IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

UNITED NUCLEAR CORPORATION,

Defendant/Third-Party Plaintiff/Appellant,

ORIGINAL

v.

No. 29,092

ALLSTATE INSURANCE COMPANY,

Third-Party Defendant/Appellee.

Appeal from the Eleventh Judicial District Court, McKinley County, New Mexico
The Honorable Louis E. Depauli, Jr., Judge

BRIEF *AMICUS CURIAE* OF TRAVELERS CASUALTY AND SURETY COMPANY IN SUPPORT OF APPELLEE

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I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

Travelers Casualty and Surety Company ("Travelers Casualty")[1] is a third-party defendant in the underlying case, as is appellee Allstate Insurance Company ("Allstate").[2] Travelers Casualty appears as an *amicus curiae* regarding construction of the phrase "sudden and accidental" in the pollution exclusion in insurance policies issued by Allstate to appellant United Nuclear Corporation ("UNC"). The district court interpreted the phrase to exclude coverage of alleged pollution damage caused over time by UNC's mining routine operations.

Travelers Casualty has an interest in the outcome of this appeal. It issued an excess indemnity policy to UNC containing a "sudden and accidental" pollution exclusion worded identically in relevant part to the exclusion in the Allstate policies. The Travelers Casualty Policy's pollution exclusion reads, in pertinent part:

> It is agreed that the policy does not apply to personal 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.

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[1] Travelers Casualty was formerly known as The Aetna Casualty and Surety Company.

[2] Allstate is successor-in-interest to Northbrook Excess and Surplus Insurance Company, formerly known as Northbrook Insurance Company.

Accordingly, the decision in this appeal may affect the ultimate determination of UNC's claims against Travelers Casualty.

II. SUMMARY OF ARGUMENT

While UNC's use of a Robert Browning pre-civil war era poem is a unique beginning to an appellate brief, it establishes only one fact. If Browning had authored the policy provision in issue, it would have been written in six stanza iambic pentameter. Fortunately he did not.

The issue for this court is straightforward: in the context of the phrase "sudden and accidental" in a pollution exclusion in a general liability insurance policy, what is the meaning of "sudden"? A majority of courts considering the issue, including the United States Tenth Circuit Court of Appeals applying New Mexico law, have concluded that the word "sudden" is unambiguous and should be given its plain and ordinary meaning of "quick" or "abrupt."

The temporal component of the word "sudden" is obvious in the context of the provision containing it, "sudden and accidental." To hold that "sudden" means "unexpected," as urged by Appellant, would render the provisions to read "unexpected and accidental." Because a plain and ordinary meaning of "accidental" is "unexpected," the phrase then becomes "unexpected and unexpected." That is a senseless redundancy which is avoided by applying the contextual meaning of "abrupt" or "quick" to "sudden." The phrase then becomes

sensible -- "abrupt and unexpected." That phrase is then applied to the alleged polluting activities of Appellant to determine if they are excluded from coverage. The court below correctly determined that the exclusion barred coverage for UNC's alleged polluting activities.

In an effort to distract from the plain and common sense reading of the exclusion, UNC argues that the court should consider statements by the insurance industry (so called "drafting history," "regulatory history" or "regulatory estoppel") regarding the "sudden and accidental" pollution exclusion when interpreting that provision in the Allstate policies. UNC's argument is an unnecessary diversion for the court and misses the mark. If an ambiguity in an insurance policy cannot be resolved by examining the language of the policy, New Mexico courts may look to extrinsic evidence of the circumstances of the execution of the agreement. None of the "evidence" offered by UNC relates to the formation of the contracts between UNC and Allstate. The statements attributed to insurance associations about the pollution exclusion were not made to New Mexico insurance authorities, and UNC does not assert that those statements were made to it in connection with its purchase of the Allstate policies. Contrary to an individual insurance purchaser who may not negotiate terms in insurance policies, UNC had a large nationwide insurance broker who was actively involved in the UNC insurance procurement program. Because UNC's "regulatory history" documents

are unrelated to the circumstances surrounding the formation of the Allstate policies, Appellant's regulatory estoppel argument is simply not relevant.

