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Commercial Law - The New Mexico Supreme Court Answers a Moot Question of Partnership Law: First National Bank in Albuquerque v. Sanchez

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COMMERCIAL LAW—The New Mexico Supreme Court Answers a Moot Question of Partnership Law: *First National Bank in Albuquerque v. Sanchez*

I. INTRODUCTION

First National Bank in Albuquerque v. Sanchez[1] presents a unique fact situation in which two partners attempted to bring separate claims, each on behalf of a general partnership. Subsequently, one partner purported to release the partnership's claim. The New Mexico Supreme Court held that the first partner could neither bring nor release a partnership claim because the complaint, answer, and subsequent release did not mention the partnership by name.[2] The court further held that the second partner could, however, bring a claim on behalf of the partnership because the partner and the adverse party, by their conduct at trial, treated most of the claims for damages as partnership damages.[3] The court upheld the validity of the partnership claim even though the second partner's claim also failed to mention the partnership.[4] The court issued the *Sanchez* opinion even though the parties had settled all matters before the final opinion was filed.[5]

This Note will examine the mootness doctrine, address the shortcomings of the court's analysis of the partnership issues, and suggest an alternative approach for analyzing the validity of partnership claims brought and released by fewer than all partners of a general partnership.

II. STATEMENT OF THE CASE

Pat and Susan Sanchez ("Sanchez") and Anthony Tafoya were equal partners in P-S Construction Company.[6] The partnership obtained a construction loan in the amount of $400,000 from First National Bank in Albuquerque ("FNB"). Sanchez and Tafoya planned to use the money to develop sixty-one undeveloped residential lots owned by the partnership. The sixty-one undeveloped lots were mortgaged to FNB to secure the note.

FNB disbursed $274,757 of the proceeds under the note; however, when the partners requested the remaining $125,243 needed to complete the development, FNB demanded additional financial information. The bank began to treat the loan as if it were an acquisition and development

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1. 112 N.M. 317, 815 P.2d 613 (1991). Justice Ransom wrote for the court and Chief Justice Sosa and Justice Montgomery concurred. *Id.*

2. *Id.* at 326, 815 P.2d at 622.

3. *Id.* at 325, 815 P.2d at 621.

4. *Id.*

5. *Id.* at 326, 815 P.2d at 622.

6. *Id.* at 318, 815 P.2d at 614. Pat and Susan Sanchez held a 50% interest and Tafoya held the remaining 50% interest in P-S Construction Co. *Id.* at 319, 815 P.2d at 615.

loan instead of a construction loan secured by a standard residential real estate mortgage covering the sixty-one undeveloped lots. An acquisition and development loan requires extensive financial and project documentation, disbursement of funds in stages as completion of the project progresses, and various other requirements.[7] The original loan agreement did not contain any of the conditions or requirements of an acquisition and development loan.[8]

The partners did not comply with FNB's demands for additional information. FNB consequently refused to disburse the remaining $125,243 as required by the loan agreement. The partners sought financing elsewhere but were unsuccessful. Sanchez and Tafoya thus could not complete the project and they defaulted on the note, causing FNB to foreclose on the secured lots. The partnership subsequently failed.[9]

FNB instituted a collection action on the promissory note against the partnership to collect the $274,757 disbursed to the partnership and a foreclosure action on the mortgaged lots. The partners stipulated to a judgment in FNB's favor for the balance due on the note plus interest, and foreclosure on the undeveloped lots securing the debt. In exchange, FNB waived any deficiency judgment and agreed that the stipulation would not prejudice the right of the partners to pursue counterclaims against the bank.

Both Tafoya and Sanchez counterclaimed. Tafoya, however, dismissed his counterclaim. Tafoya's release provided that the dismissal was to be "wholly without prejudice to the counterclaims of Pat and Susan Sanchez."[10] The release made no mention of P-S Construction or Tafoya's interest in the partnership.[11]

Sanchez, on behalf of P-S Construction Company, counterclaimed against FNB based on FNB's withholding of $125,243 from the total of $400,000 specified in the loan. Sanchez sued under the theories of breach of contract, negligent misrepresentation, and economic duress. Sanchez sought to recover damages for the forced sale of the partnership and personal assets, the financial ruin of a once profitable partnership, attorney's fees, and damage to his personal credit and business rating.[12]

The jury awarded Sanchez $1,503,000 in compensatory damages and $125,243 in punitive damages. On a motion for a judgment notwithstanding the verdict by FNB, the trial court reduced the compensatory damage award by one-half. The court viewed the award as belonging to the partnership and because Tafoya, an equal partner, had dismissed his

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7. *Id.* at 319-21, 815 P.2d at 615-17. FNB demanded that the partners provide soil reports, a copy of the partnership agreement, personal and corporate financial statements, and documents from Farmers' Home Administration ["FmHA"]. FmHA planned to purchase the developed lots. *Id.* at 321, 815 P.2d at 617.

