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COMMERCIAL LAW

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INTRODUCTION

During the survey period the New Mexico appellate courts handed down several significant and interesting decisions in the area of commercial law. Two decisions[1] on revocation and breach of warranty under Article 2 of the New Mexico Uniform Commercial Code[2] (the "U.C.C.") are of particular interest because they appear to conflict with each other.

In the area of real estate, the supreme court dealt with two real estate contract forfeiture cases.[3] The court refused to find wrongful forfeiture in both cases. For the practitioner these cases emphasize the difficulty purchasers experience in persuading courts to find wrongful forfeiture.[4]

One court of appeals decision presents a wealth of law on assignment of partnerships.[5] The remaining cases resolve contract, real estate, insurance, banking and antitrust issues.[6]

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1. International Paper v. Farrar, 102 N.M. 739, 700 P.2d 642 (1985); General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 703 P.2d 169 (1985).

2. N.M. STAT. ANN. §§ 55-2-101 to -725 (1978).

3. Jacobs v. Phillippi, 102 N.M. 449, 697 P.2d 132 (1985); Russell v. Richards, 103 N.M. 48, 702 P.2d 993 (1985).

4. *See infra* note 178.

5. Benton v. Albuquerque National Bank, 103 N.M. 5, 701 P.2d 1025 (Ct. App. 1985).

6. Elephant Butte Resort Marina v. Wooldridge, 102 N.M. 286, 694 P.2d 1351 (1985) (dealing with the term acceptance of goods under the U.C.C., and condition precedent to performance under the U.C.C.); Oda Nursery, Inc. v. Garcia Tree and Lawn, Inc., 103 N.M. 438, 708 P.2d 1039 (1985) (dealing with rejection and revocation under the U.C.C.); Albuquerque Tire Co., Inc., v. Mountain States Telephone and Telegraph Co., 102 N.M. 445, 697 P.2d 128 (1985) (interpreting the criteria for finding an adhesion contract); Guthmann v. La Vida Llena, 103 N.M. 506, 709 P.2d 675 (1985) (delineating the elements required to find an adhesion contract); Ledbetter v. Webb, 103 N.M. 597, 711 P.2d 874 (1985) (involving recission, fraud, comparative negligence, pre-judgment interest and set-off); Grynberg v. Roberts, 102 N.M. 560, 698 P.2d 430 (1985) (discussing pre-judgment interest); Paperchase Partnership v. Bruckner, 102 N.M. 221, 693 P.2d 587 (1985) (interpreting the assignment clause frequently found in New Mexico real estate contracts); Boatwright v. Howard, 102 N.M. 262, 694 P.2d 518 (1985) (deciding whether failure to maintain insurance required by a real estate contract constitutes default); Naumberg v. Pattison, 103 N.M. 649, 711 P.2d 1387 (1985) (addressing the applicability of the Residential Home Loan Act to recreational second-homes); Clodfelter v. Plaza, Ltd., 102 N.M. 544, 698 P.2d 1 (1985) (determining a real estate broker's entitlement to a full commission even though the property is sold by another broker); Clovis National Bank v. Harmon, 102 N.M. 166, 692 P.2d 1315 (1984) (discussing debt security, mortgage foreclosure and pro-rata satisfaction of the debts); F&S Co. v. Gentry, 103 N.M. 54, 702

I. CONTRACTS

A. *U.C.C.—Sale of Goods*

The supreme court rendered four decisions under Article 2 of the U.C.C., two dealing with revocation of acceptance and breach of warranty,[7] one dealing with enforceability and modification of a contract[8] and one with rejection.[9]

1. Breach of Warranty and Revocation of Acceptance

The first case presenting issues of breach of implied warranties and revocation was *International Paper Co. v. Farrar*[10]. Defendant Farrar Produce Company ordered 21,500 boxes from plaintiff to be used for the packing and shipping of tomatoes and specified that the boxes be suitable for the intended purpose and of the same type as those supplied to Florida packers.[11] The boxes were delivered but were not the Florida type and were unsuitable (they collapsed and damaged the tomatoes).[12] Plaintiff sued to collect the amount owing from Farrar on the sale of the boxes, and Farrar counterclaimed alleging breach of implied warranties of merchantability and fitness for a particular purpose.[13] The New Mexico Supreme Court, after reciting the elements which must be present to find these implied warranties, affirmed the lower court's findings of breach of both warranties.[14]

The supreme court also addressed the issue of whether there was proper revocation of acceptance under section 55-2-608.[15] The court found sufficient evidence that Farrar notified International as soon as the latent

P.2d 999 (1985) (interpreting provisions of the Recording Act in an action to foreclose a judgment lien); Vihstadt v. Travelers Insurance Company, 103 N.M. 465, 709 P.2d 187 (1985) (interpreting the phrase "accidental injury or sickness" in an insurance policy); Weldon v. Commercial Union Assurance Co., 103 N.M. 522, 710 P.2d 89 (1985) (interpreting the interaction between conflicting clauses in an insurance policy); United Nuclear Corp. v. Allendale Mutual Ins. Co., 103 N.M. 480, 709 P.2d 649 (1985) (interpreting liability clauses of an insurance policy); Bozza v. General Adjustment Bureau, 103 N.M. 200, 704 P.2d 454 (Ct. App. 1985) (concerning agency and termination of authority); Landrum v. Security National Bank of Roswell, 104 N.M. 55, 716 P.2d 246 (Ct. App. 1985), *cert. quashed*, 103 N.M. 798, 715 P.2d 71 (1986) (finding that the adverse claims statute does not apply to forged endorsement claims); Smith Machinery Corp. v. Hesston, Inc., 102 N.M. 245, 694 P.2d 501 (1985) (an anti-trust action involving the elements of a *per se* tying claim).

7. *International Paper*, 102 N.M. 739, 700 P.2d 642; *General Motors Acceptance Corp.*, 103 N.M. 72, 703 P.2d 169.

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

9. Oda Nursery, Inc. v. Garcia Tree and Lawn, Inc., 103 N.M. 438, 708 P.2d 1039 (1985).

10. 102 N.M. 739, 700 P.2d 642 (1985).

11. *Id.* at 740, 741, 700 P.2d at 643, 644.

12. *Id.*

13. *Id.* at 740, 700 P.2d at 643.

14. *Id.*

15. *Id.* N.M. STAT. ANN. § 55-2-608 (1978).

defect was discovered and held that upon revocation of acceptance defendant was entitled to recover the price of the boxes plus consequential damages.[16]

As a defense to Farrar's counterclaim, International asserted that the sample boxes initially shown to Farrar became the basis of the bargain under section 55-2-313(1)(C).[17] International was apparently arguing that it showed Farrar a sample, that the boxes Farrar received conformed to the sample, and, thus, Farrar's revocation and claim for damages was unfounded. This defense failed because Farrar had rejected the sample box and ordered boxes which conformed to different dimensions and construction.[18] Because Farrar rejected the sample it could not have formed the basis of the bargain.

The second case on revocation and breach of warranty was *General Motors Acceptance Corp. v. Anaya*.[19] The plaintiff, General Motors Acceptance Corporation ("GMAC") brought a replevin action under a financing contract for return of an automobile purchased by the Anayas.[20] The Anayas counterclaimed against the retailer and GMAC under a revocation of acceptance theory; against the manufacturer, General Motors Corporation ("GMC"), and the retailer under a breach of express warranty theory; against GMC and GMAC for willful breach of contract; against the retailer for fraud or material misrepresentation of fact; and against GMC and the retailer for violation of the Motor Vehicle Dealers Franchising Act.[21] At trial, the jury found that the Anayas had successfully proved all elements essential to establish liability on all claims. By means of special interrogatories this jury awarded approximately $40,000 in compensatory damages and $675,000 in punitive damages.[22] The trial court, granting motions for judgment notwithstanding the verdict, (1) reduced the compensatory damages to approximately $35,000 on the basis that the award for breach of warranty was inconsistent with a finding of revocation of acceptance, (2) eliminated the willful breach of contract claim and the accompanying punitive damages on the same basis of

16. *Id.* at 743, 700 P.2d at 646; N.M. STAT. ANN. § 55-2-608 Official Comment (1) (1978) provides that the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach.

17. N.M. STAT. ANN. § 55-2-313(1)(C) (1978) provides: "Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."

18. 102 N.M. at 741, 743, 700 P.2d at 644, 646.

19. 103 N.M. 72, 703 P.2d 169 (1985).

