Commentary

The Limits Of Morton: The Resistible Force Of Regulatory Estoppel Meets The Immovable Object Of New York's Insurance Statute

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All practitioners in the field of environmental coverage litigation are likely well familiar with the New Jersey Supreme Court's 1993 ruling in Morton International, Inc. v. General Acc. Ins. Co.[1] The Morton decision is famous for invoking the newly-invented rule of "regulatory estoppel" to hold insurers to what the court concluded were misrepresentations to New Jersey regulators concerning the meaning of the word "sudden" in the "sudden and accidental" pollution exclusion clause.

Often overlooked, however, is the fact that the New Jersey Supreme Court held, in that same ruling, that the word "sudden" in the "sudden and accidental" pollution exclusion clause plainly and unambiguously carries a temporal meaning, "generally connoting an event that begins abruptly."[2] The court continued: "[W]e discern that the phrase 'sudden and accidental' in the standard pollution-exclusion clause describes only those discharges, dispersal, release, and escapes of pollutants that occur abruptly or unexpectedly and are unintended."[3] As a result, if the words of the exclusion were to be given their acknowledged plain meaning, the clause would, as a matter of New Jersey law, bar coverage for damage resulting from gradual, non-abrupt discharges or releases of pollutants.

Seizing on both the "regulatory estoppel" prong of the Morton court's decision and New Jersey choice of law rules which frequently require application of New Jersey law to pollution exclusion issues, policyholders in coverage lawsuits venued in New Jersey frequently argue that the Morton ruling should preclude insurers from relying on the plain meaning of the term "sudden" in the "sudden and accidental" pollution exclusion. Among the policyholders who make such arguments are some who purchased their policies in New York State between September 1, 1971 and September 1, 1982, when New York Insurance Law § 46 required that commercial liability policies "expressly exclude" liability arising out of the discharge of pollutants "unless such discharge, dispersal, release or escape is sudden and accidental." The legislative history of both § 46 and the repealer legislation enacted eleven years later makes plain that the New York Legislature and New York's Governor intended, in enacting § 46, that the issuance of coverage for gradual pollution be barred as a matter of public policy because it would make polluters indifferent to the consequences of their actions.

Thus, unlike the situation perceived by the Morton court, in which New Jersey regulatory approval of the "sudden and accidental" pollution exclusion clause

was allegedly obtained in part through purported misrepresentations to state regulators, it is beyond dispute that the New York statute purposefully — and in furtherance of express public policy — eliminated coverage for gradual pollution. No misrepresentations of any kind were involved.

This article traces the history and purposes of § 46 and discusses why, as a matter of New Jersey law under Morton, the "sudden and accidental" pollution exclusion should be given its full effect (*i.e.*, that the term "sudden" should be accorded its unambiguous temporal meaning) when it is contained in policies that were issued in New York when § 46 was in effect. As demonstrated below, giving "sudden" a temporal meaning in such circumstances is fully consistent with Morton itself. Any other result would confer an unjustified financial windfall on policyholders by providing them with insurance coverage they could not lawfully have bought at the time they purchased such policies in New York.

I. The Meaning And Effect Of Former New York Insurance Law § 46, Which Mandated That Liability Policies Contain Provisions Barring Coverage For Gradual Pollution

A. The 1971 Enactment of § 46

Beginning in 1971, New York statutory law specifically required that all liability policies issued to commercial or industrial enterprises contain a provision barring coverage of liabilities resulting from pollution, except where the discharge or release of pollutants was both "sudden and accidental." As the New York Appellate Division noted in Borg-Warner Corp. v. Ins. Co. of North America, this requirement of New York law was "unique."[4] The statute in question, former New York Insurance Law § 46(13) and (14), stated, in pertinent part:

> Policies issued to commercial or industrial enterprises providing insurance against the legal liabilities specified in this subdivision shall expressly exclude therefrom liability arising out of pollution or contamination caused by the discharge, dispersal, release, or escape of any pollutants, irritants or contaminants into or upon land, the atmosphere or any water course or body of water unless such discharge, dispersal, release or escape is sudden and accidental.[5]