8. *Id.* at 321, 815 P.2d at 617.

9. *Id.* at 319, 815 P.2d at 615.

10. *Id.* at 318 n.1, 815 P.2d at 614 n.1.

11. *Id.*

12. *Id.* at 322-23, 815 P.2d at 618-19.

claim which represented a one-half interest in the judgment, the award had to be reduced.[13] FNB appealed,[14] and Sanchez cross-appealed.[15]

III. MOOTNESS DOCTRINE

In *Sanchez*, the parties notified the court that they had settled all matters before the court issued its opinion. Nonetheless, the court published the opinion "for its precedential value alone."[16] The doctrine of mootness, in both New Mexico and other jurisdictions, makes it clear that a court's answering of a moot question is not precedent but dictum.[17] Ordinarily, the New Mexico Supreme Court's dicta would have strong persuasive value, particularly as New Mexico case law on partnership issues is not well developed. The partnership discussion in *Sanchez* should, however, be accorded no persuasive value, as will be discussed in the next section.

A. Mootness Doctrine in New Mexico

The New Mexico Supreme Court's long-recognized practice of not adjudicating "purely academic causes"[18] is driven by its policy of conserving judicial resources.[19] "[An] orderly and uniform procedure is necessary to enable the courts to dispatch business, and secure an end to litigation."[20] If the court answers a moot question, "the successful party in the lower court would never know when he was secure in the relief awarded him."[21]

Unlike the Federal Constitution, New Mexico's Constitution does not contain a "cases or controversy" provision.[22] The New Mexico Supreme

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13. *Id.* at 318-19, 815 P.2d at 614-15.

14. FNB appealed the following issues: "(1) lack of substantial evidence on duress; (2) error in the presentation of damages to the jury; (3) error in allowing a witness qualified as an expert in banking law to testify that because the loan was not in fact an 'acquisition and development' loan First National had 'no legal right' to withhold the $125,243; (4) the compensatory award was excessive as a matter of law; and (5) lack of substantial evidence to support an award of punitive damages." *Id.* at 319, 815 P.2d at 615.

15. *Id.* at 318, 815 P.2d at 614. Sanchez argued that the trial court erred in reducing the compensatory damage award by $1/2$. *Id.*

16. *Id.* at 326, 815 P.2d at 622.

17. The Utah Supreme Court has reasoned that when a case becomes moot after an appeal has been filed from a lower court decision, the appellate court should vacate the decision of the lower court and remand the case with instructions to dismiss. Merhish v. H.A. Folsom & Assocs., 646 P.2d 731, 733 (Utah 1982). Also, the Minnesota Supreme Court has held: "Deliberate disregard of the necessary limitation on the scope of appellate review results in 'obiter dicta:' expressions which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases." Pike v. Gunyou, 488 N.W.2d 298, 310 (Minn. 1992).

18. Hatch v. Keehan, 61 N.M. 1, 3, 293 P.2d 314, 315 (1956).

19. Costilla Land & Development Co. v. Allen, 17 N.M. 343, 346, 128 P. 79, 81 (1912) ("If the setting aside of [a lower court's judgement] would accomplish nothing, why should the court be called upon to do an ineffectual thing?").

20. *Id.* at 347, 128 P. at 81.

21. *Id.*

22. The United States Constitution grants the judiciary power to decide "cases and controversies." U.S. CONST. art. III. Among the Constitution's case or controversy requirements is that the claim to be adjudicated not be moot. DeFunis v. Odegaard, 416 U.S. 312 (1974); *cf.* N.M. CONST. art.

