IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 29,092

UNITED NUCLEAR CORPORATION,

Defendant/Third-Party Plaintiff/Appellant,

vs.

ALLSTATE INSURANCE COMPANY,

Third-Party Defendant/Appellee.

APPEAL FROM THE 11th JUDICIAL DISTRICT COURT,
McKINLEY COUNTY CAUSE NO. CV 97-139-II
HONORABLE LOUIS E. DEPAULI, JR., DISTRICT JUDGE

ANSWER BRIEF
OF APPELLEE ALLSTATE INSURANCE COMPANY

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SUMMARY OF ARGUMENT

Over the course of many years, UNC regularly discharged various toxic substances into the air, ground, and water as part of its uranium and mercury mining operations. In this appeal UNC now tries to convince the Court that this discharge of pollutants may reasonably be characterized as "sudden." It can't be done. "Sudden," like most words in the English language, has several different dictionary definitions, but "[i]f merely applying a definition in the dictionary suffices to create ambiguity, no term would be unambiguous." *Fireman's Fund Insurance Co. v. Ex-Cell-O Corp.*, 702 F.Supp. 1317, 1324 (E.D. Mich. 1988). Dictionaries have their place, but "[d]ictionary definitions can shed only partial light on the reasonable understanding of an insured with regard to words in the context of a particular insurance policy." *Pompa v. American Family Mutual Ins. Co.*, 520 F.3d 1139, 1143 (10th Cir. 2008). The courts of this State do not determine ambiguity in the abstract but are guided by context and common sense. In this case, common sense dictates that although "sudden" may connote mere unexpectedness in some contexts, it can never be applied to a process that takes place gradually and routinely over an extended period of time. Any reasonably intelligent speaker of English understands that "sudden" and "gradual" are opposites.

UNC correctly states that extrinsic evidence is admissible to prove that a term is ambiguous, but extrinsic evidence is never admissible to contradict the terms of a contract. It cannot be introduced to prove that "sudden" means its very opposite. In any event, UNC fails to come forward with extrinsic evidence that might actually be relevant to understanding the intent of the parties. It offers nothing that bears on the knowledge and conduct of the parties at the time of contracting, their course of dealing or their course of performance. UNC focuses instead on what it calls "regulatory and drafting history," a tale in which the insurance industry – not Allstate -- successfully conspires to deceive insurance regulators all across the country about the true meaning of the term "sudden." Quite aside from its lack of basis in fact, this "history" has no relevance to the question presented. Under New Mexico law, the language of an insurance contract must be "considered not from the viewpoint of a lawyer, or a person with training in the insurance field, but from the standpoint of a reasonably intelligent layman, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words. . . ." *Rummel v. Lexington Insurance Co.*, 1997 NMSC 41, ¶ 19, 945 P.2d 970, 976 (1997) ("*Rummel I*"). Courts "will not impute to the hypothetical reasonable insured knowledge of statements about the meaning, policy goals, and purposes of an exclusion contained in coverage manuals and

other insurance industry materials, in treatises on insurance law, in law reviews, or in cases from other jurisdictions. . . ." *Computer Corner, Inc. v. Fireman's Fund Insurance Co.*, 2002 NMCA 54, ¶ 7, 46 P.3d 1264, 1267 (Ct. App. 2002).

UNC argues that even if "sudden" cannot mean "gradual," the district court violated its due process rights when it entered summary judgment *sua sponte*. The fact is, however, that UNC declined to respond in kind to Allstate's simple motion concerning the meaning of "sudden" but insisted that the court consider the entire policy and the broader issue of coverage. To that end UNC submitted a 48-page brief and over 900 pages of exhibits. UNC cannot complain now if the district court addressed the issues that it chose to raise. Further, a party objecting to a *sua sponte* entry of summary judgment has the burden of demonstrating prejudice. At a minimum the party must make an offer of proof as to what it would have shown in the trial court if it had been put on proper notice. Here UNC offers to prove that its business practices were not "bad"; but if "sudden" cannot mean "gradual," as the court determined, it makes no difference whether UNC's practices were "good" or "bad." UNC does not offer to show that any discharge of pollutants was "sudden" in the temporal sense. It also complains that the district court's order did not address its argument concerning the effect of certain Allstate

endorsements that refer to the underlying Travelers policies. UNC cannot say that it was deprived of an opportunity to make this argument in the district court or to present supporting evidence. It did both, so this is not really about due process but about the merits. The gist of UNC's argument is that an exception to an exclusion can create coverage for matters that are clearly excluded elsewhere in the policy. UNC offers no authority for this illogical proposition, and there is ample authority to the contrary.

LEGAL ARGUMENT

I. THE MOVING PARTY IS ENTITLED TO SUMMARY JUDGMENT WHERE THE NONMOVING PARTY FAILS TO ESTABLISH THE EXISTENCE OF A TRIABLE ISSUE OF MATERIAL FACT WITH ADMISSIBLE EVIDENCE.

Summary judgment is properly granted when no genuine issues of material fact exist "and the movant is entitled to judgment as a matter of law." *Hernandez v. Wells Fargo Bank Of New Mexico, N.A.*, 2006 NMCA 18, ¶ 5, 128 P.3d 496, 497 (Ct. App. 2006). If the moving party makes a prima facie showing that summary judgment is merited, "the burden shifts to the party opposing summary judgment to show specific evidentiary facts in the form of admissible evidence that require a trial on the merits." *Id.* The opponent "cannot rely on the allegations contained in its complaint or upon the argument or contention of counsel to defeat it [but] must come forward and establish with admissible evidence that a genuine issue of fact exists." *Ciup*

v. Chevron USA, Inc., 1996 NMSC 62, ¶ 7, 928 P.2d 263, 266 (1996) (citations omitted). An appellate court reviews de novo the issue of whether the movant was entitled to judgment as a matter of law. *Hernandez*, 2006 NMCA 18, ¶ 5.

II. UNC'S GRADUAL RELEASE OF POLLUTANTS AS A RESULT OF ROUTINE OPERATIONS OVER THE COURSE OF MANY YEARS CANNOT REASONABLY BE CALLED "SUDDEN."

A. The Starting Point For Interpretation Of An Insurance Agreement Is Its Plain Language As Understood By A "Hypothetical Reasonable Insured."

UNC begins its appellate argument with the assertion that "the circumstances surrounding the formation of a contract are of paramount importance" in understanding what the contract means. Brief, at 11. It then goes into a recitation of the purported "drafting and regulatory history" of the qualified pollution exclusion. But that is not how New Mexico courts go about interpreting contracts generally or insurance policies in particular. First and fundamentally, a reviewing court begins not with extrinsic evidence but with the language of the insurance agreement itself. *Rummel I*, 1997 NMSC 41, ¶¶ 20-21. Further, "[t]he language at issue should be considered not from the viewpoint of a lawyer, or a person with training in the insurance field, but from the standpoint of a reasonably intelligent layman, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the

words. . . ." *Id.*, 1997 NMSC 41, ¶ 19. "If ambiguities cannot be resolved by examining the language of the insurance policy, courts may look to extrinsic evidence. . . ." *Id.* That examination is only a potential second step in the process, however, and never the first step, as UNC would have it. The intent of the parties is to be derived, if possible, from the words they chose. That is the point of a written contract.