III. BACKGROUND

UNC's investigation of alleged pollution at certain of its former mine sites dates back to the State of New Mexico's Energy, Minerals, and Natural Resources Department, Mining and Minerals Division ("MMD") issuance of three notices of violation under New Mexico's 1993 Mining Act, NMSA 1978, §§ 69-36-1 to -20 (1993), as amended (the "Mining Act"), to UNC in 1995 relating to mine closure and reclamation. UNC challenged the applicability of the Mining Act by suing the MMD. *See N.M. Mining Comm'n v. United Nuclear Corp.*, 2002-NMCA-108, 133 N. M. 8, 57 P. 3d 862. Ultimately, this Court determined that the Mining Act was applicable to three of UNC's former New Mexico mine sites. *Id.* Since that time, New Mexico state regulators have been involved in investigations of environmental conditions at three former New Mexico uranium mines, St. Anthony, Section 27, and Northeast Churchrock ("NECR"), and the United States Forest Service has investigated conditions at a fourth former New Mexico mine, San Mateo, as well as a former a mercury mine site, Pine Mountain, in Arizona (collectively, the "Mine Sites"). Recently, the United States Environmental Protection Agency, with the assistance of the Navajo Nation, assumed the lead role in investigating the environmental conditions at the NECR site.

The various administrative agencies claim that UNC's routine business practices at the Mine Sites purportedly contaminated air, soil, and water at the Mine Sites. The identified routine business practices include: (1) excavating a mine shaft and thus exposing the ore body to air and groundwater; (2) leaving large piles of non-economic material removed from the mines on the surface; and (3) discharging water removed from the mines to the Mine Sites over multi-year periods of time. (*See* UNC's Br. in Chief ("UNC Br.") at 6-7. None of the claimed polluting activities was quick or abrupt in nature. UNC does not claim otherwise. Rather the alleged polluting activities were deliberate and normal mining operations which occurred over many years.

The underlying case was initially filed by Santa Fe Pacific Gold Corporation ("SFPG"), UNC's lessor at its NECR mine site near Gallup, New Mexico, alleging breach of lease claims. [3] UNC then brought suit against a number of its insurers, including Allstate and Travelers Casualty, as third-party defendants, seeking a declaratory judgment for insurance coverage for the administrative activities at the Mine Sites, including mine reclamation and closure activities. This appeal stems from a ruling by the district court on Allstate's summary judgment motion concerning the meaning of "sudden" in the context of the "sudden and accidental" pollution exclusion in the Allstate policies.

[3] In 1997, General Electric Company ("GE") acquired UNC.

IV. ARGUMENT

The district court correctly concluded in its Partial Summary Judgment on the "Sudden and Accidental" Pollution Exclusion that a "sudden and accidental" discharge of pollutants must be both abrupt and unexpected. (6 SRP A1119.) In construing the policy provision at issue in this case, the district court found the decision of the Tenth Circuit in *Mesa Oil, Inc. v. Insurance Co. of North America*, 123 F.3d 1333 (10th Cir. 1997), to be persuasive. (6 SRP A1119.) There the Tenth Circuit considered the proper construction under New Mexico law of a pollution exclusion identical to Allstate's policy term. It held that under the law of New Mexico, the provision should be interpreted to give effect to its plain meaning, such that pollution "must occur quickly or abruptly" before policy coverage will arise. *Id.* at 1340.

The district court's reliance on *Mesa Oil* was appropriate. As the Tenth Circuit recognized, the result in *Mesa Oil* is supported by a substantial number of well-reasoned decisions by other courts and follows the principles of contract construction regularly employed by New Mexico courts in interpreting insurance policies. Furthermore, the district court was not distracted by the regulatory estoppel arguments advanced by UNC that sought to divert attention from the exclusion's plain language and context by pointing to extraneous and irrelevant factors.

A. A Majority of Courts Has Held that "Sudden" as used in the "Sudden and Accidental" Pollution Exclusion Has a Temporal Meaning.

