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Commercial Law

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COMMERCIAL LAW

During the survey period,[1] New Mexico appellate courts handed down several significant decisions in the area of commercial law. This article surveys the state of commercial law in New Mexico by presenting a detailed analysis of cases affecting contract law, guaranty, secured transactions, mortgages, and commercial enactments. The commercial enactments examined in this article include the Pawnbroker's Act, the New Mexico Securities Act, the Liquor Control Act, the Unfair Trade Practices Act, and the Motor Carrier Act.

I. CONTRACT LAW

During the survey period, a wide spectrum of issues involving contract law were generated by the New Mexico Supreme Court.[2] The issues examined extend from basic contract law theory to the more difficult concepts of lien priority in contracts involving security interests.

A. Unlicensed Contractors Subject to Penalties Provided Under the Uniform Commercial Code and the New Mexico Construction Industries Licensing Act

The purpose of the New Mexico Construction Industries Licensing Act ("Construction Act") is to provide a comprehensive method for the licensing and control of contractors in order to protect the public from either irresponsible or incompetent contractors "by adopting and enforcing codes and standards for construction, alteration, installation, connection, demolition, and repair work."[3] The legislative intent of the Construction Act contemplates harsh punishment for unlicensed contractors by denying them access to the courts to collect compensation for the work they performed.[4] This legislative policy overrides the judicial principle that disfavors unjust enrichment.[5]

The Construction Act is governed by the Construction Industries Commission, which is composed of New Mexico citizens who are closely

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1. This survey covers cases printed in the New Mexico Bar Bulletin between August 1, 1990 and July 31, 1991.

2. All contract cases are appealed directly to the supreme court. *See* N.M. R. APP. P. 12-102. This rule states that the supreme court has jurisdiction over "appeals from the district courts in which one or more counts of the complaint alleges a breach of contract or otherwise sounds in contract."

3. N.M. STAT. ANN. § 60-13-1.1 (Repl. Pamp. 1989); *see In re* Romero, 535 F.2d 618, 621 (10th Cir. 1976).

4. Triple B Corp. v. Brown & Root, Inc., 106 N.M. 99, 101, 739 P.2d 968, 971 (1987). *See generally* Daughtrey v. Carpenter, 82 N.M. 173, 477 P.2d 807 (1970) (legislature intended to prohibit suits by unlicensed contractors acting illegally, and not to preclude lawful contractors from recovering damages because of a technical error in their pleadings).

5. *Triple B Corp.*, 106 N.M. 99, 100, 739 P.2d 968, 970 (1987); *see, e.g.*, Campbell v. Smith, 68 N.M. 373, 362 P.2d 523 (1961), *overruled on other grounds*, Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 789 P.2d 1250 (1990) (one who has shown himself to be required to have contractor's license cannot recover under quantum meruit in absence of such license).

affiliated with the construction industry.[6] All contractors must be licensed by the Construction Industries Commission[7] and must pass special examinations.[8] A contractor cannot bring suit in any New Mexico court for the collection of compensation for the performance of any act without proving that the contractor was licensed at the time of the cause of action.[9] Additionally, any contractor operating without a license cannot file a mechanic's lien.[10] Under the Construction Act, an employee who is paid by the hour does not constitute a contractor.[11] Courts are reluctant to construe the Construction Act more broadly than necessary for the achievement of its purpose.[12]

Mascarenas v. Jaramillo[13] involved a suit by a trailer park owner against an unlicensed contractor for breach of contract. In November, 1985, Mascarenas, the trailer park owner, entered into an oral contract with Jaramillo, an unlicensed contractor.[14] "The contract required Jaramillo to construct sewer and water lines and to perform grading, leveling, excavation and backfilling" for a price of $4,916.53.[15] Mascarenas knew that Jaramillo was not a licensed contractor.[16] Over the course of the next six months, Mascarenas paid $4,898 of the contract price before the construction was completed.[17] In June, 1987, Jaramillo's construction work failed the required government inspection.[18] Mascarenas then hired four

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6. See N.M. STAT. ANN. § 60-13-6(A) (Repl. Pamp. 1989) for a list of the members of the commission.

7. The statute states: "No person shall act as a contractor without a license issued by the division classified to cover the type of work to be undertaken." *Id.* § 60-13-12(A). *See generally* Peck v. Ives, 84 N.M. 62, 499 P.2d 684 (1972) (no person shall engage in business of a contractor unless the construction industries commission (division) has issued him a license which covers the type of work to be undertaken).

8. The statute states in pertinent part:

> Except as otherwise provided in this section, no certificate of qualification shall be issued to any individual desiring to be a qualifying party until he has passed with a satisfactory score an examination approved and adopted by the division.

N.M. STAT. ANN. § 60-13-16(A). The section further states:

> The examination shall consist of a test based on general business knowledge, rules and regulations of the division and the provisions of the Construction Industries Licensing Act [this article]. In addition, applicants for a GB, MM or EE classification or for any other classification which the Commission determines to be appropriate shall take a test based on technical knowledge and familiarity with the prescribed codes and minimum standards of the particular classification for which certification is requested. The division shall provide examinations in both English and Spanish.

Id. § 60-13-16(B).

9. N.M. STAT. ANN. § 60-13-30 (Repl. Pamp. 1989). *See generally* Fleming v. Phelps-Dodge Corp., 83 N.M. 715, 496 P.2d 1111 (Ct. App. 1972) (plaintiff's action to recover damages for breach of contract may not be maintained where the plaintiff must rely on an alleged contract created in violation of statutes which prohibit contracting as unlicensed contractor).

10. N.M. STAT. ANN. § 60-13-30(B).

11. "Contractor" does not include an individual who works only for wages. *Id.* § 60-13-3(D)(10).

12. *See generally* Olivas v. Sibco, Inc., 87 N.M. 488, 535 P.2d 1339 (1975).

13. 111 N.M. 410, 806 P.2d 59 (1991).

14. *Id.* at 411, 806 P.2d at 60.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 411-12, 806 P.2d at 60-61.

separate contractors to correct Jaramillo's work.[19] The total cost of correcting the work was $7,124.93.[20]

Mascarenas brought suit against Jaramillo claiming breach of contract, breach of implied warranty, and negligence.[21] Jaramillo counterclaimed, seeking recovery of the balance of the oral contract price and for defamation.[22] During a non-jury trial, the district court judge found that Jaramillo was not an employee of Mascarenas and entered judgment in favor of Mascarenas on all counts, awarding her $7,124.93 for the corrective work, $2,000 compensatory damages, and $250 for costs.[23] Jaramillo appealed, claiming that the trial court erred by finding that he was not an employee of Mascarenas, that he breached an implied warranty, that an unlicensed contractor must refund payments already received, and that paying the costs of correcting his work constituted double recovery.[24] Mascarenas cross-appealed, arguing that the trial court erred by refusing to award her prejudgment interest on a loan she received to pay Jaramillo for his work,[25] lost rental income, and all associated costs.[26]

The New Mexico Supreme Court stated that "the principal test to determine whether one is an independent contractor or an employee is whether the employer has any control over the manner in which the details of the work are to be accomplished."[27] The court acknowledged the sufficiency of the trial court evidence which showed that Jaramillo never received an hourly wage, never submitted time slips, or submitted tax forms.[28] The court concluded that Jaramillo met the definition of a contractor under the Construction Act.[29]

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19. *Id.* at 412, 806 P.2d at 61.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* Jaramillo did not challenge the trial court's finding of negligence. *Id.* at 413, 806 P.2d at 62.
25. *Id.* at 413, 806 P.2d at 62. Mascarenas obtained a loan to finance construction of the trailer park. *Id.* at 414, 806 P.2d at 63.
26. *Id.* at 413, 806 P.2d at 62.
27. *Id.* at 412, 806 P.2d at 61 (quoting Campbell v. Smith, 68 N.M. 373, 377, 362 P.2d 523, 526 (1961)).
28. *Id.*
29. *Id.* The Construction Act states:

> As used in the Construction Industries Licensing Act . . . , "contractor":
> A. means any person who undertakes, offers to undertake by bid or other means or purports to have the capacity to undertake, by himself or through others, contracting. Contracting includes but is not limited to constructing, altering, repairing, installing or demolishing any:
> . . .
> (7) sewerage, water, gas or other pipeline;
> . . .
> (10) water, oil or other storage tank;
> . . .
> (13) excavating earth;
> (14) air conditioning, conduit, heating or other similar mechanical works;
> (15) electrical wiring, plumbing or plumbing fixture, consumers' gas piping, gas appliances or water conditioners; or

The court next examined whether an implied warranty existed due to the oral contract.[30] Jaramillo argued that because the contract work constituted a service rather than a good, the Uniform Commercial Code ("N.M.U.C.C.") did not apply, and thus, Mascarenas would have no remedy under the N.M.U.C.C. for an implied breach of warranty.[31] The court, however, noted the long standing legal proposition that a "breach of implied warranty by a tradesman to perform in a skilled and workmanlike fashion is a common-law theory of recovery in New Mexico."[32] The court further noted that the oral contract did not contain any language defining limitations or exclusions of any warranties.[33] The court concluded that substantial evidence existed to support an affirmation of the trial court's finding of breach of implied warranty.[34]

As to double recovery, the court decided an issue of first impression in New Mexico—whether the recipient of construction work can recover payments made on a contract to an unlicensed contractor.[35] The court stated that the Construction Act bars an unlicensed contractor from bringing or maintaining a suit on the contract or in quantum meruit.[36] The court further noted that prior decisions by the supreme court affirm the legislature's intent to protect the general public in enacting the Construction Act.[37]

Additionally, the court, relying on a California Supreme Court decision,[38] found "that allowing recovery of payments made on a contract to an unlicensed construction contractor serves and advances the purpose of the [Construction] Act."[39] The court noted, however, that one potential problem with the Construction Act is that it allows an unlicensed contractor to collect compensation for most or all of the contract price before significant commencement or performance of the contract.[40] The supreme court stopped this practice, deciding that,"[a]s a matter of public policy, an unlicensed contractor may not retain payments made pursuant to a contract which requires him to perform in violation of the Construction Industries Licensing Act."[41] The court found that this rule is applicable

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(16) similar work, structures or installations which are covered by applicable codes adopted under the provisions of the Construction Industries Licensing Act[.]

N.M. STAT. ANN. § 60-13-3(A) (Repl. Pamp. 1989).

30. *Id.* at 412, 806 P.2d at 61.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 413, 816 P.2d at 62; *cf.* Peck v. Ives, 84 N.M. 62, 499 P.2d 684 (1972). Where appellant has violated provisions of the Construction Act as to aggregate dollar amount of contract for which he is financially responsible at any one time, and thus, no longer a licensed contractor, "he has . . . 'substantially complied' with the licensing requirements to such a degree that he is not barred from bringing suit". *Peck*, 84 N.M. at 65, 499 P.2d at 687.

36. *Mascarenas*, 111 N.M. at 413, 806 P.2d at 62 (citations omitted).

37. *Id.* (citations omitted).

38. Domach v. Spencer, 101 Cal. App. 3d 308, 161 Cal. Rptr. 459 (1980).

39. *Mascarenas*, 111 N.M. at 414, 806 P.2d at 63.

40. *Id.*

41. *Id.*

despite the fact that the recipient of the construction work has knowledge of the non-licensure of the contractor.[42] In so deciding, the court reversed the trial court with respect to the award of a partial refund, and instead, "remanded with instructions to award Mascarenas a full refund of $4,898.00."[43]

Examining Mascarenas' claims regarding damages, the supreme court held that "damage awards should fully compensate the injured party, whether the action is . . . in contract or in tort."[44] Because "Jaramillo's breach precluded Mascarenas from discharging the construction loan,"[45] the court found that a party "who fails to perform his contract is justly responsible for all of the damages flowing naturally from the breach."[46] The court reversed the trial court's ruling and awarded Mascarenas prejudgment interest on the loan.[47]

In examining Mascarenas' claim regarding lost rental income, the supreme court found that the trial court did not apply the correct standard when it found that "[l]ost rental income claimed by [Mascarenas] is too speculative and thus was not established by clear and convincing evidence."[48] Despite this, the court found that in view of the whole record, the trial court was not convinced by the speculative nature of Mascarenas' claim.[49] Thus, the court held that "[d]amages based on surmise, conjecture, or speculation cannot be sustained . . . [and] must be proven with reasonable certainty."[50]

The court also held that Mascarenas was entitled to recover her costs.[51] This award, the court noted, is completely discretionary and cannot be reversed unless the action constituted an abuse of discretion.[52] Finding that no abuse of discretion was present, the supreme court upheld the trial court's award of $250 to Mascarenas.[53]

This decision reflects the supreme court's willingness to bar contractor's non-licensure practices in New Mexico. This is true despite the fact that the construction project customer has knowledge of the contractor's non-licensure.[54] Before this decision unlicensed contractors could retain partial or total payment of the construction project if the unlicensed contractor

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42. *Id.*
43. *Id.*
44. *Id.* (quoting Shaeffer v. Kelton, 95 N.M. 182, 187, 619 P.2d 1226, 1231 (1980)).
45. *Id.*
46. *Id.* (quoting Shaeffer v. Kelton, 95 N.M. 182, 187, 619 P.2d 1226, 1231 (1980)).
47. *Id.* at 414, 806 P.2d at 63.
48. *Id.* at 415, 806 P.2d at 64.
49. *Id.*
50. *Id.* The supreme court did not divulge whether it believed the evidence proved or disproved Mascarenas' claim of lost rental income. *Id.* Because the court did not remand with further instructions on this issue, it must be presumed that Mascarenas did not meet her burden of proof at trial.
51. *Id.* (relying on N.M. R. Civ. P. 1-054 (1984)). This rule relates to final judgments (N.M. R. Civ. P. 1-054(A)), and the award of costs during a trial (N.M. R. Civ. P. 1-054(E)). Mascarenas alleged error on the part of the trial court for failing to award her the full $545.00 requested in her cost bill. *Mascarenas*, 111 N.M. at 415, 806 P.2d at 64.
52. *Mascarenas*, 111 N.M. at 415, 806 P.2d at 64 (citations omitted).
53. *Id.*
54. N.M. Stat. Ann. § 60-13-30(A) (Repl. Pamp. 1989).

"collect[ed] most or all of the contract price before significant commencement of performance."[55] This was true even if the project did not meet the customer's perception of quality construction work. After this decision, however, this is no longer true.[56] Unlicensed contractors will be severely punished: unlicensed contractors may be ordered to disgorge not only the contract price already received, but also pay additional costs of correction of any construction work and damages.[57] New Mexico courts will strictly interpret the Construction Act against an unlicensed contractor. Therefore, in New Mexico, the rule is "unlicensed contractor beware."

B. Third Party Beneficiary Contracts

A general rule of contracts is that "one who is not a party to a contract [or agreement] cannot maintain a suit upon it."[58] A third party, however, can attain the status of beneficiary of such contract or agreement.[59] As a beneficiary the third party may have enforceable rights against those parties in the contract.[60] Such third-parties are called "third-party beneficiaries" and are created by the intent of the contracting parties.[61] The dispositive question is whether the contracting parties intended the contract to benefit the third party.[62] The intent can be inferred from the contract itself or from the actions of any one of the contracting parties.[63] Further, an executory contract to settle a claim operates as a defense to the claim even though the contract has not yet been performed.[64]

C. Contractual Waiver Distinguished from Contractual Modification and Contractual Estoppel by Waiver

New Mexico courts have defined contractual waiver as "the intentional relinquishment or abandonment of a known right."[65] This definition

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55. *Mascarenas*, 111 N.M. at 414, 806 P.2d at 63.

56. *Id.* The court found that the Construction Act barred compensation for an unlicensed contractor "no matter how expertly performed." *Id.*

57. Because Jaramillo decided to appeal the trial court's awards to Mascarenas, he paid the price. At trial, he was ordered to pay Mascarenas a total of $9,374.93. After the supreme court decision, he had to pay Mascarenas $12,272.93 (a difference of $2,898). *Id.*

58. *See generally* Staley v. New, 56 N.M. 756, 250 P.2d 893 (1952).

59. Permian Basin Inv. Corp. v. Lloyd, 63 N.M. 1, 6, 312 P.2d 533, 538 (1957) (holders of first right to purchase prospecting permit sought to recover from promisor for its refusal to perform its contract with promisee for purchase of prospecting permit. The New Mexico Supreme Court held that the evidence sustained trial court's finding that promisor had no knowledge of first refusal rights and that holders thereof were incidental beneficiaries under contract between promisor and promisee.).

60. *Id.*

61. McKinney v. Davis, 84 N.M. 352, 353, 503 P.2d 332, 333 (1972) (a prime requisite to the status of "third party beneficiary" under a contract "is that the parties to the contract must have intended to benefit the third party, who must be something more than a mere incidental beneficiary").

62. Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987) (intent of parties to a contract to benefit third party "must appear either from the contract itself or from some evidence that the person claiming to be a third-party beneficiary is an intended beneficiary.").

63. *Id.*

64. Western Bank v. Biava, 109 N.M. 550, 551, 787 P.2d 830, 831 (1990) (citing Clark Leasing Corp. v. White Sands Forest Products, Inc., 87 N.M. 451, 535 P.2d 1077 (1975)).

