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BACK TO THE FUTURE FOR THE POLLUTION-
EXCLUSION CLAUSE?: *MORTON INTERNATIONAL, INC.*
V. *GENERAL ACCIDENT INSURANCE CO.*

I. INTRODUCTION

The pollution-exclusion clause found in the standard Comprehensive General Liability (CGL) policy has produced an immense quantity of litigation since the provision's adoption.¹ The coverage limitation represented an attempt by insurers to limit their exposure to claims arising out of environmentally-related property damages.² In July of 1993, the New Jersey Supreme Court handed down *Morton International, Inc. v. General Accident Insurance Co.*,³ an opinion which constituted the high court's first opportunity to interpret the pollution-exclusion clause. This comment seeks to understand the relationship between *Morton* and previous judicial readings of the pollution exclusion, and to assess the probable future impact of the case on the insurance industry

II. BACKGROUND: *MORTON V GAIC*

A. *The Factual History: Polluting Activity at Berry's Creek*

Beginning in 1929 and continuing until 1960, FW Berk & Company (Berk) operated a mercury-processing plant on a forty-acre parcel of land to the west of Berry's Creek, an estuary of New Jersey's Hackensack River.⁴ The Berk plant routinely dis-

1. See *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76, 86 (N.J. Super. Ct. App. Div. 1987) ("Even when considered within the context of our litigious society, it can fairly be said that the [pollution] exclusion has generated an extraordinary number of lawsuits."), *overruled by Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831 (N.J. 1993).

2. See *infra* notes 40-41 and accompanying text.

3. 629 A.2d 831 (N.J. 1993).

4. *Id.* at 838-39.

charged cooling water containing solid mercury compounds into a private sewer which led to an open ditch approximately 1200 feet from the processing facility.⁵ Effluent from the open ditch was in turn released into Berry's Creek at a point roughly 2500 feet from the plant.⁶ In 1956, subsequent to an inspection conducted by the New Jersey Health Department, Berk officials were notified that the material being discharged from the plant contained a prohibitively high level of dangerous pollutants.⁷ By 1958, Berk had made no progress toward elimination of the problem and, responding to pressure from public health engineers, the company agreed to pursue a four-point remediation plan.⁸ Nevertheless, as of March 17, 1959, it was clear that Berk's efforts to rectify its violative discharges had been negligible.⁹

In 1960, another State Department of Health investigation reiterated earlier admonitions that the waste being released from the Berk plant was "unacceptable for discharge into Berry's Creek,"¹⁰ and again called upon the company to hasten its efforts to institute a waste treatment process.¹¹ In view of Berk's four-year pattern of inaction in the face of official orders to establish palliative measures, the Department also threatened legal action should the company continue to ignore its responsibilities.¹² Later that year, the assets and property of Berk were sold to Velsicol

5. *Id.* at 839.

6. *Id.*

7. *Id.* State Health Department inspectors had found that the Berk plant utilized approximately 60,000 gallons of water each day, roughly 90% of which was used for cooling purposes. *Id.* Industrial wastes produced by the plant were comprised primarily of cooling water containing a high solid content of insoluble dimethylcithiocarbonates, which are organic and inorganic mercury compounds. *Id.* Although wastes from the Berk plant were passed through a sedimentation tank where settled solids were recovered and reprocessed before discharge into the private sewer, public health engineers at Berry's Creek nevertheless determined that the released effluent contained a prohibitively high level of suspended solids. *Id.* The engineers also concluded that the settling tank which serviced effluent from one of the three buildings producing waste at the Berk plant was too small. *Id.*

8. *Id.* On December 2, 1958, public health engineer John Wilford warned Berk's vice-president that "as this matter has [sic] been brought to [his] attention over two years ago, this department has a right to expect some appreciable progress toward the elimination of this problem." *Id.* (second alteration in original).

9. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 839 (N.J. 1993). On this date, public health engineer John Wilford noted that Berk was "'cognizant' that its wastes contained mercury compounds which had to be removed." *Id.*

10. *Id.* at 840 (quoting the Department of Health inspection report).

11. *Id.*

12. *Id.*

Chemical Co. (Velsicol) and the company was re-named Wood-Ridge Chemical Corp. (Wood-Ridge).¹³ However, the personnel structure and the primary production processes of the plant remained unchanged.¹⁴

Shortly after the sale, a small lagoon was excavated behind the industrial premises now owned by Velsicol. As before, the lagoon eventually flowed into Berry's Creek, but the receptacle served as another settling tank which retained effluent for an additional two days.¹⁵ In 1964, viewing the lagoon as a mere temporary measure, the Department of Health once again urged plant officials to apprise the State of its treatment program status.¹⁶ Although Wood Ridge subsequently exhibited some willingness to expedite the installment of an acceptable treatment system at the plant in cooperation with the State Health Department, no appreciable success was achieved.¹⁷ By 1970, the Federal Environmental Protection Agency (EPA) had become embroiled in the company's problems. In 1971, the plant was sold to Ventron Corporation (Ventron) which in turn sold the processing facility tract to Robert and Rita Wolf three years later. With the mercury-laden effluent fiasco still unresolved,¹⁸ development activity by the Wolfs caused

13. *Id.* Prior to the sale, Berk was aware that the municipal sewer system would be incapable of handling the plant's wastes, even if pretreatment procedures were employed. *Id.* However, a letter from Berk to the Department of Health represented that the company was seeking "professional help on design of a treatment plant." *Id.*

14. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 840 (N.J. 1993). Velsicol had been informed of the results of the Department of Health's various Berry's Creek inspections. Subsequent to the onset of operations under Wood-Ridge ownership, settling remained the sole means of waste treatment employed by the plant, but company officials now assured Health Department officials that Wood-Ridge intended to develop its own methods of treatment. *Id.*

15. *Id.*

16. *Id.* at 841. In connection with February, 1964 correspondence between Wood-Ridge and the Department of Health, the State complained to the company that it had received no engineering studies or treatment facility proposals. *Id.* Wood-Ridge was requested to inform the State of the progress of its treatment program status and when a treatment facility would ultimately be completed. *Id.*

17. *Id.* In order to expedite its siting of a treatment facility, Wood-Ridge hired Clinton Bogert Associates, a Consulting Engineer firm. Clinton Bogert prepared a report on behalf of Wood-Ridge which recommended a general design for the proposed treatment facilities and established minimum effluent requirements. On August 5, 1964, officials from Wood-Ridge and the Health Department agreed that the company would submit final plans for the treatment facilities within the next few weeks. *Id.* On November 2, 1964, Wood-Ridge informed the Department of Health that final plans for the treatment plant could be completed by March 31, 1965. *Id.* By March 31, 1966, despite repeated inquiries by the Health Department, a treatment facility for the Wood-Ridge plant had not even been designed. *Id.*

18. *Id.* at 842. During its tenure as owner of the Berry's Creek site, and in response

additional pollution problems which eventually resulted in a suit by the Department of Environmental Protection (DEP) against Ventron, Velsicol, Wood-Ridge and Berk.

B. *The Procedural History*

In *New Jersey Department of Environmental Protection v. Ventron Corp.*,¹⁹ the DEP sought to compel the past owners of the processing-plant tract to bear the various remediation costs associated with the clean-up of Berry's Creek. The court imposed strict liability on all defendants based on common law theories, and further rendered judgment for joint and several liability under the New Jersey Spill Compensation and Control Act of 1977 (Spill Act).²⁰ Finally, a judgment previously entered on a cross-claim asserted by Robert and Rita Wolf based on Ventron's fraudulent non-disclosure regarding mercury contamination on the land was affirmed.²¹ At the inception of the *Ventron* suit, insurers for the various owners and operators of the Berry's Creek processing plant disavowed coverage, thus forcing Ventron to provide its own defense. After the DEP-initiated litigation, as Ventron's successor in interest, Morton International, Inc. (Morton) brought a declaratory judgment action against the various insurers of the processing plant.²² Thus, in *Morton International v. General Accident Insurance Co.*,²³ Morton sought reimbursement for costs incurred in defending the *Ventron* suit and the Wolf cross-claim, plus indemnity for the clean-up and remediation expenses stemming from the DEP action.²⁴

C. *The Insurance History*

The primary comprehensive general liability (CGL) insurance coverage held by Morton's predecessors at the Berry's Creek site was provided by General Accident Insurance Co. (General Acci-

to an investigation by the Federal Water Quality Administration (F.W.Q.A.), Ventron approved capital expenditures for improved effluent treatment. The document ratifying the outlays characterized the company's effluent predicament as "currently at an emergency level", *id.* at 841, and acknowledged that "'Ventron has already suffered adverse publicity because of alleged mercury discharges, and we will certainly receive more if we do not institute controls approved by the F.W.Q.A.'" *Id.* at 841-42.

19. 468 A.2d 150 (N.J. 1983).

20. *Id.* at 157-64. See generally N.J.S.A. §§ 58:10-23.11 - 23.11z (1977).

21. 468 A.2d at 166-67.

22. Morton Int'l, Inc. v. General Accident Ins. Co., 629 A.2d 831, 835 (N.J. 1993).

23. 629 A.2d 831 (N.J. 1993).

24. *Id.* at 835.

dent) from October of 1960 until October 1971. However, the various policy forms used by the insurer varied considerably over the eleven-year period.

Beginning October 1960 and continuing until October 10, 1964, General Accident provided liability coverage on the processing facility for property damage encompassing "all sums which the Insured shall become legally obligated to pay . . . for damages because of injury to or destruction of property . . . *caused by accident.*"²⁵ The policy left the term "accident" undefined, and conceded coverage only as to "occurrences or accidents which happen during the policy period."²⁶

Effective October 10, 1964, General Accident amended the previous form of the policy by replacing the phrase "caused by accident" with "resulting from an *occurrence.*"²⁷ The endorsement supplied the following definition of "occurrence":

The word "occurrence" as used in this endorsement means an unexpected event or happening which results in injury to or destruction of tangible property during the policy period, or a continuous or repeated exposure to conditions which result in injury to or destruction of tangible property during the policy period *provided the insured did not intend or anticipate that injury to or destruction of property would result . . .*²⁸

On October 1, 1966, and continuing through October of 1971, General Accident redefined "occurrence" as: "[A]n accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*"²⁹

While the Berry's Creek plant was owned by Ventron during the period ranging from October 10, 1971 to June of 1972, the *Morton* court noted that the source of the corporation's comprehensive general liability coverage for this interval was unknown. However, the trial record indicated that CGL coverage was provided by Reserve Insurance Company (Reserve) from June 14, 1972 through

25. *Id.* at 835-36 (omissions in original) (emphasis added).

26. *Id.* at 836.

27. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 836 (N.J. 1993) (emphasis added).

28. *Id.* (emphasis added) (quoting the effective General Accident policy).

29. *Id.* (emphasis added) (quoting the effective General Accident policy).

January 1, 1975. The applicable coverage was evidenced by three policies issued by Reserve, each promising to indemnify the insured against "all sums which the Insured shall become legally obligated to pay as damages because of property damage . . . caused by an occurrence."³⁰ The definition of "occurrence" under the Reserve policies was essentially identical to that established in the General Accident policies in effect from 1966 to 1971. However, several paragraphs after the "occurrence" coverage limitation, the Reserve policies for the June 14, 1973 to June 14, 1975 period also included a "pollution-exclusion clause" which stated:

This insurance does not apply . . . (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*³¹

On January 1, 1975, Liberty Mutual Insurance Company (Liberty Mutual) assumed primary CGL coverage for Ventron until January 1, 1977. The scope of the Liberty Mutual policies included "all sums which the insured shall become legally obligated to pay as damages because of . . . property damage . . . caused by an occurrence,"³² with "occurrence" defined as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage neither expected nor intended from the standpoint of the insured . . ."³³ The Liberty Mutual policies also bound the insured to the standard pollution-exclusion clause.

III. THE *MORTON* OPINION

After a brief discussion regarding prior adjudications of the case,³⁴ the *Morton* court quickly rejected the defendant insurers' argument that the undefined "as damages" language in CGL policies should not be construed to include response costs imposed to

30. *Id.* (omission in original) (emphasis added) (quoting the effective Reserve policy).

31. *Id.* (emphasis added) (quoting the effective Reserve policy).

32. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 836 (N.J. 1993) (omissions in original) (quoting the effective Liberty Mutual policy).

33. *Id.* (omissions in original) (quoting the effective Liberty Mutual policy).

34. *See id.* at 834-35.

remediate environmental damage.³⁵ With this preliminary issue rather summarily set aside, the court proceeded to consider the proper judicial construction of the standard pollution-exclusion clause.

A. *The Adoption of the Pollution-Exclusion Clause*

Writing for a unanimous majority, Justice Stein began the assessment of Morton's claims by examining the events and circumstances which surrounded the insurance industry's adoption of the standard pollution-exclusion clause. Prior to 1966, Justice Stein noted, CGL policies generally provided liability coverage for bodily injury and property damage "caused by accident."³⁶ Although "accident" was undefined in the policy language, most jurisdictions accepted a general rule which interpreted the term to include harm caused by ongoing events that inflicted injury over an extended period of time, so long as the injury was neither expected nor intended from the standpoint of the insured.³⁷ Likewise, when the insurance industry replaced the previous "accident-based" CGL policy with an "occurrence-based" approach in 1966,³⁸ the new language was generally accepted as covering "pollution liability that arose from gradual losses."³⁹ Indeed, the occurrence-based policy first promulgated in 1966 largely represented a codification of the "unexpected and unintended" standard which had characterized judicial construction of the accident-based policy.

A short time subsequent to the adoption of the occurrence-based policy, the *Morton* court observed, the insurance industry became cognizant of the potential for a substantial future increase in the number of claims for environmentally-related losses.⁴⁰ Consequently, industry drafting organizations initiated the process of developing and securing regulatory approval for what would become

35. *Id.* at 843-47.

36. *Id.* at 849.

37. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 849 (N.J. 1993); see also E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1246 (1986) ("Most courts . . . extended coverage to pollution related losses that occurred over periods of months or years [under accident-based policies].").

