treatment device.[11]

In 1963, Wood-Ridge told the Health Department that it had consulted with engineers to design a suitable waste treatment facility. In 1964, the state complained to Wood-Ridge that it had received no proposals or plans for such a facility. State officials and Wood-Ridge representatives met in August 1964 and agreed that Wood-Ridge would submit final plans for the facility to the Health Department within several weeks.[12]

By March 1966, however, no treatment plant had been designed or completed. The Ventron Corporation acquired Wood-Ridge in 1968. In 1968 or 1969, an Environmental Protection Agency representative visited the plant and noted that its effluent contained unacceptable levels of mercury. At that point, Ventron issued internal memoranda indicating that the problem was at an "emergency level," and saying that the company was "under a moral obligation, as well as an impending legal one, to effectively control the mercury effluent from our processes."[13] Nevertheless, Ventron never succeeded in preventing the mercury contamination prior to its 1974 sale of the site and plant assets.[14] Morton is a successor in interest to Ventron.[15]

In *Ventron*, Justice Pollock summarized the effects of the long-term mercury discharge:

> 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 other elements. Due to depleted oxygen levels, fish no longer inhabit Berry's Creek, but are present only when swept in

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10 *Id.* at 312-13, 629 A.2d at 901-02.
11 *Id.* at 313, 629 A.2d at 902.
12 *Id.* at 314-15, 629 A.2d at 902-03.
13 *Id.* at 315-16, 629 A.2d at 903-04.
14 *Id.* at 316, 629 A.2d at 904.
15 *Id.* at 317, 629 A.2d at 904.

by the tide and, thus, irreversibly toxified.[16]

After the adverse result in *Ventron*, Morton brought a declaratory judgment action against its insurers, all of whom had denied coverage in the *Ventron* proceedings. The trial court granted partial summary judgment to the insurers, deciding that the insurers had no obligation to defend and indemnify Morton as to claims asserted by the purchasers of the plant from Ventron. Each party filed cross-motions for summary judgment on the remaining issues. Defendants asserted that the record contained no disputed facts concerning whether Morton's predecessors had intended or expected to cause property damage. Morton, however, contended that the chancery division was bound by the trial court's determination in *Ventron* that no intent to pollute the waters was proven. The chancery division found that no defendants were required to indemnify Morton, but one defendant was required to defend it.[17]

On appeal, the appellate division affirmed the dismissal of Morton's indemnification claims, and reversed the award of damages and counsel fees against the one insurer.[18] The New Jersey Supreme Court granted Morton's petition for certification and the joint cross-petition for certification from various insurance companies.[19] There was no dispute over which insurers provided coverage or over the terms of the policies involved.[20]

In its opinion, the court analyzed various parts of the typical CGL policy, including the "as damages" provision, the pollution exclusion clause, and the definition of "occurrence." The court also discussed whether the defendants owed Morton a duty to defend. At the outset, the court briskly disposed of the "as damages" issue, holding that cleanup costs are damages covered by the CGL policy.

The court devoted most of its opinion to analysis of the sudden and accidental pollution exclusion clause. The court expressly overruled the long-standing decision in *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co. of New York*[21] to the extent that the case held that the "sudden and accidental" portion of the pollution-exclusion clause merely restated the definition of "occurrence," which focuses on

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16 Department of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 481-82, 468 A.2d 150, 154 (1983).

17 Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 9, 629 A.2d 831, 835 (1993).

18 *Id.*

19 *Id.* at 9-10, 629 A.2d at 835.

20 *Id.* at 10, 629 A.2d at 835.

21 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987).

whether the insured expected or intended the ultimate damage.[22]

Instead, the *Morton* court decided that the word "sudden" possesses a temporal element requiring that the inception of the event be sudden, adding that the "duration of the event—whether it lasts an instant, a week, or a month—is not necessarily relevant to" this determination.[23] Further, the court said that the phrase "sudden and accidental" referred not to the *damage* caused by the pollutants, but rather to their "'discharge, dispersal, release or escape.'"[24] Thus interpreted, the court noted that the addition of the pollution exclusion clause in standard policies dramatically restricted coverage compared to that which was previously provided.[25]

The court found, however, that when the insurance industry presented the pollution exclusion clause to New Jersey and other state insurance authorities, the industry had not made it clear that the clause would greatly restrict coverage. Rather, the court held, the industry had presented the exclusion merely as a clarification of existing coverage. This presentation—known as the "regulatory history" behind the pollution exclusion—the court termed, variously, "grossly misleading,"[26] "apparent and unjustifiable,"[27] "not only astonishing but inaccurate and misleading as well,"[28] "indefensible,"[29] and "perilously close to deception."[30]

The *Morton* court concluded that the memorandum presented to the N.J. Insurance Commission "utterly obscure[d]" the distinction between coverage for accidental property damage and coverage for sudden and accidental discharge of pollutants; and the court further added that the "conclusion is virtually inescapable that the memorandum's lack of clarity was deliberate."[31] Later in the opinion the court noted that if, in fact, the pollution exclusion resulted in a sharp reduction in coverage, a significant decrease in premium rates would have been necessary at the same time.[32]

After its wide-ranging review of the case law and commentary on the pollution exclusion, the court held that the clause would be construed to provide coverage identical to that provided under the prior

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22 134 N.J. at 28, 629 A.2d at 847 (citation omitted).
23 *Id.* at 29, 629 A.2d at 847.
24 *Id.* at 28, 629 A.2d at 847 (quoting insurance policy).
25 *Id.* at 29, 629 A.2d at 847.
26 *Id.*
27 *Id.*, 629 A.2d at 848.
28 *Id.* at 38, 629 A.2d at 852.
29 *Id.*, 629 A.2d at 853.
30 *Id.* at 39, 629 A.2d at 853.
31 *Id.*
32 *Id.* at 73, 629 A.2d at 872.