The legislative history of § 46 makes clear that the New York Legislature and New York's Governor Rockefeller expressly intended to bar coverage for pollution unless the discharge was "sudden and accidental." As set forth in Governor Rockefeller's memorandum accompanying his approval of the legislation, the law's purpose was to "prohibit commercial and industrial enterprises from purchasing insurance to protect themselves against liabilities arising out of their pollution of the environment. . . ."[6] The Governor further explained that:

> New York State has adopted stringent standards to prohibit despoiling our environment through the discharge of noxious substances into the water and air. . . . As strict as these laws are, however, their effectiveness would be substantially reduced if polluters were able to insure themselves against having to pay the fines and other liabilities that may be imposed upon them for polluting.[7]

In closing, the Governor noted:

> The bill will help to assure that corporate polluters bear the full burden of their own actions spoiling the environment, and will preclude any insurance company from undermining public policy by offering this type of insurance protection.[8]

Thus, the purpose of the New York statute is evident: to "preclude" insurance coverage of liabilities resulting from pollution by mandating that liability policies include pollution exclusion clauses.[9] This statutory requirement was designed to advance express public policy of the State of New York, which the New York Appellate Division described as a "strong policy against allowing commercial or industrial enterprises to pollute the environment and escape the responsibility for the entire cost of cleanup by purchasing insurance."[10]

Comments by various parties when the New York legislation was proposed, including several policyholders, demonstrate the contemporaneous widespread understanding that the statutorily-mandated exclusion barred coverage for gradual pollution. For example, the Niagara Mohawk Power Corporation warned in a letter to the state government that the

proposed legislation would be overly restrictive because it would bar coverage of pollution that was "accidental but gradual:"

> There appears to be an implication that discharges which are not "sudden and accidental" are thereby necessarily willful or reckless. Such is not the case. A discharge or release may be, in some cases, *accidental but gradual* and not immediately detectable. The rigid language of the bill would seem to render such occurrences *uninsurable*. (Emphasis added.)[11]

The Long Island Lighting Company similarly recognized the temporal nature of the "sudden" requirement contained in the legislation, suggesting that "the continuous polluter will be faced with the possibility of being unable to obtain any insurance."[12]

B. The 1982 Repeal of § 46

Effective September 1, 1982, the New York Legislature repealed the portions of § 46 requiring that pollution exclusions be contained in all liability policies.[13] Governor Carey's memorandum approving the legislation repealing § 46 explained that the new legislation was enacted to "authorize the writing of insurance policies to cover liabilities arising from the gradual release or discharge of pollution and contaminants."[14] The sponsor of the bill, state Senator John R. Dunne, wrote in his memorandum in support of the bill that:

> In 1971, then Governor Rockefeller signed a bill into law that prevented the writing of *gradua*l pollution liability insurance. . . . *Currently, New York is the only state that prohibits the writing of gradual pollution liability coverage*. . . . The [new] bill simply deletes the 1971 prohibition and thus authorizes the writing of pollution liability coverage. (Emphasis added.)[15]

Senator Dunne specifically noted that the purpose of his repealer bill was "to authorize the sale of 'gradual' or 'nonsudden' pollution liability insurance in New York."[16]

The remainder of the legislative history of the 1982 repealer legislation (1982 N.Y. Laws, ch. 856) shows the common understanding of all concerned — government, insurance, and industry — that the 1971 law had precluded coverage for gradual pollution. In addition to the above-quoted statements from Governor Carey and Senator Dunne, this legislative history includes the following:

- The State Department of Commerce wrote that it had "no objection to this bill which would amend the Insurance Law to repeal the prohibition against the sale of *'gradual'* or *'non-sudden'* pollution liability insurance." (Emphasis added.)[17]

