Summer 2008

Introduction

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Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol38/iss3/1

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INTRODUCTION

This issue of the New Mexico Law Review showcases the scholarship of current members of the Law Review. These case notes and comments, composed by Law Review staff members during their second year in law school, always prove to be interesting, original, and thorough, and I often find them the most enjoyable scholarly articles to read. I hope you find this to be true as well. This is also the last issue for Volume 38 of the Law Review, and the outgoing members of the editorial board wish the best of luck to the new editors as they set out on the task of bringing the Law Review to print. Judging by the quality of the articles in this issue, they will do wonderfully.

While the scholarship in this issue is entirely the product of these student authors, the students also benefit from the guidance of faculty members who generously devote their time to help these students reach their potential. Faculty advisors are a tremendous aid in helping students narrow their topics, resolve thorny doctrinal problems, and get around writing roadblocks. The faculty members who have assisted with each article are thanked at the beginning of the article. These faculty members deserve recognition for their invaluable assistance.

The issue begins with two articles about civil law in New Mexico. In New Mexico’s Economic Loss Rule, Unconscionability Doctrine, and the Gap Between Them: Concepts, Realities, and How to Mend the Gap, Daniel Alsup explores the limits imposed by New Mexico law on when consumers can recover for purely economic losses caused by defective products or services. The article contends New Mexico imposes too high a bar to recovery for purely economic losses and suggests several remedies.

Neil Bell addresses the problem of settling tort suits with multiple tort-feasors under New Mexico’s system of several liability in Can I Buy Your Lawsuit? A Proposed Solution to the Unstated Problem in Gulf Insurance Co. v. Cottone. He suggests several approaches for allowing plaintiffs to settle all of their claims with one severally liable defendant, who would then prosecute the plaintiff’s remaining claims against the other defendants. He argues this will encourage greater recovery through settlement.

The issue then turns to two articles with a national scope. In Is There an Accuser in the House?: Evaluating Statements Made to Physicians and Other Medical Personnel in the Wake of Crawford v. Washington and Davis v. Washington, Dave Gordon addresses the application of the Supreme Court’s new Confrontation Clause doctrine to statements made to medical personnel. He notes that different courts have approached the problem differently, and also notes that, if the motive of the speaker is used to determine whether a statement is admissible under the Confrontation
Clause, this might create special problems for statements by young children depending upon their level of cognitive development. He concludes by offering a uniform approach to analyzing statements to medical providers.

In *Finance Nouveau: Prospects for the Securitization of Art*, Jaclyn McLean explores the possibility of securitization as a mechanism for artists to raise money and for ordinary investors to own portions of famous works of art. She explores the legal hurdles to the creation of securitized art as well as the economic costs and benefits for artists and investors. She also speculates as to how such a product might be structured.

The final three articles return to issues of special concern to New Mexico. In *Out with the New, In with the Old: Reconsidering the Analytical Framework for Excessive Force Claims Created in Cortez v. McCauley*, Kevin Pierce explores a recent Tenth Circuit decision where a fractured court struggled with how courts should try civil rights lawsuits when plaintiffs allege both excessive force and unlawful seizure. He analyzes the approach adopted by the majority as well as the approach suggested in a concurring opinion and finds both to be unsatisfactory. He then suggests a different approach.

Kyle Wackenheim dives into the fast-moving area of New Mexico’s death penalty jurisprudence in *State v. Fry: Reconsidering Death-Qualification in New Mexico Capital Trials*. He addresses the specific question of whether “death-qualification” skews juries in favor of the prosecution during the guilt/innocence phase of capital cases. He concludes there is an effect on capital juries and this effect violates the constitutional rights of capital defendants. As a solution, he proposes an alternative arrangement: simultaneous juries impaneled to hear the case, with one jury trying the guilt/innocence phase and the other jury trying the punishment phase.

Finally, Shona Zimmerman-Burnett writes about the recovery of expert witness fees as costs in *Settlement Without Sacrifice: The Recovery of Expert Witness Fees as Costs Under New Mexico’s Rule 1-068*. She notes that until recently parties have been unable to recover expert witness fees as costs when they settle pursuant to Rule 1-068 of the New Mexico Rules of Civil Procedure. However, she chronicles a recent rule change by the New Mexico Supreme Court that will enable parties to recover such fees in certain circumstances. The rule change should encourage settlement and ensure parties a fair recovery of costs.

Whether you are a practitioner or a scholar, we hope you find this issue both interesting and useful.

—Nat Chakeres, Editor-in-Chief