38. See *supra* notes 27-29 and accompanying text.

39. 629 A.2d at 849 (quoting Rosenkranz, *supra* note 37, at 1247).

40. *Id.* at 849-50; see also Rosenkranz, *supra* note 37, at 1251 ("The insurer's primary concern was that the occurrence-based policies, drafted before large scale industrial pollution attracted wide public attention, seemed tailor-made to extend coverage to most pollution situations.").

known as the standard CGL pollution-exclusion clause.⁴¹ However, Justice Stein quickly identified a vast discrepancy between the drastic limiting effect on CGL coverage suggested by the literal language of the pollution-exclusion clause and the relatively minor impact on coverage which the insurance industry had represented to insurance regulators would occur as a result of adopting the clause.⁴² With the historical context of the coverage exception firmly established,⁴³ the *Morton* court turned to an analysis of the diverse array of judicial interpretations which had been imposed upon the "sudden and accidental" language of the pollution-exclusion clause since its industry-wide acceptance.

1. New Jersey Case Law

Justice Stein's comprehensive explication of the case law deal-

41. See *supra* text accompanying note 31.

42. The *Morton* court noted that, when the Insurance Rating Board (IRB) and the Mutual Insurance Rating Bureau (MIRB) began to seek state regulatory approval for the addition of the pollution-exclusion clause to standard CGL policies, these agencies had submitted an explanatory memorandum. The memorandum supporting adoption of the pollution-exclusion clause read, in 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 [pollution] exclusion clarifies this situation so as to avoid any question of intent." Nancy Ballard & Peter Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 625-26 (1990) (quoting the IRB's memorandum to the New Jersey Insurance Commission seeking regulatory approval of the pollution-exclusion clause).

However, the court had already observed that prior occurrence-based policies broadly "covered property damage from gradual pollution and[, unlike the pollution-exclusion clause, see *supra* text accompanying note 31,] imposed no restriction on the 'suddenness' of the pollutant discharge." *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 852 (N.J. 1993). As a result, the court found the first sentence of the language quoted above from the IRB's explanatory memorandum to be "simply untrue." *Id.* Moreover, since the pollution-exclusion clause was viewed as an attempt by the insurance industry to exclude "all coverage for unintentional pollution damage except for that caused by sudden and accidental discharges," *id.*, the *Morton* court felt that the characterization of "so monumental a reduction in coverage as one that 'clarifies this situation' simply is indefensible." *Id.* at 852-53.

Justice Stein then summarized the critical functional relationship between prior occurrence-based policies and the plain language of the pollution-exclusion clause: "[U]nder the occurrence-based policy, coverage was afforded if the *property damage* was accidental; under the pollution-exclusion clause, even if the property damage is accidental, no coverage is afforded unless the *discharge of pollutants* is both sudden and accidental." *Id.* at 853. Therefore, the court opined, "[t]he memorandum utterly obscures that distinction, and the conclusion is virtually inescapable that the memorandum's lack of clarity was deliberate." *Id.*

43. See *supra* note 42 and accompanying text.

ing with past constructions of the pollution-exclusion clause began with an overview of the relevant New Jersey decisions. The New Jersey approach was found to be characterized to a considerable extent by a 1987 Appellate case, *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*⁴⁴ In *Broadwell*, the court held that the pollution-exclusion clause was ambiguous, and thus should be construed against the insurer.⁴⁵ Moreover, the *Broadwell* decision asserted that the coverage provided by the clause would be deemed to be coextensive with, and essentially a recapitulation of, the coverage afforded by the policy term "occurrence."⁴⁶ Therefore, *Broadwell* held, to the extent that environmental damages in any given case could be properly viewed as falling within the CGL policy definition of "occurrence," i.e., to the extent that the "property damage [was] neither expected nor intended from the standpoint of the insured,"⁴⁷ the pollution-exclusion clause would not serve as a bar to coverage in New Jersey.⁴⁸

44. 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987).

45. *Id.* at 86. The idea that ambiguous language in adhesion contracts should be construed against the person who selected the phrasing is commonly termed "contra proferentum" and is well-rooted in the corpus of insurance law. For cases applying the "contra proferentum" doctrine in an insurance context, see *Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co.*, 989 F.2d 635 (3d Cir. 1993); *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993); *Carey Canada, Inc. v. Columbia Casualty Co.*, 940 F.2d 1548 (D.C. Cir. 1991); *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633 (7th Cir. 1991); *Pan American World Airways, Inc. v. Aetna Casualty & Sur. Co.*, 505 F.2d 989 (2nd Cir. 1974); *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co.*, 817 F. Supp. 1136 (D. N.J. 1993); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1334 (D. N.J. 1992); *Boland v. King County Medical Blue Shield*, 798 F. Supp. 638 (W.D. Wash. 1992); *Saah v. Contel Corp.*, 780 F. Supp. 311 (D. Md. 1991), *aff'd*, 978 F.2d 1256 (4th Cir. 1992); *Phillips v. Lincoln Nat'l Life Ins. Co.*, 774 F. Supp. 495 (N.D. Ill. 1991), *aff'd*, 978 F.2d 302 (7th Cir. 1992); *French American Banking Corp. v. Flota Mercante Grancolumbiana*, 752 F. Supp. 83 (S.D.N.Y. 1990), *aff'd*, 925 F.2d 603 (2d Cir. 1991); *Alfin, Inc. v. Pacific Ins. Co.*, 735 F. Supp. 115 (S.D.N.Y. 1990); *Murray Ohio Mfg. Co. v. Continental Ins. Co.*, 705 F. Supp. 442 (N.D. Ill. 1989); *St. Paul Mercury Ins. Co. v. Duke Univ.*, 670 F. Supp. 630 (M.D.N.C. 1988); *Dronge v. Monarch Ins. Co.*, 511 F. Supp. 1 (D. Kan. 1979).

46. 528 A.2d at 86.

47. See *supra* text accompanying note 29.

48. New Jersey's interpretation of the pollution-exclusion clause evolved rather quickly. In 1975, the Superior Court, Law Division, first addressed the significance of the clause in *Lansco, Inc. v. DEP*, 350 A.2d 520 (N.J. Super. Ct. Law Div. 1975), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976). In *Lansco*, the insured was an oil company which had been forced to incur considerable expense in cleaning up a discharge of oil into New Jersey's Hackensack River. The pollution was caused by vandals who had opened the valves on oil storage tanks, hence allowing the release of approximately 14,000 gallons of oil. *Id.* at 521. The court found that the "sudden and accidental" language of the pollu-

2. Decisions from Other Jurisdictions

After reviewing a plethora of federal and state decisions addressing the issue of proper pollution-exclusion clause interpretation, the *Morton* court discerned two distinct judicial trends which clearly delineated the opinions discussed.⁴⁹ First, the court noted that one group of decisions read the pollution-exclusion clause as denying coverage for property damage "resulting from the discharge of pollutants over a sustained period"⁵⁰ Justice Stein

tion-exclusion clause, *see supra* note 31 and accompanying text, was satisfied so long as "the oil spill was neither expected nor intended" *Id.* at 524. Since the court had determined that Lansco had neither expected nor intended the release of the oil, the pollution-exclusion clause did not bar the insured's coverage. *Id.*

The New Jersey courts did not have another opportunity to construe the pollution-exclusion clause until seven years later in *Jackson Township Mun. Utilities Auth. v. Hartford Accident & Indemnity Co.*, 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982). In *Jackson*, the insured was a local utility authority which sought to compel its insurer to indemnify and defend against claims arising from the seepage of pollutants from the Authority's landfill into a nearby aquifer. *Id.* at 991. The *Jackson* case solidified the New Jersey interpretation of the pollution-exclusion clause, holding that the coverage exception was ambiguous and must be read to serve as a mere restatement of the coverage limits imposed by the CGL policy definition of "occurrence." *Id.* at 994. This approach appeared to have been derived from the statement of a legal commentator that the pollution-exclusion clause only bars coverage "for damages arising out of pollution or contamination where such damages appear to be expected or intended on the part of the insured" 3 ROWLAND H. LONG, *LAW OF LIABILITY INSURANCE*, App. 58 (1988). Thus, since the insured could not be found to have expected or intended the damage caused, neither the "occurrence" clause nor the pollution-exclusion clause precluded coverage. *Jackson*, 451 A.2d at 994-95. The *Jackson* approach to pollution-exclusion clause interpretation was subsequently affirmed by the New Jersey Appellate courts in the *Broadwell* case. 528 A.2d at 86.

For cases explicitly adopting the *Broadwell* interpretation of the pollution-exclusion clause, see *CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 962 F.2d 77 (1st Cir. 1992); *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162 (3d Cir. 1991); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich.), *vacated*, 1988 U.S. Dist. LEXIS 3560 (W.D. Mich. 1988); *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541 (S.D. Fla. 1987); *Steyer v. Westvaco Corp.*, 450 F. Supp. 384 (D. Md. 1978); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991); *Claussen v. Aetna Casualty & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071 (Ill. App. Ct.), *appeal denied*, 545 N.E.2d 133 (Ill. 1989); *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 246 (Ill. 1988); *Shapiro v. Public Serv. Mut. Ins. Co.*, 477 N.E.2d 146 (Mass. App. Ct. 1985); *Allstate Ins. Co. v. Klock Oil Co.*, 426 N.Y.S.2d 603 (1980); *Just v. Land Reclamation Ltd.*, 456 N.W.2d 570 (Wash. 1990).

49. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 870-71 (N.J. 1993).

50. *Id.* at 857. However, the court conjectured that, since the polluting activity by the insureds in many of these cases appeared to have been rather willful and flagrant, coverage might also have been denied on the theory that the ultimate damage was neither unexpected nor unintended, i.e., did not result from an "occurrence." *Id.*

further found that courts adhering to this first general category of reasoning generally barred coverage either on the grounds that the "sudden" language of the exclusion clause involved a temporal implication (meaning abrupt or instantaneous),⁵¹ or on the basis of a blunt determination that discharges of pollutants over a prolonged period could not be properly viewed as "sudden and accidental."⁵² Therefore, the *Morton* court concluded, courts were considerably more likely to ignore the questionable regulatory history of the pollution-exclusion clause⁵³ and to construe the term "sudden" more restrictively in cases wherein the insured had intentionally discharged known pollutants on a regular basis over an extended period of time.

Second, the *Morton* court identified a separate pollution-exclusion clause interpretive tendency, prevalent among a variety of both state and federal courts, which had manifested itself in cases evincing a decidedly lesser degree of culpability on the part of the insured with respect to polluting activity.⁵⁴ In these cases, opined Justice Stein, courts had avoided the prophylactic effect of the pollution-exclusion clause either by refusing to construe "sudden" as imparting a temporal connotation similar to "abrupt," or by determining that the word "sudden" or the phrase "sudden and accidental" was ambiguous and to be construed against the insurer.⁵⁵

C. *The Pollution-Exclusion Clause: The Morton Interpretation*

Prior to announcing the new standard which would control interpretation of the pollution-exclusion clause in New Jersey, the *Morton* court engaged in a brief plain language analysis of the coverage exception. In this regard, the court implicitly referred to an earlier portion of the opinion in which it had explicitly overruled the *Broadwell* application of the exclusion clause:⁵⁶

We overrule the Appellate Division's decision in *Broadwell, supra*, to the extent that it holds that the standard pollution-exclusion clause should be understood merely to impose the same conditions on coverage as are im-

51. See *id.* at 857-62.

52. See *id.*

53. See *supra* note 42 and accompanying text.

54. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 862 (N.J. 1993).

55. See *id.* at 862-70.

56. See *supra* notes 44-48 and accompanying text.

posed by the definition of "occurrence," which focuses on whether the ultimate damage was expected or intended from the standpoint of the insured.⁵⁷

Indeed, Justice Stein had previously noted that the "sudden and accidental" language in the exclusion clause was clearly intended by the drafters to modify and limit the sort of "discharge, dispersal, release or escape" of pollutants for which coverage is afforded, not the damage caused by the pollutants.⁵⁸ Thus, the *Morton* court was convinced that the term "sudden," as used in the standard pollution-exclusion clause, possessed a distinctly temporal element.⁵⁹ Consequently, a "sudden" event was viewed as one which "begins abruptly or without prior notice or warning,"⁶⁰ although the actual duration of the event was deemed "not necessarily relevant to whether the inception of the event is sudden."⁶¹ As a result, and conceding that the meaning of "accidental" was generally understood, the *Morton* court concluded that the phrase "sudden and accidental" in the standard pollution-exclusion clause "describes only those discharges, dispersals, releases, and escapes of pollutants that occur abruptly or unexpectedly and are unintended."⁶²

However, the court then proceeded to draw a stark contrast between the broad scope of coverage previously afforded under occurrence-based CGL policies,⁶³ which covered even continuous or repeated exposure to conditions so long as the property damage was not intended or expected from the standpoint of the insured, and the highly restrictive terms of coverage suggested by the plain language of the pollution-exclusion clause,⁶⁴ which "eliminate[d] all coverage for unintended pollution-caused damage that the occurrence-based policy had provided, except for the unusual 'boom-event' type case in which the discharge of the pollutants was both sudden—meaning abrupt—and accidental."⁶⁵

All at once, invoking the court's earlier discussion regarding

57. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 847 (N.J. 1993).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See supra* notes 36-40 and accompanying text.

64. *See supra* text accompanying note 31.

65. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 853 (N.J. 1993) (emphasis omitted).

the perceived bad faith through which the insurance industry had obtained adoption of the pollution-exclusion clause from state regulators,⁶⁶ Justice Stein announced that he intended to render moot the previous "plain language"⁶⁷ and "jurisdictional interpretation"⁶⁸ analyses which he had taken such great pains to advance:

The critical issue is whether the courts of this state should give effect to the literal meaning of an exclusionary clause that materially and dramatically reduces the coverage previously available for property damage caused by pollution, under circumstances in which the approval of the exclusionary clause by state regulatory authorities was induced by the insurance industry's [misrepresentations].⁶⁹

Justice Stein's inquiry proved emphatically rhetorical. The *Morton* court found that to afford the insurance industry the benefit of the plain language of the pollution-exclusion clause would sanction misrepresentation and flout public policy "requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and in policy content"⁷⁰ Accordingly, the court asserted that it would construe the pollution-exclusion clause in a manner consistent with the reasonable expectations⁷¹ of the state regulatory authorities from whom the insurance industry had procured ratification of the clause.⁷² Therefore, the *Morton* court held,

66. See *supra* note 42 and accompanying text.

67. See *supra* notes 56-62 and accompanying text.

68. See *supra* notes 49-55 and accompanying text.

69. 629 A.2d at 872.

70. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 848 (N.J. 1993).

71. The doctrine of "reasonable expectations" is a widely-used mode of judicial insurance policy interpretation which generally holds that: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970); see, e.g., *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966) (applying the "reasonable expectations" principle to oblige insurer to defend, despite "intentional harm" policy exclusion, insured who physically assaulted another); *Gerhardt v. Continental Ins. Co.*, 225 A.2d 328 (N.J. 1966) (using the "reasonable expectations" doctrine to provide homeowner with coverage for injuries sustained by a residential employee despite the presence of a policy exclusion specifically denying coverage for the damages); see also ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW § 25D (1987).

72. 629 A.2d at 874-75. Earlier in the opinion, the *Morton* court had detailed the gross misrepresentation attendant to the insurance industry's campaign to secure approval of the addition of the pollution-exclusion clause to the standard CGL policy in New Jersey and elsewhere. See *supra* note 42 and accompanying text. The court also had noted

it would "construe and give effect to the standard pollution-exclusion clause only to the extent that it shall preclude coverage for pollution-caused property damage caused by an 'occurrence' if the insured intentionally discharged, dispersed, released or caused the escape of a known pollutant."⁷³ Subject only to the exception of this new standard, coverage provided by the pollution-exclusion clause in New Jersey would remain coextensive with that which had been afforded under prior occurrence-based policies.⁷⁴ By announcing the new test, and consistent with its earlier overruling of *Broadwell*,⁷⁵ the *Morton* court refused to view the limits on coverage imposed by the pollution-exclusion clause as a mere restatement of the traditional definition of "occurrence" found in standard CGL policies.⁷⁶

D. Defining "Occurrence"

The next task facing the court required a determination of the relevant factors to be assessed in deciding whether a particular incidence of environmentally-related property damage constituted an "occurrence" within the meaning of the standard CGL policy. Recall from previous discussions that the existence of an insurable "occurrence" is a prerequisite to coverage and is definitionally contingent upon whether the particular property damage at issue was either expected or intended from the standpoint of the insured.⁷⁷

Justice Stein initially acknowledged the impracticality of applying a subjective test in order to determine whether the insured in a given case had intended or expected injury to result from his activities.⁷⁸ Absent "'smoking gun' testimony from a disgruntled em-

that the industry's representation of the exclusion to state regulators "constituted virtually the only opportunity for arms-length bargaining by interests adverse to the industry, insureds having virtually no choice at all but to purchase the standard CGL policy." 629 A.2d at 848. Therefore, the *Morton* court concluded, had insurers been forthcoming about the true effect on coverage which was intended to result from the language of the pollution-exclusion clause, *see supra* notes 63-65 and accompanying text, "a significant rate reduction would have been required." 629 A.2d at 872. Consequently, in accord with the doctrine of reasonable expectations, *see supra* note 71, the court arrived at its ultimate interpretation of the pollution exclusion clause, *see infra* note 73.

73. 629 A.2d at 848 (emphasis added).

74. *See supra* note 48 and accompanying text.

75. *See supra* text accompanying note 57.

76. *Id.* at 875.

77. *See supra* notes 27-33 and accompanying text.

78. 629 A.2d at 879.

ployee,"⁷⁹ Stein reasoned, even insureds conceding their intentional discharge of known pollutants would be able to successfully elicit a finding of coverage under a subjective "occurrence" test merely by insisting on a lack of expectation and intent with respect to the resultant harm.⁸⁰ Therefore, some form of objective evaluation was necessary. However, the court was unpersuaded that expectation or intent to cause damage should be simply presumed as a matter of law on the basis of a knowing discharge of pollutants.⁸¹ Instead, the *Morton* court again took a new approach and advanced a list of factors which were to guide a case-by-case factual analysis aimed at objectively establishing an insured's expectation and intent to injure. These factors included: the duration of the discharges, the degree of culpability associated with the discharges (whether intentional, negligent, or innocent), the quality of the insured's knowledge concerning the deleterious aspects of the pollutants involved, the existence of any attempts by regulatory authorities to halt or curtail the insured's activities, and the presence of subjective knowledge on the part of the insured regarding the possibility or likelihood of harm.⁸²

E. Old Facts Meet New Law

Turning at last to an application of its newly-announced pollution-exclusion clause interpretation,⁸³ the court determined that Morton was not entitled to indemnification for the remediation costs imposed on its predecessors in previous litigation.⁸⁴ Quite simply, the court had little difficulty finding that prior operators at the Berry's Creek plant had intentionally discharged known pollutants in direct contravention of the *Morton* court's nascent exclusion clause standard.⁸⁵ The holding was convincingly supported by a brief review of the facts and circumstances attendant to the almost four-decade pattern of evasive action exhibited by Morton's antecedents in the face of repeated Health Department warnings.⁸⁶ In the *Morton* court's view, prior operators at the Berry's Creek facility had been explicitly informed of the unacceptable level of pol-

79. *Id.*

80. *Id.*

81. *Id.* at 879-80.

82. *Id.* at 880.

83. See *supra* text accompanying note 73.

84. See *supra* notes 19-24 and accompanying text.

85. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 880 (N.J. 1993).

86. See *supra* notes 4-19 and accompanying text.

lutants contained in the plant's effluent on several occasions.⁸⁷ However, despite this clear knowledge, previous plant owners had nevertheless regularly and intentionally continued to discharge the harmful materials while ignoring the repeated demands of State officials to remedy the situation.⁸⁸ As a result, Morton was denied recovery under those policies featuring a pollution-exclusion clause which had ostensibly covered the past offending parties.⁸⁹

Finally, the court addressed the "occurrence" language found in each of the policies held by Morton's predecessors. As indicated above, the disposition of this issue turned on the factors which had been identified by the *Morton* court as germane to a determination of an insured's expectation or intent to cause damage.⁹⁰ Citing now-familiar facts, the *Morton* court issued its ultimate holding:

Without determining that such damage was intended, we find inescapable the conclusion that [the] damage . . . must have been anticipated by Morton's predecessors on the basis of their prolonged knowledge of and avoidance of compliance with complaints by regulatory officials that the company was discharging unacceptable emissions, including mercury compounds, into Berry's Creek. Based on that conclusion, . . . as a matter of law the property damage to Berry's Creek and the surrounding area was not caused by an "occurrence" within the meaning of the term in the various CGL policies.⁹¹

Since the damage caused by the previous discharges into Berry's Creek were found to have been at least "expected,"⁹² Morton's final bid for indemnification from the defendant insurers was unambiguously foreclosed.

IV. ASSESSING THE IMPACT OF *MORTON*

As the preceding discussion indicates, the *Morton* decision is noteworthy in at least two respects. First, the New Jersey Supreme

87. See *supra* notes 4-19 and accompanying text.

88. See *supra* notes 4-19 and accompanying text.

89. See *supra* notes 4-19 and accompanying text.

90. See *supra* text accompanying note 82.

91. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 884 (N.J. 1993).

92. *Id.* ("We are thoroughly persuaded that summary judgment was properly granted, there being no material disputed facts concerning whether Morton's predecessors had *expected* to cause environmental damage to Berry's Creek and the surrounding area.").

Court endeavored to sort through the vast array of jurisdictional interpretations which have been applied to the standard CGL policy term "occurrence" in order to arrive at what appears to be a relatively unified and predictable approach. As we have seen, this approach was advanced by the court in the form of a multi-factored test.⁹³ Second, and perhaps most significantly, *Morton* attempted to clearly define the limits of the pollution-exclusion clause as a bar to coverage in relation to the scope of coverage afforded under prior "occurrence-based" policies. We now proceed to investigate the extent to which the court has succeeded in its quest to establish a cohesive framework for the resolution of environmental damage coverage issues. Our analysis begins with a brief discussion regarding some fundamental mechanics of the standard CGL policy.

A. *Initial Support for the "Merger" Theory*

1. Fundamentals of the CGL Policy

The reader of a standard CGL policy, reviewing the document in order from start to finish, is first confronted with a broad coverage clause which essentially informs the insured of his most elementary rights to recover under the contract.⁹⁴ The sweeping scope of coverage suggested by the language of this clause, however, contains an implicit limitation; most modern CGL policies (including the relevant policies involved in the *Morton* case) covenant to indemnify the insured for "all sums [he] shall become legally obligated to pay as damages because of property damage . . . caused by an occurrence."⁹⁵ Thus, as a quick glance at the "Definitions" section of the policy will reveal, in order to preserve any hope of recovering from his insurer, the insured must at least demonstrate that the property damage he has caused was neither expected or intended from his standpoint.⁹⁶

However, to the insured's utter chagrin, he soon finds that passing muster under the definition of "occurrence" is not the end of his battle for remuneration. Further along in the text of the CGL policy is an "Exceptions" section which ultimately serves as a

93. See *supra* text accompanying note 82.

94. See *supra* notes 27-29 and accompanying text.

95. See *supra* text accompanying note 29.

96. See *JERRY*, *supra* note 71, § 65[d], at 337 ("Under the revised [CGL] policy . . . [t]he bodily injury or property damage must be 'caused by an occurrence.' Obviously, the meaning of occurrence is crucial.").

glorified exercise in "Indian giving." The "Exceptions" section notifies the insured that the shimmering talisman of broad coverage which he had perceived earlier in the "occurrence" clause is about to be substantially curtailed by an alphabetical laundry list of specific coverage limitations carved from the initial mirage of almost absolute entitlement to indemnity. It is in this section that the insured will find the standard pollution-exclusion clause.

These complexities aside, the most salient point to be extracted from the above diatribe is that an insured who fails to meet the requirements of an "occurrence" need not worry about the effects of the pollution-exclusion clause; he will not recover from his policy in any event. On the other hand, when an insured is able to show a lack of expectation and intent to cause injury, he must then proceed to face scrutiny under the pollution-exclusion clause. However, recall from the sections above that, prior to *Morton*, the clear tenor of New Jersey case law relegated the relevancy of the pollution-exclusion clause to a mere restatement of the coverage limits imposed by the CGL policy term "occurrence."⁹⁷ Thus, when *Broadwell* and its ilk announced that they would henceforth equate the coverage limitations imposed by the pollution-exclusion clause with those erected by the "occurrence" clause,⁹⁸ the court gave insureds a significant benefit by eliminating the significance of the coverage exception altogether. In effect, the pollution-exclusion clause was merged into the CGL "occurrence" language. As a result, an insured who could establish that he met the definition of "occurrence," i.e., that the damage he had caused was neither expected nor intended from his standpoint, would not be subjected to a traumatic foray into the perilous world of the CGL "Exceptions" section (assuming none of the enumerated exceptions in that section other than the pollution-exclusion clause applied to the insured). Nevertheless, as we have seen, the *Morton* court was dissatisfied with the liberal *Broadwell* reading and, after overruling the case,⁹⁹ laid out its new standard for pollution-exclusion clause interpretation: the clause would be "construed to provide coverage identical with that provided under the prior occurrence-based policy, *except that the clause will be interpreted to preclude coverage*

97. See, e.g., Rosenkranz, *supra* note 37, at 1256 ("[Many opinions have] read the pollution exclusion and the occurrence limitation coextensively by essentially defining the pollution exclusion out of existence.").

98. See *supra* note 48 and accompanying text.

99. See *supra* text accompanying note 57.

in cases in which the insured intentionally discharges a known pollutant"¹⁰⁰

2. A Plain Language Analysis

However, at least from the perspective of a plain language analysis, it is quite difficult to discern any meaningful distinction between the *Broadwell* and *Morton* approaches. The average individual would likely be hard-pressed to deny that a person who has intentionally discharged a known pollutant (the *Morton* standard) can also be seen to have expected, if not intended, any damages which thereby resulted (the *Broadwell* standard). Indeed, both interpretations appear to require a substantial degree of culpability with respect to both the insured's awareness that he has released materials into the environment, and his cognizance of the harmful qualities attendant to those materials. This point is especially pertinent because the issue of an insured's right to demand coverage under the CGL "occurrence" clause is essentially a question of culpability. The terms in which the "occurrence" clause standard is cast, whether damage was "expected or intended" from the standpoint of the insured,¹⁰¹ support this proposition. Indeed, as justification for its adoption of an objective, multi-factored test for the evaluation of an insured's expectation or intent to cause injury in lieu of a per se rule, the *Morton* court recognized that "insureds held responsible for remediation of environmental pollution vary significantly in their degree of *culpability* for the harm caused by pollutant discharges."¹⁰² Viewed in this light, the proper function of the "occurrence" clause can be seen as an attempt to preclude coverage for *at least those insureds which evince the highest possible degree of culpability with respect to polluting activity*. For without this limiting effect, the "occurrence" clause serves no apparent purpose. Therefore, the question arises: What sort of polluting activity can be deemed the "most culpable?"

In jurisdictions like New Jersey where the applicable "occurrence" analysis obviates the need to establish the insured's subjective expectation or intent to injure in order to bar coverage,¹⁰³ the answer to our inquiry appears quite obvious. Logic, and indeed the

100. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 875 (N.J. 1993) (emphasis added).

101. *Id.* at 836 (quoting the effective General Accident policy).

102. *Id.* at 879 (emphasis added).

103. *See supra* notes 79-82 and accompanying text.

very nature of an act of pollution, dictate that an insured's ultimate, objective culpability with respect to polluting activity in any instance is contingent solely upon two simple elements: (1) the degree of intent held by the insured regarding his actual act of releasing the pollutants, and (2) the degree to which the insured was aware that the materials he discharged were capable of causing damage, i.e., the degree to which the insured was aware that the materials he discharged were actual "pollutants."¹⁰⁴ Truly, it is impossible to imagine a more blatant incidence of polluting activity than that in which the insured, with full knowledge of the harmful effects a particular substance can have on the environment, nevertheless willfully and intentionally releases that substance into a body of water or tract of land not specifically designed for waste disposal. In light of the foregoing, it appears that from a logical standpoint the *Morton* "occurrence" analysis should indisputably bar coverage for insureds who intentionally discharge known pollutants.

