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 ELEVENTH JUDICIAL DISTRICT COURT
MCKINLEY COUNTY
HONORABLE LOUIS E. DEPAULI, JR., District Judge

BRIEF IN CHIEF

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STATEMENT REGARDING CITATIONS TO THE RECORD PROPER

All citations to the Record Proper submitted to the Court on December 15, 2008, by the Eleventh Judicial District Court Clerk are referenced as, for example, SRP 18622. All citations to the Supplemental Record Proper submitted by stipulation of the parties and accepted by the Court shall be by volume number and page reference, *i.e.,* 1 SRP-A0001.

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA 2009, the undersigned counsel certifies that the body of the Brief complies with the type-volume limitations of subsection (F). The Brief was prepared in Times New Roman proportionally-spaced typeface, and contains 10,951 words, based upon the word-count tool of the Microsoft Windows XP Professional software.

Sharon W. Horndeski

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A sudden little river crossed my path as unexpected as a serpent comes.

Childe Roland to the Dark Tower Came
Robert Browning, 1855

Poetry may be an unexpected way to open an appellate argument, just as this dark stream surprised Roland on his quest. But there should be no surprise here, no sudden argument unheralded below. Appellant seeks reversal of the trial court's conclusion that "sudden," used in an exception to an exclusion in a liability insurance policy, can only mean "abrupt." As Mr. Browning eloquently demonstrates, and as will be shown further below, "sudden" can and often does mean "unexpected."

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

This insurance coverage case presents an issue of first impression in New Mexico -- does the "sudden and accidental" pollution exclusion require understanding "sudden" to mean only "abrupt." Appellant believes the evidence is overwhelmingly against such a conclusion and that the trial court must be reversed. In addition, the lack of due process afforded by the trial court is another reason to reverse.

Between 1977 and 1981, Northbrook Insurance Company and Northbrook Excess and Surplus Insurance Company, now defunct former subsidiaries of Appellee Allstate Insurance Company (collectively "Allstate"), sold Appellant

United Nuclear Corporation ("UNC") four policies of umbrella liability insurance ("Policies") covering liabilities arising out of UNC's mining operations. Together, the Policies provided $40 million in coverage. 2 SRP-A0191-351. When UNC was sued by a mineral lessor seeking to recover environmental damages at one of UNC's minesites, UNC tendered defense and indemnity of that suit to its liability insurers, including Allstate. 1 SRP-A0036. Allstate refused to cover UNC's losses citing a standard form exclusion variously known as the "qualified pollution exclusion" or the "sudden and accidental pollution exclusion." 3 SRP-A0402. The form exclusion was widely used in commercial liability policies between 1970 and 1986. 5 SRP-A0778.

Concurrently with the mineral lessor's suit, state and federal administrative agencies sought to recover the same type of environmental damages (in the form of mandated remediation costs) from UNC. SRP 18868-18928; SRP 19255-74; 2 SRP-L0515-16; 2 SRP-L0519-20; 2 SRP-L0525-26 in Cause No. 29,397. Allstate likewise refused to cover those claims.

The issue presented is straightforward: whether the Policies so clearly exclude UNC's losses as to absolve Allstate from providing any coverage whatsoever. The answer is in two parts. First, the evidence and judicial precedent all demonstrate that, at a minimum, the sudden and accidental pollution exclusion applies on its face to non-instantaneous pollution events, or is ambiguous.

Accordingly, the decision below was in error. Second, the trial court had before it neither a request for a dispositive ruling, nor the evidence to consider such a request. Therefore, the process was fatally flawed.

II. COURSE OF PROCEEDINGS

This case commenced in 1997 when Santa Fe Pacific Gold Corporation, the mineral lessor at UNC's Northeast Churchrock Mine ("NECR"), sued for environmental damages. 9 SRP-L2193-2233 in Cause No. 29,397. Since UNC's insurance carriers refused coverage of that case, and associated administrative claims for damages at NECR and other mines, UNC promptly filed third-party complaints. 9 SRP-L2193-2233 in Cause No. 29,397. The case was stayed twice pending appeals.[1]

In 2006, Allstate moved for Partial Summary Judgment seeking a determination that the term "sudden" in the qualified pollution exclusion covered only abrupt pollution losses. 1 SRP-A0060-80. UNC made a record showing that the term "sudden" was used in the qualified pollution exclusion in a different sense because:

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[1] *See New Mexico Mining Comm'n v. United Nuclear Corp.*, 2002-NMCA-108, 133 N.M. 8, 57 P.3d 862 (finding UNC liable for administrative environmental damages); *SF Pacific Gold v. United Nuclear Corp.*, 2007-NMCA-133, 143 N.M. 215, 175 P.3d 309 (resolving evidentiary/discovery issues regarding claims of privilege).

- Dictionary definitions differ over the meaning of "sudden" with some defining the term as meaning happening without previous notice, occurring unexpectedly, or not foreseen. 6 SRP-A1085-92.

- Court decisions conflict and commentators sharply disagree regarding the meaning of the exclusion. 1 SRP-A0165.

- Since the definition of "occurrence" expressly covers a "continuous or repeated" event, 2 SRP-A0194, consistency requires that the term "sudden" be given its primary, non-temporal meaning, and not be construed to exclude gradual pollution events.

- The Policies elsewhere affirmatively promise coverage for gradual events, such as accidental "seepage," without any restriction regarding the time over which that event takes place. 2 SRP-A0256, 2 SRP-A0342-43.

- Statements of insurance industry representatives made in seeking regulatory approval of the qualified pollution exclusion form demonstrate that the meaning of "sudden" as "unexpected" was intended. 5 SRP-0778-84; 5 SRP-A0790-826; 5 SRP-A0836-42; 5 SRP-A0897-900.

- Custom and usage in the insurance industry of the phrase "sudden and accidental" was to construe "sudden and accidental" to mean "unexpected." 1 SRP-A0161-62.

III. DISPOSITION IN THE COURT BELOW

In the face of the showing summarized above, and without oral argument or an opportunity to supply additional evidence, the court granted summary judgment dismissing all of UNC's claims, thereby granting relief to Allstate that was not requested in its Motion for Partial Summary Judgment. 6 SRP-A1117-20. The effect of that ruling was to deny UNC the benefits of the $40 million in coverage sold to it by Allstate.

IV. STATEMENT OF FACTS

UNC operated five mines that are the subject of this appeal. 1 SRP-A0001-28. Three of these mines (NECR, San Mateo and Pine Mountain) are currently being remediated under the federal Superfund Law, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). SRP 18868-18928, SRP 19255-74, SRP-L0517-18, 2 SRP-L0525-26 in Cause No. 29,397. The remaining mines (St. Anthony and Section 27), are being remediated under the New Mexico Water Quality Control Commission ("WQCC") Regulations, 20.6.2.4101 *et seq.* NMAC, as well as under the New Mexico Mining Act, NMSA 1978, § 69-36-1 *et seq.* 2 SRP-L0515-16, 2 SRP-L519-20 in Cause No. 29,397; *New Mexico Mining Comm'n*, 2002-NMCA-108, ¶ 9. Under CERCLA, liability of an operator such as UNC is said to be retroactive, strict and joint and several. *See* James F. Berry & Mark S. Dennison, *The Environmental Law and Compliance Handbook*, § 9.2.2 at 378 (2000). The Mining Act and the WQCC Regulations are state counterparts of CERCLA. As a consequence, liability for remediation costs may be imposed upon a mine operator years after operations have ceased, even though it adhered to all applicable legal requirements and good mining practice, and expected and intended no environmental harm.