20. The Anayas counterclaimed on various theories arising out of defects in the automobile which had not been corrected as required by the warranty. The Anayas defaulted on their payments prompting the replevin action by GMAC under its financing contract. *Id.*

21. Motor Vehicle Dealers Franchising Act, N.M. STAT. ANN. §§ 57-16-1 to -16, (Cum. Supp. 1985).

22. *General Motors*, 103 N.M. at 73, 703 P.2d at 170.

inconsistency, and (3) eliminated the incidental and consequential damages awarded under the Motor Vehicles Franchising Act.[23]

The supreme court affirmed, holding that although the current New Mexico version of Article 2 of the U.C.C. allows the buyer to bring claims of both revocation of acceptance and breach of warranty, the non-alternative nature of the remedies does not entitle the buyer to inconsistent or double recoveries.[24] Stating that the finding of either final acceptance or revocation of acceptance of non-conforming goods ultimately determines the available remedy, the court held that in this case there was substantial evidence to support the jury's finding of liability under the plaintiff's claim of revocation of acceptance.[25] Therefore, the court said, the jury's additional award of damages for breach of warranty was inconsistent as a matter of law, and the judgment notwithstanding the verdict on the damages for breach of warranty was correct.[26]

On the award of punitive damages, the court said there was no support for the finding of willful breach by GMAC and thus no basis for punitive damages.[27] As to GMC, the court said a finding of revocation of acceptance rendered inconsistent any recovery for willful breach of contract and thus punitive damages could not be awarded.[28]

GMC raised the issue of whether the Anayas as buyers had standing to sue it under the Motor Vehicle Dealers Franchising Act.[29] After stating that the purpose of the Act is to require that the manufacturer of an automobile be truthful in advertising and properly fulfill any warranty agreement, the supreme court held that the statutory language, the explicit legislative objective of ensuring a "sound system" of motor vehicle sale and distribution within the state, and the intent to provide a remedy for warranty abuse imply a retail buyer's cause of action against a manu-

23. *Id.*, *see supra* note 21.

24. *General Motors*, 103 N.M. at 74, 703 P.2d at 171. There is no question that double recovery is not permitted. However, the breakdown in the court's reasoning flows from the premise that, with revocation, there is no breach. On the contrary, the buyer revokes because there *is* a breach. Consequently, whether the buyer claims damages under revocation or breach does not answer the question of whether the breach was willful.

25. *Id.* at 75, 703 P.2d at 172. The *GMAC* court concludes that the evidence was substantial and persuasive without detailing the evidence presented.

26. *Id.* The court reasoned that recovery on one claim rendered the other claim inconsistent. When the jury found the Anayas had successfully proven all elements essential to establish revocation of acceptance, the breach of warranty theory became extinguished. *Id.* at 74, 703 P.2d at 171; *see supra* note 25.

27. *Id.* at 75, 703 P.2d at 172. Punitive damages may be awarded by a jury when it finds serious misconduct on the part of a party. Misconduct coupled with a bad state of mind provide the case for a punitive damages award. The jury must consider the nature of the defendant's state of mind and the nature of the conduct. DOBBS, REMEDIES § 3.9, at 205, 207 (1973); *see supra* note 40 and accompanying text.

28. *General Motors*, 103 N.M. at 76, 703 P.2d at 173.

29. *Id.*

facturer for such abuse.[30] However, the court agreed that the jury's award of consequential damages under the Act was cumulative.[31]

International Paper Co. and *GMAC* are hard to reconcile, and the holding in *GMAC* that recovery of punitive damages for willful breach of contract is barred by a finding of revocation of acceptance appears contrary to the U.C.C. and principles established by previous New Mexico cases.[32] In *International Paper*, the supreme court affirmed a trial court finding of breach of warranty and went on to find that the buyer had properly revoked the goods and could "recover the price of the boxes and consequential damages".[33] On the other hand, in *GMAC* the court stated that a finding of revocation of acceptance "renders inconsistent recovery of a claim for breach of warranty" and further that "recovery for *willful* breach of contract . . . is similarly inconsistent" (emphasis by the court).[34] Comment 1 to section 2-608 of the U.C.C. clearly states that both "revocation of acceptance and recovery of damages for breach" are available to a buyer. The damages allowed to a buyer who has revoked acceptance are set forth in sections 2-711,[35] -712[36] and -713[37], the latter of which refers to incidental and consequential damages under section 2-715. Under section 2-715, consequential damages include "injury to person or property approximately resulting from any breach of warranty."[38] Thus, the court's ruling that recovery of damages for breach of warranty is inconsistent with recovery under a theory of revocation of acceptance appears directly contrary to the provisions of the U.C.C.

Of perhaps greater concern is *GMAC's* ruling that recovery under a

30. *Id.*

31. *Id.* Once the Anayas recovered their damages under the theory of revocation of acceptance, recovery under the Motor Vehicle Dealer's Franchising Act would be a double recovery. The court emphasized that the Anaya's recovery under one theory precluded additional recovery under any other theory regardless of the validity of each additional theory.

32. *See, e.g.*, Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965) (approving award of punitive damages where buyers of racehorse revoked their acceptance).

33. 102 N.M at 743, 700 P.2d at 646.

34. 103 N.M. at 75, 76, 703 P.2d at 172, 173; *see supra* note 24. This is precisely where the court's reasoning breaks down. The court leaps from not permitting double recovery under separate claims to a statement which seems to say that with revocation there is no breach.

35. Section 55-2-711 provides: "Where . . . the buyer justifiably revokes acceptance, then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract . . . the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid (a) 'cover' and have damages . . ."

36. Section 55-2-712 provides: "(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages . . ."

37. Section 55-2-713 provides: "The measure of damages for non-delivery or repudiation by the seller is the difference between the market price . . . and the contract price together with any incidental and consequential damages . . . less expenses saved . . ."

38. *Id.* at § 55-2-715(2)(b). In reality one sues for breach of contract or breach of warranty. The remedy depends on whether the buyer keeps the goods or sends them back.

theory of revocation of acceptance precludes recovery of punitive damages for willful breach of contract. In *Grandi v. LeSage*[39], the supreme court approved the award of punitive damages in a case where the buyers of a race horse had revoked their acceptance and recovered the purchase price. Moreover, the appropriateness of punitive damages in a breach of contract case is normally judged by whether the seller's behavior is "malicious, intentional, fraudulent, oppressive or committed recklessly or with a wanton disregard of the wronged party's rights,"[40] not whether the buyer has or has not revoked his acceptance under the U.C.C. The claim of willful breach of contract and the standards for awarding punitive damages are not even addressed by the U.C.C., making the court's holding in *GMAC* even harder to understand.

The holding in *GMAC* confuses a theory of recovery (breach of warranty) with a remedial action (revocation) which in turn determines available damages.[41] Nevertheless, practitioners approaching similar cases must deal with *GMAC* in deciding how to plead and present the issues in each case.[42] Under the U.C.C., the critical factor to a damages determination becomes the finding of either final acceptance or revocation of acceptance of nonconforming goods.[43] Revocation damages are computed under section 55-2-711 and damages after acceptance under section 2-714.[44] However, in view of *GMAC*, the practitioner representing a buyer must carefully evaluate all elements of a claim when there are substantial damages. If the claim merits punitive damages then the practitioner may have to pursue the willful breach of contract claim over any revocation claim the client may have.[45] The seller, on the other hand, will benefit substantially by proving revocation which may then cut off any possible punitive damage claim according to *GMAC*.

As always the practitioner may seek to limit and distinguish *GMAC* to prevent the case from extending an erroneous interpretation of the U.C.C. and New Mexico case law.[46] Or the practitioner may argue that what the court meant by the language used was that the buyer may recover under section 2-711 or section 2-714 of the U.C.C., but not both.[47] This is precisely what the U.C.C. requires and the way that double recovery is

39. 74 N.M. 799, 399 P.2d 285 (1965).

40. Fredenburgh v. Allied Van Lines, Inc., 79 N.M. 593, 598, 446 P.2d 868, 873 (1968).

41. N.M. STAT. ANN. §§ 55-2-608 and -711; *see supra* text accompanying notes 24, 25.

42. *Id.*

43. *See supra* note 26 and accompanying text.

44. *See supra* notes 17, 25, 37-40; N.M. STAT. ANN. § 55-2-714 (1978) "Where the buyer has accepted goods . . . the 'measure of' damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had as warranted . . ."

45. *See supra* notes 41, 42 and accompanying text.

46. *See supra* text accompanying notes 33-42.

47. *See supra* notes 17, 37, 38, 39, 46.

avoided. This election, however, should not require the denial of punitive damages when the buyer has revoked as a breach must be found regardless of the section under which the buyer elects to recover damages.

