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TORT LAW—New Mexico Holds Corporations Liable for Punitive Damages Based Upon the Actions of Managerial Agents: *Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*

I. INTRODUCTION

In *Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*,¹ the New Mexico Supreme Court held a corporation liable for punitive damages based on an employee's misconduct when the employee was acting in his "managerial capacity."² Before *Albuquerque Concrete*, New Mexico courts only assessed punitive damages against corporations for acts by executives with "whole executive power."³ By adopting the managerial capacity criterion, the supreme court expanded the class of agents whose acts are considered the acts of a corporation when assessing punitive damages. This Note outlines the *Albuquerque Concrete* decision in its historical context, examines the court's rationale, and explores the implications of the court's decision.

II. STATEMENT OF THE CASE

Albuquerque Concrete Coring Company (ACC) contracted with Pan American World Services (Pan Am) to perform work at a Los Alamos National Laboratory construction site.⁴ During the construction, ACC encountered conditions that made its work more difficult and expensive than specified in its subcontract. ACC requested a fee adjustment from Pan Am, the general contractor. Pan Am initially responded that it would investigate the problem and make contract adjustments after the job's completion. ACC, however, was not satisfied with Pan Am's response and continued to request a fee adjustment. After a series of failed negotiations, ACC sued Pan Am for breach of contract. The district court awarded ACC \$66,500 in compensatory damages and \$133,000 in punitive damages.

The district court held Pan Am liable for punitive damages based upon the actions of William D. Adams, a Pan Am manager.⁵ The court found

1. 118 N.M. 140, 879 P.2d 772 (1994).

2. *Id.* at 146, 879 P.2d at 778.

3. See *Cornell v. Albuquerque Chemical Co.*, 92 N.M. 121, 126-27, 584 P.2d 168, 173-74 (Ct. App. 1978); *Couillard v. Bank of New Mexico*, 89 N.M. 179, 184, 548 P.2d 459, 464 (Ct. App. 1976).

4. *Albuquerque Concrete*, 118 N.M. at 142-43, 879 P.2d at 774-75. All subsequent factual references in this section refer to this citation, unless otherwise cited.

5. The court assumed the following factual matters based upon record and transcripts: (1) Adams held the title of Administration Manager; (2) he supervised the Contract Administrator and reported to the Pan Am Vice-President apparently in charge of Los Alamos operations; and (3) Adams testified that he was in "upper management" and it was his responsibility to administer contractual problems like the one with ACC. *Id.*

that Mr. Adams' conduct included "material misrepresentations" and "bad faith." Specifically, the district court found that Adams intentionally made false statements to ACC in order to coerce it into finishing the job when he (1) threatened to "blackball" ACC from all future government contract work; (2) threatened to hold ACC liable for the costs of job completion if it did not finish the job; and, (3) persuaded ACC to perform additional work that Pan Am did not intend to pay for.

Finally, the trial court found that Pan Am acted in bad faith when Adams denied ACC's requested contract adjustment.⁶ Adams denied the adjustment because the invoice did not include necessary documentation. The district court found, however, that Adams possessed the documentation and ignored it. Pan Am appealed the punitive damages award to the Supreme Court of New Mexico.

In *Albuquerque Concrete*, the New Mexico Supreme Court upheld the punitive damages award against Pan Am based upon Adams' misconduct.⁷ The court found that Adams' discretionary authority as a Pan Am manager established corporate participation in his misconduct.⁸ Therefore, Pan Am was liable for punitive damages based upon Adams' actions.

III. BACKGROUND

Courts award punitive damages to punish and deter the outrageous conduct of wrongdoers.⁹ Under certain circumstances, courts impose punitive damages on corporations based upon the acts of their employees.¹⁰ Courts apply one of two rules to determine corporate liability for punitive damages based upon employee misconduct: (1) the scope-of-employment rule, or (2) the complicity rule.¹¹ These two rules are based upon competing legal doctrines.

