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### Corporate Law - Formulating and Applying a Proper Purpose to a Books and Records Inspection Request - *Schein v. Northern Rio Arriba Electric Cooperative, Inc.*

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# CORPORATE LAW—Formulating and Applying a “Proper Purpose” Analysis to a Books and Records Inspection Request—*Schein v. Northern Rio Arriba Electric Cooperative, Inc.*

## I. INTRODUCTION

In *Schein v. Northern Rio Arriba Electric Cooperative, Inc.*<sup>1</sup> the New Mexico Supreme Court held that a rural electric cooperative member could inspect cooperative books and records when she desired to inform herself and others of the records’ contents through publication of her findings.<sup>2</sup> The court allowed inspection because the member stated a “proper purpose.”<sup>3</sup> The *Schein* opinion sets guidelines for what constitutes a “proper purpose” when members request information from cooperatives and when shareholders request information from companies. The court’s decision is significant because it establishes, for the first time in New Mexico, that a “proper purpose” for access to corporate information should reasonably relate to the shareholder’s interest and should not harm the cooperative/corporation or its members/shareholders.<sup>4</sup> This Note examines the court’s formulation of the “proper purpose” boundaries and discusses the significance of the decision for New Mexico business enterprises, their members and shareholders, and also for business development in our state.

## II. STATEMENT OF THE CASE<sup>5</sup>

Maureen Schein (Schein) lives in Rio Arriba County, New Mexico, within the area served by the Northern Rio Arriba Electric Cooperative (NORA), a “cooperative nonprofit membership corporation”<sup>6</sup> organized under the Rural Electric Cooperative Act.<sup>7</sup> She receives her electricity from NORA and is a member in good standing. Schein works for the *Rio Grande Sun* newspaper in Española, New Mexico.

In 1992, Schein requested seven years of financial information from NORA, which NORA refused. After Schein filed a mandamus action, NORA voluntarily surrendered the documents and Schein dismissed her suit. In 1994, Schein requested NORA’s budget materials for that year. NORA granted her request with the exception of one excluded page. A subsequent demand letter from Schein’s counsel led to the full disclosure of the missing document. That same year, Schein also asked for access to salary figures of all NORA employees. When NORA refused, Schein brought her second mandamus action in which she sought not only current salary levels but also access to present and future budget records. Although the district court

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1. 122 N.M. 800, 932 P.2d 490 (1997).

2. *See id.* at 803-04, 932 P.2d at 493-94.

3. *See id.* at 803, 932 P.2d at 493.

4. *See id.*

5. Unless otherwise noted, all factual references in this section refer to *Schein*, 122 N.M. at 801-03, 932 P.2d at 491-93.

6. *See* N.M. STAT. ANN. § 62-15-2 (Repl. Pamp. 1993).

7. N.M. STAT. ANN. §§ 62-15-1 to -33 (Repl. Pamp. 1993). Subsection 62-15-3(Q) brings cooperatives organized under the Act within the scope of the Business Corporation Act, N.M. STAT. ANN. §§ 53-11-1 to -18-12 (Repl. Pamp. 1993 & Supp. 1996), for “activities and transactions for the mutual benefit of its members and patrons” not discussed in the Rural Electric Cooperative Act or the cooperative’s articles of incorporation or bylaws. *See id.* § 62-15-3(Q) (Repl. Pamp. 1993).

dismissed this action, because disclosure might violate privacy interests of NORA employees, it indicated that Schein should have access to other financial records, books and reports.

In 1995, Schein filed a third mandamus action, which is the subject of this case. Earlier that year, she requested copies of legal bills that two law firms had submitted to NORA for defending the cooperative in the previous two mandamus actions. When Schein's request for billing information led NORA to produce only edited copies of the requested bills, Schein filed suit.

Following an *in camera* review of the itemization sought, the district court granted Schein's writ. Not only did it provide for disclosure of the redacted billing information, the district court gave Schein prospective access to NORA's books and records upon reasonable request. Additionally, the writ of mandamus retained jurisdiction for the district court in the event that NORA refused to disclose a requested item. On appeal, the New Mexico Supreme Court found that the writ exceeded its permissible scope. However, the supreme court affirmed the district court's decision to permit inspection. Publication of the rural electric cooperative's legal bill was therefore a proper purpose.

### III. BACKGROUND

#### A. Other Jurisdictions

Corporate shareholders' long-recognized right of inspection has evolved in their favor, entrenched not only in common law but in state statutes as well.<sup>8</sup> The law confers similar inspection rights not only on corporate shareholders, but also on other business forms, including cooperatives.<sup>9</sup> However, the inspection right is limited. Before exercising the right, a shareholder must have a "proper purpose," a nebulous term that has spawned much litigation.<sup>10</sup> This section will summarize the evolution of American shareholder inspection rights, discussing the types of organizations affected and focusing on the proper purpose requirements. It will also examine the embryonic stage of New Mexico case law within the existing state statutory framework.

#### 1. Right of Inspection

Historically, a shareholder had a right to inspect corporate records in English common law.<sup>11</sup> This right of inspection survived in America, with qualifications.<sup>12</sup> Generally stated, the common law allowed a shareholder, acting in good faith, to inspect corporate records at reasonable times and for proper purposes.<sup>13</sup> However,

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8. See Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 336-40 (1996).

9. See 5A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2227, at 424 (perm. ed. rev. vol. 1995).

10. See *id.* § 2222, at 386.

11. See, e.g., *In re Steinway*, 53 N.E. 1103, 1105 (N.Y. 1899).

12. See FLETCHER, *supra* note 9, § 2214, at 342.

13. See *id.*

inspection was not granted to satisfy a shareholder's idle curiosity<sup>14</sup> or in broad recognition of an unqualified right.<sup>15</sup>

In the nineteenth century, with the growth in complexity and numbers of corporations, shareholders desired a more reliable mechanism to promote the flow of information between the two groups.<sup>16</sup> The ensuing codification of the common law right of inspection, with its proper purpose requirement, initially placed a significant burden upon the shareholder and bred litigation.<sup>17</sup> Thus, many state legislatures abandoned the proper purpose requirement as too restrictive, which, in turn, led to shareholder abuse of access rights.<sup>18</sup> Finally, the pendulum swung back towards where it points today, with the proper purpose limitation restored.<sup>19</sup>

Now, every United States jurisdiction has codified the shareholder right of inspection,<sup>20</sup> which most state courts interpret as expanding the pre-existing common law right.<sup>21</sup> Generally stated, inspection rights extend "(1) to qualified shareholders (2) upon written demand (3) at reasonable times and (4) for a proper purpose."<sup>22</sup>

The right of shareholder inspection stems from the shareholder's property interest in the business.<sup>23</sup> Inspection embodies the shareholder's need for self-protection.<sup>24</sup> Thus, because shareholders are owners interested in the corporation and its officers, who act on behalf of the corporation's investors, the law provides a means for promoting accountability.<sup>25</sup>

## 2. Types of Organizations

All corporations, whether closely or publicly held, are subject to inspection by their shareholders.<sup>26</sup> Statutes also extend inspection rights to not-for-profit

14. *See, e.g., Guthrie v. Harkness*, 199 U.S. 148, 156 (1905).