Court, however, has held that "in order to confer jurisdiction on the court to enter a declaratory judgement, an actual controversy must exist."[23] In addition, "[the New Mexico Supreme] Court has repeatedly stated that it will not decide moot questions."[24]

Despite the policy and law against adjudicating moot questions,[25] the New Mexico Court of Appeals has, however, previously published an opinion even after the parties had settled their controversy. In *Riesenecker v. Arkansas Best Freigh Systems*,[26] the court published its opinion for several reasons. First, the opinion was filed before the court learned that the parties had settled months earlier. Additionally, the court decided that New Mexico courts have the discretion to decide issues that are of substantial public interest even though the dispute is moot. The *Riesenecker* court found that the operation of the workers' compensation laws was an issue of substantial public interest.[27] Finally, the court published its opinion in order to aid all attorneys in framing their arguments on this issue in the future even though it had vacated its judgment.[28]

VI, § 2. The state constitution states only that the New Mexico Supreme Court "shall exercise appellate jurisdiction as may be provided by law; provided that the aggrieved party shall have an absolute right to one appeal." The phrase "provided by law" generally means "provided by statutes." State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971). An "aggrieved party" is one whose personal interests are adversely affected by an order of the court. State v. Castillo, 94 N.M. 352, 610 P.2d 756 (Ct. App. 1980).

23. Mowrer v. Rusk, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980); *see also* State *ex rel.* Malony v. Sierra, 82 N.M. 125, 136-37, 477 P.2d 301, 311-12 (1970) (Watson, J., dissenting). The court discussed the necessary features of justiciability and stated that "opinions are denominated 'advisory' when there is insufficient interest in the plaintiff or defendant to justify judicial determination, where the judgment sought would not constitute specific relief to a litigant or affect legal relations . . . ." *Id.* The court concluded that advisory opinions are not permitted in New Mexico. *Id.* The basis for the court's decision to require an actual controversy to decide an issue in a declaratory judgment action may be found in the Declaratory Judgments Article. *See* N.M. STAT. ANN. § 44-6-2 (1978).

24. Appleman v. Beach, 94 N.M. 237, 239, 608 P.2d 1119, 1121 (1980); *see also* New Mexico Health & Social Servs. Dep't v. Chavez, 85 N.M. 447, 513 P.2d 184 (1973).

25. The judiciary may not ordinarily consider and determine moot questions. Mills v. Green, 159 U.S. 651, 653 (1895). "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions . . . ." *Id.* "A 'moot question' is one that existed but because of [the occurrence] of certain events has ceased to exist and no longer presents an actual controversy over interests or rights of [a] party." 1A C.J.S. *Actions* § 38 n.74 (1985). For example, a question becomes moot where parties have settled their dispute. Local No. 8-6, Oil, Chemical & Atomic Workers Int'l Union v. Missouri, 361 U.S. 363 (1960). The strong judicial policies of conserving judicial resources and of not creating unnecessary precedent also dictates that courts refrain from adjudicating moot questions. Merhish v. H.A. Folsom & Assocs., 646 P.2d 731, 732 (Utah 1982); Dee-El Garage, Inc. v. Korzen, 289 N.E.2d 431 (Ill. 1972); Marshall v. Whittaker Corp., Berwick Forge & Fabricating Co., 610 F.2d 1141, 1147 (3rd Cir. 1979).

26. 110 N.M. 451, 796 P.2d 1147 (Ct. App. 1990).

27. *Id.* at 453, 796 P.2d at 1149. In determining whether substantial public interest exists, the New Mexico Supreme Court has stated:

> Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for future guidance of public officers, and the likelihood of future recurrence of the question.

Mowrer, 95 N.M. at 51, 618 P.2d at 889.

28. *Riesenecker*, 110 N.M. at 453, 796 P.2d at 1149. The court had already issued copies to the parties involved in this litigation and thus felt that it was only fair to allow all attorneys access to the opinion. *Id.*

B. *Analysis of the Mootness Doctrine in Sanchez*

In *Sanchez*, the New Mexico Supreme Court violated its own established practice of not deciding moot questions.[29] FNB and Sanchez settled all matters, thus rendering the case moot.[30] The parties no longer possessed a sufficient degree of adversity[31] and the harm complained of was no longer immediate enough to justify the expenditure of judicial resources.[32]

The extraordinary circumstances that occasionally provide an exception to the mootness doctrine were clearly not present in *Sanchez*. Under the test articulated by the United States Supreme Court in *Weinstein v. Bradford*,[33] the parties in *Sanchez* are not in a situation capable of repetition yet evading review. The dispute over a partner's authority to bring or release a partnership claim is likely to last as long as the time which a court requires to decide this issue. Moreover, it is unlikely that FNB or Sanchez would face this situation again.[34]

IV. THE PARTNERSHIP ISSUES

In *Sanchez* both partners brought separate suits against FNB on behalf of P-S Construction Company.[35] FNB argued that one partner, Tafoya, later released his partnership claim. The other partner, Sanchez, did not release his partnership claim. *Sanchez* raised the issue of the validity of partnership claims brought or released by fewer than all partners. This section of the Note examines the shortcomings in the court's analysis of the partnership issues and suggests an alternative approach to analyze these issues.