3. Some Perspective for the Plain Language Analysis

Notwithstanding, these observations are rendered just short of useless, for, as every first-year law student soon learns, the law often has little use for plain language.¹⁰⁵ In the courtroom, the meaning attributed to words usually has more to do with *stare decisis* and rules of construction than Noah Webster. Thus, if the true impact of the *Morton* court's new pollution-exclusion clause standard is to be fully appreciated, one must identify when, if ever, damages caused by an insured who has intentionally discharged a known pollutant can be found to be neither expected nor intended. Stated differently, we must compare the application of the pollution-exclusion standard to the type of factual elements which, when present, will elicit a judicial finding of expectation or intent to cause damage. For our purposes, the task of identifying these factors is quite simple, given that the *Morton* decision explicitly adopted a new test for deciding whether an insured has objectively expected or intended to cause injury. Reviewing briefly, the relevant factors

104. See *infra* notes 116-17 and accompanying text.

105. The phenomenon of courts disregarding the plain language of contracts between two parties has become especially prevalent in the insurance context. See Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 408 (1987) ("[J]udicial interpretations of policy provisions governing whether there was an 'occurrence' within the meaning of a policy, [and] . . . the applicability of the 'pollution exclusion,' . . . have produced coverage obligations which insurers had not anticipated.").

include:

[1] [T]he duration of the discharges, [2] *whether the discharges occurred intentionally, negligently, or innocently*, [3] *the quality of the insured's knowledge concerning the harmful propensities of the pollutants*, [4] whether regulatory authorities attempted to discourage or prevent the insured's conduct, and [5] the existence of subjective knowledge concerning the possibility or likelihood of harm.¹⁰⁶

Even the most cursory examination of these new "occurrence" factors reveals that two of the considerations, italicized above,¹⁰⁷ essentially constitute a precise restatement of the new *Morton* pollution-exclusion clause standard.¹⁰⁸ Therefore, since we can safely assume that the *Morton* court did not intend to advance a new interpretation of the pollution-exclusion clause which would be forever rendered moot, we can hold the court to an implied ruling that the intentional discharge of a known pollutant by an insured, absent additional affirmative findings with regard to the remaining three "occurrence" factors (discharges of an extended duration, intervention of regulatory officials, and subjective knowledge held by the insured regarding possibility or likelihood of harm), cannot be deemed activity sufficient to establish the expectation or intent to cause damage under the CGL "occurrence" clause. Truly, if every insured who intentionally discharges known pollutants can also be seen to have expected or intended the resultant damages in a legal sense, isn't the only substantive post-*Morton* inquiry still, as it was under *Broadwell*,¹⁰⁹ the threshold CGL policy question of whether the insured expected or intended to cause damages through his discharges of harmful materials? Is not the *Morton* pollution-exclusion standard again robbed of any substantive independent significance and "merged" into the definition of "occurrence?" Nevertheless, a reading of the *Morton* "occurrence" analysis which fails to bar coverage for the "mere" intentional discharge of known pollutants in violation of the second and third *Morton* "occurrence" factors yields strange and irrational results. In typical law school fashion, the point will be illustrated through use of

106. 629 A.2d at 880 (emphasis added).

107. See *supra* text accompanying note 106.

108. See *supra* text accompanying note 100.

109. See *supra* notes 94-100 and accompanying text.

hypotheticals.¹¹⁰

B. A Dissection of the Morton "Occurrence" Test

1. The Significance of the "Duration of Discharge" Factor

Imagine an insured who, on one occasion alone, intentionally discharges a substance known by him to be a pollutant. Assume that our insured had never previously intentionally discharged a known pollutant, and had never been contacted by any state or federal regulatory official in connection with polluting activity. Further assume that no subjective evidence exists which would establish the insured's violation of the fifth "occurrence" factor. This insured fails the two *Morton* "occurrence" factors which coincide with the *Morton* pollution-exclusion standard,¹¹¹ but does not fail any of the remaining three. Therefore, the insured's polluting activity, activity which we have previously identified as "fully culpable,"¹¹² must nevertheless pass muster under the *Morton* "occur-

110. The arguments advanced in the ensuing section will become quite involved. A brief recapitulation is helpful at this point. The *Morton* pollution-exclusion clause standard bars coverage for those insureds who intentionally discharge known pollutants. See *supra* note 100 and accompanying text. However, before a court has reason to reach the pollution exclusion issue, it must first decide that the insured's activity constitutes an "occurrence" within the meaning of the standard CGL policy. See *supra* notes 94-97 and accompanying text. The *Morton* court established a five-factor test for evaluating the "occurrence" issue, which focuses on whether the damage caused by the insured was expected or intended from his standpoint. See *supra* notes 78-82 and accompanying text. The second and third factors of the *Morton* "occurrence" test, like the *Morton* pollution-exclusion standard, militate against a finding of an "occurrence," and hence against a finding of coverage, for insureds intentionally discharging known pollutants. See *supra* notes 106-08 and accompanying text. Nevertheless, the *Morton* "occurrence" test also contains three other factors. See *supra* note 106 and accompanying text. Therefore, the reader is advised to bear in mind that the ultimate object of the following discussions is to determine whether a violation of just the two "occurrence" factors which coincide with the *Morton* pollution-exclusion clause standard can be viewed as sufficient to bar coverage under the "occurrence" clause. If so, the issue raised by the *Morton* pollution-exclusion clause inquiry will always be resolved under the *Morton* "occurrence" analysis, and the former standard will be effectively "merged" into the latter. This "merger" theory is the interpretation favored by the author.

Consequently, when the text refers to the two "fundamental" "occurrence" factors, the reference is to the second and third factors which parallel the *Morton* pollution-exclusion clause standard, a standard which speaks to the insured who has intentionally discharged known pollutants. Therefore, references to the "two fundamental occurrence factors", the "second and third 'occurrence' factors", and the "pollution-exclusion clause standard" all should be read as dealing with the same basic situation in which an insured has intentionally discharged a known pollutant.

111. See *supra* notes 106-08 and accompanying text.

112. See *supra* notes 102-05 and accompanying text.

rence" test. A holding to the contrary would amount to judicial admission that the mere intentional discharge of a known pollutant is sufficient to bar coverage under the "occurrence" test, and hence that the pollution-exclusion standard has no substantive independent significance.

Now suppose that our insured has intentionally discharged known pollutants over a prolonged period of time. This time, three of the five *Morton* "occurrence" factors militate against a finding that the insured did not expect nor intend the damage he has caused: two which coincide with the pollution-exclusion standard, and one which focuses on the duration of the discharges. Under this scenario, a court can safely deny the insured coverage under the *Morton* "occurrence" test¹¹³ without admitting the substantive irrelevance of the pollution-exclusion clause standard. This is because of the presence of a third "occurrence" factor which at least ostensibly serves to differentiate between the evidence necessary to establish an insured's expectation or intent to injure and the evidence necessary to foreclose coverage under the pollution-exclusion standard.

However, does it make sense that an insured who has "merely" intentionally discharged a known pollutant should be deemed not to have objectively expected or intended the harm he has caused, but an insured who has intentionally discharged known pollutants over a prolonged period of time should be deemed to have objectively expected or intended damage? Suppose a man, A, intentionally introduces a known poison into his wife's drink one night at dinner in an amount which A knows to be capable of harming the human body in some manner. As a result of A's actions, his wife becomes very ill and requires one week of hospitalization and medical treatment. Now suppose that another man, B, introduces an equivalent amount of the same known poison into his wife's drink. B's wife also becomes very ill and recovers after a week in the hospital. However, B continues to poison his wife's drink periodically over a period of months. Consequently, B's wife not only ultimately sustains cumulative injuries more serious than those of A's wife, but also requires substantially more hospitalization and medical attention. B can certainly not be said to have expected or intended the damage he has caused to a greater extent than A simply because he poisoned his wife more frequently than A. Although B

113. See *supra* text accompanying note 106.

has caused more damage than A, both men can be seen to have held the same level of expectation or intent to injure even though the amount of damage each actually caused is different.¹¹⁴

Why is this so? The third *Morton* "occurrence" factor inquires as to "the quality of the insured's knowledge concerning the *harmful propensities* of the *pollutants*."¹¹⁵ However, *Webster's Dictionary* defines "pollutant" as "a *harmful* chemical or waste material discharged into the water or atmosphere."¹¹⁶ Obviously, the concept of harm is inextricably woven into the very essence of the term "pollutant"; a pollutant without "harmful propensities" is no pollutant at all. Therefore, an insured who intentionally discharges, even once, a substance known by him to have harmful propensities (to be a "pollutant") cannot later be heard to deny objective expectation regarding whatever damages are eventually caused by the substance he knew to be capable of causing harm.¹¹⁷ By analogy, a one-time intentional discharger of a known pollutant into Berry's Creek may cause a small amount of damage which necessitates a brief and relatively inexpensive clean-up operation by the DEP. On the other hand, a frequent intentional discharger of the same known pollutants into Berry's Creek may cause massive damages warranting a very costly and time-consuming DEP remedial campaign. Both insureds intended to discharge substances, and both insureds knew that the substances discharged were capable of causing environmental damage, i.e., were "pollutants." The one-time flagrant polluter objectively expects to cause damage, although he may arguably expect to cause minor damage. Likewise, the frequent flagrant polluter also objectively expects to cause damage, although he may arguably expect to cause more damage than the one-time

114. Of course, a one-time intentional discharger of a known pollutant may release substances of such a quantity or of such a nature that he should expect to cause damage equivalent to or greater than that expected by a frequent intentional discharger of a known pollutant. For our purposes, assume that the one-time polluter discharges a substance of a given quantity and the frequent polluter discharges the same substance in the same amount, albeit on many occasions.

115. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 880 (N.J. 1993) (emphasis added).

116. WEBSTER'S NEW WORLD DICTIONARY 1103 (2d College ed. 1986) (emphasis added).

117. The point should be rather clear. Assess the logic of the following statement: "I admit that I intentionally discharged a substance on one occasion, and I further admit that I knew the substance discharged had the capacity to cause environmental harm at the time of discharge. However, I had no reason to expect that damage would result from my discharge."

polluter. In each instance the culpability, the objective expectation or intent of the insureds with regard to the relative respective degrees of damages actually caused, is constant.¹¹⁸

2. The Significance of the "Regulatory Intervention" Factor

Furthermore, assume that a hypothetical insured has intentionally discharged known pollutants over a prolonged period of time, and has also been previously warned on several occasions by state regulatory authorities that the materials he is discharging are causing damage to the environment. Now four of the five *Morton*

118. However, this is not to suggest that an objective finding of an insured's expectation or intent to cause damage is or should be contingent upon a subjectively-perceived recognition by the insured that the specific substances discharged, given the precise quantities released, would or were likely to yield the level of damages actually caused. While logic dictates that greater degrees of damages should generally be expected by the insured as the duration and frequency of his discharges of known pollutants increases, the insured cannot disclaim expectation or intent to injure on the grounds that, while he knew the substances released were capable of causing environmental damage, he did not expect the extent of the damages which actually resulted from his actions.

The adoption of an objective test to evaluate insured expectation or intent to cause damage necessarily entails a recognition that, at some point, the acts of an insured speak for themselves and the insured should not be able to escape the consequences of those acts due to a deficiency in the available subjective evidence. *See supra* notes 78-82 and accompanying text. Thus, the need to subjectively establish actual culpability is supplanted by a more pragmatic and realistic approach. Once the intentional discharger of a known pollutant is permitted to deny expectation or intent to injure because he did not anticipate the level of damages ultimately caused, the entire rationale supporting the use of an objective test is undermined. Indeed, proof or disproof of an insured's asserted lack of expectation or intent as to the damage actually caused is very nearly impossible; a court must either take the insured at his decidedly biased word, or, as an objective test demands, refuse to turn a blind eye to the inevitable consequences which result from intentional misdeeds. Truly, an objective "occurrence" analysis recognizes that "[i]nsurers undertake to indemnify insureds against unknown risks of harm. They do not undertake to indemnify against losses within the insured's control and of which the insured is aware." Thomas A. Gordon & Roger Westendorf, *Liability Coverage for Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures*, 25 IDAHO L. REV. 567, 592-93 (1988-89). Moreover, no person can predict with certainty what harm will stem from the release of toxins. Ecosystems are unpredictable, and the insured who willfully pollutes must be deemed to have assumed and understood the risks inherent in a volatile environment.

In fact, several pre-*Morton* courts have explicitly dismissed the significance of an insured's actual expectation or intent with respect to the precise level of damages caused when evaluating the "occurrence" issue. *See, e.g.,* Travelers Ins. Co. v. Waltham Industrial Lab. Corp., 883 F.2d 1092, 1098 (1st Cir. 1989) ("[T]he crucial question [is] whether any injury was intended, not whether the intent was 'to cause the precise magnitude of the injuries sustained.'"); Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co., 609 A.2d 440, 463 (N.J. Super. Ct. App. Div. 1992) ("Perhaps [the insured] was not aware of the exact extent of the dangerous consequences emanating from its polluting activity. However, we cannot ignore reality by accepting the blithe assurance of [the insured] that it did not intend to injure others.").

"occurrence" factors sound squarely against the insured and a finding of his objective expectation or intent to cause damage is presumably inevitable. Moreover, here the court can easily deny coverage under the *Morton* "occurrence" test with absolutely no fear of relegating the pollution-exclusion standard to a position of irrelevance. This is due to the affirmative findings regarding two "occurrence" factors other than those which parallel the pollution-exclusion standard. Again, these factors nominally serve to differentiate between the evidence necessary to establish an insured's expectation or intent to injure and the evidence necessary to foreclose coverage under the pollution-exclusion standard.