occurrence-based policies. The court noted, however, that coverage would be precluded in cases in which "the *insured* intentionally discharges a known pollutant, irrespective of whether the resulting property damage was intended or expected."[33]

Applying this holding to the facts before it, the court found that Morton was not entitled to coverage for the remediation costs imposed on its predecessors "because the conclusion is unavoidable that its predecessors had intentionally discharged known pollutants over a long and continuing period."[34] The court pointed to the state's repeated warnings to Morton's predecessors regarding the continuing mercury discharge and those companies' continued failure to repair the problem. Accordingly, no coverage was allowed under policies containing the standard pollution-exclusion clause.[35]

Next, the court examined the definition of "occurrence" in CGL policies. The court declined to lump environmental pollution cases into that category of cases, which includes child molestation cases, in which the intent to injure can be inferred from the act itself.[36] Rather, the opinion outlined a five-part test to be used, on a case-by-case basis, to establish whether or not exceptional circumstances exist that objectively establish the insured's intent to injure. The factors to be considered 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 or likelihood of harm.[37]

The court then turned to the question of whether an occurrence had taken place. Preliminarily, the court decided that the insurers were entitled to litigate whether an occurrence had taken place even though they had not participated in the *Ventron* litigation.[38]

The court then concluded that although Morton's predecessors may not have intended the precise extent of harm inflicted in this case, nonetheless such differences do not make the harm "improba-

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33 *Id.* at 78, 629 A.2d at 875.

34 *Id.* at 87, 629 A.2d at 880.

35 *Id.* at 88, 629 A.2d at 881.

36 *Id.* at 86, 629 A.2d at 879 (citing Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr., Inc., 239 N.J. Super. 276, 571 A.2d 300 (App. Div.), *certif. denied*, 122 N.J. 147 (1990)).

37 *Id.* at 86-87, 629 A.2d at 880.

38 *Id.* at 90, 629 A.2d at 881.

ble" to the extent that a subjective standard must be used.[39] The court found that the warnings from the state, the insureds' repeated and longstanding failure to act, and internal memoranda reflecting the awareness of Morton's predecessors of the problem together provided a sufficient basis to conclude that, even on summary judgment, there were no material disputed facts concerning whether Morton's predecessors expected to cause damage, and therefore no occurrence took place.[40] The *Morton* court concluded by affirming the appellate division's decision that the insurers had not breached their duty to defend.[41]

Interpretation of the Phrase "As Damages"

The CGL policies at issue in *Morton* typically promised to pay on behalf of the insured "all sums which the insured shall become legally obligated to pay as damages . . . ."[42] The insurers argued that the "as damages" phrase confined their duty to indemnify to include only traditional tort-liability money damages, and not government mandated response costs intended to remediate environmental harm.[43] Morton argued for a "plain meaning" interpretation of the term "damages" that would include such governmental actions.[44]

The court easily disposed of the "as damages" issue, holding that cleanup costs are damages covered by the CGL policy. The court, effectively adopting the reasoning of Justice O'Hern's dissent in *State v. Signo Trading International, Inc.*,[45] decided that "[t]he clear weight of authority . . . adopts the view that the undefined term 'damages' in CGL policies should be accorded its plain, nontechnical meaning, thereby encompassing response costs imposed to remediate environmental damage."[46]

Pollution Exclusion Clause

The most controversial part of the *Morton* decision is the New Jersey Supreme Court's handling of the sudden and accidental pollution exclusion clause. Several insurers contended that regardless of whether or not there was an occurrence, there was no coverage

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39 *Id.* at 90-91, 629 A.2d at 882.
40 *Id.* at 94-95, 629 A.2d at 884.
41 *Id.* at 95, 629 A.2d at 884-85.
42 *Id.* at 22, 629 A.2d at 843.
43 *Id.* at 22-23, 629 A.2d at 843-44.
44 *Id.* at 23, 629 A.2d at 844.
45 130 N.J. 51, 75-76, 612 A.2d 932, 944-45 (1992) (O'Hern, J., dissenting).
46 134 N.J. at 25, 629 A.2d at 845 (citations omitted).

under the policies containing the standard pollution exclusion clause. The clause reads as follows:

> This insurance does not apply . . . (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, 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.*[47]

The court overruled the appellate division's decision in *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*,[48] to the extent that it held that the standard pollution exclusion clause should be understood merely to impose the same conditions on coverage as are imposed by the definition of "occurrence." This definition focuses on whether the insured expected or intended the ultimate damage.[49] Examining the language of the exclusion, the supreme court noted that the phrase "sudden and accidental" does not characterize or relate to the *damage* caused by the pollution, but instead narrowly limits the kind of "discharge, dispersal, release or escape" of pollutants for which coverage is provided.[50]

SUDDEN HAS A TEMPORAL ELEMENT

The court recognized that the word "sudden" is ambiguous and undefined in those CGL policies that contain the standard pollution exclusion clause.[51] The insurance companies argued that the pollution exclusion clause was limited to the so-called "boom" event, where the discharge of the pollutants was both abrupt and accidental.[52] Persuaded that "sudden" relates to an event that begins abruptly or without prior notice or warning, the court concluded that the term possesses a "temporal" element. But the duration of the event is not germane to whether the commencement of the event is sudden.[53] The court concluded that the phrase "sudden and accidental" in the standard pollution exclusion clause "describes only those discharges, dispersals, releases, and escapes of pollutants that occur abruptly or unexpectedly and

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47 *Id.* at 28, 629 A.2d at 847 (emphasis added).

