MORTON INTERNATIONAL: THE FICTION OF REGULATORY ESTOPPEL†

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> I have great respect for the judges and courts of the United States. However, if my understanding of the [*Morton*] decision . . . is correct, then I must conclude that the court was either misled or did not understand the day-to-day workings of the state regulatory process . . . .
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> Stanley C. DuRose
> Wisconsin Insurance Commissioner in 1970

Consider a case where a court hands down a judgment that a defendant perpetrated a pervasive fraud upon victims in every state in the country years ago. Oddly, no alleged victim had ever brought a complaint against the defendant. While the purported victims were readily available, they were never approached for information about the alleged misconduct. Indeed, there was no trial on any of the issues. The only "testimony" came from briefs submitted to an appellate court citing law journal articles written by attorneys who represent parties in the same position as the plaintiff.

The defendant protests. He never had an opportunity to challenge the purported evidence submitted in the appellate court papers, much less at an evidentiary hearing. Nonetheless, he is adjudged to have committed a heinous act for which he will become subject to billions of dollars in claims.

After the news of this judgment becomes public, the so-called "victims" of the alleged misconduct band together. On a nationwide basis, they execute a host of affidavits swearing that they were not subjected to anything that remotely resembles the misconduct of which the defendant was accused. Their affidavits attest that in all their dealings the defendant was honest and straightforward. The affidavits submitted by the "victims" cry out for the court to vacate the judgment

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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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entered and the harsh punishment imposed. A motion for a rehearing is pending, along with a request for an evidentiary hearing to afford the defendant his due process rights.

This scenario is not taken from the pages of a Kafka story of bizarre judicial proceedings, although it might have been. Instead, it describes the events surrounding the recent opinion of the New Jersey Supreme Court in *Morton International, Inc. v. General Accident Insurance Company of America*.[1]

In *Morton*, New Jersey's highest court was asked to interpret what is known as the "sudden and accidental" pollution exclusion. This exclusion bars all coverage for claims arising out of pollution events, unless the pollution "discharge" was both "sudden and accidental."[2] Insurers contended that the exclusion's language is plain. They asserted that the term "sudden" cannot be stripped of its temporal element. That is, for the "sudden and accidental" exception of the exclusion to apply, the insured must prove that the pollution arose out of a discharge that was abrupt. Those seeking coverage under the exception contended that "sudden" means only "unexpected," and that "sudden" also encompasses gradual processes. Insurers further contended that the exclusion expressly requires that the "discharge" be sudden and accidental; insureds argued that only the resulting pollution damage need be sudden and accidental. In a word, the insurers asserted that the exception requires a true pollution "accident," while insureds argued that the exception applies to gradual pollution events.

The New Jersey Supreme Court agreed with every one of the insurers' positions about the meaning of the exclusion's language.[3] The

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1 134 N.J. 1, 629 A.2d 831 (1993), *petition for reh'g filed.*

2 *Id.* at 11, 629 A.2d at 836. The 1970 pollution exclusion endorsement, subsequently incorporated into the 1973 CGL policy as exclusion (f), stated that:

> 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 watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. at 11-12, 629 A.2d at 836.

3 *Id.* at 28-29, 629 A.2d at 847-48. Independent legal commentary also supports the insurers' position regarding the temporal nature of pollution exclusion language. *See Developments in the Law - Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1576-77, 1582-1583 (1986) [hereinafter *Developments in the Law*] ("Most CGL forms contain a 'pollution exclusion' clause exempting the insurer from coverage for gradual polluting leaks . . . . [These exclusions are] an attempt to remove gradual pollution from the coverage of the comprehensive general liability policy. Most pollution exclusion clauses, however, contain an exception for sudden and accidental releases of waste.").

court, however, would not enforce what it found to be plain, unambiguous language. Instead, it imposed a novel "regulatory estoppel" remedy,[4] under which it refused to enforce the exclusion as written because it came to the "virtually inescapable" conclusion that the insurance industry deliberately misled the state insurance departments which approved the exclusion in 1970.[5] The "evidence" supporting this conclusion was essentially a single piece of paper, a one paragraph "*Explanation*" forwarded to regulators by the Insurance Rating Board (IRB) along with the new pollution exclusion endorsement. The court concluded that the IRB's 1970 explanatory materials would not have advised state regulators that the exclusion would effect the sweeping reduction in coverage it then purportedly represented.

To reach its conclusions, the *Morton* court individually reviewed each sentence in the IRB *Explanation*, and imposed its own present-day conclusions about how regulators would have understood each proposition in 1970. No effort was made to ascertain how regulators actually understood the IRB *Explanation* or the context in which it was filed. As a result, the *Morton* analysis is based upon fictitious misdeeds and motives.

I. THE "WITNESSES" FOR THE PROSECUTION

The only source for the court's information about the IRB's alleged misconduct was policyholder counsel. The briefs filed by the policyholder litigants and their *amici curiae* contained allegations of 1970 insurance fraud. These allegations were said to be corroborated by commentators, whose published articles were cited as authorities. The commentators relied upon, however, were other policyholder lawyers engaged in litigating the same coverage issues.[6] The court apparently was unaware of the partisanship of the authors upon whom it relied for its "facts," for they were labeled "independent" in its opinion.[7] The court also relied upon the observations of a few other courts that similarly relied upon

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See also E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1251-53 (1986).

4 *Morton*, 134 N.J. at 73-77, 629 A.2d at 872-74.

5 *See id.* at 39, 629 A.2d at 853.

6 *See id.* at 31, 33, 629 A.2d at 848-49 (citing Nancy Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610 (1990); Robert D. Chesler et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L. J. 9 (1986); Thomas M. Reiter et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. CIN. L. REV. 1165 (1991)).

7 *Id.* at 29, 629 A.2d at 848.

these commentaries in lieu of an evidentiary hearing.[8]

The insurers urged the court to refrain from extra-record speculation and to remand the matter for an evidentiary hearing if it was inclined to consider the "history" issues raised in policyholders' appellate briefs.[9] The court, however, not only considered the hearsay evidence found in the commentaries, it exclusively focused on it to find coverage under an estoppel analysis. The *Morton* court asserted that a remand would be "redundant" because the "abundant independent commentary" addressing the exclusion's purported history afforded an "accurate and comprehensive basis for [the court's] determination."[10]

The IRB *Explanation* that the court focused upon reads in pertinent part:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies the situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . . .[11]

The first sentence of the *Explanation* sets forth the insurance community's 1970 perception that, even under the existing 1966 "occurrence" comprehensive general liability (CGL) policy, very little coverage was provided for pollution claims. The second sentence states that, in this respect, the 1970 exclusion served to clarify that coverage situation. The final sentence advised regulators that there would still be coverage afforded for a pollution "accident."

Morton takes issue with every one of these statements in reaching the "inescapable" conclusion that the IRB deliberately misled insurance regulators.[12] The court criticized the first two sentences of the *Explanation* because it assumed that broad-based pollution coverage was unconditionally provided under the 1966 "occurrence" CGL policy in use in 1970.[13] The court also took issue with the IRB's use of the term "accident." By imposing its 1993 interpretation that "accident" also encompassed gradual occurrences, the court worked backwards to its conclusion that the term "accident" was used in the

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8 *Id.*

9 Neither affidavits nor the record on appeal supported the historical "facts" which the court stated were "relatively uncontroverted." *Id.* at 31, 629 A.2d at 848.

10 *Id.* at 29, 629 A.2d at 848.

11 *Id.* at 36, 629 A.2d at 851.

12 *Id.* at 39, 629 A.2d at 853.

13 *Id.* at 31-33, 37-39, 629 A.2d at 848-49, 852-53.

Explanation to mislead insurance regulators.[14]

The court also concluded that by misrepresenting the effect of the pollution exclusion, insurers deprived state insurance regulators of the opportunity to reduce rates. It assumed that the 1970 approval of the exclusion without an accompanying premium reduction meant that the exclusion could not have been understood as a significant restriction on coverage. Allegedly, the IRB's actions were aimed at avoiding the rate reduction regulators would have been "obligated" to impose had they understood the coverage restriction imposed.[15] As will be demonstrated, all of these conclusions and assumptions have no basis in fact.

II. STATE INSURANCE COMMISSIONERS: THE UNWILLING "VICTIMS"

According to *Morton*, the entire community of state insurance regulators serving in and around 1970 were victimized by the insurers. *Morton* variously terms the IRB's presentation as "grossly misleading,"[16] "industry's misrepresentation[s],"[17] "paradigms of understatement,"[18] and "simply untrue."[19] Passing these characterizations the court assumed, without benefit of any testimony from the regulators, that the regulators "would not readily have understood" the meaning or effect of the new exclusionary language.[20]

In the short time between the issuance of the *Morton* opinion and the preparation of this Article, a host of former insurance regulators from the operative era have come forward and refuted the court's assumptions of industry misconduct and regulatory ignorance.[21] For example, Jerome Steen, Primary Rate Analyst for the New Jersey Department of Banking and Insurance, evaluated the pollution exclusion in 1970. His affidavit contradicts the court's speculation about what transpired during the New Jersey approval process:

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14 *Id.* at 39, 629 A.2d at 853.

15 *Id.*

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

17 *Id.* at 30, 629 A.2d at 848.

18 *Id.* at 37, 629 A.2d at 852.

19 *Id.*

20 *Id.* at 30, 629 A.2d at 848.

21 The list of affiants and the affidavits of those referred to in this article are found in the attached Addendum. The affiants are insurance regulators from Alabama, California, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

> It is my understanding that, with regard to the 1970 pollution exclusion filings, there now exists opinions [sic] that the Department [of Banking and Insurance] was either misled by the supporting justification provided by filers or that it misunderstood the significance of the subject filings. Neither consideration is, in fact, valid, as is indicated here and in Department documents in connection with these filings.[22]

The testimony of the former regulators shows that the IRB *Explanation* was accurate and that the regulators understood both the plain language of the pollution exclusion and its effect.

III. The 1970 Perception of the Exclusion's Impact on Pollution Coverage

The *Morton* court declared that the exclusion should have been perceived and communicated as a "sweeping" change in coverage.[23] The court considered the exclusion a "monumental" reduction of existing coverage,[24] a "substantial" and "severe" restriction of coverage,[25] and a "radical diminution" in coverage.[26] The court, however, misperceived the actual 1970 situation regarding pollution and related insurance coverage. Because of this foundational error, *Morton*'s subsequent observations and inferences, particularly relating to the IRB *Explanation*, are unsound.

The exclusion was promulgated many years before comprehensive environmental regulatory statutes imposed joint, several, retroactive, and strict liability upon policyholders. Contrary to how *Morton* now perceives the impact of the exclusion, in 1970 it was not perceived as accomplishing a "radical diminution" of coverage. At that time, insurers and regulators understood that policyholders would or should be aware of pollution damage resulting from routine business operations, and that the gradual pollution arising from such operations was not fortuitous. Thus, in 1970, the existing scope of "occurrence" coverage for pollution claims was understood to be narrow. Independent legal commentators have recognized this over the years.[27] In the context of this understand-

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22 Aff. of Jerome Steen ¶ 3.

23 *Morton*, 134 N.J. at 30, 629 A.2d at 848.

24 *Id.* at 38, 629 A.2d at 853.

25 *Id.* at 41, 72, 629 A.2d at 854, 872.

26 *Id.* at 74, 629 A.2d at 873.

27 *See* Eric M. Holmes, *Applicability of Liability Insurance Coverage to Private Pollution Suits: Do We Insure Pollution?*, 40 Tenn. L. Rev. 377, 391 (1973) ("Another indication of how 'expected' might be construed is found in the rule that an injury that is the natural and probable consequence of an act does not arise from an accident."); Werner Pfennigstorf, *Environment, Damages, and Compensation*, 1979 Am. B. Found. Res. J.

ing, the IRB *Explanation* was an accurate reflection of those conditions, and not a misrepresentation of the effect of the 1970 exclusion.

The former state regulators have confirmed this. For example, the former Montana Insurance Commissioner states:

> Pollution claims were extremely rare in 1970. In most cases, those few claims were already precluded by the coverage limitation the occurrence definition placed on expected or intended damage. In 1970, it was a matter of common knowledge that damages caused by routine and repetitive business practices were not covered occurrences. That damage should be expected, and was a cost of doing business. It was not an insurable risk.[28]

Similarly, the former Utah General Rates and Forms Analyst states:

> While I am sure pollution was taking place at that period of time, I don't think we ever had a pollution claim. I always thought repetitive business pollution was a cost of doing business. The damage it caused would most likely be expected. The first sentence of the *Explanation* indicates the Bureau [IRB] thought so also.[29]

And the former Insurance Commissioner of Kentucky concludes:

> Pollution claims were not common back at that time. In most cases, even those claims would generally be precluded by the language of the occurrence definition. It was understood that pollution damage resulting from routine normal business operations was or should have been expected. It was a cost of doing business. The pollution exclusion did clarify the general lack of pollution coverage in 1970.[30]

This understanding also prevailed in New York, where the pollution exclusion was reviewed by a Senior Insurance Examiner in that state's Insurance Department. He states:

> I was not surprised to see the *Explanation* state that "most cases" of pollution caused expected or intended damage. In those days virtually all pollution damage was caused by regular business pollution discharges, and pollution coverage claims were

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349, 439 ("the authors of [the occurrence] clause did not intend to cover pollution damages that resulted as a natural and obvious consequence from the regular operation of a business"); Jerry E. Cardwell, Note, *Insurance and Its Role in the Struggle Between Protecting Pollution Victims and the Producers of Pollution*, 31 DRAKE L. REV. 913, 922 (1982) ("it seems clear that the authors of the [occurrence] clause did not intend to cover pollution damages that resulted as a natural and obvious consequence from the regular operations of a business").

28 Aff. of Elmer V. Omholt ¶ 4.

29 Aff. of Melvin L. Summerhays ¶ 7.

30 Aff. of Robert D. Preston ¶ 4.

> few. I agreed with the *Explanation* that this situation of general lack of "occurrence" pollution coverage was clarified by eliminating coverage for gradual pollution discharges.[31]

The *Morton* decision singles out the filing in Kansas as failing to disclose the full impact of the pollution exclusion clause.[32] The Kansas Fire and Casualty Supervisor has completely repudiated *Morton's* conclusion that his department acted in ignorance:

> It was clear to me that the sudden and accidental pollution exclusion was meant (and was understood) to retain "occurrence" coverage for claims other than those involving pollutants or contaminants. Pollution claims were to be covered only on the narrower basis of sudden and accidental.
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> It is my opinion that the Department was not misled by either the exclusion or the IRB's explanation. It was obvious that coverage was being reduced. That was why we inquired about whether the exclusion could be deleted and coverage afforded through a "buy back." We also would not allow the exclusion to be attached to existing policies because, in our opinion, it potentially reduced coverage.[33]

The *Morton* court seemed to have overlooked the historical prerequisite to liability coverage: the absolute necessity of fortuity. For example, one commentary relied upon by the court[34] asserted that gradual pollution was covered under the 1966 "occurrence" CGL, citing an excerpt from a 1965 speech made by Lyman Baldwin, an executive of the Insurance Company of North America:

> Let us consider how this would apply in a fairly commonplace situation where we have a chemical manufacturing plant which during the course of its operations emits noxious fumes that damage the paint on buildings in the surrounding neighborhood. Under the new policy there is coverage until such time as the insured becomes aware that the damage was being done.[35]

The error that arises from reliance upon this commentator's excerpt, instead of examining the source document in full, is demonstrated by the balance of Baldwin's remarks. In full context, Baldwin's concluding sentence of the quoted paragraph expressed a universal

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31 Aff. of Henry L. Lauer ¶ 6.

32 Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 40-41, 629 A.2d 831, 854 (1993).

33 Aff. of Raymond E. Rathert ¶¶ 6, 7.

34 *Morton*, 134 N.J. at 33, 629 A.2d at 849 (citing Reiter, *supra* note 6, at 1191).

35 Reiter, *supra* note 6, at 1192-93 n.115 (quoting Lyman J. Baldwin, Jr., Address to the American Society of Insurance Management, New Orleans (Oct. 20, 1965)). The Wisconsin Supreme Court also cited to the Reiter article in Just v. Land Reclamation, Ltd., 465 N.W.2d 570, 574 (Wisc. 1990).

understanding: the essential prerequisite for "occurrence" coverage was the absence of an objectively reasonable anticipation of damage. Baldwin finished by stating that "[n]aturally, if he [the insured] could reasonably have anticipated that the damage would ensue there would be no coverage at all for it certainly would not have been unexpected."[36] Thus, Baldwin's address did not support the proposition that there was broad unconditional coverage for normal operational pollution events under the 1966 CGL occurrence policy.[37]

Another article cited in *Morton* stands diametrically opposed to the proposition for which it was relied upon. The *Morton* court stated that one author concluded that the 1966 policy was "tailor-made" to cover most pollution claims.[38] In the excerpt cited, however, the author was describing the insurance industry's concern that some *courts* might interpret the occurrence definition to cover gradual pollution arising from routine business operations. The commentator clearly noted that the *insurance industry* never intended to cover most pollution claims: "Significantly, the insurers never intended to cover the vast majority of pollution related claims . . . . The 'occurrence' defini-

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[36] *See* Lyman J. Baldwin Jr, Address to the American Society of Insurance Management (October 20, 1965) (on file with authors).

[37] The Reiter article relied on by the *Morton* and *Just* courts similarly misconstrues a speech by Gilbert Bean of Liberty Mutual as an expression that the 1966 CGL had expanded pollution coverage significantly. *See* Reiter, *supra* note 6, at 1191-92 (citing Gilbert Bean, Speech to the Mutual Insurance Technical Conference (Nov. 15, 1965)). The 1966 policy involved the changeover from the traditional "accident" to "occurrence" coverage. Bean's speech focused on this temporal expansion of coverage:

> The scope of coverage, as you well know by now, is considerably broader than previously, meeting legitimate needs of insureds for protection against gradual as well as sudden injury or damage . . . . Our new occurrence basis includes the gradual injury or damage which may result from *either* accident *or* exposure to conditions.

Gilbert Bean, Paper presented to the Mutual Insurance Technical Conference (Nov. 15, 1965) (emphasis added) (on file with authors).

