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# Commercial Law

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# COMMERCIAL LAW

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## INTRODUCTION

This *Survey* article begins with a brief look at the effect on New Mexico law of certain provisions of the Bankruptcy Code of 1978. The discussion then turns to a critical review of two agency cases that appear to confuse the development of that branch of the law in this state. Four significant contracts cases are then briefly reviewed. Finally, it is suggested that the legislature consider the adoption of amendments to the Uniform Commercial Code proposed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

## I. BANKRUPTCY

### *A. Bankruptcy Code of 1978.*

Clearly the most important development in commercial law during the *Survey* year occurred on October 1, 1979 when the new federal Bankruptcy Code[1] became effective. The result of intensive study over the past several years,[2] the new statute is the first comprehensive revision of the bankruptcy laws since 1938. Many, if not most, of the provisions in the new law will be familiar to those conversant with the prior law, but numerous changes have been made that will affect individual controversies. It would be impossible to discuss all of the important provisions of the new law in this survey, but it may be helpful to comment upon some aspects of the new Code that raise particular questions for those practicing in this state.[3]

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1. 11 U.S.C. § § 101-1330 (Supp. III 1979).

2. For a discussion of the legislative history *see* Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 941 (1979), *reprinted, in substance*, in 2 App., L. King, K. Klee, R. Levin, Collier on Bankruptcy at v (15th ed. 1979).

3. For a comparison of New Mexico exemption statutes and the Bankruptcy Code *see* Comment, *Bankruptcy–A Comparison of State and Federal Exemptions: 11 U.S.C. § § 101-1330 (Supp. II 1978)*, 10 N.M.L. Rev. 431 (1980).

*B. The Bankruptcy Code and Community Property.*

1. Property of the estate.

Unlike its predecessor, the Bankruptcy Code contains specific provisions applicable to community property systems.[4] Even if only one spouse is in bankruptcy, the general pattern of the Code is to bring all community property into the bankruptcy estate, to allow all community debts, including those incurred by the other spouse, as claims, and to protect after-acquired community property from debts incurred prior to the bankruptcy.[5] If the spouses file a joint petition in bankruptcy, or if one is filed against them, then all of the separate property of both also comes into the estate, and separate debts of both are allowable claims. If, however, only one spouse files, then only his or her separate property becomes part of the estate and only his or her separate creditors share in the distribution along with the community creditors. The Code provides for marshalling of debts and claims so that separate debts are paid first out of separate property and community claims are paid first out of community property.[6]

This general scheme is apparent from a reading of the Code. In some ways it treats the "community" as an entity,[7] and declares that the entity, in effect, files a petition in bankruptcy whenever either or both spouses file. This attempt to make a final disposition of community property and debts is consistent with the principle found in the Code encouraging the fullest possible liquidation of the debtor's estate and the providing of a completely fresh start for the debtor.[8] The details of how the Code attempts to reach this objective in the context of community property are complex, and are likely to raise significant legal problems. Viewed in the context of the relatively

4. H.R. Rep. No. 595, 95th Cong., 1st Sess. 383, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6339; S. Rep. No. 989, 95th Cong., 2d Sess. 97, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2549, 2608.

5. Pedlar, *Community Property and the Bankruptcy Reform Act of 1978,* 11 St. Mary's L. J. 349 (1979).

6. 11 U.S.C. § 726(c) (Supp. III 1979).

7. Nowhere does the Bankruptcy Code designate the community as an entity, but the provisions bringing all community property into the estate, allowing the filing of all community claims, and the discharge of the community from debts lead to the conclusion that the community is being treated as an existence separate from the husband and wife. As is true with partnerships, however, the community is not completely distinct from the persons comprising it. There is a similarity here to the development of the law regarding partnerships and bankruptcy. *See* J. MacLachlan, Law of Bankruptcy 425 (1956).