2. Enforceability and Modification of Contract.

While the unusual facts of *Elephant Butte Resort Marina, Inc. v. Wooldridge* may limit its precedential value, the case clearly delineates the U.C.C. approach to the enforceability and modification of contracts.[48] The case arose out of the purchase of a boat by defendant Wooldridge from plaintiff Elephant Butte Resort Marina, Inc. ("Marina").[49] The parties entered into a purchase contract with financing terms set forth on the first page of the contract, contemplating that Wooldridge would apply for a loan on those terms through a bank.[50] The bank was willing to finance the purchase, but the terms of the bank loan conflicted with the contract terms.[51] After using the new boat for about four weeks, Wooldridge attempted to cancel the contract, claiming that it conflicted with the financing plan offered by the bank.[52] The boat was returned to Marina, and it brought suit for the amount due on the contract.[53] The trial court granted judgment for Marina of $586.40, which represented the remaining amount due after crediting Marina with the "used" value of the boat and the value of Wooldridge's trade-in boat.[54]

On appeal, the supreme court affirmed, holding that the contract met the U.C.C. requirements of an enforceable contract for the sale of goods over $500 because: (1) there was a writing which included a quantity term; and (2) the contract was signed by the party against whom enforcement was sought (Wooldridge).[55] Furthermore, the court found the contract was accepted because the goods were received and used by Wooldridge for a period of four weeks.[56]

Wooldridge contended that the terms of payment in the original contract were a condition precedent to his performance as a buyer.[57] Marina, on

48. 102 N.M. 286, 694 P.2d 1351.
49. *Id.* at 287, 694 P.2d at 1352.
50. *Id.* at 287, 288, 694 P.2d at 1352, 1353.
51. *Id.* at 288, 694 P.2d at 1353.
52. *Id.*
53. *Id.* at 292, 694 P.2d at 1357.
54. *Id.* at 287, 694 P.2d at 1352.
55. *Id.* at 289, 694 P.2d at 1354; N.M. STAT. ANN. § 55-2-201(1) provides that a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought.
56. *Elephant Butte Resort*, 102 N.M. at 289, 694 P.2d at 1354; N.M. STAT. ANN. § 55-2-201(3)(c) (contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable "with respect to goods . . . which have been received and accepted)."
57. *Elephant Butte Resort*, 102 N.M. at 289, 694 P.2d at 1354.

the other hand, argued that there was no condition precedent, but that even if one did exist Wooldridge's actions constituted waiver and estoppel.[58] The supreme court stated that a condition precedent is a conditional right which must be met before the contract is formed; however, the waiver of an express contractual condition may be implied in the conduct of the parties.[59] While a contracting party may repudiate his performance if the condition precedent is not met, Wooldridge by his own conduct of accepting and using the boat formed the contract and waived any argument as to the possibility of a remaining condition precedent to his performance as a buyer.[60] Therefore, he was estopped from raising the issue of condition precedent.[61]

On the issue of modification, the court held that once the existence of a contract is established, it can be modified by the conduct of the parties without written modification.[62] Here, the court found that Wooldridge agreed to the alternative financing, thus modifying the contract.[63]

When Wooldridge returned the boat, Marina did not attempt to sell it during the seven months prior to trial.[64] Wooldridge asserted that even if the contract was enforceable, he owed Marina no damages because Marina could have sold the new boat and recovered its loss.[65] Marina, however, claimed that its damages resulted from the depreciation of the boat prior to repudiation, and that those damages were caused by the change of status from "new" to "used" goods.[66] The supreme court stated that the non-defaulting party in a breach of contract situation has a duty to use "'reasonable' diligence to mitigate damages."[67] Further, the court said, New Mexico uses the "commercially reasonable" standard[68] for resale of goods.[69] Because there were no facts indicating that Marina should have anticipated the breach prior to Wooldridge's letter of repudiation, the duty to mitigate damages arose only after Marina was notified by letter.[70] Thus, Marina had a duty to mitigate only those damages that

58. *Id.* Wooldridge, by accepting and using the boat, formed the contract.

59. *Id.*

60. *Id.* at 290, 694 P.2d at 1355.

61. Id; N.M. STAT. ANN. § 55-1-103 provides that "the principles of law and equity, including . . . estoppel . . . shall supplement [this Act's] provisions."

62. *Elephant Butte Marina*, 102 N.M. at 291, 694 P.2d at 1356. N.M. STAT. ANN. § 55-2-207(3) provides that "conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings do not otherwise establish a contract;" and § 55-2-209(4) provides that although an attempt at modification may fail because it is not written, it can operate as a waiver.

63. *Elephant Butte Marina*, 102 N.M. at 291, 694 P.2d at 1356.

64. *Id.* at 292, 694 P.2d at 1357.

65. *Id.*

66. *Id.*

67. *Id.*

68. Deaton, Inc. v. Aeroglide Corp., 99 N.M. 253, 657 P.2d 109 (1982).

69. *Elephant Butte Marina*, 102 N.M. at 292, 694 P.2d at 1357.

70. *Id.*

occurred after the letter. The loss in the value of the boat due to its "used" condition occurred before the attempted repudiation letter.[71] Therefore, that loss in value was proper damage for the trial court to consider and was not subject to the duty to mitigate.[72]

The trial court found that the difference in the market value of the boat at the time of the contract and the time of repudiation and Marina's lost profits and incidental damages such as storage and insurance for the boat all constituted proper damages.[73] The supreme court affirmed this finding as well as the trial court's calculations of damages.[74]

3. Rejection of Goods

In *Oda Nursery, Inc. v. Garcia Tree and Lawn, Inc.*[75], the New Mexico Supreme Court dealt with rejection of goods under the U.C.C. Plaintiff Oda sued defendant Garcia to recover the purchase price on a contract for the sale to Garcia of 985 spreading juniper plants.[76] Garcia counterclaimed for breach of contract, alleging that the plants were not of the quality warranted.[77] Oda argued that Garcia's rejection of the plants was ineffective and untimely.[78] The supreme court reversed the trial court and remanded the case for a determination of damages to be awarded to Oda.[79]

Garcia ordered the plants in early 1982, intending to use them in a beautification project for the City of Albuquerque.[80] When the plants arrived in Albuquerque in March, 1982, they were inspected by Garcia, and later they were inspected by the city.[81] One of Garcia's employees made a telephone call to Oda shortly after the plants arrived in Albuquerque to the effect that the plants did not look "up to snuff."[82] However, Garcia made a partial payment in June, 1982,[83] nurtured the plants for four months and planted them in July and August, 1982.[84] Over the next several months, about 700 of the plants died.[85]

The supreme court held that the agreement between Oda Nursery and Garcia qualified as a contract for the sale of goods and, as such, was

71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. 103 N.M. 438, 708 P.2d 1039.
76. *Id.* at 439, 708 P.2d at 1040.
77. *Id.*
78. *Id.*
79. *Id.* at 442, 708 P.2d at 1043.
80. *Id.* at 439, 708 P.2d at 1040.
81. *Id.*
82. *Id.* at 440, 708 P.2d at 1041.
83. *Id.*
84. *Id.* at 439, 708 P.2d at 1040.
85. *Id.*

governed by the provisions of the U.C.C.[86] The court pointed out that section 55-2-602(1)[87] provides that "rejection of goods must be within a reasonable time after their delivery or tender" and that rejection is not effective unless the seller is notified according to section 55-1-201(26).[88] Under section 55-2-605,[89] the court said, the notice must state a particular defect which is ascertainable by reasonable inspection and failure to do so precludes the buyer from relying on the unstated defect to justify rejection or to establish breach.[90] The court stated that the telephone call by Garcia's employee was not sufficient notice of rejection and that the acts of sending the check and planting the shrubs were inconsistent with any intention to rescind.[91]

B. Other Contract Issues

1. Limitation of Liability, Contracts of Adhesion, and Unconscionability

Albuquerque Tire Company, Inc. v. Mountain States Telephone & Telegraph Company,[92] raised issues of limitation of liability and contract of adhesion. Plaintiff Albuquerque Tire signed a contract with Mountain States which provided for twelve different listings and advertisements to appear in the directory under various headings and which limited Mountain States' liability for errors in the listings and advertisements to the amount of the contract price.[93] Upon publication of the directory, Albuquerque Tire's telephone number appeared incorrectly in the largest of the advertisements.[94] Mountain States eliminated the cost of that ad from the bill, but Albuquerque Tire nevertheless sued for additional damages.[95] The trial court granted Mountain States' motion for summary judgment, and Albuquerque Tire appealed, claiming that: (1) summary judgment was error because a fact issue existed regarding whether the omission resulted from gross negligence rather than ordinary negligence; (2) the limitation of liability clause contained in the contract was against public policy; and (3) the agreement was a contract of adhesion.[96] The supreme court affirmed.