- The Budget Division reported that the repealer bill, if enacted, would "make it possible for companies . . . to receive *'gradual pollution insurance' coverage."* (Emphasis added.)[18]

- Albert B. Lewis, State Superintendent of Insurance, wrote that, "[r]eaching the specific proposal made at this time by this bill, the Insurance Department notes that there has been an increased interest in recent years in obtaining insurance to cover *gradual* pollution." (Emphasis added.)[19]

- New York Attorney General Robert Abrams urged the Governor to sign the bill, noting that "[t]he purpose of this bill is to amend the Insurance Law to remove the prohibition against liability insurance for environmental pollution resulting from *gradual release of pollutants*." (Emphasis added.)[20]

- The general counsel of the New York Department of Environmental Conservation, urging approval of the bill, noted that the bill "[e]liminates *gradual and non-sudden* pollution insurance from the category of policies which are illegal. . . . The bill will provide a mechanism for providing for proper compensation to members of the public who may be injured by a *gradual* release of pollutants." (Emphasis added.)[21]

- James W. March, Executive Director of the Insurance Brokers' Association of the State of New York, commented that "[u]nder the present law, insurers in New York are unable to provide coverage for *gradual* pollution liability." (Emphasis added.)[22]

- The Business Council of New York State similarly stated that "[t]he proposed legislation is needed to allow companies to purchase liability insurance to cover unforeseen results where environmental damage occurs from a *gradual or continuous discharge* of pollutants." (Emphasis added.)[23]

Thus, the conclusion is inescapable that the pollution exclusion clause mandated by the New York statute in effect from September 1, 1971 and September 1, 1982 barred issuance of insurance policies providing insurance coverage for damage caused by gradual pollution. No evidence exists that either the New York Legislature or the Governor of New York were in any way misled about the meaning and effect of the pollution exclusion language they enacted into law. To the contrary, the statute itself and its legislative history, as well as the legislative history of the subsequent repealer statute, conclusively demonstrate that New York's lawmakers had the express purpose of barring the issuance in New York of any liability coverage that would otherwise cover "gradual" or "non-sudden" pollution.[24]

Where policies are issued in New York to a New York-based company, New York's requirements concerning the contents of the policies unquestionably apply. This means that during the period from September 1, 1971 and September 1, 1982, a New York policyholder could not lawfully purchase insurance coverage for gradual pollution. The "sudden and accidental" pollution exclusion clause in policies issued in New York during this time period was included in the policies pursuant to the mandates of New York Insurance Law § 46, not on the strength of regulatory submissions made in New Jersey or elsewhere.[25]

II. No Basis Exists To Apply Morton's 'Regulatory Estoppel' Holding To Policies Required To Exclude Coverage Of Gradual Pollution

The New Jersey Supreme Court in Morton was called upon to interpret pollution exclusions which generally excluded coverage for pollution. The pollution exclusions in Morton contained the familiar internal exception that reinstated coverage where the discharge or release of pollutants was both "sudden and accidental."[26]

Significantly, the Morton court agreed with the insurers in that case that the word "sudden" in the internal exception to the pollution exclusion plainly and unambiguously has a temporal meaning:

> [W]e are persuaded that "sudden" possesses a temporal element, generally connoting an event that begins abruptly or without prior notice or warning. . . . [W]e discern 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.[27]

As the Morton court noted, "[a]n interpretation of 'sudden' that does not acknowledge its temporal quality is unfaithful to its core meaning."[28] The court recognized that this plain and unambiguous meaning of the term "sudden" would have the effect of "sharply and dramatically" restricting insurance coverage for liabilities resulting from accidental pollution.[29]