15. *See* FLETCHER, *supra* note 9, § 2214, at 342.

16. *See* Thomas, *supra* note 8, at 338.

17. *See* JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, 89 (1970).

18. *See* Thomas, *supra* note 8, at 339. For example, rival corporations would obtain each other's stock to gain access to corporate information, thus acquiring an unearned advantage. *See id.*

19. *See id.* at 340.

20. *See, e.g.,* DEL. CODE ANN. tit. 8, § 220 (Supp. 1996); N.Y. BUS. CORP. LAW § 624 (McKinney 1986); N.M. STAT. ANN. § 53-11-50 (Repl. Pamph. 1993); *see also* MODEL BUS. CORP. ACT §§ 16.01-.04 (1984).

21. *See* FLETCHER, *supra* note 9, § 2215.10, at 353. Statutory right, however, co-exists with common law right absent express legislative intent to restrict common law access to corporate records. *See id.* § 2214, at 342.

22. *Id.* § 2215, at 348. *See also* MODEL BUS. CORP. ACT § 16.02 (1984).

23. *See, e.g., Guthrie v. Harkness*, 199 U.S. 148, 154-55 (1905) (adding that "those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property"); *see also* Durnin v. Allentown Fed. Sav. & Loan Ass'n, 218 F. Supp. 716, 718 (E.D. Pa. 1963); *Kalanges v. Champlain Valley Exposition, Inc.*, 632 A.2d 357, 359 (Vt. 1993).

24. *See* FLETCHER, *supra* note 9, § 2213, at 336.

25. *See* *William Coale Dev. Co. v. Kennedy*, 170 N.E. 434, 435 (Ohio 1930). The court stated: Can anything be plainer than the fact that the owner of property has a clear right to inspect his own property? When the owner of property selects an agent or agents to care for and manage his property, how can that act be held to clothe the agent with power to manage the owner as well as to manage the property, and to prevent the owner from even looking at his own property except he do so pursuant to the rules and restrictions promulgated by the agent, who is wholly without power or authority to formulate any such rules or regulations? Are we to forget and abandon all the law pertaining to the relation of principal and agent?

*Id.*

26. *See* FLETCHER, *supra* note 9, § 2227, at 424.

corporations,<sup>27</sup> condominium associations,<sup>28</sup> cooperatives generally,<sup>29</sup> and to rural electric cooperatives specifically.<sup>30</sup> In the only decision involving rural electric cooperative members' inspection rights, the Idaho Supreme Court interpreted a statutory scheme in which such cooperatives were formed under that state's Nonprofit Corporation Act.<sup>31</sup> Both of Idaho's Nonprofit Corporation Act and Idaho's Business Corporation Act provide for member/shareholder inspection rights.<sup>32</sup> Although the Nonprofit Act controls,<sup>33</sup> the court has held that inspection rights would exist under either statute.<sup>34</sup>

### 3. Proper Purpose

Much of the litigation on shareholder inspection revolves around the propriety of "purpose." In general, a shareholder states a proper purpose when his request: 1) relates to his position as a shareholder;<sup>35</sup> 2) is lawful; and 3) is not contrary or harmful to the interest of the corporation.<sup>36</sup> Courts construe the "proper purpose" test liberally in favor of shareholders.<sup>37</sup> Indeed, the burden of proof is on the corporation to prove an improper purpose.<sup>38</sup> In application, courts in other jurisdictions have

27. *See, e.g.*, *Bill Reno, Inc. v. Rocky Mtn. Ford Dealers' Adver. Ass'n*, 378 P.2d 206, 207 (Colo. 1963) (finding inspection rights against corporation formed under not-for-profit statute with no explicit inspection provision).

28. *See, e.g.*, *Meyer v. Board of Managers of Harbor House Condominium Ass'n*, 583 N.E.2d 14, 17 (Ill. App. 1991) (citing state statute holding associations to the same inspection standards as non-profits).

29. *See, e.g.*, *State v. State Cloud Milk Producers' Ass'n*, 273 N.W. 603, 605-06 (Minn. 1937) (stating inspection was allowed in spite of statute's language extending inspection rights only to stock corporations because statute codified broader common law rule without restriction). *Cf. Shaw v. Agri-Mark, Inc.*, 663 A.2d 464, 472 (Del. 1995) (finding that inspection was not allowed because members of a stock cooperative corporation were not shareholders).

30. Only six states, including New Mexico, have electric cooperative legislation. *See* IND. CODE §§ 8-1-13-1 to -42 (Repl. Vol. 1991) (Rural Electric Membership Corporation Act, with provision allowing for state utility regulatory commission to inspect or order inspection of books and records); KY. REV. STAT. ANN. §§ 279.010-.220 (Banks-Baldwin 1996) (nameless act, without inspection provision, allowing for issuance of stock to select members; no "bridge" to business or non-profit acts); MO. ANN. STAT. §§ 394.010-.315 (West 1994 & Supp. 1997) (Rural Electric Cooperative Law, with no inspection provision, no stock, no bridge); OKLA. STAT. tit. 4, §§ 437.00-.30 (1986); S.C. CODE ANN. §§ 33-49-10 to -1330 (Law Co-op. 1976 & Supp. 1997) (Rural Electric Cooperative Act, no inspection provision, no stock, no bridge). *Cf. N.M. STAT. ANN. §§ 62-15-1 to -33* (Repl. Pamp. 1993) (Rural Electric Cooperative Act, no inspection provision, no stock, bridge to Business Corporation Act).

31. *See Stueve v. Northern Lights, Inc.*, 797 P.2d 130, 130-32 (Idaho 1990); *see also* IDAHO CODE §§ 30-301 to -332 (1980) (Idaho has no Rural Electric Cooperative formation law).

32. *See Stueve*, 797 P.2d at 133. The Idaho Nonprofit Act contained a similar yet more explicit bridge than that of New Mexico's Rural Electric Cooperative Act, providing for application of Idaho's Business Corporation Act to nonprofits, except where the two acts conflict. *Compare* IDAHO CODE § 30-303 (1980), *cited in Stueve*, 797 P.2d at 132, *with* N.M. STAT. ANN. § 62-15-3(Q) (Repl. Pamp. 1993).

33. *See Stueve*, 797 P.2d at 132.

34. *See id.* at 133.

35. Unique among most inspection statutes, Delaware has codified this portion of the definition. *See* DEL. CODE ANN. tit. 8, § 220(b) (Repl. Vol. 1991).

36. *See* FLETCHER, *supra* note 9, § 2222, at 386; *see also* MODEL BUS. CORP. ACT § 16.02(c) (1984). The official comment to § 16.02(c) indicates that the section deliberately incorporates "proper purpose" in its formulation so as to encompass the body of case law surrounding this term of art. *See id.* (Official Comment to § 16.02(c)).

37. A study of Delaware inspection cases reveals that stockholders gained access to shareholder lists seventy-eight percent of the time and access to books and records sixty-eight percent of the time. *See* Thomas, *supra* note 8, at 354-56.