86. *Id.* at 440, 208 P.2d at 1041.
87. N.M. STAT. ANN. § 55-2-602(1) (1978).
88. *Id.* at § 55-1-201(26) provides that: "[A] person notifies or gives a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it."
89. *Id.* at § 55-2-605.
90. 103 N.M. at 440, 708 P.2d at 1041.
91. *Id.* at 441, 442, 708 P.2d at 1042, 1043.
92. 102 N.M. 445, 697 P.2d 128.
93. *Id.* at 446, 447, 697 P.2d at 129, 130.
94. *Id.*
95. *Id.*
96. *Id.* at 447, 697 P.2d at 130.

First, the supreme court rejected the contention of a fact issue, stating that Albuquerque Tire presented no facts in its support.[97] Second, the court rejected the public policy contention, stating that while a public utility generally "cannot validly contract against its liability for negligence in the performance of a duty of public service,"[98] previous New Mexico case law has held that yellow page advertising is not a part of Mountain States' essential duty of providing telephone communication service, and thus a public service duty was not involved in this case.[99]

Finally, the court addressed the issue of whether the contract between Albuquerque Tire and Mountain Bell was an adhesion contract and therefore unenforceable.[100] A contract of adhesion, the court said, has been defined as a standardized contract prepared entirely by one party for the acceptance of the other which, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining.[101] The supreme court found that Mountain States had been awarded a monopoly of the yellow page market and that the contract with Mountain States was a standardized contract prepared by it for acceptance by Albuquerque Tire.[102] Albuquerque Tire, if it wanted yellow page advertising, could not have avoided doing business with Mountain States. However, the court held that Albuquerque Tire's claim of an adhesion contract failed because there was no evidence that it did not have an opportunity to negotiate the terms of the contract.[103]

The element of a "take it or leave it" basis for the adhesion contract must be demonstrated to the court. To demonstrate that no opportunity for negotiation existed when the parties entered into the contract, the practitioner may show that the form contract was the only one ever used by the company, no opportunity arose for the parties to negotiate the terms or negotiations for contrary terms were attempted and failed.[104]

Guthmann v. La Vida Llena,[105] also dealt with a claim of contract of adhesion as well as unconscionability. Plaintiff, the personal representative of the estate of Kathleen MacKay, sought a refund of the entrance fee paid by Ms. MacKay to defendant La Vida Llena, alleging that the agreement between the parties was unconscionable and an unenforceable

97. *Id.*

98. In re Rates and Charges of Mountain States Telephone & Telegraph Company, 99 N.M. 1, 6, 653 P.2d 501, 506 (1982).

99. *Albuquerque Tire*, 102 N.M. at 447, 697 P.2d at 130.

100. *Id.* at 448, 697 P.2d at 131.

101. *Id.*

102. *Id.* at 448, 449, 697 P.2d at 131, 132. Both of these elements meet the definition of an adhesion contract.

103. *Id.* at 449, 697 P.2d at 132.

104. *Id. See supra* text following note 114.

105. 103 N.M. 506, 709 P.2d 675.

adhesion contract.[106] The trial court dismissed the complaint, and the New Mexico Supreme Court affirmed.[107]

Ms. MacKay was 79 years old and had a life expectancy of seven to nine years when she began looking for a retirement facility.[108] After several weeks of studying the residence agreement and visiting La Vida Llena and several other "life care" retirement homes, she signed the agreement, paid the $36,950 entrance fee and moved in.[109] Five months later she became sick and died shortly thereafter.[110] The contract provided for a monthly service fee of $537, several long-range services for the residents and no refund of the entry fee.[111] After her death, her personal representative sued for a refund.[112]

On the allegation that the residence agreement was an unenforceable adhesion contract, the supreme court delineated two steps to determine whether an adhesion contract is unenforceable.[113] First, the trial court must decide whether the contract is one of adhesion, and, second, the court must determine whether the contract or a provision thereof is unfair.[114]

The court set forth three elements which it said must be satisfied before an adhesion contract can be found:

1. The agreement must be in the form of a standard contract prepared or adopted by one party for the acceptance by the other.

2. The party offering the standardized contract must enjoy a superior bargaining position such that the weaker party virtually cannot avoid doing business under the particular contract terms.

3. The contract must be offered to the weaker party on a take it or leave it basis, without opportunity for bargaining.[115]

The evidence showed that although the contract was a standard form, Ms. MacKay had the choice of several retirement homes and knew she did not have to sign the contract.[116] Thus, the supreme court held that the requirements of an adhesion contract were not met.[117]

Plaintiff also argued that the contract was unconscionable. The supreme court stated that ". . . [i]f there has been 'an absence of meaningful choice on the part of one of the parties (procedural unconscionability),

106. *Id.* at 508, 709 P.2d at 677.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 508, 509, 709 P.2d at 677, 678.
112. *Id.*
113. *Id.* at 509, 709 P.2d at 678.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

together with contract terms which are unreasonably favorable to the other party,' (substantive unconscionability), a contract may be held to be unconscionable."[118]

The court explained that the lack of meaningful choice relates to a procedural analysis of unconscionability and is determined by examining the circumstances surrounding the contract formation, including the particular party's ability to understand the terms of the contract and the relative bargaining power of the parties.[119] Plaintiff argued that no "meaningful choice" existed because (1) the only other local "life-care" center that was acceptable to decedent had no immediate openings, (2) the contract was presented on a standardized printed form on a take it or leave it basis, and (3) defendant did not fully disclose the value of the rights and services the deceased was to obtain under the contract.[120] The court noted several factors to be considered in determining whether a contract is procedurally unconscionable, including use of sharp practices or high pressure techniques and the relative education, sophistication or wealth of the parties, as well as the relative scarcity of the subject matter of the contract.[121] The court noted that Ms. MacKay was not subjected to high pressure tactics, read the contract in its entirety and fully understood the implications of all of its terms.[122] Furthermore, she had engaged in extensive comparison shopping and had discussed the contract at length with both the defendant's representative and a close friend.[123] She also had a lawyer available for consultation.[124] The court noted that Ms. MacKay had a net worth exceeding $100,000 and a monthly income of $1,200.[125] This fact was relevant according to the court because consumers who successfully assert unconscionability usually are poor or otherwise disadvantaged, and businessmen and middle class purchasers are not ordinarily victims of the kinds of gross "advantage-taking" that constitutes unconscionability.[126] The court concluded that the contract was not procedurally unconscionable.[127]

On the issue of substantive unconscionability the court stated the rule that a contract which does not violate public policy is not unconscionable unless one or more of its terms are grossly unfair under the circumstances as they existed at the time the contract was formed.[128] Noting that Ms.

118. *Id.* at 510, 709 P.2d at 679.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 511, 709 P.2d at 680.
127. *Id.*
128. *Id.*

MacKay's death was totally unexpected, the court reviewed the trial court's findings that the "no refund" entrance fee was part of its overall financing plan, was comparable to the fees of similar facilities and could not be refunded upon premature death without increasing fees for other residents.[129] Given the extensive services available (including guaranteed nursing home care), the court compared the arrangement to an annuity contract and held that Ms. MacKay assumed the risk of early death.[130] Overall, the supreme court found the arrangement fair.[131]

2. Rescission, Fraudulent Misrepresentation and Prejudgment Interest.

In *Ledbetter v. Webb*,[132] the supreme court considered issues of rescission, fraudulent misrepresentation, comparative negligence and prejudgment interest. *Ledbetter* presents a breach of contract action brought by the sellers of an ice cream business against the purchaser. Shortly after the sale, the ice cream machines malfunctioned, causing the purchasers to close the business.[133] The purchasers defaulted on a promissory note to the sellers and failed to pay the rent which was due under their assignment of lease.[134] Sellers sued the purchasers for breach of contract, and the purchasers counterclaimed for fraudulent and negligent misrepresentation.[135] The trial court found that the purchasers had breached the contract, and that as a result the sellers were entitled to compensatory and special damages on the contract.[136] The trial court further found that the sellers fraudulently misrepresented the condition of the ice cream machines and offset part of the seller's damages by the amount of the purchaser's compensatory, consequential and punitive damages suffered as a result of the fraudulent misrepresentations.[137] The New Mexico Supreme Court affirmed.[138]