8. Other examples of this approach are found in the comprehensive provisions bringing property into the estate. For example, under the Bankpruptcy Code, unlike the Bankruptcy Act, all torts claims that the debtor may have become part of the estate. 11 U.S.C. § 541 (Supp. III 1979). Also, contingent and unliquidated claims must be allowed under the new law. *Id.* § 502(c).

new community property law of New Mexico,[9] which itself raises debtor-creditor issues, a number of questions undoubtedly will be litigated during the coming years. The Code implicitly makes possible more extensive "bankruptcy planning" when a married couple having financial difficulty contemplate bankruptcy. Adoption of the Code may well lead to a legislative reexamination of the state community property laws.

The Bankruptcy Code provisions bringing community property into the estate require reference to applicable state law. In some states,[10] less than all of the community property may come into the bankruptcy estate if only one spouse files a petition, but that does not seem to be the situation in New Mexico. Section 541(a)(2) of the Code establishes two tests for whether community property comes into the estate. One test looks to the power of management and control; the other to the liability of the property for debts. It provides that the bankruptcy estate is comprised of:

> All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is–
> (A) under the sole, equal, or joint management and control of the debtor; or
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.[11]

The management test of subsection (2)(A) is straightforward and easy to apply. Since New Mexico law provides that all real property held as community property is under the joint management and control of both spouses,[12] all community real property comes into the estate, and there is no need to determine the applicability of subsection (2)(B) to community real property. Much, perhaps most, community personal property will also come into the estate in New Mexico under subsection (2)(A), but this is far from certain in any specific case. With significant exceptions, either spouse has the power to manage and control community personal property under New Mexico law. The statutory exceptions, which, it must be emphasized, deal

9. The New Mexico community property laws were substantially revised in 1973 in light of the Equal Rights Amendment to the New Mexico Constitution. *See* Bingaman, *The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control*, 3 N.M.L. Rev. 11 (1973).

10. To the extent that state law places some community property under the management and control of one spouse, and makes that property liable only for debts incurred by that spouse, the property does not come into the estate. Pedlar, *supra* note 5, at 359.

11. 11 U.S.C. § 541(a)(2) (Supp. III 1979).

12. N.M. Stat. Ann. § 40-3-13 (1978).

only with management and control and not with ownership of the property or liability for debts outside of bankruptcy, read as follows:

> Where only one spouse is:
>
> (1) named in a document evidencing ownership of community personal property; or
>
> (2) named or designated in a written agreement between that spouse and a third party as having sole authority to manage, control, dispose of or encumber the community personal property which is described in or which is the subject of the agreement . . . ; only the spouse so named may manage, control, dispose of or encumber the community personal property described in such a document evidencing ownership or in such a written agreement.[13]

Neither the rationale for nor the application of these provisions is wholly clear from a reading of the statutory language. In the context of the history of the statute and commercial dealings, however, they make good sense.[14]

Subsection (1) applies, for example, where the document of title for an automobile is in a wife's name and the husband purports to have authority to transfer title on the ground that it was community property. A simple equal management and control rule would give him such power, but the commercial community would most likely not accept such a transfer by him alone, and the state certificate of title system would be compromised. New Mexico recognized this conflict between equal management and control of community property and other interests and trade usage by retreating from the equal management principle. Subsection (2) has a similar purpose. It covers situations such as insurance contracts made by one spouse who makes the payments. Under the exception only he or she can change beneficiaries or borrow under the loan provisions of the policy.

Under these exceptions, whether the property came into the bankruptcy estate under section 541(a)(2)(A) depends upon whether the document or contract designated the filing spouse as the person having power to control and manage the property. Where a wife files the petition, an automobile registered in her husband's name would not become a part of her estate under the first test. Without empirical evidence, it is difficult to speculate how much property comes within the exceptions, but it is likely that a number of automobiles, checking accounts, stocks and bonds, and insurance policies, for example, are covered by them.

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13. *Id.* § 40-3-14(B).

14. Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M.L. Rev. 1 (1974).