Bean did not address in his 1965 speech the prerequisite under both the 1966 CGL and its predecessor that harm be fortuitous; the natural and probable result of an insured's normal operational business conduct, whether swift or slow, was not covered. Bean had already addressed the fortuity prerequisite in a 1959 speech. Gilbert L. Bean, *The Accident Versus the Occurrence Concept*, 439 INS. L. J. 550 (Sept. 1959). In the previous speech Bean stressed the necessity for a "strong requirement" of fortuity when insuring gradual property damage, so that "irresponsible" business conduct resulting in "probable injury" would not be covered. Harms resulting from an insured's conduct had to be "inadvertent." *Id.* at 555 ("I've already mentioned that gradual property damage was an area which involved considerable moral hazard. It would not be advisable to insure in this area without the protection of a strong requirement that coverage apply only if the gradual property damage were inadvertent.").

[38] *Morton*, 134 N.J. at 38, 629 A.2d at 852 (citing Rosenkranz, *supra* note 3, at 1251).

tion was not intended to cover pollution related losses that were 'natural and obvious consequence[s] [of] the regular operation of a business.'"[39]

The concern described by the author helps explain why the industry sought clarification so that pollution never intended to be covered would not be the subject of claims. The *Morton* court's misapprehension of the scope of pollution coverage afforded under the 1966 CGL policy led it astray in its analysis of the IRB *Explanation* regarding the effect of the pollution exclusion in 1970. Without appreciating that most pollution claims were already viewed to be non-insurable, normal operational business risks, the court failed to understand that the IRB *Explanation* was accurate and straightforward.

IV. The Regulatory Rating Analysis

Morton's misperception that the 1970 pollution exclusion was a radical diminution of coverage from the 1966 CGL inexorably led the court to its confused analysis of the lack of premium reduction, including its "inescapable" conclusion that approval of the 1970 exclusion required a "significant reduction" in the premium. The court suggested that a desire to avoid such reduction motivated the industry to misrepresent the effect of the 1970 exclusion.[40]

Ironically, evidence before the court showed that no rate reduction was indicated. Policyholder *amicus curiae*, the State of New Jersey, argued that, if the exclusion was meant to reduce coverage in 1970, the New Jersey Department of Insurance would have rebated rates which had been "increased" in 1966 when occurrence coverage was initiated.[41] *Morton* unquestioningly accepted this argument and echoed how the industry "profited" by "maintaining pre-existing rates" despite the new exclusion.[42]

Insurers had, however, charged no premium "increase" in 1966 when the basic policy began to cover some gradual property damage.[43] Thus, there was no reason to reduce premiums due to the exclusion of gradual pollution claims, particularly when most such claims were already understood to be excluded as non-fortuitous, ordinary costs of doing business.

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39 Rosenkranz, *supra* note 3, at 1248 (quoting Cardwell, *supra* note 27, at 922.

40 *See Morton*, 134 N.J. at 75, 629 A.2d at 874.

41 *Id.* at 36, 629 A.2d at 851. *See also* Brief for *Amicus Curiae* State Of New Jersey at 33-37, *Morton* (No. C-3956-85).

42 *Morton*, 134 N.J. at 80, 629 A.2d at 876.

43 *See, e.g.*, Appendix of Brief for *Amicus Curiae* State Of New Jersey at 58-59, 62, *Morton* (No. C-3956-85) (incorporating documents obtained from the files of the New Jersey Department of Banking and Insurance).

Like the pollution exclusion, the regulatory filing of the 1966 CGL occurrence policy was accompanied by explanatory materials submitted to all state regulators. One of those documents explained, "the broadening of coverage . . . on an 'occurrence' basis is accomplished *without an increase* in rates."[44] The regulatory history submitted by *amicus*, State of New Jersey, not only fails to support the court's conclusion that a rebate would have been required in 1970, it demonstrates that there was no prior increase to be rebated.

Morton also discusses another "rate-making" proposition: rates must focus upon the "loss experience of the insurer, past and prospective."[45] The court apparently assumed that in 1970 there was sufficient pollution "loss experience" to have formed a basis for rate-making. However, in 1970 there was little "loss experience" available regarding pollution claims. Without adequate loss data, insurance regulators could not rate the exposure; without such data, a premium reduction was not only inappropriate under regulatory principles, it was incalculable.

As New Jersey regulator Steen attests, this was precisely the case in New Jersey in 1970:

> As to the lack of an immediate rate adjustment to reflect the subject change, there was no meaningful loss data then available to formulate a retrospective rate adjustment for the general liability line. Nor was there a basis for apportioning any reduction among classes, based upon the relative effect of the change on differing classes.
>
> In such circumstances, it was an accepted procedure to allow existing rates to prevail, based on the consideration that future experience would reflect whatever effect the subject provisions might have and, accordingly, rates would flow downward or upward based upon the actual specific effect on the classes or classifications that would be affected.[46]

Regulators from across the country similarly explain that the *Morton* analysis ignores normal and legally mandated regulatory rate-making principles. For example, the former Superintendent of Insurance for the District of Columbia states:

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[44] *See id.* at 62 (reprinting MIRB "Filing Memorandum—Manuals of Liability Insurance" (Feb. 16, 1966)) (emphasis added). The MIRB filing was made in New Jersey on February 16, 1966, and approved by the New Jersey Department of Banking and Insurance on April 4, 1966, to be effective October 1, 1966. *Id.* at 56.

[45] *Morton*, 134 N.J. at 73, 629 A.2d at 872 (quoting N.J STAT. ANN. 17:29A-11 (West 1985)).

[46] Aff. of Jerome Steen ¶¶ 12, 13.

> With respect to a rate reduction, the exclusion would not have required one. Adjusting the rate for every form change is surely a fantasy. A rate change for the IRB pollution exclusion could not have been computed. Pollution loss data was insufficient. In a major rate case here in the District, the United States Court of Appeals (No. 74-1732, September Term 1974) stated that I "utilized extremely reasonable methodology to reach a complex calculation." They criticized the "theoretical derivation of regulation" to compute rates, as opposed to reliance upon actual figures experienced.[47]

Similarly, the former Illinois Deputy Director of the Property and Liability Branch adds:

> During my tenure as an insurance regulator in Illinois, I understood that the lack of a premium reduction for an exclusion did not demonstrate that an exclusion could not restrict coverage. This was especially so where loss data had not been sufficiently developed. In 1970, there were not many pollution claims or related loss data. Present day pollution laws did not exist at that time.[48]

Morton's rate-making analysis also ignores the fact that many states employed a "file and use" program. Insurance regulators did not set rates in those states. Rather, the "marketplace" determined rates. The former Minnesota Chief Assistant Rate Analyst (later Assistant Commissioner of Insurance) described this process:

> In those days the Department maintained control over the approval of policy forms. However, we handled rates on a "file and use" basis. In other words, we allowed free competition in the markets to set rates. Thus, even if this pollution exclusion filing had dramatically reduced coverage (which it didn't), we would still not have required a rate adjustment on its approval.[49]

The same situation applied in New York according to a high ranking official in that state's Insurance Department:

> I recall that back around 1970 New York was an [sic] "file and use" state. The carriers' rating bureaus suggested advisory rates, and competition in the marketplace would govern rates. Moreover, insurance departments would not have required premium reductions for exclusions, such as the pollution exclusion, where there was no indication of change in loss data.[50]

In light of the fact that the 1966 CGL revisions had not occa-

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47 Aff. of Edward P. Lombard ¶ 5.
48 Aff. of Kevin M. Ryan ¶ 6.
49 Aff. of Thomas L. O'Malley ¶ 8.
50 Aff. of Henry L. Lauer ¶ 10.

sioned a rate increase and that loss data in 1970 was insufficient to calculate any rate relating to pollution claims, *Morton*'s conclusion that insurers were motivated to mislead regulators who would have been "obligated" to reduce rates has no basis in fact, nor in the record before the court.

V. THE RESTRICTIVE ASPECT OF THE EXCLUSION INTENDED BY ITS DRAFTERS WAS NOT KEPT "SECRET"

Morton recognizes that, as reflected in the plain language chosen, the internal "drafting" documents underlying the 1970 exclusion demonstrated an intent to limit pollution coverage to the "classical" accident or "boom" event.[51] That drafting intent, however, was discounted as irrelevant. The *Morton* court declares that subsequent "filings with the states are completely inconsistent with that [drafting intent],"[52] quoting testimony from another case given by a former New York Insurance Superintendent, presumably, as a disinterested former commissioner.[53] This was not the case.[54]

Morton concludes that the exclusion was not described as a "clarification" until the regulatory approval process.[55] However, even before the exclusion was drafted, its clarification aspect was discussed. Internal drafting documents are consistent with the public regulatory filing materials, as a comparison of the March 17, 1970 internal minutes and the public *Explanation* illustrate.[56] Both

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[51] Morton Int'l Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 42, 629 A.2d 831, 855 (1993).

[52] *Id.* at 43, 629 A.2d at 855 (quoting deposition testimony of Richard Stewart, *quoted in* Robert Sayler, *The Emperor's Newest Clothes, Revisionism and Retreat: The Insurer's Last Word on the Pollution Exclusion*, 5 MEALEY'S LITIG. REP.: INS., #46, 27, 46 (Oct. 8, 1991)).

[53] *Id.* at 42-43, 629 A.2d at 855 (citation omitted).

[54] Former New York Insurance Superintendent Richard E. Stewart has testified on behalf of policyholders in numerous cases, for which testimony he has received substantial compensation. *See* discussion in Section VIII, *infra*. Mr. Stewart did not personally participate in the decision-making discussions relating to the 1970 pollution exclusion. *See* Aff. of Henry L. Lauer ¶ 3.

[55] *Morton*, 134 N.J. at 43, 629 A.2d at 855 (quoting deposition testimony of Richard Stewart, *quoted in* Saylor, *supra* note 52, at 27, 46).

[56] As recorded in the *Internal March 17, 1970 Drafting Minutes*:

> It was noted that coverage for pollution may not be provided *in most cases* under present policies because the damage could be said to be expected or intended and thus would be excluded by the definition of occurrence and, therefore, the adoption of an exclusion could be said to be a *clarification*, but a necessary one in order to avoid any question of intent.
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> . . .
>
> The committee agreed that a policy exclusion of pollution that would run to bodily injury and property damage should be adopted for

the drafting and the regulatory documents said: (1) "in most cases" pollution claims were not covered under the 1966 CGL; (2) in that respect, the exclusion was a "clarification" of existing coverage; and (3) limited coverage would continue to be afforded for a pollution "accident."

Between insurers and regulators, the terms "accident" and "classical accident" have always been used interchangeably to express a sudden and unexpected event. Correspondence between the IRB and the Texas Insurance Department expressly advised that the exclusion would apply "except when pollution results from the classical accident."[57] The insurance regulator who received this letter readily grasped the concept:

> On April 20, 1970, a manager for the Insurance Rating Board, R.G. Foster, wrote a letter (attached) to me about the IRB pollution exclusion. Mr. Foster, who I always regarded as extremely intelligent, honest and forthright, advised that the exclusion would apply to all bodily injury or property damage arising from pollution "except when pollution results from the *classical accident.*"
>
> The IRB did subsequently submit such a pollution exclusion, which excluded all pollution claims unless they arose out of a "sudden and accidental" discharge. The accompanying IRB "Explanation" stated that there would still be coverage for a pollution "accident." *In 1970, I understood all of these terms ("sudden," "classical accident" and "accident") to mean the same thing. What was required was a quick or abrupt event, something identifiable in both time and place.*[58]

> all general liability insurance, the exclusion to except pollution caused by injuries when the pollution results from the *classical accident.* It was agreed that coverage should be made available on an individual risk buy-back basis.

See Appendix of Brief for Appellant at 1344, Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 629 A.2d 831 (1993) (No. C-3956-85) (emphasis added).

Compare the above with the *May 1970 Regulatory "Explanation,"* which stated:

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

See Morton, 134 N.J. at 36, 629 A.2d 851 (emphasis added).

57 *See* letter from R.G. Foster (IRB) to Milton Troxell, [former Director General Liability—Casualty Division, Texas Board of Insurance] (April 20, 1970) (on file with authors).

58 Aff. of Milton S. Troxell ¶¶ 3, 4 (emphasis added).

The *Morton* court's analysis of the term "accident," as used in the IRB *Explanation,* is flawed. The "estoppel" argument required adoption of the premise that use of that term would not have advised insurance regulators of any temporal limitation imposed by the exclusion. Thus, the court attacked the IRB's use of "accident" in the *Explanation* as misleading.[59] *Morton* generalized that "accident" was construed by *courts* as encompassing gradual "ongoing" events,[60] and assumed that regulators in 1970 would have shared that understanding.

Morton's conclusion that the IRB *Explanation* misled regulators about the meaning and effect of the 1970 exclusion appears to have been heavily influenced by the statements of former superintendent Stewart as quoted in a commentary.[61] Mr. Stewart's conclusions are directly refuted by a New York regulator who was actually involved in the 1970 filing:

> I understand that former Superintendent Stewart has testified to the effect that the carriers' rating bureaus did not communicate a temporal usage in this filing, and that regulators were told they were only dealing with a clarification of the "occurrence" definition which caused no change at all in coverage. He has apparently stated that a restrictive operation of the exclusion upon gradual pollution discharges in 1970 would have resulted in a drastic reduction of coverage. These conclusions are simply not true. It is hard for me to accept that he would advocate these positions.
>
> The way the exclusion temporally restricted coverage was clearly communicated by the carriers' rating bureaus to regulators. There was no mystery at all in the language that was used. We in the Department, and particularly in the Rating Bureau, were not in the slightest bit misled by this filing. There is absolutely no basis in fact for former Superintendent Stewart to suggest, nor for anyone to conclude, that we were misled.[62]

Morton's analysis of the previous CGL change, in 1966, is inconsistent with its analysis of the 1970 exclusion. *Morton* relates that the 1966 CGL change from "caused by accident" to "occurrence" was recognized as being intended to "'*broaden* coverage by . . . avoiding the implication that there was no coverage for a continuing condition as

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59 *Morton*, 134 N.J. at 39, 629 A.2d at 853.

60 *Id.* at 31, 629 A.2d at 849 (citing three cases and various commentaries as supportive of this proposition).

61 *Id.* at 42-43, 629 A.2d at 855 (citation omitted). *See supra* notes 52, 53, 55 and *infra* note 121 referring to this testimony.

62 Aff. of Henry L. Lauer ¶¶ 7, 8.

distinguished from a sudden event.'"[63] The court cited opinions that "confirm the uniform understanding of the broadened coverage afforded under the 1966 revision of the CGL policy."[64] But while *Morton* recognized that a pre-1966 "accident" policy provided narrower coverage than a 1966 "occurrence" policy, it disregarded the well-understood meaning of "accident" when it examined the 1970 IRB *Explanation*, in which it found the term "accident" to mean the same thing as "occurrence." This inconsistent interpretation of how the term accident was understood underpinned the court's conclusion that the IRB *Explanation* was misleading.

Insurance regulators during this time period reject the notion that they were misled. They understood "accident" as a sudden "boom" event. For example, the former Massachusetts Insurance Commissioner states:

> The IRB Explanation stated that coverage would still be provided for an "accident." In 1970 I understood an "accident" as an event which was identifiable in time and place. An "accident" was a "boom" event, like an explosion. The Explanation was perfectly consistent with the exclusion's language. In essence, pollution coverage was returned to a "caused by accident" basis in 1970.[65]

The former Insurance Commissioner of Tennessee concurs:

> The wording of the exclusion was clear. "Sudden" did not mean gradual. It meant quick or abrupt in a temporal sense. The IRB Explanation was equally clear. Only a pollution "accident" would be covered. An "accident" was a sudden event, something identifiable at a specific time and place.[66]

The former Florida Insurance Commissioner adds:

> Prior to 1966, the general liability policy covered "accidents," which were "boom" events that occurred suddenly or abruptly. "Accidents" were fortuitous events identifiable in time and place. The 1966 CGL "occurrence" policy broadened coverage to include gradual exposures as long as the damage was not intended or expected. These meanings were a matter of common knowledge in the Insurance Department at the time.[67]

Contemporaneous regulatory documents corroborate that state insurance commissioners understood the insurance concept of a sud-

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[63] *Morton*, 134 N.J. at 32, 629 A.2d at 849 (quoting ROBERT KEETON, BASIC TEXT IN INSURANCE LAW § 5.4c, at 300 (1971)) (emphasis added).

[64] *Id.* at 32-33, 629 A.2d at 849 (citations omitted).

[65] Aff. of C. Eugene Farnam ¶ 3.

[66] Aff. of Milton P. Rice ¶ 4.

[67] Aff. of Broward Williams ¶ 3.

den "accident." The IRB's *Explanatory Memorandum of Changes*[68] forwarded which the 1966 CGL policy specifically informed regulators that: "An 'occurrence', as defined, includes not only a sudden event identifiable in time which is characterized as an 'accident', but also exposures to conditions which may continue for days, weeks, months or even years."[69]

In November 1971, a similar regulatory explanation accompanied what became known as the 1973 CGL policy. That 1971 *Explanatory Memorandum of Changes*[70] also informed regulators that an "accident" required "suddenness (a boom) as to time and place."[71]

These 1966 and 1971 regulatory explanations were before the *Morton* court. They demonstrated that "accident" meant a "boom" event or a "classical accident" to regulators and insurers in 1966 and 1971. There was no basis for the court to conclude that "accident" would have been understood to mean something else in 1970.

Although "accident" had been interpreted by a few courts (as a *policy* term) to include gradual damages,[72] the regulatory estoppel issue raised in *Morton* involves what insurers meant to convey in insurance parlance to insurance regulators. In 1970, both insurers and regulators understood how the explanatory materials used the term "accident."[73] As stated by the former Insurance Commissioner of South Carolina:

> Consistent with the "sudden" language of the exclusion, the IRB "Explanation" forthrightly stated there would be continued pollution coverage for an "accident." In 1970, "accident" was recognized as describing a "boom" event, a catastrophic happen-

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68 *See* Appendix of Brief for *Amicus Curiae* State of New Jersey at 34-42, Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 629 A.2d 831 (1993) (No. C-3956-85).

69 *Id.* at 38.