B. The Existence Of Two Different Dictionary Definitions Does Not Create An Ambiguity.

The fundamental flaw in UNC's argument that the term "sudden" is ambiguous is that New Mexico courts do not determine ambiguity in the abstract but by examining the context in which the terms in question are used. Dictionaries have their place, but they are "imperfect yardsticks of ambiguity." *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162, 1193-1194 (3rd Cir. 1991). Dictionaries define almost all words in several ways, and different dictionaries may often have different definitions. If the mere existence of different dictionary definitions constituted ambiguity, drafting unambiguous contractual language would be impossible without defining almost every word. *Bureau of Engraving v. Federal Insurance Co.*, 793 F.Supp. 209, 212 (D. Minn. 1992). "If merely applying a definition in the dictionary suffices to create ambiguity, no term would be unambiguous." *Fireman's Fund*, 702 F.Supp. at 1324. It is, therefore, "inappropriate to

create ambiguity by simply finding two different dictionary definitions of [a] word." *Pompa*, 520 F.3d at 1143.

Context is crucial. "The definition of any word or term, unless it has a very limited and precise meaning, must be construed in the light of the context in which it is used." *Mountain States Mutual Casualty Co. v. Northeastern New Mexico Fair Assn.*, 84 N.M. 779, 782, 508 P.2d 588, 591 (1973). Words typically do have multiple dictionary definitions and yet are completely unambiguous when used in ordinary speech. For example, in the sentence "the bride's train was made of lace," any reasonable speaker of English would understand immediately that "train" referred to the bride's dress even though it is much more frequently used to denote a line of railroad cars. Likewise, even if the term "sudden" may connote mere unexpectedness without a temporal element in some contexts (which is debatable),[1] it cannot carry that connotation in the context given here because "sudden" never

[1] It is hard to think of examples in which "sudden" truly carries no temporal connotation. With all due respect to Robert Browning, Victorian poetic diction is not a useful guide to how a modern "reasonably intelligent layman" would understand "sudden" in an insurance policy. Browning's use of the phrase "sudden little river" is memorable and "poetic" precisely because it is so atypical of ordinary speech. A few lines later in the poem Browning calls the river "petty" and "spiteful" (other attributes not often ascribed to rivers in everyday speech). In any event, "sudden" does have a temporal connotation in Browning's poem. No one would understand that Childe Roland came upon the little river gradually.

connotes both unexpectedness *and* gradualness. *See* 1-SRP-A0126 ("Gradually, a shot rang out.") We simply know as "reasonably intelligent laymen," without having to look in the dictionary, that no event taking place gradually and routinely over the course of decades can be characterized as "sudden," no matter how unexpected it may be. "Gradual" and "sudden" are opposites.

To put it another way, ambiguity is not necessarily present where a word, considered in the abstract, may have more than one meaning but only "where a contract can reasonably and fairly be subject to several different interpretations." *Rummel v. Circle K, Inc.*, 1997 NMSC 42, ¶ 10, 945 P.2d 985, 988 (1997) ("*Rummel II*") (emphasis added). The issue in this case, therefore, is not whether "sudden" may sometimes mean unexpected but whether it can ever be fair and reasonable to characterize the gradual and routine discharge of toxic substances as "sudden." It cannot.

> [W]hatever "sudden" means, it does not mean gradual. The ordinary person would never think that something which happened gradually also happened suddenly. . . . "We cannot *reasonably* call 'sudden' a process that occurs slowly and incrementally over a relatively long time." [Citation omitted.] [Judicial decisions construing the term "sudden"] illustrate what the ordinary person readily knows: gradual is the opposite of sudden. Accordingly, no *objectively* reasonable policyholder would expect the word "sudden" to allow for coverage for gradual

> pollution. "Sudden" never means *both* "unexpected and gradual."

ACL Technologies, Inc. v. Northbrook Property and Casualty Insurance Co., 17 Cal. App. 4th 1773, 1788-1789, 22 Cal. Rptr. 2d 206, 215-216 (1993).

In the context of the qualified pollution exclusion, the term "sudden and accidental" is "clear and plain, something only a lawyer's ingenuity could make ambiguous." *American Motorists Insurance Co. v. General Host Corp.*, 667 F.Supp. 1423, 1429 (D. Kan. 1987), *aff'd* 946 F.2d 1489 (10th Cir. 1991). "No use of the word 'sudden' or 'suddenly' could be consistent with an event which happened gradually or over an extended time, nor could it be consistent with an event which was anticipated or predictable." *Id.* "New Mexico courts will not strain the words to encompass meanings they do not clearly express." *Mesa Oil, Inc. v. Insurance Co. of North America*, 123 F.3d 1333, 1340 (10th Cir. 1997), citing *Gonzales v. Allstate Insurance Co.*, 122 N.M. 137 ¶ 16, 921 P.2d 944, 947-948 (1996).

C. Consideration Of Other Parts Of The Policies Does Not Suggest A Different Result.

1. <u>The definition of "occurrence" is not inconsistent with the pollution exclusion.</u>

UNC argues that the meaning of "sudden" is informed by the definition of "occurrence" -- "an accident, event or happening including continuous or repeated exposure to conditions which results, during the policy period, in

Personal Injury, Property Damage or Advertising Liability neither expected nor intended from the standpoint of the Insured." 2-SRP-A0235. According to the definition, the insuring agreement provides no coverage "if the harm was expected or intended." Brief, at p. 27. UNC contends that the pollution exclusion has a "complementary purpose" and that the "sudden and accidental" exception must be understood as restoring coverage to all releases of pollutants that are "neither expected nor intended from the standpoint of the Insured." *Id.* It argues that any other construction "renders the Policies hopelessly conflicting in purpose and scope." *Id.* But this is to say that an exclusion that takes away part of the coverage provided by the insuring agreement is inconsistent with the insuring agreement. That can't be right because that is exactly what exclusions do. "No ambiguity is created merely because an exclusion eliminates coverage from an insuring agreement." *Hartford Accident & Indem. Co. v. U.S. Fidelity & Guarantee Co.*, 962 F.2d 1484, 1491 (10th Cir. 1992). "[T]he occurrence definition and the pollution exclusion serve distinct purposes." *Id.*

It makes no difference that the definition of "occurrence" includes events that are "a continuous or repeated exposure to conditions." Under a comprehensive general liability policy, the nature of such events may run the gamut from repeated pilferage to ongoing sexual abuse to nuisance. If it is a

polluting event, however, even if the polluting event is continuous over time, coverage is excluded unless the release of pollutants is both sudden and accidental. "It is clear . . . the 'occurrence' and pollution exclusion provisions speak to different eventualities. While an accidental 'occurrence' may be gradual, the discharge of pollution has more precise requirements for coverage." *Id.*, 962 F.2d at 1490. Further, if, as UNC argues, the "sudden and accidental" exception restored coverage for all harm from pollution that was "neither expected nor intended from the standpoint of the Insured," it would be meaningless. *Hybud Equipment Corp. v. Sphere Drake Insurance Co.*, 597 N.E.2d 1096, 1102-1103 (Ohio 1992). The exception would completely cancel the exclusion.

2. The term "sudden" cannot be dismissed as mere surplusage.

UNC concedes that if "sudden" meant no more than "unexpected" in the context of the pollution exclusion it would have no independent meaning. *See Mesa Oil*, 123 F.3d at 1340 ("sudden" would be "entirely redundant when paired with the word 'accidental' if it merely meant 'unexpected'"). UNC argues that such an interpretation would be permissible because "insurance policies are filled with words which overlap and complement each other." Brief at p. 28. However, it is a fundamental rule of contract interpretation that a court will give effect, if possible, to all parts of a contract and will avoid an

interpretation that renders any term superfluous. *Truck Insurance Exchange v. Gagnon*, 2001 NMCA 92, ¶ 13, 33 P.3d 901, 904 (Ct. App. 2001). According to this rule, the term "sudden" must be interpreted as having a separate meaning from the term "accidental" and must, therefore, convey a temporal meaning of immediacy, quickness, or abruptness. *See ACL Technologies*, 17 Cal. App. 4th at 1786.