65. J.R. Hale Contracting Co., Inc. v. United New Mexico Bank, 110 N.M. 712, 714, 799 P.2d 581, 585 (1990) (citing Young v. Seven Bar Flying Serv., Inc., 101 N.M. 545, 547, 685 P.2d 953, 955 (1984)).

recognizes that the intent to waive contractual obligations or conditions may be implied-in-fact from a party's representations or conduct, despite the absence of an express declaration of waiver.[66] Nevertheless, these "implied in fact" waivers must be a "voluntary act whose effect is intended."[67] A waiver, however, might be presumed or implied based upon the honest belief of the non-waiving party.[68]

In *J.R. Hale Contracting Co. v. United New Mexico Bank*,[69] the New Mexico Supreme Court examined the basic principles underlying the theory of waiver under contract law. J.R. Hale Contracting ("Hale") entered into numerous loan transactions with United New Mexico Bank at Albuquerque ("United New Mexico").[70] Although the notes specified due dates, Hale was frequently late in making its payments on the notes.[71] United New Mexico took no formal action as to the late payments by Hale.[72] Instead, it chose to contact Hale and request that the payment be made or take the payment from one of Hale's accounts and send a notice of advice to Hale.[73]

In November, 1982, Hale executed a renewal note in favor of United New Mexico in the amount of $400,000.[74] Toward the end of February 1983, Hale approached United New Mexico for another loan, as the existing $400,000 line of credit was fully drawn.[75] Hale and United New Mexico negotiated the possibility of a new loan during the first three weeks of March.[76] United New Mexico, however, was concerned about the existing $400,000 note and the late payment that was due on March 1.[77] In the negotiations between the parties, however, the matter of the overdue interest payment was never discussed.[78] On March 24, United New Mexico called the $400,000 note due and payable in full immediately.[79]

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66. Elephant Butte Resort Marina, Inc. v. Wooldridge, 102 N.M. 286, 290, 694 P.2d 1351, 1355 (1985).

67. J.R. Hale Contracting Co. v. United New Mexico Bank, 110 N.M. 712, 717, 799 P.2d 581, 588 (1990).

68. Ed Black's Chevrolet Center, Inc. v. Melichar, 81 N.M. 602, 604, 471 P.2d 172, 174 (1970).

69. 110 N.M. 712, 799 P.2d 581 (1990).

70. *Id.* at 714, 799 P.2d at 583. Each of these transactions involved revolving lines of credit in increasing amounts. *Id.*

71. *Id.* at 714-15, 799 P.2d at 583-84.

72. *Id.* at 715, 799 P.2d at 584.

73. *Id.*

74. *Id.* The note provided in pertinent part:

> If ANY installment of principal and/or interest on this note is not paid when due . . . or if [United Bank] in good faith deems itself insecure or believes that the prospect of receiving payment required by this note is impaired; thereupon, at the option of [United Bank], this note and any and all other indebtedness of [Hale] shall become and be due and payable forthwith without demand, notice of non-payment, presentment, protest or notice of dishonor, all of which are hereby expressly waived by [Hale] . . . .

Id.

75. *Id.*

76. *Id.* These negotiations comprised a series of meetings between Hale and United New Mexico during this period. *Id.*

77. *Id.*

78. *Id.* at 719, 799 P.2d at 588.

79. *Id.* at 715, 799 P.2d at 584.

Although Hale offered to immediately pay the accrued interest charges on the note, the bank refused to reconsider its decision to make the note payable in full immediately.[80] United New Mexico then proceeded to collect in full all amounts due on the note.[81] Hale brought suit against United New Mexico claiming wrongful acceleration of the note.[82]

At trial, Hale argued three points based on questions of fact.[83] First, Hale argued that an issue existed on whether the bank waived the late interest penalty clause in the note.[84] Second, Hale argued that an issue remained regarding whether the bank impliedly modified the note due to its previous inaction to accelerate other late payment notes.[85] Finally, Hale argued that an issue existed as to whether the bank was estopped to assert the late interest penalty clause in the note.[86] United New Mexico argued that Hale failed to produce any evidence showing that United New Mexico had waived the default clause, modified the terms of the note, or was estopped from declaring a default.[87] United New Mexico also argued that it relied on the insecurity clause in the note which required Hale to make a prima facie showing that the bank lacked good faith in accelerating payment under that clause.[88] United New Mexico also moved for a directed verdict, alleging that Hale failed to introduce sufficient evidence showing that the bank lacked a good faith belief that the $400,000 loan was in jeopardy.[89] United New Mexico moved for a directed verdict on the grounds that there was no waiver of the note's late interest penalty clause, there was no modification to the original note, and thus, the bank was not estopped from accelerating the note.[90]

The district court judge granted United New Mexico's motion for directed verdict as to the question of waiver, modification, and estoppel, finding that the note's acceleration was justified due to the note's twenty-three day delinquency period on the note's interest.[91] The district court judge reasoned that "although a jury issue existed regarding the bank's acceleration under the insecurity clause, none existed regarding the bank's right to accelerate payments" under the default clause in the note.[92] The court, however, denied United New Mexico's alternative motion for a directed verdict based on lack of evidence regarding United New Mexico's good faith efforts, holding that "facts [existed] in the record from which

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80. *Id.*
81. *Id.* The interest accrual amounted to $418,801.86. *Id.*
82. *Id.* at 714, 799 P.2d at 583.
83. *Id.* at 716, 799 P.2d at 585. The three arguments are based on that same proposition—the bank's conduct negated the express default provision in the note. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 715-16, 799 P.2d at 584-85.

a jury could conclude that the bank lacked good faith."[93] Hale appealed the entry of a directed verdict in favor of United New Mexico to the New Mexico Supreme Court.[94]

Hale argued that United New Mexico's conduct expressly abrogated the acceleration clause in the note.[95] Hale argued that based upon the party's prior course of dealing, the bank's acceptance of late payments on past due notes signified the bank's waiver of the clause which allowed the bank to call a note due and payable immediately without prior notice.[96] The court disagreed, finding that the bank's acceptance of late payments in prior transactions involved completely separate contractual obligations.[97] Because the bank never accepted a late payment on the $400,000 note, the court found that the bank never waived the contractual provision regarding late payment penalties.[98] For such a waiver to exist, the court held, an actual intent to waive the payment or waive the contractual right to call a note due without prior notice must be "implied from all parties [sic] conduct in the performance of that obligation."[99] Otherwise, the court reasoned, any express terms in the contract when executed would be meaningless.[100] Although the parties' prior agreements allowed late payments, the court found that both parties' intent to strictly comply with the provisions in the $400,000 loan contract did not allow such late payments.[101] Thus, the court upheld the legal proposition that in a conflict between prior conduct regarding contractual obligations and an express agreement, the express agreement will sustain the parties' contractual obligations to one another.[102]

Because the rest of Hale's argument relied on the combination of waiver, modification, and estoppel, the supreme court next attempted to clarify these principles.[103] Upon a comparison of relevant secondary authority, particularly *Corbin on Contracts*,[104] and prior New Mexico

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93. *Id.* at 720, 799 P.2d at 589.

94. *Id.* at 714, 799 P.2d at 583.

95. *Id.* at 716, 799 P.2d at 585.

96. *Id.* at 717, 799 P.2d at 586 (citing Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967)). In *Thomas*, a *single* finance agreement existed requiring written authorization to sell cattle. A creditor, however, continuously allowed a debtor to sell cattle without the required written authorization. The supreme court found that the creditor had consented to the sale, if not expressly, then impliedly, under the provisions set forth in the Uniform Commercial Code. Such consent to the sale of cattle, the court held, constituted a waiver of the creditor's security interest. *Thomas*, 77 N.M. 554, 425 P.2d 726.

97. *J.R. Hale*, 110 N.M. at 718, 799 P.2d at 587.

98. *Id.* The court distinguished *Thomas* by finding that the finance agreement in *Thomas* involved a *single* contract. In this case, the court found that the multiple note agreements entered into by Hale and United constituted separate and completely unique obligations. *Id.*

99. *Id.* (citations omitted).

100. *Id.*

101. *Id.* The court stated, however, "[W]hether their conduct after the execution of the agreement indicates an intention to waive a particular provision is another question." *Id.*

102. *Id.* The supreme court found that this determination comports with the New Mexico Uniform Commercial Code. *Id.*

103. *Id.* at 717, 799 P.2d at 586.

104. *See* 3A A.L. CORBIN, CORBIN ON CONTRACTS (1960).

cases,[105] the supreme court found several distinct features among these principles.[106]

1. Waiver

The court found that Professor Corbin did not clarify the meaning of waiver "without knowing the facts the term is being used to describe," but did state that "waiver depends upon what one himself intends to do."[107] The court found that in New Mexico waiver is generally viewed as the "intentional relinquishment or abandonment of a known right."[108] The intent to waive, the court held, could be implied from a party's representations, even if such representations are not express.[109]

2. Waiver by Estoppel

The court found that Professor Corbin viewed waiver by estoppel as "expressions or conduct that lead a party reasonably to believe that certain conditions or obligations will not be insisted upon [. . . and that] courts will then speak in terms of estoppel as well as waiver."[110] The court further found that Professor Corbin described estoppel as "depend[ing] only upon what one's conduct has caused another party to do."[111] In examining prior New Mexico decisions, the court found that implied representations could be labeled as "waiver by estoppel." The court stated:

> To prove waiver by estoppel the party need only show that he was misled to his prejudice by the conduct of the other party into the honest and reasonable belief that such waiver was intended. The estoppel is justified because the estopped party reasonably could expect that his actions would induce the reliance of the other party. However, unlike the case of a voluntary waiver, either express or implied in fact, the waiver of the contractual obligation or condition and the effect of the conduct upon the opposite party may have been unintentional.[112]

3. Waiver, Modification, and Waiver by Estoppel Distinguished and Applied

The court held that based upon its examination of the relevant case law and secondary authorities, three forms of waiver could be produced:

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105. *See generally* Elephant Butte Resort Marina, Inc. v. Wooldridge, 102 N.M. 286, 289, 694 P.2d 1351, 1354 (1985); *see also* Cooper v. Albuquerque City Comm'n, 85 N.M. 786, 790, 518 P.2d 275, 279 (1974).

106. *J.R. Hale*, 110 N.M. at 717, 799 P.2d at 586.

107. *Id.* at 716, 799 P.2d at 585 (citing 3A A.L. CORBIN, *supra* note 104, § 752).

108. *Id.*

109. *Id.* at 716-17, 799 P.2d at 585-86 (citations omitted).

110. *Id.* at 716, 799 P.2d at 585 (citing 3A A.L. CORBIN, *supra* note 104, § 754).

111. *Id.* (citing 3A A.L. CORBIN, *supra* note 104, § 752).

112. *Id.* at 717, 799 P.2d at 586 (footnote omitted).

(1) actual waiver, either express or implied in fact, not supported by consideration, which may be retracted in the absence of detrimental reliance;
(2) modification, which is not subject to retraction, based upon mutual agreement to waive certain obligations or conditions and the exchange of consideration; or
(3) waiver by estoppel based upon either an actual waiver or certain "expressions or conduct" where the reliance of the opposite party and his change of position justifies the inhibition to assert the obligation or condition.[113]

Applying the principles of "actual waiver," the court found that any intent of the bank to waive its contractual rights must have occurred after execution of the contract.[114] The court, however, did not find any evidence to prove the bank intended, either expressly or impliedly, an actual waiver.[115] The court held that once a party accepts a late payment without objection, that party waives any contractual rights that may have existed in an express contract.[116] If such action continues, the court noted, this may generally suggest an intention to accept late payments.[117] Although the bank's actions during the negotiations may have been construed as misleading, the court found that its conduct did not present a factual issue as to whether it intended to waive its contractual rights.[118] Rather, the court found that the bank simply intended to ignore the delinquent payment.[119]

Applying the principles of "modification," the court found that no factual question existed to prove the bank intended to waive its right to call the note due and payable immediately.[120] Because no issue existed as to the bank's intent, the court found that the parties could never have intended to generate a new contract in lieu of the previous contract, nor could the parties amend the $400,000 contract to include new late payment penalty provisions.[121] Even if the bank's intent could show that such an amended agreement existed, the court found it was not supported by consideration.[122]

Applying the principles of "waiver by estoppel," the court found that a question of fact existed in the course of negotiations between the two parties.[123] The New Mexico Uniform Commercial Code recognizes that "one party to a contract [can] use his past commercial dealing with another party as a basis for the interpretation of the other party's

113. *Id.*
114. *Id.* at 719, 799 P.2d at 588.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* The court concluded by stating: "An issue of contract modification should be approached in these terms." *Id.*
123. *Id.*

conduct."[124] The court found that due to prior transactions between the parties, Hale could reasonably interpret the bank's conduct as allowing a late payment and that the bank should have been aware of this situation.[125] The court concluded that the United New Mexico's acceleration of the note without prior notice to Hale could be considered as having a detrimental effect on Hale.[126]

4. Good Faith Acceleration

Viewing United New Mexico's claim that Hale failed to make a prima facie showing that the bank lacked good faith in accelerating the note, the court noted that such a claim presented an issue of fact under the insecurity clause.[127] Under the N.M.U.C.C.,[128] good faith is defined as "honesty in fact in the conduct or transaction concerned."[129] The court noted that there are two standards of good faith applied by courts under the model Uniform Commercial Code—one which subjectively proposes that a creditor genuinely believe the prospect for repayment is impaired (no reasonable belief is required),[130] and the other which objectively asks "whether the creditor was reasonable under the circumstances in believing that the prospect for repayment was impaired."[131] The court held that the N.M.U.C.C. "does not impose an objective standard of commercial reasonableness on . . . the bank . . . when the bank . . . [believes] . . . its prospect for repayment is impaired."[132] Instead, the court held that the U.C.C. imposes a "standard of honesty in fact," which is the minimum standard which can be altered by the parties to the contract.[133] This subjective standard, the court held, "should be based on the facts and circumstances surrounding the acceleration and not solely on the bank's testimony [regarding] its own state of mind."[134] Under this standard, the supreme court established that a trier of fact could find a creditor acted without a good faith belief that its prospect for repayment was impaired when:

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124. *Id.* (citing N.M. STAT. ANN. § 55-1-205(1) (1978)).

125. *Id.* The court examined evidence that Hale instructed the bank to notify him during the negotiations of the past due payment, but the bank failed to notify him at the next meeting. Evidence also existed which showed that the bank gave Hale a letter of reference regarding past business dealings. The letter stated: "All experience with J.R. Hale Contracting Company has been satisfactory." *Id.* at 720, 799 P.2d at 589.

126. *Id.* at 720, 799 P.2d at 589.

127. *Id.*

128. N.M. STAT. ANN. §§ 55-1-201 to -2A-532 (Repl. Pamp. 1989).

129. *J.R. Hale*, 110 N.M. at 720, 799 P.2d at 589 (quoting N.M. STAT. ANN. § 55-1-201(19)). A party may accelerate payment or performance if, in good faith, he holds a good faith belief that the prospect of payment or performance is impaired.

130. *Id.* at 721, 799 P.2d at 590. The court stated that the subjective standard has been criticized because: "[a] declaration of insecurity is a unilateral decision made by the creditor which places a severe hardship upon the debtor. This hardship is unjust if the creditor's decision is unreasonable or based upon mistaken facts which the creditor may honestly believe to be true." *Id.* (quoting Richards Engrs., Inc. v. Spanel, 745 P.2d 1031, 1033 (Colo. Ct. App. 1987)).

131. *Id.*

132. *Id.* at 722, 799 P.2d at 591.

133. *Id.*

134. *Id.*

(1) under the facts and circumstances that were known to the creditor, there existed a reasonable inference that the creditor in fact did not conclude that its prospect for repayment was impaired and that acceleration was necessary to protect its interests, or

(2) there existed a reasonable inference that the creditor chose not to undertake such investigation as:

(a) was necessary to make an informed decision and

(b) would have shown that the foreseeable risk of nonpayment was not materially greater than when the loan was made.[135]

Therefore, the supreme court affirmed the district court's determination that Hale established sufficient evidence to make a prima facie case against the bank due to lack of good faith, requiring a jury finding.[136]

This decision represents one of the most important cases to be decided during the survey period. In short, this decision clarifies the distinguishing features and requirements of contract waiver, modification, and estoppel that have been a source of confusion in prior New Mexico cases. *J.R. Hale* further demonstrates that in a conflict between prior contract conduct between the parties and a newly-formed express contract, the provisions set forth in the express contract governs. Finally, this decision is significant as it defines a standard two-step test for good faith analysis under the New Mexico Uniform Commercial Code.

II. THE STATUTE OF LIMITATIONS ON A DEMAND GUARANTY STARTS WHEN DEMAND IS MADE UPON THE GUARANTOR

In *Western Bank of Albuquerque v. Franklin Development Corp.*,[137] the New Mexico Supreme Court determined when the statute of limitations begins to run on a demand guaranty.[138] In March of 1977, Citizens Bank ("Citizens") approved a loan to Franklin Development Corporation ("Franklin") for $52,000.[139] In addition to the corporate note, Franklin's president, Max Pollack, signed a continuing personal guaranty of the loan.[140] Four years later Citizens loaned Franklin an additional $25,000.[141] In December of 1984, Citizens merged with Western Bank ("Western"), whereby Western succeeded Citizens' assets and liabilities (including all indebtedness and continuing guaranties).[142] In the same year the outstanding principles of the Franklin loans were consolidated into a single loan.[143] In 1987 and 1988, Franklin's loan was renewed and extended.[144]

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135. *Id.*

136. *Id.* at 722-23, 799 P.2d at 591-92. The court found evidence which showed that the bank had sufficient collateral to cover the interest payments. This evidence, the court said, was enough to qualify as a question of fact under the definition of good faith requirements. *Id.*

137. 111 N.M. 259, 804 P.2d 1078 (1991).