In *Mesa Oil*, the Tenth Circuit applied New Mexico law to construe a "sudden and accidental" pollution exclusion identical to the exclusion at issue here. The Tenth Circuit recognized that New Mexico courts had not addressed the issue of the interpretation of the "sudden and accidental" pollution exclusion. *Mesa Oil*, 123 F.3d at 1339. In affirming the lower court's grant of summary judgment in favor of the insurer, the Tenth Circuit initially noted that a number of courts have (1) focused on the plain meaning of the word "sudden" in concluding that the term unambiguously includes a temporal component and (2) found that the "sudden and accidental" exemption to the pollution exclusion applies to pollution that occurs abruptly. *See, e.g., Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1528-29 (10th Cir. 1995); *Federated Mut. Ins. Co. v. Botkin Grain Co.*, 64 F.3d 537, 541 (10th Cir. 1995); *Hartford Accident & Indem. Co. v. U.S. Fid. and Guar. Co.*, 962 F.2d 1484, 1489 (10th Cir. 1992); *A. Johnson & Co. v. Aetna Cas. & Sur. Co.*, 933 F.2d 66, 72-73 (1st Cir. 1991) (applying Maine law); *Ray Indus. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 768 (6th Cir. 1992) (applying Michigan law); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 702 F. Supp. 1317, 1326-27 (E.D. Mich. 1988)(noting increasing trend is for courts to hold that "sudden" includes a temporal aspect); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997); *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins.*

Corp., 636 So. 2d 700, 704 (Fla. 1993); *N. Pac. Ins. Co. v. Mai*, 939 P.2d 570, 572 (Idaho 1997); *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co.*, 568 N.W.2d 815, 819 (Iowa 1997); *Am. Motorists Ins. Co. v. ARTRA Group Inc.*, 659 A.2d 1295, 1310-11 (Md. 1995) ("We agree with the numerous cases holding that allegations of longstanding business activities resulting in pollution do not constitute allegations of 'sudden and accidental' pollution."); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 135 (Utah 1997); *Sinclair Oil Corp. v. Republic Ins. Co.*, 929 P.2d 535, 543 (Wyo. 1996); *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 555 N.E.2d 568, 571-72 (Mass. 1990); *Aetna Cas. & Sur. Co. v. Gen. Dynamics Corp.*, 968 F.2d 707, 710 (8th Cir. 1992) (applying Missouri law); *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 597 N.E.2d 1096, 1102 (Ohio 1992); *Kerr-McGee Corp. v. Admiral Ins. Co.*, 905 P.2d 760, 763 (Okla. 1995); *Upjohn Co. v. N.H. Ins. Co.*, 476 N. W.2d 392, 397 (Mich. 1991); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 153-54 (7th Cir. 1994); *Aeroquip Corp. v. Aetna Cas. & Sur. Co.*, 26 F.3d 893, 894 (9th Cir. 1994) (per curiam).

As stated by one court, "whatever [the word] 'sudden' means, it does not mean gradual. The ordinary person would never think that something which happened gradually also happened suddenly." *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 215 (Ct. App. 1993); *accord*

Technicon Elecs. Corp. v Am. Home Assurance Co., 533 N.Y.S.2d 91, 98 (N.Y.A.D. 1988) ("[N]o use of the word 'sudden' . . . could be consistent with an event which happened gradually."), *aff'd*, 542 N.E.2d 1048 (N.Y. 1989).

Recognizing that there were courts who construed "sudden" differently, the Tenth Circuit stated "in *Quaker State*, we recognized that the trend in this area is to read 'sudden and accidental' as requiring that pollution must occur quickly and abruptly to be covered by the exemption." *Mesa Oil*, 123 F.3d at 1339. The *Mesa Oil* decision is consistent with the increasing number of cases in which the pollution exclusion has been construed to preclude coverage for gradual pollution. *See, e.g., Guar. Nat'l Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 195 (5th Cir. 1998)("[R]epeated, regular discharges over numerous years in the usual course of business" is not sudden and accidental pollution.); *Amer. States Ins. Co. v. Sacramento Plating, Inc.*, No. 94-16905, 1996 WL 622744, at *2 (9th Cir. Oct. 25, 1996)(unpublished), ("Gradual pollution is unambiguously excluded from coverage"); *Dutton-Lainson Co. v. Continental Ins. Co.*, No. 1018755, 2004 WL 5452983 (Neb. Fourth Dist. Ct. Oct. 6, 2004) (citing sixteen state supreme court decisions and four appellate court decisions in which courts have ruled that "sudden" has a temporal connotation), *aff'd*, 716 N.W.2d 87 (Neb. 2006); *Travelers Cas. and Sur. Co. v. Ribi ImmunoChem Research, Inc.*, 108 P.3d 469, 476 (Mont. 2005)(finding the "sudden and accidental" exception requires an abrupt

event); *Buell Indus., Inc. v. Greater N.Y. Mut. Ins. Co.*, 791 A.2d 489, 503 (Conn. 2002) (holding that the "release of pollutants over an extended period of time cannot qualify as 'sudden'"); *Sokolski v. Am. W. Ins. Co.*, 980 P.2d 1043 (Mont. 1999); *Gulf Metals Indus., Inc. v. Chicago Ins. Co.*, 993 S.W.2d. 800, 806-07 (Tex. App. 1999); *see also* 1 B. Ostrager & T. Newman, *Handbook on Insurance Coverage Disputes* § 10.02(c) (14th ed. 2008) (cases cited therein).