3. The 1978 endorsement/exclusion does not create coverage where it is otherwise excluded.

Despite the fact that all four Allstate policies exclude coverage for all pollution claims unless the release or dispersal of pollutants is both accidental and sudden, UNC argues that an additional exclusion that occurs only in the 1978 policy would lead a reasonable insured to expect coverage for pollution that is accidental but not necessarily sudden. The exclusion in question provides that the policy "does not apply to property damage caused by seepage, pollution or contamination unless: (a) Such seepage, pollution or contamination is caused by accident and results in property damage during the period of the policy. . . ." 2 SRP-A0256. UNC argues that this exclusion provides "express coverage" for gradual seepage and that a reasonable insured would therefore interpret the term "sudden" in the pollution exclusion as being consistent with such purported coverage. This is just a convoluted

way of saying that an exclusion can create coverage that is elsewhere clearly excluded, which is simply incorrect.

It is well established that an exception to an exclusionary clause cannot broaden or create coverage where it does not otherwise exist. *E.g.*, *Sony Computer Entertainment America, Inc. v. American Home Assurance Co.*, 532 F.3d 1007, 1017 (9th Cir. 2008). "An exclusion subtracts from coverage. Yet nothing gives the exception the affirmative status of being covered by the policy." *Columbia Casualty Co. v. Georgia and Florida Railnet, Inc.*, 542 F.3d 106, 112 (5th Cir. 2008). A "carve back" within an exclusionary provision "merely restores already existing coverage." *Sony Computer*, 532 F.3d at 1017. Even more to the point here, an exception to one exclusion does not restore coverage for a claim that is excluded elsewhere in the policy. *Columbia Casualty*, 542 F.3d. at 113; *Taylor-Morley-Simon, Inc. v. Michigan Mutual Ins. Co.*, 645 F.Supp. 596, 601 (E.D. Mo. 1986).

> Exclusions sometimes have exceptions; if a particular exclusion applies, we then look to see whether any exception to that exclusion reinstates coverage. An exception pertains only to the exclusion clause within which it appears; the applicability of an exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies.

American Family Mutual Ins. Co. v. American Girl, Inc., 673 N.W.2d 65, 73 (Wis. 2004). To hold that an exception to an exclusion "can impliedly

neutralize all other specific exclusions to coverage" would be an "anomalous result." *United National Ins. Co. v. Motiva Enterprises LLC*, 497 F.3d 445, 452-453 (5th Cir. 2007). UNC suggests that a hapless policyholder might nevertheless be confused by the endorsement and might be led to believe on that basis that "sudden" could apply to gradual events like seepage. But as the court pointed out in *Mesa Oil*, the "reasonable expectations of the insured" can be used to resolve ambiguities in policy language but cannot be used to establish an ambiguity, *Mesa Oil*, 123 F.3d at 1340; and in any event the expectation must be reasonable.

D. A Conflict Among The Courts Of Other Jurisdictions Does Not Mean That "Sudden" Is Ambiguous.

In the courts of New Mexico, "[a] split in legal authority may be indicative of an ambiguity in the policy but does not establish one." *Davis v. Farmers Insurance Co. of Arizona*, 2006 NMCA 99 ¶ 7, 142 P.3d 17, 20 (Ct. App. 2006), citing *Allgood v. Meridian Security Insurance Co.*, 836 N.E. 2d 243, 248 (Ind. 2005). The *Allgood* decision states:

> [W]e do not think that a split of authority on the meaning of similar contract terms necessarily means that these terms are ambiguous. Ambiguity will be found only if reasonable persons would differ as to the meaning and is not established simply because controversy exists. *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524, 528 (Ind. 2002). . . . [A] division of authority is only evidence of ambiguity. It does not establish conclusively that a particular clause is

> ambiguous, and we are not obliged to agree that those courts that have reached different results have read the policy correctly.

Allgood, 836 N.E. 2d at 248. This is the approach that New Mexico courts have taken in practice. For example, the Supreme Court recently recognized a split of authority as to whether "vandalism" included arson in a homeowner's policy. It found the split to be of no moment in interpreting the policy, holding that the term was clear and unambiguous and that coverage was therefore excluded. *Batteshill v. Farmers Alliance Insurance Co.*, 2006 NMSC 4, ¶¶ 9-14, 127 P.3d 1111, 1113-1115 (2006).

Courts in other jurisdictions may come to different conclusions because they follow different rules of interpretation. For example, some jurisdictions have held that the words "sudden and accidental" are ambiguous based simply on the fact that there are nontemporal dictionary definitions of the word "sudden." *E.g.*, *New Castle County*, *supra*; *Hecla Mining Co. v. New Hampshire Insurance Co.*, 811 P.2d 1083 (Colo. 1991). This is not how New Mexico courts go about determining ambiguity. Some other jurisdictions have held that "sudden" is ambiguous on the basis of purported "regulatory and drafting history." *E.g.*, *Queen City Farms, Inc. v. Central National Insurance Co. of Omaha*, 882 P.2d 703 (Wash. 1994). One court, while finding that "sudden" was not ambiguous, nevertheless ruled for the policy-

holder on the novel theory of "regulatory estoppel." *Morton International, Inc. v. General Accident Insurance Co. of America*, 629 A.2d 831 (N.J. 1993). Because New Mexico courts do not follow these approaches, the holdings of these other courts have no bearing on the issue of ambiguity in this State.

E. *Mesa Oil* Is Persuasive Authority.

UNC argues that *Mesa Oil* is not persuasive authority because the Court of Appeals did not consider the "regulatory and drafting history" of the pollution exclusion. UNC points out that the same court held that "sudden" was ambiguous under Colorado law in *Blackhawk-Central City Sanitation Dist. v. American Guarantee and Liability Insurance Co.*, 214 F.3d 1183 (10th Cir. 2000). UNC "commends" the *Blackhawk-Central City* decision but provides no analysis of it, merely suggesting again that the split of authority in the Tenth Circuit must indicate that "sudden" is ambiguous. As just noted, however, the split is the result of different courts taking different approaches to interpretation. In *Blackhawk-Central City* the Tenth Circuit was obliged to follow the law of Colorado as determined by the highest court of that state in *Hecla Mining*. In that decision, the Colorado Supreme Court held that "sudden" was ambiguous because one dictionary definition connoted mere unexpectedness without a temporal element. "Since the term 'sudden' is susceptible to more than one reasonable definition, the term is ambiguous,

and we there construe the phrase 'sudden and accidental' against the insurer. . . ." *Hecla Mining*, 811 P.2d at 1092.

Unlike Colorado, New Mexico does not determine ambiguity in the abstract. Applying New Mexico principles of interpretation, the court in *Mesa Oil* considered "sudden" in the context of the policy as a whole and as applied to the circumstances of the claim. 123 F.3d at 1340-1341. The court also reviewed the "history" materials and determined that they were "not shown to be relevant to the issue upon which summary judgment was granted." 123 F.3d at 1341 fn. 8. That, too, was consistent with the practice of New Mexico courts, which may consider "the circumstances surrounding the agreement, the conduct of the parties, and oral expressions of the parties' intentions," *Rummel I*, 1997 NMSC 41 ¶ 21, but will not impute to the insured knowledge of such things as regulatory and drafting history, learned commentary, or the decisions of other jurisdictions. *Computer Corner*, 2002 NMCA 54, ¶ 7. The *Mesa Oil* decision is not binding precedent here. The Tenth Circuit does not make law for the State of New Mexico. For what it is worth, however, the Tenth Circuit has also found that "sudden" unambiguously connotes abruptness under the laws of Utah, Oklahoma, and Kansas.[2]

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[2] *See Hartford Accident & Indemnity Co. v. U.S. Fidelity and Guarantee Co.*, 962 F.2d 1484 (10th Cir. 1992) (Utah); *Anaconda Minerals Co. v. Stoller*

(Footnote continued on next page)

The *Blackhawk-Central City* decision is the outlier, the result of which is dictated solely by the Colorado Supreme Court's ruling in *Hecla Mining*.