70 Appendix of Brief for Appellant at 1710, *Morton* (No. C-3956-85).

71 *Id.*

72 Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 31-32, 629 A.2d 831, 849 (1993). Even assuming courts in some states denied "accident" its temporal element prior to 1970, that was not the case in New Jersey. *See* Liondale Beach, Dye & Paint Works v. Riker, 85 N.J.L. 426, 429, 89 A. 929, 931 (1914) ("where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no 'injury by accident'"); Ptak v. General Elec. Co., 13 N.J. Super. 294, 300, 80 A.2d 337, 340 (Essex County Ct.), *aff'd*, 16 N.J. Super. 573, 85 A.2d 214 (App. Div. 1951) (an accident is "an event happening at a specific time or occasion") (citing Dawson v. E.J. Brooks, 134 N.J.L. 94 (Sup. Ct. 1946)). The Oklahoma Supreme Court has also given the term "accident" a temporal treatment. United States Fidelity & Guar. Co. v. Briscoe, 239 P.2d 754, 758 (Okla. 1951).

73 In insurance parlance, "accident" still retains its traditional temporal element. *See* RUPP'S INSURANCE RISK & MANAGEMENT GLOSSARY 3, 4 (1991) (temporal "accident" is distinguished from "accidental occurrence").

> ing which was identifiable in time and place. *Even though some courts may have seen fit to stretch the interpretation of the policy term "accident" to include gradual exposures prior to 1970, that would not have affected insurance bureaus' and insurance regulators' longstanding usage and understanding of that term.* The pollution exclusion, then, returned pollution coverage back to a pre-1966 "caused by accident" basis.[74]

The 1970 pollution exclusion completed a pollution coverage "cycle." Under pre-1966 "accident" policies, coverage was intended only for sudden "boom" events. The 1966 CGL "occurrence" policy included coverage for both traditional "accidents" *and* certain gradual, but fortuitous, damage. Independent legal commentators have recognized that the 1970 pollution exclusion returned pollution coverage to the traditional, pre-1966 "accident" basis.[75] This cycle of coverage was recognized by the former insurance regulators. The former Massachusetts Insurance Commissioner states: "In essence, pollution coverage was returned to a 'caused by accident' basis in 1970."[76] The former Idaho Commissioner of Insurance adds: "Thus, in 1970, I knew the pollution exclusion excluded coverage for gradual pollution discharges. It did so by returning pollution coverage to the old sudden 'accident' basis."[77]

As *Morton* found, the plain language of the 1970 exclusion was clear and unambiguous. Contrary to *Morton*'s conclusion, the 1970 regulators were able to and did understand exactly what the exclusion meant and how it affected the scope of coverage. The testimony of New Jersey regulator Steen, not before the court because of the lack of an evidentiary hearing, demonstrates the court's misunderstanding. Steen was fully aware that the pollution exclusion could restrict coverage even though "in most cases," pollution claims arising at the time were already barred by the occurrence definition:

> In 1970, I understood "sudden" to mean "quick" in a temporal sense. I understood that, under certain circumstances, the "sudden" language of the exclusion would restrict coverage

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74 Aff. of John W. Lindsay ¶ 7 (emphasis added).

75 *See* Dan R. Anderson, *What Role Will the Insurance Industry Play in the Fight Against Pollution?*, 25 CPCU ANNALS 23, 27 (March 1972) ("The presence of the exclusion has the effect of converting that portion of the liability policy from a 'per occurrence' to a 'per accident' basis. This was accomplished by including the phrase 'sudden and accidental.'"); Holmes, *supra* note 27, at 395-96 ("Perhaps this exclusion does nothing more than revert to the former 'caused by accident' coverage."); S.S. HUEBNER ET AL., PROPERTY AND LIABILITY INSURANCE 434, 443 (2d ed. 1976) ("The effect, as far as the named peril [of pollution] is concerned, is to revert to an 'accident' basis.").

76 Aff. of C. Eugene Farnam ¶ 3.

77 Aff. of John R. Blaine ¶ 5.

> as well as clarify the insurance contract with respect to the insurance industry's perception in 1970 that most gradual pollution discharge claims were already precluded by "occurrence" language.[78]

Steen also understood that the "accident" which would trigger the exception to the exclusion was not a gradual process, but a sudden event identifiable in time:

> I was a general liability analyst in 1966 when "occurrence" coverage was introduced on a standard basis. I understood the difference between the terms "occurrence" and "accident." The earlier "accident" coverage related to a fortuitous event identifiable in time, an event which was both sudden/abrupt and unexpected. "Occurrence" expanded the basis of coverage to include claims for damages arising out of multiple or gradual events.[79]

Steen concluded:

> As my April 20, 1970 memorandum reflects, I was aware that, as a result of the proposed pollution exclusion, it was possible that the costs of excluded environmental damage could fall on the State or other governmental agency when a policyholder, not otherwise insured by other specific insurance instruments, was not in a financial position to pay for such loss.
>
> Whatever prospective [sic] twenty plus years after the fact might bring to consideration of the Department's actions in 1970, the Department invested considerable effort and time in evaluating the subject exclusions. The Department was not ignorant, inept, indifferent to ethical and statutory obligations, or misled in making its determination in this matter.[80]

If the *Morton* court had allowed an evidentiary hearing, Mr. Steen would have made clear that the policyholders' accusations about New Jersey's approval of the exclusion were specious.

VI. The Treatment of Regulatory History in Other Courts

Morton discounts decisions which enforced pollution exclusions, stating that those courts did not consider regulatory history.[81] *Morton* assumes that those courts were unaware of it and of the insureds' regulatory history arguments.

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78 Aff. of Jerome Steen ¶ 7.

79 *Id.* ¶ 2.

80 *Id.* ¶¶ 14, 15.

81 Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 47, 55, 629 A.2d 831, 857-58, 862 (1993).

In *Hybud Equipment Corp. v. Sphere Drake Insurance Co.*,[82] five separate *amici curiae* briefs made extensive "regulatory history" arguments to the Ohio Supreme Court. *Hybud*'s unanimous decision applying the pollution exclusion as written suggests that the policyholder arguments were found to be unpersuasive. Similarly, in *Upjohn Co. v. New Hampshire Insurance Co.*[83] and in *Polaroid Corp. v. Travelers Indemnity Co.*,[84] the regulatory history arguments were presented to the Supreme Courts of Michigan and Massachusetts. As in *Hybud*, the holdings applying the pollution exclusion demonstrate the rejection of the policyholders' regulatory history argument.

Other courts, also aware of policyholders' historical arguments, have declined to follow them.[85] *Farm Bureau Mutual Insurance Co. v. Laudick* expressly declined to follow *Morton* since there was "no suggestion of any deception" in the case before the Kansas Court of Appeals.[86]

The Florida Supreme Court was one of the first courts to consider an insurer's arguments and evidence responding to insureds' regulatory history theories.[87] *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.* (*Dimmit II*) denied gradual pollution coverage under the pollution exclusion. *Morton* essentially discounted this reversal.[88]

Dimmitt I had described the policyholders' regulatory history argument as the basis for its rejection of the pollution exclusion on

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82 597 N.E.2d 1096 (Ohio 1992).

83 476 N.W.2d 392 (Mich. 1991).

84 610 N.E.2d 912 (Mass. 1993).

85 *See* Bituminous Casualty Corp. v. Tonka Corp., No. 92-3187, 1993 WL 461825 (8th Cir. Nov. 12, 1993); Bureau of Engraving, Inc. v. Federal Ins. Co., No. 92-2910, 1993 WL 382626 (8th Cir. Oct. 1, 1993); United States Fidelity & Guar. v. Morrison Grain, 999 F.2d 489 (10th Cir. 1993); Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815 (Cal. Ct. App. 1993); ACL Technologies v. Northbrook Property and Casualty Co., 22 Cal. Rptr. 2d 206 (Cal. Ct. App. 1993); Farm Bureau Mut. Ins. Co. v. Laudick, 859 P.2d 410 (Kans. Ct. App. 1993).

86 *Farm Bureau*, 859 P.2d at 414. *See also* affidavits of Kansas regulators, Raymond E. Rathert, Larry K. Bryan, and Robert D. Hayes, which now support that court's conclusions.

87 Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., No. 78293, slip op. (Fla. Sept. 3, 1992) (*"Dimmitt I"*), *rev'd on reh'g* No. 78293, 1993 WL 241520 (Fla. July 1, 1993) (*"Dimmitt II"*), *reh'g pending.* See a detailed presentation of the evolution of the "history" debate in Bernard J. Daenzer and Edward Zampino, *Environmental Liability and the Pollution Exclusion: Why Some Courts Find Coverage*, 46 CPCU J. 2 (June 1993). The authors of this article advance the positions of insurers in environmental insurance litigation.

88 Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 52 n.1, 629 A.2d 831, 860 n.1 (1993).

the ground of ambiguity. As the New Jersey Supreme Court had in *Morton*, the Florida Supreme Court in *Dimmitt I* came to the "inescapable conclusion" that the exclusion did not restrict coverage in the manner insurers claimed it did.[89] *Dimmitt I*, however, was decided without hearing the insurer's response to the regulatory history theory. This response was presented in the insurer's Motion for Rehearing. The insurer demonstrated that in *Dimmitt I*, the historical evidence had been inaccurately represented by the policyholder and its *amici curiae*. That convinced Justice Grimes that in *Dimmitt I*, he had "relied too much upon *what was said to be* the drafting history of the pollution exclusion clause . . . ."[90] The policyholder "history" arguments that were the centerpiece of *Dimmitt I* were rejected in *Dimmitt II* on further reflection in light of the fuller historical evidence.

While eschewing *Dimmitt II*, *Morton* relies heavily upon the decision of the Wisconsin Supreme Court in *Just v. Land Reclamation, Ltd.*.[91] *Just* also rendered its regulatory history-based broad interpretation of the exclusion without the benefit of an evidentiary hearing.[92] As in *Morton*, *Just* accepted the conclusions set forth in partisan journal articles asserting how regulators understood the IRB filings.[93] Had the *Just* court held an evidentiary hearing, it could not have accepted those articles as evidence of the regulatory approval process in Wisconsin.

In 1970, Stanley C. DuRose was Wisconsin Commissioner of Insurance. Louis Hannes was his Chief in the Property Casualty Rates Division. They have described their understanding of the IRB filing. Mr. Hannes states: "I understand that there now exists [sic] opinions that regulators were either misled by the IRB *Explanation* or that the significance of the filings was misunderstood. This certainly was not the case in the Wisconsin Insurance Department."[94]

Former Commissioner DuRose agrees:

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89 *See Dimmitt I*, slip op. at 9 and 14.

90 *See Dimmitt II*, at *6 (Grimes, J., concurring) (emphasis added).

91 *Morton*, 134 N.J. at 66-68, 629 A.2d at 868-69 (citing Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wisc. 1990)).

92 Independent legal commentary describes the result achieved by such broad judicial interpretation of the pollution exclusion which "include[s] the kinds of [gradual] releases that insurers meant the pollution exclusion clause to exclude from coverage." *Developments in the Law, supra* note 3, at 1582-83. One source has described this "judicial strategy" as having "gutted the pollution exclusion clause." *Id.* at 1583.

93 Just v. Land Reclamation Ltd., 456 N.W.2d 570, 574-75 (Wisc. 1990) (citations omitted).

94 Aff. of Louis N. Hannes ¶ 6.

> I held weekly meetings with supervisory staff and had full discussion of all regulatory and administrative matters in process. I would have been fully informed and cognizant of the meaning and intent of all rate and policy form filings such as listed in my Annual Report. Louis Hannes was experienced, competent and qualified to assist me in processing and approving this filing.
>
> . . . The Insurance Rating Board's filing, which I recently reviewed, was not misleading.[95]

DuRose and Hannes had a firm grasp on how the terms in the IRB *Explanation* were used and understood, and how rates worked and were developed in Wisconsin at that time. These concepts are summed up by Mr. Hannes:

> There is no question that the language was clearly understood at the time of approval. "Sudden and Accidental" coverage meant that the event took place quickly and at a precise time, like an explosion, and not gradually over a period of time. Since General Liability policies were usually written on an occurrence basis in 1970, I would have recognized the "pollution" exclusions as also clarifying intended restrictions on coverage. The IRB *Explanation* is clear, and confirms my understanding.
>
> There would not have been any request or requirement for a rate adjustment when these exclusions were filed, as there was little, if any, loss data at that time, and, as indicated in the IRB *Explanation*, coverage was limited to true pollution accidents. The "pollution" exclusions clarified what customarily was and was not to be covered by a conventional General Liability Policy. The restriction of coverage was not significant at that time.[96]

The Wisconsin Supreme Court, without these facts, erroneously hypothesized what DuRose and Hannes understood in 1970. That misconception was then relied on in *Morton*.[97]

Morton's reliance upon *Joy Technologies, Inc. v. Liberty Mutual Insurance Co.*[98] and *Claussen v. Aetna Casualty & Surety Co.*[99] is similarly misplaced, because both cases also relied upon partisan commentaries for facts, and neither case held an evidentiary hearing. The insurers in those cases did not respond to the policyholders' regulatory arguments. The 1992 affidavit of former West Virginia Insurance Commissioner Samuel Weese directly contradicts the *Joy* court's assumptions

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95 Aff. of Stanley C. DuRose Jr. ¶¶ 6, 7.

96 Aff. of Louis N. Hannes ¶¶ 4, 5.

97 Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 67-68, 629 A.2d 831, 868-69 (1993) (citing *Just*, 456 N.W.2d at 575).

98 421 S.E.2d 493 (W.Va. 1992).

99 380 S.E.2d 686 (Ga. 1989).

of what Mr. Weese understood in 1970.[100]

VII. THE POLICYHOLDER COMMUNITY'S OBJECTIVELY REASONABLE COVERAGE EXPECTATIONS

The *Morton* court declared that a "typical commercial insured" would have had "little, if any" awareness that the pollution exclusion changed the terms of CGL policy coverage.[101] The court, therefore, "imputed" its findings of the understanding of insurance regulators to policyholders.[102]

If the "typical commercial insured" in 1970 read its new standard pollution exclusion endorsement, the first item observed would have been the statement that:

> This endorsement *modifies* such coverage as is afforded by the provisions of the policy relating to the following:
>
> COMPREHENSIVE GENERAL LIABILITY INSURANCE
>
> . . .[103]

This "alert" was on every pollution exclusion endorsement filed during the 1970 regulatory approval process with all state insurance regulators. The endorsement's title alone—"Exclusion—Contamination or Pollution"—was significant as it is widely held that exclusions subtract from the coverage grant of the insuring agreements.[104] Thus, even an unsophisticated insured should have understood that the scope of coverage was being affected.

The doctrine of objective reasonable expectations cannot be validly applied without evidence of the expectations of the insureds. Relevant evidence includes:

(a) Documents generated by sophisticated insurance brokers, the agents *for* the policyholders, who negotiated and procured policies on their behalf. Brokers' internal records, newsletters, and seminar materials recognized the restrictive aspect of the exclusion (in *addition* to its clarification aspect), and the coverage "gap" the exclusion

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100 Aff. of Samuel H. Weese ¶ 3. Mr. Weese submitted this affidavit after the *Joy Technologies* court had rendered its decision. The carrier filed this affidavit with the court in its rehearing motion. Among other reasons, the policyholder opposed the filing on a timeliness basis. The order denying rehearing did so summarily without addressing this affidavit.

101 *Morton*, 134 N.J. at 77, 629 A.2d at 874-75.

102 *Id.* at 78, 629 A.2d at 875. One of the reasons the court made this assumption was because premiums were unchanged.

103 *See, e.g.*, Appendix of Brief for Appellant at 1353, *Morton* (No. C-3956-85) (emphasis added).

104 *See, e.g.*, Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247, 405 A.2d 788, 795 (1979).

created. Brokers advised their policyholder clients accordingly.[105]

(b) The records of policyholder trade associations, including those of frequent policyholder *amici curiae* filers, such as the Chemical Manufacturers Association ("CMA"). Ten years ago, the CMA admitted that the pollution exclusion took away coverage for gradual pollution discharge claims. One of the heads of CMA's specialized insurance committee publicly criticized policyholders for filing "frivolous" claims that "all" risk managers always knew were not covered.[106] CMA now appears before courts across the country, claiming that its members could not understand this thoroughly "ambiguous" pollution exclusion.[107]

(c) Records of policyholder insurance associations comprised of risk managers and insurance personnel, such as the Risk and Insurance Management Society, Inc. (RIMS), which demonstrate an understanding and acceptance of the exclusion's restrictive aspect.[108]

(d) United States Environmental Protection Agency (EPA) documents, including documents expressly recognizing that CGL policies with a pollution exclusion did not afford coverage for gradual pollution events. EPA documents

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105 *See* Victor C. Harwood III et al., *The Frivolity of Policyholder Gradual Pollution Discharge Claims*, 5 MEALEY'S LITIG. REP.: INS., #46, 25-29 (August 27, 1991).

106 *See* T.A. Caldwell, *A Multinational's Environmental Liability Problems*, INT'L INS. REP. 9, 11-12 (Sept. 1986). Caldwell, who was and continues to be Director of Corporate Insurance for the American Cyanamid Corporation, has written:

> I think the underwriters have been grossly mistreated by the US courts. Also, I believe that many insured [sic] submitted frivolous claims at best to their insurers and the courts in the hope of finding coverage. It was clearly not the intent of either party to the insurance contract to cover many of these events which were not truly sudden and accidental in nature.
>
> . . . .
>
> . . . Non-sudden or gradual pollution liability insurance took the form of the Environmental Impairment Liability policy (EIL). . . .
>
> . . . .
>
> . . . Although a creative lawyer can exploit a lack of specificity in policy wording and convince a judge that any doubt regarding intent should be ruled in favour [sic] of the policy holder — "This doesn't make the final outcome right."

Id. Caldwell's position on the CMA's insurance committee was identified by Thomas D. Lewison, also a former member of that committee, in an interview with one of the authors of this article.

107 *See* Harwood, *supra* note 105, at 30-32. *See also* discussion of CMA evidence in an article of insurer counsel, Victor C. Harwood III, et al., *The Emperor's Illusionist: Policyholders Retreat From Pollution Exclusion Extrinsic Evidence (Part One)*, 6 MEALEY'S LITIG. REP.: INS. #25, 17, 39-42 (May 5, 1992).