Further, to remove the temporal element from "sudden" would thwart the purpose of the exclusion. As noted by one court, if the exclusion is not enforced, "insureds will be tempted (at the margin) to engage in harm-generating (or reckless) behavior." *Charter Oil Co. v. Am. Employers' Ins. Co.*, 69 F.3d 1160, 1166 (D.C. Cir. 1995). In contrast, enforcement of the exclusion "encourages diligence by placing the financial burden for gradual or long-term pollution upon the entity best able to foresee and stop it." *Hybud,* 597 N.E.2d at 1103. The public has a stake in preserving disincentives for pollution.

As correctly analyzed by the district court in this case and consistent with the decisions of courts nationwide, this court should find that the word "sudden," as contained in the pollution exclusion, has a temporal element. Under Appellant's theory, even years of gradual and continuous discharges are "sudden" so long as they are "unexpected and unintended." The plain and common sense definition of

"sudden" does not include the words "gradual" or "routine." UNC seeks not to interpret the pollution exclusion, but to rewrite it.

B. New Mexico Law Would Give Effect to the Plain Temporal Meaning of a "Sudden" Discharge, Particularly in the Context of the "Sudden and Accidental" Pollution Exclusion.

The Tenth Circuit correctly applied the contract construction principles of New Mexico law in deciding *Mesa Oil*. Under New Mexico law, an ambiguity does not exist merely because the parties disagree as to the meaning of a particular word. *Levenson v. Mobley,* 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). Language which is not reasonably susceptible to different interpretations is to be given its plain meaning. *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). "Undefined words in an insurance policy are given their plain and ordinary meaning if that can reasonably be ascertained." *Grisham v. Allstate Ins. Co.,* 1999-NMCA-153, ¶ 8, 128 N.M. 340, 992 P.2d; *see Battishill v. Farmers Alliance Ins. Co.*, 2006-NMSC-004, 139 N.M. 24, 127 P.3d 1111. A court will not find an ambiguity when the term is "clear and unambiguous and capable of resolution within the plain meaning of the language employed, especially when placed in context." *Grisham*, 1999-NMCA-153, ¶ 13.

In determining how New Mexico would analyze the issue, the Tenth Circuit in *Mesa Oil* concluded: "First, a New Mexico court would likely honor the plain meaning of the word 'sudden' and conclude that the term encompasses a temporal

component, and thus that pollution must occur quickly or abruptly before the exemption will apply." 123 F.3d at 1340. The court further stated that under New Mexico law: "When an insurance policy is unambiguous, New Mexico courts 'will not strain the words to encompass meanings they do not clearly express.' The word 'sudden' clearly expresses a meaning of quickness or abruptness." *Id.* (quoting *Gonzales v. Allstate Ins. Co.,* 1996-NMSC-041, ¶ 16, 122 N.M. 137, 921 P.2d 944).

The Tenth Circuit considered the language of the policy, as directed by New Mexico contract construction law, in determining that "sudden" is not ambiguous and means "quick" or "abrupt." If provisions appear even potentially ambiguous, New Mexico courts first look at the language of the insurance policy. *Rummel v. Lexington Insurance Co.,* 1997-NMSC-041, ¶ 20, 123 N.M. 752, 945 P.2d 970. A court should only look "to other sections in a policy for clarification, not in an attempt to create an ambiguity where none exists." *Battishill*, 2006-NMSC-004, ¶ 17. While the general rule in New Mexico is that an ambiguous insurance policy is construed liberally in favor of the insured, "[r]esort will not be made to a strained construction for the purpose of creating an ambiguity when no ambiguity in fact exists." *Id.* (internal quotation marks & citation omitted).

One key to construing policy language used by New Mexico courts is to consider the words in context. For instance, the court in *Rummel* examined the

insurance contract by reviewing "provisions" rather than individual words. *Rummel*, 1997-NMSC-041, ¶ 20. Thus in construing "sudden" a court should first look at its connected word "accidental."