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29. *See* Appleman v. Beach, 94 N.M. 237, 239, 608 P.2d 1119, 1121 (1980); *see also* State *ex rel.* Malony v. Sierra, 82 N.M. 125, 136-37, 477 P.2d 301, 311-12 (1970) (Watson, J., dissenting).

30. *Sanchez*, 112 N.M. at 326, 815 P.2d at 622. The court stated that it was only deciding the issues of lack of substantial evidence on duress and error in the presentation of damages to the jury, but went on to say that it would comment on the partnership issue "because it raised important questions of partnership law . . . ." *Id.* at 319, 815 P.2d at 615. The court's discussion of the partnership issue was, therefore, dicta addressing a moot question.

31. *See* Colyar v. Third Judicial Dist. for Salt Lake County, 469 F. Supp. 424, 434-36 (D. Utah 1979).

32. *See* Fire Fighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 595-96 (1984) (Blackmun, J., dissenting). The courts' duty is to ensure that it has sufficient concrete facts, and sufficiently adverse parties to permit it to perform its proper role. *Id.*

33. 423 U.S. 147, 149 (1975). A recognized exception to the mootness doctrine exists for cases of public interest which involve disputes "capable of repetition yet evading review." Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911). Two requirements are inherent to this doctrine: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) a reasonable expectation exists that the same complaining party would be subjected to the same action again. *Weinstein*, 423 U.S. at 149. Issues which fall under this exception include the right to have an abortion, the right to social security benefits, and welfare assistance. *See* Roe v. Wade, 410 U.S. 113, 125 (1973); Darby v. Schweiker, 555 F. Supp. 285, 289-90 (E.D. Pa. 1983); Fischer v. Weaver, 55 F.R.D. 454, 460 (N.D. Ill. 1972).

34. The refusal of the bank to disburse the remaining funds to the partnership caused the dispute. The bank's decision stemmed from a change in personnel overseeing the partners' loan. *Sanchez*, 112 N.M. at 321, 815 P.2d at 617.

35. *Id.* at 325-26, 815 P.2d at 621-22.

A. *The Court's Analysis of the Partnership Issues in Sanchez*

In *Sanchez*, the New Mexico Supreme Court found that the trial court erred by reducing the partnership's damage award by one-half.[36] The court reasoned that a partner could neither bring nor release a claim for damages to partnership property or interest, nor bring or release a claim for his proportionate share of a partnership claim unless he had the consent of the other partners.[37] The court questioned but did not decide whether "under Section 54-1-9 of the Uniform Partnership Act there could be implied actual authority or apparent authority for a partner to settle any part of a partnership claim that was not usual to the business."[38] The court found that a partner could, however, bring and release claims "based upon damage to personal property and interests."[39]

In analyzing the facts of *Sanchez*, the court found that Tafoya's counterclaim was not brought on behalf of the partnership nor did his subsequent release of the counterclaim suggest that he was relinquishing one-half of any partnership recovery.[40] The court reached this conclusion because neither FNB's complaint, the partners' answers, the stipulated judgement, nor Tafoya's release mentioned P-S Construction Company by name.[41] In upholding the validity of Sanchez's partnership claim, however, the court reasoned that the parties at trial treated the counterclaim as having been made on behalf of the partnership even though it did not mention P-S Construction Company.[42] The court concluded that because Sanchez's partnership claim was unaffected by Tafoya's release, the trial court erred in reducing the damage award by Tafoya's fractional interest in the partnership.[43]

B. *Shortcomings in the Court's Analysis*

The court's analysis of the partnership issues in *Sanchez* has several shortcomings. First, the court did not examine the partners' claims to determine which were personal claims and which were partnership claims. The court also failed to discuss whether Tafoya had the power to bring a partnership claim in the first place.[44] Instead, the court jumped to a discussion of Tafoya's capacity to release a partnership claim.[45] In doing so, the court not only failed to analyze the issues logically, it also failed