A. *Scope-of-Employment Rule*

A minority of United States jurisdictions apply the "scope-of-employment rule."¹² This relatively liberal rule holds a corporation liable for the acts of employees when the employees act within the scope of their

6. Court records indicate: (1) Adams instructed the Contract Administrator to inform ACC of the adjustment denial; and (2) the Vice President "may have been carbon-copied" with a written copy of the denial. *Id.*

7. *Albuquerque Concrete*, 118 N.M. at 145, 879 P.2d at 778.

8. *Id.*

9. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, § 2, at 9 (5th ed. 1984). Punitive damages are "given as an enhancement to compensatory damages because of [the] wanton, reckless, malicious or oppressive character of acts complained of." *BLACK'S LAW DICTIONARY* 390-91 (6th ed. 1990). See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (stating that punitive damages "have long been a part of traditional state tort law"); *Day v. Woodworth*, 54 U.S. (13 How.) 362, 371 (1851) ("It is a well-established principle of the common law" that juries may award punitive damages).

10. CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES*, § 80, at 282-84 (1935).

11. Philip H. Corboy, *Vicarious Liability for Punitive Damages: The Effort to Constitutionalize "Tort Reform"*, 2 *SETON HALL CONST. L.J.* 2, 13 (1991).

12. See RICHARD L. BLATT ET AL., *PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE*, § 8.2, at 114 (1991).

employment.¹³ It does not require ratification on the part of the employer.¹⁴ This rule views an agent's acts as the legal equivalent of the corporation's acts.¹⁵ Courts applying the scope-of-employment rule stress deterrence as the purpose of punitive damages.¹⁶ A 19th century case articulated this rule's rationale:

A corporation is an imaginary thing. It has no mind but the mind of its servants; . . . and it has no hands with which to act but the hands of its servants. . . . All attempts therefore to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant or the malice of the corporation . . . is sheer nonsense. . . . When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better [employees] will take their places and not before.¹⁷

An important feature of this rule is that courts do not consider an agent's rank within the corporation when assessing liability for punitive damages.¹⁸ Proponents of the "scope-of-employment rule" argue that it (1) encourages corporate responsibility for corporate acts, (2) eliminates the necessity of gathering evidence of wrongdoing that is in the custody of the defendant, and (3) provides an opportunity for plaintiffs to act "for the benefit of the public."¹⁹

B. The Complicity Rule

A majority of United States jurisdictions apply the more conservative "complicity rule."²⁰ This rule is based on the belief that an innocent party should not be liable for punitive damages arising from a third party's actions.²¹ The complicity rule holds a corporation liable for punitive damages only when corporate agents who possess a requisite level of authority affirm or participate in the misconduct.²² The complicity rule

13. Corboy, *supra* note 11, at 16-17. In other words, *respondeat superior* applies to both compensatory and punitive damages.

14. *Id.*

15. McCORMICK, *supra* note 10, at 284.

16. KEETON ET AL., *supra* note 9, at 13 (exemplary damages levied against a railway carrier for the purpose of deterring future conduct were warranted when a brakeman assaulted and grievously insulted a passenger (citing *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202 (1869))).

17. *Id.* at 223-224.

18. See *Mobile & O.R. Co. v. Seals*, 13 So. 917 (Ala. 1893) (holding that a trespasser on a railroad train may recover exemplary damages for a wanton, willful and intentional wrong committed by a brakeman within the scope of his employment). "The president of a railway corporation is no more or less its agent than a brakeman on one of its trains . . . [A] brakeman is as fully authorized to act for the company, within the range of his employment, as the president is within the limits of his office." *Id.* at 919. See also *Stroud v. Denny's Restaurant, Inc.*, 532 P.2d 790 (holding that a trial court appropriately awarded punitive damages against a coffee shop chain for malicious prosecution when a cook, acting within the scope of his employment, executed a citizen's arrest upon a customer who refused to pay for unbuttered toast).