The purchasers challenged the trial court's refusal to find that they were entitled to rescission of the purchase contract.[139] Recognizing that misrepresentation of a material fact, even if innocently made, will entitle the party who has justifiably relied thereon to rescind the contract,[140] the

129. *Id.*
130. *Id.* at 513, 709 P.2d at 682.
131. *Id.*
132. 103 N.M. 597, 711 P.2d 874.
133. *Id.* at 599, 711 P.2d at 876.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 604, 711 P.2d at 881.
138. *Id.* at 605, 711 P.2d at 882.
139. *Id.* at 600, 601, 711 P.2d at 877, 878.
140. *Id.* at 600, 711 P.2d at 877.

supreme court stated that rescission is an equitable remedy which seeks to restore the status quo ante.[141] The aggrieved party must return or offer to return that which has been received under the contract as a condition precedent to maintaining a suit for rescission.[142] In this case, the record indicated that the purchasers acted in such a way that it was impossible to restore the status quo ante.[143] Furthermore, the purchasers' conversion of certain equipment on the premises deprived them of the "clean hands" necessary to seek the equitable remedy of rescission.[144]

The sellers challenged the trial court's finding of fraudulent misrepresentation regarding the ice cream machines, arguing that purchasers did not prove by clear and convincing evidence that the machine was defective and that the sellers knew it was defective at the time of the sale.[145] The supreme court rejected this contention, pointing out that "facts and circumstances surrounding a transaction may provide clear and convincing evidence of fraudulent intent," and found sufficient circumstantial evidence in the record to support the trial court's findings.[146] The court also held that the purchasers were inexperienced in the use of these machines and justifiably relied on the sellers' representations regarding the condition of the machines.[147]

In addition to the finding of fraudulent misrepresentation, the trial court had found that the sellers negligently misrepresented the condition of the machines.[148] It accordingly apportioned the purchaser's consequential damages on the basis of comparative negligence.[149] The supreme court, however, held that conduct amounting to fraud cannot also constitute negligent misrepresentation nor can negligent misrepresentation somehow be a "lesser included tort" within the greater tort of fraud.[150] The court

141. Status quo ante, the term used by the court; means the state of things before. BLACK'S LAW DICTIONARY 1581 (4th ed. 1968).

142. *Ledbetter, Id.* at 601, 711 P.2d at 878.

143. *Id.*

144. *Id.* The unclean hands doctrine bars a plaintiff's claim when the plaintiff's improper conduct is the source, or part of the source of his equitable claim. DOBBS, REMEDIES at 45-46 (1973).

145. *Ledbetter,* 103 N.M. at 600, 711 P.2d at 877.

146. *Id.*

147. *Id.* at 602, 711 P.2d at 879.

148. *Id.* at 601, 711 P.2d at 878. Negligent and fraudulent misrepresentation cannot coexist on the same facts. The very nature of the claims are inconsistent. Negligent misrepresentation requires a false representation made by a person when there is no reasonable basis to believe the statement is true. Fraudulent misrepresentation requires knowing and intentional misrepresention of the facts. The burden of proof also differs; fraud requires clear and convincing proof, while negligent misrepresentations requires proof by a preponderance of the evidence.

149. *Id.* at 601, 711 P.2d at 878.

150. *Id.* at 603, 711 P.2d at 880. However, the court determined that the trial court's erroneous conclusion of law must be reconciled if possible to sustain the judgment. The court determined there was substantial evidence to justify the fraudulent misrepresentation. Denying the existence of negligent misrepresentation did not overturn the lower court's judgment. *Id.*

further stated that the allocation of a portion of purchasers' damages to themselves should have been characterized as a reduction for failure to mitigate rather than comparative negligence.[151]

The promissory note signed by purchasers provided for interest from the date of default, but the trial court refused to award interest to the sellers.[152] The supreme court affirmed, stating that while interest is normally allowed on a contract to pay a definite sum of money from the time performance was due, such interest is not to be awarded arbitrarily without regard for the equities of each particular situation.[153] In this case, the sellers' wrongful acts of misrepresentation provided sufficient ground for the trial court to deny pre-judgment interest.[154]

The supreme court also discussed pre-judgment interest in *Grynberg v. Roberts*.[155] Plaintiff and defendants entered into a contract in which each defendant agreed to pay a certain percentage of the operating costs of a well-drilling operation.[156] The defendants failed to pay these costs for several years.[157] The trial court granted judgment to the plaintiff on the principal indebtedness but failed to award the requested interest on the principal awarded.[158] Plaintiff appealed, relying on section 56-8-3[159] which allows interest on indebtedness where the amount due can be readily ascertained. Citing both the Restatement of Contracts[160] and *Shaeffer v. Kelton*,[161] the supreme court held that in this case the plaintiff was able to show that the debt was "ascertainable by mathematical calculation from a standard fixed in the contract" and allowed interest on the amount of the debt.[162] The court also held that the rate of pre-judgment interest to be granted is that rate in effect "when this became a pending case."[163]

II. REAL ESTATE

A. *Real Estate Contracts*

1. Forfeiture

The New Mexico Supreme Court dealt with two real estate contract forfeiture cases. In both cases, the court refused to find wrongful forfeiture.

151. *Id.* at 603, 711 P.2d at 880.
152. *Id.* at 604, 711 P.2d at 881.
153. *Id.* at 605, 711 P.2d at 882.
154. *Id.*
155. 102 N.M. 560, 698 P.2d 430 (1985).
156. *Id.* at 561, 698 P.2d at 431.
157. *Id.*
158. *Id.*
159. N.M. STAT. ANN. § 56-8-3 (Cum. Supp. 1984).
160. RESTATEMENT OF CONTRACTS § 337 (1932).
161. 95 N.M. 182, 619 P.2d 1226 (1980) (where amount of indebtedness under contract was ascertainable to breaching party, injured party had a right to interest at the legal rate on amount due).
162. *Grynberg*, 102 N.M. at 563, 698 P.2d at 433.
163. *Id.*

In *Jacobs v. Phillippi*,[164] plaintiffs signed a real estate contract to purchase a residence from defendants. The negotiations were carried out through a real estate agent.[165] The purchasers had initially offered an interest rate of ten percent.[166] The sellers then made a counteroffer through the agent raising the interest rate to twelve percent.[167] The purchasers made a further counteroffer of ten percent for the first six months and twelve percent for the second six months.[168] The agent did not inform the sellers of the further counteroffer, however, and the sellers believed that their offer of twelve percent interest had been accepted.[169] Both parties then signed the real estate contract which provided for an interest rate of twelve percent and a balloon payment within one year.[170] The purchasers failed to pay the balloon payment, and the sellers declared the purchasers in default under the real estate contract and withdrew the special warranty deed from escrow and filed it.[171] The purchasers sued for rescission of the real estate contract with a return of their down payment and for damages against the real estate agent.[172] The trial court dismissed the purchasers' complaint and they appealed.[173]

The supreme court affirmed.[174] The purchasers first contended that the trial court erred in concluding that they suffered no damage as a result of the agent's breach of fiduciary duty.[175] The supreme court held that there was substantial evidence to support the trial court's finding that the agent had breached his duty, but that the interest rates were not a material factor in the negotiations between the parties and in the execution of the real estate contract.[176]

The supreme court also discussed the purchasers' contention of unwarranted forfeiture, stating that in New Mexico the rule is well settled that real estate contracts are enforceable, unless enforcement of the literal terms would result in an unwarranted forfeiture or in unfairness which shocks the conscience of the court.[177] The court further stated that the exceptions to enforcement of default provisions involve equitable con-

164. 102 N.M. 449, 697 P.2d 132 (1985).
165. *Id.* at 450, 697 P.2d at 133.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 451, 697 P.2d at 134. The agent's breach of fiduciary duty consisted of not telling the seller of the buyer's counteroffer of 10% interest on the real estate contract. The executed contract contained the originally proposed 12% interest rate.
176. *Id.* The buyer never paid the higher interest rate because the balloon payment was not paid. Consequently, the buyer never suffered damage from paying a higher interest rate due to the agent's breach of fiduciary duty.
177. *Id.*

siderations which have been addressed in several New Mexico cases.[178] The court said that those considerations did not exist in this case and thus no exception to enforcement was applicable.[179]