38. *See Kalanges v. Champlain Valley Exposition, Inc.*, 632 A.2d 357, 359-60 (Vt. 1993) (citing thirteen cases from as many jurisdictions in the last forty-five years as illustration of a trend away from the common law burden placement upon the shareholder). *But see* CM & M Group, Inc. v. Carroll, 453 A.2d 788, 792 (Del. 1982) (placing

found a wide variety of proper inspection purposes. For example, proper purposes can include determining whether corporate affairs are legally conducted,<sup>39</sup> obtaining a list of other shareholders in hopes of consummating a tender offer,<sup>40</sup> and valuing one's stock.<sup>41</sup> Examples of improper purposes defeating the inspection right include non-specific demands for a shareholder list,<sup>42</sup> strictly personal investment concerns,<sup>43</sup> and to gain a competitive advantage over the party resisting inspection.<sup>44</sup> In a notable line of Delaware cases, improper purposes were rendered irrelevant and did not preclude inspection so long as the shareholder had previously established a proper purpose.<sup>45</sup>

### B. New Mexico

New Mexico statutory law on shareholder inspection of business<sup>46</sup> and non-profit<sup>47</sup> corporation books and records substantially comports with that of a majority of other jurisdictions.<sup>48</sup> Indeed, the inspection right section of the state's Business Corporation

the burden of proof on the shareholder); *Meyer v. Board of Managers of Harbor House Condominium Ass'n*, 583 N.E.2d 14, 17 (Ill. App. Ct. 1991) (placing the burden of proof on the shareholder).

39. *See, e.g., Compaq Computer Corp. v. Horton*, 631 A.2d 1, 4-6 (Del. 1993) (holding that where corporate affairs were being conducted illegally, a stockholder could inspect corporate records to solicit other shareholders to join in litigation).

40. *See, e.g., Davey v. Unitol Corp.*, 585 A.2d 858, 861-62 (N.H. 1991) (even when list would be turned over to an offeror who was otherwise without access to list).

41. When courts accept them as proper, valuation purposes yield access limited to that information necessary to establish value and are not a *carte blanche* grant of access. *See, e.g., Tatko v. Tatko Bros. Slate Co.*, 569 N.Y.S.2d 783, 785 (App. Div. 1991) (granting shareholder of closely-held corporation already in possession of latest financial report greater access to establish "book value"). *Cf. Advance Concrete Form, Inc. v. Accuform, Inc.*, 462 N.W.2d 271, 275-76 (Wis. Ct. App. 1990) (holding that because any shareholder could maintain that an inquiry is to value stock, such a bald assertion would restore an absolute right of inspection, negating state statute).

42. *See, e.g., Weisman v. Western Pac. Indus.*, 344 A.2d 267, 267-69 (Del. Ch. 1975) (holding that stated purpose to communicate with other shareholders "with respect to how [the company] may more profitably and beneficially manage their resources and assets" as too vague and thus improper).

43. *See, e.g., Shabshelowitz v. Fall River Gas Co.*, 588 N.E.2d 630, 633-34 (Mass. 1992) (denying access to stockholder list where purpose was to solicit other shareholders for purchase of their stock, noting that in Massachusetts a shareholder's purpose must advance the company's interest and not just relate to his or her position as such).

44. *See, e.g., Advance Concrete*, 462 N.W.2d at 277-78.

45. *See, e.g., Compaq Computer Corp. v. Horton*, 631 A.2d 1, 6 (Del. 1993); *CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982); *Helmsman Mgmt. Serv., Inc. v. A&S Consultants, Inc.*, 525 A.2d 160, 164 (Del. Ch. 1987). *Cf. Advance Concrete*, 462 N.W.2d at 276 (not granting access, given that the purpose alleged, although proper, was not actually primary).

46. *See* N.M. STAT. ANN. § 53-11-50(B) (Repl. Pamp. 1993). This is part of the Business Corporation Act which states:

Any person who shall have been a holder of record of shares or of voting trust certificates therefor at least six months immediately preceding his demand or who shall be the holder of record of, or the holder of record of voting trust certificates for, at least five percent of all the outstanding shares of the corporation, upon written demand stating the purpose thereof, may examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its relevant books and records of account, minutes and record of shareholders and make extracts therefrom.

*Id.*

47. *See id.* § 53-8-27 (Repl. Pamp. 1983 & Supp. 1996). "All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time." *Id.* The Nonprofit Corporation Act is found at N.M. STAT. ANN. §§ 53-8-1 to -99 (Repl. Pamp. 1983 & Supp. 1996).

48. *See* FLETCHER, *supra* note 9, § 2215, at 348.

Act adopted that of the 1970 Model Business Act nearly verbatim.<sup>49</sup> State case law interpreting the statutes, however, is underdeveloped. In the only significant New Mexico shareholder inspection decision, *Schwartzman v. Schwartzman Packing Co.*,<sup>50</sup> the supreme court interpreted the business corporation inspection law generously, in favor of the shareholders, but with limits.<sup>51</sup> The *Schwartzman* court affirmed that the minority shareholders, who had alleged misappropriation of assets and oppressive conduct on the part of the majority shareholders, could inspect the books of a closely held family corporation.<sup>52</sup> However, the court held that such rights had boundaries, which the trial court properly fixed.<sup>53</sup> At issue in *Schwartzman*, therefore, was the scope of inspection rights, rather than their existence.<sup>54</sup>

Prior to *Schein*, no New Mexico decision had addressed inspection rights for members of cooperatives formed under the Rural Electric Cooperative Act. Indeed, that Act has no inspection provision. However, section 62-15-3(Q) of that Act applies the provisions of the Business Corporation Act<sup>55</sup> to rural electric cooperatives when the Rural Electric Cooperative Act<sup>56</sup> is silent. No New Mexico decision has addressed inspection rights of nonprofit members under the Nonprofit Corporation Act.<sup>57</sup>

#### IV. RATIONALE

The *Schein* decision marks the first New Mexico interpretation of the "proper purpose" requirement. This section traces the court's decision, beginning with its recognition of inspection rights.<sup>58</sup> Next, the focus shifts to the court's extension of inspection rights to cooperatives<sup>59</sup> and its historical discussion and analytical application of the proper purpose requirement.<sup>60</sup> The section ends with an examination of the finding that *Schein* demonstrated a proper purpose.<sup>61</sup>

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49. See N.M. STAT. ANN. § 53-11-50 (Repl. Pamp. 1993). Cf. MODEL BUS. CORP. ACT § 52 (1970). The 1984 revisions to the Model Business Corporation Act somewhat narrow the scope of the earlier provisions, adding, for example, that the records sought must directly relate to the shareholder's purpose. See MODEL BUS. CORP. ACT § 16.02(c) (1984). However, the revised Act still contains, deliberately, the necessity of a "proper purpose." *Id.*

50. 99 N.M. 436, 659 P.2d 888 (1983).