UNC has not contested the district court's finding that "accidental" has a plain and unambiguous meaning of "unintended," "unexpected," or by chance. Thus, in order not to be superfluous, "sudden" must mean something more than "unexpected" or "unintended." "The word 'sudden' clearly expresses a meaning of quickness or abruptness, particularly in light of the fact that it would be entirely redundant when paired with the word 'accidental' if it merely meant 'unexpected.'" *Mesa Oil*, 123 F.3d at 1340. If the meaning of "sudden" ("unexpected") as advocated by Appellant were adopted, the phrase would be "unexpected and unexpected." That is a senseless and absurd result. New Mexico courts reject a construction that results in senseless redundancy. *See Rummel*, 1997-NMSC-041, ¶ 27. "The rules of contract construction prohibit such an absurd interpretation." *Id.* When construed in context, it is obvious that "the word 'sudden' would be superfluous if it did not impose a temporal requirement on the exemption." *Mesa Oil*, 123 F.3d at 1339.

The Connecticut Supreme Court explained and applied the contextual interpretation of "sudden" and "accidental" in *Buell Industries, Inc. v. Greater New York Mutual Insurance Co,* 791 A.2d 489 (Conn. 2002). The court held that the

term "sudden" in the standard pollution exclusion requires that the release in question occur abruptly or within a short amount of time. *Id.* at 549. In considering the context of the language, the court determined:

> In the context of these policies, it makes sense to include, within the definition of sudden, the temporally abrupt quality of the word. This becomes evident through the juxtaposition of the word 'sudden' with the word 'accidental' in the exception to the pollution exclusion. We agree with the statement by other appellate courts: 'The very use of the words sudden and accidental . . . reveal a clear intent to define the words differently, stating two separate requirements. Reading sudden in its context, *i.e.* joined by the word and to the word [accident], the inescapable conclusion is that sudden, even if including the concept of unexpectedness, also adds an additional element because unexpectedness is already expressed by accidental. This additional element is the temporal meaning of sudden, *i.e.* abruptness or brevity. To define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage.'

Id. at 540-41 (quoting *Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co.*, 76 F.3d 89, 92 (5th Cir. 1996)); *see also SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 680 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998). Particularly "[g]iven that the phrase 'sudden and accidental' consists of only two words, there is all the more reason to conclude that sudden was intended to convey some independent meaning not subsumed by 'accidental'." *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 214 (Cal. Ct. App. 1993).

The New Mexico rules of contract construction, in addition to the well reasoned decisions of other courts across the country direct that "sudden" be

construed in the context of the phrase containing it -- "sudden and accidental." UNC's attempt to create ambiguity fall short in the face of the plain and obvious meaning of the phrase. When properly construed in the context of the pollution exclusion, the word "sudden" means, as the district court correctly held, "quick" or "abrupt."

C. The "Extrinsic Evidence" Presented by UNC is Irrelevant.

UNC attempts to distract the court by pointing to statements made by insurance industry organizations, which it characterizes as "extrinsic evidence." The materials submitted by UNC, however, bear no relation to the formation of the contracts between UNC and Allstate and are not "extrinsic evidence" requiring examination by the court.

If the language of an insurance policy does not resolve the question of ambiguity, New Mexico courts may look to extrinsic evidence of the circumstances surrounding the execution of the agreement. *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). The purpose of an examination of that extrinsic evidence is to permit the court to "consider the context in which the agreement was made to determine whether the party's words are ambiguous." *Id.* "The common and ordinary meaning of an undefined term should be based upon contemporary usage, where possible, because the issue is how a reasonable insured would understand the term at the time of purchase."

Battishill, 2006-NMSC-004, ¶ 11. As stated by Appellant, the circumstances surrounding the formation of a contract are of paramount importance in understanding the intent of the parties. (UNC Br. at 11.)

The court may consider collateral evidence of the circumstances surrounding the execution of the agreement in determining whether the language of the agreement is unclear. *Mark V,* 114 N.M. at 781, 845 P.2d at 1235. If the parties do not provide evidence of the facts and circumstances surrounding execution of the agreement, the court may resolve any ambiguity as a matter of law. *Id.* at 782, 845 P.2d at 1236. Here, UNC has provided no evidence of the circumstances surrounding the formation of its agreement with Allstate.