F. Allstate Is Not Judicially Estopped To Argue That "Sudden" Does Not Mean Gradual.

UNC argues that "Allstate cannot challenge the reasonableness of UNC's position [on the meaning of 'sudden'] because Allstate has made the same argument." Brief, at p. 22. For this proposition UNC cites a law review article that allegedly quotes a few sentences from a brief filed on behalf of Allstate in *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F. Supp. 35 (D. Mass. 1989), *vacated*, 784 F. Supp. 927 (D. Mass. 1990). This argument fails for a couple of reasons. First, obviously, an excerpt from a law review article is not admissible evidence. Second, even if the excerpt were admissible, Allstate would not be judicially estopped here. Judicial estoppel "prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Rodriguez v. La Mesilla*

(Footnote continued from previous page)
Chemical Co., 990 F.2d 1175 (10th Cir. 1993) (Utah); *Macklanburg-Duncan Co. v. Actual Casualty & Surety Co.*, 71 F.3d 1526 (10th Cir. 1995) (Oklahoma); *United States Fidelity & Guarantee Co. v. Morrison Grain Co.*, 999 F.2d 489 (10th Cir. 1993) (Kansas); *Federated Mutual Insurance Co. v. Botkin Grain Co.*, 64 F.3d 537 (10th Cir. 1995) (Kansas); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Insurance Co.*, 52 F.3d 1522 (10th Cir. 1995) (Utah).

Constr. Co., 1997 NMCA 62, ¶ 20, 943 P.2d 136, 141 (Ct. App. 1997) (emphasis added). In this case it is not clear from the snippet provided exactly what position Allstate took, nor can it be said that Allstate prevailed. Although the published opinion shows that the court did reject one insurer's argument that a certain contamination claim was not covered because it was not "sudden and accidental," the court makes no mention of Allstate's position in that part of the decision. *Id.*, 713 F. Supp. at 41. On the contrary, the court cites *Shapiro v. Public Service Mutual Insurance. Co.*, 477 N.E. 2d 146 (Mass. Ct. App. 1985), as controlling authority, which it was at the time. *Quinn*, 713 F. Supp. at 41. Shortly thereafter the Massachusetts Supreme Court overruled *Shapiro*, holding that "sudden" "has a temporal quality" and is not ambiguous. *Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc.*, 555 N.E.2d 568, 572 (Mass. 1990). At about the same time, *Quinn* was vacated. *Quinn*, 784 F. Supp. 927 (D. Mass. 1990).

III. UNC'S "REGULATORY AND DRAFTING HISTORY" IS INADMISSIBLE AND IRRELEVANT.

A. Interpretation Of The Policies Is A Matter Of Law Because UNC Failed To Offer Relevant And Admissible Evidence Of The Facts And Circumstances Surrounding Their Issuance.

Under New Mexico law, "even if the language of the contract appears to be clear and unambiguous, 'a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade,

course of dealing, and course of performance,' in order to decide whether the meaning of a term or expression contained in the agreement is actually unclear." *Mark V, Inc. v. Mellakas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993), quoting *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 508-509, 817 P.2d 238, 242-243 (1991). "If the evidence presented is so plain that no reasonable person could hold any way but one, then the court may interpret the meaning as a matter of law." *Mark V*, 114 N.M. at 781. "[I]n the event that the parties do not offer evidence of the facts and circumstances surrounding execution of the agreement and leading to conflicting interpretations as to its meaning, the court may resolve any ambiguity as a matter of law by interpreting the contract using accepted canons of contract construction and traditional rules of grammar and punctuation." *Id.*, 114 N.M. at 782, 845 P.2d at 1236.

In this case, UNC failed to submit any relevant or admissible evidence of "the facts and circumstances surrounding the execution of the agreement." It submitted no evidence with regard to the conduct of the parties or their communications pertinent to the issuance of the policies in question, no evidence of a course of dealing, course of performance, or usage of trade. Instead, UNC submitted what it refers to as the "regulatory and drafting history" of the qualified pollution exclusion, a history in which UNC fails to

show that Allstate had any part. UNC does not show that the "history" had any bearing on the understanding of the parties as they entered into the contract or that they were even aware of it. In the absence of such evidence, the district court was correct in interpreting the policy as a matter of law.

B. UNC's "Regulatory And Drafting History" Is Not Relevant Under New Mexico Law.

With regard to the interpretation of "standardized policy language," this Court has held that the "focus must be upon the objective expectations the language of the policy would create in the mind of a hypothetical reasonable insured, who, we assume, will have limited knowledge of insurance law." *Computer Corner*, 2002 NMCA 54, ¶ 7.

> Accordingly, we will not impute to the hypothetical reasonable insured knowledge of statements about the meaning, policy goals, and purposes of an exclusion contained in coverage manuals and other insurance industry materials, in treatises on insurance law, in law reviews, or in cases from other jurisdictions unless it is fair to assume that such information would be common knowledge among lay insureds.

Computer Corner, 2002 NMSC 54, ¶ 7. That is exactly what UNC is asking the Court to do in this case – to impute to the "reasonably intelligent layman" a sophisticated knowledge of the workings of the Insurance Ratings Board and the correspondence of various insurance companies with state insurance regulatory boards many years earlier. As a matter of law as well as common

sense, no such obscure knowledge can be imputed, and UNC's proffered "history" is irrelevant.

C. Extrinsic Evidence Is Inadmissible To Show That "Sudden" May Mean "Gradual."

Extrinsic evidence is inadmissible to show that "sudden" may mean "gradual." The parol evidence rule permits extrinsic evidence "to determine the circumstances under which the parties contracted and the purpose of the contract," but it "precludes the admission of prior negotiations or extrinsic evidence offered to contradict or vary the terms of a complete, integrated, written agreement." *Sanders v. FedEx Ground Package Systems, Inc.*, 2008 NMSC 40, ¶ 29 fn. 2, 188 P.3d 1200, 1208 (2008); *see also Mark V*, 114 N.M. at 782 ("no evidence should be received when its purpose or effect is to contradict or vary the agreement's terms"). The key word in the parol evidence rule is "contradict." *ACL Technologies*, 17 Cal. App. 4th at 1791.

> Whatever else extrinsic evidence may be used for, it may not be used to show that words in contracts mean the exact opposite of their ordinary meaning. . . . To allow extrinsic evidence to show that "sudden and accidental" may mean "gradual as long as unintended and unexpected" is to allow extrinsic evidence to contradict the terms of the contract by stripping from "sudden" its unambiguous meaning of "not gradual."

Id. The parol evidence rule permits evidence of circumstances surrounding the transaction to aid the court in determining whether certain terms are clear.

Memorial Medical Center, Inc. v. Tatsch Construction, Inc., 2000 NMSC 30, ¶ 16, 12 P.3d 431, 437 (2000). But "evidence contradicting a term . . . is still prohibited under New Mexico's parol evidence rule." *Id.* at ¶ 18.