19. Corboy, *supra* note 11, at 18-20.

20. Blatt, *supra* note 12, at 114. See also Clarence Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 221 (1960) (using the term "complicity rule" first).

21. See Corboy, *supra* note 11, at 13; see also McCORMICK, *supra* note 10, at 284.

22. Morris, *supra* note 20, at 221.

exists in two main versions, a conservative version known as the "whole-executive-power rule," and a more moderate version known as the "Restatement rule."

1. The Whole-Executive-Power Rule

The whole-executive-power rule holds corporations liable for punitive damages only when very high ranking executive officers authorize, participate in, or ratify misconduct.²³ The whole-executive-power rule focuses authority at the very top of the corporate hierarchy.²⁴ This rule usually requires that the corporation's chief executive officer, or the vice-president acting in the C.E.O.'s absence, authorize or participate in the misconduct.²⁵

A 19th century case, *Lake Shore & Michigan Southern Railway v. Prentice*,²⁶ articulated the rationale of the rule. In *Lake Shore*, the United States Supreme Court noted that exemplary or punitive damages are awarded to punish the offender, not to compensate the victim.²⁷ Therefore, courts should only uphold such awards against those who participate in the misconduct.²⁸ According to *Lake Shore*, only those holding essentially plenary "whole executive power" should be treated as representing the intent, and therefore the participation, of the corporation itself.²⁹

2. The Restatement Rule

The Restatement rule holds corporations liable for the acts of agents under a wider variety of circumstances.³⁰ This is the most common form of the complicity rule.³¹ It contains four subsections that describe actions by or circumstances under which a corporation or an employer may be

23. *Lake Shore & Mich. So. Ry. v. Prentice*, 147 U.S. 101 (1893).

24. *See id.* at 114.

25. *See id.*

26. 147 U.S. 101 (1893).

27. *Id.* at 114.

28. *Id.* at 107. In other words, it is inappropriate to assess punitive damages against innocent third parties.

29. *Id.* at 109.

30. *See Corboy, supra* note 11, at 24-25. The Restatement rule states:

§ 909. Punitive Damages Against a Principal

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

Corboy, supra note 11, at 25 (quoting RESTATEMENT (SECOND) OF TORTS § 909 (1979)). *See also* RESTATEMENT (SECOND) OF AGENCY § 217C (1971), which is identical to section 909 in the Restatement (Second) of Torts. Future citations are to the Restatement (Second) of Torts only.

31. *See Corboy, supra* note 11, at 24-25.

held liable for punitive damages based upon the actions of an employee.³² Like other forms of the complicity rule, the Restatement rule does not assess punitive damages against an employer who is personally innocent.³³ However, within its various subsections, the Restatement rule does hold an employer liable who authorizes, ratifies, or approves employee misconduct, or who recklessly employs or retains an unfit employee.³⁴ In addition, the Restatement rule holds employers directly liable for the misconduct of managerial employees who are acting within the scope of their employment, or who approve the wrongful act while acting as a managerial agent.³⁵

The Restatement's "managerial capacity" criterion holds corporations vicariously liable for the acts of a specific class of employee: managers.³⁶ The Restatement rule seeks to balance the two policy goals of protecting innocent third parties and encouraging the responsible delegation of authority that is necessary within modern corporations.³⁷

C. Corporate Liability for Punitive Damages in New Mexico

Prior to *Albuquerque Concrete*, New Mexico courts applied the whole-executive-power form of the complicity rule.³⁸ The New Mexico Supreme Court first applied the complicity rule in *Stewart v. Potter*³⁹ in 1940. In *Stewart*, the court rejected the scope of employment rule and embraced the complicity rule rationale found in *Lake Shore*.⁴⁰ The court reversed a punitive damages award when it found no evidence that a car dealer had authorized, ratified, or participated in his agent's fraudulent sale of a used car as new.⁴¹ In 1957, the court applied the complicity rule to a corporation in *Sanchez v. Securities Acceptance Corp.*⁴² Without explicitly adopting the "whole executive power" language, the court referred to the corporate culpability and employee authority concerns articulated in *Lake Shore*.⁴³ The *Sanchez* court stated that liability required sufficient employee authority to constitute corporate ratification, authorization or participation in the misconduct.⁴⁴