UNC's experience at NECR is illustrative of the type of claim presented to Allstate and the other carriers. The New Mexico Mining and Minerals Division ("MMD") first asserted jurisdiction over the site in 1994. SRP 18872. As a result, UNC was required to incur engineering expenses for the preparation of a "site assessment," which provides for an evaluation of environmental conditions at a site (including groundwater) and an analysis of the operation's impact on the environment and surrounding communities. *New Mexico Mining Comm'n*, 2002-NMCA-108, ¶¶ 1, 10; NMSA 1978, § 69-36-5. In 2004, the Environment Department ("NMED") ordered UNC to abate groundwater at the facility, thus requiring further engineering analysis. SRP 18872; *see* 20.6.2.4104 NMAC.

NECR is adjacent to lands of the Navajo Nation. At the behest of the Navajo Nation EPA, the United States Environmental Protection Agency ("EPA") became involved and ultimately assumed a lead agency role in ordering "investigation" and "removal action[s]" requiring UNC to pay "response costs" under CERCLA. SRP 18868-18928.

EPA has identified at least four potential pathways of CERCLA "hazardous substances," which, it alleges, trigger liability under that act. They include groundwater contamination from mining in the aquifer, off-site soils contamination from airborne migration of dust to the Navajo Reservation, on-site soils contamination from mine dewatering, and on-site soils contamination from mine

operations (even though a 1987 NRC closure document on the portions of the site most affected by mining concluded: "No further action is . . . necessary."). SRP 18873. An EPA draft document estimated that the cost of a CERCLA removal action for the NECR site alone could range from the tens of millions to the hundreds of millions of dollars. SRP 18928.

Under these circumstances, insurance coverage, both for defense and indemnity, becomes critical. Although the wording of the Policies differs slightly, the 1977-78 policy contains typical language. Its insuring agreement promises:

> 1. COVERAGE
>
> The Company [Allstate] hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability
>
> A. imposed upon the Insured by law, ... for damages on account of . . .
>
> * * *
>
> B. Property Damage . . .
>
> * * *
>
> caused by or arising out of each Occurrence happening anywhere in the world.

2 SRP-A0192.

The two key terms are defined as follows:

> "Property Damage" shall mean loss of or direct damage to or destruction of tangible property (other than property owned by any Insured) and which results in an Occurrence during the policy period.

2 SRP-A0193.

> "Occurrence" means an accident, event or happening *including continuous or repeated exposure to conditions* which results, during the policy period, in . . . property Damage . . . neither expected nor intended from the standpoint of the Insured. . . . All such . . . Property Damage . . . caused by one event or by continuous or repeated exposure to substantially the same conditions shall be deemed to result from one Occurrence.

2 SRP-A0194 (emphasis added).

Thus, it is a simple matter to see how the facts described above fall within the coverage grant of the Policies: where "property damage" (environmental contamination) is allegedly caused by a policyholder to non-owned property (the minesite owned by the mineral lessor, the Navajo Reservation, and the groundwater), despite compliance with regulatory limits and restrictions in effect at the time of mining, that is an "[un]expected [] or [un]intended" "accident, event or happening" which results in "liability . . . imposed on the insured by law [CERCLA or State counterparts]."

We now turn to the crux of this appeal. The Policies contained qualified pollution exclusions which provided:

> This Policy Shall Not Apply: . . .

> I. To . . . 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* . . . .

2 SRP-A0195-96 (emphasis added).[2]

As noted previously, the record is replete with evidence that the term "sudden" has more than one meaning, and thus is not always used in connection with an "abrupt" or "instantaneous" "accident, event or happening." That evidence creates at a minimum issues of fact regarding which meaning of "sudden" was employed by the drafters of that policy term.

In addition, the Policies expressly require an analysis of the "underlying insurances" in order to reach a conclusion regarding whether the Policies cover a particular loss. The trial court did not appropriately consider the language in those policies.

Finally, Allstate did not move for summary judgment, it sought only a declaration that "sudden" carried a temporal meaning. 1 SRP-A0061. Even assuming that Allstate should have prevailed on that argument, the record was

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[2] An exception to an exclusion, such as the language emphasized above, is "covered by the policy." *Krieger v. Wilson Corp.*, 2006-NMCA-034, ¶ 37, 139 N.M. 274, 131 P.3d 661. So, if the losses at any of UNC's mines are "sudden and accidental," Allstate must cover them.

insufficient to support a further conclusion that there was no coverage of any sort under the Policies for UNC's activities.

ARGUMENT

I. THE INSURANCE INDUSTRY'S STATEMENTS REGARDING THE MEANING OF "SUDDEN" PROVIDE THE SUREST INDICATOR OF THE INTENT OF THE PARTIES.

A. Standard of Review.

De novo review is appropriate for all legal issues arising in the context of summary judgment. *See Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-62, ¶ 42, 133 N.M. 669, 68 P.3d 909. The determination of whether a policy provision is ambiguous presents an issue of law. *Rehders v. Allstate Ins. Co.*, 2006-NMCA-058, ¶ 15, 139 N.M. 536, 135 P.3d 237.

B. Preservation.

The issues were preserved below in Allstate's Motion for Partial Summary Judgment on the "Sudden and Accidental" Pollution Exclusion and supporting brief filed February 3, 2006, in UNC's Memorandum of Law in Opposition filed February 28, 2006, and in Allstate's Reply filed March 24, 2006. RP 9846-59, RP 14571-14620, RP 16923-42.

C. The Drafters of the Standard Form Pollution Exclusion Used by Allstate Stated Coverage was Continued for Accidental Contamination.

The circumstances surrounding the formation of a contract are of paramount importance in understanding the intent of the parties. *McNeil v. Rice Eng'g & Operating, Inc.*, 2003-NMCA-078, ¶ 14, 133 N.M. 804, 70 P.3d 794 (citation omitted). Great weight, if not controlling weight, is to be given to the construction adopted by the parties as reflected by available evidence. *Spinoso v. Rio Rancho Estates, Inc.,* 96 N.M. 5, 8, 626 P.2d 1307, 1310 (Ct. App. 1981). Since the parties are presumed to know what the contract means, *see Schultz & Lindsay Constr. Co. v. State,* 83 N.M. 534, 535, 494 P.2d 612, 613 (1972), citing *Jernigan v. New Amsterdam Cas. Co.*, 69 N.M. 336, 367 P.2d 519 (1961) (meaning of a term in an insurance policy), the statements of the parties regarding their understanding of the contract is significant. *Spinoso,* 96 N.M. at 8, 626 P.2d at 1310. The preceding rules are especially applicable if the parties' understanding has been evidenced by conduct that occurred before any controversy between them has arisen. *Schultz*, 83 N.M. at 535, 494 P.2d at 613.

Detailing those circumstances, it is useful to understand that insurers historically have joined together in organizations called rating bureaus. Rating bureaus develop forms, file them with state regulators for approval and file premium rates for various coverages. Working together in drafting committees,

company representatives (often after years of trying) agree on a form. It is then used by all the companies in the rating bureau. From time to time these forms are amended through the same process. 5 SRP-A0894. The qualified pollution exclusion at issue here was created by a rating bureau known as the Insurance Rating Bureau ("IRB") (predecessor of the Insurance Services Office). IRB filed the final version of the exclusion with regulatory agencies, including New Mexico, with explanatory memoranda explaining its purpose and meaning. 5 SRP-A0779.

In the course of that drafting and approval process, the insurance industry shed considerable light upon the intended meaning of the term "sudden." UNC submitted the affidavit of its expert, Richard D. Stewart. He was the Superintendent of Insurance of the State of New York in 1970, with comprehensive experience in the industry. In his affidavit, he summarized the reasons why "sudden" in the qualified pollution exclusion was never intended to be synonymous with "abrupt."

> The [explanatory] memoranda and other contemporaneous public statements by the bureaus and insurers suggest that the essential purpose of the [sudden and accidental pollution exclusion] was only to make clear that the insurers did not mean to cover intentional destruction of the environment. The U.S. insurance industry memoranda declared the endorsement was only a "clarification" of the existing meaning of the policy wording, particularly the meaning of "neither expected nor intended." The memoranda went on to state affirmatively that coverage was preserved for pollution injury "on an accident basis" . . .