48 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987).

49 134 N.J. at 28, 629 A.2d at 847 (citation omitted).

50 *Id.* at 28, 629 A.2d at 847 (quoting the insurance policy).

51 *Id.* at 28-29, 629 A.2d at 847.

52 *Id.* at 42, 629 A.2d at 855.

53 *Id.* at 29, 629 A.2d at 847.

are unintended."[54] The court recognized that in most factual contexts, discharges of pollutants are neither abrupt nor unexpected.[55]

REGULATORY ESTOPPEL BARS TEMPORAL APPLICATION OF EXCLUSION

The court undertook an exhaustive analysis of independent commentary and cases around the country construing the pollution exclusion clause.[56] Having completed this exhaustive analysis, the critical issue which concerned the court was not what the clause meant, but whether it should be given its literal effect in New Jersey. The court found this issue pivotal because of the clause's drafting and regulatory history. The court declared:

> We are fully satisfied that if given literal effect, the standard clause's widespread inclusion in CGL policies would limit coverage for pollution damage to so great an extent that the industry's representation of the standard clause's effect, in its presentation to New Jersey and other state insurance regulatory agencies, would have been grossly misleading. Proffered to regulators merely as a clarification of existing coverage "so as to avoid any question of intent," and as a continuation of coverage for pollution-caused "injuries that result[ ] from an accident," the industry's understatement of the clause's actual effect of coverage for pollution damage is both apparent and unjustifiable.[57]

The *Morton* court recognized that there is no chance for arms-length negotiating between insurance companies and policyholders, other than the industry's presentation of the standard pollution exclusion clause to state regulators. Therefore the court considered it appropriate to interpret the clause consistently with the objectively reasonable expectations of New Jersey and other state regulatory authorities because only they had an opportunity to object to the clause.[58]

The court believed, because of the manner in which the insurance industry had presented the exclusion clause to regulatory authorities, that those authorities would not have perceived that the pollution exclusion clause would eliminate all coverage for pollution-

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54 *Id.*

55 *Id.* at 70, 629 A.2d at 871.

56 *Id.* at 31-70, 629 A.2d at 848-70.

57 *Id.* at 29, 629 A.2d at 847-48.

58 *Id.* at 30, 629 A.2d at 848. Note that this, in effect, takes away the "sophisticated insured" argument frequently put forth by insurance companies. *See id.* at 77, 629 A.2d at 874-75.

related claims with the exception of abrupt and accidental discharge cases. The court rejected the insurance industry's representation that the clause simply "clarified" the pre-existing coverage scope. Rather, the court asserted that the exclusion clause virtually eliminated pollution-caused property damage coverage even though the industry did not indicate that the change in coverage was so sweeping or that rates should be reduced.

For that reason, the court declined to enforce the standard pollution exclusion clause as written. To do so, the court posited, would contravene the state's public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and in policy content. Further, the court continued, enforcement would condone the industry's misrepresentation to New Jersey regulators and the regulators of other states concerning the clause's effect.[59]

The court noted that this was the first time it had applied the estoppel doctrine in a regulatory context, but found its application under the circumstances to be both appropriate and compelling. In misrepresenting the effect of the pollution exclusion clause to the New Jersey Department of Insurance, the court concluded the Insurance Rating Board ("IRB"), an insurance industry group that drafted the exclusion, misled the department in its assessment of the clause and averted disapproval of the proposed exclusion as well as a decrease in rates.[60] The court declared that to give literal effect to the clause would "violate this State'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."[61] The court maintained that, as a matter of fairness, the representations of the insurers' agent, the IRB, should bind the insurers.[62]

In addition, the court asserted, the insureds were probably unaware that coverage had been changed. The court, therefore, was "fully persuaded" that the "reasonable expectations" of the New Jersey Department of Insurance should be attributed to the insureds.[63]

THE EXCLUSION CLAUSE BARS COVERAGE ONLY WHEN THERE IS AN INTENTIONAL DISCHARGE OF A KNOWN POLLUTANT

Finding that the insurance industry had "knowingly misstated

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59 *Id.* at 30, 629 A.2d at 848.
60 *Id.* at 75, 629 A.2d at 874.
61 *Id.* at 74, 629 A.2d at 873.
62 *Id.* at 75-76, 629 A.2d at 874.
63 *Id.* at 77-78, 629 A.2d at 875.

the intended effect"[64] of this significant exclusionary clause in its submission of the clause to state departments of insurance and had "profited from this non-disclosure by maintaining pre-existing rates for substantially reduced coverage," the court maintained that "the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities."[65] Therefore, in New Jersey the pollution exclusion clause will bar coverage only when a known pollutant was intentionally discharged. As the court declared:

> [N]otwithstanding the literal terms of the standard pollution-exclusion clause, that clause will be construed to provide coverage identical with that provided under the prior occurrence-based policy, except that the clause will be interpreted to preclude coverage in cases in which the *insured* intentionally discharges a known pollutant, irrespective of whether the resulting property damage was intended or expected. We expressly limit our holding concerning the limited effect of the pollution-exclusion clause to cases in which the insured or an agent specifically authorized to act for the insured intentionally discharges a known pollutant.[66]

Note that the court could have reached the same conclusion on an alternate basis. The court contended that "sudden" is "hardly susceptible of precise definition;"[67] that is, it is ambiguous. In insurance coverage cases, general rules of construction dictate that ambiguous language in a policy will be construed to sustain coverage,[68] and that terms in an insurance policy should be interpreted in accordance with their plain and commonly understood meaning.[69]

The words "sudden" and "accidental" in the standard CGL policy are undefined. Dictionaries have various definitions for "sudden." In its review of case law, the supreme court noted that in Webster's and other dictionaries, the primary definition for "sudden" is typically "'happening without previous notice . . . occurring unexpectedly . . . not foreseen.'"[70] Secondary definitions often include a temporal ele-

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64 *Id.* at 79, 629 A.2d at 876.