32. RESTATEMENT (SECOND) OF TORTS § 909; see also *supra* note 30.

33. RESTATEMENT (SECOND) OF TORTS § 909 cmt. b.

34. *Id.* § 909(a)-(b), (d). "It is, however, within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee who was known to be vicious, if the harm resulted from that characteristic." *Id.* cmt. b.

35. *Id.* § 909(c)-(d).

36. *Id.* "Although there has been no fault on the part of a corporation or other employer, . . . imposition of punitive damages upon the employer serves as a *deterrent* to the employment of unfit persons for important positions." *Id.* cmt. b (emphasis added).

37. See *id.*

38. See *Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 601, 577 P.2d 1245, 1247 (1978); *Sanchez v. Securities Acceptance Corp.*, 57 N.M. 512, 516, 260 P.2d 703, 707 (1953).

39. 44 N.M. 460, 104 P.2d 736 (1940).

40. *Id.* at 464, 104 P.2d at 740.

41. *Id.* at 461, 104 P.2d at 737.

42. 57 N.M. 512, 512, 260 P.2d 703, 703 (1953). In *Sanchez*, the supreme court reversed a punitive damages award for wrongful taking and false imprisonment resulting from an employee's tortious conduct when he repossessed a car. *Id.* at 518, 260 P.2d at 709.

43. *Id.*

44. *Id.* at 515, 260 P.2d at 706.

In 1976, New Mexico officially adopted the *Lake Shore* "whole executive power" language when assessing punitive damages against a corporation.⁴⁵ In *Couillard v. Bank of New Mexico*,⁴⁶ the court reversed a punitive damages award levied against a parent bank when it found that the manager of a branch bank did not possess the whole executive power of the parent bank.⁴⁷

Two years later, in *Cornell v. Albuquerque Chemical Co.*,⁴⁸ the New Mexico Supreme Court assessed punitive damages against a corporation based upon the fraudulent actions of the company's vice-president.⁴⁹ The court found that the vice-president wielded the whole executive power of the company because he controlled all of the company's operations.⁵⁰ The vice-president was the only officer who performed any executive duties of this family business.⁵¹

Prior to *Albuquerque Concrete*, New Mexico courts consistently applied the whole-executive-power rule when assessing punitive damages against corporations. In 1978, however, one New Mexico Supreme Court justice called for adoption of the managerial capacity standard in the case of *Samedan Oil Co. v. Neeld*.⁵² In *Samedan*, the supreme court reversed a punitive damages award in a wrongful death action.⁵³ The court found no evidence of liability under New Mexico's whole-executive-power rule when an improperly designed natural gas well vent system burst and killed an employee.⁵⁴ A district production foreman, employed by Samedan Oil Company, designed the system and supervised its construction.⁵⁵

In the *Samedan* dissent, Justice Easley urged adoption of the managerial capacity criterion from the Restatement (Second) of Agency.⁵⁶ Justice Easley noted that "considerable controversy and change" was occurring in the area of liability for punitive damages in other jurisdictions.⁵⁷ The justice argued that the law should penalize corporations when they fail to control their managerial personnel.⁵⁸ Justice Easley's dissent foreshadowed the court's decision in *Albuquerque Concrete*.

45. See *Couillard v. Bank of New Mexico*, 89 N.M. 179, 182, 548 P.2d 459, 463 (1976).

46. 89 N.M. 179, 548 P.2d 459 (1976).