Finally, the purchasers asserted that the real estate contract was void due to a mutual mistake which resulted in no meeting of the minds between the parties.[180] The court rejected this contention, saying a contract is void because of a mutual mistake only where the minds of the parties have not met on any part of the contract.[181] However, in this case, evidence existed supporting the trial court's conclusions that the purchasers' belief that the interest rate was ten percent for the first six months was a unilateral mistake.[182] The contract stated the sellers' belief that the interest rate of twelve percent was the rate agreed to by the parties.[183] Only the purchasers believed that the interest rate should have been ten percent for the first six months.[184] The courts will refuse to void a contract for unilateral mistake except where the mistake is basic and material to the agreement and the other party knew or reasonably should have known of the mistake.[185]

Russell v. Richards[186] was another case where the trial court was called upon to judge whether forfeiture of a real estate contract "shocks the conscience." Here, Russell had purchased the property by paying the original purchaser an $11,000 down payment and assuming the original purchaser's contract balance of $38,000.[187] After paying about $10,800 on the principal balance, she defaulted and the original seller effected a forfeiture.[188] Russell sued for damages. The trial court held the forfeiture to be unwarranted and awarded damages equal to the total of her down payment, her principal payments and the increase in the value of the house over the period she held it.[189] The original sellers (Richards) appealed, and the supreme court *reversed* (in part), holding the forfeiture to be valid and eliminating the real estate contract damages.[190]

178. *Id.* When enforcement of the literal terms would result in an unwarranted forfeiture or in unfairness which shocks the conscience of the court, then the court may refuse to enforce the contract's default provisions. Huckins v. Ritter, 99 N.M. 560, 661 P.2d 52 (1983); Hale v. Whitlock, 92 N.M. 657, 593 P.2d 754 (1979); Elfeile v. Toppino, 90 N.M. 469, 565 P.2d 340 (1977). *See supra* text following note 190.

179. *Jacobs*, 102 N.M. at 451, 697 P.2d at 134.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. 103 N.M. 48, 702 P.2d 993 (1985).

187. *Id.* at 50, 702 P.2d at 995.

188. *Id.*

189. *Id.*

190. *Id.* at 51, 702 P.2d at 996.

The court listed the equitable considerations applicable in determining whether a forfeiture shocks the conscience of the court; namely, the amount of money already paid by the buyer to the seller, the period of possession of the real property by the buyer, the market value of the real property at the time of default compared to the original sales price, and the rental potential and the value of the real property.[191] The court then held that the trial court erred in considering the down payment because the Richards had not received it.[192] The court also stated that the trial court should not have considered the increased market value of the real property, citing cases[193] to the effect that the purchaser (Russell) bears the risk of loss or any enhancement in value.[194]

2. Assignment

In *Paperchase Partnership v. Bruckner*,[195] the supreme court interpreted the clause found in most New Mexico real estate contracts prohibiting assignment without consent. Plaintiff Paperchase sold an apartment complex to the Bruckners under a real estate contract which contained the standard non-assignment clause.[196] Two years later the Bruckners transferred their interest in the property to A & O Investments who then subsequently transferred its interest to another party.[197] Neither of these transfers was with the consent or approval of Paperchase.[198] All payments due under the original contract were made in a timely manner.[199] Paperchase claimed that because the subsequent transfers violated the non-assignment clause, the Bruckners were in default under the contract.[200] The trial court ruled that the later transfers were not assignments and granted summary judgment in favor of the Bruckners.[201]

The supreme court affirmed, stating that according to the Restatement (Second) of Contracts,[202] unless a contrary intention appears from the language or the circumstances, an assignment of contract is both an assignment of the assignor's rights and a delegation of his duties.[203] A

191. *Id.*
192. *Id.* at 51, 702 P.2d at 996. The down payment was received by the Richards' assignors. The court reasoned that the Richards could not be forced to repay money they had not received.
193. *See, e.g.*, M.G.I.C. Mortgage Corp. v. Bowen, 91 N.M. 200, 202, 572 P.2d 547, 549 (1977).
194. *Russell*, 103 N.M. at 51, 702 P.2d at 996.
195. 102 N.M. 221, 693 P.2d 587 (1985).
196. *Id.* at 222, 693 P.2d at 588.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. RESTATEMENT (SECOND) OF CONTRACTS § 328 (1979).
203. *Paperchase*, 102 N.M. at 223, 693 P.2d at 589.

provision prohibiting assignment in the contract bars only the delegation of duties, and if there is no delegation of duties there is generally no violation of the prohibition on assignment.[204] Because the subsequent transfers had no effect on the duties of the parties to the original contract, the Bruckners were still liable for the installment payments and Paperchase could not require return of the property or acceleration of the balance due in the absence of default.[205] Thus, the court held, the assignment prohibition was not violated.[206]

3. Failure to Maintain Insurance

In *Boatwright v. Howard*,[207] the New Mexico Supreme Court dealt with a real estate contract purchaser's failure to maintain insurance on the contract property. The plaintiffs sold property to the defendants under a real estate contract.[208] The Boatwrights alleged that the Howards had failed to maintain the insurance on the property as specified in the contract and had destroyed certain improvements.[209] As a result of these actions, the Boatwrights sought to accelerate the balance due, and when that demand was not met they brought suit to terminate the Howards' rights under the contract and to regain possession of the property.[210] The district court granted summary judgment, holding that the Howards' actions did not constitute a default under the contract and that therefore the Boatwrights could not regain possession.[211]

On appeal, the supreme court affirmed.[212] The Boatwrights asserted that paragraph six of the real estate contract, requiring that the purchaser pay all "taxes, assessments, or *other charges against the real estate*" and allowing a forfeiture of the purchaser's right to the real estate if such charges are not paid entitled them to regain possession.[213] The court held that the term "charges against the real estate" meant only those charges which if not paid could become liens or affect title to the real estate, and that insurance was not such a charge.[214]

The Boatwrights also contended that a security agreement entered into by the parties four months after the real estate contract helped clarify what the parties intended to constitute default under the real estate con-

204. *Id.*
205. *Id.* at 223, 693 P.2d at 589.
206. *Id.* at 223, 224, 693 P.2d at 589, 590.
207. 102 N.M. 262, 694 P.2d 518 (1985).
208. *Id.* at 264, 694 P.2d at 520.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 265, 694 P.2d at 521.
213. *Id.* at 264, 694 P.2d at 520.
214. *Id.* at 265, 694 P.2d at 521.

tract.[215] The court disregarded the security agreement, stating that the real estate contract was unambiguous and found no evidence that the parties intended for the real estate contract and the security agreement to merge or for the default provisions in the security agreement to replace the default provisions in the real estate contract.[216]

4. Prepayment Penalty

Naumburg v. Pattison,[217] addressed the applicability of the Residential Home Loan Act[218] to a prepayment prohibition in a real estate contract covering a "recreational second-home." The Act forbids a lender from requiring a penalty or premium for the prepayment of the balance of an indebtedness on a residence.[219] Plaintiffs purchased a lot with a log cabin pursuant to a real estate contract containing a complete prepayment prohibition.[220] After attempting to prepay the contract, they brought suit against the sellers to have the prohibition declared invalid, for damages for failure to accept prepayment and to have defendants forfeit all interest, charges and other advantages of sale.[221] The trial court denied relief on the ground that the Act did not apply.[222]

After stating that the Act's restriction applies to real estate contracts made for the purchase of a "residence", the supreme court reversed, holding that although the structure was located in a commercial area and was a second home used primarily for recreational purposes the Act nevertheless applied to the purchase.[223] The court further found that a complete prohibition against prepayment is a penalty of the most extreme kind and therefore forbidden by the Act.[224]

The court also discussed what constitutes the tender of prepayment.[225] The purchasers had, by letter to the sellers, stated an intention to prepay the real estate contract and asserted that the letter was a sufficient tender because the purchasers were ready, willing and able to make full payment.[226] Alternatively, the purchasers argued that even if the letter was not a sufficient tender, a formal tender was not required since the sellers

215. *Id.*
216. *Id.*
217. 103 N.M. 649, 711 P.2d 1387 (1985).
218. N.M. STAT. ANN. §§ 56-8-22 to -30 (Cum. Supp. 1982).
219. *Id.* at § 56-8-30.
220. *Naumburg*, 103 N.M. at 651, 711 P.2d at 1389.
221. *Id.*
222. *Id.*
223. *Id.* at 652, 711 P.2d at 1390.
224. *Id.*
225. *Id.* at 653, 711 P.2d at 1391. The plaintiffs sued arguing that the defendant refused to accept prepayment on a real estate contract. Since the court found no valid tender at prepayment occurred, plaintiffs were not entitled to damages for defendant's refusal to accept the prepayment.
226. *Id.*

rejected the purchasers' offer to prepay.[227] The court stated that common law rules define tender as more than a mere offer to pay.[228] It must be an offer to perform coupled with the present ability of immediate performance so that were it not for the refusal or cooperation by the party to whom the tender is made, the condition or obligation would be immediately satisfied.[229] The purchasers' letter stated that the purchasers would shortly pay the outstanding balance.[230] The court held that this was clearly not an offer to pay coupled with the actual production of the amount owing.[231] Rather, it was an offer to pay the balance at some uncertain time in the near future and was therefore not a proper tender.[232]