The proper interpretation of subsection 541(a)(2)(B) may be unclear in some situations, but it would appear that in New Mexico the language acts to bring into the estate all the personal property not covered by subsection 541(a)(2)(A). The analysis yielding this result can be simplified somewhat by applying the subsection to a hypothetical case. Assume that certain property is under the sole control of a wife and that her husband files a petition in bankruptcy. The property under the wife's sole control will come into the husband's estate only if it is liable, under New Mexico law, for "an allowable claim against the debtor [here the husband] or for both an allowable claim against debtor [husband] and an allowable claim against the debtor's spouse [wife]."[15] A community claim is an allowable claim against the husband,[16] and, since the property is presumed to be community property under New Mexico law,[17] the property is clearly liable for community claims. Therefore, the test of subsection (2)(B) is met, and the property becomes part of the husband's bankruptcy estate.

If this analysis is correct, there is no way to isolate community property so that it will not come into the bankruptcy estate even though only one spouse files the petition. However, New Mexico allows married couples to hold property as joint tenants or as tenants in common, and the statutes specifically provide that property so held is separate property.[18] In a state that follows the theory of separate marital property, the filing spouse's interest in such property would come into the estate, but the non-filing spouse's interest would not. The property would come into the estate subject to the interest of the non-filing spouse.[19] The same results should obtain in a community property state. Thus, if husband and wife each own an undivided one-half interest in real or personal property as joint tenants or as tenants in common, upon the husband's bankruptcy only his interest in the property would pass to the bankruptcy estate. This would appear to be true even if the property were being used as though it were community property because, under New Mexico law, the husband and wife have exercised their right to take this property out of the class of community property. In New Mexico, however, such property is liable for the payment of debts as though it were

15. 11 U.S.C. § 541(a)(2)(B) (Supp. III 1979).

16. A "creditor" may file a "claim." *Id.* § 501. A "creditor" is one who has a "community claim." *Id.* § 101(9). A "community claim" is a claim for which community property is liable. *Id.* § 101(6).

17. N.M. Stat. Ann. § 40-3-12 (1978).

18. *Id.* § 40-3-8(A)(6).

19. 4 L. King, Collier on Bankruptcy ¶ 541.07[8] (15th ed. 1979).

community property where the spouses hold equal undivided shares.[20] This latter provision may stem from a fear that a husband and wife might isolate half of what would generally be considered community property by holding it in joint tenancy or tenancy in common and by having only one spouse contract all the community debts. Outside of bankruptcy, creditors could reach only the interest of the spouse who contracted the debt in this property.

The New Mexico approach, treating some joint tenancies and tenancies in common as community property for the purpose of subjecting the property to community debts, provides an argument that it should be treated as community property in bankruptcy and that the interests of both spouses should come into the bankruptcy estate, even though only one spouse files the petition. The thrust of the argument is that the federal bankruptcy law should comport with the state law, to the greatest extent possible, and that New Mexico has determined that property held by husband and wife in joint tenancy or as tenants in common is the equivalent of community property in the debtor-creditor relationship. This argument has considerable appeal. By not defining community property, the Bankruptcy Code appears to rely upon state law, and New Mexico has bifurcated the attributes of joint tenancies and tenancies in common: although it calls them separate property, it treats them as community property where their availability to satisfy a claim is concerned. Therefore, these types of estates do become community property in the context of the specific area covered by the Bankruptcy Code. The result is also appealing because creditors receive the same treatment, regardless of whether they are attempting to collect on their claims outside or within the bankruptcy process. A contrary result would shield some property from the bankruptcy proceeding, even though that property otherwise would have been liable for claims now being filed in the bankruptcy.

2. Distribution of the estate.

A creditor having a community claim against the debtor may file a claim in the bankruptcy proceeding and is entitled to share in its distribution. A community claim is defined by the Code as a "claim . . . for which property of the kind specified in section 541(a)(2) . . . is liable."[21] If only one spouse files a petition, debts incurred by the other spouse still can be filed provided they are community claims as defined by the Code.[22] Separate debts of the debtor are also allow-

20. N.M. Stat. Ann. § 40-3-11 (1978).
21. 11 U.S.C. § 101(6) (Supp. III 1979).
22. *Id.* § 501.

able; if only one spouse files, however, separate debts of the other spouse cannot be filed.[23]