138. *Id.* at 260, 804 P.2d at 1079.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* The total outstanding balance was $39,609.07. *Id.*

144. *Id.*

Although Franklin continuously made late loan payments to Western after October 1984, Western never contacted Pollack about the problems or about his liability on his guaranty until the summer of 1987.[145] In February of 1988, Western informed Franklin it was in default of its payments as of October 25, 1987.[146] Two weeks later Western wrote Franklin demanding that the note be brought current.[147] In April 1988, Western called the note due in full, notifying Franklin and Pollack.[148] In the notice Western demanded full payment of the unpaid portion of the consolidated loan.[149]

Western brought suit against Franklin to collect all amounts due on the unpaid loan and to invoke Pollack's guaranty.[150] The Bernalillo County District Court found in favor of Western in the amount of $32,262.42 and also awarded interest, attorney's fees and costs.[151] Pollack appealed.[152] Pollack argued that the statute of limitations for written contracts barred the Bank's claim against the corporation.[153] Pollack further argued that "because the Guaranty was payable 'on demand . . . whether due or not due,' it should be construed as a demand 'instrument' and therefore, the limitations period should run from the day it is signed."[154]

The New Mexico Supreme Court first analyzed the event that triggers the limitation period on general guaranty contracts.[155] The general rule is that "the statute of limitations begins to run upon a contract of guaranty the moment a right of action upon the contract accrued, not before."[156] The court recognized that "a demand for performance is an express condition precedent to the duty of immediate performance."[157] In adopting the general rule, the court noted other jurisdictions' approval.[158] Therefore, the court reasoned, "the statute of limitations does not begin to run until demand is actually made."[159] Once the demand is made, the court held, a duty is created to pay the debt in full.[160]

An "exception to this rule applies to demand notes or negotiable instruments payable on demand."[161] This exception states that the start

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145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* Franklin and the other codefendants did not participate in the appeal.
153. *Id.* The relevant statute defining the statute of limitation period is "those founded upon any bond, promissory note, bill of exchange or other contract in writing, or upon any judgment of any court not of record, within six years." N.M. STAT. ANN. § 37-1-3(A) (Repl. Pamp. 1990).
154. *Western Bank*, 111 N.M. at 261, 804 P.2d at 1080.
155. *Id.* at 260, 804 P.2d at 1079.
156. *Id.* (quoting Cullender v. Levers, 38 N.M. 436, 440, 34 P.2d 1089, 1091 (1934)).
157. *Id.* at 261, 804 P.2d at 1080 (quoting 3A A.L. CORBIN, *supra* note 104, § 643).
158. *Id.* at 260-61, 804 P.2d at 1079-80 (citing Production Credit Ass'n of Midlands v. Schmer, 233 Neb. 749, 448 N.W.2d 123 (1989); California First Bank v. Braden, 216 Cal. App. 3d 672, 264 Cal. Rptr. 820 (1989)).
159. *Id.* at 261, 804 P.2d at 1080 (citing 3A A.L. CORBIN, *supra* note 104, § 643).
160. *Id.*
161. *Id.* (citing 3A A.L. CORBIN, *supra* note 104, § 643).

"of the statute of limitations commences upon the execution or delivery of the note" or negotiable instrument.[162] The court stated that the exception provides notice that a debt is due and payable when the term "on demand" is used.[163] In affirming the trial court's judgment for Western, the court held that the statute of limitations on a demand guaranty begins to run when demand is made upon the guarantor.

III. SECURED TRANSACTIONS

During the survey year, the New Mexico Court of Appeals considered secured transactions as they relate to the pawnbroker business. The typical loan transaction between a pawnbroker and a pawnor results in a security agreement.[164] The security agreement creates a security interest for the pawnbroker in the pawned property or collateral.[165] This security interest "secures" the loan by providing the pawnbroker a remedy for satisfying the debt if the pawnor defaults on the loan.[166] The Pawnbrokers Act requires the pawnbroker to comply with the New Mexico Uniform Commercial Code when it disposes of the collateral to satisfy the debt.[167] Among other requirements, the pawnbroker must notify the pawnor of its intent to retain or sell the collateral in satisfaction of the debt.[168] The mechanics of this notification determine whether the pawnbroker is subject to gross receipts tax on the sale of the pawned property.[169] During the survey period, the New Mexico Court of Appeals established how a pawnbroker's failure to accord proper sale notification to the pawnor will subject the sale to gross receipts tax.

In *Wing Pawn Shop v. Taxation & Revenue Department*,[170] the court of appeals dealt with an issue of first impression: whether a pawnbroker's receipts from the sale of pawned property represents funds which are exempt from gross receipts taxes as the return of principal and costs associated with the loan transaction.[171] A summary of a pawnbroker's remedies on a defaulted loan is necessary before addressing the issue above.

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162. *Id.* (citing 3A A.L. CORBIN, *supra* note 104, § 643).

163. *Id.* The Court said, however, that the exception does not apply when the term "on demand" is applied to one who is to pay the debt of the original debtor. "Because no cause of action for breach arises until demand is made upon the guarantor, the statute of limitations does not commence until demand has been made." *Id.*

164. N.M. STAT. ANN. § 55-9-105 (Repl. Pamp. 1987).

165. *Id.* § 55-1-201(37) (Cum. Supp. 1992) (defining "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation").

166. *Id.* § 55-9-504 (allowing the creditor to sell the collateral to satisfy the debt); *Id.* § 55-9-505(2) (allowing the creditor to retain the collateral in satisfaction of the debt).

167. *Id.* § 56-12-11(A) (Repl. Pamp. 1986). For a discussion of the Pawnbrokers Act see *infra* text accompanying notes 268-300.

168. *Id.* §§ 55-9-504, -505(2) (Repl. Pamp. 1987).

169. *See infra* notes 292-300 and accompanying text.

170. 111 N.M. 735, 809 P.2d 649 (Ct. App. 1991).

171. *Id.* at 738, 809 P.d at 652. For a detailed discussion of facts in this case see *infra* notes 273-300 and accompanying text.

A pawnbroker can secure the pawnor's loan under the N.M.U.C.C. in two ways. First, the pawnbroker can retain the pawned property in satisfaction of the debt and forego any deficiency judgment.[172] To do so, however, the pawnbroker must notify the pawnor of his intention to retain the pawned item and allow twenty-one days to object.[173] The pawnor can object, automatically forcing the pawnbroker to sell the pawned property.[174] On the other hand, if the pawnor does not object, the pawnbroker may retain the pawned property in satisfaction of the debt.[175]

Second, the pawnbroker may sell the pawned property to satisfy the debt.[176] The pawnbroker, however, must notify the debtor (pawnor) of the intent to *dispose* of the secured property.[177] In the notice, the pawnbroker must notify the pawnor of the time, place, and manner of the disposition to allow reasonable time for the pawnor to participate in the sale.[178] After the pawned property is sold, the pawnbroker must account to the debtor for any surplus.[179] Therefore, the pawnbroker's notice to the pawnor informs the pawnor as to whether the pawnbroker intends to claim ownership[180] or to act as an agent[181] for the pawnor in the sale

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172. N.M. STAT. ANN. § 55-9-505(2) (Repl. Pamp. 1987).

173. *Id.*

174. *Id.* (The pawnbroker must comply with N.M.U.C.C. § 55-9-504 when selling the collateral).

175. *Id.*

176. *Id.* § 55-9-504.

177. *Id.* (emphasis added). "Reasonable notification . . . must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire." *Id.* comment 5. No additional notice is required if the chattel is a consumer good. *Id.* § 55-9-504(3).

178. *Id.* § 55-9-504.

179. *Id.* § 55-9-504(2), (3). While section 56-12-11 of the Pawnbrokers Act requires a pawnbroker to comply with the N.M.U.C.C § 55-9-504 when selling collateral to satisfy the debt, the Pawnbrokers Act specifically addresses how a pawnbroker must notify the pawnor of any surplus. The Pawnbrokers surplus notification requirement only differs from the N.M.U.C.C.'s surplus notification requirement in that the Pawnbrokers Act distinguishes between surplus less than or equal to $100 and surplus greater than $100 and gives the pawnor a shorter reclaim period for surplus less than $100. The N.M.U.C.C. makes no such distinction. A pawnbroker must perform the following acts to insure the pawnor receives proper notification that he is entitled to the surplus:

> [I]f a surplus remains after sale of the pledged property the pawnbroker *must make a record* of the sale and the amount of the surplus and *must notify the pledgor by first class mail* sent to the pledgor's last known address *of the amount* of the surplus *and the pledgor's right to claim it* at a specified location *within ninety days* of the date of mailing of the notice if the surplus is one hundred dollars ($100) or less, *or within twelve months* of the date of the mailing of the notice if the surplus is greater than one hundred dollars ($100). In the event that the first class mail addressed to any person is *returned unclaimed* to the pawnbroker, then the *pawnbroker must post* and maintain on a *conspicuous* public part of his premises an appropriately entitled *list* naming each such person. Ninety days or twelve months, as applicable, after the date of such mailing or posting whichever is *later*, the pawnbroker *may retain any surplus* remaining unclaimed by the pledgor as his *own* property.

N.M. STAT. ANN. § 56-12-11(C) (Repl. Pamp. 1986) (emphasis added).

180. If the pawnbroker decides to retain the collateral in satisfaction of the debt under N.M.U.C.C. § 55-9-505(2) and notifies the pawnor accordingly, the pawnbroker is demonstrating its intent to claim *ownership* over the collateral.

181. If the pawnbroker decides to sell the collateral in satisfaction of the debt under N.M.U.C.C. § 55-9-504 and notifies the pawnor accordingly, the pawnbroker is demonstrating its intent to act as an *agent* for the pawnor in satisfying the debt.

of the property securing the debt. If Wing intended to sell the collateral, rather then retain ownership to satisfy the debt, the sale of the collateral is exempt from gross receipts tax.[182] The taxation statutes[183] exempt *principal*, *interest*, and loan handling charges from gross receipts tax.[184] Therefore, accurate and detailed transaction records, for each item pawned and later sold to the public, allows one to trace these three basic receipt components associated with the transaction.

For example, recall the results of the *Wing* audit: The Taxation and Revenue Department found that Wing Pawn Shop loaned a pawnor $75 for a gun and later sold it for $125.55.[185] Suppose the pawnbroker incurred costs of $5.55 in handling the original loan and also earned $10 in accrued interest.[186] Then, the pawnbroker is exempt from paying gross receipts taxes on the $5.55 handling costs, the $10 in interest, and the principal loan amount.[187] The only amount remaining is the $40 surplus. The N.M.U.C.C. requires that the pawnbroker notify the pawnor of the $40 surplus[188] and allow the pawnor ninety days to respond.[189] If the pawnor responds to the notice and receives the $40 surplus, the pawnbroker's entire sale of the pawned property is tax exempt because the component sums, excluding the surplus, are exempt. The pawnbroker, however, must keep sufficient records to prove the various component sums (cost, principal, interest, and surplus) are exempt from a gross receipt tax.[190] Refunding the surplus to the pawnor is evidence proving that the pawnbroker was acting as an agent for the pawnor.[191]

In the transaction examined by the court, Wing loaned $75 to a pawnor and received a handgun as collateral.[192] Upon the pawnor's default, Wing sent the pawnor a notice stating that Wing "proposes to dispose of the [property] in satisfaction of [the pawnor's] obligation."[193] Wing then sold the gun for $125.55 to secure the pawnor's defaulted loan, but Wing

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182. *Wing Pawn Shop*, 111 N.M. at 741, 809 P.2d at 655.

183. N.M. STAT. ANN. §§ 7-1-1 to -18A-7 (Repl. Pamp. 1990).

184. *Id.*

185. *Wing Pawn Shop*, 111 N.M. at 738, 809 P.2d at 652.

186. Security Escrow v. Taxation & Rev. Dep't, 107 N.M. 540, 760 P.2d 1306 (Ct. App. 1988) (legislature intended to allow the deduction from gross receipts only for typical loan transactions involving both a traditional lender and borrower).

187. N.M. STAT. ANN. §§ 7-9-61.1, 7-9-25, 7-9-3(F) (Repl. Pamp. 1990 & Cum. Supp. 1992) (a return of loan principal does not fall within the definitions of gross receipts).

188. N.M. STAT. ANN. § 55-9-504(2) (Repl. Pamp. 1987).

189. *See supra* note 179.

190. "[Wing] was unable to point to records of his *costs* and lost *interest* on defaulted loans." *Wing Pawn Shop*, 111 N.M. at 738-39, 809 P.2d at 652-53 (emphasis added). "[T]he pawnbroker *must make a record* of the sale and the amount of the surplus . . ." N.M. STAT. ANN. § 56-12-11(C) (Repl. Pamp. 1986) (emphasis added). Therefore, maintaining records is evidence that the pawnbroker is acting as an agent for the pawnor.

191. The court concluded that Wing sold the collateral with an intent to retain ownership and not account to the pawnors for any surplus over the amount necessary to satisfy the debt. *Wing Pawn Shop*, 111 N.M. at 740, 809 P.2d at 654. From this conclusion, the court found that Wing was not acting as an agent for the pawnors. *Id.* Therefore, a pawnbroker's surplus refund to a pawnor is at least evidence that the pawnbroker is acting as an agent for the pawnor.

192. *Id.* at 738, 809 P.2d at 652.

193. *Id.*

failed to refund the surplus of, at most, $50.55 to the pawnor.[194] Wing claimed that this surplus covered the interest on the loan and other costs.[195] The court of appeals examined Wing's transactions to determine whether Wing owned the property it sold or whether Wing was simply acting as an agent for the pawnor when it sold the property.[196]

The court agreed that the return of loan principal and interest are exempt from gross receipts tax and that loan handling charges are deductible.[197] The court found, however, that Wing was unable to produce records proving what surplus "amount was attributable to costs and interests for any particular item he sold."[198] Hence, Wing was unable to support its claim that the entire surplus covered loan costs and interest. This lack of records is evidence that Wing intended to retain ownership and then sell the items rather than act as an agent for the pawnor.[199] The court then examined whether Wing complied with the N.M.U.C.C.'s notice requirements.[200]

The court of appeals held that Wing's generic notice to dispose of the collateral did not satisfy either of the N.M.U.C.C.'s "disposition" provisions.[201] The court found that if Wing intended to claim ownership over the collateral to satisfy the debt, the notice failed to notify the pawnor of his right to object within twenty-one days[202] and redeem[203] the collateral or force Wing to sell the collateral.[204] The court also found that if Wing intended to sell the collateral to satisfy the debt, Wing failed to notify the pawnor of any surplus proceeds from the sale.[205] Hence, Wing did not act as an agent for the pawnor to secure the debt, but rather, through its *insufficient notices* to dispose of the property and to refund the surplus, Wing acted as the *owner* of the property.[206] As the court noted, when a creditor or pawnbroker, *retains* the collateral to *secure the debt*, he becomes the owner.[207] Thus, when a pawnbroker sells the "retained" collateral, he is no longer acting as an *agent*, to secure the pawnor's debt but is acting as a "purveyor" of used property

194. *Id.*
195. *Id.*
196. *Id.* at 740, 809 P.2d at 654. The court determined that if the pawnbroker took ownership of the collateral and later sold it then he was acting as a "purveyor of used chattel" and not as an agent for the pawnor. Therefore, the pawnbroker would be subject to the taxation statutes. *Id.*
197. *Id.* at 739, 809 P.2d at 653.
198. *Id.*
199. *See supra* note 190.
200. *Wing Pawn Shop*, 111 N.M. at 740, 809 P.2d at 654.
201. *Id.* at 740, 809 P.2d at 654.
202. *Id.*
203. "[T]he debtor . . . may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral . . . ." N.M. STAT. ANN. § 55-9-506 (Repl. Pamp. 1987).
204. "If the secured party receives objection in writing from a person entitled to receive notification within twenty-one days after the notice was sent, the secured party must dispose of the collateral under Section 9-504 [55-9-504]." *Id.* § 55-9-505(2).
205. *See supra* notes 175-79 and accompanying text.
206. *Wing Pawn Shop*, 111 N.M. at 740, 809 P.2d at 654.
207. *Id.*

- a person selling used property, which he owns, for profit.[208] Therefore, the court held that Wing sold *its* property and, therefore, was subject to the taxation statutes.

The court of appeals impliedly established the following as the test to determine whether a pawnbroker's receipts are exempt from gross receipts tax. Did the pawnbroker's notice to the pawnor to sell the collateral and refund all surplus comply with the N.M.U.C.C. and the Pawnbroker's Act? If the answer is yes, then the pawnbroker's receipts from the sale of the collateral are tax exempt because the pawnbroker acted as an agent for the pawnor to secure the debt.[209] On the other hand, did the pawnbroker's notice to the pawnor to retain the collateral comply with the N.M.U.C.C.? If the answer is yes, the pawnbroker's receipts from the sale of *its* property are subject to the taxation statutes because the pawnbroker sold its personal property.[210] If the pawnbroker's notice failed to comply with either of the N.M.U.C.C.'s "retain" or "sell" provisions, the court examines whether the pawnbroker's acts demonstrated its intent to retain ownership. Did the pawnbroker sell the collateral with "an intention to: (1) retain the collateral in satisfaction of the debt; and (2) not account to the pawnors after sale."[211] If the answer is yes, then the pawnbroker's receipts from the sale of *its* property are subject to the taxation statutes.[212]

In analyzing the court of appeals decision, a pawnbroker must pay gross receipts taxes where the following are shown: (1) the pawnbroker retained the collateral in satisfaction of the debt, and hence is now the owner of the pawned property;[213] and (2) the pawnbroker sold the pawned property for profit.[214] One can plausibly infer the following from the court of appeals' analysis: if the pawnbroker does not notify the pawnor of the surplus and does not refund the surplus, then the pawnbroker is demonstrating his prior intent[215] to claim ownership and not sell the property in satisfaction of the debt.[216] For example, if Wing Pawn Shop

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208. *See* Reeves v. Foutz & Tanner, Inc., 94 N.M. 760, 617 P.2d 149 (1980).

209. The pawnbroker is demonstrating its intent to act "as an agent for the pawnors to fulfill their obligations." *Wing Pawn Shop*, 111 N.M. at 740, 809 P.2d at 654. It is reasonable that the court may determine that a portion of the sales receipts is exempt and a portion is not exempt. For example, a pawnbroker may have accurate records on the principal and costs, while having poor or no records of interest earned on the loan. In this situation the court is likely to subject the pawnbroker's claimed interest to the taxation statutes. *See supra* note 190.

210. The pawnbroker is demonstrating its intent to take "ownership of the [property] from the pawnors, [make] it part of his inventory, and then [sell] it . . . . He [is] . . . acting as a purveyor of used [property]." *Wing Pawn Shop*, 111 N.M. at 740, 809 P.2d at 654 (citation omitted).

211. *Id.* at 740, 809 P.2d at 654.

212. *See supra* note 210.

213. A pawnbroker's intention to become owner is shown when it fails to comply with the N.M.U.C.C. disposition provisions. *See supra* notes 190-202 and accompanying text.

214. *Wing Pawn Shop*, 111 N.M. at 740, 809 P.2d at 654.

215. "Prior intent" refers to the pawnbroker's intent, prior to selling the collateral, to claim ownership over the collateral.

