DESPITE POLLUTION EXCLUSIONS, SUPREME COURT FINDS INSURANCE COVERAGE POSSIBLE FOR URANIUM MINING COMPANY'S LEGACY SITES

By Stuart R. Butzier

The New Mexico Supreme Court has issued an important opinion in a case of first impression for the state arising from fifteen year old litigation over legacy sites operated from the late 1960s through the early 1980s by United Nuclear Corporation (UNC), now a subsidiary of General Electric. *United Nuclear Corp. v. Allstate Ins. Corp.*, __ NMSC__, __ N.M. __, __ P.3d __ (Slip Op. August 23, 2012). At issue was the meaning of the word "sudden" within pollution exclusions that limited coverage except in cases of "sudden and accidental" damages.

The Court of Appeals had upheld a summary judgment for the insurer, holding that "sudden" unambiguously signifies "quick, abrupt or a temporarily short period of time." Slip Op. at 2, quoting *United Nuclear Corp. v. Allstate Ins. Co*., 2011-NMCA-039, ¶ 20, 149 N.M. 574, 252 P.3d 798. The Supreme Court reversed, finding "sudden" to be an ambiguous term that should be construed against the insurance company as meaning "unexpected." Slip Op. at 15. The Court thus narrowly construed the pollution exclusion and remanded to allow UNC to continue to press its claims of coverage against the insurer.

The case arose from third-party claims of UNC that swept the insurer into a 1997 lawsuit brought against UNC by Santa Fe Pacific Gold Corporation, the mineral lessor and holder of surface use rights to lands held in trust by the United States for the benefit of the Navajo Nation.[1] Over time, UNC broadened the scope of its third-party claims against the insurer to also seek coverage for a wide range of actual and potential liabilities arising from state and federal enforcement proceedings relating to radiological and other contamination associated with multiple sites UNC had operated in the general area.

The Supreme Court relied on a variety of sources in determining whether "sudden" was ambiguous and how it should be construed, including provisions in the policies themselves as well as extrinsic evidence in the form of dictionary definitions, decisions from other jurisdictions, insurance industry practices, and insurance drafting and regulatory history. For the most part, extrinsic evidence is what carried the day for UNC.[2]

Because "sudden" was undefined in the policies at issue, the Court looked to the term's "usual, ordinary and popular" meaning as found in dictionaries. Slip Op. at 8, citing *Davis v. Farmers Ins. Co. of Ariz*., 2006-NMCA-0099, ¶ 7, 140 N.M. 249, 142 P.3d 17. Various

[1] The author was counsel of record for the mineral lessor in the underlying action to force UNC to clean up the Northeast Church Rock Mine in Gallup County, New Mexico.

[2] New Mexico law allows a court to consider extrinsic evidence not only once an ambiguity is determined to exist, but also on the preliminary issue of whether an ambiguity exists in the first place. *See Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993)

dictionaries analyzed by the Court defined "sudden" either in temporal terms or as synonymous with "unexpected," or both. Slip Op. at 8-9 (citations omitted). Likewise, the Court noted and discussed a divergence of opinion among numerous courts on the meaning of "sudden" in similar insurance coverage disputes. Slip Op. at 10-12 (citations omitted).

Perhaps most tellingly, however, the Court agreed with a dissenting judge from the Court of Appeals who had recognized that "[t]he events leading up to the creation of the pollution exception by the insurance industry are 'well-documented and relatively uncontroverted.'" Slip Op. at 14, citing *United Nuclear,* 2011-NMCA-039, ¶ 40 (Vigil, J., dissenting) (quoting *Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am.*, 629 A.2d 831, 848 (N.J. 1993). That history, according to Justice Serna, who authored for the Supreme Court's unanimous decision, indicated that the insurance industry drafted pollution exclusions to merely clarify that coverage would be denied to reckless or intentional polluters, and that the industry represented that to be the case to state regulators from whom it had sought approval for the pollution exclusion without having to reduce premiums. Slip Op. at 13 (citations omitted).

Because the Supreme Court found no genuine dispute about facts material to the interpretation of "sudden," it concluded that it could construe the word as a matter of law rather than have the interpretation tried on remand. Slip Op. at 15. Construing the ambiguous term against the insurer, as is required by New Mexico law, the Court found that "sudden" meant "unexpected" rather than indicating a temporal limitation on an occurrence. *Id.*; *see Ponder v. State Farm Mut. Auto Ins. Co*., 2000-NMSC-033, ¶ 26, 129 N.M. 698, 12 P.3d 960 (courts generally construe ambiguities in favor of the insured as a matter of public policy). The Court observed, however, that its interpretation did not necessarily mean that UNC is entitled to coverage, and it remanded to allow UNC an opportunity to prove that its operations led to discharges that were in fact "sudden and accidental."[3] Slip Op. at 15-16.

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[3] The insurer argued that if "sudden" means "unexpected," then the term "sudden and accidental" would be redundant. The Court rejected this argument by pointing out that "unexpected" and "accidental" do not always have exactly the same meaning, and that, in any event, insurance policies often string together terms that are largely coextensive in their meanings. Slip Op. at 11 (citations omitted.)