However, it is again difficult to see why this insured should be deemed to have expected or intended the injury he has caused to any greater degree than the insured in our original hypothetical who "merely" intentionally discharged a known pollutant. Returning to the unsavory world of misogyny, recall the example of B, the frequent and flagrant wife-poisoner. Suppose now that after two or three poisonings, B's wife becomes suspicious and calls the police. The police are appalled at B's behavior, but have better things to do. However, they do warn B that they know what he has done, and threaten to arrest him if he poisons Mrs. B again. Undaunted, B proceeds to poison his wife several more times, and each time the police simply reiterate their initial warning.¹¹⁹ Does B now, because of the police warnings, expect or intend the damage to his wife to a greater degree than did our old friend A, who intentionally introduced a known poison into his wife's drink on only one occasion and was never confronted by the police? No. Unlike the frequency of discharge factor discussed above,¹²⁰ the police warnings do not even have the potential to affect the extent of the damage expected or intended. B did not need the police to tell him that the substance he was intentionally putting in his wife's drink was harmful. Like A, B knew of the poison's potential to adversely effect the human body at the outset. Thus, whether in the context of an insured who has intentionally discharged a known pol-

119. This scenario closely parallels the facts of the *Morton* case. Despite years of evasive activity by Morton's predecessors at Berry's Creek, see *supra* notes 4-19 and accompanying text, New Jersey Health Department officials apparently declined to invoke any concrete means of ensuring compliance with environmental regulations. Indeed, the Morton court noted that: "[W]e might fault the Department of Health officials for not acting on threats to institute enforcement proceedings . . ." 629 A.2d at 882.

120. See *supra* notes 112-18 and accompanying text.

lutant only once (A), or an insured who has done so on several occasions (B), warnings by state or federal regulatory officials have absolutely no impact on the insured's expectation or intent to injure. Although such warnings may provide a previously innocent polluter with notice that the materials he has been discharging are harmful to the environment, our discussions here have nothing to do with previously innocent polluters. An insured who intentionally discharges a substance which he knew at the time of discharge to be capable of causing environmental damage holds the same degree of expectation or intent to injure, with respect to each release, regardless of whether he is thereafter discouraged by regulatory authorities, and regardless of whether he continues to intentionally discharge known pollutants after receiving notice from the officials.

3. The (Lack of) Significance of the "Subjective Knowledge" Factor

As a final note, we need not consider the impact of the fifth *Morton* "occurrence" factor. The third *Morton* "occurrence" factor directs future courts, when determining whether the insured has expected or intended to cause damage, to inquire as to "the quality of the insured's knowledge concerning the harmful propensities of the pollutants."¹²¹ Let us assume that, under the third *Morton* "occurrence" factor, a hypothetical insured has been found to have held absolute knowledge regarding the harmful qualities of the pollutants he has discharged. It should be noted that such a finding is in fact redundant. Recall from earlier discussions that the concept of harm is necessarily part and parcel of the term "pollutant."¹²² Thus, assuming our hypothetical insured can also be found to have intentionally discharged the materials under the second *Morton* "occurrence" factor, a finding that he had held absolute "knowledge concerning the harmful propensities of the pollutants" under the second "occurrence" factor¹²³ dismisses the need to consider the fifth *Morton* "occurrence" factor, which purports to necessitate an investigation into "the existence of subjective knowledge [held by the insured] concerning the possibility or likelihood of harm."¹²⁴ It is simply not possible to intentionally discharge a substance one knows to have harmful propensities, i.e.,

121. 629 A.2d at 880.

122. See *supra* notes 116-18 and accompanying text.

123. See *supra* text accompanying note 106.

124. 629 A.2d at 880.

knows to be a "pollutant," yet still disclaim knowledge concerning the possibility or likelihood of the resultant harm.

Whether this knowledge can be viewed as objective or, as the fifth factor purports to require, subjective, will depend merely on the nature of the evidence used to establish the second and third "occurrence" factors. Thus, if only objective evidence can be identified by the court to find insured intent as to factor two and insured knowledge as to factor three, the court will be unable to establish the insured's subjective knowledge that harm was likely to occur as the result of his discharges under factor five. However, due to the close relationship between factor five and the second and third factors,¹²⁵ the court will necessarily, albeit implicitly, have found that the insured held objective knowledge regarding the possibility or likelihood of harm. If only subjective evidence can be identified by the court to establish insured intent as to factor two and insured knowledge as to factor three, the court will then be able to convert these findings into a recognition that the insured had also held subjective knowledge in violation of factor five. Finally, if objective evidence can be identified by the court to establish intent as to factor two and knowledge as to factor three and subjective evidence can also be identified which demonstrates violations of factors two and three, the court will necessarily have found both objective and subjective knowledge on the part of the insured that harm was likely to occur as a result of his discharges. However, since factor five seeks only that evidence which establishes the insured's subjective knowledge of the possibility of harm, the court in this instance will naturally declare that the insured has violated factor five, while neglecting to explicitly mention the finding of objective knowledge of the possibility of harm which must surely follow from its partial use of objective evidence to establish factors two and three.¹²⁶

In each case, a judicial finding of insured intent as to factor two and insured knowledge as to factor three logically yields the conclusion that the insured had held some form of knowledge, either objective, subjective or both, with regard to the possibility or likelihood of harm. Factor five is violated only when subjective evidence is used to support a finding that the insured has violated factors two and three. Therefore, the issue raised by factor five is

125. See *supra* notes 121-24 and accompanying text.

126. See *supra* notes 121-25 and accompanying text.

subsumed within, and will always be resolved by the court's evaluation of factors two and three; the mere fact that the *Morton* court has chosen to explicitly announce the existence of insured knowledge that harm was likely to result from his discharges only when subjective evidence is available does not alter the basic reality that such knowledge, of whatever quality, is always realized upon a violation of factors two and three. Consequently, a court's finding that an insured had held "subjective knowledge concerning the possibility or likelihood of harm"¹²⁷ under the fifth "occurrence" factor adds nothing substantive to the analysis and merely constitutes a conclusory label, a semantic encapsulation of the impact produced by already-established findings regarding the second and third "occurrence" factors. Although the language used in factor five is certainly another way of enunciating the nature of the conclusions to be drawn from perceived violations of factors two and three, one should not fall into the trap of assuming that the fifth "occurrence" consideration has any independent bearing on whether an insured has expected or intended to cause injury.

Moreover, the potentially useful impact of the fifth factor on the *Morton* "occurrence" analysis in cases wherein the insured exhibits less than full culpability with respect to the second and third "occurrence" factors is irrelevant to our discussion. Remember that the purpose of this section is to determine whether an insured who intentionally discharges (the second "occurrence" factor) a known pollutant (the third "occurrence" factor), an insured who is explicitly denied coverage under the *Morton* pollution-exclusion standard,¹²⁸ will always nevertheless first be barred from coverage under the threshold "occurrence" inquiry, hence resulting in the "merger" of the pollution-exclusion standard into the "occurrence" test. In order to arrive at our answer, we must focus merely on the capacity of the five *Morton* "occurrence" factors to yield a finding of insured expectation or intent to injure in the context of an insured who displays the type of "fully culpable" polluting activity prohibited by the pollution-exclusion clause standard. To the extent that one or more of the "occurrence" factors has no bearing on the outcome of this issue, it must be disregarded. Here, the fifth "occurrence" factor is always irrelevant where an insured has intentionally discharged a known pollutant because the issue raised by

127. 629 A.2d at 880; see also *supra* text accompanying note 106.

128. See *supra* text accompanying note 100.

that consideration will always be resolved by the court's disposition of the second and third "occurrence" factors which, as we have seen, coincide with both the *Morton* pollution-exclusion clause standard¹²⁹ and the two fundamental elements we have identified as together determining the ultimate culpability of an insured with respect to polluting activity.¹³⁰

C. *The "Merger" Theory Meets Morton*

The preceding discussions raise an interesting question. Why is it that, although we gradually introduce more *Morton* "occurrence" factors to the basic situation in which an insured merely intentionally discharges a known pollutant (i.e., merely violates the two *Morton* "occurrence" factors which coincide with the *Morton* pollution-exclusion standard), the insured's level of expectation or intent to injure does not rise accordingly? What is the proper function of the "extra" factors? The answer appears to be that the "duration of discharge" and "regulatory intervention" factors simply serve as objective facts which can be used by the court to infer the existence of the two fundamental elements which exclusively bear upon the determination of whether an insured has expected or intended the damage he has caused. As we have seen, these fundamental elements are the insured's intent to discharge and his knowledge that the substances discharged were actual pollutants.¹³¹

Again, keep in mind that these considerations are represented in two of the five *Morton* "occurrence" factors¹³² and comprise the crux of the *Morton* pollution-exclusion standard.¹³³ If the *Morton* court can be found to have used the three extraneous "occurrence" factors as mere means to achieve the ultimate end of establishing the insured's intentional discharge of a known pollutant in violation of the second and third "occurrence" factors, we can infer that the court viewed the intentional discharge of a known pollutant as activity sufficient to bar coverage under the "occurrence" clause. If that is the case, our "merger" theory is supported.¹³⁴

In resolving the "occurrence" issue under its new test, the court

129. See *supra* notes 106-08, 110 and accompanying text.

130. See *supra* notes 100-05, 110 and accompanying text.

131. See *supra* notes 100-05 and accompanying text.

132. See *supra* notes 106-08 and accompanying text.

133. See *supra* text accompanying note 100.

134. See *supra* note 110.

did note that Morton's predecessors at Berry's Creek had discharged pollutants over a prolonged period of time.¹³⁵ However, the effect of this factor upon the court's finding of an expectation to cause damage was clearly ancillary to the import of evidence relating to the numerous confrontations between Morton's predecessors and state environmental officials. Indeed, the court used evidence of the intervention of New Jersey state regulatory officials at the Berry's Creek plant, and the subsequent evasive action exhibited by Morton's predecessors in response thereto, to infer intent to discharge.¹³⁶ Moreover, reports sent to the Berry's Creek plant by regulatory officials and state engineers, which both identified the specific harmful components of the plant's effluent and detailed the harmful effect on the environment which these components were likely to have, were used to infer that Morton's predecessors had knowledge that their discharges were "likely to cause harm."¹³⁷ Based on our earlier discussions, note that this second inference is tantamount to a finding that Morton's forerunners had knowledge that they were discharging "pollutants" in violation of the third "occurrence" factor.¹³⁸ Since the concept of harm is necessarily ingrained within the term "pollutant," one who knows that a particular substance is a "pollutant" also knows of its capacity to cause harm.¹³⁹ Therefore, one who intentionally discharges a "pollutant" must have knowledge that the release is "likely to cause harm."¹⁴⁰ Thus, the important point to derived from the court's analysis is that evidence pertaining to the "regulatory intervention" factor was deemed significant only insofar as it tended to inferentially establish the existence of what the court clearly felt to be the most important "occurrence" factors: intent to discharge (the second factor) and knowledge that the substances discharged were harmful, i.e., were actual "pollutants" (the third factor).¹⁴¹ Such a circu-

135. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 882 (N.J. 1993).

136. *Id.* ("The conclusion is inescapable that from . . . when the unacceptable quality of its emissions first was brought to Berk's attention, the discharges of pollutants thereafter occurred intentionally. The intentional nature of the discharges is confirmed by [the] . . . continued evasion of . . . compliance with the repeated demands by Department of Health engineers . . .").

137. *Id.* ("Knowledge that its discharges were likely to cause harm was also inferable from the regular reports submitted and demands for compliance asserted by state engineers, which Berk and Wood Ridge consistently ignored.").

138. *See supra* notes 115-17 and accompanying text.

139. *See supra* notes 115-17 and accompanying text.

140. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 882 (N.J. 1993).

141. This assertion is amply supported by the following observation of Judge Havey in

itous use of evidence relating to regulatory intervention should not prove surprising. Indeed, the warnings of authoritative officials are relevant to an insured's intent or expectation to injure only in that such admonitions generally tend to serve notice to the chastised party that he is engaging in illegal or destructive activities. Consistent with our earlier conclusions, then, at least one of the "extra," non-fundamental "occurrence" factors was used by the *Morton* court merely as a vehicle to establish the two fundamental elements of insured culpability.

Turning to the fifth "occurrence" factor, the reports and demands for compliance issued by state officials, the evasive action exhibited by Morton's predecessors, and the correspondence from state officials to the prior owners, which outlined the deleterious substances in the effluent discharged by the Berry's Creek plant and the harmful effect a release of those materials was likely to have, were also used by the court to infer subjective knowledge "that environmental harm was an inevitable result of its discharges."¹⁴² However, as discussed at length earlier,¹⁴³ the court's finding of subjective knowledge under the fifth "occurrence" factor adds nothing of substance to the resolution of the expectation or intent to injure issue, and proves purely redundant in view of its previous assessment of the second and third factors. This assertion is supported by the fact that the court used the same objective facts (the correspondence between Morton's predecessors and state officials, evasive conduct, etc.) to establish the fifth factor as it had previously used to infer violations of factors two and three.¹⁴⁴

Finally, the *Morton* court also noted that other documents existed which actually appeared to subjectively establish that prior plant owners knew "that environmental damage inevitably would occur if its untreated effluent continued to flow into Berry [sic]

Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 994 (N.J. Super. Ct. Law Div. 1982): "The industry, for example, which is put on notice that its emissions are a potential hazard to the environment and who [sic] continues those emissions is an *active polluter* excluded from coverage." (emphasis added)

142. 629 A.2d at 883 ("Berk's subjective knowledge that environmental harm was an inevitable result of its discharges was fairly inferable as early as the mid-1950s.").

143. See *supra* notes 121-30 and accompanying text.

144. See *supra* notes 135-42 and accompanying text. Moreover, the *inference of subjective knowledge* from objective facts, see *supra* text accompanying note 142, raises doubts even as to whether the Morton court was warranted in finding a violation of the fifth "occurrence" factor. The court's logical progression in effect concedes that what it labels as "subjective knowledge" is in fact knowledge deduced through inference (itself an objective process) and based on objective facts.