216. *Wing Pawn Shop*, 111 N.M. at 740, 809 P.2d at 654 (stating that a pawnbroker's intention to retain the collateral in satisfaction of the debt and not account to the pawnors may not fit within any commercial practice the N.M.U.C.C. authorizes. Furthermore, when a pawnbroker retains the collateral in satisfaction of the debt, he becomes the owner).

acted as an *agent* for the pawnor to secure the debt, Wing Pawn Shop would have refunded the surplus to the pawnor. Thus, Wing would recognize that the pawnor still had an interest in the merchandise to the extent that the pawnor was entitled to the difference between his debt and the amount received for the sale of the merchandise.

Wing, however, did not refund the surplus, which is evidence that Wing Pawn Shop previously intended to retain absolute dominion and control over the gun to the exclusion of the pawnor.[217] Thus, Wing Pawn Shop intended to claim ownership of the gun. A pawnbroker, however, can take precautions to avoid the "owner or agent" question.

The pawnbroker can ensure that sales of pawned property are exempt from the taxation statutes by complying with the Pawnbrokers Act.[218] The pawnbroker should keep accurate and detailed records of each part of all transactions.[219] After loaning a pawnor cash in exchange for an item, the pawnor should record the loan amount, deductions in the principal balance (as the pawnor makes payments), and the accrued monthly interest on the principal balance.[220] These complete records will enable the pawnbroker to establish a resale price based on lost interest, the unpaid balance, and on the property's market value. In addition, the pawnbroker should record any reasonable maintenance costs necessary to retain the property's market value. These records are evidence that the pawnbroker is acting as an agent for the pawnor because the pawnbroker can accurately attribute sales receipts to principal, interest, costs, and surplus.[221]

At this point the pawnbroker can determine whether selling the property or retaining it in satisfaction of the debt is most advantageous. The notice to retain the property must inform the pawnor of his twenty-one day grace period to redeem the property. During this twenty-one day grace period the pawnor can object to the pawnbroker's proposed intent to retain the collateral and compel a sale of the collateral. The notice to the pawnor to sell the property must include the time, place, and manner of the disposition to allow reasonable time for the pawnor to participate in the sale.[222] Upon selling the property the pawnbroker must notify the pawnor of the surplus proceeds calculated from the detailed records of the transaction.[223] The pawnbroker must then pay the pawnor the surplus amount if the pawnor responds to the notice.[224] The pawn-

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217. The facts indicate that Wing, at times, exercised exclusive dominion and control over the collateral after the pawnor defaulted on the loan. *Id.* at 738, 809 P.2d at 652.

218. N.M. STAT. ANN. §§ 56-12-1 to -16 (Repl. Pamp 1986 & Cum. Supp. 1992).

219. Additionally, the pawnbroker "must make a record of the sale and the amount of surplus . . . ." N.M. STAT. ANN. § 55-9-504(3) (Repl. Pamp 1987).

220. The appellate court noted that although Wing claimed the receipts from the sale of collateral covered principal, interest, and costs, Wing "was unable to point to *records* of his costs and lost interest on defaulted loans." *Wing Pawn Shop*, 111 N.M. at 738-39, 809 P.2d at 652-53 (emphasis added).

221. *See supra* note 190 and accompanying text.

222. N.M. STAT. ANN. § 55-9-504(3) (Repl. Pamp. 1987).

223. *See supra* note 179 and accompanying text.

224. *Id.*

broker should require the pawnor to sign a receipt for the surplus received.[225] In this situation, the pawnbroker is clearly acting as an agent for the pawnor and is exempt from the taxation statutes.

IV. MORTGAGES

During the survey period, the New Mexico Supreme Court decided issues involving purchase-money mortgages[226] and due-on-sale clauses within mortgages.[227]

A. Refinancing an Existing Real Estate Mortgage Does Not Create a Purchase-Money Mortgage

A "purchase-money mortgage" is a mortgage executed at the same time as a deed, or "during negotiations involving an agreement as part of one continuous transaction, in favor of a vendor or a third-party lender who pays the purchase price to the vendor, provided money was loaned for this purpose."[228] Other jurisdictions have held that in determining lien-holder priority for a purchase-money mortgage, a judgment lien cannot attach to the property before the mortgage of the party who advances the purchase money attaches.[229]

In *C & L Lumber Supply, Inc. v. Texas American Bank*,[230] the New Mexico Supreme Court examined the purchase-money mortgage exception to statutory mortgage laws and the relation of subrogation to a purchase-money mortgage.[231] In 1980, Joe McDermott purchased a small tract of land (1.7 acres) next to a racetrack in Ruidoso from the Wests for $90,000.[232] He paid $10,000 down and entered into a real estate contract for the balance.[233] In 1981, he purchased an adjacent 6.4 acre tract for $300,000 from the Wests.[234] He paid $200,000 cash, which he obtained from a loan through Ruidoso State Bank.[235] The remaining $100,000 was financed through a second mortgage to the Wests.[236]

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225. The courts look to "records" as evidence that a pawnbroker allocated all receipts from the sale of collateral appropriately. *See Wing Pawn Shop*, 111 N.M. at 740, 809 P.2d at 654.

226. C & L Lumber v. Texas Am. Bank, 110 N.M. 291, 795 P.2d 502 (1990).

227. Los Quatros, Inc. v. State Farm Ins. Co., 110 N.M. 750, 800 P.2d 184 (1990).

228. N.M. STAT. ANN. § 40-3-13(A) (1978); *see also* Davidson v. Click, 31 N.M. 543, 249 P. 100 (1926).

229. *See, e.g.*, Liberty Parts Warehouse, Inc. v. Marshall County Bank & Trust, 459 N.E.2d 738, 739 (Ind. Ct. App. 1984).

230. 110 N.M. 291, 795 P.2d 502 (1990).

231. *Id.* at 293, 795 P.2d at 504.

232. *Id.* At the time, Joe McDermott was married to Dixie McDermott. *Id.* The deeds, however, were "executed by McDermott as 'a married man dealing with his sole and separate property.'" *Id.* American Bank argued as a separate cause of action that this wording raised a presumption that the property was McDermott's separate property, not subject to New Mexico's community property provisions. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* The Wests were given a second mortgage on both tracts of land. *Id.*

In 1983, McDermott borrowed $200,000 from the Texas American Bank ("American Bank") to pay off the Ruidoso State Bank loan.[237] In return, American Bank obtained a mortgage on the large tract.[238] American Bank also entered into a subordination agreement with the Wests, which was intended to place American Bank in first position over the Wests' 1981 mortgage.[239] Later that same year, McDermott borrowed another $120,000 from American Bank.[240] He used $60,000 to pay the real estate contract on the smaller tract to the Wests.[241] Again, American Bank was given a mortgage on the small tract of land, which was to be superior to the mortgage of the Wests under the terms of the subordination agreement.[242] The promissory notes to American Bank were due within six months from the date of execution.[243] The loans, however, were extended at various times between September 1984 and March 1985.[244]

Dixie McDermott never executed any of the contracts.[245] In 1984, the McDermotts were divorced, and Dixie conveyed to Joe her community property interest in the land by a special warranty deed.[246] In 1986, horse barns were constructed on the two parcels of land.[247] The materials supplier for the project, C & L Lumber, "brought suit in December, 1986, to foreclose its materialmen's lien on the property."[248]

In the foreclosure proceeding, the district court determined the lien priority holders as American Bank, the Wests, C & L Lumber, and others.[249] Because Dixie McDermott never executed the mortgage agreements, the district court held that American Bank was not entitled to first priority as to *either* of the tracts.[250] As to the small tract, the court determined that C & L Lumber was the first priority holder, followed by three parties not related to the suit, and that American Bank was the last priority holder.[251] As to the large tract, the court determined that the Wests were the first priority holder, the mechanics' and ma-

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237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* (emphasis added). New Mexico is a community property state, meaning that any assets acquired during marriage are presumed to be owned equally by both spouses. Except for purchase-money mortgages, spouses must join in all mortgages of community real property. Any attempt to mortgage community property by only one spouse is void. N.M. STAT. ANN. § 40-3-13(A) (Repl. Pamp. 1989).
251. *C & L Lumber*, 110 N.M. at 293, 795 P.2d at 504. Five parties were noted as lien holders on the small tract of land. Additionally, the district court found American Bank's mortgages void at the time of execution, and found that their mortgages were not purchase-money mortgages. *See id.* at 292, 795 P.2d at 503; *see also* N.M. Stat. Ann. § 40-3-13(A).

terialmen's lien claimants the second priority holder and American Bank the third priority holder.[252] American Bank appealed.[253]

As to the large tract, the New Mexico Supreme Court agreed with American Bank, finding that "the original financing by the Ruidoso State Bank [with McDermott] created a purchase-money mortgage in favor of Ruidoso State Bank."[254] The court found that McDermott granted the mortgage as part of the same transaction in which Ruidoso State Bank executed the deed of purchase transferring title to the property.[255] When McDermott refinanced the Ruidoso State Bank loan through Texas American Bank, however, the court found that a second purchase-money mortgage was not created in favor of American Bank.[256] The court reasoned that because "title had already passed to McDermott as part of the original financing transaction" with Ruidoso State Bank, McDermott was already indebted to Ruidoso State Bank for the full loan amount.[257] Any subsequent refinancing, the court held, was for discharging the loan obligation to Ruidoso State Bank, not for the acquisition of the title in the property.[258] Therefore, no purchase-money mortgage could be created.[259]

Additionally, American Bank argued that its loan to McDermott for the small tract allowed him to pay off a real estate contract with the Wests which created a purchase-money mortgage.[260] The court disagreed, and instead held that "under New Mexico law, a mortgage executed for the purpose of paying off a land sales contract is itself not a purchase-money mortgage."[261] The court noted that before refinancing, various liens may exist on the property under previous property sales contracts.[262]

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252. *C & L Lumber*, 110 N.M. at 292, 795 P.2d at 503. Three parties were noted as lien holders on the large tract of land.

253. *Id.* at 292-93, 795 P.2d at 503-04.

254. *Id.* at 295, 795 P.2d at 506. The trial court had originally held that the financing between McDermott and Ruidoso State Bank did not create a purchase-money mortgage. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 296, 795 P.2d at 507.

261. *Id.* at 295, 795 P.2d at 506. The court disagreed with the decision in Liberty Parts Warehouse, Inc. v. Marshall County Bank & Trust, 459 N.E.2d 738, 739 (Ind. Ct. App. 1984), which held that a refinancing mortgage, under the guise of a purchase-money mortgage, is entitled to first priority over all other existing liens. Instead, the court stated:

> In New Mexico, the purchaser's equitable estate under a land sales contract is an estate in property. He is treated as the owner and his interest in the property is subject to a judgment lien. Thus, various liens in fact may attach themselves to property under a land sales contract prior to the execution of a refinancing loan and mortgage. To hold that such a refinancing mortgage was a purchase-money mortgage, entitled to priority over all other liens, would ignore both the earlier attachment of these liens and the possible inequity in subordinating them to the refinancing agreement. We conclude that under New Mexico law a mortgage executed for the purpose of paying off a land sales contract is itself not a purchase-money mortgage.

C & L Lumber, 110 N.M. at 295-96, 795 P.2d at 506-07 (citations omitted).

262. *C & L Lumber*, 110 N.M. at 296, 795 P.2d at 507.

The court held that a purchase-money mortgage refinancing on an existing mortgage "was junior to" existing liens on the property.[263]

The bank further argued that because of the refinancing, it possessed subrogation rights to the purchase-money mortgage position of the original lender, Ruidoso State Bank.[264] The court held that subrogation is generally not allowed when a third party, such as American Bank, pays the debt of another without any duty or compulsion to do so.[265] Because American Bank did not receive an assignment of the rights to the mortgages from either Ruidoso State Bank or the Wests, it failed to qualify as a party with subrogation rights to the purchase-money mortgage.[266]

C & L Lumber demonstrates that in New Mexico, purchase-money mortgages cannot be superior to existing liens on a mortgage, even if the mortgage has been refinanced. Additionally, if a mortgage is refinanced, a duty or compulsion to pay must exist between the financier and the third party financee for subrogation rights to exist.[267] Once subrogation rights are assigned, this decision implies that a purchase-money mortgage will then exist in favor of the assignee.

V. THE ACT CASES

During the survey year, New Mexico appellate courts considered a variety of cases involving several of New Mexico's commercial enactments. The cases are analyzed in accordance with the acts which govern them.

A. The Pawnbrokers Act

The purpose of the Pawnbrokers Act is to protect people that rely upon money or credit extended by pawnbrokers from exploitation, fraud, and unfair practices.[268] More specifically, the Pawnbrokers Act regulates pawn transactions by regulating the acquiescence and disposition of tangible personal property.[269] The Act focuses on the protection of the pawnor;[270] one who gives the pawnbroker personal property as security for a loan which creates a security interest, in the pawnbroker's favor.[271] For example, the Act requires the pawnbroker to notify the pawnor before selling the pawned item.[272] During the period, the New Mexico

263. *Id.* at 295, 795 P.2d at 506. The court found that this may result in an inequity by subordinating existing liens through the refinancing agreement. *Id.*
264. *Id.* at 296, 795 P.2d at 507.
265. *Id.*
266. *Id.*
267. *Id.*
268. N.M. STAT. ANN. § 56-12-3 (Repl. Pamp. 1986).
269. *Id.*
270. *Id.*
271. N.M. STAT. ANN. § 55-1-201 (1978) (defining "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation").
272. N.M. STAT. ANN. § 56-12-11(A) (pawnbroker must comply with section 55-9-504 of N.M.U.C.C.). Section 55-9-504(3) of the N.M.U.C.C. requires that the seller of collateral give the debtor *reasonable notification* of the sale to satisfy a debt. N.M. STAT. ANN. § 55-9-504(3) (Repl. Pamp. 1987) (emphasis added).

Court of Appeals examined the circumstances under which a sale by a pawnbroker is exempt from gross receipts tax.

In *Wing Pawn Shop v. Taxation and Revenue Department*,[273] the Department of Taxation and Revenue audited the pawnbroker's business for the years 1982 through 1985.[274] The Department only investigated the transaction in which Wing Pawn Shop took property as collateral[275] for a loan and later sold the property after the borrower defaulted on the loan.[276] Wing Pawn Shop ("Wing") described its loan securing process as follows. The borrower (pawnor) brings personal property to the pawn shop and Wing loans the pawnor cash for the item.[277] The pawnor has an absolute right to redeem the chattel if he pays back the cash plus interest within 120 days.[278]

If the pawnor fails to satisfy the redeeming criteria, Wing sends the pawnor a written notice of default which states that the pawn shop "proposes to dispose of the [chattel] in satisfaction of [the pawnor's] obligation," and the pawnor receives no further notice.[279] Wing then either retains the property as its own by exercising exclusive dominion over the property, or offers it for sale to the public.[280] In the latter instance, Wing determines the resale price based on the principal loan, accrued interest, repair costs and market value.[281] The results of the audit were based on sixteen transactions showing that Wing earned substantial sums on the sale of each pawned item.[282] For example, the pawnbroker loaned a pawnor $75 for a gun and sold it for $125.55.[283]

Wing claimed there was no surplus money because any money received above the amount of the loan covered costs such as loan setup charges, chattel maintenance, disposal costs,[284] and accrued interest.[285] Wing also claimed the loan principal was exempt from gross receipts tax.[286] Because Wing liquidated the pledged chattel, it maintained that it came within

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273. 111 N.M. 735, 809 P.2d 649 (Ct. App. 1991).

274. *Id.* at 738, 809 P.2d at 652.

275. N.M. STAT. ANN. § 55-9-105 (Repl. Pamp. 1987) (defining "collateral" as the property which "is subject to a security interest").

276. *Wing Pawn Shop*, 111 N.M. at 738, 809 P.2d at 652.

277. *Id.*

278. *Id.* at 738, 809 P.2d at 652. The Act limits the interest rate or "pawn service charge" that a pawnbroker can charge the pawnor. The pawnbroker can charge $7.50 or ten percent of the loan amount, whichever is greater, for the first thirty-day period of the pawn transaction. The pawnbroker can only charge a maximum interest rate of four percent per month on the unpaid principal balance of the loan for the remaining pawn transaction period. N.M. STAT. ANN. § 56-12-13 (Repl. Pamp. 1986).

279. *Wing Pawn Shop*, 111 N.M. at 738, 809 P.2d at 652.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* The parties agreed that these transactions were typical of Wing's everyday business activities. *Id.*

284. N.M. STAT. ANN. § 7-9-61.1 (Repl. Pamp. 1990) (deduct receipts from gross receipts tax if the receipts cover charges made for handling loan payments).

285. *Id.* § 7-9-25 (this statute exempts receipts for interest earned on money loaned from gross receipts tax).

286. *Id.* § 7-9-3(F).

the exception from the taxation statutes.[287] Nevertheless, based upon the audit and testimony from the formal hearing before the Department, the Department found that Wing owed $11,460.11.[288]

The department based its finding on the fact that Wing could not distinguish between the cash proceeds received for the item's market value from the cash proceeds attributable to costs and interest on the loan amount for that item.[289] Hence, Wing could not prove that the *difference* between the proceeds received from the sale and the original loan amount was equal to Wing's costs and lost interest.[290] As a result, the Department issued an order denying Wing's protest of the gross receipts tax. Wing appealed the Department's decision.[291]

The New Mexico Court of Appeals[292] faced an issue of first impression: does a pawnbroker's receipts from the sale of pawned chattels represent funds that are exempt from gross receipts taxes as the return of principal and cost associated with the loan transaction?[293] In affirming the Department's decision, the court of appeals held that the Pawnbrokers Act did not apply in this case.[294] The Pawnbrokers Act does not indicate the Act's effective date. Therefore, the court of appeals applied the New Mexico Constitution, article IV, § 23 to determine that the effective date of the Pawnbrokers Act was June 14, 1985.[295] Evidently, Wing's transactions occurred prior to the Act's effective date as the court of appeals stated "the Act *only* applies to those pawns arising after the effective date of the Act."[296] Because the Pawnbrokers Act did not apply to this case, the court of appeals relied upon the remedies of the New Mexico Uniform Commercial Code to explain its holding.[297] Nevertheless, had the court of appeals focused on the Pawnbrokers Act, it would have obtained a result *similar* to the one it obtained by using the N.M.U.C.C.[298]

Assuming the Pawnbrokers Act does apply to the *Wing* case, are the pawnbrokers questioned sales of pawned items subject to gross receipts tax? The answer hinges on *how* the pawnbroker disposed of the chattels to secure the various debts. The Pawnbrokers Act states that upon default by the pledgor, the pawnbroker must comply with the requirements of

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287. *Wing Pawn Shop*, 111 N.M. at 739, 809 P.2d at 653.