B. Real Estate Brokers

Clodfelter v. Plaza, Ltd.[233] presents a classic set of facts entitling a real estate broker to collect his full commission even though the property was sold by another broker. The original broker, Clodfelter, signed an agreement with the defendants which contained an "exclusive right to sell provision" but which also contained language allowing the defendants to sell the property themselves.[234] Several months later, without revoking the first agreement, the defendants signed another agreement with a new broker, and the new broker obtained a contract for sale.[235] Two weeks later, without disclosing the new listing agreement, the defendants obtained an agreement from Clodfelter that he was not entitled to a commission if the property was sold solely through the efforts of the owners.[236] The trial court awarded Clodfelter his full commission.[237]

The supreme court affirmed the trial court, holding that the original agreement was valid and was breached by defendant.[238] The court first recited that there are two types of exclusive listing agreements commonly in use, the "exclusive agency" agreement and the "exclusive right to sell" agreement.[239] An exclusive agency agreement "prohibits an owner from selling the property through another broker during the listing period, but allows the owner to sell his property through his own efforts."[240] In

227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. 102 N.M. 544, 698 P.2d 1 (1985).
234. *Id.* at 545, 698 P.2d at 2.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 546, 698 P.2d at 3.
240. *Id.*

comparison, the exclusive right to sell agreement precludes the sale of property by anyone other than the broker, including the owner, thus protecting the broker from any sale other than the one he arranges.[241] "In the instant case, the parties agreed to an exclusive right to sell provision, but by modifying the agreement to allow the Owners to sell their property, they created an exclusive agency contract."[242] Because defendants sold their property through another broker, the court said they breached the original contract with Clodfelter.[243]

Noting that defendant made no effort to revoke prior to the sale, the supreme court stated that Clodfelter's efforts constituted sufficient partial performance to preclude revocation at will.[244] Clodfelter was not required to tender a willing buyer in order to recover his full commission.[245]

C. Other Real Estate Issues

Clovis National Bank v. Harmon[246] is an unusual case which concerns several notes and mortgages signed by defendant in favor of Clovis National Bank ("CNB"). In July, 1974, Harmon gave the bank a real estate mortgage securing existing and future indebtedness.[247] In December, 1974, Harmon signed a promissory note to the bank which Ken White endorsed on behalf of Whiteway Cattle Company, Inc.[248] In January, 1975, Harmon signed another promissory note and in January, 1976, gave the bank another mortgage to secure past, present and future debts.[249] In December, 1981, Harmon signed an additional promissory note. Although the bank made repeated demands for payment, none of the notes were paid.[250] The bank filed suit against the Harmons, White and Whiteway on the 1974 note and against the Harmons and others on the 1975 and 1981 notes.[251] CNB also sought foreclosure of the 1974 and 1976 real estate mortgages.[252]

The trial court granted judgment in favor of the bank on all counts against all parties including the endorsers, but held that the 1974 note

241. *Id.*
242. *Id.*
243. *Id.* at 547, 698 P.2d at 4.
244. *Id.* at 548, 698 P.2d at 5. *See* White v. Ragel, 82 N.M. 644, 647, 485 P.2d 978, 981 (Ct. App. 1971) (The exclusive agency provision precludes (seller) from employing another broker. The exclusive right to sell protects (broker's) real estate commission upon any sale by anyone. Broker's partial performance established a binding contract.)
245. *Clodfelter*, 102 N.M. at 548, 698 P.2d at 5.
246. 102 N.M. 166, 692 P.2d 1315 (1985).
247. *Id.* at 168, 692 P.2d at 1317.
248. *Id.* Ken White's relationship to Harmon is not identified.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*

(endorsed by White and Whiteway) should be satisfied proratably with the other notes out of the foreclosure proceeds.[253] The bank appealed the finding that the 1974 note was to be satisfied out of the foreclosure proceeds.[254] Although the opinion does not say so, the bank undoubtedly wanted to collect on the 1974 note directly from White and Whiteway without having to apply the foreclosure proceeds.

The supreme court affirmed.[255] Because the provisions of both mortgages clearly expressed an intent that they secure all Harmon's debts, the 1974 endorsed note was secured by the mortgages and should be satisfied proratably out of the sale of the mortgaged property.[256]

Based on language in one or more of the promissory notes, the trial court awarded the bank attorney fees of 10% of the total judgment but gave no indication of why this amount was reasonable.[257] The supreme court, citing previous New Mexico cases determining that mortgage provisions on attorney fees are subject to scrutiny and will be reduced where uncertain or unreasonable,[258] remanded the case for a hearing on a reasonable amount to be awarded for attorney fees.[259]

In *F & S Company, Inc. v. Gentry,*[260] plaintiff F & S sought to foreclose a judgment lien against two parcels of real estate allegedly owned by Gentry. Finding that Gentry had no interest in the subject realty,[261] the trial court denied the foreclosure.[262]

Gentry had originally acquired the realty as a co-tenant with Burch.[263] This deed was recorded in the clerk's office.[264] Gentry and Burch subsequently formed a limited partnership and conveyed the property to the partnership, but they did not record that deed of transfer.[265]

On appeal, F & S argued that sections 14-9-1 and 14-9-3[266] require that all deeds and mortgages must be recorded in the county clerk's office in order to affect the title or rights to real estate of any judgment lien

253. *Id.*
254. *Id.*
255. *Id.* at 169, 692 P.2d at 1318.
256. *Id.*
257. *Id.* at 170, 692 P.2d at 1320. Attorney fees when awarded pursuant to a contract must be reasonable in value and shall not exceed an amount stipulated in the contract. Budagher v. Sunnyland Enterprises, 90 N.M. 365, 563 P.2d 1158 (1977).
258. *Budagher,* 90 N.M. 365, 563 P.2d 1158; Robison v. Katz, 94 N.M. 314, 610 P.2d 201 (Ct. App.), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980).
259. *Clovis Nat'l Bank,* 102 N.M. at 170, 692 P.2d at 1320.
260. 103 N.M. 54, 702 P.2d 999 (1985).
261. N.M. STAT. ANN. §§ 39-4-2, 39-4-13 (1978) permits foreclosure on realty in which the debtor has an interest. Both equitable and legal interests are covered by the act.
262. *F & S,* 103 N.M. at 54, 702 P.2d at 999.
263. *Id.*
264. *Id.*
265. *Id.*
266. N.M. STAT. ANN. §§ 14-9-1 to -3 (1978).

creditor. Gentry argued that even though the deed from Gentry to the partnership was not recorded, the plaintiffs nevertheless had constructive knowledge from the certificate of limited partnership that was filed in the miscellaneous records.[267] The supreme court held that F & S had a duty to search the miscellaneous records, but under these circumstances the partnership certificate was not sufficient to give notice of Gentry's transfer of the interest in the property. The court noted that certificates of partnership are recorded under the partnership name, and although Gentry was a general partner of the partnership his name did not appear anywhere in the index notation for that certificate.[268] Furthermore, the certificate of limited partnership would also fail as notice of the transfer because it was not acknowledged and thus could not be treated as a recorded instrument.[269] Therefore, F & S was entitled to rely on the county records indicating Gentry's continuing interest in the real estate, and the supreme court remanded the case to the district court for an order foreclosing F & S's judgment lien against the real estate to the extent of Gentry's interest.[270]

III. INSURANCE

During the survey period, the New Mexico Supreme Court dealt with three cases requiring interpretation of coverage language in insurance policies. One case addressed wrongful payment of proceeds.