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36. *Id.* at 326, 815 P.2d at 622.
37. *Id.* at 325-26, 815 P.2d at 621-22.
38. *Id.*
39. *Id.* at 326, 815 P.2d at 622.
40. *Id.*
41. *Id.* at 325-26, 815 P.2d at 621-22.
42. *Id.*
43. *Id.* at 326, 815 P.2d at 622.
44. The court discussed whether either Tafoya or Sanchez actually brought a claim on behalf of the partnership but did not address the issue of whether either partner had the authority to do so. *Id.* at 325-26, 815 P.2d at 621-22. The court stated that "a partner cannot bring suit as an individual on a claim belonging to the partnership." *Id.* at 325, 815 P.2d at 621. This proposition fails to recognize that an individual partner may have the authority to bring a partnership claim under section 9 of the Uniform Partnership Act [hereinafter U.P.A.] and the laws of agency.
45. *Sanchez*, 112 N.M. at 325-26, 815 P.2d at 621-22.

to recognize the uniqueness of the fact situation in *Sanchez*. The majority of cases, including the cases relied on by the court, involve one partner's capacity to bring a claim on behalf of a partnership or one partner's capacity to release a partnership claim properly brought by all the partners.[46] The facts in *Sanchez* are distinct in that both partners purported to have brought their separate claims on behalf of the partnership and subsequently one partner attempted to release all partnership claims.[47]

The court's discussion of a partner's capacity to release a partnership claim was also flawed. In examining Tafoya's release, the court relied on the captions of the documents existing when the release was executed to determine whether he was releasing individual or partnership claims.[48] By ruling that Tafoya's release did not involve the partnership because the captions to the complaint and release failed to mention P-S Construction, the court failed to consider the common name statute which provides that the partnership need not be named in the caption as a party to the suit in an action brought by or against a partnership.[49]

C. *Alternative Approach to Analyze the Partnership Issues Raised in Sanchez*

This section of the Note suggests an alternative, two-step approach to analyze the partnership issues raised in *Sanchez*. The first step is to determine the validity of the claim brought on behalf of the partnership. This involves examining a partner's claim to determine whether it is based on damage to personal property and interests, or on damage to partnership property and interests. If the claim is based on damage to personal property and interests, a partner has the capacity to bring and release a claim. If, however, the claim is based on damage to the partnership, one must examine the facts to determine whether the partner had the capacity to bring the claim. If the partner did have the capacity to bring the partnership claim, the next step is to determine whether the partner had the capacity to release the partnership claim.

Both steps in the analysis involve the question of whether the partner has the capacity to bind a partnership by his own acts. A partner's

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46. Daniels Ins., Inc. v. Daon Corp., 106 N.M. 328, 331, 742 P.2d 540, 543 (Ct. App. 1987) (partner in a limited partnership could not bring a claim on behalf of a partnership); Stephen v. Phillips, 101 N.M. 790, 792, 689 P.2d 939, 941 (Ct. App. 1984) (one of three partners was the proper plaintiff to bring a claim on behalf of the partnership because the second partner assigned his interest to the plaintiff and the third partner no longer held an interest in the partnership); *see also* 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 1.03(c)(3) (1988).

47. The bank asserted that Tafoya's counterclaim and subsequent release were made on behalf of the partnership. Consequently, the trial court found that his release of the counterclaim was a release of 50% of the partnership's claim. *Sanchez*, 112 N.M. at 318-19, 815 P.2d at 614-15. Although Sanchez asserted that his suit was brought as an individual and not on behalf of the partnership, some of the damages he sought clearly belonged to the partnership. *Id.*

48. *Id.* at 326, 815 P.2d at 622.

49. *Id.*; *see* N.M. STAT. ANN. § 38-4-5 (Repl. Pamp. 1987). The statute provides that "suits may be brought by or against a partnership as such, or against all or either of the individual members thereof . . . ." *Id.*

capacity to bind the firm is derived from two related sources: section 9 of New Mexico's Uniform Partnership Act ("UPA"); and the doctrine of authority, a concept of the law of agency.[50]

1. Individual versus Partnership Claims

New Mexico case law makes it clear that, although an individual partner may bring and release claims based upon damage to personal property and interests, he generally cannot bring and release a claim based upon damage to partnership property and interests.[51] In *Loucks v. Albuquerque National Bank*,[52] an individual partner brought an action against a bank for wrongfully dishonoring partnership checks and for damages resulting from an ulcer the partner alleged was caused by the defendant's acts.[53] The court found that "any damages arising from the dishonor [of the partnership checks] belonged to the partnership" and thus this claim could not be brought by the partner individually.[54] The partner could, however, bring a claim for his personal injuries.[55]

2. The Uniform Partnership Act and the Laws of Agency

Section 9 of the UPA provides that a partner has complete authority to bind the partnership in transactions with third parties by any act "for apparently carrying on in the usual way the business of the partnership."[56] An individual partner's capacity to bring a partnership claim also stems

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50. Another potential source by which a partner may bind the firm exists when the partnership has dissolved. This type of authority is termed "winding up authority." *See generally* N.M. STAT. ANN. §§ 54-1-29 to -37 (Repl. Pamp. 1988). Winding up authority grants a partner the power to "bind the partnership . . . by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution . . . ." *Id.* § 54-1-35. This potential source of authority will not be discussed further as P-S Construction was not dissolved at the time of this dispute.