51. See *id.* at 439, 659 P.2d at 891.

52. See *id.* at 438, 659 P.2d at 890.

53. See *id.* at 438-39, 659 P.2d at 890-91. Plaintiffs had been sending teams of three to six accountants, who monopolized the office of the general manager during business hours, hampering his work. After provisions were made to accommodate the accountants after-hours, and after they failed to regularly appear, the district court allowed plaintiffs one final period of review, with as many accountants and for as much time as they wished. The accountants worked for thirty or forty consecutive hours. See *id.*

54. See *id.* at 439, 659 P.2d at 891.

55. N.M. STAT. ANN. §§ 53-11-1 to -18-12 (Repl. Pamp. 1993 & Supp. 1996).

56. N.M. STAT. ANN. §§ 62-15-1 to -32 (Repl. Pamp. 1993).

57. N.M. STAT. ANN. §§ 53-8-1 to -99 (Repl. Pamp. 1983 & Supp. 1996).

58. See *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 803, 932 P.2d 490, 493 (1997).

59. See *id.*

60. See *id.* at 803-05, 932 P.2d at 493-95.

61. See *id.* at 803, 932 P.2d at 493.

### A. *Right of Inspection*

In *Schein*, the court stated the majority rule, codified<sup>62</sup> and applied previously in *Schwartzman*,<sup>63</sup> that a shareholder has the right to inspect corporate records at reasonable times and places, for proper purposes.<sup>64</sup> Indicating its support for a policy of “generous access” in favor of shareholders, and setting the tone for the decision, the court credited a shareholder’s possessory interest in the corporation as grounds for supporting inspection.<sup>65</sup>

### B. *Types of Organizations*

As a statutory basis for Schein’s right of inspection, the *Schein* court cited the inspection provision of New Mexico’s Business Corporation Act.<sup>66</sup> The court did not explain how or why the state’s for-profit laws applied to NORA, a rural electric “cooperative nonprofit member corporation,”<sup>67</sup> nor did it invoke the inspection rights granted under New Mexico’s Nonprofit Corporation Act.<sup>68</sup> Without so stating, the court may have relied on subsection 3(Q) of the Rural Electric Cooperative Act, which provides a bridge to the Business Corporation Act for “such other and further activities and transactions for the mutual benefit of its members and patrons” not already enumerated in the Act or the cooperative’s articles of incorporation or bylaws.<sup>69</sup>

Regardless of whether or not the court invoked subsection 3(Q) implicitly, or simply overlooked it, the court bolstered its extension of inspection rights to cooperatives by analogy to other jurisdictions.<sup>70</sup> The *Schein* court cited with approval<sup>71</sup> cases in which other courts allowed inspection of a non-stock, for-profit mutual corporation comprised of capital contributing members,<sup>72</sup> a non-profit corporation by a dissolved corporate member,<sup>73</sup> and a non-stock, for-profit association formed under a state Cooperative Act.<sup>74</sup> The court also noted a Delaware decision, which denied cooperative members’ inspection rights.<sup>75</sup> In that case, *Shaw v. Agri-Mark, Inc.*, the state court of appeals certified a question to the Delaware Supreme Court asking if inspection was allowed for non-stockholding equity capital supplying members of a cooperative for which only directors were issued limited stock.<sup>76</sup> In answer, the Delaware court held that where members and stockholders co-

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62. See N.M. STAT. ANN. § 53-11-50 (Repl. Pamp. 1993).

63. See *Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 439, 659 P.2d 888, 891 (1983).

64. See *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 803, 932 P.2d 490, 493 (1997).

65. *Id.*

66. See *id.* (citing N.M. STAT. ANN. § 53-11-50 (Repl. Pamp. 1993)).

67. As defined by the Rural Electric Cooperative Act under which NORA was formed. See N.M. STAT. ANN. § 62-15-2 (Repl. Pamp. 1993).

68. See *id.* § 53-8-27 (Repl. Pamp. 1983 & Supp. 1996)

69. See *id.* § 62-15-3(Q) (Repl. Pamp. 1993).

70. See *Schein*, 122 N.M. at 803, 932 P.2d at 493.

71. See *id.*

72. See *Fleisher Dev. Corp. v. Home Owners Warranty Corp.*, 856 F.2d 1529, 1530-31 (D.C. Cir. 1988).

73. See *Bill Reno, Inc. v. Rocky Mtn. Ford Dealers’ Adver. Ass’n*, 378 P.2d 206, 207 (Colo. 1963).

74. See *State v. State Cloud Milk Producers’ Ass’n*, 273 N.W. 603, 604-05 (Minn. 1937).

75. See *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 803, 932 P.2d 490, 493 (1997) (citing *Shaw v. Agri-Mark, Inc.*, 67 F.3d 18, 19 (2d Cir. 1995)).

76. See *Shaw v. Agri-Mark, Inc.*, 67 F.3d 18, 19 (2d Cir. 1995).



exist, they possess distinct rights, which, for members, do not include the right of inspection reserved under the common law specifically for shareholders.<sup>77</sup>

### C. *Proper Purpose*

In reaching its decision in *Schein*, the court placed the burden of proof upon the respondent to prove a shareholder's improper purpose.<sup>78</sup> The *Schein* court considered an improper purpose to be one harmful to the corporation.<sup>79</sup> "Consistent with this policy of allowing generous access," the court assumed shareholders act in good faith and have a proper purpose.<sup>80</sup> Further, bare assertions of impropriety will not suffice to stop inspection, as the court noted in *Curkendall v. United Federation of Correction Officers, Inc.*<sup>81</sup> The *Schein* court cited *Curkendall* with approval.<sup>82</sup> There, the corporation's motion to deny inspection, supported with affidavits of the shareholder's bad faith, met the corporation's burden of showing improper purpose.<sup>83</sup> Thus, a corporation in New Mexico must enunciate "strong and articulable" reasons for denying inspection.<sup>84</sup>

The *Schein* court's determination of what constitutes a proper shareholder purpose relied on other jurisdictions favoring access to corporate records for legitimate shareholder concerns.<sup>85</sup> In the course of its survey, the court first found that a proper purpose should reasonably relate to legitimate shareholder interests, such as assessing corporate investments.<sup>86</sup> The court then found that a proper purpose should not harm the corporation or other shareholders.<sup>87</sup>

According to the opinion, *Schein* gave three primary purposes for her desire to inspect NORA's legal bills.<sup>88</sup> First, she wanted to inform herself of the bills' contents; second, she hoped to inform other cooperative members; and third, she

77. See *Shaw v. Agri-Mark, Inc.*, 663 A.2d 464, 470 (Del. 1995). Both parties conceded that inspection was not warranted under Delaware statute reserving inspection rights only for "a stockholder of record." *Id.* at 468. The Delaware Supreme Court had not considered a case such as *Schein* questioning inspection rights of a member of a non-stock corporation under statutory or common law. See *id.* at 469.

78. See *Schein*, 122 N.M. at 803, 932 P.2d at 493.

79. See *id.* at 805, 932 P.2d at 495.

80. *Id.* at 803, 932 P.2d at 493.

81. 438 N.Y.S.2d 872, 874 (App. Div. 1985).

82. See *Schein*, 122 N.M. at 803, 932 P.2d at 493.

83. See *Curkendall v. United Fed'n of Correction Officers, Inc.*, 438 N.Y.S.2d 872, 874 (App. Div. 1985).

84. *Schein*, 122 N.M. at 803, 923 P.2d at 493.