The Code provisions on marshalling[24] are complicated,[25] but are similar in approach to those under the New Mexico statutes: proceeds from community property are first distributed to community creditors, and separate creditors are paid first out of the proceeds from separate property. Where only one spouse files a petition in bankruptcy, however, a major difference between state law and the Code arises if there is community property in excess of that needed to satisfy community debts. Under the Bankruptcy Code, apparently all of the excess community property can and will be distributed to separate creditors of the filing spouse if the separate property is insufficient to satisfy the separate debts.[26] Under New Mexico law, only the debtor's interest in the community property can be reached to satisfy his or her separate debt.[27] A similar difference exists with regard to the separate property of a debtor. Under the Bankruptcy Code, all of the filing party's separate property that is not needed to satisfy separate debts will be distributed to community creditors who have not been paid out of community property;[28] under New Mexico law, community creditors can reach the separate property only of the spouse who contracted the debt.[29]

These differences may be significant in some cases. For example, take a case in which a husband has substantial separate debts, but little or no separate property, and where the community has more assets than liabilities. Under New Mexico law, only half of the community property can be reached by the separate creditors of the husband, but under the bankruptcy law all of the community property in excess of community debts would go to the husband's separate creditors if the husband files a petition in bankruptcy or one was filed against him. In such a case, the wife's interest in the community would be extinguished.

3. Discharge.

Where there is a joint bankruptcy involving husband and wife, both are discharged[30] from their separate debts and community debts unless an objection is made to the discharge,[31] or a particular debt is

23. *Id.*
24. *Id.* § 726(c).
25. Pedlar, *supra* note 5, at 363.
26. 11 U.S.C. § 726(c)(2) (Supp. III 1979).
27. N.M. Stat. Ann. § 40-3-10 (1978).
28. 11 U.S.C. § 726(c) (Supp. III 1979).
29. N.M. Stat. Ann. § 40-3-11 (1978).
30. 11 U.S.C. § 727 (Supp. III 1979).
31. *Id.*

one that is not dischargable.[32] Where only one spouse is in bankruptcy, that spouse's separate debts are discharged, the other spouse's separate debts are not,[33] and community debts are uncollectible out of community property that is acquired after the petition in bankruptcy is filed.[34] Thus, both the filing spouse and the "community" get a fresh start as a result of the bankruptcy. The separate property of the non-filing spouse still, however, may be liable for the community debts that were unpaid from the assets of the bankruptcy estate, provided that state law makes the separate property liable for community debts. In New Mexico, the separate property of a spouse is liable for those community debts that were contracted or incurred by the spouse.[35] Thus, in New Mexico if a wife files a petition in bankruptcy, her husband's separate property will be liable after the bankruptcy for those debts that were incurred or contracted by the husband, but not for those incurred or contracted by the wife. Although there is no law squarely on point, principles of agency would seem applicable here to determine whether a specific debt was contracted on behalf of one spouse by the other.

*C. Debtors' Exemptions.*

Unlike prior bankruptcy law, the Bankruptcy Code provides a detailed listing of property that can be claimed as exempt.[36] The Code retains, however, the right of a debtor to choose his or her state law exemptions,[37] thus providing debtors a choice. It is probably accurate to say that the New Mexico exemptions[38] are, in general, more extensive than those of the Bankruptcy Code. This will not be true of all cases, however, and it is necessary to compare the two schedules carefully in the context of the debtor's property to assure that full advantage is taken of the exemptions.[39]

Where both a husband and wife are in bankruptcy, each is entitled to claim exemptions, even if a joint petition has been filed.[40] Clearly, each can claim the federal exemptions separately, in effect doubling the amounts provided. Also, it would appear that one can claim the federal exemptions and the other the state exemptions. Although it

32. *Id.* § 523.
33. *Id.* § 727 provides only that the "debtor" is granted a discharge.
34. *Id.* § 524(a)(3).
35. N.M. Stat. Ann. § 40-3-11 (1978).
36. 11 U.S.C. § 522(d) (Supp. III 1979).
37. *Id.* § 522(b).
38. N.M. Stat. Ann. § § 42-10-1 to -13 (1978).
39. Comment, *Bankruptcy—A Comparison of New Mexico Exemption Statutes and Federal Exemptions: 11 U.S.C. § § 101-1330 (Supp. II 1978),* 10 N.M.L. Rev. 431 (1980).
40. 11 U.S.C. § 522(b) (Supp. III 1979).

is unclear whether both can claim the state exemptions, the better answer, based upon the apparent intent of both the New Mexico law and the Bankruptcy Code would seem to be that they cannot. In any event, it would be a rare case in which this would be advantageous.