The Morton court declined to apply this "literal" interpretation of the pollution exclusion clause, however, because of its determination that certain insurers, in seeking regulatory approval of the clause, had presented New Jersey regulators with materials that misrepresented the scope and effect of the pollution exclusion.[30] In particular, the Court traced the history of filings in New Jersey by the Insurance Rating Board and the Mutual Insurance Rating Bureau which, in seeking New Jersey regulatory authorization to include the pollution exclusion clause in general liability policies, stated that the clause "clarifies" the extent of coverage available under then-current policies.[31] The court found that this specific statement was misleading because the effect of the clause was, in fact, to restrict coverage "sharply and dramatically." The Morton court therefore concluded that giving the pollution exclusion its literal interpretation "would reward" insurers for their alleged "misrepresentation and non-disclosure to state regulatory authorities."[32] The court further noted that giving the term "sudden" its literal interpretation despite the alleged misrepresentations by insurers would be unfair to policyholders "who were charged rates that did not reflect the radical diminution in coverage contemplated by the insurance industry."[33]

Two points in the court's decision are of particular note here. First, although the court painstakingly reviewed the filings made in New Jersey, and noted the New Jersey statutes pursuant to which insurers were required to obtain approval to include the pollution exclusion clause in policies issued in New Jersey, the court made no examination of the history of the pollution exclusion clause in New York or the legislative history of New York Ins. Law § 46.[34]

Second, the court was careful to emphasize that "[i]n declining to give effect to the literal provisions of the pollution-exclusion clause, we manifest no hostility to restrictive coverage provisions in standard-form insurance policies."[35] This is because "the insurance industry is entitled to reassess periodically the perils it chooses to insure and, subject to regulatory approval, to restrict coverage of risks in a manner consistent with its economic interests."[36] In fact, the court declared, if "full disclosure" about the effect of the pollution exclusion had been made, "we would not hesitate to enforce the pollution-exclusion clause as written" even though the effect of such enforcement would have been to severely restrict coverage.[37]

In other words, the New Jersey Supreme Court would not hesitate, as a matter of New Jersey law, to apply the literal, plain, unambiguous meaning of the word "sudden" — meaning temporally abrupt — in a situation where there was no evidence that state regulators had been in any way misled.

That is precisely the situation that exists with respect to policies issued in New York pursuant to the New York statute which mandated that such policies bar coverage for gradual pollution by including a "sudden and accidental" pollution exclusion. Even when coverage litigation concerning such policies takes place New Jersey, a New Jersey court cannot overlook the fact that the "sudden and accidental" pollution exclusion clauses are in the policies because of the requirement imposed under New York law for policies issued in New York, not because they were approved by New Jersey regulators who allegedly had been misled about the meaning of the clause. New York enacted a statute barring coverage of gradual pollution because it wanted, as a matter of public policy, to make it impossible for policyholders to shift the financial costs of their gradual pollution to their insurers. As such, the purpose and meaning of the clause is self-evident: to bar the issuance in New York of insurance coverage that might previously have been available for such costs.

Given the distinct history of the pollution exclusion clause in New York, the Morton court's sole reason for not giving the provision its admittedly "literal" effect is entirely inapplicable. Whatever misrepresentations may have been made to New Jersey regulators should be of no import when the policies in question were exclusively subject to New York regulatory and legislative requirements at the time they were issued. Put simply, no part of the coverage purchased by a policyholder in New York between September 1, 1971 and September 1, 1972, when the pollution exclusion clause was specifically mandated by New York law, was based on alleged misrepresentations to New Jersey regulators.[38]

In addition, the express provisions of § 46 and the demonstrated widespread contemporaneous understanding that the New York statute completely barred any coverage of gradual pollution make obvious that, for policies subject to § 46, the policyholder did not pay any premium to cover liabilities resulting from gradual pollution. A policyholder would therefore receive an unjustified windfall if it were afforded coverage that it could not have legally purchased at the time. In Morton, the New Jersey Supreme Court refused to foist an unfair result on policyholders by taking away coverage which the court felt they had paid for.[39] The same principle applied evenhandedly requires a finding that it would be inappropriate and unjustified to require an insurance company to provide coverage that a policyholder never paid for — indeed, was prohibited by statute from purchasing.