85. See *Schein*, 122 N.M. at 803, 932 P.2d at 493-4. (citing *Guthrie v. Harkness*, 199 U.S. 148 (1905); *Uldrich v. Datasport, Inc.*, 394 N.W.2d 286 (Minn. Ct. App. 1984); *State ex. rel. Kennedy v. Continental Boiler Works, Inc.*, 807 S.W.2d 164 (Mo. Ct. App. 1991); *Davey v. Unital Corp.*, 585 A.2d 858 (N.H. 1991); *Tatko v. Tatko Bros. Slate Co.*, 173 A.2d 917 (N.Y. 1991); *Carter v. Wilson Constr. Co.*, 348 S.E.2d 830 (N.C. 1986); *Shaw v. Hurst*, 582 A.2d 87 (Pa. 1990); *Sto-Rox Focus on Renewal Neighborhood Corp. v. King*, 398 A.2d 241 (Pa. 1979)).

86. See *Schein*, 122 N.M. at 804, 932 P.2d at 494 (finding "shareholder's request for information about corporation's investments reasonably germane to status as shareholder"). For this proposition, the court cited *Advance Concrete Form v. Accuform, Inc.*, 462 N.W.2d 271 (Wis. Ct. App. 1990). That decision, however, discussed the propriety of a request to value a shareholder's own investment in the corporation. See *Advance Concrete*, 462 N.W.2d at 275. The court there found such a purpose met the "reasonably related" test. See *id.* But the court further found that purpose unbelievable and thus disallowed inspection. See *id.*

87. See *Schein*, 122 N.M. at 804, 932 P.2d at 494.

88. See *id.* Although the court here characterized *Schein*'s desire to publish newsworthy information as one of three primary purposes, it later relegated this purpose to secondary status. See *id.* at 805, 932 P.2d at 495. In so doing, the court declined to hold that secondary purposes did not matter. The potential for harm from a secondary purpose could still defeat inspection. See *id.*

proposed to notify the general public of any newsworthy information.<sup>89</sup> In finding that these purposes reasonably related to her membership in the cooperative, the court validated her interest in the cooperative's use of legal services.<sup>90</sup> The court reasoned that contracting for legal services and the value of services received can affect the value of a share or rural electric cooperative capital account.<sup>91</sup> Thus, shareholders' and members' interest in such legal services questions reasonably relates to their position as shareholders and members concerned about their investment.<sup>92</sup>

The court further found none of Schein's purposes harmful to the corporation or other shareholders.<sup>93</sup> Proposed publication of the legal billing information that Schein sought, in this situation, would not defeat inspection.<sup>94</sup> In so finding, the supreme court deferred to the district court, which it deemed better positioned to assess the propriety of the redacted information that the district court had reviewed *in camera*.<sup>95</sup> That *Schein* court found the redacted information, even if published, would not harm NORA.<sup>96</sup> Thus, because Schein's request reasonably related to her role as a shareholder and did not pose any harm to NORA, Schein met the proper purpose test.<sup>97</sup>

## V. ANALYSIS

By its selective treatment of Schein's stated purposes, the *Schein* court seemed determined to grant inspection and to find publication to be a proper purpose. In doing so, the court rejected arguments that the billing information sought was confidential information and inappropriate for newspaper publication.<sup>98</sup> The court said nothing about a potentially improper purpose raised in deposition,<sup>99</sup> only partially addressed another,<sup>100</sup> and instead discussed a purpose that Schein never alleged.<sup>101</sup>

The *Schein* court could have barred disclosure, even with a finding of proper purpose, had it adopted NORA's argument that the attorney-client privilege protected the redacted billing information.<sup>102</sup> While recognizing that materials subject to the

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89. *See id.* at 804, 932 P.2d at 494.

90. *See id.*

91. *See id.* at 804-05, 932 P.2d at 494-95.

92. *See id.*

93. *See id.* at 805, 932 P.2d at 495.

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See* Appellant's Brief-In-Chief at 15-16, *Schein v. Northern Rio Arriba Elec. Coop.*, 122 N.M. 800, 932 P.2d 490 (1997) (No. 23,333) (suggesting curiosity as a proper purpose).

100. *See Schein*, 122 N.M. at 805, 932 P.2d at 495 (discussing the impact on "the capital accounts of NORA"). *Cf.* Appellee's Answer-Brief-In-Chief at 14, *Schein* (No. 23,333) (proposing inspection "to investigate matters bearing on the value of her capital account" as a proper purpose).

101. *See Schein*, 122 N.M. at 804, 932 P.2d at 495 (suspicion of mismanagement as a proper purpose).

102. *See id.* N.M. R. Civ. P. 11-503(B) (1986), provides in part that: "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." *Id.* Rule 11-503(A) defines a confidential communication as one "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.*

attorney-client privilege may be kept from shareholders, the court held that the limits of the privilege do not extend to billing information.<sup>103</sup> The court likened the materials sought to information about the purpose for which NORA retained an attorney, the steps the attorney took in fulfilling his obligations, and the general nature of legal services provided, none of which are confidential and protected.<sup>104</sup> The court also rejected NORA's assertion of confidentiality, holding that a mere assertion of sensitivity would lead to unwarranted protection.<sup>105</sup> Thus, the court's action reinforces existing authority holding that simple inquiries into the dates legal services are rendered, the time allotted, and the nature of the work performed are not privileged.<sup>106</sup> More importantly, it limits corporate options in searching for a device to protect against disclosure of information relating to the company's dealings with its lawyers. A question of shareholder access will not create exceptions for traditional boundaries of attorney-client privilege.

The common-law shareholder right of inspection, purportedly adopted by the court in *Schein*,<sup>107</sup> denied that right when its object was merely to satisfy curiosity.<sup>108</sup> The court's decision, however, does little to clarify the line in New Mexico between mere curiosity and legitimate proper purpose. The court defined Schein's goal as to "inform" herself and others about the bills' contents, and perhaps publish her findings.<sup>109</sup> However, certain of her statements taken in deposition could lead one to believe that Schein was engaged in nothing more than the sort of fishing expedition frowned upon by the common law.<sup>110</sup> Perhaps due to Schein's invocation of several other purposes, or the fact that curiosity underlies every request for shareholder access, the *Schein* court chose not to address statements suggestive of mere inquisitiveness.

Another of Schein's previously stated purposes not expressly recognized and inadequately addressed by the court was the valuation of her cooperative capital account.<sup>111</sup> Given the type and volume of material previously released to Schein, she probably already had information sufficient to value her account at the cooperative.<sup>112</sup> Release of itemized legal billing information would not further that purpose. The court, however, made no mention of this intention which it could have used to deny

103. See *Schein*, 122 N.M. at 805, 932 P.2d at 495.

104. See *id.* at 805-06, 932 P.2d at 495-96.

105. See *id.* at 806, 932 P.2d at 496.

106. See *id.*; see also *Colton v. United States*, 306 F.2d 633, 636 (2d Cir. 1962); *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 483 (E.D. Pa. 1978).

107. See *Schein*, 122 N.M. at 803, 932 P.2d at 493.

108. See *FLETCHER*, *supra* note 9, § 2219, at 368.

109. *Schein*, 122 N.M. at 804-05, 932 P.2d at 494-95.

110. See Appellant's Brief-In-Chief at 15-16, *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 932 P.2d 490 (1997) (No. 23,333). "[S]he 'thought it would be interesting to see what issues attorneys had been asked to address for the Co-op' and 'was interested to see if [NORA's counsel] had been dealing with my case since March of '94, as well as what other issues [counsel] had been dealing with.'" *Id.* She also wanted to screen the information and "if it was interesting to me" to publish it to let readers decide if the attorney's fees in question were reasonable. *Id.* at 16.