## II. AGENCY

### *A. Insurance Broker as Insurer's Agent.*

Whether an insurance broker is the agent of the insurance company or of the insured can be an important factor in resolving disputes.[41] The issue would seem to have been settled by statute in New Mexico:

> Any person licensed as an agent to represent an insurance company shall, in any controversy between the insured or his beneficiary and the company, be held to be the agent of the company issuing the insurance solicited or applied for, anything in the application or the policy to the contrary notwithstanding; and any broker licensed to transact an insurance business in the state of New Mexico shall, in any controversy between any insured or his beneficiary and the company, issuing the insurance through its licensed agent at the request of said broker, be held to be the agent of the insured, anything in the application or policy to the contrary notwithstanding.[42]

The effect of the second part of the statute relating to the broker is to protect the insurance company from potential liability for claims made by the insured or the beneficiaries of a policy based upon a broker's representations or actions. In *Fryar v. Employers Insurance Co. of Wausau,*[43] the supreme court struggled mightily to avoid the plain meaning of the statute and, in doing so, significantly limited its effect.

The Fryars had been told by the broker that a refund owed to them of premiums paid on a workmen's compensation policy could be applied to pay the premiums of a general liability policy also carried with Wausau. Relying on this representation, the Fryars spent money that would otherwise have been available to pay the premium. Wausau then refused to recognize the broker's promise. Being unable to pay premiums on both the workmen's compensation and the liability policies, the Fryars elected to pay the latter, and the workmen's

41. A customer may wish to bring an action either against the insurer or the broker or agent. If the broker or agent is the agent of the insurer, then recovery will normally be allowed only against the insurer. On the other hand, if the broker or agent is the agent of the customer, no action will lie against the insurer, but an action will lie against the broker for breach of his or her fiduciary duty.

42. N.M. Stat. Ann. § 59-5-37 (1978).

43. 94 N.M. 77, 607 P.2d 615 (1980).

compensation policy was cancelled. Under the provisions of that policy, this cancellation forfeited the Fryars' right to the refund. When Wausau refused to make the refund of over $52,000, the Fryars sued both the broker and Wausau. The trial court, in a non-jury trial, allowed recovery against both defendants, finding that (1) the forfeiture provision was unenforceable as a penalty, (2) the policy was a contract of adhesion and was ambiguous, and (3) the broker was the company's agent.

The supreme court, applying agency principles, affirmed as to the insurer and reversed as to the broker. The statute presented the primary hurdle to recovery against Wausau. The statute, the supreme court stated, was designed to protect the insured and is remedial in nature. To support this position, the court quoted a United States Supreme Court opinion[44] interpreting a statute which provides that brokers are to be held the agent of the insurance company. It is difficult to see the applicability of that case to a statute providing that brokers are the agents of insured. Unfortunately, the court neglected a better argument for reading the statute as remedial. Where the customer is involved in litigation with the broker, the broker is unlikely to be liable to the customer if the broker is the agent of the insurer. Any action, therefore, would have to be brought against the insurer as principal. The statute is remedial in that it avoids this result and allows an action against the broker as agent of the customer.

Finding the statute to be remedial does not, necessarily, get to the result reached by the court. On the contrary, this finding could lead to the opposite result, that liability should be imposed upon the defendant broker but not upon the insurer. It does, however, set the stage for finding the statute to be inapplicable to the facts of this case. The trial court found there to be sufficient evidence to establish apparent authority in the broker to act for the insurer. The question then becomes one of whether the existence of apparent authority overrides the rule of the statute. The court determined that the statute does not preclude a finding that the broker is an agent of the insurance company where the facts establish authority in the broker to act for the insurer. This determination is not inconsistent with the legislative objective of assuring the customer a right of action against the broker in appropriate cases. The decision is also consistent with language in another New Mexico case holding that an insurance agent can be the agent of the insured under the right circumstances despite the first clause of the statute.[45]

44. Continental Insurance Co. v. Chamberlin, 132 U.S. 304 (1889).

45. Thompson v. Occidental Life Ins. Co. of California, 90 N.M. 620, 567 P.2d 62 (Ct. App. 1977). *See also* Inland Empire Ins. Co. v. Bair, 246 F.2d 505 (10th Cir. 1957).