47. *Id.* at 182-83, 548 P.2d at 462-63. The court considered the relationship between the parent bank organization and the bank branch office to be a principal and agent relationship. The court reasoned that as manager of the agent office serving the principal, the branch manager could not possess the whole executive power of the parent organization (even though his title was "Vice-President"). *Id.*

48. 92 N.M. 121, 584 P.2d 168 (1978).

49. *Id.* at 126-27, 584 P.2d at 173-74.

50. *Id.*

51. *Id.* at 126, 584 P.2d at 173.

52. 91 N.M. 599, 603-04, 577 P.2d 1245, 1249-50 (Easley, J., dissenting).

53. *Id.* at 603, 577 P.2d at 1249.

54. *Id.* at 600, 577 P.2d at 1246.

55. *Id.*

56. *Id.* at 604, 577 P.2d at 1250 (citing RESTATEMENT (SECOND) OF AGENCY § 217(c)).

57. *Samedan*, 91 N.M. at 603, 577 P.2d 1249.

58. *Id.* at 604, 577 P.2d at 1250.

IV. RATIONALE

In *Albuquerque Concrete*, the New Mexico Supreme Court upheld the punitive damages award against Pan Am based upon the conduct of William D. Adams, a Pan Am manager.⁵⁹ The court applied the Restatement managerial capacity criterion and found that Adams' discretionary authority as a Pan Am manager established corporate participation in his misconduct.⁶⁰ In reaching its decision, the court considered the arguments of both ACC and Pan Am, and ultimately chose its own path.

A. *Applicability of Punitive Damages to Adams' Conduct*

When concluding that Adams' conduct merited punitive damages, the court noted that punitive damages are appropriate "when the defendant's actions are malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for plaintiff's rights."⁶¹ The court reasoned that the purpose of punitive damages is to punish and deter misconduct.⁶² The court further reasoned that punitive damages require a culpable mental state on the part of the offending party.⁶³ The court found substantial evidence of Adams' culpable mental state and held that his conduct merited a punitive damages award.⁶⁴

B. *Pan Am's Liability for Punitive Damages Based on New Mexico's Complicity Rule*

In *Albuquerque Concrete*, the supreme court stated that the "central issue [of the] case [was] whether Adams' conduct [could] be imputed to Pan Am."⁶⁵ The court declared that in New Mexico a principal is liable for punitive damages if it "authorized, ratified, or participated" in the culpable acts of its agent.⁶⁶ Because the district court made no specific findings or conclusions regarding whether Pan Am's conduct fell within this rule, the supreme court performed its own analysis.⁶⁷

The supreme court considered three ACC arguments for imputing Adams' conduct to Pan Am:⁶⁸ (1) that the district court's findings that Pan Am "acted through its duly authorized employees" constituted corporate participation;⁶⁹ (2) that Pan Am ratified Adams' acts by acqui-

59. *Albuquerque Concrete Coring Co. v. Pan Am World Serv., Inc.*, 118 N.M. 140, 145-46, 879 P.2d 772, 777-78 (1994).

60. *Id.* at 146, 879 P.2d at 778.

61. *Id.* at 143, 879 P.2d at 775 (citing *Romero v. Mervyn's*, 109 N.M. 249, 255, 784 P.2d 992, 998 (1989)).

62. *See id.* (citing *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 9, 791 P.2d 452, 460 (1990)).

63. *Id.*

64. *Id.*

65. *Albuquerque Concrete*, 118 N.M. at 143, 879 P.2d at 775.

66. *Id.* at 146, 879 P.2d at 778. *See supra* notes 38-42 and accompanying text.

67. *Id.* at 143, 879 P.2d at 775.

68. *See id.* at 143-44, 879 P.2d at 775-76.

69. *Id.* This argument echoes the principles of the scope of employment rule. The court did not directly refute this argument, but later applied the rule of managerial capacity to corporate participation.

essence when a vice-president received copies of the contract adjustment denial;⁷⁰ and (3) that Pan Am ratified Adams' acts when it accepted the benefits of the contract breach.⁷¹ The court held ACC's second and third arguments did not establish corporate ratification because the facts did not establish a culpable mental state on the part of Pan Am.⁷² Instead, the court agreed with the agent-based liability argument asserted by Pan Am.