65 *Id.* at 80, 629 A.2d at 876.

66 *Id.* at 78, 629 A.2d at 875.

67 *Id.* at 28, 629 A.2d at 847.

68 Mazzilli v. Accident & Casualty Ins. Co. of Winterthur, Switzerland, 35 N.J. 1, 170 A.2d 800 (1961); Werner Indus., Inc. v. First State Ins. Co., 112 N.J. 30, 548 A.2d 188 (1988). *See also Morton*, 134 N.J. at 55, 629 A.2d at 862.

69 Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 51, 372 A.2d 372 (1977). *See also Morton*, 134 N.J. at 56, 58, 629 A.2d at 862, 864.

70 134 N.J. at 56, 629 A.2d at 862 (quoting Hecla Mining Co. v. New Hampshire

ment, meaning "abrupt," as argued by the carriers.

In its review of cases, the *Morton* court noted that where courts have barred coverage based on the notion that sudden has a temporal meaning, the issue tends to be a highly fact-sensitive one. As the court observed, however, while coverage in these cases was barred for property damage resulting from the discharge of pollutants over a sustained period, in some of these cases "the polluting activity was so flagrant that coverage might have been denied on the basis that the damage was not unexpected or unintended."[71]

The supreme court noted another category of cases in which courts have declined to construe "sudden" as necessarily having a temporal meaning akin to "abrupt." The court observed that a common characteristic of these cases was that the insureds' conduct was generally less culpable than that reflected in cases construing "sudden" to have a temporal meaning. According to the court, relatively few of these insureds had regularly engaged in willful or knowing pollution.[72]

The supreme court followed this "good guy/bad guy" pattern. Faced with a policyholder that it determined to be an intentional polluter as a matter of law, the court construed the pollution exclusion clause to have a temporal element. Had the policyholder not been such an intentional polluter, however, the court very well may have followed the usual New Jersey rules of construction—holding that the word "sudden" was ambiguous and should be construed against the insurer in accordance with its plain and commonly understood meaning of "unexpected." In effect, the court would then have affirmed *Broadwell.*

Several motions for reconsideration were filed with the supreme court. Morton and the New Jersey State League of Municipalities, as *amicus curiae,* have asked the court to confirm that the pollution exclusion clause is a restatement of the occurrence definition on the basis that the insurance companies should not be allowed to profit in any way from their misrepresentations.[73] Some carriers have filed motions for reconsideration on the basis that the record before the court on the regulatory history was incomplete and that a hearing is required

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Ins. Co., 811 P.2d 1083 (Colo. 1991) which quoted WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (1986)).

71 *Id.* at 47, 629 A.2d at 857.

72 *Id.* at 55-56, 629 A.2d at 862.

73 They are also requesting that the court extend this principle to its interpretation of "occurrence" and make it clear that the test for intent in the occurrence definition is subjective and excludes coverage only if the policyholder intended to cause the specific resultant harm.

to establish what the regulatory history was and whether regulatory estoppel should apply here.[74] The supreme court stated in its decision, however, that it had a sufficient basis on the record before it, along with the reported cases and independent commentary that address the regulatory history, to examine the regulatory history without a remand.[75]

WHAT IS AN INTENTIONAL DISCHARGE OF A KNOWN POLLUTANT?

The only pertinent question that remains for courts applying the pollution exclusion clause is how to determine whether there has been an intentional discharge of a known pollutant. The supreme court gave no guidance on this issue. Unlike its treatment of the "occurrence" definition, the court did not discuss whether the test was objective or subjective and provided no guidelines. The court also never discussed who has the burden of proof.

The issue of how to determine whether there has been an intentional discharge of a known pollutant will present difficult questions for courts for many years to come. Courts, in effect, will be called upon to determine "looking-glass" science. They will be required to ignore current scientific understanding and attempt to discover what was state-of-the-art knowledge in the 1940s, 1950s, 1960s, and so forth, when many of the discharges took place. The determination of whether there has been an intentional discharge of a known pollutant will be intensively fact-specific.

For example, it is sometimes difficult to distinguish between a substance that was "discharged" and one that was "treated." In the past, reputable scientists recommended placing certain organic chemical wastes into the ground as it was believed that the ground had the capacity to change these wastes through biochemical degradation, oxidation, volatilization, absorption and other mechanisms, rendering the wastes harmless.[76] As late as 1979, scientists asserted that these phenomena prevented or retarded the movement of organic chemicals from land surface to groundwater.[77]

Sanitary wastes are frequently discharged into septic fields with the understanding that bacterial action will convert these wastes

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74 Certain underwriters at Lloyd's, London and London Market Insurance Companies have also moved for reconsideration on two bases. First, they claim that their relevant policies did not use the "sudden and accidental" language construed by the court. Second, they assert that they were not members of the IRB.

75 *Morton*, 134 N.J. at 29, 629 A.2d at 848. As of December 1993, the supreme court had not decided the various motions for reconsideration.

76 R. ALLEN FREEZE AND JOHN A. CHERRY, GROUNDWATER 425 (1979).

77 *Id.*

into innocuous harmless substances. Hindsight has shown that this treatment was not always totally effective, and that septic system design has to be changed to avoid significant environmental damage.[78] Nevertheless, these discharges into septic fields should not be considered intentional discharges which bar insurance coverage.