> In evidently trying both to please its members and their reinsurers and to avoid alienating their biggest customers and brokers, the rating bureaus wrote an unclear provision and then explained it as not doing anything much at all. Under those circumstances, it would not seem appropriate—or conducive to clarity and candor in the future – to give the 1970 [sudden and accidental pollution exclusion] a meaning which would significantly restrict coverage.

5 SRP-A0898. UNC submits that Superintendent Stewart's affidavit, by itself, demonstrates that the Policies were intended to continue to cover all "accidental" pollution. Thus, Allstate was not "entitled to judgment as a matter of law." *See* Rule 1-056(C) NMRA 2009.

Superintendent Stewart's views are supported by contemporaneous documentation. The drafting history to which Superintendent Stewart refers includes materials prepared by IRB. In the course of submissions to regulators, IRB and its constituent members made the following statements, among others, assigning non-temporal meanings to the proposed form:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above [qualified pollution exclusion] *clarifies* this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injury when the pollution or contamination results from an accident. 5 SRP-A0783 (emphasis added) (hereinafter "1970 IRB Explanatory Memorandum").

* * *

> [T]he impact of the [qualified] pollution exclusion clause on the vast majority of risks would be no change. It is rather a situation of *clarification* . . . . Coverage for expected or intended pollution and

> contamination is not now present as it is excluded by the definition of occurrence. Coverage for accidental mishaps is continued [except for the risks described in the filing]. *Claussen v. Aetna Cas. & Sur. Co.*, 676 F. Supp. 1571, 1573 (S.D. Ga. 1999), quoting IRB explanatory memorandum of June 1970 (emphasis added).
>
> * * *
>
> It is our opinion that coverage for pollution or contamination is not provided under the present General-Automobile Liability policy because the damages can be said to be expected or intended, and thus are excluded by the definition of occurrence. It should be noted that the proposed [qualified pollution exclusion] will definitely *clarify* the situation. 1 SRP-A0146 (emphasis added).

Leaping out from the IRB memoranda is the notion that the new exclusionary language was clarifying something. What was it? It was confirming that expected or intended pollution was to be excluded but accidental pollution was covered: "Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident[.]" 5 SRP-A0783.

Courts that have reviewed the history summarized above have concluded that carriers should not be permitted to play "fast and loose" by switching legal positions when it suits their own ends. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001). Accordingly, courts have adopted the construction the industry advanced to regulators: that "sudden" does not invariably have a temporal meaning. *Id. See also* Eugene R. Anderson, Jordan S. Stanzler & Lorelie S. Masters, *Insurance Coverage Litigation*, § 15.06[E] at 15-60 (2d ed. 2009) ("Nearly every court that has relied on the regulatory history and other

historical insurance industry documents relating to the scope and effect of the pollution exclusion has held that the exclusion bars coverage only for pollution that was deliberately caused, . . ."). Since the drafting history was fully documented in the summary judgment record and not controverted, this Court should hold, as a matter of law, that "sudden" includes *all* accidental pollution and not just pollution that is abrupt.

D. The Drafting History Establishes the Intent and Meaning of the Qualified Pollution Exclusion.

It is noteworthy that "most courts that have examined the drafting history of the pollution-exclusion clause as an aid in its construction have found the word 'sudden' to mean unexpected." *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 754 A.2d 742, 751 (R.I. 2000). Most of these states, like New Mexico, require "a court [to] consider the context and circumstances surrounding the meaning of what otherwise appears to be clear and unambiguous . . . language." *See New Castle County v. Hartford Acc. & Indem. Co.,* 933 F.2d 1162, 1196 (3d Cir. 1991) (internal quotation omitted); *McNeil*, 2003-NMCA-078, ¶ 14. Under those circumstances, consideration of the drafting history of the qualified pollution exclusion is especially appropriate. *New Castle County,* 933 F.2d at 1196. Since the drafting history is well-documented and uncontroverted, courts have reviewed that drafting history from a variety of sources such as reported decisions, law review commentaries and insurance bulletins. *See Am. States Ins. Co. v. Koloms*, 687

N.E.2d 72, 79 (Ill. 1997); *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 882 P.2d 703, 721-22 (Wash. 1994).

As courts have recognized, the insurance industry is "powerful and closely knit," as indicated by the fact that standard-form, similarly worded provisions are universally employed. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1218 (Ill. 1993). Even a relatively sophisticated policyholder must accept a contract that "is written according to the insurer's pleasure," and presented with "little or no negotiation." *Id.* at 1219. In that context, the statements of the drafters of these forms are critical. As one court put it, the documents generated during the drafting of policy boilerplate are akin to "[c]ommittee [r]eports in the legislative setting" and are "highly indicative" of collective intent. *Queen City Farms*, 882 P.2d at 723. No one could reasonably contend that such committee reports should be disregarded in interpreting statutes. Likewise, representations to state regulators interpreting or clarifying proposed language when the insurance industry seeks collective approval of its forms (as it must in New Mexico) is also highly informative. *Id.*; *New Castle County*, 933 F.2d at 1194-95; *Sunbeam*, 781 A.2d at 1194 (memoranda drafted by "a consortium of insurers purporting to represent the industry as a whole" are "strong evidence" of the meaning of policy terms).

Allstate argued below that since it did not file the forms or draft any of the explanatory memoranda referenced above, it is not bound by the regulatory history. To the contrary, since the forms are prepared and submitted by rating bureaus, statements by those organizations or their constituent members to regulators are made as "agent[s] of all the insurance companies" which later issue the endorsement at issue. *Queen City Farms*, 882 P.2d at 723. Thus, it is immaterial that Allstate did not make the statements recorded in the drafting history. *See Textron*, 754 A.2d at 750 (although the insurer argued it never misrepresented the meaning of its clause to insurance regulators, "courts have held nonetheless that such clauses should not benefit from the misleading explanation of the standard pollution exclusion submitted to state regulators by American insurance companies").

Since Allstate, by using the form exclusion, has adopted the regulatory record, the court below erred in disregarding the meaning of "sudden" as set forth in that record.

II. THE TRIAL COURT ERRED IN HOLDING THE QUALIFIED POLLUTION EXCLUSION UNAMBIGUOUS.

A. Standard of Review.

See Part I(A) above.

B. Preservation.

See Part I(B) above.

C. New Mexico Law on Contract Ambiguity.

Even if this Court does not believe it can conclude as a matter of law that "sudden" in this context was used in its non-temporal sense, the district court nonetheless erred in finding that Allstate's policy unambiguously excluded UNC's losses. The drafting history recounted above, and other evidence discussed in this point, establish beyond question that "sudden" has two meanings, one of which might exclude UNC's loss, and the other of which would not. That ambiguity precludes summary judgment.

1. Evidence regarding the meaning of the qualified pollution exclusion must be considered by the trial court.

In the early 1990s, New Mexico contract law underwent a sea change. Previously, a court needed to make a finding that a contract was ambiguous on its face before resorting to extrinsic evidence, in accordance with traditional statements of the parol evidence rule. In *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 508-09, 817 P.2d 238, 242-43 (1991), the Supreme Court "retreated from strict application of the four-corners standard." It allowed extrinsic evidence to be admitted "to aid the court in determining whether the chosen terms [in the contract] are clear . . ." *Id.*, 112 N.M. at 508, 813 P.2d at 242. Such

extrinsic evidence could include "evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing and course of performance . . ." *Id.*, 112 N.M. at 509, 813 P.2d at 243. The parol evidence rule did not bar admission of such evidence to explain the meaning of contract terms. *Id.*, 112 N.M. at 508, 813 P.2d at 242. If unclarity remained, the issue of proper interpretation is a question of fact, precluding summary judgment. *Id.*, 112 N.M. at 510, 817 P.2d at 244.