An initial reading of the statute, and, indeed, of the case itself, leads to the conclusion that the result is wrong. The court appears to be turning the meaning of the statute completely around. Upon closer analysis, however, the result appears to be based upon the court's determination that the statute's purpose is limited, making the statute essentially irrelevant to the question presented. The result is reached, therefore, by a process of statutory interpretation advocated by Llewellyn[46] and others.[47] On the other hand, the opinion is not very satisfactory. It cites a case to support the apparent rationale for the holding that is relevant, if at all, only to another part of the statute. In relying upon that case to ascertain the statute's purpose, the court does not explain its reasons for determining that that purpose is limited.

*Fryar* advances the judicial process in this state by indicating the court's unwillingness to "allow any statute to remain as an undigested and undigestible lump in the middle of Our Law."[48] Unfortunately, the impact of the case is diminished because the court did not explain its rationale.

*B. Apparent Authority of Real Estate Development Manager.*

In *Vickers v. North American Land Development, Inc.*,[49] the supreme court held that the sales manager of a land development company had apparent authority to bind the company to an agreement giving the purchaser of land the right to exchange the lot purchased for another within the development. While the result may be defensible, the opinion unnecessarily confuses the doctrine of apparent authority in this state.

In purchasing a lot from North American Land Development, the plaintiffs signed a separate agreement, apparently a form contract, giving them the right to exchange the lot they purchased for another. They inquired of Mr. Walsh, the sales manager with whom they were dealing, whether he had the authority to enter into the exchange agreement. Mr. Walsh testified at trial that: "*I probably replied that I had the authority.* I did have the authority to do what I was doing."[50] The record also discloses that, after the contract was signed, the defendant promptly informed the plaintiff of its position that the exchange agreement was not binding, but cashed plaintiffs' check nevertheless.

46. K. Llewellyn, The Common Law Tradition 374 (1960).

47. *See, e.g.*, R. Dworkin, *How to Read the Civil Rights Act*, 26 N.Y. Review of Books 37 (Dec. 20, 1979).

48. K. Llewellyn, *supra* note 46, at 378.

49. 94 N.M. 65, 607 P.2d 603 (1980).

50. *Id.* at ____, 607 P.2d at 605 (emphasis in original).

Apparent authority arises from manifestations made by the principal, North America in this case, to a third party.[51] These may be made by words or acts and, as the court correctly states,[52] putting another into a position in which he usually would have authority to bind the principal operates to confer apparent authority.[53] The scope of such apparent authority must be determined according to the facts of each case.[54] In most transactions, an agent's apparent authority is identical with the agent's actual authority. Only where actual authority to bind the principal is lacking, as in this case, is it necessary to determine the existence and extent of the apparent authority. The difficulty in such cases lies not in determining what doctrine to apply, but in applying the doctrine to the facts.

In *Vickers,* the court found that apparent authority existed because North American "placed Walsh in a position and gave him a title and power that would lead a reasonable prudent person to believe that he did have authority to enter into the Contract and Trade Agreement in question."[55] The court also noted that North American had not posted or given any notice of the limitation of Walsh's authority, and that the cashing of the $5,000 down payment check created "an inference of ratification of Walsh's action."[56] Since the court reversed in favor of the plaintiffs, rather than remanding for a factual determination of the extent of Walsh's authority, the court must have determined that the facts so clearly established the apparent authority that the plaintiffs must recover. Even if the act of cashing the check amounted to ratification, it would not support this determination because ratification is unnecessary where apparent authority exists.[57] Also, the fact that no notice was given of limitation on Walsh's authority goes only to whether the authority was limited, not to its existence. Only the court's general language regarding Walsh's position, power, and title remains to explain why the court ruled as it did.