Creek.”¹⁴⁵ The most damning of these records was a Wood-Ridge inter-company memorandum which acknowledged that: “[W]e are under a moral obligation, as well as an impending legal one, to effectively control the mercury effluent from our processes.”¹⁴⁶ Again, however, recalling our prior analysis of the fifth “occurrence” factor,¹⁴⁷ it is clear that any subjective evidence used by the court to establish the insured’s violation of the fifth factor could just as easily have been used to establish the same knowledge that harm was likely to occur under factors two and three. In fact, the language of the memorandum is, within the context of the third “occurrence” factor, clearly capable of demonstrating that Morton’s predecessors held “knowledge concerning the harmful propensities of the pollutants.”¹⁴⁸ Moreover, according to the *Morton* court, the existence of such knowledge permits an inference of intent to discharge under the second “occurrence” factor: “The conclusion is inescapable that from . . . when the unacceptable quality of its emissions was first brought to [the insured’s] attention, the discharges of pollutants thereafter occurred intentionally.”¹⁴⁹ Therefore, although the subjective evidence relating to the inter-company memorandum was certainly relevant to issue of whether Morton’s predecessors expected or intended injury, the analysis of this evidence under the rubric of the fifth “occurrence” factor yielded precisely the same conclusion as would have been reached through an analysis of the evidence under factors two and three. As a result, the court’s reliance on the fifth factor was unnecessary and added nothing of import to the court’s resolution of the “occurrence” issue.

In sum, through a careful dissection of the *Morton* court’s “occurrence” test, we have encountered no reasonable justification for allowing an insured who has “merely” intentionally discharged a known pollutant in violation of the two fundamental “occurrence” factors to claim a lack of expectation or intent to injure.¹⁵⁰ This conclusion has gained support from an analysis of the court’s actual application of its “occurrence” test.¹⁵¹ Although the court made

145. 629 A.2d at 883.

146. *Id.* at 884.

147. *See supra* notes 121-30 and accompanying text.

148. 629 A.2d at 880.

149. *Id.* at 882.

150. *See supra* notes 110-30 and accompanying text.

151. *See supra* notes 130-50 and accompanying text.

liberal use of regulatory intervention evidence relating to the fourth "occurrence" factor, this evidence was found to be significant only as a means to infer violations of the fundamental second and third "occurrence" factors. While the lengthy duration of the discharges by Morton's predecessors was mentioned, the court's reliance on this factor appeared rather insubstantial. The language of the fifth "occurrence" factor was unraveled to reveal that the issue raised by this consideration was simply a rephrasing of the inquires necessitated by the fundamental second and third "occurrence" factors. Thus, the only "occurrence" factor invoked by the court which could not be traced back to the two fundamental factors was that pertaining to duration of discharge.¹⁵²

It should be remembered that the facts presented by the *Morton* case represent an extremely flagrant bout of polluting activity; all five of the "occurrence" factors were found to have been violated. However, the court gave no indication that an insured who transgressed less than all, even substantially less than all, of the five factors would not be found to have expected or intended injury. Indeed, the court's heavy reliance on the two fundamental factors strongly suggests that a showing adverse to the insured regarding these considerations may be sufficient to bar coverage under the "occurrence" test. Thus, to the extent that the conclusions drawn in this section tend to indicate that an insured who "merely" intentionally discharges a known pollutant in violation of the second and third "occurrence" factors and the *Morton* pollution-exclusion criteria will be found to have expected or intended to cause injury, it appears that the latter standard is "merged" into the former.

D. *The Morton Court Shows Its Hand*

1. Rationale for the Subjective "Occurrence" Test

Other factors also support the "merger" theory. First, the *Morton* court purported to adopt the objective multi-factored "occurrence" analysis precisely because it feared that a test which looked solely to the insured's subjective expectation or intent to injure would wrongfully allow intentional dischargers of known pollutants to demand coverage under the standard CGL policy. The court expressed the reasoning as follows:

[W]e acknowledge the impracticality of adherence to the

152. See *infra* notes 156-62 and accompanying text.

general rule that "we will look to the insured's subjective intent to determine intent to injure." Although insureds may concede that pollutants—even known pollutants—had been intentionally discharged, those insureds are virtually certain to insist that the resultant harm was unintended and unexpected.¹⁵³

Thus, the *Morton* court found, an objective "occurrence" test was necessary which would allow insurers to bypass the difficult task of establishing subjective intent or expectation to injure and deny coverage for flagrant polluters.¹⁵⁴ Indeed, as the passage quoted above reveals,¹⁵⁵ the court used the example of the intentional discharger of known pollutants as a paradigm for the type of unacceptable behavior which necessitated a more subjective and coverage-restrictive "occurrence" analysis. Through negative implication, therefore, the quoted language asserts the court's belief that a subjective "occurrence" test is fundamentally flawed in that it would often fail to preclude coverage, due solely to evidentiary deficiencies, for highly culpable classes of insureds such as intentional dischargers of known pollutants.

2. A Capitulation of the "Merger" Theory?

In addition, the *Morton* court appears to have explicitly conceded at least the rough equivalence of the "occurrence" analysis and the new pollution-exclusion clause standard in support of our "merger" theory. During its resolution of the "occurrence" issue, the court reviewed the facts of the case which demonstrated intent to discharge and knowledge of the harmful nature of the effluent released on the part of Morton's predecessors.¹⁵⁶ As support for its conclusion that prior operators at the Berry's Creek plant had expected to cause injury within the meaning of the occurrence clause, the *Morton* court cited with approval the decisional weight of a substantial body of existing case law: "Many courts have concluded under comparable circumstances that continued discharges of pollutants over a prolonged period, combined with knowledge of the pollutants' deleterious qualities, is sufficient to establish an intention or expectation that environmental damage will occur."¹⁵⁷

153. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 879 (N.J. 1993) (citation omitted).

154. *Id.*

155. See *supra* text accompanying note 153.

156. See *supra* notes 130-49 and accompanying text.

157. 629 A.2d at 884. For a detailed review of pre-*Morton* cases which found insured

The court immediately buttressed the persuasive impact of the quoted proposition with a string of cites to cases decided in a variety of jurisdictions.

Quite revealingly, the cited language indicates that the court believed that an insured who has intentionally discharged¹⁵⁸ known pollutants over a prolonged period of time must be deemed to have expected or intended the damage which results from his actions. Therefore, we can safely assume that, in the *Morton* court's view, an insured's simple violation of "occurrence" factors one, two and three should in all cases be sufficient to bar coverage under the "occurrence" clause. Moreover, the court's statement¹⁵⁹ can be converted into an admission that the pollution-exclusion standard is merged within the "occurrence" analysis. Admittedly, it is vexing to decide whether the cited language can be construed as establishing a *prima facie* case for the "occurrence" analysis comprised of the first three "occurrence" factors. Indeed, for whatever reason, it is very difficult to find a pre-*Morton* case interpreting the "occurrence" clause which does not involve an extended pattern of polluting activity. Perhaps the costs to the insurer of challenging an insured's claim through litigation are prohibitively high in all but the most severe cases. Presumably, pollution-caused damages are more extensive, and hence more costly, in instances involving multiple discharges spanning a number of years. In any event, although the language cited above¹⁶⁰ provides convincing evidence that an insured will be denied coverage upon the mere transgression of "occurrence" factors one through three, we have no clear indication as to how the court might alter its ruling in an identical case, save for the absence of a prolonged history of polluting activity. However, our earlier discussions formulated a hypothetical which illustrated the irrationality of allowing an insured who has only intentionally discharged a known pollutant to claim coverage under the occurrence clause, yet disallowing coverage for the same insured who has also discharged over a prolonged period

expectation or intent to injure based on the intentional discharge of known pollutants, see *infra* note 177.

158. Although the court does not explicitly refer to an intentional discharge in the passage above, see *supra* note 157, the context in which passage is advanced makes clear that the court was indeed speaking to the situation in which pollutants are willfully released. See 629 A.2d at 884.

159. See *supra* note 157 and accompanying text.

160. See *supra* note 157 and accompanying text.

of time.¹⁶¹ We concluded that the third "occurrence" factor could not logically be held dispositive of the two cases. Thus, it seems likely that a court faced with a short-term intentional discharger of known pollutants would be willing to set aside the significance of the "duration of discharge" factor.¹⁶² Should our analysis prove sound, the *Morton* "occurrence" test will have been effectively merged into the court's pollution-exclusion standard.

3. Parallel Applications

Finally, the apparent equivalency of the "occurrence" test and the pollution-exclusion clause standard is perhaps most identifiable in the *Morton* court's application of the facts to these issues. More specifically, the facts used by the court to resolve each inquiry were, for all intents and purposes, identical. In short, the court surely could have disposed of both interpretive chores through a single factual explication. Both analyses generated findings adverse to the insured, with the support for each holding founded almost exclusively upon evidence tending to show that Morton's predecessors had ignored and evaded state officials, and continued to discharge pollutants well after environmental authorities had warned them of the danger attendant to their actions.¹⁶³ Truly, if the *Morton* court had a distinction between the two standards in mind, it is certainly not apparent from the language of the opinion.

The conclusions drawn from the language of the *Morton* opinion in the sections above are not purely academic. It should be remembered that, even under the *Morton* test, the resolution of the "occurrence" issue is essentially a weighing process in which "specific facts and circumstances inevitably determine whether courts conclude that proof of an occurrence has been established."¹⁶⁴ Consequently, future courts are still likely to be guided, as they had been before *Morton*, primarily by a common sense application of facts to the "expectation or intent to injure" standard. One commentator has summarized the traditional matter-of-fact judicial approach to "occurrence" clause interpretation thusly:

The courts frequently look to the quality of the underlying conduct where constructive intent is not readily apparent. If

161. See *supra* notes 110-18 and accompanying text.

162. See *infra* note 167.

163. See *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 880-84 (N.J. 1993).

164. *Id.* at 884.

the insured takes reasonable precautions to prevent possible damage or acts promptly to remedy and prevent the reoccurrence of actual damage after its discovery, the courts have been inclined to find that the damage is unintentional and caused by accident. Conversely, coverage is generally denied when an insured takes no steps to avoid conduct which has a high risk of causing damage.¹⁶⁵

Indeed, the *Morton* court itself relied on several past cases which had denied coverage for insureds intentionally discharging known pollutants under the expectation or intent to cause injury inquiry.¹⁶⁶ Future courts applying the *Morton* "occurrence" test will find no explicit caveat in the opinion which would lead them to diverge from this line of precedent. In fact, in light of our previous discussions, the language of the decision is likely to encourage such findings.¹⁶⁷

165. Robert D. Chesler et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 23 (1986).

166. See *supra* note 157 and accompanying text.

167. Not surprisingly, the conclusions drawn in the preceding sections initially appear to have been confirmed by the first available case decided under the *Morton* opinion. In *Mottolo v. Fireman's Fund Ins. Co.*, 830 F. Supp. 658 (D. N.H. 1993), the insureds had been charged by federal officials with dumping large quantities of hazardous wastes in a hidden site. After investigations by both New Hampshire and federal agencies, it was determined that the site contained approximately 1650 drums of toxic, flammable, corrosive, irritant and explosive liquid waste which had been compacted by bulldozers and partially buried. *Id.* at 659. Consequently, many of the drums were punctured, leaking, crushed or disfigured. *Id.*

Judge DeClerico encountered little difficulty in finding that the "damages did not arise from an 'occurrence,'" *id.* at 665, and thus that, although the insurers raised a defense to coverage based on the pollution-exclusion clause, "the court need not address these arguments." *Id.* at 659 n.2. Such a result is clearly consistent with the "merger" theory advanced in the text above. See *supra* note 110. The *Mottolo* court began its analysis by acknowledging the "occurrence" test which had recently been established by the *Morton* court. Beginning with the "duration of discharge" factor, the court found that the insured's discharges had continued over a four-year period. 830 F. Supp. at 664. Note that this time period is considerably shorter than the more than twenty-year pattern of polluting activity apparent in the *Morton* case, and indeed ranks as one of the shortest histories of pollutant discharges in any pollution-exclusion case on record. To the extent that the *Mottolo* court found expectation to injure despite a relatively brief bout of polluting on the part of the insured, our earlier arguments which suggested that a post-*Morton* court would be willing to deny coverage regardless of the duration of discharge where the insured had also intentionally discharged a known pollutant, see *supra* notes 158-62 and accompanying text, are at least partially validated.

Next, the *Mottolo* court found that the insured had intentionally discharged known pollutants in violation of the second and third *Morton* "occurrence" factors. 830 F. Supp. at 664. While the court also held that the fifth factor had been violated, *id.* at 664-65, we have recognized that a finding adverse to the insured under this element constitutes a

E. *The Impact of the Morton Decision*

At this point, we have marshalled a great deal of evidence which strongly suggests that an insured who intentionally discharges a known pollutant will be always be denied coverage under the *Morton* court's "occurrence" test. Thus, since the threshold coverage issue under the CGL policy is embodied in the occurrence clause,¹⁶⁸ and since the *Morton* court's pollution-exclusion standard also erects a barrier to coverage for insureds who have simply intentionally discharged known pollutants,¹⁶⁹ the latter inquiry can be viewed as having been merged within the "occurrence" test. In other words, any insured exhibiting less culpability than the situation in which an intentional discharge of a known pollutant has occurred will certainly survive the pollution-exclusion standard, and coverage will be contingent upon the outcome of the "occurrence" analysis. However, any insured exhibiting full culpability with regard to polluting activity, i.e., intentional discharge of a known pollutant, will be precluded from coverage under the "occurrence" test before the court has reason to reach a determination under the

mere semantic recapitulation of the findings already established through the analysis of the "fundamental" second and third "occurrence" factors. See *supra* notes 121-30 and accompanying text. In fact, the *Mottolo* court realized the virtual equivalence of the two inquiries by essentially treating the second and fifth "occurrence" factors as a single consideration: "Mottolo had both objective and subjective knowledge of the harmful propensities of the discharged materials." 830 F. Supp. at 664. The "harmful propensities" language is taken from the second "occurrence" factor, but the "subjective" aspect is derived from the fifth. Thus, the *Mottolo* court simply combined the two, dropping the "possibility or likelihood of harm" language of the fifth factor, see *supra* text accompanying note 106, as redundant in light of the "harmful propensities" language of the second factor, see *supra* text accompanying note 106. This is *precisely* the interpretation we have already attributed to the combined impact of these factors. See *supra* notes 121-30 and accompanying text.