In *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993), the Supreme Court elaborated: "New Mexico law, then, allows the court to consider extrinsic evidence to make a preliminary finding on the question of ambiguity." As one court recently summarized the state of New Mexico law under *C.R. Anthony* and *Mark V*, "the court *must* hear the [extrinsic] evidence regarding the statements to determine whether contracts at issue are ambiguous in light of the extrinsic evidence, and, if the contract is ambiguous, then the determination of ambiguity is a question of fact." *Israel v. Glasscock*, 2009 WL 1312873 at *12 (D.N.M.) (emphasis added).

2. If "sudden" is ambiguous, then UNC prevails.

Consideration of extrinsic evidence of policy ambiguity is paramount in the insurance field. As our courts have long recognized, policies are contracts of adhesion drafted by carriers and presented to insureds on a take-it-or-leave-it basis

with no opportunity for negotiation. *Pribble v. Aetna Life Ins. Co.*, 84 N.M. 211, 215, 501 P.2d 255, 259 (1972). Thus, New Mexico courts allow evidence of the process in which particular terms came to be included in a policy in determining whether the circumstances render policy provisions ambiguous. *See, e.g., Barth v. Coleman*, 118 N.M. 1, 878 P.2d 319 (1994) (assault and battery exclusion).

If the term "sudden" is ambiguous, the meaning most favorable to UNC must be used. *See New Mexico Physicians Mut. Liab. Co. v. LaMure,* 116 N.M. 92, 95, 860 P.2d 734, 737 (1993). Had the district court conducted the review required by applicable New Mexico authority, it would have discerned that "sudden" has two perfectly acceptable meanings: (i) abrupt or instantaneous, and (ii) unprepared for, unexpected, or unanticipated. If the Policies are construed in favor of UNC (as is required) and the latter meaning accepted, at a minimum a factual issue precluding summary judgment would arise under the qualified pollution exclusion because, under the factual scenarios described above, the pollution at UNC's mines was unprepared for, unexpected and unanticipated.

3. *Rummel v. Lexington Ins. Co.* establishes the process to be followed.

In *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶¶ 21-23, 123 N.M. 752, 945 P.2d 970, the Supreme Court spelled out the full sequence of analysis that is necessary in considering whether extrinsic evidence demonstrates ambiguity in an insurance policy. If any of the terms "appear questionable," the trial court must

first consider whether the other portions of the policy clarify the ambiguity. *Id.*, ¶ 20. If that does not resolve the ambiguity, the court should then look to extrinsic evidence, including, but not limited to, the surrounding circumstances and the expressions of the parties' intentions. *Id.*, ¶ 21.

a. *Rummel* Factor No. 1: Do any of the terms at issue appear questionable or ambiguous?

New Mexico courts have used differing dictionary definitions to determine whether a policy term has two reasonable meanings and is therefore ambiguous. *E.g.*, *Risk Mgmt. Div. ex rel. Apodaca v. Farmers Ins. Co. of Ariz.*, 2003-NMCA-095, ¶ 10, 134 N.M. 188, 75 P.3d 404. While the dictionary may provide an "imperfect yardstick" for determining whether a policy term is ambiguous, it is nonetheless appropriate for a judge to *begin* the analysis by doing what any reasonable person would do: "look[] it up in the dictionary." *New Castle County*, 933 F.2d at 1194.

Numerous courts, accordingly, have predicated a finding of ambiguity in the qualified pollution exclusion upon differing dictionary definitions of the undefined policy term "sudden." One accepted definition is, as Allstate alleges, "abrupt" or "instantaneous." However, the primary meaning given the term in *Webster's Third New International Dictionary* (1986) is "happening without previous notice," "occurring unexpectedly," "not foreseen." *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573 (Wis. 1990) (quoting *Webster's*); *see also Webster's New*

Collegiate Dictionary at 1164 (1977) ("sudden" means "happening or coming unexpectedly"). In *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1217 (Or. 1996), the court quoted another edition of *Webster's* as indicating that "sudden" can mean "unprepared for." "Thus, 'sudden' *may* have, but *need not* always have, a temporal element." *Id.* (emphasis in original). *See also Textron*, 754 A.2d at 748 and n.1 (conducting a self-described "etymological foray," in which definitions from fifteen different dictionaries are reviewed with inconclusive results).

In *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989), the court illustrated acceptable non-temporal use of the term in common parlance as follows:

> [O]n reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring. *See also*, Oxford English Dictionary, at 96 (1933) (giving usage examples dating back to 1340, e.g., "She heard a sudden step behind her"; and, "A sudden little river crossed my path as unexpected as a serpent comes.")

Id. at 687-88. While differing dictionary definitions do not resolve the issue, they certainly do establish the threshold "questionableness" of the meaning of the term referred to in *Rummel*.

Indeed, Allstate cannot challenge the reasonableness of UNC's position, because Allstate has made the same argument. As reported in Eugene R.

Anderson, Sharon A. Merkle & Natalia Kisseleff, *Liability Insurance Coverage for Pollution Claims*, 12 U. Haw. L. Rev. 83, 100 (1990), Allstate took the same position as that advanced by UNC here in a gradual pollution case.[3] Specifically, Allstate informed the court as follows:

> The so-called pollution exclusions contained in [the other insurers'] policies bar the recovery of liability insurance proceeds for the intentional disposal or release of hazardous substances. The exclusion does not prevent recovery where the release is "sudden and accidental," *i.e.,* where the release was not intended by the insured . . .
>
> The purpose of the exclusion is limited; it is intended solely to deter intentional and willful pollution of the environment. As is evidenced by the exception to the exclusion for "sudden and accidental" releases, the exclusion was not meant to penalize companies for unintended and unexpected discharges of hazardous substances.

Id. Given these inconsistent statements, no clearer demonstration of ambiguity is conceivable.

In concluding that the term "sudden" was unambiguous, the district court relied exclusively upon *Mesa Oil Inc. v. Ins. Co. of N. Am.*, 123 F.3d 1333 (10th Cir. 1997). However, the Tenth Circuit acknowledged that New Mexico had not decided the issue and, without any New Mexico authority, concluded that the plain meaning of "sudden" "clearly expresses a meaning of quickness or abruptness." *Id.* at 1340. Although the court did review some extrinsic evidence, it does not

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[3] *See Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F. Supp. 35 (D. Mass. 1989), *settled on appeal,* 784 F. Supp. 927 (D. Mass. 1990).

appear that it considered the evidence identified above emphasizing that the "sudden and accidental" language *clarifies* the issue of intent (*see* Part I.C., *supra*).

To the contrary, the primary value of Tenth Circuit decisional law is to demonstrate how sharply divided courts are on the central question. In *Blackhawk Cent. City Sanitation Dist. v. Am. Guar. & Liab. Ins. Co.*, 214 F.3d 1183 (10th Cir. 2000), the Tenth Circuit, without acknowledging *Mesa Oil*, reached precisely the opposite conclusion. Based on applicable Colorado authority, it concluded that an exception to a pollution exclusion for a "sudden accident" was ambiguous. *Id.* at 1191. And, it was forced to acknowledge that Colorado state courts had expressly "rejected" the Tenth Circuit's earlier view of the ambiguity of "sudden" in a qualified pollution exclusion. *Id.* at 1192, citing *Pub. Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 931-33 (Colo. 1999) ("sudden" is ambiguous and is not restricted to a temporal meaning). Colorado courts have relied on conflicting dictionary definitions to hold that the term "sudden" has more than one reasonable meaning. *See Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1091 (Colo. 1991). As a consequence, the court in *Blackhawk* held the term ambiguous, rejected the argument that it meant only "abrupt" or "instantaneous," and required the insurer to defend a gradual pollution claim. On the whole, we commend the Colorado approach, as reflected in the above-cited cases, as well as in *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606 (Colo. 1999).