General language of the kind employed by the court in describing the facts is not helpful in determining its precedential value. Under the court's holding the doctrine of apparent authority clearly applies

51. Restatement (Second) of Agency § 8 (1958).
52. 94 N.M. at ___, 607 P.2d at 605.
53. Restatement (Second) of Agency § 27, Comment a (1958).
54. *Id.* § 49, Comment c.
55. 94 N.M. at ___, 607 P.2d at 605.
56. *Id.* at ___, 607 P.2d at 606.
57. "In its effect, ratification relates back to the time the act was done; it operates ab initio." H. Reuschlein & W. Gregory. Handbook on the Law of Agency and Partnership 72 (1979). *See also* W. Seavey, Handbook of the Law of Agency 57 (1964).

to real estate transactions.[58] The case also may be read as holding that the manager of a real estate development sales scheme always has the apparent authority, by virtue of his position and title, to enter into transactions of this kind. This interpretation of the case, however, seems overly broad. Perhaps the existence of the form contract permitting purchased lots to be traded, and the fact that these contract forms were given to the sales manager, were important to the court's holding, but the court does not mention these factors.

The court's failure to specify what facts actually gave rise to its finding of apparent authority weakens the value of the case as precedent. A quick reading of *Vickers* may lead to the conclusion that Walsh's statement as to his authority was critical to a finding of apparent authority, but this is incorrect. The statement of an agent as to the scope of his power binds the principal only if the agent had the authority to make the statement.[59] The opinion does not indicate that the development company told Walsh to make the statement even though he did not in fact have the actual authority. The court relies on Walsh's statement not to establish apparent authority, but only to indicate that the purchasers had no notice of the limitations on his authority.

Another disturbing feature of the case is the court's characterization of apparent authority as being based upon an estoppel theory.[60] This confusion of authority by estoppel with apparent authority sometimes can lead to unfortunate results.[61] In this case, for example, once the court applied the doctrine of estoppel, it postulated that a finding of detrimental reliance was necessary to hold the principal liable.[62] The court ultimately found the reliance in the fact that the purchaser had entered into the contract.[63] However, consider the language used by the court: "The detriment suffered here is in the nature of the loss of the benefit of the bargain . . . ."[64] Although the words "in the nature of" weaken the effect of the sentence, the

58. The lower court held that apparent authority did not apply to transactions involving the sale of land. 94 N.M. at ___, 607 P.2d at 605. Although never expressly holding otherwise, the supreme court found the existence of apparent authority.

59. W. Seavey, *supra* note 57, at 190.

60. 94 N.M. at ___, 607 P.2d at 605.

61. The characterization of apparent authority as an estoppel doctrine has been frequently criticized. Restatement (Second) of Agency § 8, Comment d (1958); W. Seavey, *supra* note 57, at 15. Many courts, however, do treat apparent authority in this way. H. Reuschlein and W. Gregory, *supra* note 57, at 58.

62. 94 N.M. at ___, 607 P.2d at 605.

63. Restatement (Second) of Agency § 8, Comment d (1958).

64. 94 N.M. at ___, 607 P.2d at 606.

notion that the expected benefit of a contract can amount to detrimental reliance is disturbing at best.

## III. CONTRACTS

Of the numerous contracts cases decided during the *Survey* year, four have been selected for comment in this article. The others appear to apply established principle in a workmanlike manner without disturbing settled doctrine or developing new trends. The cases selected are of general interest either because of their results or because of the manner in which the court addressed the issue concerned.

### *A. Real Estate Contracts.*

In two cases involving real estate contracts, the New Mexico Supreme Court continued a trend toward treating the vendor's interest as it would the interest of a mortgagee.[65] In *Marks v. City of Tucumcari,*[66] the City obtained a judgment against the vendor and filed a transcript of the judgment in the county where the land was located. Prior to that time, however, the property had been sold by the judgment debtor on a real estate contract that was filed before the judgment was entered. The court held that the lien did not attach to the property because the interest of the vendor was personal, not real, property. An earlier case[67] was expressly overruled to the extent that it had implied to the contrary.