Finally, the *Mottolo* court found that the insured's conduct had not violated the "regulatory intervention" factor because "plaintiffs had ceased their dumping at the site before officials discovered the contamination." 830 F. Supp. at 665. The court's finding of expectation to cause damage despite the absence of this fourth "occurrence" factor greatly supports our previous hypothetical discussions in which we could discern no logical justification for denying coverage to an insured who intentionally discharged a known pollutant in disregard of the warnings of regulatory officials, but not to an insured who had "merely" intentionally discharged a known pollutant. See *supra* notes 118-21 and accompanying text. In sum, the *Mottolo* application of the *Morton* "occurrence" test goes a long way toward bolstering the validity of the "merger" theory. A finding of expectation to injure was rendered in a case involving the intentional discharge of known pollutants, notwithstanding the absence of a "regulatory intervention" violation, the comparatively weak "duration of discharge" evidence, and the presence of facts which naturally and necessarily established the perpetually redundant fifth factor.

168. See *supra* notes 94-97 and accompanying text.

169. See *supra* note 100 and accompanying text.

pollution-exclusion clause. In either case, the question raised by the pollution-exclusion standard will be moot. As a result, future courts applying the *Morton* decision will never have occasion to visit the pollution-exclusion clause issue.

1. The *Morton* Court Hides the Ball

Notwithstanding, the reader might question the significance of our conclusions. Recall that before *Morton*, courts in New Jersey and other jurisdictions treated the pollution-exclusion clause as merely restating the limits on coverage imposed by the "occurrence" language of the CGL policy.¹⁷⁰ Indeed, the *Broadwell* case largely typified this approach. Thus, the coverage issue in all pre-*Morton* cases turned upon the "occurrence" issue, i.e., whether the insured had expected or intended to cause damage.¹⁷¹ We have now recognized that, due to the perceived "merger" of the *Morton* "occurrence" test and the pollution-exclusion standard, the *Morton* opinion simply constitutes a relatively convoluted affirmation of the pollution-exclusion clause interpretation adopted by *Broadwell* and similar cases.¹⁷² The sole relevant coverage consideration after *Morton* remains, as it was before *Morton*, whether the insured expected or intended to cause injury. Consequently, the ultimate impact of the case may appear rather benign.

However, there is one major distinguishing factor between *Morton* and the *Broadwell* line of cases. The *Broadwell* case at least possessed the virtue of presenting the legal community with a candid admission regarding the insignificant status to which the pollution-exclusion clause was to be relegated as a consequence of the court's holding. In *Broadwell*, the New Jersey Appellate Court explicitly stated: "[D]ecisional law in New Jersey and elsewhere has tended to interpret the pollution exclusion . . . exception, as 'simply a restatement of the definition of 'occurrence'—that is, that the policy will cover claims where the injury was 'neither expected nor intended.' . . . We agree with this analysis."¹⁷³ In contrast,

170. See *supra* notes 44-48 and accompanying text.

171. See *supra* note 48 and accompanying text.

172. See *supra* notes 93-170 and accompanying text.

173. *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76, 85 (N.J. Super. Ct. App. Div. 1987); see also Chesler et al., *supra* note 165, at 43 ("The principal consequence of [the *Broadwell* line of cases] is that the coverage issue has returned to the question of whether the pollution damage was unintended and unexpected from the standpoint of the insured, notwithstanding the pollution exclusion clause.").

the *Morton* court has seemingly "hidden the ball" from state insurers and insureds. The court explicitly overruled *Broadwell* "to the extent that it holds that the standard pollution-exclusion clause should be understood merely to impose the same conditions on coverage as are imposed by the definition of 'occurrence,'"¹⁷⁴ Thus, the court specifically intended to convey the idea that the *Broadwell* interpretation of the pollution-exclusion clause was unacceptable. More importantly, the cited language amounts to a pronouncement by the court that its new pollution-exclusion standard is substantially different from that of *Broadwell*. Were this not so, there would be no need to overrule the clear weight of precedent. However, we have already recognized that this representation is false; the ultimate impact of *Morton* is a simple re-affirmation of the *Broadwell* approach.

Furthermore, at several points in the opinion, the *Morton* court took great pains to emphasize the distinction it perceived between the *Broadwell* and *Morton* pollution-exclusion standards:

[T]he standard pollution-exclusion clause . . . will be construed to provide coverage identical with that provided under the prior occurrence-based policy, *except that the clause will be interpreted to preclude coverage in cases in which the insured intentionally discharges a known pollutant, irrespective of whether the resultant property damage was intended or expected.*¹⁷⁵

The language cited above suggests the court's belief that it was adopting a more coverage-restrictive interpretation of the pollution-exclusion clause than had existed under *Broadwell* in two important respects. First, the *Broadwell* line of cases was to be abandoned to the extent that these decisions failed to bar coverage under the pollution-exclusion clause for insureds who intentionally discharged known pollutants. However, as suggested previously,¹⁷⁶ the *Broadwell* precedents erected a standard under which coverage was *in fact often barred* for intentional dischargers of known pollutants.¹⁷⁷ Therefore, pre-*Morton* case law already provided a means

174. *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 847 (N.J. 1993).

175. *Id.* at 875 (emphasis added).

176. See *supra* notes 156, 166 and accompanying text.

177. Although pre-*Morton* cases did not always explicitly announce the conclusion that the simple intentional discharge of a known pollutant would automatically serve to establish insured expectation or intent to injure, such a holding was certainly inferable from

the language of the opinions. The relevant cases each relied to varying degrees upon some combination of the factual elements later codified by the *Morton* "occurrence" analysis, see *supra* text accompanying note 106. However, the critical elements common to the courts' findings of expectation or intent to injure always focused on the reality that the insured had intentionally discharged a known pollutant. As in *Morton*, any other facts considered appeared to be viewed as extraneous vehicles useful as a means to establish this core inquiry. See *supra* notes 130-52 and accompanying text. The decisions abstracted below all can be viewed as being guided by the principle that: "The chemical manufacturer or industrial enterprise who discharges, disburses or deposits hazardous waste material knowing, or who may have been expected to know, that it would pollute, will be excluded from coverage . . ." Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 994 (N.J. Super. Ct. Law Div. 1982).

In *Travelers Ins. Co. v. Waltham Indus. Lab. Corp.*, 883 F.2d 1092 (1st Cir. 1989), the insured operated an electroplating business, in the course of which he repeatedly discharged untreated chemical wastes containing cyanide, acids, nickel, aluminum and zinc into the public water supply. *Id.* at 1093. Repeatedly admonished by Massachusetts state officials to cease and correct his hazardous activities, the insured nevertheless continued. In finding intent to cause harm, the court found that the insured had "repeatedly and knowingly" released hazardous materials into the environment . . ." *Id.* at 1099. Moreover, the *Travelers* court observed that the insured "was a chemical engineer. He must have known of the corrosive effect of acids, caustics and cyanides." *Id.*

In *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984), the insured operated a barrel reconditioning business. Toxic wastes cleansed from barrels by the company were knowingly deposited and discharged into the ground, eventually finding their way into the local groundwater supply. *Id.* at 33. The *Great Lakes* court held: "The government has alleged that Great Lakes is liable because pollution and contamination of the soil, surface and subsurface waters has taken place as a concomitant of its regular business activity. . . . There is no 'occurrence' within the meaning of the policy . . ." *Id.*

In *Mapco Alaska Petroleum, Inc. v. Central Nat'l Ins. Co.*, 784 F. Supp. 1454 (D. Alaska 1991), the insured was a crude oil refinery which regularly experienced spills of petroleum products. However, the company had established a system of underground concrete sumps for the collection of the pollutants. Without the insured's knowledge, the sumps cracked and leaked, eventually contaminating local groundwater with benzene. *Id.* at 1456. Although the insured knew of the harmful qualities of the discharged materials, the *Mapco* court apparently refused to find expectation or intent to injure for the sole reason that the discharges were not intentional: "There is no evidence that [the insured] expected or intended for the various spill recovery systems to fail and cause the resultant damage to the groundwater. Absent such evidence, summary judgment on this issue is denied." *Id.* at 1460.

In *Fireman's Fund Ins. Co. v. Meenan Oil Co.*, 755 F. Supp. 547 (E.D.N.Y. 1991), the insured was an oil storage and distribution company. Groundwater contamination after the insured's underground storage system began to leak. However, the company was well aware of the discharges which were occurring and both state officials and corporate employees insisted that the problem be addressed. *Id.* at 550-53. The insured took no remedial action. In finding expectation to cause injury, based implicitly on the intentional discharge of known pollutants, the court stated: "[The insured] knew that its system leaked, that it had always leaked, and that it would continue to leak . . . [The insured] was aware of the . . . imminent threat of an environmental incident." *Id.* at 553.

In *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 750 F. Supp. 1340 (E.D. Mich. 1990), one of the insureds was a manufacturer of automobile parts. The company's manufacturing processes generated various solid and liquid wastes which were then discharged

into a nearby brook. Despite extensive knowledge gained from independent chemical engineers regarding the potential consequences, *id.* at 1351-53, the insured's polluting activity continued unabated. The court easily found expectation to cause damage, noting that the insured had knowledge of the harmful nature of the substances it was discharging into the environment: "Test results showed the presence of volatile suspended solids indicating chemical contamination." *Id.* at 1351. The court also found an intent to discharge: "[The insured] knew that contaminated liquid wastes were flowing into the [brook] . . . and continued to discharge contaminants into the environment." *Id.* at 1352.

In *Acolac, Inc. v. St. Paul Fire & Marine Ins. Co.*, 716 F. Supp. 1541 (D. Md. 1989), the insured operated a chemical plant in Missouri. Discharges of wastes eventually made nearby residents ill from systemic chemical intoxication. *Id.* at 1542. Clearly recognizing the insured's intentional discharge of known pollutants, the court found expectation to cause damage, stating: "[W]hen pollutants regularly have escaped over a period of years, especially when management was either deliberately indifferent to the situation or consciously disregarded it, coverage is excluded under the policy definition of 'occurrence,' because damage is to be expected with a substantial degree of probability." *Id.* at 1544 (citation omitted).

In *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423 (D. Kan. 1987), landowners proximate to the insured's salt company brought suit, alleging that careless operation of the plant had resulted in the release of tons of salt brine into the environment, hence rendering a local aquifer unfit for irrigation purposes. *Id.* at 1425. Implicitly basing its finding of expectation to cause injury on the intentional discharge of a known pollutant, the court held: "[D]efendants knew that their operation . . . was resulting in considerable salt pollution. Complaints were received from landowners and state agencies to that effect. . . . To argue that the damage resulting from defendants' discharge of salt was unexpected . . . is unsupported." *Id.* at 1430 (citation omitted).

In *American Mut. Liab. Ins. Co. v. Neville Chem. Co.*, 650 F. Supp. 929 (W.D. Pa. 1987), the defendant insured owned and operated a chemical manufacturing facility. Discharges by the company eventually contaminated and altered the groundwater supply, and such releases of contaminants continued after the insured had been notified of the deleterious character of its activities. *Id.* at 932-33. Finding expectation to cause damage based on a clear recognition of the intentional discharge of known pollutants, the *Neville* court found: "[Plaintiff] alleges that each time it discovered another contaminated well, [it] or the Department of Environmental Resources notified [the insured] Despite this notice, the complaint states 'Neville Chemical has continued to fail to prevent spills . . . and continued to dispose of chemical pollutants . . .'" *Id.*

In *Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co.*, 609 A.2d 440 (N.J. Super. Ct. App. Div. 1992), the insured was a chemical manufacturing plant which had caused substantial personal and property damage as the result of its release of dioxins. Quickly dismissing the possibility that the insured had not expected or intended to cause damage, the court noted that "Diamond's management knew of the hazardous nature of dioxins at a relatively early stage." *Id.* at 462. Moreover, speaking to "intentional discharge" element, the court found that "[o]verwhelming evidence was presented that Diamond knew about the release of dioxins from its plant and the migration of these substances to surrounding areas." *Id.* at 463.

In *County of Broome v. Aetna Casualty & Sur. Co.*, 540 N.Y.S.2d 620 (N.Y. App. Div.), *appeal denied*, 74 N.Y.2d 614 (1989), the defendant insurer owned and operated a landfill. Plaintiffs alleged that the dumping of chemical and industrial wastes at the site had contaminated both soil and groundwater, resulting in personal and property damage. In a stark acceptance of the concept that the intentional discharge of a known pollutant cannot give rise to an "occurrence," the *Broome* court bluntly held: "Here, the evidence is clear that [the insured] was well aware of the leakage problems and yet continued to

to deny coverage for insureds meeting the culpability requirements of the new pollution-exclusion standard, and the adoption of this test was unnecessary. As a result, it appears that the "concession" supposedly embodied in the *Morton* court's pollution-exclusion standard, the barring of coverage for intentional dischargers of known pollutants, actually provides no new benefit to insurers.

Second, in the language quoted above,¹⁷⁸ the court touted the new pollution-exclusion standard as relieving the pre-existing burden on insurers to show insured expectation or intent to cause injury in order to deny coverage; a mere showing of the intentional discharge of a known pollutant would now suffice. However, as we have seen, the two inquiries are essentially two sides of the same coin. Since the *Morton* pollution-exclusion standard raises an issue which will always first be capable of resolution under the court's "occurrence" test,¹⁷⁹ when an insurer demonstrates that an insured has intentionally discharged a known pollutant, he will also have simultaneously shown insured expectation or intent to injure. Furthermore, again recall that the *Morton* court itself noted a significant body of prior case law from a wide array of jurisdictions which reflected the common judicial view under *Broadwell* that the intentional discharge of known pollutants was alone sufficient to establish insured expectation or intent to cause harm.¹⁸⁰ Thus, whether evaluated in the context of the *Broadwell* or the *Morton* approach, an insured who intentionally discharges a known pollutant has always and will continue to be deemed to have expected or intended to cause environmental injury under New Jersey law. Consequently, the court's implicit assertion that an objective showing of insured expectation or intent to injure is somehow more burdensome to the insurer than a showing of the same insured's intentional discharge of a known pollutant is simply untenable. The "new approach" purportedly promulgated by the *Morton* court, rooted in the idea that the revised pollution-exclusion standard will serve as a boon to insurers, is illusory.