51. 76 N.M. 735, 747-48, 418 P.2d 191, 199-200 (1966).

The rationale behind the common law rule prohibiting less than all partners from bringing a partnership claim was to protect defendants from multiple suits, and to conserve judicial resources. Smith v. Smith, Barney, Harris, Upham & Co., 505 F. Supp. 1380, 1383 (W.D. Mo. 1981); Pine Prods. Corp. v. United States, 15 Cl. Ct. 11, 14 (1988); DeToro v. Dervan Inv. Ltd. Corp., 483 So. 2d 717, 721 (Fla. 1986). From the view point of the non-joining partner, the suit may be viewed as a poor use of partnership resources if, for example, the claim is weak, the time and money costs of enforcement may be high, or the chances of collecting a judgment may be small. *See* Cates v. International Telephone & Telegraph Corp., 756 F.2d 1161, 1179 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988). Moreover, the partners may not agree on the plaintiff partner's choice of counsel or method of handling the case. *Id.* at 1179. The suit may even lead to counterclaims against the partnership for which all partners are personally liable. *Id.*

52. 76 N.M. 735, 418 P.2d 191.

53. *Id.* at 741, 418 P.2d at 195.

54. *Id.* at 744, 418 P.2d at 197.

55. *Id.* at 746, 418 P.2d at 199; *see* Amador v. Lara, 93 N.M. 571, 574, 603 P.2d 310, 313 (Ct. App. 1979). The right of a partner to recover for personal injuries and losses caused by a defendant's tortious acts belongs to the individual partner and not to the partnership. *Id.* at 574, 603 P.2d at 313; *see also* Daniels Ins., Inc. v. Daon Corp., 106 N.M. 328, 742 P.2d 540 (Ct. App. 1987) (individual partner cannot bring suit on a claim belonging to the partnership).

56. N.M. STAT. ANN. § 54-1-9 (Repl. Pamp. 1988).

from the law of agency.[57] The UPA provides that the "law of agency shall apply under this act."[58] Section 54-1-9 of the UPA[59] and the laws of agency provide the basis for one partner's liability for the acts of his co-partners.[60]

In *Dotson v. Grice*,[61] the doctrine of authority in agency law was interpreted by the New Mexico Supreme Court as being a broader concept than a partner's authority under section 9(A) of the UPA. In *Dotson*, the court held that a partner's inherent authority to convey realty belonging to the partnership without the consent of the other partners was sufficient to bind the firm.[62] The court reasoned that whether or not section 9 of the UPA embraces the doctrine of apparent authority, a partner can still bind a firm under some other theory of an agent's authority, including implied agent authority.[63]

3. Application of Suggested Approach to *Sanchez*

In hypothetically applying the suggested approach to the facts in *Sanchez*, the first step is to determine whether Tafoya's and Sanchez's counterclaims were for personal or partnership injuries. It is unclear from the opinion whether Tafoya's counterclaim was for damages to him as an individual or to the partnership because Tafoya was not a party to this appeal.[64] Assuming that Tafoya's counterclaim was for personal damages, he had the authority both to bring and release the claim.[65] If Tafoya's counterclaim was for personal damages then his subsequent release of the claim would not have affected any partnership claims.[66] Assuming, however, that his counterclaim was based upon damage to the partnership, Tafoya's capacity to bring the claim must be analyzed under section 9 of the UPA and the laws of agency.

Sanchez's counterclaim, however, was based upon both personal and partnership damages.[67] Sanchez clearly had the capacity to bring a claim

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57. According to the laws of agency, a principal can be bound by an agent acting with actual, apparent, or inherent authority. BROMBERG & RIBSTEIN, *supra* note 46, § 4.01. Actual authority is the power of the agent to bind the principal "by acts done in accordance with the principal's manifestations of consent [to the agent]." RESTATEMENT (SECOND) OF AGENCY § 7 (1988). Apparent authority exists when the principal clothes the agent with the appearance of authority which could reasonably lead a third party to believe that the agent had authority to act as he did. *Id.* § 8. Implied (or inherent) authority arises from a third party's reasonable belief that the agent has authority to do acts ordinarily entrusted to one occupying his position. *Id.* § 8A cmt. a-b.