In addition, sometimes chemicals or wastes may be placed into one medium and contamination may unexpectedly reach another medium. For example, wastes placed into a lagoon or onto soil may unexpectedly end up in groundwater. These also should not be considered intentional discharges for insurance purposes.

Whether a substance is a known pollutant also raises interesting questions, such as who must know that the substance is a pollutant. Many environmental statutes and regulations now define certain substances and wastes as toxic or hazardous.[79] Prior to the 1970s, however, there were only a few environmental statutes enacted by the legislature. It will therefore be far more difficult to determine what was a known pollutant prior to the enactment of those statutes.

In their examination of parties with varying degrees of culpability, the courts will face perplexing scientific and public policy issues regarding when an intentional discharge of a known pollutant takes place. The courts will have to determine whether releases in compliance with government-sanctioned permits are excluded and what quantity of a substance must be discharged before it is considered harmful and thus a pollutant.

Furthermore, a substance may be a pollutant when discharged into one medium and may not be a pollutant when discharged into another.[80] For example, septic wastes are usually biodegradable in soil but can be harmful to aquatic life if discharged into water.

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78 *See, e.g.*, BUILDING CONSTRUCTION HANDBOOK (Frederick S. Merritt ed., 1965) 22-8, 22-9 (referring to modifications in design parameters in use since 1927).

79 *See, e.g.*, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 (14) (1988); Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1321(b)(2)(A) (1988); Solid Waste Disposal Act, 42 U.S.C. § 6903(5) (1988); Toxic Substances Control Act, 15 U.S.C. § 2601(a)(2) (1977); Emergency Planning & Community Right-to-Know Act, 42 U.S.C. § 11002 (1988); Toxic Catastrophe Prevention Act, N.J. STAT. ANN. § 13:1K-21(e) (1991) and accompanying regulations, N.J. ADMIN. CODE tit. 7, § 31-2.3(a) and Table I (1993); Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11b(K) (1992) and accompanying regulations, N.J. ADMIN. CODE tit. 7, § 1E-1.7 and Appendix A (1993).

80 Jack H. Gentile & Steven C. Schimmel, *Strategies for Utilizing Laboratory Toxicological Information in Regulatory Decisions, in* CONCEPTS IN MARINE POLLUTION MEASUREMENTS 57-80 (H.H. White ed., 1984).

Thus, courts will need to look at a number of technical issues in order to determine if there is an intentional discharge of a known pollutant.

One instance in which the pollution exclusion clause should not bar coverage is in the typical Superfund case where "joint and several liability for cleanup may be imposed retroactively and without regard to fault on a broad class of entities involved directly or indirectly in the process of disposal of hazardous substances."[81] In *Morton*, Justice Stein pronounced that had the insurance industry candidly revealed the extent of the contraction in coverage intended by the pollution exclusion clause, the court would not have hesitated to enforce the pollution exclusion clause literally, resolving subtleties intrinsic in the meaning of "sudden" on a case-by-case basis.[82] Because of the industry's failure to disclose the intended effect of the pollution exclusion clause, however, the industry "justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities."[83] Thus, potentially responsible parties who sent their wastes to an appropriate disposal site can expect that the pollution exclusion clause will not bar coverage in New Jersey.

Finally, note that in order for a substance to be a known pollutant, it should be shown to be harmful, that is, to cause some sort of damage or injury. This inquiry will bring the courts full circle back to the "expected or intended" occurrence definition and blurs the supreme court's distinction of whether there has to be an intent to discharge or an intent to injure for the exclusion to apply.

DEFINITION OF OCCURRENCE

Perhaps the most enigmatic portion of the *Morton* decision is the court's treatment of the definition of the policy term "occurrence." The court set out to establish guidelines for determining what constitutes an occurrence in environmental pollution cases. The opinion articulated a flexible test allowing substantial latitude in showing whether there was an occurrence. It is apparent, however that there is no bright-line test for determining whether an occurrence has taken place.

The definition of occurence set forth in the policies for most of the period germane to the litigation was as follows: "'Occur-

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[81] Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 79, 629 A.2d 831, 875-75 (1993).

[82] *Id.*, 629 A.2d at 876.

[83] *Id.* at 80, 629 A.2d at 876.

rence' means 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.*"[84]

The test for determining whether an occurrence has taken place therefore revolves around the matter of intent. The court distinguished intent in the occurence context from intent as understood in the sudden and accidental pollution exclusion context, and examined whether there should be an objective or subjective test for determining whether there is a covered occurrence. The supreme court agreed with the appellate division's finding that Morton was not entitled to coverage because there was no occurrence as defined by the policies. The court disagreed, however, with the rationale of the appellate division's decision, which relied on *Atlantic Employers Insurance Co. v. Tots and Toddlers Pre-School Day Care Center, Inc.*,[85] a case involving child molestation. Morton argued that the appellate division's reliance on *Atlantic Employers* improperly equated the discharge of pollutants with child molestation as acts that could be deemed as intentionally injurious as a matter of law. The supreme court agreed.[86]

INTENT TO CAUSE INJURY IS DETERMINATIVE

Relying on *Voorhees v. Preferred Mutual Insurance Co.*,[87] the supreme court held that "the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury."[88] The court considered an injury to be "caused by an occurrence if the *injury* was unintended and unexpected, whether or not the *act* that caused the injury was intentional."[89] The court also examined *SL Industries, Inc. v. American Motorists Insurance Co.*[90] to determine whether proof of a subjective intent to cause the specific injury was required.