108 *See* Harwood, *supra* note 105, at 30-32; Harwood, *supra* note 107, at 35-37.

describe abrupt spills or explosions as "sudden," in contrast to "gradual" pollution events, which were long-term practices, such as the discharging and burial of wastes.[109]

(e) Insurance trade publications recognizing both the restrictive and clarification aspects of the exclusion over the years.[110]

(f) Evidence from individual insureds themselves adopting the premise that only an Environmental Impairment Liability (EIL) policy afforded coverage for gradual pollution exposures.[111]

There was no basis to "impute" any understanding of insurance regulators to policyholders when better evidence was readily available. *Morton* expressly found that the pollution exclusion was plain and unambiguous.[112] Therefore, it is not surprising that insureds, their brokers, their insurance and trade associations, insurance trade publication authors, and federal and state environmental agencies understood that it was not reasonable to expect gradual pollution coverage under CGL policies.

In reality, insurers, regulators, and insureds were all on the same page. The carriers misrepresented nothing. The regulators misunderstood nothing. The policyholders' coverage expectations were in accord. To impute a contrary expectation to policyholders only underscores the dangers inherent in ruling without the benefit of real evidence.

VII. Due Process and Evidentiary Issues

Even more disturbing than *Morton*'s erroneous conclusions is the judicial procedure employed to reach them. First, the court employed a new theory—regulatory estoppel—on appeal. Second, the court permitted that theory to be argued on the basis of "facts" arising from partisan commentators' descriptions in law journal articles. Finally, the court failed to afford the opposing party the op-

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109 *See* Harwood, *supra* note 105, at 34-37; Harwood, *supra* note 107, at 43-45. Notably, CGL policies had to be specially endorsed to fulfill New Jersey's financial responsibility regulations. *See, e.g.*, N.J. Admin. Code tit. 7, § 26-9 (1990).

110 *See* Harwood, *supra* note 105, at 32-34; Harwood, *supra* note 107, at 45-47.

111 *See* Harwood, *supra* note 105, at 29-30. *See also* Caldwell, *supra* note 106. In addition, independent legal commentary describes the temporal "gradual" way an EIL policy supplements the temporal sudden pollution coverage of the CGL policy. *See Developments in the Law, supra* note 3, at 1577 ("To cover the gradual events apparently excluded by the standard CGL, the environmental impairment liability (EIL) policy was invented in the late 1970s.").

112 *Morton*, 134 N.J. at 28-30, 629 A.2d at 847-48.

portunity to challenge the "evidence" through cross-examination. Hearsay was not merely permitted, it was the exclusive evidence before the court.

The Due Process Clauses of the United States Constitution and state constitutions, including New Jersey's, require that litigants be permitted to produce evidence in support of their positions and be provided with a hearing before significant remedies can be invoked against them.

When a claim or defense emerges on appeal, if it is to be considered, a remand must be afforded to permit the opposing party to develop and present evidence relevant to the new claim. Thus, in *Harr v. Allstate Insurance Co.*,[113] when a *prima facie* case of estoppel was made out on appeal against an insurer, the case was remanded to afford the insurer an opportunity to respond. In contrast, *Morton* estopped insurers from relying upon the "literal terms" of the pollution exclusion without affording them the opportunity to present a fully developed factual record to rebut the matters raised on appeal and upon which the court relied.[114] The rationale given by the court was its conclusion that the partisan commentaries it considered provided an "accurate and comprehensive basis" for its decision.[115]

Saunders v. Shaw[116] demonstrates the constitutional error committed in *Morton*. In *Saunders*, the United States Supreme Court reversed a decision by the Louisiana Supreme Court which had denied a request for an evidentiary hearing on whether a parcel of property was subject to a tax assessment.[117] Justice Holmes suggested that the state court's denial was based on its conclusion that the legality of the assessment "was so plain on the uncontroverted facts . . . that to remand [the case] would be an empty form—a mere concession to technicality."[118] The Justice highlighted the constitutional infirmity in that reasoning: "It *may* turn out so, but we do not see in the record an *absolute warrant* for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."[119] The

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113 54 N.J. 287, 255 A.2d 208 (1969).

114 *Morton*, 134 N.J. at 29, 629 A.2d at 848. *See also* Sparks v. St. Paul Ins. Co., 100 N.J. 325, 342 n.6, 495 A.2d 406, 416 n.6 (1985) (remanding a matter to hear further arguments on the understanding of the parties, although the court asserted that if *any* evidence existed, it would have already been in the record).

115 *Morton*, 134 N.J. at 29, 629 A.2d at 848.

116 244 U.S. 317 (1917).

117 *Id.* at 319.

118 *Id.*

119 *Id.* (emphasis added).

Morton court's determination that it would be "redundant" to remand the case for an evidentiary hearing similarly violated the insurers' due process rights under the Fourteenth Amendment.

Morton's refusal to hold an evidentiary hearing on the regulatory history issues also deprived the insurers of the opportunity to confront opposing witnesses and cross-examine them. These rights are fundamental elements of judicial due process:

> Certain principles have remained relatively immutable in our jurisprudence. . . . We have formalized these protections in the requirements of confrontation and cross-examination. . . . This court has been zealous to protect these rights from erosion. . . . It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny.[120]

The absence of cross-examination may have significantly influenced the *Morton* court, as it relied heavily on the reported statements of one former state insurance regulator, Richard E. Stewart.[121] Reportedly, he had stated that insurers' internal drafting documents were inconsistent with the regulatory filings. As noted, the *Morton* court was unaware that Stewart had frequently worked as an "expert" witness for policyholders in environmental insurance matters since 1985. One of the important functions of cross-examination is to identify potential bias, which can be missed when a court relies on hearsay.[122]

Cross-examination can also bring to light a witness's inconsistent statements. *Morton* cited Stewart's testimony that the drafters intended to accomplish a serious cutback in coverage by restricting coverage "in a temporal sense."[123] Lacking a hearing and cross-examination, the court was unaware that, until he was confronted with them, Stewart previously opined that drafting documents showed that

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[120] Greene v. McElroy, 360 U.S. 474, 496-97 (1959) (citations omitted); *accord*, Ledenza v. A & C Drywell, 254 N.J. Super. 613, 618, 604 A.2d 169, 171 (App. Div. 1992).

[121] *Morton*, 134 N.J. at 43, 629 A.2d at 855. *See also supra* notes 52, 53, 55, and 61 (referring to Mr. Stewart's testimony).

[122] The article which cited the testimony the court relied upon failed to acknowledge Mr. Stewart's relationship with policyholders. In 1989 alone, Stewart was paid $600,000 for his "expert" testimony on behalf of policyholders. *See* Stewart's deposition testimony in transcript of deposition at 27, Hatco Corp. v. W.R. Grace & Co., No. 89-1031 (D.N.J. November 18, 1991).

[123] Indeed, Stewart now admits that he has *never* seen a *single* document generated by the exclusion's drafters where "sudden" was said to just mean "unexpected." *See* Transcript of proceedings at 6173-74, Purex Indus. v. Leslie Walpole Proctor, No. C446935 (Sup. Ct. Cal. Dec. 4, 1992).

the exclusion "does not have a temporal component."[124]

The opportunity for cross-examination would also have permitted the insurers to adduce testimony in support of their position. In particular, Stewart has agreed with the proposition in the IRB *Explanation* that, because of the occurrence definition, "in most cases" pollution claims were not covered under the 1966 CGL.[125] This testimony is inconsistent with the basic premise underlying *Morton*'s conclusion that the IRB *Explanation* was misleading.

Stewart further accepts that there is no factual basis to conclude that the amount of premiums charged has a direct bearing on the amount of coverage provided because there are "a million and one" reasons why a premium may or may not be charged. He has warned against "work[ing] backwards" from premium data, as *Morton* did, to ascertain the coverage provided by a policy.[126] Other statements by Stewart similarly support the insurers' position in *Morton*, but were unavailable to the court.[127]

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[124] *See* Stewart's expert report submitted in J.T. Baker v. Aetna Casualty and Surety Co., No. 86-4794SSB (D.N.J. Nov. 21, 1988) ¶ 11 ("These [drafting history *and* regulatory filings] documents establish that the 'sudden and accidental' language of that exclusion does *not* have a temporal component.") (emphasis added).

[125] In *Purex Industries*, Stewart deposed:

> Q. Mr. Stewart, if one accepts your view of the occurrence definition and its impact on pollution claims, could one accept the statement that was made to the West Virginia authorities that most pollution claims are already excluded by the occurrence definition?
>
> A. At the time the statement was made, I think you could accept it, yes.
>
> . . . .
>
> . . . I don't have any difficulty accepting that people believed that the state of claims in their past experience was such that many of them would have been knocked out or, in fact, maybe were being knocked out by coverage defenses based on expected and intended.
>
> . . . .
>
> . . . But it does not, on the face of it, surprise me coming at the time it did.

Transcript of Stewart's Deposition (March 4, 1992) at 292-94.

[126] *See* Stewart deposition testimony in Celotex Corporation v. London Insurers, (A.D.R. Proceeding, Aug. 21, 1990) at 76-77.

[127] Stewart has testified that there were discussions of *both* the clarification *and* the restrictive aspects of the pollution exclusion in the West Virginia filings. Rather than characterizing it as misleading, Stewart found the filing, at worst, a "confused record." *See* Stewart's deposition testimony in Hartford Accident & Indem. Corp. v. United States Fidelity & Guar. Co., No. 88C-10515 (D. Utah Mar. 20, 1990), at 309-10.

Moreover, Stewart rejected the "drafting presumption" argument. He agrees that drafters cannot be "presumed" to have intended a non-temporal meaning for "sudden and accidental," based upon a prior court interpretation of that language in a boiler and machinery policy. *See* Stewart's deposition testimony in National Union Fire Ins. Co. of Pittsburgh v. BKK Corp., No. C637637 (Cal. Los Angeles Cty. Apr. 3, 1991), at 133. Stewart has stated that the drafters, Bruton and Schmalz, chose the

The discussion here of Mr. Stewart is not intended to denigrate him because he now provides expert testimony for policyholder-litigants. Rather, Stewart's various statements, both inconsistent with the published material relied on by the court, and also those statements supporting the insurers on other issues, were not available to the *Morton* court because there was no evidentiary hearing. By hearing and adopting only a single, narrow statement by Stewart which appeared in one article, the court lost the benefit of all of Stewart's potential evidence, and the insurers lost the protections afforded by the rights of confrontation and cross-examination.

Cross-examination is not the only office of an evidentiary hearing. A hearing affords litigants the opportunity to present evidence in refutation of their opponents' evidence. For example, in an evidentiary hearing insurers could respond to Mr. Stewart's statements with the testimony of a New York regulator who was actually involved in the 1970 proceedings, Henry Lauer.[128] And where witnesses' testimony and recollections collide, issues of credibility arise, which can only be resolved by a trier of fact who can directly assess the witnesses and their testimony.[129]

Finally, the resort to law journal articles as an exclusive source of factual evidence raises substantial concerns. The right to cross-examine is not absolute; hearsay exceptions have been developed over the years to permit the use of hearsay evidence that has "circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant."[130] Under the Federal Rules of Evidence, even the hearsay exception for learned treatises permits their use as evidence only when presented in conjunction with an expert witness who is subject to cross-examination, and not as independent, self-authenticating evidence.[131] Moreover, law journal articles are not recognized as reliable authorities *per se*; like any other text their authority can only be established through competent testimony that is subject to cross-examination.[132]

Factual questions, especially disputed and dispositive ones,

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exclusion's language so as to put the "occurrence genie" back in the bottle. *See* Stewart's deposition testimony in Smith v. Hughes Aircraft Co., No. 88-406-TUO-WDB (D. Ariz. Apr. 23, 1991), at 446-47.

128 Mr. Lauer's testimony refutes Mr. Stewart on every point on which the *Morton* court relies on Stewart. *See* Aff. of Henry L. Lauer.

129 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 495-96 (1951).

130 *See* FED. R. EVID. 803 advisory committee's note.

131 FED. R. EVID. 803(18); *see also* Generella v. Weinberger, 388 F. Supp. 1086, 1089-90 (E.D. Pa. 1974) (stating that it is improper to rely on medical treatises where no opportunity to cross-examine as expert).

132 *See* Hemmingway v. Ochsner Clinic, 608 F.2d 1040, 1047 (5th Cir. 1979) (ex-

should not be presumed by a court of last resort.[133] If the 1970 understanding of insurance regulators is as important as *Morton* has deemed, it is equally important to ascertain what that understanding actually was. Commentaries cannot substitute for evidence that has been subjected to cross-examination without doing great violence to fundamental principles of justice.

IX. THE POLLUTION EXCLUSION AND "SOCIAL PREMISES"

In *Dimmitt II* Justice Grimes of the Florida Supreme Court candidly stated that in *Dimmitt I* he had "perhaps subconsciously [relied] upon a social premise that I would rather have insurance companies cover these losses rather than parties . . . who did not actually cause the pollution damage."[134] This recognition helped compel Justice Grimes to become part of the new Florida Supreme Court majority finding the exclusion plain, unambiguous and enforceable.

New Jersey probably has more contaminated sites than any other state. Although the availability of additional funding for their clean-up is an appealing social premise, insurance carriers' rights require that such ends not be allowed to justify the means. As Justice Grimes recognized, perhaps some courts have been predisposed to the inaccurate policyholder "history" presentation because of such social premises. Thus, far from being "redundant," an evidentiary hearing is absolutely necessary. No court in the country has ever held such a hearing in any case. No social premise, especially one fueled by unfounded accusations of pervasive fraud, should deprive litigants of a true day in court.

The New Jersey Supreme Court has historically been lauded as one of the most progressive and fair-minded courts in the nation. It has, at times, fashioned new remedies to ensure that the rights of the litigants before it are vindicated. Both the court's refusal to permit a full evidentiary hearing, and its holding, are unprecedented in New Jersey. *Dimmitt II* demonstrates, however, that a fair-minded court can remedy its error. The "inescapable conclusion" reached in *Dimmitt I* was indefensible in light of the full facts. The vehemence of that ruling did not, however, prevent that court from rectifying its grievous error in *Dimmitt II.*

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cluding medical text where there was no testimony that the document was recognized as reliable authority).

[133] *See, e.g.*, Sparks v. St. Paul Ins. Co., 100 N.J. 325, 342 n.6, 495 A.2d 406, 416 n.6 (1985).

[134] *Dimmitt II, supra* note 87, slip op. at 14.

The *Morton* court claims to manifest "no hostility to restrictive coverage provisions" in insurance policies.[135] Whether it will demonstrate the sincerity of that resolve by re-examining or rejecting the regulatory fictions underlying its estoppel analysis is yet to be seen. At least for now, it is the New Jersey Supreme Court that has misapprehended the regulatory issues of 1970. The state insurance regulators of 1970 did not.

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135 *Morton*, 134 N.J. at 78, 629 A.2d at 875.

ADDENDUM

The following affidavits are included in the Addendum:

1. Blaine, John R., Former Insurance Commissioner of the State of Idaho;
2. Bryan, Larry K., Former Kansas Fire and Casualty Policy Examiner;
3. DuRose, Stanley C., Former Wisconsin Insurance Commissioner;
4. Farnam, C. Eugene, Former Massachusetts Commissioner of Insurance;
5. Hannes, Louis N., Former Wisconsin Deputy Insurance Administrator;
6. Hayes, Robert D., Kansas regulatory staff member;
7. Lauer, Henry L., Chief of the Property & Casualty Division of the New York Insurance Department;
8. Lindsay, John, Former South Carolina Commissioner of Insurance;
9. Lombard, Edward P., Former District of Columbia Superintendent of Insurance;
10. O'Malley, Thomas L., Former Minnesota Assistant Insurance Commissioner;
11. Omholt, Elmer V., Former Montana Insurance Commissioner;
12. Preston, Robert D., Former Kentucky Commissioner of Insurance;
13. Rathert, Raymond E., Supervisor of the Fire and Casualty Division of the Kansas Department of Insurance;
14. Rice, Milton P., Former Tennessee Insurance Commissioner;
15. Ryan, Kevin, Former Illinois Deputy Director of the Property and Liability Branch;
16. Steen, Jerome, Former Primary Rate Analyst of the New Jersey Department of Insurance;
17. Summerhays, Melvin L., Former General Liability Rates and Forms Analyst of the Utah Department of Insurance;
18. Troxell, Milton S., Former Director of the Texas Board of Insurance General Liability-Casualty Division;
19. Weese, Samuel, Former West Virginia Insurance Commissioner (Mr. Weese's affidavit was obtained prior to the rendering of the *Morton* opinion);
20. Williams, Broward, Former Florida Insurance Commissioner.

The following additional affidavits are on file with the authors:

21. Balfour, Edward H., Former Chief Property and Casualty Analyst of the Rhode Island Department of Insurance;
22. Barger, Richards D., Former Insurance Commissioner in the State of California;
23. Barnes, J. Richard, Former Colorado Insurance Commissioner;
24. Briggs, Theodore T., Former Maine Insurance Commissioner;
25. DeGeeter, Jr., Frank, Former Delaware Deputy Commissioner of Insurance;
26. Dirks, Warren E., Former South Dakota Insurance Commissioner;
27. Erway, Donald, Former Deputy Director of the Nebraska Department of Insurance;
28. Forrester, Tharpe, Former Alabama Insurance Commissioner;
29. Harbolt, James, Former Oregon General Liability Rates and Forms Analyst;
30. Hazelwood, Garland, Former Assistant Insurance Commissioner of Virginia;
31. Herrmann, Karl V., Former Washington State Insurance Commissioner;
32. Higley, Robert M., Former Assistant General Liability Senior Rate Analyst of the State of Washington Department of Insurance;
33. Howatt, F. Frank, Former Deputy Commissioner of the Oregon Department of Insurance;
34. Jasso, Vincente B., Former New Mexico Superintendent of Insurance;
35. Mastos, Louis T., Former Commissioner of the Nevada Department of Insurance;
36. McCue, Jr., William G., Former Florida Senior Rate Analyst;
37. Mullaney, Peter F., Former Rhode Island Commissioner;
38. Ovaitt, Frank E., Former Assistant Supervisor of the Missouri Insurance Department;
39. Ritz, Oscar H., Former Indiana Insurance Commissioner;
40. Simpson, Richard W., Former Assistant Director of the Pennsylvania Insurance Department;
41. Timmons, William E., Former Insurance Commissioner of the State of Iowa;

42. Tirey, Lucius, Former member of the Oklahoma State Board for Property and Casualty Rates;
43. Van Hooser, Russell E., Former Michigan Insurance Commissioner;
44. Walker, Hargis P., Former Executive Officer of the Louisiana Casualty and Surety Rating Commission;
45. Walton, William G., Former Wyoming Insurance Commissioner;

All affidavits were obtained by the authors of this article, with the exception of Oklahoma (Tirey), which was obtained by Lord, Bissell & Brook of Chicago, Illinois, and Huckaby, Fleming, Frailey, Chaffin & Darrah of Chickasha, Oklahoma. Mudge, Rose, Guthrie, Alexander & Ferdon of New York participated in obtaining affidavits of regulators in New Jersey (Steen) and Kansas (Rathert, Bryan and Hayes).