288. *Id.* at 737-38, 809 P.2d at 651-52.

289. *Id.* at 738-39, 809 P.2d at 652-53. Wing's *records* did not show its costs and lost interest on defaulted loans.

290. *Id.*

291. *Id.* at 737, 809 P.2d at 651.

292. *See* N.M. STAT. ANN. § 7-1-22 (Repl. Pamp. 1990) (stating that no court has jurisdiction over a proceeding by a taxpayer who questions his liability for any tax, except by his appeal to the court of appeals from the action).

293. *Wing Pawn Shop*, 111 N.M. at 738, 809 P.2d at 652.

294. *Id.* at 739, 809 P.2d at 653.

295. *Id.*

296. *Id.* (emphasis added).

297. *Id.* The court states: "Upon a pawnor's default, [the pawnbroker] had two choices under the UCC." For a detailed discussion regarding the court's analysis of these transactions see *supra*, notes 172-81 and accompanying text.

298. N.M. STAT. ANN. § 56-12-11 (Repl. Pamp. 1986) (this section requires that the pawnbroker, upon disposing property, comply with New Mexico's Uniform Commercial Code).

sections "55-9-501 through 55-9-507 NMSA 1978 in the disposition of the pledged goods."[299] A pawnbroker's disposition of pawned property must be performed in accordance with New Mexico's version of the U.C.C. to insure the pawnbroker avoids gross receipts tax when selling pawned property.[300] Therefore, the Pawnbrokers Act must be read in conjunction with the U.C.C. in all transactions involving the retention and resale of property by a pawnbroker.

B. New Mexico Securities Act

The general purpose of the Securities Act is to protect the public from various deceitful and fraudulent methods employed in the sale of securities.[301] As a result, the Securities Act requires a security owner to register[302] the security prior to selling it or apply for an exemption from registration.[303] A person who sells a security in violation of the Securities Act can cure the violation by offering to repurchase the security from the buyer.[304] During the survey period, the New Mexico Court of Appeals examined the requirements under the Securities Act to cure a violation through an offer to repurchase the stock. In addition, the court examined whether the Securities Act provided the exclusive method of recovery where a violation is found.

In *Naranjo v. Paull*,[305] Raymond and Fil Naranjo invested in two oil and gas limited partnerships known as GF83 Limited and ABO 84 Limited.[306] Mr. and Mrs. Les Paull served as the directors of Paull Petroleum Corporation ("Paull Corp."), which was the general partner for both limited partnerships.[307] Mr. Paull was the president and treasurer of Paull Corp. and Mrs. Paull was the vice-president and secretary.[308] The securities sold to the Naranjos were never registered or exempted.[309]

Sometime after Mr. Paull sold the Naranjos the securities, he sent two letters, the GF 83 LTD Newsletter and the ABO 84 LTD Newsletter, to all limited partners.[310] Mr. Paull was confident that the oil and gas wells would soon begin to "yield the fruits of [their] labors."[311] In fact, Mr. Paull was so confident that he made an offer to purchase anyone's interest in either of the partnerships for cost plus annual interest.[312] Specifically, Mr. Paull made an offer to purchase any limited partner's

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299. *Id.* § 56-12-11.
300. For a complete analysis of a pawnbroker's sales of pawned property, see Secured Transactions, *supra* section III.
301. White v. Solomon, 105 N.M. 366, 368, 732 P.2d 1389, 1391 (Ct. App. 1986).
302. N.M. STAT. ANN. § 58-13B-20 (Repl. Pamp. 1991).
303. *Id.* § 58-13B-26.
304. *Id.* § 58-13B-42(1)(a) to -42(1)(d).
305. 111 N.M. 165, 803 P.2d 254 (Ct. App. 1990).
306. *Id.* at 166, 803 P.2d at 255.
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 167, 803 P.2d at 256.
311. *Id.*
312. *Id.*

interest, including the Naranjos' interest.[313] Mr. Paull's offer explained he would pay any limited partner 125% of his or her investment in exchange for his or her interest in the partnership.[314] The repurchase offer was valid for a period of thirty days.[315] The Naranjos did not take advantage of Paull's offer to repurchase and later incurred losses in their investments.[316] As a result, the Naranjos sued Paull Corp. and the limited partnerships for securities fraud.[317]

The district court held a bench trial and found that Mr. Paull made various misrepresentations that the Naranjos relied upon in their decision to invest in the oil and gas partnerships.[318] In addition, the district held that the limited partnership interests were securities and found that Mr. Paull failed to register them or apply for exemption from registration.[319] Although Mr. Paull argued his offer of rescission barred[320] the Naranjos suit, the district court held that the rescissions did not contain sufficient information to bar the suit.[321] Specifically, Mr. Paull did not disclose in the rescission offers the misrepresentations he made to the Naranjos.[322] Thus, the district court awarded compensatory damages to the Naranjos under the Securities Act and punitive damages.[323] Mr. Paull appealed the decision.[324] The Naranjos cross-appealed.[325]

The New Mexico Court of Appeals addressed the following issues on appeal: (1) What are the requirements under the Securities Act to cure a violation through an offer to repurchase stock? (2) What is the method to be used in determining an offset for the value of stock exchanged for interest in securities? (3) Is the Securities Act the exclusive method of recovery where a violation is found?

Because the conduct that gave rise to this action took place during the years 1983 and 1984, the court applied the prior version of the Act.[326]

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313. *Id.*
314. *Id.* at 168, 803 P.2d at 257.
315. *Id.*
316. *Id.*
317. *Id.* at 166, 803 P.2d at 255.
318. *Id.* at 166-67, 803 P.2d at 255-56.
319. *Id* at 166, 803 P.2d at 255.
320. N.M. STAT. ANN. § 58-13B-42(B) (Repl. Pamp. 1991).
321. The district court held that Mr. Paull did not disclose his earlier misrepresentations when he made his repurchase offer to the Naranjos. *Naranjo*, 111 N.M. at 168, 803 P.2d at 257.
322. *Id.*
323. *Id.* at 167, 803 P.2d at 256.
324. *Id.*
325. *Id.* The Naranjos claimed that they were entitled to benefit-of-the-bargain damages instead of the mere statutory damages awarded by the district court. *Id.*
326. *Id.* at 168, 803 P.2d at 257; *see* N.M. STAT. ANN. §§ 58-13-1 to -47 (Repl. Pamp. 1984). The pertinent 1984 version of the Securities Act states:

> No purchaser shall claim or have the benefit of this section if he refused or failed to accept, within thirty days from the date of such offer, an offer in writing of the seller to take back the securities in question and to refund the full amount paid by such purchaser, together with interest on such amount for the period from the date of payment by such purchaser to the date of repayment . . . .

N.M. STAT. ANN. § 58-13-42(B) (Repl. Pamp. 1984); *cf.* N.M. STAT. ANN. § 58-13-42(A) (Repl. Pamp. 1986) (seller must disclose information necessary to cure all material misstatements or omissions when the Act required such disclosure at the time seller sold securities to purchaser).

Mr. Paull argued that he met the offer requirements of the Securities Act in effect at that time:[327] a written offer to take back the securities for a full refund including interest.[328] The court of appeals responded by stating that the courts have a duty to recognize "what is necessarily implicit in statutory language."[329] First, the court established the elements of a repurchase offer necessary to cure a violation under the Securities Act.[330] The express elements of the repurchase offer require the seller to make an offer to buy back the securities "in exchange for the purchaser's net outlay, plus interest."[331] An additional expressed element requires that the seller must make the offer in writing.[332] The court of appeals then examined which implied elements of the repurchase offer are essential for the intended operation of the Act.[333]

For example, the Securities Act states that the purchaser has thirty days to respond to the seller's repurchase offer.[334] If the purchaser fails to respond during the thirty-day time period, he is barred from recovery under the Securities Act.[335] The Act does not expressly require the seller to disclose the time limit.[336] The court of appeals, however, stated that the seller must disclose the purchaser's thirty-day time limit in the repurchase offer. The court's rationale was that it "would be patently unjust" to bar the purchaser from the benefit of the Securities Act because he was not aware of the time limit.[337] Therefore, because the time for response is an essential element of the offer, the seller must disclose it in the repurchase offer.[338]

Furthermore, the court of appeals stated that the offer must "advise the offeree of the *statutory consequences* of the offer."[339] The court reached this conclusion by defining "offer."[340] An offer sets forth the terms essential to the transaction.[341] In this case, the Securities Act forecloses the purchaser from obtaining remedies under the Act if he fails or refuses to respond to the seller's repurchase offer.[342] This is a serious consequence if the Naranjos refused or failed to accept Mr.

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327. *Naranjo*, 111 N.M. at 168, 803 P.2d at 257.
328. *See supra* note 326.
329. *Naranjo*, 111 N.M. at 168, 803 P.2d at 257.
330. The appellate court examined the 1984 version of the Securities Act because that version was in effect at the time of Mr. Paull's alleged violation. *Id.*
331. *Id.* at 168-69, 803 P.2d at 257-58.
332. *Id.* at 169, 803 P.2d at 258.
333. *Id.*
334. N.M. STAT. ANN. § 58-13-42 (Repl. Pamp. 1984).
335. *Id.*
336. *Id.* (does not expressly require seller to inform purchaser of the thirty day time limit); *cf.* N.M. STAT. ANN. § 58-13B-42(A)(1)(d) (Repl. Pamp. 1991) (seller must disclose in the offer the limited time the purchaser has available to accept).
337. *Naranjo*, 111 N.M. at 169, 803 P.2d at 258.
338. *Id.*
339. *Id.* at 168, 803 P.2d at 257 (emphasis added).
340. *Id.* at 169, 803 P.2d at 258.
341. *Id.* "'In order to be legally operative and to create a power of acceptance, it is necessary that the offer shall contain all the terms of the contract to be made.'" *Id.* (quoting CORBIN ON CONTRACTS § 11 at 26 (1963)).
342. N.M. STAT. ANN. § 58-13-42 (Repl. Pamp. 1984).

Paull's repurchase offer; a consequence that may have even encouraged the Naranjos to accept Mr. Paull's offer.[343] Therefore, the court of appeals held that the Securities Act clearly implied that an offer pursuant to the Act must disclose the statutory consequences of the Act.[344]

Second, Mr. Paull argued that even if he was subject to the lawsuit, the district court improperly failed to offset the damages.[345] Mr. Paull claimed the court failed to offset the damages by an amount equal to the value of the Texas Star Resources ("TSR") stock which he gave to the Naranjos in exchange for the partnership investments.[346] The court of appeals held that the evidence did not support Mr. Paull's claims for an offset because the value of the TSR stock was too uncertain.[347] The factors the court of appeals relied upon to determine the value of the TSR stock include (1) the nature of the market, (2) the track record of the stock, (3) the type of stock, and (4) the value of the assets exchanged for the stock.[348]

The court of appeals found that the price of the TSR stock did not arise in a bona fide market because there was no evidence of the quantity of stock traded or purchased.[349] In addition, the court of appeals found that TSR was a new corporation.[350] The Naranjos' transaction only occurred halfway through TSR's first fiscal year.[351] The corporation was authorized to issue 50,000,000 shares, but of the 7,772,000 the corporation did issue, only 750,000 were free trading and the book value for each outstanding share was $1.23.[352] The appellate court held that these facts, along with the fact that no market value for TSR stock was published in the national daily reporting services for one year after the transaction, indicate there was *not a sufficient track record* to determine the value of the TSR stock.[353] Moreover, the court found that the Naranjos received restricted stock, not free trading stock.[354] Furthermore, the Naranjos only received twenty-five percent of the restricted stock because the corporation escrowed the remainder until certain events occurred.[355] Finally, the Naranjos' never actually physically received any TSR stock because Mr. Paull was waiting for them to pay operating costs.[356] The court of appeals

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343. *Naranjo*, 111 N.M. at 169, 803 P.2d at 258. "The principle that a legally binding choice should be a knowing choice would be grossly violated if one could be foreclosed from relief under the New Mexico Securities Act merely by remaining silent in the face of an 'offer' that did not refer to the Act or otherwise indicate that relief under the Act would henceforth be barred." *Id.*

344. *Id.* at 168, 803 P.2d at 257.

345. *Id.* at 167, 803 P.2d at 256.

346. *Id.* at 170, 803 P.2d at 260.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* Outstanding stock is defined as "stock issued and in the hands of stockholders . . . ." BLACK'S LAW DICTIONARY 1417 (6th ed. 1990).

353. *Naranjo*, 111 N.M. at 170, 803 P.2d at 260.

354. *Id.*

355. *Id.*

356. *Id.*

stated that "one indication of the value of the TSR stock is the value of the assets exchanged for the stock."[357] The court held that all these factors together indicate that there was not a preponderance of the evidence showing that the Naranjos received valuable stock in the TSR stock transaction. As a result, the court of appeals held that district court correctly denied Mr. Paull credit for the TSR stock.[358]

Finally, the court of appeals considered whether the district court erred in awarding punitive damages against the seller of securities.[359] First, the court of appeals noted that while the Securities Act does not provide a remedy of punitive damages, it does not limit a person's rights under common law for the sale of securities.[360] Furthermore, the court found that although the district court awarded the Naranjos actual damages under the Securities Act, this simply meant that Mr. Paull was guilty of fraudulent misrepresentations under the Securities Act.[361] These conclusions of fact and law did not rule out the possibility that Mr. Paull was also guilty, as the district court held, of common-law fraud.[362] Finally, Mr. Paull argued that a finding of common-law fraud requires a higher standard of proof (clear and convincing evidence) than a finding of securities fraud (preponderance of the evidence standard) requires.[363] Therefore, Mr. Paull argued that the evidence the district court used to find him guilty of securities fraud is not sufficient to find him guilty of common-law fraud.[364] While the appellate court implicitly agreed with the difference in standards, the court stated that it simply could not presume that the district court did not apply the correct standard of proof in finding Mr. Paull guilty of common-law fraud.[365]

After upholding the trial court's finding of common-law fraud, the court of appeals examined whether a seller of securities in violation of the Securities Act is liable for punitive damages as well as for damages awarded under the Securities Act.[366] The court held that a court can award punitive damages in addition to other remedies provided by the

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357. *Id.*

358. *Id.*

359. *Id.* at 171, 803 P.2d at 261.

360. *Id.* (citing N.M. STAT. ANN. § 58-13-42(C) (Repl. Pamp. 1984)).

361. *Id.* at 171-72, 803 P.2d at 261-62.

362. *Id.* at 173, 803 P.2d at 262. Mr. Paull argued that since the district court rejected "Naranjos' requested Findings Nos. 17, 38, and 40," the district court rejected the Naranjos' claim of common law fraud. The appellate court, however, stated that Findings Nos. 17, 38, and 40 asserted that the district court rejected one of a number of alleged misrepresentations by Mr. Paull, Naranjos' request for benefit-of-the-bargain damages, and Naranjos' request for treble damages under the Racketeering Act respectively. The appellate court held that these rejections are consistent with a finding of common law fraud. *Id.* The elements of common law fraud "consists of *misrepresentations* of fact, *known* to be untrue by the maker, and made with an *intent* to *deceive and* to *induce* the other party to *act in reliance* thereon to his *detriment*." *Id.* at 172, 803 P.2d at 261 (quoting Cargill v. Sherrod, 96 N.M. 431, 432-33, 631 P.2d 726, 727-28 (1981)) (emphasis added).

363. *Id.* at 173, 803 P.2d at 262; *see also* Treider v. Doherty & Co., 86 N.M. at 737, 527 P.2d at 500 (Ct. App. 1974).

364. *Naranjo*, 111 N.M. at 173, 803 P.2d at 262.

365. *Id.*

366. *Id.* at 174, 803 P.2d at 263.

Securities Act as long as the damages are nonduplicative.[367] The Securities Act only computes damages under an out-of-pocket-loss theory.[368] The buyer, however, can obtain benefit-of-the-bargain damages under the common-law fraud theory.[369] In this case, the Naranjos asserted that Mr. Paull promised them a four-to-one return on their investment.[370] As a result, the Naranjos claimed they were entitled to receive four times their investment in damages under common-law fraud and the benefit-of-the-bargain theories.[371]

The appellate court, however, rejected the Naranjos' argument because the district court found that the Naranjos *did not rely* on Mr. Paull's misrepresentation that they would receive a four-to-one return on their investment.[372] To the contrary, the district court rejected Naranjos' argument that Mr. Paull's representation was a misleading material representation.[373] Moreover, the appellate court held that even if the district court found that Mr. Paull fraudulently promised the Naranjos an investment return of four-to-one, benefit-of-the-bargain damages are only allowed if one can prove the damages with *reasonable certainty*.[374] The appellate court stated that a promise of a four-to-one return on an investment is too ambiguous to prove damages with reasonable certainty.[375] Therefore, the appellate court upheld the district court's calculation of damages in accordance with the Securities Act.[376] The court of appeals also noted that if the bargained-for or represented value of the interest did not exceed its purchase price, then the Naranjos did receive the benefit-of-the-bargain damages.[377] In this situation, benefit-of-the-bargain damages is equal to out-of-pocket or recision damages.[378]

The court of appeals established the elements that a seller of securities must state in its repurchase offer to successfully cure the seller's violation of the 1984 version of the Securities Act:[379] (1) *Offer to repurchase securities*: The seller must make an offer to buy back the securities from the buyer in exchange for the buyer's net investment plus interest;[380] (2)

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367. *Id.* For a discussion on the relationship between punitive and statutory damages, *see* The Unfair Trade Practices Act, Choice of Remedies, *infra* section V(D)(1)(e).