Voorhees involved a suit for breach of the duty to defend a defamation action under the comprehensive general liability coverage

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84 *Id.* at 11, 629 A.2d at 836 (emphasis added). For complete policy history, *see id.* at 10-11, 629 A.2d at 835-36.

85 239 N.J. Super. 276, 571 A.2d 300 (App. Div. 1990), *certif. denied*, 122 N.J. 147, 584 A.2d 218 (1990).

86 134 N.J. at 86, 629 A.2d at 879.

87 128 N.J. 165, 607 A.2d 1255 (1992).

88 134 N.J. at 83, 629 A.2d at 878 (quoting *Voorhees*, 128 N.J. at 183, 607 A.2d at 1264).

89 *Id.* (emphasis added).

90 128 N.J. 188, 607 A.2d 1266 (1992).

of a homeowner's policy. The key interpretive question raised was what should be deemed "accidental"—the defamatory *act* or the *injuries* resulting from the act. The court adhered to the prevalent New Jersey rule and held that the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury.

The *Voorhees* court was then faced with the question of what constitutes the "intent to injure." The answer required determining whether the court had to find a subjective intent to cause a specific injury, or whether it could presume an intent to injure from the objective circumstances. Justice Garibaldi, writing for the court, observed a general trend which required an evaluation of "the actor's subjective intent to cause injury."[91] The *Voorhees* court ruled that when deeds are most "reprehensible," as in cases of child molestation, intent to cause injury could be inferred from the actions taken without examination of the defendant's actual intent to cause harm.[92] The *Voorhees* court concluded that "[a]bsent exceptional circumstances that objectively establish the insured's intent to injure, we will look to the insured's subjective intent to determine intent to injure."[93]

THE EXCEPTIONAL CIRCUMSTANCES TEST: OBJECTIVE OR SUBJECTIVE?

The *Morton* court adopted the *Voorhees* test in part. The court noted the "impracticality of adhering to the general rule that 'we will look to the insured's subjective intent to determine intent to injure'" in environmental coverage litigation.[94] Instead, the court held that 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.'"[95]

The supreme court included guidelines for determining whether such exceptional circumstances exist. The court suggested that 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

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91 *Voorhees*, at 184, 607 A.2d at 1264.

92 *Id.*, 607 A.2d at 1265.

93 *Id.* at 185, 607 A.2d at 1265.

94 134 N.J. at 85, 629 A.2d at 879 (quoting *Voorhees*, 128 N.J. at 185, 607 A.2d at 185).

95 *Id.* at 86, 629 A.2d at 880 (quoting *Voorhees*, 128 N.J. at 185, 607 A.2d at 1265).

> pollutants, whether regulatory authorities attempted to discourage or prevent the insured's conduct, and the existence of subjective knowledge concerning the possibility or likelihood of harm.[96]

The court, however, gave no guidance on how to assess these factors, the weight to be given to each one, or who bears the burden of proof. In fact, while the court maintained that the test is objective, some of these factors are clearly subjective, such as the third factor (the quality of the insured's knowledge concerning the harmful propensities of the pollutants), and the fifth (the existence of subjective knowledge concerning the possibility or likelihood of harm).

This raises a number of questions. For instance, what if there are no exceptional circumstances? In one of the first cases to apply *Morton*, United States District Court Judge Barry, in *Continental Insurance Co. v. Beecham, Inc.*,[97] determined that while an insured's intent to injure could be objectively established in some instances where "exceptional circumstances" demonstrate such intent, it is the subjective intent of the alleged wrongdoer that otherwise is relevant. Judge Barry's opinion does not address Justice Stein's concern with the "impracticality" of proving intent in environmental coverage cases. Nevertheless, Judge Barry's opinion seems to be a logical result of the *Morton* decision.

It remains to be seen whether it will in fact be "impractical" to prove intent in environmental coverage litigation. The *Morton* court based its decision on the observation 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."[98] It should be noted, however, that juries in criminal cases often find specific intent where the burden of proof is substantially higher than the burden of proof in environmental insurance coverage litigation. Courts deal with difficult issues of proof every day, and should be able to do so in these sorts of cases as well.

THE EXCEPTIONAL CIRCUMSTANCES TEST AS APPLIED TO *MORTON*

The court applied the five factors to Morton's predecessors' conduct and found, based on the summary judgment record, that the trial court properly concluded as a matter of law that Morton's predecessors had intended or expected environmental injury. The court noted that exceptional circumstances existed objectively es-

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96 *Id.* at 86-87, 629 A.2d at 880.
97 No. 88-2890 (MTB), 1993 WL 469906 (D.N.J. Aug. 31, 1993).
98 134 N.J. at 85-86, 629 A.2d at 879.

tablishing Morton's predecessors' intent to injure.[99]

Morton had also argued that even if the court found that its predecessors expected to cause injury, the magnitude of damage to Berry's Creek and the surrounding areas so far exceeded what Morton's predecessors may have expected or intended that there was no bar to coverage. The court held that it did not "consider that differences in harm relating to the severity of environmental damage give rise to a finding of 'improbability' of harm that invokes the need for evidence of subjective intent."[100]

The application of these guidelines to *Morton* shows one extreme. The court noted that the conclusion was "inescapable that from as early as 1956, when the unacceptable quality of its emissions first was brought to [Morton's predecessor's] attention, the discharges of pollutants thereafter occurred intentionally."[101] The court also noted that the record reflected a pattern of "stonewalling" on the part of Morton's predecessors.[102] The court found that Morton's predecessors' subjective knowledge that environmental harm was an inevitable result of its discharges was inferable as early as the mid-1950s.[103] The court also made the "inescapable inference" that another predecessor was "fully cognizant that its effluent was unsuitable for a stream discharge and that environmental damage inevitably would occur if its untreated effluent continued to flow into Berry's Creek."[104]

How Will Intent to Injure Be Determined in Future Cases?