D. Relevance Aside, UNC Failed To Submit Admissible Evidence.

As noted, the party opposing a motion for summary judgment "cannot rely on the allegations contained in its complaint or upon the argument or contention of counsel to defeat it. Rather, the opponent must come forward and establish with admissible evidence that a genuine issue of fact exists." *Ciup*, 1996 NMSC 62, ¶ 7 (citations omitted). In this case, although UNC refers to its purported "regulatory and drafting history" as both "well-documented and uncontroverted," it is neither. UNC failed to document its view of history with any admissible evidence, and it has ignored the fact that courts and commentators alike have found it untenable. UNC's "evidence" consists of an amalgam of (a) findings, testimony, or documents in other lawsuits as reported in judicial decisions, (b) alleged historical facts recited by UNC's experts in unsworn reports, (c) unauthenticated documents improperly submitted with those reports, and (d) unauthenticated documents improperly attached to the declaration of its counsel.[3] UNC sometimes quotes documents

[3] Allstate submitted timely written objections to UNC's evidence. *See* "Northbrook's Objections and Motion to Strike Argument and Evidence,
(Footnote continued on next page)

that are quoted in judicial decisions. It sometimes quotes expert witness reports that quote judicial decisions or that quote documents in judicial decisions. At one point UNC actually cites its own brief in the trial court, which quotes a judicial decision, which in turn quotes a document that is not in evidence. Brief, at p. 14, citing 1-SRP-A0146. All of this is hearsay.

1. Findings reported in the decisions of other courts are inadmissible hearsay.

UNC did not file a motion for judicial notice in the district court. It simply quoted freely from judicial decisions as if that were an acceptable way of establishing the facts found by those courts and authenticating the documents to which the decisions refer. It isn't. *E.g.*, *Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2nd Cir. 1992); *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 829-830 (5th Cir. 1998). A party must move for judicial notice, and the facts must be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule of Evidence 11-210(B) NMRA. None of the materials submitted by UNC qualify under this standard. UNC's citation to such cases

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etc.," SRP-A1121-1130. Specifically Allstate objected to Statement of Fact Nos. 45 through 69 (SRP-A0141-149) and Exhibits 15, 22, 23, 24, 25, 26, and 30 to the Natali Affidavit, including both expert reports in their entirety.

as *Morton International* and *Joy Technologies* cannot take the place of admissible evidence.

2. Unsworn expert reports are inadmissible.

Most of UNC's "regulatory and drafting history" is based on the reports of its two experts, Jordan Stanzler and Richard Stewart, but neither report is admissible. 5-SRP-A0777-0926. First, although UNC refers to them repeatedly as "affidavits," the reports are unsworn and are therefore hearsay without exception. The fact that the reports may have been "served" in the course of disclosures (*see* 2-SRP-A0185) does not make them admissible for the truth of the matters asserted. Second, although experts are sometimes allowed to base their opinions on otherwise inadmissible facts or data, expert testimony cannot be used as a shortcut for establishing historical facts of which the expert has no personal knowledge. *Kaczmarek v. Allied Chemical Corp.*, 836 F.2d 1055, 1061 (7th Cir. 1987). In this case both expert reports are just lengthy narratives, recitations of alleged historical facts submitted under the guise of opinion, submitted primarily if not solely for the purpose of establishing the truth of the historical facts asserted. The report of Mr. Stanzler, for example, is virtually devoid of "expert opinions" in the usual sense of the term but is simply his assertion of what various persons and entities said and did, based on his review of documents that are not in

evidence. Under Rule of Evidence 11-703, even justifiable reliance by an expert on hearsay does not make hearsay itself admissible. *Coulter v. Stewart*, 97 N.M. 616, 617, 642 P.2d 602, 603 (1982). Documents on which an expert relies do not become admissible by virtue of his or her reliance on them. An expert may not act as a "mere conduit" for the hearsay of another. *Hutchinson v. Groskin*, 927 F.2d 722, 725-726 (2nd Cir. 1991). In this case, none of the dozen documents submitted with Mr. Stanzler's report is authenticated. They are merely attached to his unsworn report, which is in turn attached to the declaration of UNC's counsel. Also, the entire report concerns Travelers, not Allstate.

E. UNC's Version Of The "Regulatory And Drafting History" Has Been Rejected By Courts And Commentators.

UNC's assertion that its "regulatory and drafting history" is "uncontroverted" is simply not true. The "history" is essentially a species of conspiracy theory – that the insurance industry determined to effect a significant reduction in coverage, that it falsely represented to state insurance regulators across the country that this change was merely a clarification of existing coverage, and that state regulators were duped *en masse* into believing it. However, it has been pointed out in a law review article that no court relying on the "regulatory and drafting history" has ever held an evidentiary hearing on this issue. The *Morton International* decision was based largely on

"learned commentary" generated by members of the plaintiffs bar. Zampino, Cavo, and Harwood, *Morton International: The Fiction of Regulatory Estoppel*, 24 Seton Hall L. Rev. 847 (1993). The authors of the article collected affidavits from forty-five former state insurance commissioners and regulatory officials, twenty of which are printed in full with the article, each attesting to the fact that he or she was not misled. Most agree that prior coverage for pollution under the term "accident" was widely understood to refer to "a 'boom' event, one that occurred quickly."[4] *Id.* at p. 895. The explanation submitted by the IRB to state insurance regulators in 1970, and on which UNC relies here, "quite appropriately stated that, since 'in most cases' pollution claims were already precluded by the occurrence definition, the exclusion clarified a lack of existing pollution coverage at the time."[5] *Id.* at p. 898.

A number of courts have subsequently held that actual history does not show that insurers misrepresented the effect of the qualified pollution

[4] Affidavit of Henry L. Lauer of the New York Insurance Department. "We in the Department, and particularly in the Rating Bureau, were not in the slightest bit misled by this filing. There is absolutely no basis in fact for former Superintendent Stewart to suggest, nor for anyone to conclude, that we were misled." *Id.* at p. 896.

[5] Affidavit of John W. Lindsay, who was State Insurance Commissioner of South Carolina from 1970 to 1972. Mr. Lindsay states: "I cannot conceive how anyone could have understood that 'sudden' in any way included a gradual process or ongoing event." *Id.*

exclusion. For example, in *Charter Oil Co. v. American Employers' Insurance Co.*, 69 F.3d 1160, 1168 (D.C. Cir. 1995), the Court of Appeals held that none of the historical evidence proffered by the policyholder (essentially the same evidence proffered here) suggested any material inconsistency between the representations made by the insurance industry in 1970 and the proposition that "sudden" cannot mean "gradual."

> [T]he classic image of pollution in that era [prior to the drafting of the qualified pollution exclusion] was the steady emission of pollutants into the air or a stream, not the kind of ground contamination that CERCLA and parallel developments made crucial. [Citation omitted.] Against this backdrop, the insurers' statement that damages from pollution tended to be expected or intended and thus exempt from coverage under standard occurrence policies seems entirely plausible. While the expansion of liability for environmental harm in subsequent decades may have greatly increased the scope of "pollution damages" and reduced the likelihood of such damages being expected or intended, these later developments cannot convert the insurers' 1970 statements into misrepresentations.

Id. at 1169. *See also American Motorists Insurance Co. v. General Host Corp.*, 120 F.R.D. 129, 133-34 (D. Kan. 1988) (evidence submitted by the policyholder actually supports the insurer's position that representations to regulators were not misleading).