This analysis is mandated as a matter of New Jersey law by the plain meaning of Morton itself. The Morton court itself noted that the term "sudden" in the pollution exclusion clause unambiguously had a temporal meaning that, in context, barred coverage of gradual pollution. The Morton court declined to give the clause its admitted plain meaning because of the misrepresentations it perceived had taken place. But no such misrepresentations are even alleged to have occurred in the legislative process in New York. Indeed, the demonstrated understanding of New York lawmakers and New York's governor is that they not only knew that § 46 barred coverage of gradual pollution, they enacted the statute in order to achieve that very result. Thus, application of the reasoning of

Morton itself requires that New Jersey courts give full effect to "sudden and accidental" pollution exclusion clauses issued in New York between September 1, 1971 and September 1, 1982 — including construing the clause to bar coverage of gradual pollution.

In this context it is noteworthy that not a single one of the New Jersey Supreme Court's leading "choice of law" decisions in the context of insurance coverage comes close to addressing this specific issue.[40] For example, the Pfizer decision simply determined that the interpretation of the pollution exclusions in that case would be governed by the law of the state where the waste site was located rather than the law of the place where the policies were issued or the law of the place where the policyholder's headquarters were located.[41] Assuming that Pfizer requires a court to apply New Jersey law to a policy that was subject to § 46 when the policy was issued, then the court should apply the plain, unambiguous meaning of the pollution exclusion as declared in Morton (*i.e.*, a New Jersey court should conclude that coverage for gradual pollution is excluded) because no basis exists, under New Jersey law, for invoking "regulatory estoppel" to override the provision's acknowledged plain meaning.

Moreover, to the extent a policyholder argues that Morton's "regulatory estoppel" holding should apply despite the clear import of the New York statute and its legislative history, it bears emphasis that the policyholder has the burden of proving that such an extraordinary remedy is appropriate.[42]

In view of the legislative history set forth above, a policyholder could not possibly sustain this heavy burden. Absolutely no evidence exists that the New York Legislature or Governor Rockefeller were "misled" in any way by insurance industry representatives. Indeed, the legislative history belies any such conclusion. Rather, the legislative history establishes beyond dispute that New York made the pollution exclusion mandatory in liability policies issued in New York in order to promote the public policy of limiting pollution by making sure those responsible for gradual pollution incurred the associated financial burdens without being able to shift them to insurers.[43]

Conclusion

If a court is to apply Morton, then logically it must apply the entirety of the decision. There can be no disputing the fact that the New Jersey Supreme Court held in Morton, as a matter of New Jersey law, that the word "sudden" in the internal exception to the pollution exclusion means "temporally abrupt." The only reason the court hesitated to apply that literal meaning was its determination that, at least in New Jersey, state regulators were misled when they were asked to approve the clause.

It is also clear that policies issued in New York that were subject to § 46 contained "sudden and accidental" pollution exclusions not because of some misrepresentation to New Jersey regulators, but rather because New York lawmakers concluded that it was sound public policy to bar all coverage for liabilities resulting from gradual, non-sudden pollution.

Under these circumstances, no basis exists for failing to apply the "literal" temporal meaning of the word "sudden" as expounded by the New Jersey Supreme Court in Morton.[44] As a matter of New Jersey law, the interpretation of such exclusions should be governed by the first part of Morton (finding that the term "sudden" unambiguously has a temporal meaning) but not by the second part of Morton (declining to give the clause its literal meaning due to application of "regulatory estoppel") because no evidence exists of any misrepresentations by insurers to the New York lawmakers who mandated that policies issued in New York contain such a pollution exclusion. Any other result would confer an unjustified financial windfall on policyholders by providing them with insurance coverage they could not lawfully buy at the time they purchased policies in New York.

Endnotes

1. 134 N.J. 1, 629 A.2d 831 (1993), *cert. denied*, 512 U.S. 1245 (1994).

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

3. *Id.*, 629 A.2d at 847.