111. See Appellee's Answer Brief at 14, *Schein* (No. 23,333) (claiming investigation of "matters bearing on the value of her capital account" are a proven, and proper, objective).

112. See *Schein* 122 N.M. at 802, 932 P.2d at 492 (indicating NORA had previously disclosed a vast array of financial information); see also Appellant's Brief-In-Chief at 17, *Schein* (No. 23,333) (citing an admission by Schein that she needs no further information to value her capital account).

Schein access. It instead focused on a general recognition that a corporation's use of legal service affects the value of a shareholder's investment.<sup>113</sup> The court nevertheless ignored evidence that, for valuation purposes, would render access to billing narrations irrelevant. Thus, the court's decision leaves open the question of whether an unsupported assertion of intent to value one's investment suffices to constitute a proper purpose in New Mexico.

Although the *Schein* court omitted discussion of some of Schein's purposes, it did discuss a purpose that Schein did not assert.<sup>114</sup> As a defense, NORA argued that Schein had no basis for suspecting improper behavior on the part of NORA management.<sup>115</sup> Indeed, Schein made no such allegation. The court, however, dispelled the notion that successful shareholder plaintiffs, like those in *Schwartzman v. Schwartzman Packing Co.*,<sup>116</sup> must suspect and allege improper managerial behavior before requesting inspection.<sup>117</sup> According to the court, requiring such suspicions might actually make mismanagement more likely and would also deny shareholders their ownership rights.<sup>118</sup> Thus, the *Schein* court's clarification of *Schwartzman*, dispensing with the need to suspect and allege managerial abuses, further tips the balance in shareholders' favor.

## VI. IMPLICATIONS

The *Schein* decision may adversely affect companies and their shareholders, and cooperatives and their members, in New Mexico. Among managers, the *Schein* decision should promote accountability. A wide range of business forms should now be on notice that their shareholders or members are afforded a general presumption of propriety when seeking access to corporate books, records and probably shareholder lists. New Mexico cooperative members will better appreciate their highly respected ownership rights. All parties interested in the impact of law on economic development, including New Mexico courts, may well be concerned if New Mexico adopts a general rule that publication is always a proper purpose. Although the publication purpose should clearly be limited to the facts of this case, the analysis in *Schein* may nonetheless discourage business enterprises considering incorporating here. This section will therefore discuss *Schein's* implications for managers and shareholders, and will then discuss how business enterprises and New Mexico courts might react.

### A. Management Perspective

Leaving aside consideration of propriety of purpose, which was not an issue in her previous requests and legal battles with NORA, Schein obtained access earlier to contracts, budgets, financial statements, audit reports, invoices, bank statements, reconciliations, check registers, expense account information and management salary

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113. See *Schein*, 122 N.M. at 804, 932 P.2d at 494.

114. See *id.*

115. See *id.*

116. 99 N.M. 436, 438-39, 659 P.2d 888, 890-91 (1983).

117. See *Schein*, 122 N.M. at 804, 932 P.2d at 494.

118. See *id.*

data.<sup>119</sup> The only information the courts denied her were staff salary figures.<sup>120</sup> The message to New Mexico corporations, therefore, is to prepare to disclose to stockholders in nearly unlimited fashion.

When considering propriety of purpose, the court's placement of the burden of proof further favors disclosure. New Mexico corporations must state "strong and articulable" reasons for denying shareholder access to corporate records.<sup>121</sup> For management, this burden will result in the need for investigation and support to overcome the shareholder's presumption of proper purpose. Further, allegations, even if supported, that the shareholder has no basis for suspecting improper or illegal actions on the part of management will not militate against shareholder inspection.<sup>122</sup> Therefore, the corporate lawyer's burden will be to demonstrate the potential for harm to the corporation with well-supported pleadings to meet the high standard.<sup>123</sup>

Although not successful for NORA here, the court in *Schein* recognized that arguments of confidentiality and privilege might also succeed in stopping disclosure.<sup>124</sup> However, such approaches are likely to be less effective because they merely state limited varieties of harm. A court may limit shareholder disclosure by finding that narrow spans of requested information would violate privacy or privilege rights if divulged, and thus may limit, rather than fully preclude shareholder disclosure. Arguing that access would harm individuals within the organization or the relationships between the company and outside professionals may serve as a partial bar to inspection. On the other hand, arguing access to information may harm the company as a whole could effectively block inspection.

### B. Shareholder Perspective

Rural electric cooperative members, as well as shareholders of New Mexico corporations, may be concerned that a broad reading of *Schein* will over-expose an entity's activities to public view. All parties, however, should bear in mind that *Schein* pursued a rather restricted scope of information. *Schein* sought access to the redacted narration of NORA's legal bills.<sup>125</sup> NORA previously revealed to her the totals of these bills.<sup>126</sup> In deciding whether publication of the narratives on NORA's legal bills would be harmful to NORA, and thus an improper purpose, the court relied heavily on the district court's finding of harmlessness.<sup>127</sup> The court did not rule, nor was it asked to rule, on publication as a proper purpose for any of the

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119. *See id.* at 802, 932 P.2d at 492.

120. *See id.* The district court reasoned that distribution of such information might violate employees' privacy interests, vitiating disclosure. *See id.*

121. *See id.* at 803, 932 P.2d at 493.

122. *See id.* at 804, 932 P.2d at 494.

123. *See id.* at 805, 932 P.2d at 495.

124. *See id.* at 806, 932 P.2d at 495-96.

125. *See id.* at 802, 932 P.2d at 492.

126. *See id.*

127. *See id.* at 805, 932 P.2d at 495. The court here cited *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (stating that the district court is in the best position to weigh parties' needs and interests). That case involved publication of information gleaned in discovery, for some of which the Supreme Court held barring publication would not violate First Amendment rights. *See Seattle Times*, 467 U.S. at 31. The *Schein* court may have wanted to stave off a constitutional question in referring to a case with comparable facts for an unrelated and relatively minor proposition concerning the weight of a district court's review.

previous disclosures NORA made to Schein.<sup>128</sup> Instead, the court accepted possible publication as appropriate only for the limited billing information that it characterized as “ministerial”<sup>129</sup> and otherwise not damaging if disclosed to the public.<sup>130</sup> Further, given the unprecedented acceptance of publication as a proper purpose, the practitioner arguing for such a purpose may be advised to limit *Schein*’s support for such a proposition to its context.

However, the shareholder advocate in New Mexico need not hesitate to allege valuation as a proper purpose. For those representing stockholders of closely held businesses where financial information may be less forthcoming than from a large, public entity with a regular reporting timetable,<sup>131</sup> a desire to value one’s investment has been an acceptable purpose in most jurisdictions,<sup>132</sup> and New Mexico promises to be no exception. Indeed, dicta in *Schein* indicates New Mexico’s intent to follow the majority rule.<sup>133</sup> New Mexico practitioners, however, should note three points of caution. First, valuation materials in many instances may already be available to the shareholder through proactive corporate disclosures and shareholders’ meetings. *Schein*, however, had sufficient financial assessment materials<sup>134</sup> and nonetheless argued valuation as proper purpose.<sup>135</sup> Fortunately for her, the court did not deny her.<sup>136</sup> The shareholder with a smaller array of purposes may not be so lucky. Second, disclosure, if granted, will probably be limited to only that information necessary for valuation purposes. Third, valuation purposes will likely protract litigation as a district court sifts through volumes of records to determine which are necessary and which are not.