AFFIDAVIT

I, John R. Blaine, do depose as follows:

1. I have a long background in insurance. After working in an insurance agency and the Idaho Surveying and Rating Bureau, I was special agent for the Hartford Insurance Group for fourteen years. I then served as Insurance Commissioner of the State of Idaho from 1967 to 1972. Thereafter I worked for several major brokerage firms. I then managed my own insurance agency from 1976 to 1985. In 1979 I was involved in the formation of a domestic reciprocal insurance company which wrote only worker's compensation coverage for the Idaho logging industry. I am presently the President and Chairman of the Board of the Attorney-In-Fact of this company known as the Associated Loggers' Exchange.

2. I was careful to hire knowledgeable people who knew the insurance business. We took pride in our responsibility to protect the insurance-consuming public as well as treat the insurance industry fairly, which also enures to the benefit of the consumer. I know that we studied proposed filings with these thoughts in mind. We were very concerned with the cost of insurance and we did not want to disrupt insurance markets.

3. I do recall generally the Insurance Rating Board's (IRB) "sudden and accidental" pollution exclusion filing and the Explanation submitted with it. I have also recently reviewed those materials which refresh my recollection of them.

4. I can state that I understood these IRB documents in 1970 in accordance with long established word meanings commonly held in insurance circles and within our department. "Sudden" was "abrupt/quick/fast." "Accident" was the way insurance used to be written before the change to "occurrence." An "accident" was a fortuitous and sudden event. "Occurrence" policies expanded coverage to insure accidents plus gradual unexpected damage. Further, "sudden and accidental" described an "accident."

5. Thus, in 1970, I knew that the pollution exclusion excluded coverage for gradual pollution discharges. It did so by returning pollution coverage to the old sudden "accident" basis. The Explanation specifically said so by continuing coverage for an "accident." The exclusion itself said the same thing by covering only "sudden and accidental" pollution discharges.

6. There was absolutely no mystery in the language used in the pollution exclusion and the Explanation. The IRB used words we regulators were all familiar with. I certainly was not misled by this filing. There is no basis in fact for anyone to think I was misled.

7. In those days I never thought regular business pollution was covered but was a

cost of doing business. Repetitive practices would almost always cause expected damage. That is probably why there were so few pollution claims. I was not surprised to see the first part of the Explanation express the same thought. By now excluding coverage for gradual pollution discharges, the pollution exclusion certainly clarified and emphasized that regular business pollution would not be covered. Even though they operated differently, the results to be achieved by the occurrence definition and the pollution exclusion were pretty much the same.

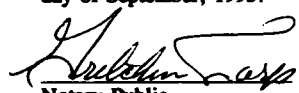
8. There was no way to rate the pollution exposure at that time. Loss experience was scarce. Thus a reduction in premium was not indicated.

9. Any gradual pollution discharges which were not expected were also excluded from coverage by the pollution exclusion. Such a claim would be random at best. The present environmental liabilities recently created by statutes were not around at that time. The restrictive way the exclusion accomplished its purpose was not viewed in 1970 as causing any kind of real reduction in coverage.

10. I was confident at the time, and remain so today, that we fulfilled our public trust in approving the pollution exclusion. The cost of insurance was kept in line for most consumers without upsetting the insurance and reinsurance markets.

JOHN R. BLAINE

Subscribed and sworn to before me, this 15th day of September, 1993.



Notary Public

AFFIDAVIT

I, LARRY K. BRYAN, on my oath, depose and say:

1. I have been employed by the Kansas Department of Insurance since July 22, 1963 as a policy examiner for the Fire & Casualty Section.

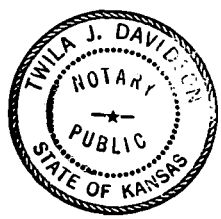
2. I have a very limited recollection of the 1970 filing of the "sudden and accidental" pollution exclusion by the Insurance Rating Board. A review of the file shows that I had some involvement in the process.

3. I have read the September 30, 1993 Affidavit of Raymond E. Rathert. Based on my review, knowledge and recollection, the contents of that Affidavit are accurate.

Larry K. Bryan

Sworn and subscribed to before me this 30th day of September, 1993.

Twila J. Davidson



AFFIDAVIT

I, Stanley C. DuRose, Jr., do depose as follows:

1. I have been informed that the New Jersey Supreme Court has issued a decision which involves an interpretation of a liability insurance contract containing an insuring agreement exclusion for release of pollutants that is not sudden or accidental. It is my understanding that the decision in part is based on a belief by the court that state insurance regulatory officials at the time of the filing and approval of such contract language in 1970 were misled by insurance bureaus and did not understand the scope and meaning of the coverage to be afforded under that exclusion.

2. The University of Wisconsin - Madison granted me a Bachelor of Science Degree in Mechanical Engineering in June, 1948. I commenced employment with the State of Wisconsin Office of the Commissioner of Insurance as a trainee property insurance rate and form analyst on July 1, 1948. Except for 17 months in 1951-52 when I was recalled to the Air Force, I worked on property rates and forms until 1955. In 1955, I transferred to the Casualty Insurance Rates and Forms unit. In 1956, I was placed in charge of all casualty rate and form filings. In 1961, I was named Assistant Deputy Commissioner with general responsibility for Office operations and administration. In 1965, I was appointed Deputy Commissioner of Insurance. All of these positions were under the Civil Service competitive examination system. In 1969, the then-Governor appointed me Commissioner of Insurance. I served as Commissioner under the subsequent Governor until 1975, at which time I reverted back to my civil service position as Deputy Commissioner for approximately two years.

3. In 1958, I was accepted as an Associate member of the Casualty Actuarial Society. In 1966, I was accepted as a member of the American Academy of Actuaries. I currently have a retired status in both societies.

4. In 1970, I was Vice Chairman of the National Association of Insurance Commissioners' (NAIC) Property and Liability Committee. I was also a member of the Laws and Legislation Committee and a member of some 20 subcommittees of the NAIC.

5. I have attached an excerpt of the 102nd Annual Report of the Wisconsin Commissioner of Insurance. It contains a summary of the significant General Liability and other Casualty insurance filings made in 1970, prepared by Louis N. Hannes, Chief, Property-Casualty Rates Division. It states that the IRB and the MIRB amended rules in their manuals and filed forms to exclude coverage arising out of contamination or pollution. The IRB filing was effective June 10, 1970 and the MIRB filing was effective July 29, 1970.

6. I have no clear recollection of specific discussions I may have had with my staff, other Insurance Commissioners or insurance industry representatives before or at the time of the filings identified in paragraph 5 above. I do not think that the Wisconsin Records Center and Archives would have retained any internal memorandum to me on the subject of the filed pollution exclusion. However, I held weekly meetings with supervisory staff and had full discussion of all regulatory and administrative matters in process. I would have been fully informed and cognizant of the meaning and intent of all rate and policy form filings such as listed in my Annual Report. Louis Hannes was experienced, competent and qualified to assist me in processing and approving this filing. I am also confident that I was directly involved in the approval several years earlier of policy forms wherein coverage was to be provided on an occurrence basis as opposed to the traditional accident basis.

7. In 1970, we would have understood "sudden" in terms of a happening that was precipitous or abrupt. It did not mean "gradual." We understood what a sudden "accident" was, and how it was different from an occurrence. The Insurance Rating Board's filing, which I recently reviewed, was not misleading. Moreover, pollution claims had not been filed with frequency at the time of the filing, and it would not have been logical to reduce premiums for an exposure that could not be rated because of inadequate loss data.

8. In reflecting on approval of the pollution exclusion contract language in 1970, it occurs to me that an attempt to disapprove would have also raised the question in my mind concerning the public policy of the State. During my service in the Office of the Commissioner I was sensitive to the public policy issue of whether it would be appropriate to approve insurance contracts that would provide coverage to the insured (as opposed to third parties) for intentional and probably illegal acts of the insured. The question would have been whether the disapproval of the filing would have mandated pollution coverage, which in turn would have encouraged policyholders to take the risk of polluting because the costs of such pollution would be spread among all such policyholders.

9. In addition to the above, it has been my experience that the regulation of insurance and the administration of state law is not conducted in isolation or a vacuum. There are a great many competing segments and facets of the insurance industry. Also there are, and have been, multiple consumer organizations and active members of the legislative and executive branches of government. Further, there has always been an extensive and active trade press which contains detailed analysis and commentary on specific filings, industry problems and significant court decisions relevant to the industry and its regulation. There were also a number of detailed information resource publications such as the Fire, Casualty and Surety Bulletins, which contained up-to-date analysis of contract language and its rationale, etc.

10. I have great respect for the judges and courts of the United States. However, if my understanding of the decision as outlined in paragraph 1 is correct, then I must conclude that the court was either misled or did not understand the day to day workings of the state regulatory process, the level of interaction with the insurance industry and the trade press, and the use of available technical publications available at that time.

STANLEY C. DuROSE, JR.

Subscribed and sworn to
before me, this 1st
day of October, 1993.

Notary Public

My Commission 11-29-96

1971

WISCONSIN

INSURANCE REPORT

PATRICK J. LUCEY
Governor

S. C. DuROSE
Commissioner of Insurance

BUSINESS OF 1970

Rao 8/6/71

Paid fire department members:
Jerome Gumbinger, Kenosha
Ernst Denecke, Sheboygan

Joint Survey Committee on Retirement Systems. This committee performs duties mandated under section 13.50, Wis. Stats. Committee membership comprises 2 members of the State Senate, 2 from the Assembly, an Assistant Attorney General, a member of the public appointed by the Governor, and the Commissioner of Insurance or an experienced actuary in his office appointed by him.

The Committee evaluates all legislative proposals which would create or modify any system of retirement for public officers or employes. No such bill may be acted upon by the legislature until it has been referred to this Committee for preparation of a written report thereon. Such a report must indicate the probable costs involved, the effect of the proposal upon the actuarial soundness of existing retirement systems, and the desirability of the proposal as a matter of public policy.

In cases where a public employe may qualify for membership either in the Wisconsin Retirement Fund or in a state teachers retirement system, the Committee is empowered, upon petition, to determine in which system such employe is to be enrolled.

Committee members who served during 1970 are listed below:

Legislative members
Senator Reuben La Fave, Oconto
Senator Walter E. Terry, Baraboo
Representative Milton McDougal, Oconto Falls
Representative Alvin Baldus, Menomonie

Assistant Attorney General
David McMillan (replaced by Warren Schmidt, August 19, 1970)

Public member
Professor William Bicknell, Madison

Commissioner of Insurance
M. E. Van Cleave, Assistant Deputy Commissioner, Office of the Commissioner of Insurance, Madison (designee)

Retirement Research Committee. This Committee performs duties mandated under section 13.51, Wis. Stats. Its membership is broadly representative of employe groups having vested interests in various state retirement programs. The Committee has investigatory powers over all state retirement systems for public employes. In addition, it may require any public pension or retirement system to furnish it with periodic financial reports and records. The Committee conducts a continuous review of retirement benefits afforded to public employes under the existing state systems in the light of the requirements and complexities of modern retirement programs; to this end it maintains a current reference library of all public employe pension and retirement plans throughout the United States. It makes its findings and recommendations available to the Governor and to the legislature.

The composition of this Committee is established by statute. This composition, together with Committee members who served during 1970, are listed below:

The Members of the Joint Survey Committee on Retirement Systems
Senators Reuben LaFave and Walter E. Terry, Representatives Alvin Baldus and Milton McDougal, Asst. Atty. Gen. Warren Schmidt, Professor William Bicknell, and M. E. Van Cleave, Assistant Deputy Commissioner

The Executive Director of the Wisconsin Retirement Fund Board
C. M. Sullivan, Madison

The Executive Secretary of the State Teachers Retirement Board
Harry Joyce, Madison

One representative of state, county or municipal employes, appointed by the Governor
Roy E. Kubista, Madison

A teacher-member of the State Teachers Retirement System, appointed by the Governor
Daryl K. Lien, Amery

A trustee-member (in a city of the first class) of the Teachers Annuity and Retirement Fund, appointed by the Governor
Edmund G. Olszyk, Milwaukee

Members of the public, appointed by the Governor
Will G. Ballentine, Menomonie
E. L. Wingert, Madison
F. N. MacMillin, Madison (replaced by Charles F. Jones, October 15, 1970)

One representative of county or municipal employers, appointed by the Governor
Mayor Ralph Voigt, Merrill

One senator and one representative, each of the minority party in their respective branches of the legislature
Senator Wayne Whittow, Milwaukee
Representative Jerome F. Quinn, Green Bay

PARTICIPATION IN NAIC ACTIVITIES

M. E. Van Cleave, Assistant Deputy Commissioner

The National Association of Insurance Commissioners (NAIC) is a voluntary association of the principal insurance regulatory authorities of the 50 states, the District of Columbia, and territories of the United States. Section 601.48 of the statutes provides that the Commissioner of Insurance shall maintain close relations with the commissioners of other states and shall participate in the activities and affairs of the National Association of Insurance Commissioners.

The NAIC was formed and has had regular meetings since 1871. The object of the association, as stated in its constitution, is to promote uniformity in legislation affecting insurance, to encourage uniformity in departmental rulings under the insurance laws of several states, to disseminate information of value to insurance supervisory officials in the performance of their duties, to establish ways and means of fully protecting the interest of the insurance policyholders in the various states, territories and insular possessions of the United States and to preserve to the several states the regulation of the business of insurance.

The Wisconsin Commissioner of Insurance has, for many years, taken an active part in the activities and affairs of the NAIC. The annual meeting of the NAIC was held in June, 1970 in Cleveland,

Ohio, and the regular meeting was held in December, 1970 in Chicago, Illinois. The Commissioner and several members of his staff attended both meetings. During 1970, Commissioner DuRose served as a member of the following committees of NAIC:

Laws, Legislation and Regulation
Property and Liability (Vice Chairman)

Commissioner DuRose was also a member of the following subcommittees of NAIC during 1970:

Blanks
Special Committee on Automobile Insurance Problems
To Make Recommendations, Including Drafting of Model Legislation if Necessary, Dealing with Unauthorized Insurers
To Study Life and Disability Insurance Insolvencies and Prepare any Necessary Legislation (Vice Chairman)
To Prepare Model Legislation for Guaranty Funds
Accident and Health Insurance
Accident and Health Insurance with Cash Surrender or Other Non-Forfeiture Value Benefits
Fraternal Insurance
Variable Annuities and Other Contracts
To Study Benefits and Coordination of Accident and Health Insurance Policies
Rates and Rating Organizations
Unauthorized Insurers
Actuarial
Small Business Administration Lease Guaranty Liaison (Chairman)
Regulatory Information
Profitability and Investment Income in Property and Liability Insurance
Uninsured and Partially Uninsured Non-regulated Plans
Accident and Health Protection
Availability of Essential Insurance (Chairman)
Medical Malpractice Insurance

In addition, Martin F. Raynoha, Chief, Examining Division, and John W. Vilberg, Chief, Employe Welfare Funds Division, served on technical subcommittees of the blanks subcommittee which had responsibility for development of particular annual statement blanks.

The committee and subcommittee system of the NAIC was revised during 1970 so that in the future, there will be fewer committees and subcommittees.

Commissioner DuRose took a very active part in the drafting of model legislation concerning life and disability insurance insolvencies which was finally adopted by the NAIC at the December, 1970, meeting. He also was primarily responsible for inviting representatives of the automobile manufacturers, the automoblie repair industry, the insurance industry and the U. S. Department of Transportation to appear before the December, 1970 meeting of the property and liability committee to discuss the possibility of the development by the NAIC of an annual rating or index that would reflect the relative damageability and ease of repair of automobiles. This is a continuing subject on the agenda of this committee and will be considered at the 1971 meeting.

In addition to the meetings and activities of the NAIC, the Commissioner and staff have been active over the years in the meetings of Zone IV of the NAIC. Zone IV consists of the 8 upper midwest states which are considered as a unit for some of the examination functions of the NAIC. In addition, the commissioners of these states and members of their staff meet once a year to consider problems of particular interest to them. There have been many instances of problems which were first considered by the commissioners of Zone IV which have been forwarded to be considered at the national level by all of the states in the NAIC. The 1970 meeting of Zone IV commissioners was held in October in Indianapolis, Indiana. Martin F. Raynoha, Chief, Examining Division, for many years has been in charge of the committee which prepares the agenda concerning insurance company examinations and financial reporting blanks.

LEGISLATION

By M. E. Van Cleave, Assistant Deputy Commissioner

The legislative changes which became effective in 1970 as a result of enactments by the 1969 Wisconsin Legislature, were fully reported in the 1970 *Wisconsin Insurance Report* beginning at page 87. Since there was no Wisconsin legislative session for 1970, there are no additional legislative changes to report for that year.

The Commissioner of Insurance has worked closely with the Insurance Laws Revision Committee of the Joint Legislative Council which is preparing a complete codification of the state insurance laws and he is channeling his suggestions for legislative changes through that committee. Several significant chapters of insurance legislation have been presented to the 1971 Wisconsin Legislature.

ACCIDENT AND SICKNESS INSURANCE

D. A. Paulman, Insurance Rate and Form Analyst

The health insurance section of the Life and Health Rates Division is primarily concerned with reviewing, for approval or filing, the policy or contract and related forms and rates submitted to the division by (1) stock and mutual insurance companies under sections 204.31, 204.32, 204.321 and 204.322, Wisconsin Statutes, (2) nonprofit medical society sickness care plans, hospital service plans, dental care plans and optometric service plans under section 200.26, Wis. Stats., (3) nonprofit cooperative sickness care plans under section 185.983, Wis. Stats., and (4) nonprofit voluntary school accident benefit plans under section 185.992, Wis. Stats.