It would be difficult to argue (and UNC doesn't try) that the New Mexico Insurance Department was misled by anyone. The correspondence

between the Superintendent and the Insurance Company of North America (attached without proper authentication to the declaration of UNC's counsel[6]) suggests no such thing. 5-SRP-A0944-950. INA states that damage caused by the discharge or escape of pollutants or contaminants will not be covered "unless such discharge or escape results from a sudden happening, during the policy period, neither expected nor intended from the standpoint of the insured." 5-SRP-A0944. "[C]overage would continue in cases where the pollutant or contaminant released is the result of a sudden happening which the insured did not expect or intend." 5-SRP-A0946. "In our judgment, repetitive acts . . . which result in pollution or contamination are not insurable exposures and any attempt to provide such insurance may well be contrary to public policy." 5-SRP-A0949. In short, INA told the Superintendent in unmistakable terms that it did not intend to cover "repetitive acts . . . which result in pollution" and that pollution was covered only if it was *both* unexpected *and* sudden. There is not the slightest suggestion that coverage will apply to the gradual discharge of pollutants.

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[6] The mere expedient of attaching "true and correct copies" of documents to the declaration of counsel does not provide a proper foundation for these documents (Exhibit 26) or for UNC's exhibits 24 and 25 (5-SRP-A0927-950). They are unauthenticated hearsay.

IV. "REGULATORY ESTOPPEL" DOES NOT APPLY.

UNC argues briefly that Allstate should be estopped to take the position that "sudden" has a temporal element on the ground that the "insurance industry" gained regulatory approval of the qualified pollution exclusion "by asserting that gradual pollution remained covered." In support of this theory, UNC relies principally on the decision of the New Jersey Supreme Court in *Morton International*. For the reasons just explained, the New Jersey court's decision is based on a highly questionable view of the facts. In any event, there is no basis for imposing estoppel on Allstate. UNC offers no evidence of any representations made by Allstate to anyone concerning the pollution exclusion, and there were none. It offers no evidence of any relationship whatsoever between Allstate and the Insurance Rating Board.

Even if UNC's allegations of an insurance industry conspiracy were supported by the record, its estoppel theory would still find no support in the law. "Regulatory estoppel" is not a type of collateral estoppel. UNC does not allege that there were findings by the New Mexico Insurance Department in 1970 concerning the meaning of the pollution exclusion that would now be binding on the Court. UNC's citation of *Rex, Inc. v. The Manufactured Housing Committee for the State of New Mexico*, 2003 NMCA 134, 80 P.3d 470 (Ct. App. 2003), is therefore beside the point. "Regulatory estoppel" as

adopted in *Morton International* is more analogous to judicial estoppel – the idea that it would be inequitable for a party to take one position successfully in proceedings before a government regulatory body and then take the opposite position in court proceedings. But, as noted, UNC offers no evidence that Allstate or any other insurer took an inconsistent position before the New Mexico Insurance Department or that it was successful in doing so.

Aside from *Morton International*, "[t]he regulatory estoppel argument has been rejected by virtually every other state and federal court to address the issue." *SnyderGeneral Corp. v. Great American Ins. Co.*, 928 F. Supp. 674, 682 (N.D. Tex. 1996) (citing numerous cases). The only court to follow *Morton International* in this regard is *Joy Technologies, Inc. v. Liberty Mutual Insurance Co.*, 187 W.Va. 742, 421 S.E.2d 493 (1992). The other cases cited in this section of UNC's brief do not impose "regulatory estoppel" but rather consider the "regulatory and drafting history" in determining that "sudden" is ambiguous. Brief, at pp. 38-39. Those cases are completely different from *Morton*, which actually holds that the pollution exclusion is *not* ambiguous at all but nevertheless estops the defendant insurer from relying on it.

V. ENTRY OF SUMMARY JUDGMENT DID NOT VIOLATE UNC'S DUE PROCESS RIGHTS.

A. The Judgment Must Be Upheld Because UNC Cannot Demonstrate Prejudice.

Allstate moved for a summary determination of the meaning of "sudden." The district court entered summary judgment. UNC contends that this was a violation of due process because it was not given notice of the court's intent and an opportunity to respond. This argument fails because UNC cannot show that it would have submitted additional facts sufficient to defeat the motion if the court had provided notice. A court is not barred from entering summary judgment, even when there is no motion before it, as long as there are no material factual issues in dispute. *Martinez v. Logsdon*, 104 N.M. 479, 482-483, 723 P.2d 248, 251-252 (1986); *see also Federal Deposit Insurance Corp. v. Moore*, 118 N.M. 77, 82, 879 P.2d 78, 83 (1994). The issue on appeal from such a judgment is whether the losing party sustained prejudice. "If a losing party was not prejudiced by the lack of notice, [the appellate court] will not reverse because the grant of summary judgment came *sua sponte*." *Ward v. State of Utah*, 398 F.3d 1239, 1245-1246 (10th Cir. 2005). "[I]f, notwithstanding its surprise, the party had no additional evidence to bring, it cannot plausibly argue that it was prejudiced by the lack of notice." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 140 (2nd Cir. 2000).

The district court's ruling did not come "out of the blue," as UNC contends. On the contrary, while Allstate's motion focused on the meaning of "sudden," UNC urged the court to take a broader view, arguing that the effect of the pollution exclusion could not be determined in isolation but that "the entire policy must be reviewed and harmonized," 1-SRP-A0154, and that "numerous provisions of the Northbrook policies, along with related testimony and documents, provide coverage of pollution liabilities." 1-SRP-A0150. Allstate submitted a simple 14-page motion, alleging just two "undisputed facts" and supported by just two exhibits. 1-SRP-A0060-126. UNC, on the other hand, submitted a 48-page opposition addressing pollution coverage generally. 1-SRP-A0128-176. UNC asserted 76 "undisputed facts," and submitted over 900 pages of exhibits. 1-SRP-A0188 to 6-SRP-A1092. In other words, UNC responded to Allstate's "laser shot" motion by putting all of its cards on the table and inviting the court to consider the broader issue of coverage. UNC should not be heard to complain now that the district court accepted its invitation and ruled on the issues that it chose to raise.

UNC makes two arguments in an effort to demonstrate prejudicial error. First, it says that if given an opportunity to respond it would have submitted evidence that its operational practices were not "bad," as the district court suggested, but that it followed applicable law and "best

practices." Second, it complains that the district court failed to consider its argument that Allstate's pollution exclusion was somehow cancelled out by certain references in Allstate endorsements to the underlying Travelers policies. The first point is irrelevant, however, because proof of UNC's "good" operational practices would have no effect on the court's determination that UNC's discharge of pollutants was gradual and not sudden. The second point goes to the merits and is not a due process claim at all. UNC made the very same argument about endorsements in the district court, and it submitted supporting evidence. The argument had no merit when made in the district court, and it has no merit recycled as a due process claim here.

1. Whether UNC's operational practices were good or bad is irrelevant.

Unless the term "sudden" can mean "gradual," it makes no difference whether UNC's practices were good or bad. UNC's offer to show that its business practices were sound and complied with applicable law is beside the point, and UNC has misconstrued the district court's order. The court was responding in its order to UNC's argument that since Allstate was well aware of UNC's business practices when it issued the policies it must have intended to insure any and all harm that might result from those practices. This is not a "reasonable inference," as UNC suggests, but borders on the absurd. As the court pointed out,

> if Northbrook was that familiar with UNC's business, neither Northbrook nor any other insurance company would undertake to insure such a liability of protecting UNC from what could be considered its own bad business practices. It is clear from the wording of the policies, that the policies were to protect UNC from something unforeseen that occurred "suddenly" and "accidentally" and not from years of business practices.