368. N.M. STAT. ANN. § 58-13B-40(C) (Repl. Pamp. 1991).

369. Stewart v. Potter, 44 N.M. 460, 104 P.2d 736 (1940).

370. *Naranjo*, 110 N.M. at 174, 108 P.2d at 263.

371. *Id.*

372. *Id.* at 174, 803 P.2d at 263.

373. *Id.*

374. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 549(2) (1977)) (emphasis added).

375. The appellate court went on to say that "timing is everything." For example if the four to one return is achieved in a lump sum at the end of twenty years, the investment does not have as great a monetary value as if the return came from smaller periodic returns over a shorter period of time. *Naranjo*, 111 N.M. at 174, 803 P.2d at 263.

376. *Id.*

377. *Id.*

378. *Id.*

379. Note, however, that these elements are also applicable to the 1986 version of the New Mexico Securities Act. In fact, some of the elements that the court held were implied under the 1984 Act are now expressed elements under the 1986 Act. *See infra* notes 380-83 and accompanying text.

380. *Naranjo*, 111 N.M. at 168-69 803 P.2d at 257-58; *see also* N.M. STAT. ANN. § 58-13-42

Offer in writing: The sellers repurchase offer to the buyer must be in writing;[381] (3) *Disclose buyer's thirty-day time limit*: The seller must inform the buyer, in the written offer, that he has thirty days to accept the repurchase offer or disclose the Securities Act in the offer;[382] (4) *Inform buyer of statutory consequences or mention statute*: Finally, the seller must inform the buyer of the statutory consequences concerning the repurchase offer.[383] The seller must inform the buyer, in the offer, that if he does not accept the repurchase offer within thirty days, he is foreclosed from receiving any remedy under the Securities Act.[384]

To determine an offset for the value of stock exchanged for interest in securities, the court of appeals will examine (1) the nature of the market, (2) the track record of the stock, (3) the type of stock and (4) the value of the assets exchanged for the stock.[385] The court implied that the liquidity (type) of the stock is an indicator of the value of the stock. One can readily determine the value of free-traded stock because it usually is in a bonafide market and the value of the shares are published daily. On the other hand, it is more difficult to determine the value of severely restricted stock. This difficulty arises because share values are not published daily which is a direct result of the lack of free trading on the open market.[386] Hence, if a court cannot determine the value of the stock, as in this case, with some specificity, the court cannot arbitrarily offset the damages.

Finally, the court of appeals held that one can receive an award of punitive damages in addition to other remedies provided by the Securities Act as long as the damages are nonduplicative.[387] The Securities Act only computes damages under an out-of-pocket-loss theory.[388] Hence, the buyer can only recover the principal amount he invested to purchase the securities, including interest and attorney's fees.[389] The buyer, however, can

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(Repl. Pamp. 1984) (seller in violation of the Securities Act liable to buyer for full amount buyer paid for the securities plus interest); *cf.* N.M. STAT. ANN. § 58-13B-40(A) (Repl. Pamp. 1991) (purchaser entitled to recover consideration paid for securities and interest upon tendering securities to the seller).

381. *Naranjo*, 111 N.M. at 169, 803 P.2d at 258; *see also* N.M. STAT. ANN. § 58-13-42 (Repl. Pamp. 1984) (a purchaser cannot claim the benefit "of this section" if he fails or rejects seller's offer in writing); *cf.* N.M. STAT. ANN. § 58-13B-42(A)(1) (Repl. Pamp. 1991) (purchaser cannot commence an action under "Subsection A of Section 40" of the Securities Act if he receives a written offer).

382. *Naranjo*, 111 N.M. at 169, 803 P.2d at 258 (informing buyer that acceptance only open for thirty days is implicit essential element of offer); *see also* N.M. STAT. ANN. § 58-13-42 (Repl. Pamp. 1984) (purchaser barred from claiming benefit "of this section" if rejects or fails to accept seller's offer within thirty days); *cf.* N.M. STAT. ANN. § 58-13B-42(A)(1)(d) (Repl. Pamp. 1991) (seller must state buyer can accept offer within specified time period disclosed in offer (but not less than thirty days) after date of its receipt by buyer).

383. *Naranjo*, 111 N.M. at 168, 803 P.2d at 257. The court of appeals reasoned that the statutory consequences of rejecting the offer was an implicit essential element of the offer. *See supra* notes 335-38 and accompanying text.

384. *Naranjo*, 111 N.M. at 168, 803 P.2d at 257.

385. *See supra* notes 348-58 and accompanying text.

386. *See supra* notes 353-56 and accompanying text.

387. *See supra* note 357 and accompanying text.

388. *Naranjo*, 111 N.M. at 174, 803 P.2d at 263.

389. N.M. STAT. ANN. § 58-13B-40(C) (Repl. Pamp. 1991).

obtain benefit-of-the-bargain damages under the common-law fraud theory.[390] Benefit-of-the-bargain damages allow the buyer to recover the value of the interest it purchased, *as represented by the seller*, minus any return on the interest plus interest.[391] Thus, rather than simply recovering the original investment plus interest, a buyer may also recover the extra value that seller promised him the securities were worth.

C. *The Liquor Control Act*

The purpose of the Liquor Control Act[392] is to protect the public health and safety by regulating the sale, service, and public consumption of alcoholic beverages.[393] The New Mexico Supreme Court has long held that a liquor license is considered a "privilege" rather than a "right" to sell liquor to the general public.[394] Hence, the Act is considered a police regulation.[395] The Liquor Control Act prohibits a wholesaler from initiating an action to collect on a debt for liquor sold in violation of the Act.[396] During the survey period, the New Mexico Supreme Court established the definition of the word "invoice" as it relates to the Liquor Control Act.

In *Pucci Distributing Co. v. Nellos*,[397] Pucci Distributing Company ("Pucci"), a liquor wholesaler, offered a special deal on Stroh's beer for a reduced price and allowed retailers to purchase the beer while *deferring* delivery until a later date.[398] On October 12, 1985, Nellos signed and dated a purchase order for Stroh's beer on a Pucci invoice form.[399] Pucci accepted Nellos's purchase order and delivered the beer to Nellos on October 15.[400] Nellos contends that Pucci never delivered the beer or, in the alternative, that the beer delivery violated the Liquor Control Act because an invoice did not accompany the beer delivery.[401] In addition, Nellos alleged that Pucci did not obtain a signature from Nellos ac-

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390. Stewart v. Potter, 44 N.M. 460, 104 P.2d 736 (1940).

391. *Naranjo*, 111 N.M. at 174, 803 P.2d at 263.

392. N.M. STAT. ANN. §§ 60-3A-1 to -7, 60-4B-1 to -9, 60-4C-1 to -3, 60-5A-1 to -2, 60-6A-1 to -30, 60-6C-1 to -9, 60-7A-1 to -25, 60-7B-1 to -12, and 60-8A-1 to -19 (Repl. Pamp. 1991).

393. *Id.* § 60-3A-2.

394. "Such [liquor] license is a privilege and not property within the meaning of the due process and contract clauses of the constitutions of the State and the nation, and in them licensees have no vested property rights." Baca v. Grisolano, 57 N.M. 176, 187, 256 P.2d 792, 803 (1953) (quoting Chiordi v. Jernigan, 46 N.M. at 400, 129 P.2d at 644 (1942)).

395. "The liquor control act is a police regulation and its purpose is, as stated therein, to protect the public health, safety and morals of every community in this State . . . ." *Baca*, 57 N.M. at 187, 256 P.2d at 803 (1953) (quoting Chiordi v. Jernigan, 46 N.M. 396, 400, 129 P.2d 640, 642 (1942)).

396. N.M. STAT. ANN. § 60-8A-5 (Repl. Pamp. 1992).

397. 110 N.M. 374, 796 P.2d 595 (1990).

398. *Id.* at 375, 796 P.2d at 596 (emphasis added).

399. *Id.*

400. *Id.*

401. *Id.* The applicable portion of the Act states: "Whenever a New Mexico wholesaler delivers any item of alcoholic beverages to a New Mexico retailer . . . the delivery shall be *accompanied* by an *invoice* which accurately and clearly shows the *date* of the sale and the *quantity* of each item of merchandise delivered." N.M. STAT. ANN. § 60-8A-3 (Repl. Pamp. 1992) (emphasis added).

knowledging delivery which was contrary to Pucci's normal practice.[402] Nellos refused to pay the $19,320 for the 2,400 cases of Stroh's beer delivered by Pucci.[403]

Pucci sued Nellos.[404] Nellos raised as an affirmative defense Pucci's failure to deliver an invoice with the beer in violation of the Liquor Control Act.[405] Nellos argued that the document he signed on October 12 was merely a pre-bill or purchase order and that Pucci never delivered an invoice of any kind.[406] The district court rejected Nellos's argument and found that the October 12 document signed by Nellos was an invoice.[407] The district court awarded Pucci $19,320. In addition, the trial court awarded Pucci $10,702.75 for prejudgment interest, and $10,000 for attorney's fees and costs.[408] Nellos appealed.[409]

The New Mexico Supreme Court was presented with the issue of what constitutes an invoice under the Liquor Control Act.[410] Also, if the document was in fact an invoice, did a copy accompany the delivery of the beer by Pucci as required under the Liquor Control Act.[411]

The supreme court rejected Pucci's interpretation of the definition of an invoice under the Liquor Control Act. The court held that the contents of Nellos's purchase order was an invoice and affirmed the judgment of the trial court.[412] The court determined that an invoice is a written account of the merchandise shipped or to be shipped to the purchaser that contains the quantity and value or prices of the merchandise.[413] Thus, the supreme court found that although the Act requires an invoice to accompany the delivery, the definition of an invoice allows the seller

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402. *Pucci Distrib. Co.*, 110 N.M. at 375, 796 P.2d at 596.
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.* at 376, 796 P.2d at 597. A purchase order is a "document authorizing a seller to deliver goods with payment to be made later . . . . It constitutes an offer which is accepted when the vendor supplies the quantity and quality ordered." BLACK'S LAW DICTIONARY 1235 (6th ed. 1990).
407. *Pucci Distrib. Co.*, 110 N.M. at 376, 796 P.2d at 597.
408. *Id.* at 375, 796 P.2d at 596.
409. *Id.*
410. *Id.*
411. *Id.* at 376, 769 P.2d at 597. The court was also required to determine whether Pucci had actually delivered the beer to Nellos. The court applied the substantial evidence standard of review and affirmed the district court finding that the beer was delivered to Nellos. *Id.* at 377, 796 P.2d at 598. The supreme court was also presented with the issue of whether the amount of the trial court's award of attorney's fees was proper. The supreme court upheld the trial court's award of attorney's fees, allowing contingent fees to be a consideration in establishing the amount of an award of attorney's fees. *Id.* (citing Fryar v. Johnsen, 93 N.M. 485, 601 P.2d 718 (1979)).
412. *Id.* at 378, 796 P.2d at 599. The court did not address the issue of whether the Act barred Pucci from recovery, because Pucci complied with the Act's invoice requirement. *Id.* at 376, 796 P.2d at 599.
413. *Id.* The supreme court defined an invoice as:

> A written account, or itemized statement of merchandise shipped or sent to a purchaser * * *, with the quantity, value or prices and charges annexed . . . . Document showing details of a sale or purchase transaction. A list sent to a purchaser * * * containing the items, together with the prices and charges of merchandise sent or *to be sent* to him.

Id. (quoting BLACK'S LAW DICTIONARY 742 (5th ed. 1979) (emphasis added by the court)).

to create the invoice *prior* to the actual merchandise delivery.[414] The court then examined whether Nellos's alleged purchase order met the content requirements for the definition of an invoice.

The disputed document was a Pucci form "which listed various types of beer including the 2,000 cases of Stroh's and 400 cases of Stroh's light."[415] The form also contained the "quantity, unit price, total price, and a discount."[416] In addition, the Pucci form was labeled as an "invoice."[417] The court found that Pucci's invoice sufficiently detailed the transaction of the beer merchandise to be delivered to Nellos.[418] Thus, the document complied with the definition of an invoice, and there was substantial evidence for the trial court to determine that the disputed document was, in fact, a valid invoice.[419]

Nevertheless, the court still had to consider whether the previously created invoice actually accompanied the delivery as required by the Liquor Control Act.[420] Nellos contends that evidence indicates the invoice did not accompany the beer delivery.[421] The supreme court, however, found sufficient evidence to negate Nellos's argument.[422] First, Pucci's driver testified that he signed a copy of the invoice and delivered it to Nellos's retail liquor establishment with the beer.[423] Pucci's accounts receivable supervisor testified that a copy of the invoice was taken by the driver when he made the delivery.[424] Pucci's sales supervisor also testified in detail concerning the circumstances of the delivery and that the driver left a copy of the invoice with the delivery.[425] Finally, Pucci presented photographs of the Stroh's beer delivered by Pucci located on Nellos's display floor.[426] The supreme court found substantial evidence showing that Pucci delivered the invoice and the Stroh's beer and affirmed the district court's award and remanded the case to the district court to determine an appropriate award of attorney's fees and costs for Pucci.[427]

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414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.* at 377, 796 P.2d at 598.
419. *Id.* The court held that there was "adequate evidence" for the district court to conclude the disputed invoice was a valid invoice.
420. N.M. STAT. ANN. § 60-8A-3 (Repl. Pamp. 1992).
421. *Pucci Distrib. Co.*, 110 N.M. at 376, 796 P.2d at 597.
422. *Id.* at 377-78, 796 P.2d at 598-99. The supreme court stated that "the issue on appeal is not whether there is sufficient evidence to support an alternative finding, but whether the court's determinations were supported." *Id.* at 376, 796 P.2d at 597 (citing Nosker v. Trinity Land Co., 107 N.M. 333, 757 P.2d 803 (Ct. App.), *cert denied*, 107 N.M. 267, 755 P.2d 605 (1988)). The supreme court defined substantial evidence as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing Register v. Roberson Constr. Co., 106 N.M. 243, 741 P.2d 1364 (1987)).
423. *Id.* at 375, 796 P.2d at 596.
424. *Id.* at 377, 796 P.2d at 598.
425. *Id.*
426. *Id.*
427. *Id.* at 378, 796 P.2d at 599.

This case differentiates, albeit quite subtly, between a purchase order and an invoice.[428] A "purchase order" is a written *offer* which a vendor gives to a supplier.[429] The vendor uses this offer to request and authorize a supplier to furnish certain goods.[430] The supplier then creates an invoice when it manifests its intention to accept the vendor's offer. An "invoice," on the other hand, is a written account or itemized statement containing the items ordered and the quantity, prices, and charges of the items *sent or to be sent to* the vendor.[431] Thus, as the court held, the seller can create the invoice at a date earlier from the actual date of the delivery of the merchandise.[432] Additionally, the court established that a purchase order and invoice can exist on the same form.[433] Hence, when Nellos placed its order on the purchase order form and signed it, Pucci simultaneously manifested its intent to accept the offer because the form's contents satisfied all the requirements of an invoice. Finally, Pucci met New Mexico's first element of *accepting* a liquor order when it supplied Nellos with its requested quantity and quality of goods.[434]

The second "acceptance" requirement for New Mexico suppliers of liquor, such as Pucci, is that the wholesaler must provide the invoice to the vendor *at the time* of the delivery.[435] In addition to containing the prices and charges for the liquor merchandise, the invoice must contain the *date* of the sale and the *quantity* of each item delivered to the vendor.[436] Pucci met the above invoice requirements, and its testimonial evidence on the delivery issue provided the courts with substantial evidence to infer that Pucci delivered the beer and a *valid* invoice to Nellos.[437]

D. The Unfair Trade Practices Act

The purpose of the Unfair Practices Act[438] is to prevent false or misleading statements, or descriptions associated with the sale of goods

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428. *Id.* at 376, 796 P.2d at 597. The supreme court shows that Pucci accepted Nellos's offer or solicitation for buying Stroh's beer by issuing Nellos an invoice describing the beer including its price:

> [Nellos] claims . . . that the document was a . . . purchase order, not an invoice.
>
> . . .
>
> The document at issue, which is labeled as an invoice. [contains] a list of various types of beer. . . . Listed on the form are quantity, unit price, total price, and a discount. We hold that . . . this was an invoice.

Id.

429. BLACK'S LAW DICTIONARY 1235 (6th ed. 1990) (defining "purchase order").

430. *Id.*

431. *Id.* at 827 (defining "invoice").

432. *Pucci Distrib. Co.*, 110 N.M. at 376-77, 796 P.2d at 597-98. "The invoice was dated October 12 and delivery was made October 15." *Id.* at 376, 796 P.2d at 597.

433. Nellos placed "a purchase order on Pucci's invoice form (termed a prebill) with delivery to occur sometime hereafter." *Id.* at 375, 796 P.2d at 596. The supreme court held that the "document [purchase order] at issue" was an invoice. *Id.* at 376, 796 P.2d at 597.

434. BLACK'S LAW DICTIONARY 1235 (6th ed. 1990) (seller accepts the purchase order offer when seller "[delivers] the quantity and quality ordered.").

435. N.M. STAT. ANN. § 60-8A-3 (Repl. Pamp. 1992).

436. *Id.*

437. *Pucci Distrib. Co.*, 110 N.M. at 376-77, 796 P.2d at 597-98.

438. N.M. STAT. ANN. §§ 57-12-1 to -21 (Repl. Pamp. 1987 & Cum. Supp. 1991).

and services in the normal course of trade or commerce which tends to deceive purchasers.[439] The Act provides protection for buyers in the ordinary course of business in that it deters a seller from inducing the buyer to "deal" with the seller through false or deceptive trade practices.[440]

One must establish four elements to invoke the Unfair Trade Practices Act.[441] First, the complainant "must show that the party charged made 'an oral or written statement, visual description or other representation' that was either false or misleading."[442] Second, "the false or misleading representation must have been 'knowingly made in connection with the sale, lease, rental or loan of goods or services in the extension of credit or . . . collection of debts.'"[443] Third, "the conduct complained of must have occurred in the regular course of the representer's trade or commerce."[444] "[F]ourth, the representation must have been of the type that 'may, tends to or does, deceive or mislead any person.'"[445]

During the survey period, the New Mexico Supreme Court addressed the issues of misrepresentation of goods as new, awarding of damages, trebling or multiplying damages, and awarding attorney's fees and costs under the Unfair Trade Practices Act.