New Mexico appellate courts also have long recognized that a nationwide conflict of authority is a strong indication of the ambiguity of a policy term. *Schanuel v. State Farm Mut. Auto. Ins. Co.*, 82 N.M. 211, 214, 478 P.2d 539, 542 (1970); *Davis v. Farmers Ins. Co. of Ariz.*, 2006-NMCA-099, ¶ 7, 140 N.M. 249, 142 P.3d 17; *see also* Charles C. Marvel, *Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, as Evidence that Particular Clause of Insurance Policy is Ambiguous*, 4 A.L.R.4th 1253 (Westlaw 2009). A clearer split of authority on whether "sudden" invariably has a temporal meaning cannot be imagined. At various times each side has claimed to represent the "majority" position. *See Textron*, 754 A.2d at 748 ("[b]oth sides claim to hold the majority view, but the numbers are close enough that any slight preponderance of one position over the other is not particularly meaningful"); *also* Claudia G. Catalano, *Construction of Qualified Pollution Exclusion Clause in Liability Insurance Policy,* 88 A.L.R.5th 493 (Westlaw 2009).

Several courts have expressly stated that the wide split in judicial authority on the scope and effect of the sudden and accidental pollution exclusion assists in establishing the exclusion's ambiguity. *See Hecla Mining*, 811 P.2d at 1092 & n.13 (reversal of summary judgment against policyholder who had received potentially responsible party ("PRP") letter for gradual pollution at Superfund site); *McCormick & Baxter Creosoting*, 923 P.2d at 1218; *Just*, 456 N.W.2d at

577-78; *New Castle County,* 933 F.2d at 1196 (recognizing that the split of authority at least suggests that "the term 'sudden' is susceptible of more than one reasonable definition").

Although Allstate below attempted to dismiss the above positions as mere "lawyer's ingenuity" (6 SRP-A1094-96), the fact that learned judges, commentators and lexicographers have disagreed so sharply on the meaning of the term provides at least the threshold showing of ambiguity referenced in *Rummel. See Just,* 456 N.W.2d at 578 ("comprehensive debate dispels the insurer's contention that the exclusionary language is clear"); *Textron,* 754 A.2d at 748-49 (diversity of views "proves only that the word's meaning is legitimately subject to different interpretations").

b. The Second *Rummel* Factor: Context of the Agreement.

Once a preliminary finding of ambiguity is made, the court must consider whether the "meaning and intent" of a disputed provision is explained by other parts of the policy. *Rummel,* 1997-NMSC-041, ¶ 20. The Allstate Policies contain numerous provisions which suggest that, viewed as a whole, pollution which occurs over time was intended to be covered.

The first such provision is the cornerstone of the policy: the definition of a covered "occurrence," which provides that any unexpected or unintended damage-producing "event . . . including *continuous or repeated exposure to conditions*"

qualifies as an occurrence. 2 SRP-A0194. The "overall structure" of a policy containing this type language is to provide coverage for gradual events or happenings. *Alabama Plating Co. v. United States Fid. & Guar. Co.*, 690 So. 2d 331, 334 (Ala. 1997). The purpose of the definition of "occurrence" is to preclude coverage if the harm was expected or intended. *Queen City Farms*, 882 P.2d at 715. If the meaning of the pollution exclusion defining "sudden" as unexpected or unprepared for is accepted, the pollution exclusion would serve a complementary purpose. *See Textron*, 754 A.2d at 750 (holding that the word "sudden" bars coverage for "the intentional or reckless polluter but provides coverage to the insured that makes a good-faith effort to contain and to neutralize toxic waste"). A "coordination of meaning" between the definition of occurrence and the pollution exclusion exists: "Expected or intended damage (under the occurrence clause) or expected or intended polluting events (under the pollution exclusion) resulting in damage are not covered." *Queen City Farms*, 882 P.2d at 723. As such, "the [pollution] exclusion simply reinforces the definition of occurrence." *Alabama Plating*, 690 So. 2d at 335. Any other construction of the term renders the Policies hopelessly conflicting in purpose and scope. *See Hecla Mining*, 811 P.2d at 1092, n.13; *Outboard Marine*, 607 N.E.2d at 1220. Under New Mexico law, conflicting policy provisions render a policy ambiguous. *E.g.*, *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 11, 129 N.M. 698, 12 P.3d 960.

Allstate argued below that acceptance of the proposition that the occurrence definition and the qualified pollution exclusion must be construed in a consistent fashion results in rendering the word "sudden" mere surplusage. 1 SRP-A0166. The argument apparently is that since the "occurrence" definition already excludes unexpected or unintended pollution, the pollution exclusion necessarily must exclude something more, i.e., unintended gradual pollution. As one court noted in rejecting the same contention, "insurance policies are filled with words which overlap and complement each other." *Outboard Marine*, 607 N.E.2d at 1220. One need only refer to the language of the pollution exclusion itself to conclude that Allstate's position is meritless. To say that distinct meanings must be ascribed to synonymous terms like "discharge/dispersal," "release/escape" or "pollution/contamination" defies credulity. *See id.*

The touchstone of insurance policy interpretation is the reasonable expectation of the policyholder. *E.g.*, *Azar*, 2003-NMCA-62, ¶ 81. The 1978 Allstate Policy also contains an additional coverage provision which would lead a reasonable policyholder to believe that coverage is provided for "seepage, pollution or contamination" liabilities occurring over time, the central element of UNC's claim here.

The 1978 Allstate policy, in a typed endorsement, provides:

> The policy does not apply to property damage caused by seepage, pollution or contamination unless:

> Such seepage, pollution or contamination *is caused by accident* and results in property damage during the period of the policy; . . .

2 SRP-A0256 (emphasis added). Based on that unequivocal language, a policyholder could reasonably conclude that it would have coverage for all accidental "seepage, pollution or contamination," regardless of whether it was abrupt or gradual. "Accident," as we have seen, includes gradual damage. That is appropriate given that seepage is only something that occurs gradually. *See, e.g.*, *Webster's New Collegiate Dictionary* at 1046 (1977) (definition of seepage: "1: the process of seeping: OOZING 2: a quantity of fluid that has seeped (as through porous material); definition of seep: "to flow or pass *slowly* through fine pores or small openings" (emphasis added)).

Yet to accept Allstate's present-day understanding of "sudden" would mean that this express coverage for "seepage" is revoked by an exclusion for the "discharge, dispersal, release or escape of . . . liquids" (*e.g.*, seepage) because seepage is not abrupt. More reasonable, of course, is to construe "sudden" as "unexpected" which would permit, without any sort of linguistic contortion, coverage for unexpected seepage, while excluding expected seepage. *See Rummel*, 1997-NMSC-041, ¶ 20 ("The insurance contract -- with its declarations, endorsements, and any other attachments--will be construed as a whole.") (citation omitted).

c. The Third *Rummel* Factor: Extrinsic Evidence.

Since the context of the Policies surely does not resolve the uncertainty in the meaning of "sudden" in favor of an "abrupt" or "instantaneous" connotation, *Rummel* counsels that whether the policy is ambiguous depends on extrinsic evidence. *Rummel* identified three examples of such evidence: (i) premiums paid; (ii) conduct of the parties, and (iii) oral expressions of the parties. *Rummel*, 1997-NMSC-041, ¶ 21. Additionally, *Rummel* cited *C.R. Anthony*, 112 N.M. at 508-509, 817 P.2d at 242-43, which states that trade custom or usage illuminates the inquiry. The district court below was presented with significant evidence of this type, but again ignored it all. That evidence creates *at least* a factual issue concerning whether the term "sudden" invariably means "abrupt" or "instantaneous."

i. Drafting History.