As of December 31, 1970, there were approximately 550 stock and mutual companies licensed to write accident and sickness insurance in the state. Approximately 375 of these companies had accident and sickness insurance forms and rates on file with the Commissioner of Insurance. There were 7 nonprofit plans licensed and operating in the state.

Wisconsin Administrative Code section Ins 3.15 (4) (a), relating to risks eligible for blanket accident and sickness insurance, was amended effective September 1, 1970, to include participants in racing meets and to broaden subdivision 10 relating to fraternal organizations.

Rate increases, mostly applicable to hospital-medical-surgical expense and major medical expense coverages, were submitted and approved for many companies.

Initial filings of prepaid group practice plans were made by Associated Hospital Service, Inc., Surgical Care and Wisconsin Physicians Service.

erty insurance available to responsible applicants who have been unable to secure insurance in the normal insurance market. Any person having an insurable interest in real or tangible personal property at a fixed location anywhere in the state of Wisconsin, except manufacturing risks, farm property, and automobiles may obtain insurance through the Wisconsin Insurance Plan if the property for which insurance is desired meets the Plan's reasonable underwriting standards.

On July 1, 1970, Vandalism and Malicious Mischief insurance was added to the other coverages available through the Plan, and temporary coverage became available to the applicant upon payment of a portion of the total cost of the policy.

The Fire Insurance Rating Bureau, which acts as Manager of the Plan, reported that from the inception of the Wisconsin Insurance Plan until December 30, 1970, 7,177 properties were insured with the Plan and 1,204 risks were conditionally declined because of the physical condition of the property. Many of these were subsequently accepted after compliance with recommended property improvements. Approximately 75% of the property insured with the Wisconsin Insurance Plan is located in the city of Milwaukee. Most of the rates on the risks insured under the Plan are surcharged in order to reflect the increased exposure not contemplated by the class rates or by the specifically published rates.

GENERAL LIABILITY AND MISCELLANEOUS CASUALTY INSURANCE

L. N. Hannes, Chief, Property-Casualty Rates Division

During 1970, the Insurance Rating Board, the Mutual Insurance Rating Bureau, and the independent insurance companies all filed several rate revisions for general liability and other casualty insurance.

Effective January 7, 1970, the IRB increased basic rates for all major burglary sublines an average of 33.3%. They also increased glass rates an average of 26.4%. The MIRB increased glass rates 22.0% on February 25, 1970, and burglary rates 26.2% on March 4, 1970.

Effective January 21, 1970, the MIRB increased Owners', Landlords', and Tenants' bodily injury rates 20% for all Area, Frontage, Storekeepers, Theatres, and certain Miscellaneous classifications; 30% for Hotel–Motel classifications; and 33.3% for Residences.

The MIRB also increased the policy writing minimum premiums for all Owners', Landlords', and Tenants' classes from $10 for bodily injury and $5 for property damage to $15 and $10, respectively. This change was effective February 4, 1970. The IRB changed its policy writing minimum premium for certain miscellaneous professional liability classes from $5 to $15 on May 27, 1970.

Effective February 25, 1970, the MIRB increased by 75% the Hospital Professional Liability Increased Limits Table.

Manufacturers' and Contractors' bodily injury liability rates were increased an average of 12% by the MIRB as of April 1, 1970. On May 6, 1970, the MIRB also increased Products Liability rates 2% for bodily injury and 16.8% for property damage.

Both the IRB and the MIRB amended rules in their manuals of liability insurance and filed forms to exclude coverage for liability

arising out of contamination or pollution. The IRB filing was effective June 10, 1970, and the MIRB filing was effective July 29, 1970.

Effective May 27, 1970, the IRB increased Lawyers' Professional Liability rates 60.4% and Dentists' Professional Liability rates 31.6%.

The MIRB withdrew its special Service Station Policy Program on July 1, 1970.

Effective October 28, 1970, the IRB filed rules, rates, and forms to provide for the exclusion of snowmobile coverage and the "buy-back" of such coverage if desired, for both the Comprehensive Personal Liability and Farmers' Comprehensive Personal Liability policies.

The IRB filed revised Boiler and Machinery Premium Adjustment Rating Plants A and B to be effective June 1, 1970. They also revised the Boiler and Machinery Public or Institutional Risk Rating Plan effective November 1, 1970.

Owners', Landlords', and Tenants' bodily injury rates for Hotel–Motel classifications were increased 15% by the IRB on December 9, 1970. Effective the same day, the IRB revised Farmers' Comprehensive Personal Liability rates although there was no change in overall rate level.

The independent rate filings made during 1970 generally followed the lead of the rate service organizations. Both the rate service organizations and the independent companies also submitted numerous underwriting rule and form revisions during 1970.

INLAND MARINE INSURANCE

J. Ed. Kennedy, Actuary

During the early part of 1970, various inland marine class rates were revised to delete previous Wisconsin exceptions so that Wisconsin rates, in general, are filed on the same basis as in other states. The minimum premium, unless otherwise specified for special classes, is $25 regardless of term. The revisions referred to were initiated by the Inland Marine Insurance Bureau and the Transportation Insurance Rating Bureau, countrywide rate service and statistical agencies for stock and mutual insurers, respectively. A majority of independent insurers amended their filings to correspond with bureau filings. A substantial number of insurers have revised their rate charges to conform to bureau rate filings on the basis that individual company experience is not credible on a class basis.

The expansion of multiple peril programs, both Homeowners and Commercial, to include coverages on property traditionally classified as inland marine tends to cast doubt on the necessity of a special rate service organization, the purpose of which is to promulgate rates or premiums for classes which constitute approximately 40% of the total inland marine premiums.

LIFE INSURANCE

David L. Heineck, Insurance Rate and Form Analyst

Despite current economic conditions, life insurance companies continued their interest in equity related products. In addition to the continued filing of the types of forms referred to in last year's report, a variable life insurance policy was filed. Both the sum insured and the premium for this form vary in direct proportion to the value of an insurance unit which is based on the performance of a sepa-

AFFIDAVIT

I, C. Eugene Farnam, do depose as follows:

1. I was Insurance Commissioner in the State of Massachusetts from 1962 to 1972. I generally recall the "sudden and accidental" pollution exclusion filed by the insurance bureaus in approximately 1970. My recollection is refreshed by a recent reading of the exclusion's language and the Explanation submitted to state insurance regulators by the Insurance Rating Board.

2. It goes without saying that in 1970 I understood the policy term "sudden" as describing a temporal event. It meant "quick"/"abrupt." It could not include processes or happenings that occurred gradually or incrementally over time.

3. The IRB Explanation stated that coverage would still be provided for an "accident." In 1970 I understood an "accident" as an event which was identifiable in time and place. An "accident" was a "boom" event, like an explosion. The Explanation was perfectly consistent with the exclusion's language. In essence, pollution coverage was returned to a "caused by accident" basis in 1970.

4. The Explanation was also correct in stating in 1970 that "in most cases" pollution claims would not be covered under the occurrence definition, which precluded claims for damage that was expected or intended. It was understood in 1970 that there was generally no pollution coverage under the 1966 CGL occurrence policy. Pollution damage generated in the normal course of an insured's business operations would, or should, be expected. It was a cost of doing business and not an insurable risk.

5. In this context, the pollution exclusion certainly did clarify the coverage situation in 1970. The restriction inherent in the exclusion's language, and confirmed in the Explanation, was obvious. The exclusion was not, however, considered as significantly reducing whatever pollution coverage existed in 1970.

6. The explanatory materials submitted in 1970 to the department were not misleading. Both the exclusion's plain language and the IRB Explanation said the same thing. There would be no coverage for ongoing or continuous pollution discharges, even if the discharges were unexpected. A claim would have to arise out of a pollution event that was both sudden and accidental.

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7. The lack of a premium reduction when the exclusion was approved did not mean the exclusion's restrictive effect was not understood in my department. Pollution claims were quite rare in 1970. This was many years before the age of Superfund. There was no way to rate the exposure at that time. Premiums would have been adjusted prospectively as loss data was compiled.

C. EUGENE FARNAM

NOTARY PUBLIC
Sworn to before me this
24th day of September 1993

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss September 24, 1993

Then personally appeared before me, the above named C. Eugene Farnam and declared to me that the material contained herein is the truth to the best of his memory.

William M. Leonard, Notary Public
My commission expires:
April 29, 1994

AFFIDAVIT

I, Louis N. Hannes, do depose as follows:

1. I was employed by the State of Wisconsin Insurance Department from November, 1961 through March, 1978. I started as a Property and Casualty Rate and Form Analyst, and in 1971, I was named Administrator of the Property and Casualty Rates and Forms Division. I currently am the President of the Wisconsin Compensation Rating Bureau, a licensed rate service organization for worker's compensation insurance in Wisconsin.

2. My responsibilities as an Analyst included General Liability, Worker's Compensation, Burglary, Glass, Surplus Lines and Unauthorized Insurance. I also worked on Automobile and other casualty coverages as a back-up. When I became Administrator, I was responsible for all lines of Property and Casualty Insurance.

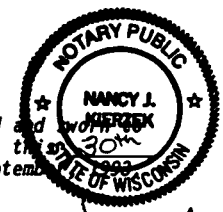
3. While I do not actually recall the "pollution exclusion" filing in 1970, the filing would have been approved by me as it was considered a General Liability filing. Our procedure at that time was for the Analyst responsible to review and either approve or disapprove the filing, and to routinely advise the supervisor and others in the Department, including the Commissioner.

4. I have recently reviewed the pollution exclusion language and the Explanation submitted by the IRB. There is no question that the language was clearly understood at the time of approval. "Sudden and Accidental" coverage meant that the event took place quickly and at a precise time, like an explosion, and not gradually over a period of time. Since General Liability policies were usually written on an occurrence basis in 1970, I would have recognized the "pollution" exclusions as also clarifying intended restrictions on coverage. The IRB Explanation is clear, and confirms my understanding.

5. There would not have been any request or requirement for a rate adjustment when these exclusions were filed, as there was little, if any, loss data at that time, and, as indicated in the IRB Explanation, coverage was limited to true pollution accidents. The "pollution" exclusions clarified what customarily was and was not to be covered by a conventional General Liability Policy. The restriction of coverage was not significant at that time.

6. I understand that there now exists opinions that regulators were either misled by the IRB Explanation or that the significance of the filings was misunderstood. This certainly was not the case in the Wisconsin Insurance Department.

Louis N. Hannes



Subscribed and sworn to before me, this 30th day of September, 1993.

NOTARY PUBLIC

AFFIDAVIT

I, ROBERT D. HAYES, on my oath, depose and say:

1. I have been employed by the Kansas Department of Insurance since February 1972. Currently, I am the Supervisor of the Professional Liability Section.

2. I was not employed by the Department when the Insurance Rating Board filed the "sudden and accidental" pollution exclusion for use on comprehensive general liability policies; however, I was involved with the regulatory approval process as it pertained to the Farmers Comprehensive Personal Insurance Policy.

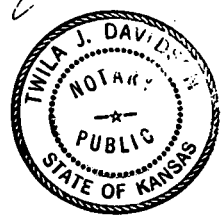
3. As such, I am familiar with the materials submitted with the exclusions both in 1970 and 1973.

4. I have read and reviewed the Affidavit of Raymond E. Rathert dated September 30, 1993, and find it accurate to the best of my knowledge and recollection.

Robert D. Hayes

Sworn and subscribed to before me this 30th day of September, 1993.

Twila J. Davidson



AFFIDAVIT

I, HENRY L. LAUER, do depose as follows:

1. I joined the New York Insurance Department ("the Department") in 1957. In 1962 I became a Senior Insurance Examiner of the Rating Bureau. In 1981 I was promoted to Chief of the Property and Casualty Division. I continue in that capacity today. In 1970, in addition to other duties, I was responsible, along with others in our Rating Bureau, for approving general liability form filings for the Department. We processed form filings under the supervision of our superiors in the Rating Bureau.

2. In 1970 we had quite a large department of professional career insurance regulators. We were part of Zone 1, which included New Jersey, Maine and others. We examined filings of insurance carriers and their rating bureaus very carefully to make certain they complied with the provisions of Section 2307 of the Insurance Law. That law required that forms not be misleading nor be in violation of public policy. We frequently discussed filings with insurance regulators in other Zone 1 states.

3. During my career of over thirty-five years with the Department I have served under many Superintendents and Deputy Superintendents. They were generally not involved in the day-to-day operations of the approval process of filings. However, the degree of their involvement varied with the individual. During the time that he was Superintendent of the Department, Richard E. Stewart, to the best of my recollection, never participated in the decision making discussions which led to approval or rejection of form filings. In fact all such approvals were signed in his name, usually by one of the Insurance Examiners.

4. Throughout my career the meaning of certain words has been basic to liability insurance. When I joined the Department liability policies were written on a "caused by accident" basis. An "accident" was a "boom" event, one which occurred quickly. It was a "sudden" happening in the temporal abrupt sense. "Sudden was always understood as the opposite of "gradual." "Sudden and accidental" was another way of describing an event which was an "accident." In 1966 the carriers' rating bureaus filed the "occurrence" general liability policy which temporally expanded standard coverage. It insured not only the sudden accident but also gradual damage. I know that these word usages were part of common, every-day speech, not only within the Department's Rating Bureau, but also among the general liability regulators of the other departments within Zone 1.

5. I recall the "sudden and accidental" pollution exclusion which the carriers' rating bureaus submitted for approval in 1970. I easily recognized that it excluded coverage for gradual pollution discharges by excepting coverage for the old "boom" pollution accident which it identified as "sudden and accidental." I observed that for non-pollution situations the policy continued to insure gradual damage on an "occurrence" basis.

6. The Explanation submitted with the exclusion confirmed that coverage for pollution damage

was continued only for a pollution "accident." That was about the only real basis for pollution coverage under "occurrence" policies anyway. I was not surprised to see the Explanation state that "most cases" of pollution caused expected or intended damage. In those days virtually all pollution damage was caused by regular business pollution discharges, and pollution coverage claims were few. I agreed with the Explanation that this situation of general lack of "occurrence" pollution coverage was clarified by eliminating coverage for gradual pollution discharges. Obviously when you stop covering damage caused by gradual pollution discharges, you also stop coverage for the expected damage which, "in most cases," those gradual discharges are causing.

7. I understand that former Superintendent Stewart has testified to the effect that the carriers' rating bureaus did not communicate a temporal usage in this filing, and that regulators were told they were only dealing with a clarification of the "occurrence" definition which caused no change at all in coverage. He has apparently stated that a restrictive operation of the exclusion upon gradual pollution discharges in 1970 would have resulted in a drastic reduction of coverage. These conclusions are simply not true. It is hard for me to accept that he would advocate these positions.

8. The way the exclusion temporally restricted coverage was clearly communicated by the carriers' rating bureaus to regulators. There was no mystery at all in the language that was used. We in the Department, and particularly in the Rating Bureau, were not in the slightest bit misled by this filing. There is absolutely no basis in fact for former Superintendent Stewart to suggest, nor for anyone to conclude, that we were misled.

9. Although we did not view this exclusion as working a significant reduction in the limited amount of realistic pollution coverage then available under occurrence policies, we did clearly recognize that the exclusion would take away coverage for any gradual pollution discharges which were truly unexpected. At that time any such liability was very rare since today's vast array of Superfund liabilities did not exist. Nevertheless, because it was possible that some gradual but unexpected losses had accrued under existing liability policies we refused to permit the exclusion to be attached to existing policies as the carriers' rating bureaus had proposed. We granted our approval for its use only on new and renewal policies. Our approval on that basis clearly signals our perception of this filing as causing a reduction of coverage in some cases.

10. I recall that back around 1970 New York was an "file and use" state. The carriers' rating bureaus suggested advisory rates, and competition in the marketplace would govern rates. Moreover, insurance departments would not have required premium reductions for exclusions, such as the pollution exclusion, where there was no indication of change in loss data.

11. We thought at the time that our approval of the exclusion for prospective application was in accord with Section 2307 of the Insurance Law. We felt the exclusion was not unfairly discriminatory nor in violation of public policy. We thought it would help contain the cost of insurance as well as discourage pollution activities. Our public policy perceptions were soon validated. In 1971 the State of New York enacted the "sudden and accidental" pollution exclusion into law. That made it illegal to insure damage caused by gradual pollution discharges.

12. I understand it has been suggested that the Legislature understood that this law would preclude coverage only for active (reckless and intentional) polluters. That was one object accomplished by the statute However, I know and recall that we in the Department clearly recognized that the new law operated the same restrictive way as did the pollution exclusion the carriers' rating bureaus had previously submitted. Our Department drafted this bill which the Governor subsequently, and successfully, sponsored. It clarified that coverage for regular pollution damages would not be available because coverage for all gradual pollution discharges, even if unexpected, was prohibited. That clarification was accomplished by permitting coverage to be written only for temporally sudden pollution accidents it described as "sudden and accidental." Of course, the statute did not affect the legality of non-pollution insurance to continue to be written for gradual damages on an "occurrence" basis.

13. Because of the requirements of the "sudden and accidental" pollution statute it was necessary for a gradual pollution exclusion to be attached to the Farmers Comprehensive Personal Insurance Policy. The carriers' rating bureau submitted the standard form "sudden and accidental" pollution exclusion for compliance with the statute I approved that filing on August 11, 1971 when I was Senior Insurance Examiner of the Rating Bureau.

Henry L. Lauer

HENRY L. LAUER

Subscribed and sworn to before me, this 28 day of October, 1993.

Elaine R Berger

Notary Public

Elaine R Berger

ELAINE R. BERGER
Notary Public, State of New York
No. 30-4709373
Qualified in Nassau County
Commission Expires January 31, 1994

AFFIDAVIT

I, John W. Lindsay, do depose as follows:

1. I was the South Carolina State Insurance Commissioner from March 1970 to 1972. I returned to the department, again as Insurance Commissioner, from 1975 to 1981. From 1955 to 1970, I actively observed regulatory matters that came before the National Association of Insurance Commissioners.