Further, the New Mexico shareholder need not fear alleging mismanagement as a proper purpose. Although *Schein* did not raise the issue, the opinion is replete with language recognizing that a shareholder’s reasonable suspicion of mismanagement will warrant inspection.<sup>137</sup> New Mexico has already recognized the legitimacy of that purpose in *Schwartzman v. Schwartzman Packing Co.*<sup>138</sup> Because the issue there was

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128. Schein used previously disclosed information as material for news stories in the *Rio Grande Sun*, publication of which had not been litigated. See *Schein*, 122 N.M. at 802, 932 P.2d at 492.

129. *Id.* at 806, 932 P.2d at 496.

130. See *id.* at 805, 932 P.2d at 495.

131. The Securities and Exchange Act of 1934, 15 U.S.C. § 78l(g)(1) (1994), requires companies with 500 or more shareholders and assets greater than \$10 million, as modified by SEC rule, see 17 C.F.R. § 240.12g-1 (1997), to file annual or other comparable reports with the SEC, see *id.* §§ 240.13a-1 to .13a-16, and make disclosures to shareholders, see *id.* §§ 240.14a-1 to .14f-1. The purpose of these regulations is, in part, to promote accurate valuation. See 15 U.S.C. § 78b(3) (1994).

132. See FLETCHER, *supra* note 9, § 2224, at 404.

133. See *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 804, 932 P.2d 490, 494 (1997) (“A proper purpose can include a desire to place a monetary value on stock interests . . . Like any business choice, the selection of legal services and a determination of the value of services received are relevant inquiries to a party concerned about his investment in the entity . . .”).

134. See Appellant’s Brief-in-Chief at 17, *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 932 P.2d 490 (1997) (No. 23,333).

135. See Appellee’s Answer-Brief-in-Chief at 14, *Schein* (No 23,333).

136. See *Schein* 122 N.M. at 803, 932 P.2d at 493.

137. See *id.* at 804, 932 P.2d at 494 (“Reasonable purpose can also include inspection of corporate records to ensure that a nonprofit is managed properly . . . [S]uch access allows for . . . deterrence of abuses by corporate directors.”).

138. 99 N.M. 436, 438, 659 P.2d 888, 890 (1983).

the scope of relief, the supreme court presumed the shareholders' propriety of purpose in successfully alleging managerial wrongdoing.<sup>139</sup>

Supported allegations of mismanagement can serve as a springboard to other actions. For example, mismanagement can be the purpose for inspection when a disgruntled shareholder is upset with a lack of dividends. Because under New Mexico statute, a corporation is under no obligation to pay a dividend,<sup>140</sup> simple allegations to that effect will not succeed. However, if the basis for a failure to pay dividends is managerial impropriety, as is often the case, the court may grant inspection, which in turn could lead to larger relief.<sup>141</sup> Mismanagement can also provide support for access to a company's shareholder list. Management may be so bad that a shareholder suing the corporation can successfully gain access to the list to recruit other plaintiffs from among shareholder ranks to join in a lawsuit.<sup>142</sup>

A shareholder's mere recitation from the index of previously proven shareholder purposes should not necessarily guarantee access. Cloaking one's true purpose intentionally may not be effective. In a well-reasoned decision, *Advance Concrete Form, Inc. v. Accuform, Inc.*,<sup>143</sup> which found all of the shareholder's stated purposes proper, a Wisconsin court refused to allow inspection because those purposes were simply unbelievable.<sup>144</sup> In that case, both parties were fierce competitors in the same industry.<sup>145</sup> After hiring away an employee from its smaller competitor, the larger company purchased the employee's stock, thus acquiring an interest in the competing corporation.<sup>146</sup> The new shareholder then requested access to its rival's books and records, ostensibly to value its investment and to assess the previous year's performance.<sup>147</sup> While the *Advance Concrete* court found such purposes proper, it denied inspection because of a past history of stiff competition, the potential harm to the smaller company from disclosure of vital records, and the admitted lack of a market for its stock.<sup>148</sup> The *Advance Concrete* court found the larger company's stated purposes unbelievable because of the company's underlying motive.<sup>149</sup>

New Mexico shareholders therefore should be wary of the court's power to assess shareholder veracity. The *Schein* court couched this warning in its language discussing secondary purpose. The court, in a marked departure from the Delaware rule that an ulterior secondary purpose is irrelevant,<sup>150</sup> cautioned against improper secondary purposes that might defeat proper primary purposes.<sup>151</sup> Although the *Schein* court's admonition differs slightly from that of the Wisconsin Court of

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139. *See id.* at 438-39, 659 P.2d at 890-91.

140. *See* N.M. STAT. ANN. § 53-11-44 (Repl. Pamp. 1993).

141. *See, e.g.,* Kelley v. Axelson, 687 A.2d 268, 272 (N.J. Super. Ct. App. Div. 1997).

142. *See, e.g.,* Compaq Computer Corp. v. Horton, 631 A.2d 1, 2 (Del. 1993).

143. 462 N.W.2d 271 (Wis. Ct. App. 1990).

144. *See id.* at 276.

145. *See id.* at 277.

146. *See id.*

147. *See id.* at 273.

148. *See id.* at 276-77.

149. *See id.* at 276-78.

150. *See supra* note 45 and accompanying text.

151. *See Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 805, 932 P.2d 490, 495 (1997). Although the court previously considered Schein's proposal of publication to be a primary purpose, *see id.* at 804, 932 P.2d at 494, here it implied that publication was instead a secondary purpose, but nonetheless proper, *see id.* at 805, 932 P.2d at 495.

Appeals, which was faced instead with an improper primary purpose, the result is comparable: improper purposes harmful to the corporation, stated or implicit, will not be tolerated.

### C. *Effect on New Mexico's Business Climate*

The *Schein* decision in many ways follows the national norm. While no court has ever considered publication as a proper purpose, others have affirmed inspection rights for members of rural electric cooperatives<sup>152</sup> and found that legal bills targeted for inspection do not necessarily qualify for the attorney-client privilege.<sup>153</sup> The *Schein* court cited the same "proper purpose" test that others use.<sup>154</sup> It also placed the burden of proving an improper purpose on the corporation, as many other jurisdictions do.<sup>155</sup> Additionally, the *Schein* court ultimately recognized the shareholder's right of inspection, as the majority of courts do that face shareholder inspection requests.<sup>156</sup> In application, however, the *Schein* decision may be a troublesome signal regarding New Mexico's sensitivity to the justifiable needs of corporate management.