Allstate argued below, and the district court apparently agreed, notwithstanding *Rummel*, that the substantial history related to the qualified pollution exclusion could not be considered on the issue of policy ambiguity because: (i) the Tenth Circuit refused to consider evidence of this type in *Mesa Oil*, the sole case relied upon by the district court in its decision; and (ii) the language employed is purportedly clear, and there is no need to consider extrinsic evidence.

The court in *Queen City Farms* rejected similar arguments. It observed that the interpretation of policy forms which come from the "mouth of the drafter" are necessarily deemed reasonable. 882 P.2d at 722-23. Since the policyholder only needs "*to show that its interpretation of an ambiguous provision is but one reasonable interpretation, evidence that the interpretation subscribed to by at least some of the drafters was the same as or similar to the policyholder's interpretation would seem relevant.*" *Id.* at 723 (emphasis by the court). Quite simply, "the insured is entitled to bring before the court any reasonable construction," and the fact that the insured's construction "happens" to be one which the insurance industry advanced when approval was sought "does not preclude" the court from considering that interpretation. *Id.* Since Allstate *chose* to use the IRB form pollution exclusion, it is illogical for it now to say that prior interpretations of that form by IRB, and its constituent members, are unreasonable.

We described above the drafting history evidence presented to the district court and will not repeat it here other than to note that that history ("clarification" of the policy form to make clear that expected or intended pollution is not covered) is entirely consistent with UNC's position and does not support Allstate's argument that "sudden" means "abrupt." Indeed, one cannot fathom how language to clarify the scope of coverage for "continuous or repeated exposures" could possibly be construed to mean abrupt.

As a consequence, it has been held that the standard, occurrence-based policy containing a qualified pollution exclusion will not insure a company that indiscriminately dumps toxic chemicals into the environment (*Textron*, 754 A.2d at 750), or a manufacturer which was an intentional or reckless polluter (*id.* at 751), or for intentional or expected pollution. *Queen City Farms*, 882 P.2d at 723. In contrast, the courts have held that coverage is provided for gradual polluting events, provided that the insured believed that discharged pollutants would be "safely filtered" before causing damage (*id.* at 719), or that they were placed into an impoundment for containment (*id.*). *See also Joy Tech., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 498 (W. Va. 1992) (coverage for pollution exists where policyholder followed disposal practices "commonly accepted in the industry at the time"); *Outboard Marine*, 607 N.E.2d at 1222 (coverage exists where policyholder "was expressly authorized and permitted by governmental agencies"). These matters are "for fact-finding at trial and not for summary judgment." *Textron*, 754 A.2d at 750; *see also Outboard Marine*, 607 N.E.2d at 1222. As discussed more fully in Part IV, the district court here obviously erred when it found, absent evidence in the record, or even argument from the parties, that UNC's disposal practices which caused the alleged environmental damages at UNC's mine sites resulted from years of "its own bad business practices." 6 SRP-A1117-20; *see* Part IV.C.1., *infra.*

ii. Premiums Paid.

Rummel also identified "premiums paid" as valuable extrinsic evidence in ascertaining the scope of coverage. 1997-NMSC-041, ¶ 21. The insurance industry had a powerful economic motive to represent the new exclusion as a mere "clarification" and continuation of pre-existing coverage. A substantive reduction in coverage would have required a corresponding premium reduction, while a mere "clarification" would not. The West Virginia Insurance Commissioner explained his rationale for approving the qualified pollution exclusion as follows. Thus,

> The insurers stated in pre-hearing submissions, at the hearing, and in post-hearing submissions that the proposed endorsement forms did not limit or narrow coverage and were not intended to do so. Based upon those representations, I concluded that the pollution endorsement forms did not narrow or limit coverage and, instead, were mere clarifications of existing coverage as defined and limited by the definition of the term "occurrence." Accordingly, I approved the endorsement forms IRB 335 and MIRB MB G008 submitted respectively by the Insurance Rating Board and Mutual Insurance Rating Bureau.

Joy Tech., 421 S.E.2d at 499. As many courts have noted, since these approvals were regarded as mere clarifications not effecting a significant reduction in coverage, no corresponding premium reductions were ever required. *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1217-18 (Cal. 2003); *Gen. Ceramics, Inc. v. Fireman's Fund Ins. Cos.*, 66 F.3d 647, 656-57 (3d Cir. 1995). Thus, it has been deemed inherently unfair to allow insurers using these exclusions to contend now

and contrary to reasonable constructions of the language that were previously made by policy drafters, that the exclusion drastically reduced coverage. *See Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am.*, 629 A.2d 831, 876 (N.J. 1993).

The reasons for the insurance industry's change of position on the meaning of the term "sudden" are transparent. There has been an "explosion of litigation seeking compensation for damage to the environment . . . " *Claussen*, 380 S.E.2d at 689. Since CERCLA and its state counterparts now impose all-encompassing liability which is "retroactive, strict and joint and several," the industry has attempted to disavow the representations it made four decades ago. This switch is deceptive and should not be tolerated.

iii. Trade Custom and Usage.

New Mexico has determined that "any relevant usage of trade" may be considered in "determining whether a term or expression to which the parties have agreed is unclear . . ." *C.R. Anthony*, 112 N.M. at 508-509, 817 P.2d at 242-43 (overruling cases). The phrase "sudden and accidental" has a specialized meaning in the insurance industry that was relied upon in drafting the qualified pollution exclusion. As demonstrated below, if that meaning is applied, the term "sudden" indisputably will sustain a non-temporal meaning.

Several jurisdictions have referred to trade usage in concluding that the term "sudden" is ambiguous. *New Castle County*, 933 F.2d at 1181; *Sunbeam*, 781

A.2d at 1193-94; *McCormick & Baxter Creosoting*, 923 P.2d at 1217-18; *Alabama Plating*, 690 So. 2d at 335. As those courts have explained, before 1966 the standard form liability policy covered liability arising out of an "accident." The industry attempted to limit coverage "to brief catastrophic events," but that effort "was roundly rejected by the judiciary." *New Castle County*, 933 F.2d at 1196.

Hence, in 1966 the industry capitulated to the prevailing judicial views, issued "occurrence-based" policies covering gradual events ("continuous or repeated exposure to conditions"), and increased premiums. *Id.* at 1196-97. Around 1970, when public environmental awareness dawned, the industry "tacked" the pollution exclusion onto their policies as a way to distance themselves "in the public mind from deliberate polluters." *Id.* at 1197.

The verbiage used, "sudden and accidental," was not new to the insurance industry. *Id.* Previously, it was employed in a specialized type of coverage known as "boiler and machinery," which covered losses due to equipment breakdowns in manufacturing plants. In that context, "sudden and accidental" did not mean instantaneous; rather, it meant "happening without previous notice," or "something coming or occurring unexpectedly, as unforeseen or unprepared for." *Id.*, quoting 10A *Couch on Insurance 2d* § 42:396 at 505 (1982 ed.).

In the boiler and machinery context, numerous courts have construed "sudden and accidental" to include gradual breakdowns of insured equipment. *See,*

e.g., *Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co.*, 333 P.2d 938 (Wash. 1959); *New England Gas & Elec. Ass'n v. Ocean Acc. & Guar. Corp.*, 116 N.E.2d 671 (Mass. 1953); *City of Detroit Lakes v. Travelers Indem. Co.*, 275 N.W. 371 (Minn. 1937); *Julius Hyman & Co. v. Am. Motorists Ins. Co.*, 136 F. Supp. 830 (D. Colo. 1955).