The court, however, rejected Pan Am's claim that it was not liable for punitive damages because Adams did not possess the whole executive power of the corporation.⁷³ The court found the whole-executive-power criterion "[v]ery restrictive and . . . impractical in today's business world."⁷⁴ The court noted that the rule only applies to a few members of the corporation who hold plenary authority.⁷⁵ Instead, the court chose the managerial capacity rule, which focuses on whether an agent possesses discretionary or policymaking authority for the corporation.⁷⁶

C. Acts of an Agent with Managerial Capacity Constitute Corporate Participation

The court adopted the managerial capacity subsection of the Restatement and held Pan Am liable for Adams' misconduct.⁷⁷ The court reasoned that "when a corporate agent with managerial capacity acts on behalf of the corporation . . . his acts are the acts of the corporation; [and] the corporation has participated" in the agent's acts.⁷⁸ In applying this rule, the court looked to other jurisdictions for a definition of "managerial capacity."

The court drew on language from *Egan v. Mutual of Omaha Mutual Ins. Co.*,⁷⁹ in which the California Supreme Court stated that the agent's level in the corporate hierarchy does not necessarily determine managerial capacity.⁸⁰ The New Mexico Supreme Court concluded that the more appropriate test is whether the agent has authority to set corporate policy

70. *Albuquerque Concrete*, 118 N.M. at 144, 879 P.2d at 776. The court acknowledged that a corporation may authorize an agent's acts by acquiescence in those acts. *Id.* (citing *Bank of Santa Fe v. Honey Boy Haven, Inc.*, 106 N.M. 584, 587, 746 P.2d 1116, 1119 (1987)). However, the court noted the record contained no indication that the vice-president had knowledge of Adams' misconduct toward ACC. *Id.* at 144, 879 P.2d at 776. The court found that receipt of a contract adjustment denial notice was insufficient to establish culpable knowledge on the part of Adam's supervisors. *Id.*

71. *Albuquerque Concrete*, 118 N.M. at 144, 879 P.2d at 776. The court noted that accepting the benefits of a breach of contract is not a sufficient basis for awarding punitive damages without evidence of culpable knowledge or behavior. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Albuquerque Concrete*, 118 N.M. at 145, 879 P.2d at 777.

76. *Id.* at 146, 879 P.2d at 778.

77. *Id.* at 146, 879 P.2d at 778.

78. *Id.*

79. 620 P.2d 141 (Cal. 1979), cert. denied, 445 U.S. 912 (1980).

80. *Albuquerque Concrete*, 118 N.M. at 145, 879 P.2d at 777 (citing *Egan*, 620 P.2d at 148).

and make decisions regarding what to do and how to do it.⁸¹ Focusing on language in *Abshire v. Stoller*,⁸² the court followed the Illinois Court of Appeals' definition of a managerial employee as one who "formulates, determines and effectuates his employer's policies . . . with discretion or authority . . . independent of company consideration . . ."⁸³

The court noted that the rule of managerial capacity "retain[s] the philosophy that corporations should not be liable for punitive damages absent corporate culpability . . ."⁸⁴ The court also noted, however, that the rule "tends to deter the employment of unfit persons for important positions" and "encourage[s] their supervision."⁸⁵

The court affirmed that wrongdoing by managing agents who supervise daily operations is sufficient to "trigger imposition of corporate liability for punitive damages."⁸⁶ The court acknowledged that the modern business world requires large corporations to delegate control to managing agents who do not possess upper-level executive authority.⁸⁷ The court reasoned that if managers in charge of daily operations cannot activate liability for punitive damages, large corporations "could unfairly escape liability . . . by virtue of their size."⁸⁸ According to the court, liability for punitive damages should be based on "corporate responsibility for wrong doing," not the "ability to insulate top executives . . ."⁸⁹