4. 174 A.D.2d 24, 577 N.Y.S.2d 953, 956 (App. Div.), *review denied*, 80 N.Y.2d 753 (1992). *See also* Technicon Elecs. Corp. v. American Home Assur. Co., 141 A.D. 2d 124, 141, 533 N.Y.S.2d 91,

101-02 (App. Div. 1988), *aff'd*, 74 N.Y.2d 66, 542 N.E.2d 1048 (1989) ("Beginning in 1971, . . . the State of New York required liability carriers to insert a 'pollution exclusion' in all [comprehensive general liability] policies containing the 'sudden and accidental' exception") (emphasis added).

5. N.Y. Ins. Law ch. 765, at 1230-31 (McKinney 1971) ("§ 46"). The same language was in both subsections 13 and 14 of Section 46. Subsection 13 governed requirements for "personal injury liability insurance" issued in New York whereas Subsection 14 set forth requirements for "property damage liability insurance" issued in New York.

6. 1971 N.Y. Laws ch. 765, at 2633 (McKinney) (Governor's Memorandum).

7. *Id.*

8. *Id.*

9. See 1971 N.Y. Laws ch. 765 (Bill Jacket at 2) (Memorandum to Governor) (stating that the bill is "intended to prohibit commercial or industrial enterprises from purchasing insurance to protect themselves against liability arising out of their pollution of the environment, other than through sudden and accidental circumstances").

10. Borg-Warner v. Ins. Co. of North America, 174 A.D.2d at 32-33, 577 N.Y.S.2d at 958-59. In furtherance of this strong public policy, New York courts have consistently held that the statutorily-mandated pollution exclusion should be deemed included in liability policies issued to New York commercial policyholders during the relevant time period (1971-1982) even where the clause was not actually included in the policy. *See, e.g.*, Maestri v. Westlake Excavating Co., 894 F. Supp. 573, 576 (N.D.N.Y. 1995); Hartford Acc. & Indem. Co. v. Chenango Indus., Inc., No. 90-1462, Vol. 8 **Mealey's Lit. Rept.: Ins.**, Issue #12 at B-1, B-13-15, January 25, 1994 (N.Y. Sup. Ct., Broome Cty., Dec. 30, 1993).

11. 1971 N.Y. Laws, ch. 765 (Bill Jacket at 12).

12. *Id.* (Bill Jacket at 15).

13. N.Y. Ins. Law ch. 856, at 2029-30 (McKinney 1982).

14. 1982 N.Y. Laws ch. 856, at 2628-29 (McKinney) (Governor's Memorandum).

15. 1982 N.Y. Legis. Annual at 271 (Memorandum of Senator Dunne).

16. *Id.* The repeal of the prohibition on writing coverage for "gradual" or "non-sudden" pollution reflected, as the Technicon court noted, the balancing of "two legitimate competing public policy concerns — the need to protect the environment and the need to provide financial compensation for persons who have suffered damages caused by pollution." Technicon, 141 A.D.2d at 143, 533 N.Y.S.2d at 103. The calculus made by the State Legislature in 1982 was that it was more important to assure that non-public funds were available for cleanup if a responsible party was no longer financially viable. *Id.*, 533 N.Y.S.2d at 103.

17. 1982 N.Y. Laws, ch. 856 (Bill Jacket) (July 28, 1982 Memorandum of Law of John J. Kelliher to John G. McGoldrick, counsel to the Governor, at 12).

18. 1982 N.Y. Laws, ch. 856 (Bill Jacket) (July 14, 1982 Budget Report on S. 10119, at 10).

19. 1982 N.Y. Laws, ch. 856 (Bill Jacket) (July 15, 1982 letter from Mr. Lewis to Mr. McGoldrick, at 17).

20. 1982 N.Y. Laws, ch. 856 (Bill Jacket) (July 22, 1982 Memorandum from Mr. Abrams to the Governor, at 13).

21. 1982 N.Y. Laws, ch. 856 (Bill Jacket) (July 21, 1982 memorandum, at 18).