Where, as here, an insurer appropriates standard phraseology from one type of policy into another, it does so "with knowledge of the construction given to it by courts" interpreting the former type of policy (here, boiler and machinery). *Lopez v. Townsend*, 42 N.M. 601, 82 P.2d 921, 933 (1938). Accordingly, courts have construed "sudden and accidental" in the same fashion, once the phrase was incorporated in the qualified pollution exclusion. Courts that have employed this approach have observed that custom or usage may be considered, notwithstanding the parol evidence rule, even in the absence of a finding of ambiguity. *Sunbeam*, 781 A.2d at 1193, citing *Restatement (Second) of Contracts* § 202(5).

In reversing the lower court's judgment in favor of the insurers, the court in *Sunbeam* determined that the 1970 IRB Explanatory Memorandum stating that "[C]overage is continued for pollution or contamination of cause to injuries when the pollution or contamination results from an accident . . . [5 SRP-A0938], evidenced a factual issue concerning whether coverage was to be continued for both gradual and abrupt pollution." *Id.* at 1195. In the court's view, the 1970 IRB

Explanatory Memorandum, by itself, was sufficient evidence of a "specialized usage" of the phrase to require the fact-finder to determine whether "sudden and accidental" is synonymous with "unintended and unexpected" in insurance parlance. *Id.*

III. ALLSTATE IS ESTOPPED FROM ASSERTING THAT ITS POLICIES DO NOT COVER ENVIRONMENTAL LIABILITIES THAT DEVELOPED OVER TIME.

A. Standard of Review.

See Part I(A) above.

B. Preservation.

See Part I(B) above.

C. Insurers Are Estopped Now from Arguing that Losses Are Not Covered.

We believe the greatest significance of the drafting history recounted above is to confirm the industry's public position that "sudden" means "unexpected", or at the very least to demonstrate the ambiguity of the qualified pollution exclusion. Nevertheless, several courts have used the same evidence to hold that insurers using the IRB form are estopped from asserting that the clause precludes coverage of gradually-occurring environmental losses. These courts reason that since approval of the form was obtained from regulators by asserting that gradual pollution remained covered, insurers should not now be allowed to reverse course and now argue that those losses are not covered.

The leading case on the subject is *Morton International.* Noting that IRB advanced the restrictive reading of the proposed qualified pollution exclusion reflected in the 1970 IRB Explanatory Memorandum and other documents summarized above merely to avoid premium reductions (629 A.2d at 875), the New Jersey Supreme Court concluded:

> Having profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities.

Id. at 876.

Other courts which have based a restrictive reading of the qualified pollution exclusion upon the insurance industry's deceptive practices include: *Sunbeam*, 781 A.2d at 1195-96 (finding that the insurance industry should not be heard to assert a position contrary to that presented to insurance regulators concerning the sudden and accidental pollution exclusion); *Joy Tech.*, 421 S.E.2d at 499-500 (finding the industry associations "unambiguously and officially" represented to the West Virginia Insurance Commission that the sudden and accidental pollution exclusion should not bar gradual pollution claims); *New Castle County v. Hartford Acc. & Indem. Co.,* 970 F.2d 1267, 1269 (3d Cir. 1992); *Pac. Employers Ins. Co. v. Servco Pac., Inc.*, 273 F. Supp. 2d 1149, 1157-58 (D. Haw. 2003); *Queen City Farms*, 882 P.2d at 720-21, 723; *Just*, 456 N.W.2d at 573-75. This Court must likewise

consider the insurance industry's conduct in construing the meaning of the sudden and accidental pollution exclusion.

The doctrine of collateral estoppel is applicable in New Mexico administrative proceedings. *See, e.g., Rex, Inc. v. Manufactured Hous. Comm'n for the State of N.M.*, 2003-NMCA-134, 134 N.M. 533, 80 P.3d 470. There is no reason to decline to apply the doctrine in this instance.

IV. THE DISTRICT COURT IMPROPERLY RULED ON FACT ISSUES NOT RAISED BY THE PARTIES ON SUMMARY JUDGMENT.

A. Standard of Review.

See Part I(A) above.

B. Preservation.

See Part I(B) above.

C. Such a Ruling Constitutes a Due Process Violation.

Under New Mexico law, as elsewhere, it is inappropriate for a trial court to grant summary judgment on a matter which the parties have not raised. In *Azar*, 2003-NMCA-62, ¶¶ 86-88, this Court concluded that the entry of summary judgment without notice and an opportunity to respond constituted a due process violation, and reversed on that point. Requirements of notice in Rule 1-056 are intended "to protect the rights of the party opposing the motion." *Id.* (internal quotation marks omitted). *See also Barnett v. Cal M, Inc.*, 79 N.M. 553, 555, 445 P.2d 974, 976 (1968) (court reversed summary judgment entered without notice,

hearing or an opportunity to timely respond); *Ward v. Utah*, 398 F.3d 1239, 1245 (10th Cir. 2005) (recognizing that the practice of granting summary judgment *sua sponte* is "not favored," and may only be appropriate if the losing party is "on notice that she had to come forward with all of her evidence"), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Here, both parties asked for a hearing, but none was afforded. 1 SRP-A0060-62; 1 SRP-A0179.

1. UNC's purported "bad business practices."

In its Motion for Partial Summary Judgment, Allstate sought only a declaration of the meaning of the "sudden and accidental" clause in the policies. 1 SRP-A0061. Allstate did not specifically seek any particular application of the exclusionary language, much less dismissal of UNC's claims. Nonetheless, in the judgment entered in Allstate's favor (6 SRP-A1117-20), the trial judge *sua sponte* dismissed UNC's claims with prejudice out of the blue on an issue that went far beyond the partial summary judgment briefs. He concluded that UNC could not receive coverage for any environmental damage sustained in the course of its own mining operations because, in his view:

> UNC relies in its argument on the fact that [Allstate] was intimately familiar with its business, and therefore knew what it was getting into and what it was insuring. However, this same logic can be used for the contra argument that if [Allstate] was that familiar with UNC's business, neither [Allstate], 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 (emphases added). There was certainly no evidence in the record suggesting the UNC's "business practices" were somehow "bad," which is, as noted previously, a patently factual question.

In fact, if the trial judge had provided notice that he contemplated raising this point, UNC could certainly have countered such a suggestion based on information obtained in discovery, and it is proper to bring this point to this Court's attention now. *See, e.g., Dayko Corp. v. Goodyear Tire & Rubber Co.*, 523 F.3d 389, 393 n.2 (6th Cir. 1971) (suggesting that plaintiff should have indicated on appeal what other material it would file if the court reversed and remanded the case).

Actually, the court's finding quoted above was directly at odds with the testimony of Allstate's corporate claims designee, Bridget Gould, who was responsible for investigating UNC's claim. She testified, in response to a Rule 1-030(B)(6) notice of deposition, that she had never "independently" seen anything to indicate that UNC's mining environmental liabilities were anything other than "an accident." *See* 4 SRP-A0612 at p. 74. So, contrary to the district court's finding, Allstate's official company position was that it simply did not have enough information to be able to say whether the qualified pollution exclusion would apply in the circumstances presented. 4 SRP-A0611 at p.73.

Moreover, the insurers' own mining expert, after a site visit and review of thousands of pages of technical information on the site, testified that he believed that UNC did not intentionally cause "environmental damage" at its minesites, nor did UNC expect such a consequence. 3 SRP-L0900-01 in Cause No. 29,397.

And the issue is not simply one of a lack of evidence of UNC's practices. Evidence offered by Travelers' own engineers who observed UNC's operations as they were occurring confirms that there was no reason for UNC to expect environmental harm. Specifically, it was not reasonable for UNC to expect that pumping water out of a mine (as UNC regularly did) would cause contamination of the aquifer. Robert Harner, Dep. Tr. at 115-116 (Sept. 23, 2005). Likewise, it was not reasonable to expect groundwater contamination from a properly constructed settling pond (as UNC constructed). *Id.* at 58-59. Accordingly, the district court surely had no basis for finding, as a matter of law, that UNC's business practices were "bad."