58. N.M. STAT. ANN. § 54-1-4(C) (Repl. Pamp. 1988).

59. *Id.* § 54-1-9.

60. 59A AM. JUR. 2D *Partnership* § 250 (1987).

61. 98 N.M. 207, 210, 647 P.2d 409, 412 (1982).

62. *Id.* at 211, 647 P.2d at 413.

63. *Id.*; *see also* National Hygienics, Inc. v. Southern Farm Bur. Life Ins. Co., 707 F.2d 183, 187 (5th Cir. 1983). A Mississippi court found that even if a partner acted outside the scope of his actual authority as conferred by section 9 of the UPA, the partner may still have been acting within his apparent authority. *National Hygienics*, 707 F.2d at 187.

64. *Sanchez*, 112 N.M. at 318, 815 P.2d at 614.

65. *See Loucks*, 76 N.M. at 746-47, 418 P.2d at 199-200.

66. *See id.*

67. *Sanchez*, 112 N.M. at 322-23, 815 P.2d at 618-19. Sanchez claimed the following elements

for damage to his personal credit rating.[68] His capacity to bring claims for partnership damages, however, must be analyzed under the section 9 of the UPA and the law of agency.[69]

a. Section 9 of the UPA

Assuming that Tafoya's and Sanchez's counterclaims were brought on behalf of the partnership, the next step is to apply section 9(A) to the facts of the case. Applying section 9(A) to Tafoya's counterclaim, the issue becomes whether Tafoya's bringing of the claim on behalf of the partnership was an act for "apparently carrying on in the usual way the business"[70] of P-S Construction Company. Businesses must settle outstanding debts which are normally considered a usual business activity.[71] P-S Construction Co., however, was in the business of developing real estate and not litigating claims. The bringing of a lawsuit would not comport with P-S Construction's "carrying on in the usual way of the business."[72] Tafoya, therefore, did not have the authority under section 9 of the UPA to bring a claim on behalf of P-S Construction Company. As he did not have the authority to bring a partnership claim under section 9, it is necessary to examine whether Tafoya had the authority, under the section 9 of the UPA, to release a claim on behalf of P-S Construction Company.

Section 9 of the UPA should also be applied in determining whether Sanchez had the power to bring a claim on behalf of the partnership. The *Sanchez* court did not discuss whether Sanchez had the authority under section 9 of the UPA to bring a suit on behalf of P-S Construction Company. Instead, the court found that since Sanchez and the bank treated the claim as having been made on behalf of the partnership, "any objection to Sanchez's lack of capacity to raise such a claim . . . was waived."[73] Applying section 9 to Sanchez's claim, however, makes

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of damages: (1) loss of the partnership's 61 lots that were mortgaged to the bank; (2) loss of profit on those same lots; (3) attorney fees in connection with enforcing the partnership's loan agreement with the bank; (4) damage to Sanchez's personal and business credit; (5) loss of the partnership's office building; and (6) loss of profit on another 44 lots Sanchez was forced to sell below market value. *Id.*

68. *See id.*

69. *Sanchez* casts doubts on whether a partner acting with less than actual authority can bind his firm under section 9 of New Mexico's UPA. The *Sanchez* court stated the following in dicta:

> While a partner acting within his or her actual authority may execute a valid release of a partnership claim, we question (but do not decide) whether under section 54-1-9 of the Uniform Partnership Act there could be implied actual authority or apparent authority for a partner to settle any part of a partnership claim that was not usual to the business.

Id. at 325-26, 815 P.2d at 621-22.

Two respected commentators disagree with the court's statement. *See* BROMBERG & RIBSTEIN, *supra* note 46, § 4.01. Bromberg and Ribstein argue that by virtue of the UPA's incorporation of agency law, section 9 encompasses actual, apparent, and implied authority. *See* N.M. STAT. ANN. § 54-1-4(C) (Repl. Pamp. 1988).

70. N.M. STAT. ANN. § 54-1-9.

71. *See* BROMBERG & RIBSTEIN, *supra* note 46, § 4.02.

72. *See* N.M. STAT. ANN. § 54-1-9.