V. ANALYSIS AND IMPLICATIONS

In *Albuquerque Concrete*, the New Mexico Supreme Court moved from an ultra-conservative rule to a less conservative rule for assessing punitive damages against corporations.⁹⁰ It did so by incorporating the Restatement's managerial capacity criterion into the participation element of the traditional New Mexico complicity rule.⁹¹ As a result, New Mexico courts will continue to hold corporations liable for punitive damages only when

81. *Id.*

82. 601 N.E.2d 1257 (Ill. App. Ct. 1992).

83. *Albuquerque Concrete*, 118 N.M. at 145, 879 P.2d at 777 (citing *Abshire*, 601 N.E. 2d at 1263 (quoting *Kemner v. Monsanto Co.*, 576 N.E.2d 1146, 1157 (Ill. App. Ct.), cert. denied, 584 N.E.2d 130 (1991))).

84. *Albuquerque Concrete*, 118 N.M. at 146, 879 P.2d at 778.

85. *Id.*

86. *Id.*

87. See *Albuquerque Concrete*, 118 N.M. at 146, 879 P.2d at 778.

88. *Id.*

89. *Id.*

90. See *id.*

91. This new hybrid rule creates a rule that is roughly equivalent to the entire four sections of the Restatement rule. See *supra* note 30. Subsection (a) of the Restatement rule refers to authorizing the acts of an agent and subsection (d) of the Restatement rule refers to ratifying the acts of an agent. See RESTATEMENT (SECOND) OF TORTS §§ 909(a) (d). "Authorizes" and "ratifies" are explicitly stated elements of the New Mexico common law complicity rule. See, e.g., *Albuquerque Concrete*, 118 N.M. at 145-46, 879 P.2d at 777-78. Subsection (b) refers to recklessly retaining an unfit agent. See RESTATEMENT (SECOND) OF TORTS § 909(b). This subsection can be compared to ratification of an agent's acts through "acquiescence in or acceptance of the unauthorized acts of an agent." *Albuquerque Concrete*, 118 N.M. at 144, 879 P.2d at 776 (citing *Bank of Santa Fe*, 106 N.M. at 587, 746 P.2d at 1119).

they are found to ratify, participate in, or authorize the misconduct of an agent. However, any employee with managerial capacity can now ratify, participate in, or authorize that misconduct.

A. *The New Mexico Rule*

New Mexico's new hybrid version of the complicity rule expands the class of agents with sufficient authority to establish corporate participation in misconduct. Before *Albuquerque Concrete*, only the actions of executives with plenary "whole executive power" could represent the intent which constitutes participation by the corporation.⁹² After *Albuquerque Concrete*, those agents who act on behalf of the corporation in a managerial capacity have this authority.⁹³

An agent with managerial capacity may now impute wrongdoing to a corporation in two ways: (1) by ratifying or authorizing the misconduct of a subordinate corporate agent;⁹⁴ or (2) by personally committing acts of wrongdoing.⁹⁵ Essentially, this second form of imputing an agents' acts to a corporation is a version of the scope-of-employment rule.⁹⁶ The managerial capacity criterion creates a limited group of agents within the corporation for whom the corporation is vicariously liable.

B. *More New Mexico Lawsuits Will Seek Punitive Damages*

As a result of *Albuquerque Concrete*, New Mexico now subjects powerful corporations to punitive damages for the egregious acts of local managers. In the future, New Mexico plaintiffs will arguably file more lawsuits seeking larger punitive damages awards against corporations. Hopefully, this change in the law will result in greater corporate responsibility toward local communities.