2. The court did not consider the language in the underlying policies on summary judgment.

Further, although not requested, the trial court dismissed all of UNC's claims against Allstate. Even if it is assumed that "sudden" means abrupt, Allstate provides certain coverages based on the coverage provided by the underlying Travelers Indemnity Co. ("Travelers") policies, rather than based on the terms and conditions of the Allstate Policies. Since the trial court did not consider the

language in the underlying Travelers policies, and other relevant evidence pertaining to those policies, it was improper to grant summary judgment to Allstate.

> The 1977 and 1978 Allstate Policies provide that:
>
> Except insofar as *coverage is available to the Insured in the underlying insurances* 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; . . .

2 SRP-A0226; 2 SRP-A0268 (emphasis added). "Underground resources" include "oil, gas, *water* or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water." 2 SRP-A0227; 2 SRP-A0269 (emphasis added).

Since "[i]njury to" underground "water" is a primary basis of the administrative damages that UNC is legally obligated to pay, this provision bears close scrutiny. As was true in *Ivy Nelson Grain Co. v. Commercial Union Ins. Co. of New York*, 80 N.M. 224, 226, 453 P.2d 587, 589 (1969), this provision might be "easily understood by one schooled in insurance terms," but "might not be so easy for an insured to comprehend." *Id.* This obscure provision, once again, hides a key coverage clause within the terms of an exclusion. Then, that coverage clause (an exception to an exclusion) refers the policyholder to a completely different

group of policies—the "underlying insurances"—to determine what coverage exists.

Here, the "underlying insurances" are the policies sold by Travelers to UNC. Unlike the Allstate Policies, the "underlying" Travelers policies do not have "sudden and accidental" pollution exclusions at all. Instead, a typical pollution exclusion by Travelers is in the following form:

> [This policy excludes] bodily injury or property damage arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant . . . if such emission, discharge, seepage, release or escape is *either expected or intended from the standpoint of any insured* or any person or organization for whose acts or omissions any insured is liable . . .

5 SRP-A0779 (emphasis added). Accordingly, in order to assess whether there is coverage under the Allstate 1977 and 1978 Policies, the court *must* evaluate whether there is coverage under the 1977 and 1978 Travelers policies and, with respect to pollution, must assess whether the Travelers pollution exclusion applies. This never occurred.

The preceding Allstate provision applicable in 1977 and 1978 was replaced in 1979 and 1980 by a new typed endorsement, in which Allstate reached the height of policy-drafting prolixity. *See Computer Corner, Inc. v. Fireman's Fund Ins. Co.*, 2002-NMCA-54, ¶¶ 19-20, 132 N.M. 264, 46 P.3d 1264 (criticizing policy drafting practices which result in a "impenetrable thicket of

incomprehensible verbosity"). The new endorsement provided:

> In consideration of the premium charged, it is agreed that insofar as the "Liabilities" listed below are *covered by valid and collectable underlying insurance* as set out in the schedule of underlying policies and then only for such "Liabilities" as listed below for which *coverage is afforded for said underlying insurance* this policy subject to its limit of liability shall apply as excess.
>
> * * * *
>
> *"Follow Form Liabilities"*
>
> I. "D" and "E" Hazards as respects mining.

2 SRP-A0302; 2 SRP-A0342 (emphasis added).

The "D" Hazard is defined in the 1980 Policy[4] as:

> property damage included within the underground resources and equipment hazard, which in turn includes "oil, gas, *water* or other mineral substances which have not been reduced to physical possession above the surface of the earth or above the surface of any body of water.

2 SRP-A0342-43 (emphasis added). The new endorsement again requires reference to the Travelers policies which, again, contain no "sudden and accidental" exclusion. 6 SRP-A1084. Since it is clear that the court below did not consider the underlying Travelers policies (they were not before the court), that decision cannot stand.

These additional policy provisions, unreferenced by the district judge, create additional questions of fact that require reversal of the lower court's decision.

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[4] The "D" Hazard is undefined in the 1979 Policy.

V. ALLSTATE POTENTIALLY HAD A DUTY TO DEFEND UNC.

A. Standard of Review.

See Part I(A) above.

B. Preservation.

See Part I(B) above.

C. Again a Due Process Violation.

The district court's precipitous dismissal with prejudice of all of UNC's claims against Allstate, even though that relief was not requested, had the further consequence of depriving UNC of a fair hearing on Allstate's duty to defend UNC. That action also amounts to a due process violation.

An insurance carrier has a heavy burden of demonstrating that it need not defend a claim that tends to show a covered occurrence. *Foundation Reserve Ins. Co., Inc. v. Mullenix*, 97 N.M. 618, 642 P.2d 604 (1982). Often, umbrella policies like Allstate's provide broader coverage than that found in primary policies. In those situations, the umbrella carrier must defend claims within the umbrella coverage, but which are not within the primary coverage. Through the following clause, the Policies require Allstate to defend:

> 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, [Allstate] shall . . . defend any suit . . . alleging such injury, sickness, disease or destruction and seeking damages on account thereof . . . .

E.g., 2 SRP-A0276.

Because the Travelers policies exclude coverage for damage to property in the "care, custody or control" of UNC, 5 SRP-A0897, Travelers has contended it is not required to defend claims involving direct damage to UNC's minesites. 2 SRP-L0618 in Cause No. 29,397. In these circumstances, Allstate would be required 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. *Compare* 2 SRP-A0222, SRP-A0309 and 2 SRP-A0347 *with* 5 SRP-A0897. Since UNC did not own, but instead leased, its minesites, the duty to defend would fall on Allstate, not Travelers, insofar as claims of damage to those areas are concerned.

In New Mexico, it is clear that (i) the duty to defend is far broader than the duty to indemnify; (ii) the duty to defend is determined from the allegations of the complaint; and (iii) if the complaint potentially shows a covered occurrence, but is ambiguous as to whether a claim within coverage is alleged, the insurer must nonetheless defend. *Mullenix*, 97 N.M. at 620, 642 P.2d 606.

In an administrative proceeding like the CERCLA actions described above, no formal complaint is filed. Accordingly, courts have looked to the allegations of PRP letters, Administrative Orders on Consent and Unilateral Administrative Orders to determine the scope of the defense duty in a CERCLA (or comparable

state) proceeding. *See Compass Ins.*, 984 P.2d at 616 ("PRP letters are the functional equivalent of the complaint in the underlying action"). While these letters and orders were before the district court, SRP 18868-18928, SRP 19255-74, 2 SRP-L0525-26, 2 SRP-L0515-16, and 2 SRP-L0519-20 in Cause No. 29,397, none of them contained *any* basis to justify a conclusion that the losses in question were excluded by the qualified pollution exclusion. Hence, as in *Mullenix*, the unclarity must be resolved in favor of providing a defense.

Additionally, since the meaning of the term "sudden" had not been determined in New Mexico at the time those claims were tendered to Allstate for defense, there was unclarity in the law as regards the scope of the defense obligation under policies containing the qualified pollution exclusion. Courts have required carriers to defend pollution claims in these circumstances as well. *E.g.*, *Apana v. TIG Ins. Co.*, 504 F. Supp. 2d 998, 1004 (D. Haw. 2007); *Pac. Employers Ins. Co.*, 273 F. Supp. 2d at 1158.

CONCLUSION

For the reasons stated above, Appellant United Nuclear Corporation asks the Court to reverse the district court's summary dismissal of UNC's claims with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June 2009, I caused a true and correct copy of the foregoing **BRIEF IN CHIEF** to be mailed first class, postage prepaid, to:

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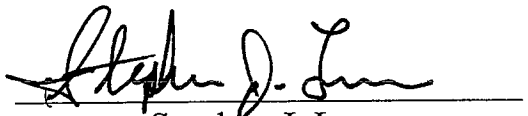

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