22. 1982 N.Y. Laws, ch. 856 (Bill Jacket) (July 12, 1982 letter from Mr. March to Mr. McGoldrick, at 24).

23. 1982 N.Y. Laws, ch. 856 (Bill Jacket) (July 16, 1982 letter from Raymond T. Schuler to Mr. McGoldrick, at 28).

24. Even if a policyholder were to attempt to support an argument that the New York Legislature or Governor Rockefeller were misled by the insurance industry, such an argument would be impermissible. To credit such claims, courts would have to peer behind the language of statutory enactments to examine the

veracity of countless statements made by interested citizens to individual legislators or legislative committees. New York courts do not permit such inquiries. *See* People v. Finnegan, 85 N.Y.2d 53, 58, 647 N.E.2d 758, 760 (1995) (when statute is clear and unambiguous, it "should be construed so as to give effect to the plain meaning of [the] words used. . . . Equally settled is the principle that courts are not to legislate under the guise of interpretation") (citations and internal quotations omitted); Doctors Council v. New York City Employees' Retirement System, 71 N.Y.2d 669, 674, 525 N.E.2d 454, 457 (1988) ("Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute"); Bright Homes, Inc. v. Wright, 8 N.Y.2d 157, 162, 168 N.E.2d 515, 517-18 (1960) ("Courts are not supposed to legislate under the guise of interpretation") New Jersey courts similarly do not allow such inquiries. *See* Cornblatt v. Barow, 153 N.J. 218, 231, 708 A.2d 401, 407 (1998) ("If the language [of the statute] is plain and clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms") (emphasis added, citation omitted). *See also* Newark Superior Officers Assoc. v. City of Newark, 98 N.J. 212, 222, 486 A.2d. 305, 310 (1985) (it is "well recognized that the courts do not act as a super-legislature") (citation omitted); New Jersey Assoc. on Correction v. Lan, 80 N.J. 199, 211, 403 A.2d 437, 443 (1979) ("the prudence, wisdom, good sense or otherwise of the legislative action are not for the Court," if the act is within the Constitution); Croswell v. Shenouda, 275 N.J. Super. 614, 623-24, 646 A.2d 1140, 1145 (Ch. Div. 1994) ("There is no more fundamental canon of separation of powers, or tenet of statutory construction, than that the wisdom of a statute is not for the court to determine, and it is not the function of the court to sit as a super-legislature or concern itself with the wisdom of policy underlying a statute").

25. *E.g.*, former N.Y. Ins. Law § 46(13), (14); Continental Cas. Co. v. Rapid–American Corp., 80 N.Y.2d 640, 652, 609 N.E.2d 506, 512 (N.Y. 1993) ("[a] pollution exclusion was required in all liability policies from 1971 through 1982"); Borg-Warner, 174 A.D.2d at 33 n.2, 577 N.Y.S.2d at 959 n.2 ("[t]he Legislature made a pollution exclusion mandatory from September 1, 1971 to September 1, 1982"); Technicon, 141 A.D.2d at 141, 533 N.Y.S.2d at 102 ("the State of New York required liability carriers to insert a 'pollution exclusion' clause in all such policies").

26. *See* Morton, 134 N.J. at 28, 629 A.2d at 847. The ISO standard "sudden and accidental" pollution exclusion clause introduced in the early 1970s and known as exclusion "f" provided, in part:

> 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.

Id. at 11, 629 A.2d 831 (emphasis added).

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

28. *Id.* at 71, 629 A.2d at 871.

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

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

31. *Id.* at 35-36, 629 A.2d at 851.

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

33. *Id.* at 73-74, 629 A.2d at 873.