6-SRP-A1118. The court's point in the quoted passage is that no insurance company would have provided pollution coverage for UNC if it had known that UNC was regularly releasing pollutants into the ground and air as part of its routine business practices. The protection afforded is governed by "the wording of policies," as the court points out, and the wording makes it clear that there is no coverage for pollution unless it results from a sudden and accidental release. Pollution resulting "from years of business practice" cannot be characterized as "sudden," regardless of the insured's good practices or best intentions. The policies mean what they say.

UNC offers to show that it was "not reasonable to expect groundwater contamination from a properly constructed settling pond" or to expect that "pumping water out of a mine . . . would cause contamination of the aquifer." Brief, at p. 42.[7] Such a showing would matter only if "sudden and accidental"

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[7] For these propositions UNC cites the deposition testimony of Robert Harner, which is not in the record. Since UNC has made no attempt to

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meant "unexpected and unintended," which it does not. The crucial fact is that pumping water out of a mine and operating a settling pond were both long term business practices that resulted in the release and dispersal of pollutants gradually, not suddenly, as the exception to the pollution exclusion requires. UNC also cites the testimony of Allstate witness Bridget Gould to the effect that "she had never 'independently' seen anything to indicate that UNC's mining environmental liabilities were anything other than an 'accident.'" Brief, at p. 41. Again, even if Ms. Gould had so testified (and she did not), it would be relevant only if "sudden and accidental" meant "unexpected and unintended."[8] The exception to the pollution exclusion applies only if the release and dispersal of pollutants is both "accidental" and "sudden." If "sudden" cannot mean "gradual," remand would be futile. It is clear from UNC's brief that it does not intend to offer proof that its release of pollutants was "sudden" but only that it was "accidental."[9] "Absent some

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supplement the record, the testimony is not before the Court and must be disregarded. The testimony lacks foundation in any event.

[8] Bridget Gould actually testified that "we are in discovery, and we are trying to find what the actual facts are" but "I haven't seen anything to indicate that there was an accident." 4-SRP-A0611-612 at 73:19-74:8. "I don't have any facts that [the pollution was] caused by an accident." *Id.*

[9] It is Allstate's burden to demonstrate that the pollution exclusion applies, but it is UNC's burden to prove that the "sudden and accidental" exception applies. The "overwhelming weight of authority now places the burden of
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indication that [a party] might otherwise bring forward evidence that would affect the court's summary judgment determination, failure to provide an opportunity to respond is not reversible error." *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2nd Cir. 2000).

2. UNC already presented its argument about the relevance of the Travelers policies in the district court.

UNC complains that the district court "did not consider the language in the underlying Travelers policies, and other relevant evidence pertaining to those policies." Brief at pp. 42-43. But UNC does not complain that it was deprived of an opportunity to raise this issue in the lower court due to lack of notice. UNC did raise the issue, in fact, and it submitted evidence. *See* 1-SRP-A0152-154; 2-SRP-A0186; 6-SRP-A1084. There is no due process violation. UNC's complaint on appeal is that the court did not expressly address the issue in its order, which is an entirely different matter.

UNC refers the Court to certain exclusions provided in endorsements to the 1977 and 1978 Allstate policies. 2-SRP-A0226, 2-SRP-A0268. These two identical exclusions provide *inter alia* in "Part A" that the "insurance shall not apply to . . . (1) The cost of removing, nullifying or cleaning up

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proving the 'sudden and accidental' exception on the insured." *See Aydin Corp. v. First State Insurance Co.*, 18 Cal. 4th 1183, 1190 , 959 P.2d 1213, 1216 (1998) (collecting cases).

seeping, polluting, or contaminating substances." (Emphasis added.) Understandably, UNC does not mention this provision, which, on its face, would exclude coverage for all of the claims at issue here, even without regard to the meaning of "sudden and accidental." Instead, UNC calls the Court's attention to a provision in "Part B" that provides: "Except insofar as coverage is available to the Insured in the underlying insurance at the limits specified in the schedule, this policy shall not apply to . . . (1) Injury to or destruction of 'Underground resources and equipment hazard' as defined below, except as excluded by (A4) above. . . ." The term "underground resources" is defined as including "property damage to . . . oil, gas, water or other mineral substances which have not yet been reduced to physical possession above the surface of the earth. . . ." In other words, according to the endorsement, the Allstate policies exclude coverage for damage to "underground resources," but an exception is made if such coverage is available pursuant to the underlying policy.

UNC contends that coverage for "underground resources," specifically "water," is available pursuant to the underlying Travelers policy, but it did not offer any evidence to that effect when it made the same argument in the district court, and it proffers none here. Instead of submitting copies of the Travelers policies, UNC offers a page from a 1981 Travelers "Underwriting

Pricing Guide," 6-SRP-A1084, and hearsay from an expert's unsworn report.[10] 5-SRP-A0779. Both documents, if admissible, would suggest that the Travelers policies provided coverage for accidental releases of pollutants without regard to "suddenness"; but that would be irrelevant, even if true, because it does not tend to show that the Travelers policies cover damage to "underground resources," a different issue.

It would be futile to give UNC a second chance to present this argument to the district court in any event because, as already noted above, exceptions to exclusions do not create coverage where it does not otherwise exist. The policies exclude coverage for the cleanup of pollution at least three different ways. First, the endorsement in question unambiguously provides that the "insurance shall not apply to . . . (1) The cost of removing, nullifying or cleaning up seeping, polluting, or contaminating substances." Second, the pollution exclusion found in the body of the policy excludes coverage for all pollution unless the release of pollutants is sudden and accidental. Third, coverage for pollution of water (the only "underground resource" that could be at issue here) is absolutely excluded by Endorsement 3 to the 1977 policy

[10] Both documents lack foundation and are hearsay without exception. UNC does not explain why it submitted this inadmissible, secondary evidence rather than copies of the Travelers policies themselves when it made this argument in the district court.

and Endorsement 4 to the 1978 policy. 2-SRP-A0225, 2-SRP-A0267. Thus, even if harm to "underground resources" may be covered in some instances, it is not covered under the Allstate policies if it is caused by pollutants. As a matter of law, an exception to one exclusion does not restore coverage for a claim that is excluded elsewhere in the policy. *Columbia Casualty*, 542 F.3d. at 113; *United National Ins. Co.*, 497 F.3d at 452-453. *See* Section II-B-3, *supra*. Considering the contract as a whole, no reasonable insured would expect coverage for liability arising out of the gradual discharge of pollutants into the water table.

UNC further complains about a manuscript endorsement that was attached to the 1979 and 1980 Allstate policies. 2-SRP-A0302, 2-SRP-A0342. Again, the two endorsements seem to make reference to the underlying Travelers policies. They provide that "insofar as the 'Liabilities' listed below are covered by valid and collectable underlying insurance as set out in the schedule of underlying policies, . . . this policy subject to its limit of liability shall apply as excess." The "Liabilities" listed include the "D hazard," which includes property damage to "oil, gas, water or other mineral substances which have not been reduced to physical possession above the surface of the earth." According to UNC, the existence of these endorsements demonstrates a triable issue of material fact with respect to coverage under

the 1979 and 1980 policies. The problem, again, is that UNC made the very same argument in the trial court but failed to submit admissible evidence to support it. *See* 1-SRP-A0153-154. UNC failed to submit copies of the Travelers policies. The documents that it did submit were inadmissible, and even if they had been admissible they would not have shown that the Travelers policies covered the "D hazard" but only that they covered accidental releases of pollutants without regard to their suddenness, which is not the issue.

The more fundamental problem is that UNC ignores crucial terms in the endorsement. UNC simply omits the part that it doesn't like, namely:

> In the event of reduction or exhaustion of the aggregate limits of liability under said underlying limits by reason of losses paid thereunder, this policy subject to all of its terms and conditions, shall
>
> 1. In the event of reduction pay the excess of the reduced underlying limit or,
>
> 2. In the event of exhaustion continue in force as underlying insurance.