1. Alteration of Goods

In *Hale v. Basin Motor Co.*,[446] the plaintiffs-appellees, Gregory and Donna Hale ("Hales"), purchased a 1985 Buick Riviera from Basin Motor Company ("Basin").[447] Basin sold the car as a "new demonstrator."[448] After the purchase, the paint finish on the right front fender, right door, and right door pillar began "oxidizing, fading, and distorting."[449] The Hales discovered that the car had been in an accident and subsequently repaired prior to sale.[450] Based on estimates obtained by the Hales, it was determined that the car was worth $10,175 undamaged.[451] The actual value of the car, however, was estimated at $9,175 as a result of the accident and the need for a paint job.[452] The Hales repainted the car at a cost of $840 and eventually traded it in.[453] At trade-in, the dealer valued the car at $9,000 and added a $949 over-

439. *Id.* § 57-12-2(C).
440. *Id.*
441. *See* Ashlock v. Sunwest Bank of Roswell, N.A., 107 N.M. 100, 101, 753 P.2d 346, 347 (1988).
442. *Id.* (quoting N.M. STAT. ANN. § 57-12-2(C) (Repl. Pamp. 1987)).
443. *Id.* (quoting N.M. STAT. ANN. § 57-12-2(C) (Repl. Pamp. 1987)).
444. *Id.*
445. *Id.* (quoting N.M. STAT. ANN. § 57-12-2(C) (Repl. Pamp. 1987)).
446. 110 N.M. 314, 795 P.2d 1006 (1990).
447. *Id.* at 316, 795 P.2d at 1008.
448. *Id.*
449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.*

allowance to make the deal and pay off the balance the Hales still owed on the car.[454]

The Hales brought suit against Basin, alleging that Basin had violated the Unfair Trade Practices Act by making misrepresentations about the car's condition.[455] The Hales claimed that Basin failed to provide them with an affidavit describing the damage to the car in violation of the Unfair Trade Practices Act.[456] Further, the Hales contended that Basin's acts were fraudulent because it intended to deceive the Hales.[457] Specifically, the Hales argue that Basin received a price greater than the car's actual market value by concealing the fact that the car was previously damaged in an accident.[458]

The trial court held that Basin willfully violated the Unfair Trade Practices Act by failing to disclose the car's damages to the Hales.[459] The trial court also held that Basin knowingly represented the car "as good as new" after it altered (repaired and refinished) the car,[460] in violation of the Unfair Trade Practices Act.[461]

The trial court computed damages by subtracting the total amount the Hales received for the car at the time of trade-in ($9,749.50) from the estimated value of the car undamaged ($10,175).[462] Thus, the base award was $425.50.[463] The court then trebled the damages and awarded the Hales $1,262.50.[464] The court refused the Hales' request for punitive damages holding that the trebling of damages was punitive in nature and, hence, precluded an additional punitive damage award.[465] Finally, the court awarded the Hales attorney's fees of $7,741.93 and costs of $954.27.[466] Basin appealed this decision and the Hales cross-appealed.[467]

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454. *Id.*

455. *Id.*

456. *Id.* The Unfair Trade Practices Act requires that the seller of a motor vehicle to provide the buyer with an affidavit, at the time of sale, which "states to the best of the seller's knowledge whether there has been an alteration or chassis repair due to wreck damage." N.M. STAT. ANN. § 57-12-6(B)(2) (Repl. Pamp. 1987).

457. *Hale*, 110 N.M. at 316-17, 795 P.2d at 1008-09.

458. *Id.*

459. *Id.* at 317, 795 P.2d at 1009.

460. *Hale*, 110 N.M. at 317, 795 P.2d at 1009.

461. N.M. STAT. ANN. § 57-12-2(D)(6) (Cum. Supp. 1991).

462. *Hale*, 110 N.M. at 317, 795 P.2d at 1009.

463. *Id.*

464. *Id.*

> Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($300), whichever is greater, to the party complaining of the practice.

N.M. Stat. Ann. § 57-12-10(C) (Repl. Pamp. 1987).

465. *Hale*, 110 N.M. at 317, 795 P.2d at 1009. Because the trebled award was punitive in nature, the trial court refused to consider Hales' claim of common law fraud because that damage award is also punitive. Hence, the trial court felt precluded from considering common law fraud as the punitive damages would duplicate the trebled damage award already granted under the Unfair Trade Practices Act. *Id.* at 320 n.3, 795 P.2d at 1012 n.3.

466. *Id.* at 317, 795 P.2d at 1009.

467. *Id.*

The New Mexico Supreme Court addressed the following issues: (1) Is a seller who represents that a motor vehicle is a "new demonstrator" representing that the vehicle is "new" under the Unfair Trade Practices Act?[468] (2) Under what circumstances is the seller of a motor vehicle required to provide the purchaser with an affidavit describing any alterations or repair work to the vehicle?[469] (3) Does the Unfair Trade Practices Act require a showing of multiple violations before the seller violates the Act?[470] (4) How are damages calculated, and when are treble damages warranted under the Unfair Trade Practices Act?[471] (5) Is the court precluded from considering punitive damages under alternative theories if trebled damages are awarded under the Unfair Trade Practices Act?[472] (6) Does the Unfair Trade Practices Act permit an appellate court to award costs and attorney's fees incurred on appeal?[473]

a. Representing a Vehicle as a "New Demonstrator"

The supreme court first examined the statutory definition for misrepresenting a good as "new."[474] The Act states that an unfair trade practice is any false or misleading statement knowingly made in connection with a sale, by any person in the regular course of his trade, which may tend to or does deceive or mislead any person.[475] An example of an unfair trade practice is when a person, in the regular course of his trade, represents the goods as original or new when they are actually deteriorated, altered, reconditioned, or used.[476] A motor vehicle is clearly a good within the meaning of the Act.[477]

The supreme court stated that although Basin represented the car as a "new demonstrator" the car had several thousand miles on it before the Hales purchased it.[478] Additionally, the Hales requested that Basin perform several minor repairs on the car before delivery.[479] Thus, the supreme court found that in light of these facts, there was no substantial evidence tending to show that the Hales believed the car was "new" as defined by the Act.[480] Evidently, the court found that the Hales' knowledge of the car's mileage coupled with their requests for many repairs proved that the Hales knew or should have known they were purchasing a "used" car. Furthermore, the court stated that substantial evidence was

468. *Id.*
469. *Id.*
470. *Id.* at 318, 795 P.2d at 1010.
471. *Id.* at 318-19, 795 P.2d at 1010-11.
472. *Id.* at 320, 795 P.2d at 1012.
473. *Id.* at 321, 795 P.2d at 1013.
474. *Id.* at 317, 795 P.2d at 1009.
475. N.M. STAT. ANN. § 57-12-2(D) (Cum. Supp. 1991).
476. *Id.* § 57-12-2(D)(6).
477. *Id.* § 57-12-6 ("Misrepresentation of motor vehicles; penalty").
478. *Hale*, 110 N.M. at 317, 795 P.2d at 1009.
479. *Id.*
480. *Id.*

lacking to find that Basin represented the car as "'new' as that term is used in Section 57-2(D)(6)."[481]

It appears that the court interprets "new" as synonymous with "original."[482] The supreme court implicitly found that "demonstrator," a term commonly used in the automobile sale business, modified "new" so that "new demonstrator" described a *used* car in excellent condition as opposed to a brand new car direct from the factory.[483] Hence, the buyer could not reasonably infer that the car was in its original out-of-the-factory condition when Basin described the car as a "new demonstrator." The court, however, went on to state that Basin's use of "new demonstrator" may have been misleading when coupled with the undisclosed collision damage and repairs.[484] Nevertheless, the court was still unable to conclude that Basin violated the Act[485] because Basin did *not intend* to suggest the car was new.[486]

The court found that substantial evidence did not exist in support of the Hales' allegations that Basin intended to deceive or mislead the Hales into believing that the car was new.[487] The "unfair trade practice" definition specifically states the violator's culpability as: ". . . any false or misleading statement . . . *knowingly* made . . . by any person in the regular course of his trade or commerce, which *may*, *tends to* or does deceive or mislead any person . . . ."[488] The court found that the Act only requires that the statements *may* mislead or tend to mislead a buyer.[489] The Act, however, does not require that Basin actually *intend* to mislead, but only that Basin *knows* or is aware that its statements may *tend to* mislead or deceive.[490] Thus, while Basin may not have willfully made statements with intentions to mislead the Hales, it is possible that Basin may have been aware that its statements might mislead the Hales.

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481. *Id.*

482. The drafter's language states that an unfair trade practice includes "representing that goods are *original or new* if they are . . . altered . . . used or secondhand . . . ." N.M. STAT. ANN. § 57-12-2(D)(6) (emphasis added).

483. "Basin Motor represented that the vehicle had been used as a demonstrator. A statement by Basin Motor that the vehicle was a 'new demonstrator' may well have been misleading . . . however, we *cannot conclude* Basin Motor's representation was *intended* to suggest that the vehicle was *unused or 'new.' This is the import* of the specific Section 57-12-2(D)(6)." *Hale*, 110 N.M. at 317, 795 P.2d at 1009 (emphasis added).

484. *Id.*

485. N.M. STAT. ANN. § 57-12-2(D)(6) (Supp. 1991) (states an unfair trade practice occurs when a person in the regular course of his trade represents goods as original or new if they are deteriorated, altered, reconditioned, used, or secondhand).

486. *Hale*, 110 N.M. at 317, 795 P.2d at 1009.

487. *Id.*

488. N.M. STAT. ANN. § 57-12-2(D) (Supp. 1991) (emphasis added).

489. *Hale*, 110 N.M. at 317, 795 P.2d at 1009 (1990) (emphasis added) (stating that representing the vehicle as a "'new demonstrator' *may have been misleading* in light of the undisclosed collision damage and repairs").

490. N.M. STAT. ANN. § 57-12-2(D)(6) (Supp. 1991) (emphasis added); *see also* Ashlock v. Sunwest Bank of Roswell, N.A., 107 N.M. 100, 101, 753 P.2d 346, 347 (1988). "Had the legislature wished intent to deceive to be an essential element of the offense, it would have so specified." *Id.*

According to the Act, this awareness is enough to hold Basin in violation of the Unfair Trade Practices Act.[491] First, Basin withheld the fact that the car was in an accident and that Basin performed body repairs on the car.[492] This fact along with Basin's representation that the car was a "new demonstrator" is evidence that Basin represented that the car is in as new a condition as the consumer can reasonably expect from a demonstrator vehicle. It should be obvious to the consumer that a demonstrator vehicle already has been driven several thousand miles. On the other hand, a consumer who purchases a new demonstrator vehicle, *cannot* reasonably expect that the new demonstrator has sustained damage in an accident that substantially affects the vehicle's value.[493] One might reasonably infer, from the evidence, that Basin feared the Hales may not purchase the vehicle if they were aware that the car was previously damaged.[494] Thus, it is plausible that Basin knew that by representing the car as a new demonstrator, it probably had a better chance of closing the deal.[495] The supreme court found that Basin did not use the word "new" to suggest the car is unused or original, which "is the import of section 57-12-2(D)(6)."[496] Basin's representation, however, tends to mislead a consumer that the car is of a particular quality (a new demonstrator), when the car is actually of another quality (a previously damaged and poorly repaired demonstrator).[497] This is a violation of the Unfair Trade Practices Act.[498]

Furthermore, in *Ashlock v. Sunwest Bank of Roswell, N.A.*,[499] the supreme court held that the Act applies to all misleading or deceptive statements, regardless of the violator's intent, or lack of intent, to make the statements.[500] The seller's actual intent is of no import in determining whether the seller violated the Unfair Trade Practices Act.[501] Therefore, to find a violation of the Act, the trial court must find that the seller

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491. Richardson Ford Sales, Inc. v. Johnson, 100 N.M. 779, 782, 676 P.2d 1344, 1347 (Ct. App. 1984). "[A]n intent to deceive is not a requirement under the New Mexico statute. Our statute does, however, require that a representation be 'knowingly made'. In this case the failure to disclose must have been a knowing nondisclosure. A knowing nondisclosure requires an awareness of the nondisclosure." *Id.* at 782-83, 676 P.2d at 1347-48.

492. *Hale*, 110 N.M. at 317, 795 P.2d at 1009 (1990) ("statement . . . misleading in light of the *undisclosed* collision damage and repairs").

493. *Id.* at 318, 795 P.2d at 1010 (1990) ("goods are 'altered' if, as measured against the reasonable expectations of the consumer, the characteristics or value of the motor vehicle is affected in a meaningful way"); *cf.* Boulevard Chrysler-Plymouth, Inc. v. Richardson, 374 So. 2d 857, 859 (Ala. 1979).

494. Basin represented the car as a new demonstrator and did not disclose the collision damage nor the subsequent repairs to the car. *Hale*, 110 N.M. at 317, 795 P.2d at 1009.

495. *See supra* notes 490-91.

496. *Hale*, 110 N.M. at 317, 795 P.2d at 1009 (1990).

497. *See supra* note 490.

498. N.M. STAT. ANN. § 57-12-2(D)(5) (Supp. 1991) (stating an "unfair or deceptive trade practice" occurs when any person in the regular course of his trade represents that goods are of *a particular quality* if they are of *another* quality); *see supra* note 492 and accompanying text.

499. 107 N.M. 100, 753 P.2d 346 (1988).

500. *Id.* at 102, 753 P.2d at 348.

501. N.M. STAT. ANN. § 57-12-2(D)(6) (Supp. 1991).

knew that its statements were misleading or would tend to mislead or deceive the purchaser.[502]

b. Affidavit Describing Alterations or Repairs

The Act requires a seller of a motor vehicle to furnish an affidavit at the time of the sale that "states to the best of the seller's knowledge whether there has been an *alteration or chassis repair due to wreck damage*."[503] The supreme court held that Basin was in violation of the Act because it failed to provide the Hales with an affidavit.[504] The court applied basic English grammar rules and held that the statutory language "due to wreck damage" only applies to "chassis repair" and *not* to an "alteration."[505] With this interpretation, the court impliedly ruled that Basin was not limited, under the Act, to only disclosing alterations to the car *as a result of the accident*.[506] If Basin were only required to disclose alterations as a result of an accident, the circumstances under which the Act would require an alteration disclosure would be severely limited.[507] The court held that goods are altered if the characteristics or value of the goods are affected in a meaningful way.[508] The repairs affect the value "in a meaningful way" if they affect the value of the vehicle in the eyes of the consumer.[509] Substituting one standardized part for another is not considered to affect the value of a vehicle in a meaningful way.[510]

Basin's repairs, however, were extensive. Basin replaced the right front fender, straightened the right door frame, drilled holes in the door panel to pull out a dent, ground down the sheet metal in the damaged area and resurfaced it with body filler, and repainted the damaged area.[511] The damage and repairs clearly affected the value of the car in the eyes of the consumer. The court held: "This was sufficient evidence to support the trial court's finding that the vehicle was altered within the meaning of [the Act], and the repair should have been disclosed by affidavit."[512]

c. Multiple Violations Not Required Under the Unfair Trade Practices Act

Basin argued that the Unfair Trade Practices Act requires that a seller commit multiple violations to fall within the purview of the Act and that the trial court erred by finding a violation of the Act where it had

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502. *Hale*, 110 N.M. at 317, 795 P.2d at 1009.
503. N.M. STAT. ANN. § 57-12-6(B)(2) (Supp. 1991) (emphasis added).
504. *Hale*, 110 N.M. at 318, 795 P.2d at 1010.
505. *Id.*
506. *Id.*
507. *Id.*
508. *Id.*
509. *Id.*
510. *Id.*
511. *Id.*
512. *Id.*

only a single occurrence of violating the Act.[513] The court disagreed and relied on its earlier holding in *Ashlock v. Sunwest Bank of Roswell, N.A.*[514] to show that multiple violations are not required for a court to apply the Act.[515] In *Ashlock*, the court found that the Act does not distinguish between single and multiple occurrences of prohibited conduct.[516] Hence, the Ashlock court found that a single instance of prohibited conduct triggers the application of the Act.[517] Thus, the court reaffirmed its earlier holding by specifically finding that multiple violations were not required under the Unfair Trade Practices Act.[518]

d. Calculating and Trebling Damages

The court found that a person who suffers *any loss* of money as a result of a practice declared unlawful by the Act is entitled to recover actual damages or $100 whichever is greater.[519] The damaged party can only recover the repair costs or the difference in the value of the car before and after the damage, whichever is the smaller amount.[520]

The trial court compared the cost of repairs to the difference between the property's fair market value *before* sustaining the damage and the amount or value the dealer gave to the Hales for trading-in the car.[521] The amount the dealer gave the Hales for trade-in does not reflect the car's actual *fair market* value *after damage*, as required, but reflects the car's value *after repairs*.[522] Furthermore, the dealer may have taken into consideration other factors besides the car repairs, when he allowed an over-allowance to close the deal.[523] Thus, the supreme court found that the trial court applied an incorrect measure of damages.

The supreme court relied upon expert testimony to estimate the car's value *after* it sustained the damage.[524] The expert determined the car's value, before the damages, was $10,175 and its value after the damage was $9,175, a difference of $1000.[525] The Hales paid $840 in repair costs.[526] Therefore, because the repair cost was less then the difference in the car's value before and after the damage, the Hales could only

513. *Id.*
514. 107 N.M. 100, 753 P.2d 346 (1988).
515. *Hale*, 110 N.M. at 318, 795 P.2d at 1010.
516. *Ashlock*, 107 N.M. at 102, 753 P.2d at 348.
517. *Hale*, 110 N.M. at 318, 795 P.2d at 1010.
518. *Id.*
519. *Id.* at 318-19, 795 P.2d at 1010-11 (construing N.M. STAT. ANN. § 57-12-10(B) (Supp. 1991)).
520. *Id.*
521. *Id.*
522. *Id.* (the trial court calculated the difference in the car's value at $425.50 by subtracting the amount received for trade-in, $9,749.50, from the car's value prior to any damage, $10,175. Because the difference in car value was smaller than the $840 repair cost, the lower court awarded Hale $425.50).
523. *Id.*
524. *Id.*
525. *Id.* at 316, 795 P.2d at 1007.
526. *Id.*

recover $840.[527] Nevertheless, this amount is almost twice the amount awarded by the trial court.