34. Although the Morton court mentioned § 46, it did not evaluate the statute or its legislative history, or draw any conclusions about the law's purpose. Rather, the court merely noted in passing that New York had enacted a statute in 1971 requiring CGL policies to include a "sudden and accidental" pollution-exclusion clause. Morton, 134 N.J. at 33-35, 629 A.2d at 831, 849-51. The court then briefly quoted a portion of the bill jacket for § 46 and cited one New York court decision that had mentioned the statute but made no holding concerning its meaning.

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

36. *Id.*, 629 A.2d at 875.

37. *Id.* at 79, 629 A.2d at 876. *See also* Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 457, 650 A.2d 974, 984 (1994) ("we did not find ambiguity in the language of the pollution–exclusion clause in Morton International").

38. Put another way, a policyholder purchasing a policy in New York that was subject to § 46 could not, by definition, have had any "reasonable expectation" that the policy would provide coverage for gradual pollution. *See* Nav-Its, Inc. v. Selective Ins. Co. of America, ___ N.J. ___, ___ A.2d ___, 2005 NJ Sup. LEXIS 302 (Apr. 7, 2005) (asserting that the Morton court imputed the reasonable expectations of New Jersey regulators to policyholders).

39. *Id.* at 73-74, 629 A.2d at 873.

40. Pfizer, Inc. v. Employers Ins. of Wausau, 154 N.J. 187, 712 A.2d 634 (1998); HM Holdings, Inc. v. Aetna Cas. & Sur. Co., 154 N.J. 208, 712 A.2d 645 (1998), Unisys Corp. v. Ins. Co. of North America, 154 N.J. 217, 712 A.2d 649 (1998), Gilbert Spruance v. Pennsylvania Mfrs. Ass'n Ins. Co., 134 N.J. 96, 629 A.2d 885 (1993).

41. 154 N.J. at 205, 712 A.2d at 643. The Pfizer court never analyzed how Morton would apply to the policies at issue in that case, and did not consider whether "regulatory estoppel" would apply to policies issued in New York while § 46 was in effect. In fact, the closest the court came to saying anything about the issues discussed in this article was when it emphasized that Morton's "regulatory estoppel" holding should not be applied in an overbroad fashion. *See id.* at 193, 712 A.2d at 637 ("New Jersey courts have rejected efforts to base the choice of law determination upon New Jersey's perceived interest in broadly applying the regulatory estoppel holding set forth in Morton to environmental coverage disputes") (citations omitted).

42. *See, e.g.*, Palatine I v. Planning Bd. of Montville, 133 N.J. 546, 562, 628 A.2d 321, 330 (1993). Moreover, in New Jersey the policyholder must carry this burden by clear and convincing evidence. *See, e.g.*, Eileen T. Quigley, Inc. v. Miller Family Farms, Inc., 266 N.J. Super. 283, 295, 629 A.2d 110, 116 (App. Div. 1993).

43. We are not aware of any decision applying New York law that adopted the Morton "regulatory estoppel" approach to benefit a policyholder based on a representation made by an insurer to a state regulator. *See* Papock v. American Home Assurance Co., No. 924/95, slip op. at 16 (N.Y. Sup. Ct., Westchester Cty., Aug. 16, 1996) (declining to consider extrinsic evidence relied on by the policyholder in support of its regulatory estoppel argument); Gold Fields American Corp. v. Aetna Cas. & Sur. Co., No. 19879/89, slip op. at 20 n.14 (N.Y. Sup. Ct., New York Cty., Mar. 28, 1996) (rejecting regulatory estoppel argument).

44. *See, e.g.*, Morton, 134 N.J. at 79, 629 A.2d at 876 ("Had full disclosure been made, we would not hesitate to enforce the pollution-exclusion as written"); Kimber Petroleum Corp. v. Travelers Indem. Co., 298 N.J. Super. 286, 298-99, 689 A.2d 747, 754 (App. Div.) (applying the "absolute" pollution exclusion as written to bar coverage because Morton "does not require that we ignore the pollution exclusion clause here . . . we find no evidence that the insurance industry misled regulators"), *cert. denied*, 150 N.J. 26, 695 A.2d 669 (1997). ■