The court recognized that comparison with analogous cases is of limited value because specific facts and circumstances inevitably determine whether courts conclude that proof of an occurrence has been established. It also noted that "[m]any courts have concluded under 'comparable circumstances' that continued discharges of pollutants over a prolonged period, combined with knowledge of the pollutants' deleterious qualities, is sufficient to establish an intention or expectation that environmental damage will occur."[105]

One federal court has already applied *Morton*'s five factor test.

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99 *Id.* at 90-95, 629 A.2d at 882-85.

100 *Id.* at 90-91, 629 A.2d at 882 (citing SL Indus., Inc. v. American Motorists Ins. Co., 128 N.J. 188, 212, 607 A.2d 1266, 1279 (1992)).

101 *Id.* at 91, 629 A.2d at 882.

102 *Id.* at 92, 629 A.2d at 882.

103 *Id.* at 91, 629 A.2d at 882.

104 *Id.* at 93, 629 A.2d at 883.

105 *Id.* at 94, 629 A.2d at 884 (citations omitted).

In *Mottolo v. Fireman's Fund Insurance Co.*,[106] the District Court of New Hampshire applied *Morton*'s exceptional circumstances test to the insured's conduct and found that exceptional circumstances existed which objectively established the insured's intent to injure. As the *Mottolo* court reasoned:

> In applying these factors in the present action, the court is of the opinion that exceptional circumstances exist that objectively establish the plaintiffs' intent to injure. First, the discharges continued over a four-year period. Second, the discharges resulted from the plaintiffs' intentional acts; they did not occur negligently or innocently. Third, Mottolo had both objective and subjective knowledge of the harmful propensities of the discharged materials. For example, Mottolo knew he was not burying barrels containing distilled water, but barrels containing waste products from manufacturing and solvent recovery businesses. He knew that licensed landfills were not accepting these materials. When he bulldozed the barrels, he saw them break and spill their contents. He knew distilled water did not seep from these barrels; indeed, he indicated the contents were colored and would often "sit there and mass." However, it is true there is no evidence federal and state officials attempted to discourage or prevent the plaintiffs' conduct. . . . This lack of involvement, however, is due to the fact the plaintiffs had ceased their dumping at the site before officials discovered the contamination.
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> In view of this analysis, the court finds the plaintiffs' acts were so inherently injurious they could not be performed without causing the resulting injury, the contamination of the site, and therefore *infers the plaintiffs subjectively intended to cause the injury*. In making this determination, however, the court emphasized its conclusion rests on the exceptional circumstances in the complete record in this litigation and not on an assumption that environmental pollution cases involving intentional discharges of pollutants warrant a presumption that injury was intended.[107]

Policyholders in the future can therefore expect a fair amount of latitude in the determination of whether there has been a covered occurrence while the courts continue to wrestle with the exact nature of the test. The *Morton* court recognized that specific facts and circumstances will vary and it did not set clear-cut guidelines for the determination of intent; nor did it spell out who has the burden of proof in this issue. It is apparent, however, that courts will be called upon to

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106 No. 89-320-JD, 1993 WL 335263 (D.N.H. 1993).

107 *Id.* at *8 (emphasis added).

determine whether the policyholder's actions and activities were in keeping with the standards of the day, thereby inferring the policyholder's intent from its conduct. While Morton's predecessors were determined to have expected or intended to cause injury as a matter of law, these were under "exceptional circumstances" which will not be present in most cases.

DUTY TO DEFEND

In one paragraph at the end of the 95-page decision, the supreme court gave short shrift to Morton's contention that certain of its insurers breached their duty to defend its predecessors in the *Ventron* litigation; the court simply affirmed the appellate division's view without analysis.[108]

On the one hand, this is disturbing, as the court has countenanced a practice in which the insurer can withhold the duty to defend until the underlying litigation is concluded, effectively denying the insured defense coverage for which it was paid. On the other hand, the court had already found as a matter of law that Morton's predecessors were intentional dischargers of known pollutants and therefore not entitled to coverage. It therefore appears that the duty to defend tends to be case-specific. It remains to be seen what the supreme court will do when it is confronted with an environmental policyholder whom it considers to be less culpable.

Because the court's analysis was so brief, an extended discussion will have to wait for another day. Because the court's treatment leaves open a number of questions, however, a few observations are appropriate.

Generally, the duty to defend is "triggered by a complaint against the insured alleging a cause of action that may potentially come within the coverage of the policy."[109] It does not matter whether it ultimately does come within the coverage or whether the insurer is eventually required to pay.[110] This "potential for indemnity" principle "applies where there is a factual issue between the third-party claimant and the insured, the resolution of which may result in an adjudication that at least part of the claim against the insured is within policy coverage."[111]

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108 134 N.J. at 95, 629 A.2d at 884-85, *aff'g* 266 N.J. Super. 300, 340-345, 629 A.2d 895, 917-20 (App. Div. 1991).

109 Hartford Ins. Group v. Marson Constr. Corp., 186 N.J. Super. 253, 257, 452 A.2d 473, 474 (App. Div. 1982), *certif. denied*, 93 N.J. 247, 460 A.2d 565 (1983).