2-SRP-A0302, 2-SRP-A0342 (emphasis added). This is exactly what Allstate's witness said when asked about the meaning of the endorsement: that it was a "follow form" endorsement and that the Allstate policy would therefore cover the "D hazard," if Travelers covered it, but "subject to the terms and conditions of the NESCO [Allstate] policy. . . ." Deposition of

Jung at p. 125:9-22, 4-SRP-A0684. No amount of proof on remand concerning the terms of the underlying policies will change that fact that coverage is still subject to all of the terms and conditions of the Allstate policies, including the pollution exclusion. Remand would be futile.

B. There Is No Duty To Defend.

UNC lastly contends that the district court's entry of summary judgment deprived it of a fair opportunity to present argument and evidence that Allstate owed a duty to provide a defense. This issue became moot when the court determined that Allstate had no duty to indemnify UNC. In *Mesa Oil* the Tenth Circuit held that the insurer had not breached its duty to defend because the terms of the pollution exclusion were unambiguous and that the claim was therefore not "potentially within the scope of its insurance coverage." *Mesa Oil*, 123 F.3d at 1342. No duty to defend arises when the claim "clearly falls" outside the coverage provided by the policy. *Bernalillo County Deputy Sheriff's Ass'n. v. County of Bernalillo*, 114 N.M. 695, 697, 845 P.2d 789, 791 (1992). UNC contends, however, that even if there is no duty to defend going forward, Allstate had a duty to defend at least up to the point when the district court made its determination. For a number of reasons, this contention fails.

As an excess carrier, Allstate would ordinarily have no duty to defend UNC in the first instance. In this case, however, UNC alleges that Allstate's policies are "umbrella" policies and that they provide broader coverage in some respects than the underlying policies. Where it is shown that coverage is broader, the "Supplemental Defense" duty may apply:

> It is agreed that with respect to any Occurrence covered only by the terms and conditions of this policy except for the amount of the retained limit the Company shall (A) defend any suit against the insured alleging such injury, sickness, disease or destruction seeking damages on account thereof. . . .

1-SRP-A0087 (emphasis added). In order for this duty to arise, there must be (a) a suit seeking damages (b) arising from an occurrence that is (c) covered by the Allstate policy and (d) not covered by the underlying Travelers policy. According to UNC, the Travelers policy excludes coverage for damage to property in the "care, custody, or control" of UNC and that Travelers, on that basis, contends that it is not required to defend claims involving direct damage to UNC's leased mine sites. UNC contends that Allstate has "a duty to defend claims of that sort because the 1977 Policy is broader; while it excludes property "owned by UNC, it contains no 'care, custody or control' exclusion applicable to real property." Brief, at p. 47, citing 2-SPR-A0222 (Endorsement #6 to the 1977 policy).

UNC's argument fails, first, because it has made no real attempt to show that the Travelers policies in question say what it claims they say. UNC did not put copies of the Travelers policies into the record, and its only citations in that regard are to (a) the unsworn report of expert Stewart that talks about a 1965 Travelers policy, 5-SRP-A0897, and (b) the face page of a Travelers pleading that is not part of the record in this appeal. 2-SRP-L0618 in Cause No. 29,379. Further, UNC has not included the administrative letters on which it relies in the Supplement Record Proper. UNC offers no excuse for these failures. At this point, on appeal, it is certainly not a "notice and opportunity" issue. It is UNC's burden on appeal to demonstrate prejudicial error. It has not met its burden.

Second, while it is true that the 1977 Allstate policy on which UNC relies does not contain a "care, custody or control" provision that applies to real property, it does contain an exclusion for "the cost of removing, nullifying or cleaning up seeping, polluting or contaminating substances." 2-SRP-A0226 (Endorsement #2). It also contains an absolute exclusion for water pollution. 2-SRP-A0225. Even if the various administrative letters did not indicate on their face whether the contamination at issue was the result of a sudden and accidental discharge, they did obviously indicate, and everyone understood, that the purpose of the administrative action was "removing,

nullifying, or cleaning up . . . polluting or contaminating substances." UNC fails to explain why these exclusions would not apply.

Third, although an insurer is required to provide a defense under New Mexico law when it cannot be determined from the complaint whether the claimant alleges facts potentially within the coverage of the policy, *Foundation Reserve Ins. Co. v. Mullenix*, 97 N.M. 618, 620, 642 P.2d 604, 605-606 (1982), UNC would stretch this doctrine to an extreme. It is one thing when the complaint is too vague to make a determination that a "sudden and accidental" release of pollutants is alleged. It is quite another when the insured *knows* that no such event occurred and never represents otherwise to the insurer. UNC does not contend now and has never contended that the release of pollutants was anything other than the result of its normal business operations over a course of years. The benefit of the doubt goes to the insured when the complaint is vague; but that should not be the case when there is, in fact, no doubt. The "four corners" rule that applies to complaints in lawsuits should not apply to administrative letters, which obviously do not adhere to the requirements of pleading and often do not make the sort of allegations that would allow an insurer to determine whether there is a potential for coverage.

Finally, the Supplemental Defense duty applies only to the defense of a "suit . . . seeking damages." None of the administrative proceedings for which UNC claims the right to a defense is a suit for damages. "Suit" is a "generic term . . . referring to any proceeding by one person or persons against another or others in a court of law, in which the plaintiff pursues, in such court, the remedy which the law affords him. . . ." *Black's Law Dictionary* (6th ed. 1990), p. 1434 (emphasis added). The California Supreme Court in *Foster-Gardner, Inc. v. National Union Fire Insurance Co.*, 18 Cal. 4th 857, 959 P.2d 265 (Cal. 1998), held that the term "suit" was unambiguous and did not include letters from environmental agencies, no matter how coercive in tone or effect. *See id.*, 18 Cal. 4th at 870 fn. 6 (collecting a number of cases to the same effect from other jurisdictions). The Court rejected the argument that an EPA proceeding was or could be the "functional equivalent" of a suit, holding that an unambiguous term cannot be stretched beyond its plain meaning. *Id.*, 18 Cal. 4th at 882-883. The Court also rejected various public policy arguments, holding that it was not free to rewrite the contract to serve public policy. *Id.*, 18 Cal. 4th at 887-888. Several state courts have disagreed with the *Foster-Gardner* decision, but it remains an open question in New Mexico whether "suit" can be stretched to include administrative letters, notices, and demands. Allstate submits that *Foster-*

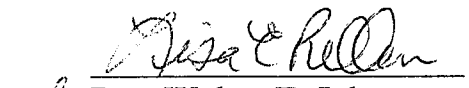
Gardner should be followed by this Court and that "suit" should be given its plain meaning.

CONCLUSION

For the reasons stated, UNC has failed to sustain its burden of demonstrating prejudicial error. The judgment should be affirmed.

Respectfully submitted,

NIXON PEABODY L.L.P.



By: Walter T. Johnson

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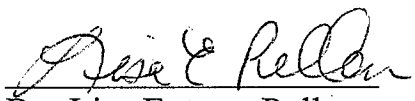

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellee Allstate's Answer Brief was served by U.S. Mail on this 28th day of August, 2009 on the following:

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CERTIFICATE OF COMPLIANCE WITH RULE 12-231F

Pursuant to NMRA 12-213G, I certify that this brief is proportionately spaced in Times New Roman typeface, the point size is 14, and the word count is 10,917, exclusive of tables, signature blocks and certificates.

Lisa Entress Pullen