The "drafting history" relied upon by Appellant is not relevant to the making of the insurance contract between Allstate and Appellant. The "evidence" provided by UNC of the "drafting history" consists of citations to cases discussing an affidavit of the Superintendent of Insurance of New York and statements made by the Insurance Rating Bureau (an insurance industry group, later the Insurance Services Organization) regarding the scope of existing insurance coverage for polluting events at the time the sudden and accidental pollution exclusion was implemented by insurers. Omitted from Appellant's Brief is the fact that former insurance regulators from thirty-eight states, including New Mexico, signed affidavits that they were not misled by the Insurance Rating Bureau's statement as

to the scope of existing pollution coverage. Elizabeth Eastwood, *The Regulators Speak: The True Understanding of the Pollution Exclusion in 1970 Versus that of the New Jersey Supreme Court in* Morton International, 8 Mealey's Litigation Reports, Insurance 18 (April 19, 1994) ("Eastwood"); *see also* Edward Zampino, et al., *Morton International: The Fiction of Regulatory Estoppel*, 24 Seton Hall L. Rev. 847 (1993) (attaching affidavits from twenty former state insurance commissioners and regulatory officials discussing their interpretation of the term "sudden" as "quick" or "abrupt" based on the Insurance Rating Bureau's explanation of the pollution exclusion).

There is no evidence in the record regarding the circumstances of the execution of the policies between Allstate and UNC. There is no evidence that UNC knew about, or relied upon, any statements by any insurance industry group. *See Mark V,* 114 N.M. at 781, 845 P.2d at 1235. (A court may consider "evidence . . . surrounding the execution of the agreement."). There is no evidence that the nationwide insurance broker, Johnson & Higgins, used by UNC to negotiate and manage its insurance program knew about, or relied upon, any statements by any insurance group in connection with its representation of UNC regarding the Allstate policies. There is no evidence that UNC was even aware of the Insurance Rating Bureau prior to purchasing insurance policies from Allstate. Where there is no evidence of reliance by the insured, other courts have refused to consider

"drafting history" evidence. *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 555 N.E. 2d 568, 573 (Mass. 1990).

With respect to New Mexico's regulation of insurance, a former insurance regulator executed an affidavit that there was no misleading by any statements of the Insurance Rating Bureau concerning existing pollution coverage. Eastwood at 19. UNC does not contend that any New Mexico insurance regulator was misled regarding the sudden and accidental pollution exclusion. UNC does not contend that the sudden and accidental pollution exclusion was not appropriately filed and approved by the New Mexico Insurance Department. In short, there is no evidence and no contention that any interest of the state of New Mexico was affected by the use of the sudden and accidental pollution exclusion by insurers doing business in New Mexico.

The district court was properly not distracted by the "drafting history" argument advanced by UNC, absent the "drafting history's" connection to the insured and to the policies at issue.

In addition to *Mesa Oil*, other decisions have held that the "drafting history" proffered by UNC does not support the argument that the limited pollution exclusion is ambiguous and "sudden" means "unexpected." *See, e.g.*, *Charter Oil*, 69 F.3d at 1168-69; *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 842 F.Supp.

1166, 1175 (N.D. Iowa 1993); *Am. Motorists Ins. Co. v. Gen. Host Corp.*, 120 F.R.D. 129, 133-34 (D. Kan. 1988).

UNC offers no New Mexico authority supporting its regulatory estoppel theory. That theory is, in fact, found only in the State of New Jersey. Regulatory estoppel has been rejected "by virtually every other state and federal court to address the issue." *See SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 682 (N.D. Tex. 1996) (cases cited therein); *see Buell*, 791 A.2d at 502-03 (noting regulatory estoppel has been rejected by several courts that have addressed the issue since *Morton*).

UNC's other arguments are subsumed within the issue of the definition of "sudden" and are not separately addressed by this *amicus*. UNC's additional argument regarding whether the district court should have dismissed UNC's claims against Allstate, as opposed to declaring the meaning of the pollution exclusion, is a procedural issue which this *amicus* will not address on the merits. If, however, the Court of Appeals determines that the district court should not have dismissed UNC's claims against Allstate, the proper relief is to reverse the dismissal of the claims and leave undisturbed the district court's proper interpretation of the pollution exclusion.

V. CONCLUSION

The district court correctly decided that "sudden" as used in the "sudden and accidental" pollution exclusion means "quick" or "abrupt". That decision should be affirmed by the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served upon all counsel of record by first-class mail on this 28th day of August, 2009.

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