The recognition that publication of information gleaned from inspection is a proper purpose is without precedent. While *Schein* could do little harm if limited to its facts, future New Mexico court cases may not. True, the court said publishing the legal bills is an acceptable purpose "in this instance."<sup>157</sup> The opinion, however, fails to explicitly acknowledge the glaring difference between *Schein* and the vast majority of shareholder inspection decisions—the public nature of the targeted organization. NORA, for all intents, is a nonprofit public utility,<sup>158</sup> run without competition for the benefit of captive members who own no stock.<sup>159</sup> Members, therefore, participate not to earn money on an investment but simply because they live in the surrounding area and do not want to live without electricity.<sup>160</sup> Although the court did cite decisions<sup>161</sup> involving non-profits,<sup>162</sup> cooperatives<sup>163</sup> and utilities,<sup>164</sup> it failed to distinguish *Schein* explicitly from "true" inspection cases involving business corporations and stockholders.

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152. See *Stueve v. Northern Lights, Inc.*, 797 P.2d 130, 131 (Idaho 1990).

153. See *Meyer v. Board of Managers of Harbor House Condominium Ass'n*, 583 N.E.2d 14, 18 (Ill. App. Div. 1991).

154. See *Schein*, 122 N.M. at 804, 932 P.2d at 494; FLETCHER, *supra* note 9, § 2222, at 386 (stating that a request reasonably relates to requestor's position as a shareholder and is not harmful to the corporation).

155. See *Schein*, 122 N.M. at 803, 932 P.2d. at 493; see also *supra* note 37.

156. See *Schein*, 122 N.M. at 803, 932 P.2d at 493; Thomas, *supra* note 8, at 334-35.

157. See *Schein*, 122 N.M. at 805, 932 P.2d at 495.

158. See N.M. STAT. ANN. § 62-3-3(E), (G) (Repl. Pamp. 1993 & Supp. 1997)

159. Members of New Mexico rural electric cooperatives are like customers of any other regulated New Mexico public utility—they do not have a choice of a service provider. Service areas do not overlap. See *id.* § 62-3-1(B) (all utilities are regulated so as to provide service "without unnecessary duplication and economic waste").

160. Rural electric cooperative members pay some of New Mexico's highest utility rates. See Michael G. Murphy, *Electric Co-op Merger Stalls*, ALBUQ. J., October 24, 1997, at B4.

161. See *Schein*, 122 N.M. at 803-04, 932 P.2d at 493-94.

162. See *Bill Reno, Inc. v. Rocky Mtn. Ford Dealers' Adver. Ass'n*, 378 P.2d 206 (Colo. 1963); *Sto-Rox Focus on Renewal Neighborhood Corp. v. King*, 398 A.2d 241 (Pa. Commw. Ct. 1979).

163. See *State v. State Cloud Milk Producers' Ass'n*, 273 N.W. 603, 604 (Minn. 1937) (non-stock cooperative for dairy farmers).

164. See *Davey v. Unitol Corp.*, 585 A.2d 858 (N.H. 1991) (public utility, shares issued).



Managers of New Mexico business corporations and those shareholders who have a serious economic stake in the continued well-being of their enterprise may worry that they might find the contents of the corporation's books and records spread across the pages of a local paper. The *Schein* opinion does little to allay those fears. Concerned parties should nonetheless strive to restrict *Schein* to its facts. A business corporation facing the threat of publication of records at the hands of a shareholder should, and can, compellingly point to NORA's status as a public utility. The company should point out that a corporation whose purpose is to make money for shareholders is much more subject to harm by publication than NORA. The readership of the local newspaper in which Schein wanted to publish her findings almost certainly consisted of many other cooperative members who, like Schein, obtained their power from NORA. Publication in the town paper would therefore be an effective means of reaching many members quickly. However, as the number of members or shareholders dwindles to a figure more like that of a closely held corporation, publication of corporate information in a widely circulated community paper becomes much less appropriate. To publish sensitive information for a large number of non-members or non-shareholders raises serious questions of propriety. Publication in such a situation would be more inimical to the interest of the business, and thus, an improper purpose.

New Mexico businesses justifiably may be concerned about "this policy of allowing generous access."<sup>165</sup> Certainly the odds are slim that New Mexico shareholders/journalists, more concerned about their roles as journalists rather than as shareholders with an economic stake in their enterprise, will seize on *Schein* as a way to advance their careers. Inspection cases, however, will arise in other contexts. Yet, *Schein* does not set limits on where the "generous access" ends and an improper purpose begins. True, the court indicated that improper "secondary motives" would defeat access.<sup>166</sup> That still begs the question, which *Schein* does not answer: What is an improper purpose? Other jurisdictions have found, for example, that inspection for curiosity or to second-guess corporate decisions were improper purposes.<sup>167</sup> Another decision indicates that use of a privileged position to obtain financial information and then to disclose such information to others could be a breach of a shareholder's fiduciary duty.<sup>168</sup> When a shareholder hopes to sell information taken from inspection to third parties, inspection will be denied.<sup>169</sup> Several courts have found valuation to be a proper purpose but have expressly limited inspection to documents that would further that purpose.<sup>170</sup> Because the *Schein* court declined to

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165. *Schein v. Northern Rio Arriba Elec. Coop., Inc.*, 122 N.M. 800, 803, 932 P.2d 490, 493 (1997).

166. *Id.* at 805, 932 P.2d at 495.

167. *See Logal v. Inland Steel Indus.*, 568 N.E.2d 152, 155-56 (Ill. App. Ct. 1991).

168. *See Leviton Mfg. Co. v. Blumberg*, 660 N.Y.S.2d 726, 729 (App. Div. 1997) (complaint alleging breach reinstated where requestor was a board member and one of only two total shareholders, passing information to a prospective buyer). *See also Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 709 (Del. Ch. 1995) (disclosure to a third party would be improper where it harms the corporation).

169. *See FLETCHER, supra* note 9, §2226.20, at 416. The reader may question whether this was in fact what happened in *Schein*.

170. *See, e.g., Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 709 (Del. Ch. 1995); *Computer Solutions, Inc. v. Gnaizda*, 633 So.2d 1100, 1101-02 (Fla. Dist. Ct. App. 1994); *Tatko v. Tatko Bros. Slate Co.*, 569 N.Y.S.2d 783, 785-86 (App. Div. 1991).

attribute any of these purposes to Schein, and thus did not label them as improper, when or if the court might do so is uncertain.

The *Schein* decision affects companies and cooperatives in New Mexico in many ways. All parties now understand that corporations must be prepared to disclose. Although parties recognize that disclosure for publication is a proper purpose, *Schein* should be largely restricted to its facts. Unfortunately, courts may not so limit the *Schein* decision. *Schein*, therefore, may send discouraging signals about business development in New Mexico.

## VII. CONCLUSION

In *Schein*, the New Mexico Supreme Court defined for the first time what constitutes a “proper purpose” when a shareholder or member requests access to corporate books and records. The court held that a rural electric cooperative member’s desire to see a legal bill submitted to the cooperative, and to then publish its contents, constituted a proper purpose. Because the request reasonably related to her position as a cooperative member, and in this instance, would not harm the cooperative, the court granted inspection. Managers and shareholders of New Mexico corporations are now aware of the court’s willingness to force inspection. However, while the court’s decision helps to define certain proper purposes, it fails to address other potentially improper purposes, thus leaving unanswered questions. Further, the decision to allow publication of inspection information in a newspaper does not sufficiently recognize the target entity’s uniquely public nature. Thus, the decision may discourage shareholders and managers alike, especially if the courts prove willing to apply *Schein* broadly to other inspection cases.

AARON C. VIETS