2. Going back to 1970, the filing of then-new pollution exclusions was not a matter of earthshaking consequence. Pollution coverage issues were essentially non-issues. This was so because, even under the 1966 CGL "occurrence" policy, there was generally no coverage intended or provided for pollution.

3. Contamination damage resulting from the routine and normal operations of an insured was not a covered occurrence. Damage resulting from repetitive business practices was a cost of doing business and not insurable. I have recently reviewed the "Explanation" submitted by the Insurance Rating Board to state insurance regulators in 1970. It quite appropriately stated that, since "in most cases" pollution claims were already precluded by the occurrence definition, the exclusion clarified the lack of existing pollution coverage at that time.

4. It should not be forgotten that 1970 was years before the era of Superfund. The many liabilities created by statutes like RCRA and CERCLA simply didn't exist. To impose a modern-day perspective on the perceptions of insurance bureaus and insurance regulators in 1970 is illogical. The pollution exclusion would not have been perceived as having the dramatic impact on coverage it may have in today's climate of environmental liabilities.

5. That is not to say that the exclusion was not understood as restricting coverage under certain circumstances. The focus of the occurrence definition was upon harm that was neither expected nor intended. The language of the pollution exclusion focused on the pollution discharge, which had to be both "sudden and accidental."

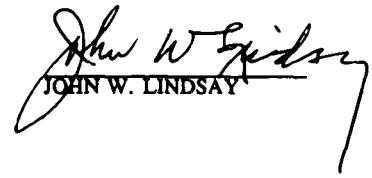
6. In 1970, there would be no question that "sudden" contained a temporal element of quickness/abruptness. I cannot conceive how anyone could have understood that "sudden" in any way included a gradual process or ongoing event.

7. Consistent with the "sudden" language of the exclusion, the IRB "Explanation" forthrightly stated there would be continued pollution coverage for an "accident." In 1970, "accident" was recognized as describing a "boom" event, a catastrophic happening which was identifiable in time and place. Even though some courts may have seen fit to stretch the interpretation of the policy term "accident" to include gradual exposures prior to 1970, that would not have affected insurance bureaus' and insurance regulators' longstanding usage and understanding of that term. The pollution exclusion, then, returned pollution coverage back to a pre-1966 "caused by accident" basis.

8. Even though the obvious restriction the pollution exclusion carried was clearly understood, pollution claims were few in 1970. Thus, there would have been no basis to rate the exposure or request a reduction in premiums. Rates would be adjusted subsequently as loss data was compiled. This was a common practice in the insurance regulation field.

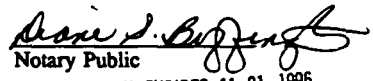
9. In South Carolina, we took our responsibility to protect the public very seriously. The merits of regulatory filings, especially exclusions that could reduce coverage, were seriously weighed. The pollution exclusion was a fair exclusion, and its approval in South Carolina in 1970 was appropriate.

10. There is absolutely no basis in fact for anyone to assert or conclude that insurance regulators in South Carolina were misled by the explanatory materials submitted by the insurance bureaus in 1970. The representations made in them were accurate and honest in every respect.



JOHN W. LINDSAY

Sworn and Subscribed to
before me this 5th day
of October, 1993.



Notary Public
MY COMMISSION EXPIRES 11-21-1996

AFFIDAVIT

I, Edward P. Lombard, do depose as follows:

1. From 1941 to 1956, as Assistant Secretary of the National Union Insurance Company of Washington, I supervised contacts with agencies, production of policies and maintaining records necessary to produce the Annual Statement in the form prescribed by the National Association of Insurance Commissioners. From 1956 to 1970, I served as a Deputy Superintendent of Insurance for the District of Columbia. In 1970, I was appointed Superintendent of Insurance. I retired in September of 1973.

2. My predecessor, Hon. Albert F. Jordan, was the dean of his contemporaries. For some 35 years he was highly regarded by our legislature, the Congress of the United States. His every effort was directed toward providing a competitive market for the benefit of our residents. He wrote much of our law. His staff of Casualty actuaries had broad experience in industry. I worked very closely with this man for 14 years and continued his regulatory approach. I read every insurance periodical for years. This was necessary so that when I appeared before Committees or Sub-Committees of the Congress (about 50 times), I was able to field their every question.

3. With respect to the Insurance Rating Board's pollution exclusion filing, I saw it. In fact I reviewed all incoming mail in this rather small jurisdiction. Mr. Haydon, whose signature is on a May 25, 1970 letter to the Insurance Rating Board, was my Deputy Superintendent of Insurance. Neither he or I felt any need to move against the filing. It was not misleading or inaccurate.

4. In 1970, we understood that "sudden" had a temporal meaning, and was the opposite of gradual. We also understood at that time the difference between a sudden "accident" and an occurrence, which could also cover a gradual process. Pollution claims were not common, and were generally not covered as occurrences. Damage routinely caused in the normal course of a business' repetitive operations was not an occurrence. My mind goes back to those years at my summer homes at Sea Isle City and, later, Stone Harbor. It was common knowledge that the sewage just flowed freely into the sea and the wetlands, and the dump fires on a windless day had everyone's eyes watering.

5. With respect to a rate reduction, the exclusion would not have required one. Adjusting the rate for every form change is surely a fantasy. A rate change for the IRB pollution exclusion could not have been computed. Pollution loss data was insufficient. In a major rate case here in the District, the United States Court of Appeals (No. 74-1732, September Term 1974) stated that I "utilized extremely reasonable methodology to reach a complex calculation." They criticized the "theoretical derivation of regulation" to compute rates, as opposed to reliance upon actual figures experienced.

6. The IRB's explanatory materials confirmed what we understood from the language used in the pollution exclusion. It was direct and accurate. There was nothing deceptive or misleading about the filing.

Edward P. Lombard
EDWARD P. LOMBARD

Subscribed and sworn to before me, this 29th day of September, 1993.

CAROLYN A. FOWLER NOTARY PUBLIC PRINCE GEORGES CO. MD

Carolyn A. Fowler
Notary Public
My Commission Expires 9/1/96

Affidavit

I, Thomas L. O'Malley, do depose as follows:

1. I have been in either the insurance business or in the governmental regulation of insurance for thirty-seven years (1951-1988). I joined the Minnesota Insurance Division, now the Department of Commerce (the "Department"), in 1964. In 1970, I was the Chief Assistant Rate Analyst to Charles Richter, now deceased. He was manager of the Rates and Forms Section of the Department. I was later appointed Assistant Commissioner. I held that position for at least ten years before I retired in 1988. For a brief period in 1982, I was the Commissioner of Insurance.

2. I hold two professional designations. I hold a Chartered Property and Casualty Underwriter ("CPCU") designation, bestowed by the American Institute for Property and Liability Underwriters. I am also a Certified Insurance Examiner ("CIE"), a designation awarded by the Insurance Regulatory Examiners Society.

3. The meaning of certain words are a matter of common knowledge in insurance circles. These meanings were always well-understood by insurance departments throughout the country. I know this from my CPCU and CIE studies. "Sudden" is a temporal word which means "quick/abrupt." "Accident" is a sudden "boom" event. Early liability insurance was written on a "caused by accident" basis. In 1966, the Bureau expanded insurance to cover both a sudden "accident" and gradual damage. "Sudden and accidental" was another way that insurance people described an "accident."

4. These word usages prevailed within the Department. I know this from my close working relationship with Charles Richter, and others who handled aspects of general liability filings. All filings were seriously studied. We took pride in the fair way we managed insurance regulation in Minnesota.

5. I have recently reviewed the "sudden and accidental" pollution exclusion clause and the Explanation which was submitted by the Insurance Rating Board ("IRB") in 1970. I do not presently have clear recall of their filing, but it would have crossed my desk in 1970. I no doubt recommended that it be approved since its wording, and that of its Explanation, are quite clear to me now, and would have been equally clear to me in 1970. The Explanation says only a pollution "accident" is covered. This is the same concept expressed in the exclusion's "sudden and accidental" language. I do now understand, and I would have then understood, that all coverage for gradual pollution discharges was excluded by this filing, even if they were unexpected.

6. In 1970, I would have agreed that existing "occurrence" coverage was clarified by the exclusion. Most cases of pollution damage at that time were caused by regular, repetitive business operations. Such pollution damage should be expected. The

occurrence language would have knocked out such claims. The exclusion clearly "clarifies" that situation. Whatever gradual discharges were not precluded by the occurrence definition would be excluded by the pollution exclusion. However, since the effect of the exclusion would not have substantially impacted the little coverage realistically available under the "occurrence" definition, in 1970 the reduction in coverage did not seem at all significant.

7. Any suggestion that insurance regulators did not understand this filing is wrong. The words of the exclusion and its Explanation were not misunderstood by me, nor would they have been misunderstood by Charles Richter. The Department would not have been led to the erroneous conclusion that the exclusion only clarified the definition of "occurrence" and could not restrict coverage in any way.

8. In 1970, pollution claims were not common. Today's Superfund liabilities did not exist. Unexpected gradual pollution claims were even more rare. Without adequate loss claim data, it would be exceedingly difficult to rate the pollution exposure. No rate reduction would be warranted in 1970. In those days the Department maintained control over the approval of policy forms. However, we handled rates on a "file and use" basis. In other words, we allowed free competition in the markets to set rates. Thus, even if this pollution exclusion filing had dramatically reduced coverage (which it didn't), we would still not have required a rate adjustment on its approval.

Thomas L. O'Malley

THOMAS L. O'MALLEY

Sworn and Subscribed to
before me this 22nd day
of SEPTEMBER 1993

Clifton A. Gustafson

Notary Public

CLIFTON A. GUSTAFSON, JR.
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Commission Expires 8-19-96

AFFIDAVIT

I, Elmer V. Omholt, depose as follows:

1. I was Insurance Commissioner in the State of Montana for over twenty-three years (1961-1985).

2. I do not specifically recall the Insurance Rating Board's filing of a "sudden and accidental" pollution exclusion in 1970. It was just one of many filings made. The topic it addressed was then not the big issue it is today. I have recently read that exclusion and the IRB Explanation which accompanied it. I can state without any hesitation that there was and is nothing misleading about the IRB Explanation. The language of the exclusion is also clear.

3. As the exclusion plainly states, a pollution event must be "sudden" as well as fortuitous to be covered. "Sudden" meant something quick or abrupt. It would certainly not include something that occurred gradually over time. The exclusion is precisely worded. Only a true pollution "accident" would be covered. That is exactly what the IRB Explanation confirmed. An "accident" was a "boom" event, like an explosion.

4. Pollution claims were extremely rare in 1970. In most cases, those few claims were already precluded by the coverage limitation the occurrence definition placed on expected or intended damage. In 1970, it was a matter of common knowledge that damages caused by routine and repetitive business practices were not covered occurrences. That damage should be expected, and was a cost of doing business. It was not an insurable risk.

5. Therefore, while the restrictive language of the exclusion was obvious, that restriction was not viewed as very significant in the pre-Superfund era of 1970. Today's stringent pollution laws and regulations were not part of the perspective of those of us in the insurance field back then. The exclusion indeed clarified in 1970 the general lack of pollution coverage available under the 1966 CGL occurrence policy.

6. It makes no sense for anyone to say that the lack of a premium reduction in 1970 meant that the exclusion lacked restrictive effect. You cannot reduce premiums (or increase them for that matter) without adequate data. As pollution loss data was yet unavailable, no reduction of premium would have been indicated in 1970.

7. My department took its obligation to protect insurance consumers very seriously. I emphatically reject the notion that there was anything remotely misleading about the IRB Explanation. The IRB Explanation was straightforward and accurate.

ELMER V. OMHOLT

NOTARY PUBLIC
Sworn to before me this
30 day of Sept. 1993.

AFFIDAVIT

I, Robert D. Preston, do depose as follows:

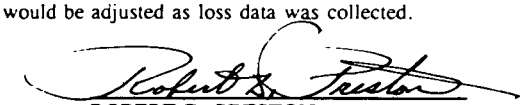
1. I had seventeen years experience in the insurance business before I became an Assistant Attorney General in Kentucky in 1964. In 1966 I went over to the Kentucky Insurance Department as General Counsel. I was the Insurance Commissioner in Kentucky from 1967 through 1971. From 1975 through 1993, I served as a member of both the Kentucky Insurance Assigned Claims Committee and the Kentucky Insurance Guarantee Association Board. From 1976 through 1980, I served as a member of the Kentucky Insurance Rate Regulatory Board.

2. I do not recall with any specificity the filing and approval of the pollution exclusion which excluded coverage for all pollution, other than "sudden and accidental" discharges, in 1970. I have, however, reviewed the pollution exclusion and the Insurance Rating Board's Explanation regarding the exclusion. I can state that the IRB's explanatory materials were not misleading, and would not have misled the department in 1970.

3. There would have been no question in 1970 that "sudden" meant quick/abrupt. It could not have ever been understood as something occurring gradually over time. The IRB Explanation confirmed this when it stated that coverage would be afforded for a pollution "accident". In 1970, an "accident" was understood to be a sudden event, such as a spill. An "accident" was identifiable in time and place. In contrast, an "occurrence" could also cover gradual exposures.

4. Pollution claims were not common back at that time. In most cases, even those claims would generally be precluded by the language of the occurrence definition. It was understood that pollution damage resulting from routine normal business operations was or should have been expected. It was a cost of doing business. The pollution exclusion did clarify the general lack of pollution coverage in 1970.

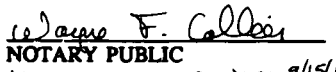
5. Approval of the pollution exclusion in 1970 would not have required a premium reduction. As pollution claims were rare, there was no body of loss data permitting the exclusion to be rated. Future premiums would be adjusted as loss data was collected.



ROBERT D. PRESTON

Commonwealth of Kentucky)
County of Fayette) **ss**

Sworn to before me this
30th day of September, 1993.



NOTARY PUBLIC
My commission expires 9/15/1996

AFFIDAVIT

I, Raymond E. Rathert, on my oath, depose and say:

1. I am presently employed by the State of Kansas, Department of Insurance, as Fire & Casualty Division Supervisor. I have held this position since 1971. I have been employed at the Kansas Department of Insurance since July 1, 1957. My first position at the Department was Casualty Policy Examiner. In June of 1959, I was appointed to the Fire Section as a Fire Policy Examiner. In January of 1971, the Kansas Commissioner of Insurance appointed me to my present position as Fire & Casualty Division Supervisor.

2. I do generally recollect the filing process of the "sudden and accidental" pollution exclusion back in 1970. I have additionally recently reread the exclusion's language, the Explanation filed by the Insurance Rating Board ("IRB") and correspondence between the bureau and the Department.

3. When the exclusion was first filed for approval, Frank Sullivan was the Insurance Commissioner. Fletcher Bell succeeded him in early 1971. Mr. Sullivan is deceased. Mr. Bell retired in 1991. My supervisor, Russell R. Brown, was also involved in the 1970-71 approval process. However, he passed away in January 1971.

4. General liability coverage used to be written on an "accident" basis. We understood that the term "accident" referred to a distinct event, rather than an ongoing process. "Occurrence coverage" generally replaced accident coverage. This eliminated the requirement of "suddenness," but to be insurable, a loss still had to be fortuitous.

5. When the exclusion was filed, there was no question that "sudden" meant more to us than just "unexpected." It expressed an element of brevity. The "boom" theory.

6. It was clear to me that the sudden and accidental pollution exclusion was meant (and was understood) to retain "occurrence" coverage for claims other than those involving pollutants or contaminants. Pollution claims were to be covered only on the narrower basis of sudden and accidental.

7. It is my opinion that the Department was not misled by either the exclusion or the IRB's explanation. It was obvious that coverage was being reduced. That was why we inquired about whether the exclusion could be deleted and coverage afforded through a "buy back." We also would not allow the exclusion to be attached to existing policies because, in our opinion, it potentially reduced coverage.

8. To the best of my knowledge, in 1970 no gradual pollution claims had been filed in Kansas. These type of claims probably started to develop after the 1966 policy was submitted. The earlier "accident" style policies probably would not have covered gradual pollution claims.

9. There could be some gradual and fortuitous claims arising from pollution prior to the approval of the exclusion. The exclusion was designed to clarify the insurers' intent to not cover gradual pollution. The current climate of stringent environmental regulation and enforcement appears to be far different from how it was in 1970. The actual reduction in coverage brought about by the exclusion was not thought to be as significant at that time as it is now because there were no known claims paid under this coverage in the State of Kansas.

10. Because of the lack of claims, there was not sufficient data available to mandate a reduction in premiums. In hindsight, I believe that gradual pollution coverage as interpreted by modern day courts was not reflected in the then existing rates.

11. There was a lot of correspondence between IRB and the Department on this issue. A good part of this correspondence concerned the pollution and contamination exclusion for oil and gas risks. We believed insurers should provide coverage to those kinds of risks on the same basis as the sudden and accidental exclusion, i.e. to still indemnify insureds for losses, even catastrophic ones, if they resulted from the classical "boom" accident.

12. In finally approving both exclusions, the Department insisted that insurers acknowledge that the excluded risks were "ratable." In other words, we recognized that it was not against public policy to insure these exposures and an appropriate rate could be developed.

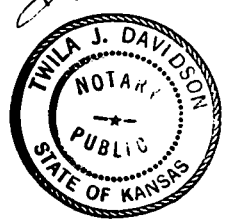
13. The Kansas Insurance Department was very conscientious in the consideration of these filings. We believe our action was in the best interests of the insured public.

14. I do not believe that Kansas Insurance Department personnel were misled or tricked into approving the sudden and accidental pollution exclusion in 1970.

Raymond E. Rathert

Sworn and subscribed to before me this 30th day of September, 1993.

Twila J. Davidson



AFFIDAVIT

I, Milton P. Rice, do depose as follows:

1. I was Insurance Commissioner in the State of Tennessee from 1969 to 1971. I also served over twenty-five years as an Assistant Attorney General and Deputy Attorney General in Tennessee. After I left the Department of Insurance in 1971, I returned to the Attorney General's Office and was Acting Attorney General for some five months in 1974.

2. I believe our insurance department in Tennessee was one of the tougher insurance departments in the country. We were fair, but did not always do what the Insurance Rating Board wanted. All filings that could potentially impact the coverage of Tennessee insurance consumers were given serious study.