More New Mexico lawsuits will seek punitive damages after *Albuquerque Concrete* for two reasons. First, plaintiffs can prove their cases more easily. Plaintiffs will no longer need to gather certain evidence that is in the hands of out-of-state corporate defendants. They can now sue large multinational or out-of-state corporations for misconduct of local managers without proving knowledge on the part of superior out-of-state officers.⁹⁷

Second, plaintiffs will be more likely to pursue punitive damages suits when there is a greater potential for recovery. The acts of local managers alone can now give plaintiffs access to the deep pockets of the parent company.⁹⁸ This will increase the likelihood of plaintiff success and will arguably result in a greater number of lawsuits.

92. See *Albuquerque Concrete*, 118 N.M. at 144, 879 P.2d at 776.

93. See *id.* at 146, 879 P.2d at 778.

94. See generally *supra* notes 61, 76, 80-83, 86-89 and accompanying text.

95. See generally *supra* notes 35-36, 78, 86-89 and accompanying text.

96. See *supra* text accompanying notes 12-15 and 35-36.

97. See *supra* notes 86-89 and accompanying text.

98. See *supra* notes 86-89 and accompanying text.

C. Larger Punitive Damages Awards

New Mexico will assess larger punitive damages awards against corporations. The stated purpose of punitive damages in New Mexico is to punish and deter future misconduct.⁹⁹ In order to punish and deter misconduct on the part of a corporation, the award must be of sufficient size to impact on the corporation's resources. The bigger the corporation, the larger the award must be. After *Albuquerque Concrete*, juries will more often consider the financial resources of an entire corporation, rather than an individual, when determining the size of punitive damages. Therefore, juries will arguably assess larger awards in order to produce the required deterrent effect.

D. Greater Corporate Responsibility

Expanding liability for punitive damages to the managerial class may serve New Mexico commerce by creating a corporate climate that is more responsible. Policymaking employees will now bind their corporations for outrageous, incompetent or malicious actions. This should benefit the New Mexico business community.

For example, it will be harder for large businesses with greater financial power to take advantage of small businesses. Indeed, the *Albuquerque Concrete* case is an example of a small subcontractor who was bullied into finishing a construction job by the threats and lies of a larger, more powerful company. Adams' message to ACC was that if ACC did not finish the job on Pan Am's terms, then (1) ACC would not get paid (and even then Pan Am failed to pay the requested amount); (2) Pan Am would sue ACC for the costs of job completion (and by implication Pan Am had the resources to do so); and (3) Pan Am would "blackball" ACC from government contracts in the future (and by implication Pan Am had the connections and power to do this; ACC would then be cut off from a major source of business in a state with a relatively small private economy).¹⁰⁰ As a result of the decision in *Albuquerque Concrete*, small businesses in New Mexico can now plan and run their affairs with a greater expectation of good faith negotiations and keep agreements when dealing with larger businesses.

With *Albuquerque Concrete*, New Mexico joins the majority of United States jurisdictions that include the acts of managers within corporate liability for punitive damages. Since a majority of states already hold corporations liable for the acts of managerial agents, it is unlikely that this change will discourage corporations from doing business in New Mexico.¹⁰¹ The managerial capacity criterion will expand liability for punitive damages awards in a controlled way that will not unduly burden corporate financial reserves.

99. *Albuquerque Concrete Coring Co. v. Pan Am World Serv., Inc.*, 118 N.M. 140, 143, 879 P.2d 772, 775 (1994).

100. *Id.* at 142, 879 P.2d at 774.

101. *Id.*

VI. CONCLUSION

The *Albuquerque Concrete* decision expands corporate liability for punitive damages to include the actions of agents with managerial capacity. Before this decision, New Mexico courts only assessed punitive damages against corporations for acts by agents with whole executive power. *Albuquerque Concrete* will increase the number of New Mexico lawsuits that seek punitive damages against corporations and will result in more and larger punitive damages awards. The more liberal New Mexico rule, adopted in *Albuquerque Concrete*, should make corporations that conduct business in New Mexico more responsible in their hiring and supervision of local managers.

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