Basin next argued that the trial court was unable to apply retroactively the treble damage portion of the Unfair Trade Practices Act in this case.[528] In upholding the trial court's award of treble damages, the majority found that the amendment to the Act was remedial in nature and could be retroactively applied in this case.[529] The court defined a remedial right as a right that provides an additional remedy to enforce substantive rights that already exist.[530] By comparison, the court defined substantive right as a right that creates a new duty, right, or obligation under the law.[531]

Although Justice Montgomery concurred in the result, he disagreed with the majority's classification of the treble damages award portion of the Act as a remedial right.[532] Justice Montgomery argued that the difference between a substantive and a remedial right must be more than just that substantive rights are new rights or obligations and remedial rights are merely an expansion or contraction of existing rights.[533] According to Justice Montgomery, the court should look to the amendment's purpose when determining whether retroactive application is appropriate.[534] One purpose of this amendment is to provide an incentive for seeking redress of these *often* relatively minor damage awards.[535] In this case, applying the amendment will not advocate this purpose as the damaged party did not have this amendment's special incentive to seek redress because the amendment did not exist at that time.[536] Another purpose is to deter unfair or deceptive trade practices.[537] Although the legislature enacted the amendment after the "unfair" car sale, applying the amendment retroactively will deter other car dealers, and others in general, from unfair trade practices, especially because the suit was brought after the effective date of the amendment.[538] By considering these purposes, the court may determine whether it should apply an amendment retroactively.

e. Choice of Remedies

The Hales claimed that they were entitled to punitive damages under the common law fraud theory *in addition* to the trebled damages under

527. *Id.* at 319, 795 P.2d at 1010.
528. *Id.* (amendment added to statute on June 19, 1987, which is after Basin sold Hale the car).
529. *Id.*
530. *Id.*
531. *Id.*
532. *Id.* at 322, 795 P.2d at 1013 (Montgomery, J., concurring).
533. *Id.*
534. *Id.*
535. *Id.*
536. *Id.*
537. *Id.*
538. *Id.*

the Unfair Trade Practices Act.[539] On its face this argument appears persuasive, but the supreme court found that allowing additional damages would result in a *duplication* in awards because the trebling was punitive in nature.[540] Nevertheless, the court held that the Hales had the option of recovering trebled damages under the Unfair Trade Practices Act *or* punitive damages under a common law fraud theory.[541] As a result, the trial court erred when it refused to accept the findings of either party on the fraud issue.[542] Evidently the trial court precluded itself from considering a punitive award because the trebled award was already punitive in nature and, therefore, no additional punitive damages were awarded.[543] The supreme court remanded the case back to the trial court with instructions to consider the common law fraud claim and, should it find fraud, give the Hales the option of recovering either the trebled or punitive damages.[544] Therefore, a finding of a violation under the Unfair Trade Practices Act does not prohibit the trial court from finding in favor of the plaintiff on other theories raised by the plaintiff; rather, the Act allows a plaintiff to choose its remedy.

f. Costs and Attorney's Fees On Appeal

The New Mexico Supreme Court faced an issue of first impression on the issue of costs and attorney's fees: Whether the Hales are entitled to costs and attorney's fees on appeal as well as on the action in the trial court.[545] The Act states that the court shall award attorney's fees and costs to the party complaining of a violation under the Unfair Trade Practices Act if the complaining party *prevails*.[546] The court had to determine whether a prevailing party is entitled to attorney's fees and costs incurred at the appellate court level as well as at the trial court level.

In *Superior Concrete Pumping, Inc. v. David Montoya Construction, Inc.*,[547] the supreme court awarded the prevailing party, in an open account case, attorney's fees and costs at the trial level and the appellate level.[548] The court's rationale was that the underlying statute's[549] purpose is to

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539. *Id.* at 320, 795 P.2d at 1011 (Hale argued that N.M. STAT. ANN. § 57-12-10(D) requires the court to *also* award punitive damages under common law fraud because the section states, "the relief provided in this section is *in addition to remedies otherwise available* against the same conduct *under the common law* or other statutes of this state").

540. *Id.* (referring to the Roberts v. American Warranty Corp., 514 A.2d 1132 (Del. 1986), decision that held punitive damages are not allowed when actual damages have been multiplied under the Unfair Trade Practices Act).

541. *Id.*

542. *Id.*

543. *Id.* at 320 n.3, 795 P.2d at 1011 n.3.

544. *Id.* at 322, 795 P.2d at 1013.

545. *Id.* at 321, 795 P.2d at 1012.

546. N.M. STAT. ANN. § 57-12-10(C) (Supp. 1991).

547. 108 N.M. 401, 733 P.2d 246 (1989).

548. *Id.*

549. N.M. STAT. ANN. § 39-2-2.1 (Supp. 1989) (states, in part, that the district court, small claims court or magistrate court may award reasonable attorneys fees, to the prevailing party, in any civil action on an open account case).

discourage the threat of litigation as a tactic to enforce false claims or to avoid paying debts.[550] In addition, the statute motivates the party, who is convinced it is correct, to pursue litigation knowing that it may recover attorney's fees.[551]

The supreme court awarded the Hales attorney's fees and costs based on a similar rationale. First, the Act does not limit an award of attorney's fees and costs to only trial expenses.[552] Second, the court found that awarding attorney's fees and costs at the trial level *and* at the appellate level is *consistent* with the private remedy section in the Unfair Trade Practices Act:[553] Awarding expenses at *both* the trial and appellate level enhances the private remedy's purpose of motivating parties to successfully "press their claims" especially in light of the sometimes minor damage claim.[554] This aids the prevailing party to win in practice, rather than merely to win on principal.[555] Therefore, the Unfair Trade Practices Act permits the prevailing party to recover its costs and attorney's fees related to both trying the case and meeting or asserting rights on appeal.

E. Administrative Law - The Motor Carrier Act

1. Proof of Public Need Required for "Right to Transport Certification of Common Carrier"

The New Mexico State Corporation Commission ("Commission") is charged with administering the New Mexico Motor Carrier Act.[556] The Motor Carrier Act regulates motor carriers that seek to operate within the state.[557] To engage in transportation as a common carrier, a party must apply to the Commission, which has the power to issue a Certificate of Public Convenience and Necessity.[558] The Commission can then au-

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550. *Superior Concrete Pumping, Inc.*, 108 N.M. at 405, 733 P.2d at 350.

551. *Id.*

552. N.M. STAT. ANN. § 57-12-10(C) (Supp. 1991).

553. *Hale*, 110 N.M. at 321, 795 P.2d at 1012.

554. *Id.* at 322, 795 P.2d at 1013.

555. As N.M. STAT. ANN. section 57-12-10(B) contemplates, most damages under the Unfair Trade Practice Act are between $100 and $300. A party may win in theory, but may lose for all practical purposes because the prevailing party's attorney's fees and costs will probably easily exceed $300. Thus, the court's discretion in awarding attorney's fees and costs both at the trial and appellate levels enables the prevailing party to win in the practical monetary sense.

556. N.M. CONST. art. XI, § 7. This section provides that the Commission has constitutional authority to determine matters of public convenience and necessity relating to common carriers. Additionally, N.M. STAT. ANN. section 65-2-81 states:

> It is declared to be the policy of New Mexico that the transportation of persons and property by motor vehicle for hire [upon] public highways of this state be supervised and regulated so as to provide for the developments, coordination and preservation of a safe, sound, adequate, economical and efficient intrastate motor carrier system. . . . To that end, it is necessary that the regulation promote competitive, economical and efficient service by motor carrier, and reasonable charges therefor, without undue preference or advantage; enable efficient and well-managed motor carriers to earn adequate profits, . . . and provide for competitive motor carrier services at affordable rates . . . .

557. N.M. STAT. ANN. § 65-2-83.

558. *Id.* § 65-2-84(D).

thorize an applicant to provide transportation as a common carrier under the Motor Carrier Act.[559] Such certification requires:

> (1) that the person is fit, willing and able to provide the transportation to be authorized by the certificate and to comply with the Motor Carrier Act and regulations of the commission; and
> (2) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need.[560]

The Commission must deny the certification if, based on intervenor/protestant testimony, certification would be inconsistent with public convenience and necessity.[561]

In *Oil Transportation Co. v. State Corporation Commission*,[562] the supreme court examined, after a lengthy administrative process, whether a plaintiff complied with the Commission's regulations regarding Public Convenience and Necessity certification.[563] Ash Corporation ("Ash Corp.") applied for a certificate of public convenience and necessity from the Commission to transport petroleum products throughout New Mexico.[564] Oil Transportation Company ("Oil Co."), consolidated its application with Mission Petroleum Carriers for the same type of certificate.[565] At one point, both Ash Corp. and Oil Co. intervened to protest each other's application.[566] Oil Co. moved to consolidate the Ash Corp. and the Oil Co. applications, but the motion was denied due to the Commission's failure to act upon the motion.[567] Finally, the Commission granted Ash Corp.'s application, and a few days later, denied Oil Co.'s application.[568]

Oil Co. appealed the Commission's denial of its application to district court claiming that the Commission's decisions were arbitrary, biased, and unsupported by substantial evidence.[569] Oil Co. further argued that the Commission's refusal to consolidate the Ash Corp. and Oil Co. applications constituted a violation of due process and equal protection.[570] The Commission responded that their decision was proper and claimed that Oil Co. lacked standing to appeal Ash Corp.'s certification because

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559. N.M. CONST. art. XI, § 7.

560. N.M. STAT. ANN. § 65-2-84(D)(1), (2).

561. N.M. STAT. ANN. § 65-2-84(E); *see also* Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n, 101 N.M. 470, 473-74, 684 P.2d 1135, 1138-39 (1984).

562. 110 N.M. 568, 798 P.2d 169 (1990).

563. *See* N.M. STAT. ANN. § 65-2-84. Although the term "public convenience and necessity" is not expressly defined, this section of the statute sets forth the general requirements for Public Convenience and Necessity certification.

564. *Oil Transp. Co.*, 110 N.M. at 569, 798 P.2d at 170.

565. *Id.*

566. *Id.*

567. *Id.*

568. *Id.*

569. *Id.*; N.M. STAT. ANN. section 65-2-120(A) (1978) states in pertinent part: "Any motor carrier and any other person in interest being dissatisfied with any order or determination of the [C]ommission. . . may commence an action in the district court for Santa Fe county against the [C]ommission . . . ."

570. *Oil Transp. Co.*, 110 N.M. at 569, 798 P.2d at 170.

Oil Co. was an intervenor in the earlier action.[571] The district court vacated the Commission's earlier decision, and ordered the Commission to provide a comparative review of both the Ash Corp. and Oil Co. applications.[572] The district court further found that the Ash Corp. certification was supported by substantial evidence, and instructed the Commission, if after comparative review for Ash Corp., to correct a clerical error in Ash Corp.'s certificate.[573] Oil Co. moved to reconsider the court's findings that substantial evidence supported Ash Corp.'s certification because it conflicted with the court's decision to vacate and remand the Commission's order.[574] The district court denied this motion, reasoning that the two applications were not mutually exclusive "as an economic fact."[575]

The Commission, during remand, maintained its original orders on the grounds that Ash Corp.'s services were publicly needed and Oil Co.'s were not.[576] Additionally, the Commission found that Oil Co.'s intervenors established that certification of Oil Co.'s application would contravene public convenience and necessity.[577] Notwithstanding the district court's orders, the Commission failed to make a comparative review between the Ash Corp. application and the Oil Co. application.[578] Because a comparative review never commenced, Oil Co. again motioned the district court for relief, arguing lack of due process under the first district court order.[579] The district court denied the motion, holding that the Commission complied with the original remand instructions and that the Commission's findings were supported by substantial evidence.[580] Oil Co. appealed the district court decision directly to the New Mexico Supreme Court.[581] On appeal, the supreme court examined "whether the Commission's orders were 1) within the scope of its authority;[582] 2) supported by substantial evidence; 3) arbitrary, capricious, or fraudulent; and 4) the result of bias or an abuse of discretion."[583]

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571. *Id.*

572. *Id.* When applications are contemporaneous and seek substantially the same authority, due process requires that the applications be consolidated for comparative decision making. *See* Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945).

573. *Oil Transp. Co.*, 110 N.M. at 570, 798 P.2d at 171.

574. *Id.*

575. *Id.* (emphasis omitted).

576. *Id.*

577. *Id.*

578. *Id.*

579. *Id.*

580. *Id.*

581. N.M. STAT. ANN. § 65-2-120(G) (Repl. Pamp. 1990). This section states that any party may appeal to the supreme court within 60 days of service of notice.

582. The New Mexico State Corp. Commission is constitutionally empowered to determine matters of public convenience and necessity relating to common carriers. N.M. CONST. art. XI, § 6. The Commission also is authorized to set licensure requirements to perform its functions. N.M. STAT. ANN. § 65-2-83(C), (D). As discussed, the Commission has constitutional authority to regulate common carriers. This issue was not brought up on appeal.

583. *Oil Transp. Co.*, 110 N.M. at 570, 798 P.2d at 171. This standard for appellate review is set forth in N.M. STAT. ANN. § 65-2-120 (Repl. Pamp. 1990). *See* N.M. R. APP. P. 12-8-22(A); *see also* Groendyke Transport v. State Corp. Comm'n, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984).

"Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion."[584] The Commission denied Oil Co.'s application for its failure to show a public need or request for its services.[585] The court disagreed with this analysis, and found that public need is not shown by presenting evidence that the public require the carrier's service.[586] The court held instead that public need is shown "by identifying 1) commodities to be shipped; 2) points to and from which traffic moves; 3) the volume of freight to be tendered to the applicant; and 4) why present freight transportation services fail to meet present demands."[587] The court found that because Ash Corp.'s witnesses declared the public need for more carriers, and that this evidence should also have been used in Oil Co.'s application.[588] The court concluded that the failure to use this relevant evidence substantially deprived Oil Co. of evidence supporting its application.[589]

"An administrative agency acts arbitrarily or capriciously when its action is unreasonable, irrational, wilful (sic), and does not result from a sifting process."[590] Because the Commission established public need through Ash Corp.'s witnesses, the court held that the Commission had no rational basis for denying the Oil Co. application.[591] The court concluded that the Commission's decision was arbitrary, because they found public need from Ash Corp.'s evidence, but failed to find Oil Co.'s requirement of public convenience and necessity.[592]

"An agency abuses its discretion when its decision is not in accord with legal procedure or supported by its findings, or when the evidence does not support its findings."[593] Because the Commission ignored the first district court order to comparatively review both Ash Corp.'s and

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584. *Oil Transp. Co.*, 110 N.M. at 571, 798 P.2d at 172; *see* National Council on Compensation Ins. v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988).

585. *Oil Transp. Co.*, 110 N.M. at 571, 798 P.2d at 172.

586. *Id.*

587. *Id.* (citations omitted). The court found that the Commission's denial of the Oil Co. application was based on a strict interpretation of Section 65-2-84(D), which requires "persons supporting the issuance of the certificate. . ." to present evidence that the public requires their services. *See* Refrigerated Transp. Co. v. Interstate Commerce Comm'n, 616 F.2d 748, 751 (5th Cir. 1980).

588. *Oil Transp. Co.*, 110 N.M. at 572, 798 P.2d at 173.

589. *Id.*

590. *Id.* at 572, 798 P.2d at 173 (citing Perkins v. Department of Human Servs., 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987); Garcia v. New Mexico Human Servs. Dep't, 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct. App. 1979) (quoting Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 N.W.2d 86, 89 (1965), *rev'd on other grounds*, 94 N.M. 175, 608 P.2d 151 (1980))).

591. *Id.* Both Ash Corp. and Oil Co. presented evidence of commodities to be shipped, points of transportation, and prospective freight volume. Ash Corp.'s witnesses testified that the state needed more carriers to meet the public demand and encourage competition. Oil Co.'s evidence focused on quality of product transportation and business expansion. Oil Co.'s competitors, however, presented evidence that the New Mexico carrier business was declining, and that Oil Co.'s certification would harm present carriers. *Id.*

592. *Id.*

593. *Id.* at 573, 798 P.2d at 174 (citing Perkins v. Department of Human Servs., 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987)). "An agency also abuses its discretion when its decision is contrary to logic and reason." *Id.*

Oil Co.'s applications, the court found that the Commission abused its discretion by failing to consolidate the evidence of public need when considering Oil Co.'s application for certification.[594]

The court remanded the decision to the Commission to make a comparative review based on the whole record of both the Ash Corp. and Oil Co. applications.[595] The court further required the Commission to "enter additional findings of fact and conclusions of law, based upon the entire consolidated record," to determine whether the grant of a certificate to Oil Co. would be, "inconsistent with the public convenience and necessity" and whether Oil Co. is, "fit, willing and able to provide the transportation to be authorized by the certificate and to comply with the Motor Carrier Act and regulations of the commission."[596]

This decision clearly defines the State Corporation Commission's legal responsibilities in certifying common carriers within New Mexico by enforcing regulations which define statutory conduct by the Commission. Further, this decision demonstrates that certification hearings which involve more than one applicant allow evidence presented by one applicant to be used for all other applicants.

VI. CONCLUSION

New Mexico courts were busy during the survey period, deciding cases involving commercial law. Many of the decisions had a great impact on the course of commercial law. Even in those cases in which commercial law did not change, the court wisely expanded, explained, and established the relevant areas of law.

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594. *Oil Transp. Co.*, 110 N.M. at 573, 798 P.2d at 174.
595. *Id.* at 574, 798 P.2d at 175.
596. *Id.* at 573, 798 P.2d at 174 (1990); *see* N.M. STAT. ANN. § 65-2-84(D)(1) (Repl. Pamp. 1990).