73. *Sanchez*, 112 N.M. at 326, 815 P.2d at 622.

it clear that his bringing of a legal claim on behalf of the partnership was not "for apparently carrying on in the usual way" the business of P-S Construction Company.[74] Like Tafoya, Sanchez also lacked the authority under section 9 to bring a claim on behalf of P-S Construction Company.

b. Actual Authority Under the Laws of Agency

Tafoya also lacked the authority to bring a claim on behalf of the partnership under the laws of agency. Sanchez, however, may have had implied authority to bring a claim on behalf of P-S Construction Company. The facts in *Sanchez* indicate that neither Tafoya or Sanchez had express, actual authority to bring a partnership claim. If either Tafoya or Sanchez had the other's consent to bring a claim on behalf of the partnership, both partners would not have brought claims on behalf of the company.[75]

c. Apparent Authority Under The Laws Of Agency

When analyzing the partners' capacity to bring a partnership claim under the doctrine of apparent authority, it is unclear whether Tafoya had the capacity to bring a claim on behalf of P-S Construction Company. FNB knew that it was also dealing with Sanchez, an equal partner, and that Sanchez would most likely have to approve of Tafoya's bringing or releasing of this partnership claim because it was not an ordinary business decision. The facts do not indicate, however, whether Sanchez had consented to Tafoya's making such important partnership decisions before, or whether FNB knew that Sanchez had allowed Tafoya to make similar decisions in the past. It is possible that FNB was reasonable in believing that Tafoya had the authority to act as he did because of past experiences with the partners or knowledge of the partners' business practices. Additional facts would be needed to make a more certain conclusion about this issue.

Sanchez, however, may have had apparent authority to bring a claim on behalf of the company. The bank seemed reasonable in believing that Sanchez had the authority to act for the partnership, considering that Tafoya was no longer a functioning partner at the time of the dispute.[76] Sanchez, therefore, likely had the apparent authority to bring a claim on behalf of P-S Construction Company.

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74. N.M. STAT. ANN. § 54-1-9.

75. A situation where two individual partners each brought separate suits on behalf of the partnership with the consent of the other partner would require a duplicate use of resources. Even though the common name statute allows individual partners to bring suit on behalf of the partnership, for both Sanchez and Tafoya to do so having consented to the other partner bringing suit would be a poor business decision. *See* N.M. STAT. ANN. § 38-4-5.

76. FNB knew that Tafoya was in a federal prison on cocaine charges before it accepted the release of his counterclaim. *See, e.g.*, Answer Brief for Cross-Appellee at 14, First Nat'l Bank in Albuquerque v. Sanchez, 112 N.M. 317, 815 P.2d 613 (1991) (No. 18236).

d. Implied Authority Under the Laws of Agency

Under the doctrine of implied authority FNB would need to have reasonably believed that Tafoya's and Sanchez's bringing and releasing of a partnership claim against the bank were acts ordinarily entrusted to each partner.[77] Bringing and releasing a partnership claim, the success of which would determine the future of the partnership, were most likely not acts ordinarily entrusted to each general partner of P-S Construction Company. It would seem unreasonable for FNB to have believed that Tafoya's position as an equal partner, without more, gave him the authority to bring or release a partnership claim of this importance. FNB, however, may have been reasonable in believing that because Tafoya was in prison, Sanchez's bringing of a partnership claim was an act ordinarily entrusted to an equal partner in his situation.[78]

The alternative approach suggested in this Note has several advantages over the court's approach. First, it is in accordance with the majority view on these issues. It is also clear, logical, and consistent. Lastly, the suggested approach is flexible in that it can be adapted to varied factual situations.

V. CONCLUSION

As *Sanchez* does not fit into any exception to the mootness doctrine, one must speculate as to why the court would publish this opinion. It is possible that at the time the parties informed the court that they had settled all matters, the opinion on all but the partnership issue, the last issue, had been analyzed. The court may, therefore, have ordered that the opinion be published because it was necessary to decide the other issues raised in the case.

Regardless of Justice Ransom's purpose for publishing this opinion, the court's own precedent leads one to the conclusion that the *Sanchez* opinion is not precedent as Justice Ransom states, but merely dictum, not binding on future litigants. Furthermore, the court's discussion of the partnership issues should not be accorded persuasive value because the analysis is confusing and inconsistent with the majority view on the subject. The alternative approach suggested in this Note to analyze the partnership issues in *Sanchez* is consistent with the majority view and applicable to varied factual situations. The court's partnership analysis should thus be re-examined and modified by both courts and practitioners to reflect a better-reasoned and more consistent approach.

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77. RESTATEMENT (SECOND) OF AGENCY § 8A cmt. a-b.

78. It is unnecessary to examine Sanchez's capacity to release the partnership claim because the facts do not require this analysis.