3. I do not recall the IRB's pollution exclusion coming to my attention in 1970. I do not recall my staff having any problems with it. I have recently examined the language of this exclusion and the Explanation the IRB used to describe it. We would not have been misled by the Explanation in 1970.

4. The wording of the exclusion was clear. "Sudden" did not mean gradual. It meant quick or abrupt in a temporal sense. The IRB Explanation was equally clear. Only a pollution "accident" would be covered. An "accident" was a sudden event, something identifiable at a specific time and place.

5. Under the existing "occurrence" definition, damage which was the natural result of normal operational business practices was not covered. Expected or intended pollution damage was not an occurrence. To that extent, the new pollution exclusion clarified the general lack of coverage for pollution claims. The significance of its restrictive wording was minimal in 1970. Only years later would the strict environmental laws we are now familiar with create liabilities that did not exist back then.

6. A rate reduction for this exclusion was not indicated in 1970. I am unaware of pollution loss data being available at the time.

Milton P. Rice

MILTON P. RICE

Cynthia C. Lees

NOTARY PUBLIC
Sworn to before me this
16th day of October 1993.

My Commission Expires July 22, 1994

AFFIDAVIT

I, Kevin Ryan, depose as follows:

1. I joined the Illinois State Department of Insurance in 1969 as a Casualty Actuary. In 1970-71, I was the Deputy Director of the Property and Liability Bra[illegible]

2. It has been over twenty-three years since the Insurance Rating Board submitted the "sudden and accidental" pollution exclusion, and I have no recollection of the events surrounding that filing. I have had the opportunity to review the language of the exclusion and the IRB Explanation relating to it.

3. In 1970, the filing would have been reviewed by our Rating Division staff. Both they and I would have readily recognized that "sudden," a term used in the pollution exclusion, described an event that happened abruptly or quickly. It did not describe something that occurred gradually. We also understood in 1970 the difference between a sudden "accident," a term used in the IRB Explanation, and an occurrence.

4. Even under an occurrence policy, damage that was expected or intended was not covered. I understood in 1970 that there would be no coverage for damage which was the natural result of the day-to-day operations of an insured. In this respect, the pollution exclusion would not have been seen as a huge cut-back in coverage, and clarified the general lack of pollution coverage available in 1970.

5. There was nothing misleading or deceptive about the insurers' filing of the exclusion or the explanatory materials. It was a straightforward filing.

6. During my tenure as an insurance regulator in Illinois, I understood that the lack of a premium reduction for an exclusion did not demonstrate that an exclusion could not restrict coverage. This was especially so where loss data had not been sufficiently developed. In 1970, there were not many pollution claims or related loss data. Present day pollution laws did not exist at that time.

Kevin M. Ryan

NOTARY PUBLIC
Sworn to before me this
6th day of October 1993.

NOTARIAL SEAL
JEANNE C.P. SOMMERS, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Nov. 19, 1995

AFFIDAVIT OF JEROME STEEN

I, Jerome Steen, do depose as follows:

1. I joined the New Jersey Department of Banking and Insurance ("Department") in 1956. In 1970, I was the primary general liability rate analyst for the Department and was involved in most of the complex general liability filings, including the pollution exclusions.

2. I was a general liability analyst in 1966 when "occurrence" coverage was introduced on a standard basis. I understood the difference between the terms "occurrence" and "accident." The earlier "accident" coverage related to a fortuitous event identifiable in time, an event which was both sudden/abrupt and unexpected. "Occurrence" expanded the basis of coverage to include claims for damages arising out of multiple or gradual events.

3. It is my understanding that, with regard to the 1970 pollution exclusion filings, there now exists opinions that the Department was either misled by the supporting justification provided by filers or that it misunderstood the significance of the subject filings. Neither consideration is, in fact, valid, as is indicated here and in Department documents in connection with these filings.

4. The initial such filings were made by INA/Pacific Employers in March of 1970, with subsequent filings made by the IRB and the MIRB. As all these filings were substantially similar in effect and supporting statements, the subsequent filings were bundled with the INA filing. The Department's disposition of the INA filing would form the guideline for evaluating any similar filings.

5. As the analyst first reviewing the filings, I had no particular problem or concern with the filers' assertion that - from their standpoint - this was a clarification of coverage, in that the filers did not consider that pollution liability was covered or was not intended to be covered in most situations by the conventional general liability policy. I was aware of no information that would contradict that perception. Claims for environmental damage were not common at the time.

6. I also had no particular problem in discerning that - from a contractual standpoint - the filings introduced specific new exclusionary language that was sufficiently important to be evaluated not only in terms of contractual effect but, also, in terms of public policy considerations. Our thoughts ran along many lines, such as: should polluters be protected from the economic consequences of their intentional acts through insurance; should payment through insurance be available where the polluter cannot pay; should insurers pay, but have

contractual recourse against the insured; should it be a basic coverage whose cost would be borne by all insureds?

7. In 1970, I understood "sudden" to mean "quick" in a temporal sense. I understood that, under certain circumstances, the "sudden" language of the exclusion would restrict coverage as well as clarify the insurance contract with respect to the insurance industry's perception in 1970 that most gradual pollution discharge claims were already precluded by "occurrence" language.

8. I reviewed the issues of the new exclusionary language and its public policy considerations with Charles Maier, Chief of the Rating Division, who sent the matter to the Commissioner's office for review by counsel and others on the Commissioner's staff.

9. Mr. Maier received commentary from Walter Davis, Jr., Director on the Commissioner's staff, that outlined various public policy considerations and laws then existing relating to environmental damage. It was clear that Mr. Davis had serious misgivings concerning the exclusion's approval.

10. There were subsequent discussions about the matter among persons in the Rating Divisions and the Commissioner's office, in part dealing with the question of whether potential pollution liability was a matter of "nuisance" (or minor) claims or something more significant. Ultimately, after all such considerations, Mr. Maier recommended approval of the subject exclusions with no immediate rate effect, and such action was then approved by Acting Commissioner Morgan Shumake.

11. Among the reasons for approving the exclusions were:

    (a) While there were differing views, based upon information then available there was no consensus pro or con as to the public policy concerns regarding the desirability of altering the policy to either clarify that certain coverage was provided or that coverage was not provided for most environmental damage. Both options were considered within the Department at that time. Had the Department been prescient enough to have foreknowledge of judicial decisions to come in future years, it is possible a somewhat different decision might have been made.

    (b) Based on the sparse data then available, it was the Department's understanding that claims for environmental damage were not common events and pertained to only a narrow class of insureds.

    (c) The generally accepted forms development concept is, in order to provide the broadest coverage to the greatest population of insureds at the least cost, that basic

insurance coverage should be keyed to the common needs of the many and that the special or extra ordinary needs of a limited class of insureds is better handled by supplemental specifically priced endorsements or by other insurance.

(d) As both the potential for coverage for nonfortuitous loss and the actual occurrence of loss appeared at that time to be quite limited, the application of the subject exclusions conformed to this forms coverage development concept. We believed this change would limit coverage to liability arising out of sudden fortuitous events, shifting the cost of general environmental damage coverage of those insureds that might have special need for such coverage to other specific insurance instruments.

12. As to the lack of an immediate rate adjustment to reflect the subject change, there was no meaningful loss data then available to formulate a retrospective rate adjustment for the general liability line. Nor was there a basis for apportioning any reduction among classes, based upon the relative effect of the change on differing classes.

13. In such circumstances, it was an accepted procedure to allow existing rates to prevail, based on the consideration that future experience would reflect whatever effect the subject provisions might have and, accordingly, rates would flow downward or upward based upon the actual specific effect on the classes or classifications that would be affected.

14. As my April 20, 1970 memorandum reflects, I was aware that, as a result of the proposed pollution exclusion, it was possible that the costs of excluded environmental damage could fall on the State or other governmental agency when a policyholder, not otherwise insured by other specific insurance instruments, was not in a financial position to pay for such loss.

15. Whatever prospective twenty plus years after the fact might bring to consideration of the Department's actions in 1970, the Department invested considerable effort and time in evaluating the subject exclusions. The Department was not ignorant, inept, indifferent to ethical and statutory obligations, or misled in making its determination in this matter.

Jerome Steen

Sworn to before me this 17 day of August, 1993

Notary Public
ANNA MAY MELIO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 18, 1997

AFFIDAVIT

I, Melvin L. Summerhays, do depose as follows:

1. I began my insurance career in 1951 as a casualty agent for State Farm Insurance Company. In 1959 I left State Farm and joined an independent insurance agency in Salt Lake City, Utah. I joined the State of Utah Department of Insurance ("the Department") in 1970 as the general liability rates and forms analyst. I held that position until I retired in 1979.

2. We were a small department in those days. I handled all of the general liability filings myself. I discussed these matters with Commissioner Ottesen, but he always took my recommendations. Our job was to protect the public. At the same time we were mindful to consider proposed Bureau filings fairly. [I use "Bureau" to mean the Insurance Rating Board (IRB) which later changed its name to ISO.] We had an on-going dialogue with the local Bureau office. If a problem developed over a Bureau matter I would just call and work it out with them.

3. While I do not actually recall the "sudden and accidental" pollution exclusion, it would have been handeled by me. I have now reviewed that exclusion and the Bureau's Explanation.

4. The pollution exclusion the Explanation are simple, clearly worded documents. They used language in 1970 that I was long familiar with. "Sudden" was something "abrupt" or "quick". An "accident" was a sudden event which happened by chance. An "occurrence" was defined in the policy to cover gradual damage and also an "accident". "Sudden and accidental" referred to an "accident", not to an "occurrence".

5. In 1970 I would certainly have understood these pollution exclusion documents in line with the way I understood the words they used. The language was so obvious there would have been no reason for me to ask the Bureau office what it meant. Clearly, coverage for gradual pollution discharges would be excluded. The only exception was coverage for "sudden and accidental" pollution discharges. The Explanation also said the only thing now covered was a pollution "accident". It was the same thought.

6. It is hard for me to understand how this language can be said to be confusing. To read it any other way is to just disregard plain policy language. I can say without any reservation that I would not have been misled by the Bureau's Explanation. There is no basis whatsoever for anyone to think I was misled.

7. While I am sure pollution was taking place at that period of time, I don't think we ever had a pollution claim. I always thought repetitive business pollution was a cost of doing business. The damage it caused would most likely be expected. The first sentence of the Explanation indicates the Bureau thought so also.

8. Of course on-going business pollution also causes gradual pollution discharges in addition to expected damage. As stated in the Explanation the exclusion clearly "clarifies" the existing situation that pollution would not be covered. Certainly the exclusion would also apply as well

to any unexpected gradual pollution discharges, if any.

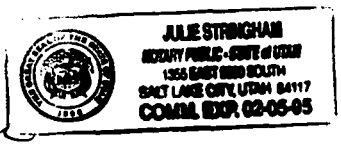
9. Since the restriction of coverage to only sudden pollution accidents did not really reduce the actual amount of existing coverage under an "occurrence", no rate reduction would have been warranted. With no loss experience for pollution claims even under "occurrence" language, a premium adjustment for the gradual pollution exclusion would not have been considered.

10. My approval of this exclusion helped contain the cost of insurance. Besides, businesses did not expect to have pollution coverage under their general liability policies except for a true "accident". The exclusion was fair and appropriate for endorsement to policies in Utah.

Melvin L. Summerhays
MELVIN L. SUMMERHAYS

Subscribed and sworn to before me, this 2nd day of September, 1993.

Julie Stringham



AFFIDAVIT

I, MILTON S. TROXELL, do depose as follows:

1. I served as Director, General Liability-Casualty Division, of the Texas Board of Insurance from 1968 to 1987.

2. I have reviewed correspondence directed to me by the Insurance Rating Board in 1970. I have also reviewed the language of the "sudden and accident" pollution exclusion and the Insurance Rating Board's "Explanation" pertaining to that exclusion. While I do not specifically recall the details of this situation, which took place over twenty years ago, I do generally recall the context in which terms utilized in these materials were used in 1970. I also generally recall the coverage then available for pollution at that time.

3. On April 20, 1970, a manager for the Insurance Rating Board, R.G. Foster, wrote a letter (attached) to me about the IRB pollution exclusion. Mr. Foster, who I always regarded as extremely intelligent, honest and forthright, advised that the exclusion would apply to all bodily injury or property damage arising from pollution "except when pollution results from the classical accident."

4. The IRB did subsequently submit such a pollution exclusion, which excluded all pollution claims unless they arose out of a "sudden and accidental" discharge. The accompanying IRB "Explanation" stated that there would still be coverage for a pollution "accident." In 1970, I understood all of these terms ("sudden", "classical accident" and "accident") to mean the same thing. What was required was a quick or abrupt event, something identifiable in both time and place.

5. In 1970, pollution claims were rare. Today's environmental laws and liabilities didn't exist. In addition, most of those pollution claims would have been precluded by existing language in the occurrence definition (no coverage for damages which were expected or intended). The pollution exclusion did clarify that coverage situation. Therefore, even though the exclusion would exclude coverage for all gradual pollution discharge claims, it was not viewed as a significant restriction of existing coverage.

6. Nothing in the IRB "Explanation" was misleading, nor was the Texas Board of Insurance misled by the explanatory materials.

7. As pollution claims were rare in 1970, there was no loss data available. The Board of Insurance would have had no reason to inquire about or demand a reduction in premiums

when the exclusion was approved. Future premiums would be adjusted based upon loss data acquired later on.

Milton S. Troxell
MILTON S. TROXELL

Sworn and Subscribed to
before me this 16th day
of September 1993

James M. Nixon
Notary Public

JAMES M. NIXON
Notary Public
STATE OF TEXAS
My Comm. Exp. 01-20-97

AFFIDAVIT

I, Samuel H. Weese, do depose as follows:

1. From 1969 to 1975, I held the position of Insurance Commissioner of West Virginia. In July of 1970, a hearing was held regarding the effect of various exclusions offered for approval including the qualified "sudden and accidental" pollution exclusion submitted by the Mutual Insurance Rating Bureau and the Insurance Rating Board.

2. I did not actively participate at the hearing or in the pre-hearing or post-hearing filing process. Although present at the hearing, as Insurance Commissioner, I appropriately delegated the filing process to others. I was not involved in the discussions of the legal complexities underlying the coverages provided by the policies as amended by the addition of the proposed pollution exclusion. I recall entering the hearing with the belief that coverage was generally excluded for normal operational polluting events and premiums charged did not reflect such coverage under the 1966 CGL policy. I also recall leaving the hearing with an assumption that, with the addition of the pollution exclusion, there continued to be no general coverage for normal operational polluting events. Therefore, without additional analysis, I assumed that the exclusion did not alter coverage, as none was intended initially.

3. The affidavit executed by me on November 11, 1988 in the FMC v. Liberty Mutual case does not accurately reflect my recollection as it tends to suggest that my involvement was extensive and that my memory of events was clear. In fact, my involvement was minimal and my recollection is only that there was generally no coverage for polluting events. To go further would be to misrepresent my involvement in and my memory of such events.

4. In 1970, I understood that a "sudden" event was one which was identifiable in time and place. I also knew that an "accident" was an insurance term which contained a "sudden" element. In addition, I understood that the language of the occurrence definition focused upon unexpected or unintended damage.

5. The fact that the pollution exclusion was approved in West Virginia only as applicable to new or renewal policies and could not be attached to existing policies tends to indicate that the exclusion was generally perceived as a restriction.

Samuel H. Weese
SAMUEL H. WEESE

Dated: July 7, 1992

Mary Anne Brunetti
Notary Public

Notarial Seal
Mary Anne Brunetti, Notary Public
Radnor Twp., Delaware County
My Commission Expires May 6, 1995
Member, Pennsylvania Association of Notaries

AFFIDAVIT

I, Broward Williams, do depose as follows:

1. I was insurance commissioner in the State of Florida between 1965 and 1971. I first joined the State Treasury and Insurance Commission (the "Insurance Department") in 1938 as Administrative Assistant.

2. It was my policy to handpick experienced and very competent insurance staff for the Insurance Department. They were schooled and sophisticated in insurance matters. I was a great believer that people working for the Insurance Department must be well educated in the field they were employed to handle on behalf of the citizens of Florida. This concept was reflected in the significant budget we were allocated by the legislature, which was sought and approved based upon our representation that we wanted to retain the most competent employees in the field.

3. Prior to 1966, the general liability policy covered "accidents", which were "boom" events that occurred suddenly or abruptly. "Accidents" were fortuitous events identifiable in time and place. The 1966 CGL "occurrence" policy broadened coverage to include gradual exposures as long as the damage was not intended or expected. These meanings were a matter of common knowledge in the Insurance Department at the time.

4. The term "sudden", as used in the 1970 pollution exclusion, meant quick or abrupt in a temporal sense. This was also a matter of common knowledge in the Insurance Department at the time.

5. I do not have a precise recollection of the filing of the pollution exclusion in 1970. I have however, reviewed the Explanation submitted to the Insurance Department in 1970. It states that the pollution exclusion continued to provide coverage for a pollution "accident". In 1970, the Insurance Department would have readily recognized from the explanatory materials that pollution coverage would be returned to a sudden accident or "boom" basis. Only pollution events that were fortuitous and identifiable in time and place would be covered.

6. In 1970, pollution claims were rare. It was perceived that claims for most cases of gradual pollution would already be precluded by the language of the occurrence definition. The restrictions carried by the exclusion would not have been viewed as significant in 1970. It was appropriate to describe how the exclusion clarified coverage at that time.

AFFIDAVIT
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7. There is no basis in fact to conclude that the Insurance Department was misled in any respect by the Explanation submitted to it by the insurance bureaus in 1970. Careful attention was given to the approval of any exclusion submitted to the Insurance Department. My staff and I conferred and deliberated carefully over the appropriateness of approving policy exclusions.

8. There was no reason why premiums would have had to be reduced when the exclusion was approved. In 1970, pollution claims were so uncommon that adequate loss data was unavailable. Premiums would be adjusted over time as sufficient loss data and claims experience was compiled.

Broward Williams

Sworn to before me this
25th Day of August, 1993.

Rebecca L. McKee
Notary Public, State of Florida
My Commission Expires May 7, 1995
Bonded Thru Troy Fain-Insurance Inc.