110 *Id.*

111 *See id.* (citations omitted). *See also* Kristine L. Wilkes, *The Montrose Trilogy: Califor-*

This general rule has been narrowed in certain limited instances in two cases referenced in the *Morton* decision.[112] First, *Morton* referred to *Burd v. Sussex Mutual Insurance Co.*,[113] a case involving an insured who had been criminally convicted of atrocious assault and battery. There, the supreme court decided that if the trial will leave the question of coverage unresolved so that the insured may later be called upon to pay, or if the carrier's defense might prejudice the insured because of the carrier's desire for the insured to be found to have acted intentionally, the carrier may not be permitted to control the defense and the duty to defend is translated into a duty to reimburse. Furthermore, the court held that where the carrier's position is so different from the insured's that the carrier cannot defend the action in good faith, there has to be a separate proceeding between the carrier and the insured, represented by counsel of their own choosing, to resolve their differences.

In *Hartford Accident and Indemnity v. Aetna*,[114] a dispute between two carriers, the New Jersey Supreme Court affirmed the law division opinion. The lower court had held that because of the conflict generated by a critical coverage issue, Aetna was within its rights in refusing to take over the defense on behalf of its insured and was justified in litigating the coverage issue later in a separate proceeding.

The timing of the *Morton*, *Aetna*, and *Burd* cases was critical. The cases reached the New Jersey Supreme Court long after the underlying cases were adjudicated. In such instances, the court could only be looking at the question of reimbursement. Nevertheless, these cases encourage carriers to sit on the sidelines in the hope that, with hindsight, a reviewing court will find they never have to pay defense costs.

This determination stands the entire concept of an insurer's duty to defend on its head. By allowing the carriers to wait until the underlying litigation is over, the "potential for indemnity"

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nia Court Appears Poised to Reaffirm Insured's Defense Rights in Environmental Context, 7 MEALEY'S LITIG. REP.: INS. #44, 12, 14 (Sept. 28, 1993).

112 134 N.J. at 95, 629 A.2d at 884-85 (citing Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co., 98 N.J. 18, 24-25, 483 A.2d 402, 406-07 (1984) and Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 388-90, 267 A.2d 7, 9-10 (1970)).

113 56 N.J. 383, 394, 267 A.2d 7, 13 (1970).

114 98 N.J. 18, 29, 483 A.2d 402, 411 (1984) (claim against a pharmaceutical company for injuries to an infant as a result of taking pharmaceutical drugs; conflict arose over the chronology of drug dispensation and the manifestation of injuries in relation to the date the policies were in effect).

test[115] has been transformed into a "certainty of indemnity" test and will make it virtually impossible for a policyholder to obtain a defense while the underlying proceeding is ongoing.[116]

It is unfair to a policyholder who has paid for defense costs and has been sued by a third party alleging intentional and unintentional conduct to have to pay for its own defense and then undergo the expense of a second lawsuit to determine the liability of the insurance company for these costs. While the policyholder may ultimately receive reimbursement both for its defense costs and the costs of the second action,[117] it may be years and thousands of dollars later before it gets reimbursement, tying up dollars that otherwise could have been applied to the environmental cleanup.

Where there is a potential conflict of interest because the underlying action alleges intentional and unintentional conduct, or where intent in the coverage sense will not be resolved in the underlying action, there are options available to protect the policyholder and make sure it receives the defense coverage for which it has paid. If intentional conduct is not an issue in the underlying action, the carrier may be able to defend subject to a reservation of rights.

If intentional conduct is an issue, and the carrier cannot give an unbiased defense, independent counsel can be appointed with counsel fees paid by the carriers as the case progresses.[118] The onus, in other words, should be on the insurer who has been paid premiums to provide the duty to defend in some fashion, rather than requiring the insured to make his own way and try to recover later on. When the duty to defend becomes co-extensive with the duty to indemnify, it ceases to have any independent meaning. Yet this is what will happen if the appellate division's decision, affirmed by the supreme court, is applied in the future.

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115 *Morton*, 134 N.J. at 82, 629 A.2d at 877-78 (citing Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 607 A.2d 1255 (1992) (New Jersey Supreme Court noted the duty to defend clause may not be triggered "absent a potentially-coverable occurrence")).

116 *Cf.* Wilkes, *supra* note 111, at 12.

117 Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 266 N.J. Super. 300, 342, 629 A.2d 895, 918 (App. Div. 1991), *aff'd* 134 N.J. 1, 629 A.2d 831 (1993).

118 *See, e.g.*, LaSalle Nat'l Trust v. Harper Realty, N.D. Ill. No. 91C8247, Mar. 25, 1993, *reprinted in* 7 MEALEY'S LITIG. REP.: INS. #23, B1, B13 (Apr. 20, 1993); San Diego Fed. Credit Union v. Cumis Ins. Soc., Inc., 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (Cal. Ct. App. 1984).

CONCLUSION

The *Morton* decision will present interesting challenges to the New Jersey courts for years to come. *Morton* demonstrates how the New Jersey Supreme Court handled one extreme. No matter what test the court applied, whether it was the "intentional discharge of a known pollutant" test for the application of the pollution exclusion, or the five-part exceptional circumstances "guidelines" test to determine if there was an objective intent to injure, the supreme court found that Morton failed. Nevertheless, except for the duty to defend, the court still ruled in favor of policyholders on each issue it examined, setting a powerful precedent in New Jersey and nationwide. Furthermore, the court's willingness to examine drafting and regulatory history and to apply regulatory estoppel opens the door for such examination and application in other contexts.

Future cases will involve policyholders who fall all along the spectrum of culpability. The cases will be fact-specific and the courts will have to flesh out the "intent" tests developed by the supreme court in *Morton* and apply them on a case-by-case basis. These activities are nothing new for New Jersey courts and they are well-equipped for this task. One thing, however, is clear: substantial amounts of insurance money should be available for environmental cleanups in New Jersey.