2. Uncertainty, Insolvency & the Plight of the Insurer

Thus, the *Morton* decision certainly sends conflicting messages to legal counsel for insurers. While the excerpts from the opinion

permit the dumping." *Id.* at 623.

178. See *supra* text accompanying note 175.

179. See *supra* notes 93-170 and accompanying text.

180. See *supra* notes 176-77 and accompanying text.

provided in the preceding section evince the court's belief that a clearly-defined distinction exists between the "occurrence" issue and the new pollution-exclusion clause inquiry,¹⁸¹ our earlier explanation of the *Morton* opinion,¹⁸² as well as many pre-*Morton* cases,¹⁸³ have failed to pinpoint the nature of this elusive, and perhaps fictitious, dichotomy. Future attorneys seeking to discern the effect of the *Morton* case will encounter great difficulty in attempting to reconcile the language quoted previously with the parity between the two standards suggested by the court's own resolution of the "occurrence" and pollution-exclusion clause issues. The *Morton* court unquestionably appreciated the potential impact of its rulings on the future of CGL policy interpretation in environmental damage cases,¹⁸⁴ so one cannot help but wonder why the court did not make some concerted effort to draw an obvious line for the sake of clarity. In any event, the diametrically-opposed signals sent by the *Morton* decision certainly raise the possibility of confusion.

Indeed, the New Jersey legal community may already have received the wrong message. Immediately following the New Jersey Supreme Court's disposition of the *Morton* case, lawyers, insurance industry representatives, and legal commentators in the Garden State began their attempts to quantify the future impact of the decision.¹⁸⁵ On July 26, 1993, a mere five days after the *Morton* case had been decided, the *New Jersey Lawyer* covered the court's disposition of the case. In the article, Wendy L. Mager, attorney for the Insurance Environmental Litigation Association, stated that *Morton* "is a more expansive interpretation of the exclusion that had existed in New Jersey."¹⁸⁶ Elliot Abrutyn, attorney for GAIC, was similarly convinced that the *Morton* opinion "is better than *Broadwell*."¹⁸⁷ Abrutyn noted that "[*Morton*] still gives the insurance industry something. . . . The *Broadwell* case basically

181. See *supra* notes 172-75 and accompanying text.

182. See *supra* notes 93-170 and accompanying text.

183. See *supra* note 177 and accompanying text.

184. See *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 834 (N.J. 1993) ("Because the policies are essentially standardized, industry-wide forms, our interpretation of their coverage provisions may affect significantly the allocation of damages for environmental pollution of New Jersey property among insurance carriers, industry, and government.").

185. See Jeffrey Kanige, *Court Narrows Pollution Exclusion*, 134 N.J. L.J. 1053 (1993).

186. Rocco Cammarere, *Intentional Polluters Cannot Use Insurance*, 2 N.J. LAWYER 1147 (1993).

187. *Id.* at 1162.

emasculated the pollution exclusion clause.”¹⁸⁸ These statements reflect a critical misunderstanding of what we have regarded as the essential equivalence of the *Morton* and *Broadwell* pollution-exclusion clause interpretations. Most alarmingly, John Tiene, spokesman for the New Jersey Insurance News Service, claimed that “[t]he *Morton* case could potentially free up approximately \$ 1 billion of insurance money”¹⁸⁹

As Mr. Tiene’s statement suggests, judicial opinions interpreting CGL policy clauses influence the future predictions of insurers. Consequently, if insurers are convinced that they have gained a substantially increased degree of financial leeway as a result of the *Morton* decision, operating capital derived from premiums may be channelled into riskier investment opportunities. Insurers may also conclude that, since *Morton* appears to ratify a more coverage-restrictive interpretation of the pollution-exclusion clause, hence decreasing the number of environmentally-related damage claims they will be obliged to indemnify, they can safely set aside a reduced level of cash reserves.¹⁹⁰ However, we have recognized that

188. *Id.*

189. *Id.*

190. Many commentators have addressed the impact of judicial policy interpretation on the financial stability of insurers. See Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 955 (1988) (“Insurers make their living relying on the certainty afforded by the law of large numbers. To achieve that certainty, insurers must assess the risk to their insureds posed by existing law and potential legal changes.”); Abraham, *supra* note 105, at 406 (“Because many of the expansions of tort liability that have occurred during the past decade were not anticipated by insurers, they have become wary of their ability to predict future expansion. . . . Insurance underwriters have become highly distrustful of courts and juries.”); James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 1023 (1992) (“Courts also must consider the impact of their decisions on insurer solvency. An obvious consequence of pro-insured rules is expansion of the insurer’s liability beyond that which the insurer assumed when the underwriting office calculated the premium. This increased exposure necessarily impacts the solvency of the insurer.”); Frona M. Powell, *Insuring Environmental Cleanup: Triggering Coverage for Environmental Property Damage Under the Terms of a Comprehensive General Liability Insurance Policy*, 71 NEB. L. REV. 1194, 1224 (1992) (“The insurance industry is an industry built on risk assessment. Until insurers can better identify and predict their potential liability for environmental damages under the CGL policy, expensive litigation over the scope of liability under the CGL policies is sure to continue.”); Joanna L. Johnson, Comment, *Whether Insurers Must Defend PRP Notifications: An Expensive Issue Complicated by Conflicting Court Decisions*, 10 N. ILL. U. L. REV. 579, 595 (1990) (“In order for the insurance system to function effectively, insurers must know the extent of the risks being insured by their policies. . . . If policy language can be subsequently redefined to expand coverage beyond what was planned by the insurer, then it nullifies the original risk assessment.”); Sharon M. Murphy, Note, *The “Sudden and Accidental” Ex-*

such conclusions cannot reasonably be drawn from the language of the *Morton* opinion; insurer expectations of more restrictive coverage will eventually meet head-on with the rational meaning which will be attributed to the decision by future courts.¹⁹¹ Consistent with our observations, insurers will find themselves no better off under *Morton* than they had been under *Broadwell* because the scope of coverage provided by the two approaches is identical.¹⁹² Should these apprehensions be realized, New Jersey insurers will face threats to solvency and some quantum of financial loss.¹⁹³

ception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability, 45 VAND. L. REV. 161, 164 (1991) ("Judicial interpretation of policy language has a direct effect on an insurer's risk of liability. If judicial construction of policy language is narrow, losses that must be covered by the insurer are more infrequent. If interpretation is broad and far-reaching, the insurer's risk grows commensurately.").

The most influential and authoritative of these voices has certainly been University of Virginia law professor Kenneth S. Abraham. Abraham notes that unbridled and liberal judicial interpretations of policy language "undermine insurers' actuarial calculations," Abraham, *supra*, at 960, and work "like a mandatory retroactive price decrease." *Id.* at 961. Consequently, "[i]nsurers suffer an immediate financial loss . . ." *Id.* Others have noted the potential for related repercussions. See Powell, *supra*, at 1224-25 ("Ultimately, industries may be unable to obtain liability insurance for activities that may expose them to risk of environmental contamination. The result will be to deter many desirable business activities . . ."); Johnson, *supra*, at 610-11 ("Because the [unforeseen] risks were not spread among insureds, insurers have no prepared funds with which to address [environmental] claims. Insurers must instead take the necessary funding from the same general insurance pool that encompasses the insurers' other planned commitments."); Murphy, *supra*, at 177 ("Insurers are left unable to rely on the language in their own policies. As a result, insurers must either draft new language . . . or drop coverage for a particular risk from the policy entirely.").

Abraham recognizes with particular dismay the threats to insurer solvency created by the "gutting" of the pollution-exclusion clause. Abraham, *supra*, at 961-65. This damaging result was of course perpetrated by courts which have long read the limits of the clause to be coextensive with the CGL policy definition of "occurrence." Therefore, insurers have already felt the fiscal sting of the judicial gloss applied to the pollution-exclusion clause through the *Broadwell* line of cases, see *supra* notes 44-48 and accompanying text, and have presumably adjusted risk assessments accordingly. However, the danger of the *Morton* opinion is that it falsely suggests to insurers, due to the apparent merger of the *Morton* "occurrence" and pollution-exclusion standards, see *supra* notes 93-170 and accompanying text, that the courts are now willing to take back some of the risk which they had previously foisted upon the industry. The insult of *Morton* will be added to the injury of *Broadwell* as over-zealous insurance industry officials respond gleefully to the empty promise of a smaller risk pool. See *supra* notes 185-89 and accompanying text. Thus, if insurers truly fix actuarial predictions on the basis of changes in the law as Abraham and other commentators suggest, then the *Morton* decision appears destined to raise further difficulties for already beleaguered underwriters.

191. See *supra* notes 163-67 and accompanying text.

192. See *supra* notes 170-73 and accompanying text.

193. See *supra* note 190.

Therefore, the fundamental shortcoming of the *Morton* decision is its failure to clearly illustrate the practical distinction between the pollution-exclusion standard it creates (intentional discharge of a known pollutant), and the standard it overrules (insured expectation or intent to injure).¹⁹⁴

194. The potentially misleading results of the *Morton* decision could perhaps have been avoided, while still achieving the court's desired outcome, through the use of various well-established insurance law principles. While the *Morton* court used the "reasonable expectations" doctrine to interpret the pollution-exclusion clause as barring coverage for insureds who had intentionally discharged known pollutants, *see supra* notes 70-76 and accompanying text, a more lucid approach could have been formulated from the court's additional observation that "where an insurer or its agent misrepresents, . . . the coverage of an insurance contract, or the exclusions therefrom, to an insured before or at the inception of the contract, and the insured reasonably relies thereupon to his ultimate detriment, the insurer is estopped to deny coverage . . ." *Harr v. Allstate Ins. Co.*, 255 A.2d 208, 219 (N.J. 1969), *quoted in Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 873 (N.J. 1993). Based on this legal theory, and due to the perceived fraud which had accompanied the insurance industry's representation of the pollution-exclusion clause to state officials, the *Morton* court could arguably have refused to recognize the effect of the exclusion altogether.

The clause might also have been invalidated by public policy considerations. *See, e.g., North River Ins. Co. v. Tabor*, 934 F.2d 461 (3d Cir. 1991) (invalidating as contrary to public policy embodied in a Pennsylvania statute an insurance clause providing for the reduction of uninsured motorist coverage benefits). An insurance policy clause is generally against public policy, and thus void, where it "dilutes or diminish[es] statutory provisions applicable to the insurer's contract of insurance."); *DC Elec., Inc. v. Employer's Modern Life Co.*, 413 N.E.2d 23, 28 (Ill. App. Ct. 1980). In *Morton*, the court found that to give effect to the literal language of the fraudulently represented pollution-exclusion clause would run contrary to state statutes authorizing the Commissioner of Insurance to determine the reasonableness of rates for insurance coverage.

Furthermore, since the *Morton* court found that state insureds were forced to accept the inclusion of the pollution exclusion in CGL policies after the adoption of the clause by state insurance regulators, *see supra* note 72 and accompanying text, garden-variety adhesion contract interpretative principles might have been employed to neutralize the coverage exception. *See JERRY, supra* note 71, § 25C, at 105 ("In the usual case, when a contract is recognized as being 'adhesive,' courts are more active in policing the bargain to counterbalance the potential detriment to the weaker parties."). In these ways, coverage in the *Morton* case would have been made contingent upon the outcome of the "occurrence" test. The *Morton* court might then have achieved the goals of its pollution-exclusion standard by holding that, as a matter of law, an insured's intentional discharge of known pollutants in contravention of the second and third "occurrence" factors would in all cases be sufficient to establish the insured's objective expectation or intent to cause damage. To avoid confusion, the court might also have noted that many previous cases had failed to find an "occurrence" under identical circumstances. *See supra* note 177. Such an approach would have sent a clear message regarding the court's vision of what type of polluting activity is not entitled to coverage and avoided the confusion which inevitably resulted from the *Morton* court's misleading representation that more restrictive coverage would ensue as a result of its decision, *see supra* notes 170-80 and accompanying text. Insurers have already incurred substantial damages from the judicial emasculation of the pollution-exclusion clause. *See supra* note 190. If the *Morton* court was unwilling

V. CONCLUSION

Although the *Morton* decision titularly restricted coverage for environmentally-related damages, our analyses have shown that things certainly are not as they seem. Before Mr. Tiene and his colleagues deposit their \$1 billion,¹⁹⁵ the ultimate impact of the case should be carefully considered. Likewise, the variety of jurisdictions which adhere to the New Jersey pollution-exclusion interpretive schema should exercise similar prudence.

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to afford any substantive significance to the exclusion, it should at least have been forthcoming regarding the actual coverage consequences created by its opinion.

Finally, the suggested approach would also have cured a "mootness" defect in the *Morton* opinion. As we have noted, the "occurrence" inquiry is the threshold coverage issue in any standard CGL policy. *See supra* notes 94-97 and accompanying text. Since the *Morton* court decided that the activities of the insureds did not constitute an "occurrence," coverage was barred and there was no reason for the court to proceed to address the pollution-exclusion clause issue. *See, e.g., International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758, 767 (Ill. App. Ct.)* ("[I]f there were no 'occurrence,' there would be no coverage in the first instance and it would be unnecessary to reach the question whether the pollution exclusion clause applied."), *appeal denied, 530 N.E.2d 246 (Ill. 1988)*. Therefore, the pollution-exclusion issue in the *Morton* case was "moot." *See generally WILLIAM EATON, WHO KILLED THE CONSTITUTION? 163 (1988)* (discussing the 'ripeness' and 'mootness' doctrines in the context of constitutional law adjudications).

195. *See supra* note 189 and accompanying text.