In *Hale v. Whitlock,*[68] the court again affirmed the right of a vendor under a real estate contract to regain possession of the property upon a default by the vendee; however, the court held, in line with recent cases,[69] that the vendee was entitled to time beyond the contract period to cure a default. In this case, the original vendor had allowed the vendee to make late payments, but, upon an assignment of the contract, the assignee demanded that the vendees bring their payments up to date by tendering $1,675. The trial court granted the vendees an additional fifteen days to pay the entire amount due under the contract, and the supreme court affirmed on the ground that the trial court had not abused its discretionary equity powers.

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65. *See* Comment, *The Real Estate Contract in New Mexico: Eiferle v. Toppino,* 8 N.M.L. Rev. 247 (1978).

66. 93 N.M. 4, 595 P.2d 1199 (1979).

67. Mutual Bldg. & Loan Ass'n of Las Cruces v. Collins, 85 N.M. 706, 516 P.2d 677 (1973).

68. 92 N.M. 657, 593 P.2d 754 (1979).

69. Comment, *supra* note 65, at n. 53.

*B. Insurance Contracts.*

In a case of first impression, the court held that an insurer may not void an insurance policy where there has been a substantial breach by the insured, unless it can show actual prejudice flowing from the breach.[70] The court held that a substantial breach had occurred because the insured had failed to report an accident and failed to cooperate in the defense of an action brought by persons injured in the accident. In line with both the weight of authority and the trend outside of New Mexico, the court held that the insurance company must show that it was substantially prejudiced by the breach in order to void the policy.[71] In its well reasoned opinion, the court noted that a contrary rule would often work to the prejudice of innocent third parties and create windfalls for insurance companies.

*Berlier v. George*[72] was another case of first impression. Berlier purchased a 9,000 acre ranch from George on a real estate contract. The agreement provided that a house situated on the property would be insured by the vendor for $10,000 during the first fourteen months of the contract. George insured the house for $30,000, the house was destroyed by fire, and the insurer paid George $30,000. The issue was whether $30,000 or $10,000 should be applied to the amount remaining to be paid under the contract. The court held that the entire amount, less an amount equal to the premiums, should go to reduce the debt. The party bearing the risk of loss, in this case the vendee, is entitled to the proceeds of any insurance on the property, regardless of who contracts for the coverage.

## IV. UNIFORM COMMERCIAL CODE

No cases construing the Uniform Commercial Code were decided during the *Survey* year, nor were there any legislative developments affecting the Code. It may be time for the legislature to consider adoption of the 1972 revision of Article 9 of the Code[73] and the 1978 revision of Article 8[74] proposed by the Permanent Editorial Board for the Uniform Commercial Code and approved by the American Law Institute and the National Conference of Commissioners on

70. Foundation Reserve Ins. Co. v. Esquibel, 94 N.M. 132, 607 P.2d 1150 (1980).
71. 94 N.M. at ___, 607 P.2d at 1152.
72. 94 N.M. 134, 607 P.2d 1152 (1980).
73. *See* Permanent Editorial Board for the U.C.C., Final Report of Review Committee for Article 9 of the Uniform Commercial Code (1971).
74. *See* Permanent Editorial Board for the U.C.C., Proposed Revision of Article 8 and Related Changes in Other Articles (1977).

Uniform State Laws. The 1972 revisions, which have been adopted by more than thirty states,[75] resolve some ambiguities in the prior version of Article 9. If this proposed revision is considered, care should be taken to retain two beneficial variations in the New Mexico Code: (1) the anti-deficiency judgment provision,[76] and (2) the restriction on the effect of trade usage in the interpretation of security interests in farm products.[77]

75. F. Hart and W. Willier, Forms and Procedures Under the Uniform Commercial Code ¶ 91C.01 (1963).

76. N.M. Stat. Ann. § § 55-9-501(3)(a), -504(2) (1978).

77. *Id.* § § 55-1-205(3)-(4), -306(2).