In *Vihstad v. The Travelers Insurance Company,*[271] plaintiff was the mother of a 14-year-old girl who deliberately ingested fifty aspirins in an attempt to commit suicide or to scare her mother. An insurance claim was filed to recover medical expenses and the claim was denied.[272] The issue was the interpretation of the policy term covering "accidental injury or sickness".[273] The supreme court, stating that absent any provision in the policy defining "accidental" as something different from what is understood by the general public, held that words in a policy will be given their ordinary meaning.[274] The case law has interpreted "accidental" as an event occurring without design or purpose or unintentionally on the part of the insured.[275] In this case, the daughter deliberately and inten-

267. *F & S,* 103 N.M. at 55, 702 P.2d at 1000.
268. *Id.*
269. *Id.* at 56, 702 P.2d at 1001. N.M. STAT. ANN. § 14-8-4 (Cum. Supp. 1984).
270. *F & S,* 103 N.M. at 55, 702 P.2d at 1000.
271. 103 N.M. 465, 709 P.2d 187 (1985).
272. *Id.* at 466, 709 P.2d at 188.
273. *Id.*
274. *Id.*
275. *Id.*; Webb v. New Mexico Publishing Co., 84 N.M. 550, 505 P.2d 1226 (1973); King v. Traveler's Insurance Co., 47 N.M. 279, 284, 141 P.2d 333, 336 (1943).

tionally ingested the aspirin. Therefore, the court said, her injury was not the result of an accident as meant in the policy.[276]

In *Weldon v. Commercial Union Assurance Company,*[277] defendant issued a hazard insurance policy to plaintiff for coverage on his motor lodge. Section 1 of the policy defined covered property, and section 2 listed the property excluded from coverage.[278] Subsequent to the issuance of the policy, a leak developed in the underground gas pipeline to the lodge, causing damages for interruption of business.[279] Plaintiff filed a claim under the insurance policy. The defendant denied coverage because section 2 of the policy excluded coverage of underground pipes.[280] However, section 1 of the policy referred to coverage of all fixtures constituting a permanent part and pertaining to the service of the building.[281] The trial court entered judgment in favor of the insured, ruling that the policy was ambiguous and must be construed so as to sustain coverage.[282] The supreme court reversed, holding that the policy must be considered as a whole, and that the specific provisions of Section 2 relating to underground pipes governed as against the general provisions of Section 1.[283]

In *United Nuclear Corp. v. Allendale Mutual Insurance Co.*,[284] plaintiff United Nuclear Corporation ("UNC") sought reimbursement for business interruption and property damage losses that occurred when a tailings embankment failed at UNC's Churchrock uranium millsite. UNC brought suit under two different insurance policies against defendant Allendale Mutual Insurance Company ("Allendale") and its subsidiary Appalachian Insurance Company ("Appalachian").[285] The trial court found in favor of Appalachian but found coverage under Allendale's policy, awarding judgment to UNC for losses and damages, including attorneys fees, prejudgment interest and punitive damages.[286] On appeal, the supreme court discussed those issues, affirming in part and reversing in part.[287]

Allendale's insurance policy provided coverage for "collapse of buildings, structures or a material part thereof" and excluded from coverage "subsidence or any other earth movement."[288] The policy also stated

276. *F & S*, 103 N.M. at 467, 709 P.2d at 189.
277. 103 N.M. 522, 710 P.2d 89 (1985).
278. *Id.* at 523, 710 P.2d at 90.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.* at 524, 710 P.2d at 91.
284. 103 N.M. 480, 709 P.2d 649 (1985).
285. *Id.* at 482, 709 P.2d at 651.
286. *Id.*
287. *Id.*
288. *Id.* Subsidence means falling, lowering or flattening out. WEBSTER'S, THIRD NEW INTERNATIONAL DICTIONARY (1976).

"collapse shall not mean settling . . . ."[289] Allendale's refusal to honor UNC's claim for coverage was based in part on the ground that the dam failure was excluded under the "subsidence or any other earth movement" exception.[290] All parties agreed that the "collapse" was caused by "differential settlement."[291] Allendale claimed that differential settlement was a kind of "subsidence."[292] UNC argued, however, that according to Allendale's own written guidelines, even though "settling"is specifically excluded, when settling is accompanied by or results in physical deterioration and material impairment of the structure, there *is* coverage under the policy.[293] The supreme court upheld the trial court's finding that the "differential settlement" which caused the collapse at the mill site was not a form of "subsidence" that would have been excluded under the policy.[294]

Alternatively, Allendale argued that if coverage was not excluded under the "subsidence" exception, loss by "differential settlement" must be excluded as "any other earth movement."[295] However, "earth movement" had been defined in several previous cases,[296] and the supreme court rejected Allendale's argument, stating that terms used in a policy which have by prior judicial decisions been given a definite meaning will be regarded as being used in view of such established construction and be governed thereby; and if the insurer continues to issue policies containing clauses which have been judicially construed, it will be considered as issuing them with the established construction placed on them, even though the construction violates the literal sense of the words used.[297] In this case the court found that earlier courts had interpreted "earth movement" to apply only to naturally occurring phenomena prior to the execution of the policy.[298] Thus, the exclusion in the Allendale insurance policy did not apply to the tailings embankment spill at the mill site.[299]

Allendale also argued that the award of punitive damages was unlawful and unconstitutional because Allendale had a reasonable basis for denying

289. *United Nuclear*, 103 N.M. at 482, 709 P.2d at 651.

290. *Id.*

291. *Id.* The meaning of differential settlement was a key issue in the case. If it means subsidence then there was no coverage. However, if it means settling which results in damage to the structure then there is coverage.

292. *Id.*

293. *Id.* at 483, 709 P.2d at 652.

294. *Id.* at 484, 709 P.2d at 653.

295. *Id.* at 483, 709 P.2d at 652.

296. *See, e.g.*, Peach State Uniform Serv., Inc. v. Am. Ins. Co., 507 F.2d 996 (5th Cir. 1975). Gullett v. St. Paul Fire and Marine Ins. Co., 446 F.2d 1100 (7th Cir. 1971); Wyatt v. Northwestern Mutual Ins. Co., 304 F. Supp. 781 (D. Minn. 1969).

297. *United Nuclear*, 103 N.M. at 484, 709 P.2d at 653.

298. *Id.*

299. *Id.*

coverage.[300] Allendale further argued that the standard of proof to determine punitive damages should be a clear and convincing standard.[301] The supreme court held the standard of proof for punitive damages is in accordance with the general rule, not only in New Mexico but elsewhere, that issues of fact in civil cases are to be determined by a preponderance of the evidence and not by clear and convincing evidence.[302] However, the court determined that the trial court's award of $25,000,000 in punitive damages was erroneous because the very substantial difference in the amount claimed and the amount awarded showed that Allendale had a legitimate reason to question the amount of damages claimed by UNC.[303] Futhermore, the court said that there were legitimate issues under the various policy provisions regarding UNC's claim for loss in operating profits, extraordinary costs, carrying costs and costs of repairs.[304]

In awarding attorneys fees, the trial court employed a "lode star" figure, using the number of hours worked by UNC's legal counsel and multiplying that number by the attorney's billing rate.[305] The "lode star" figure was then increased by a multiplier of three which represented, in the trial court's view, a proper enhancement for the exceptional success of UNC's attorneys in prosecution of this suit.[306] The supreme court, however, determined that Allendale was not unreasonable in failing to pay UNC's claimed damages under the policy and therefore reversed the trial court's award of attorneys fees.[307] The supreme court also said that "lode star" and multiplier methods of determining awards of attorneys fees have generally been applied only in civil rights cases and class action suits and were inappropriate in this case.[308]

On the issue of pre-judgment interest, Allendale argued that the trial court erred in awarding interest from the date of Allendale's denial of UNC's claim to the date of judgment because the compensatory damage amount was neither liquidated nor ascertainable as of the date of denial.[309] The supreme court affirmed the award. The court recited the established

300. *Id.* Insurance companies may deny coverage when they have a good faith belief that no coverage exists. A policy of insurance is simply a contract between the insurer and the insured. The obligation which arises from the contract is that both the insured and insurer will deal fairly and honestly with one another. *See, e.g.*, Modisette v. Found. Reserve Ins. Co., 77 N.M. 661, 427 P.2d 21 (1967).

301. 103 N.M. at 484, 709 P.2d at 653; Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. App. 1982); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

302. *United Nuclear*, 103 N.M. at 485, 709 P.2d at 654.

303. *Id.*

304. *Id.*

305. *Id.* at 486, 709 P.2d at 655.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 488, 709 P.2d at 657.

law that, where the amount is ascertainable, pre-judgment interest may be awarded at the judge's discretion.[310] The court stated that, although the amount payable to UNC under Allendale's policy was not finally settled until judgment, "mere difference of opinion as to the amount is no more reason to excuse defendant from interest than difference of opinion whether he legally ought to pay it off, which has never been held an excuse."[311]

Bozza v. General Adjustment Bureau,[312] involved a suit by an insured corporation and one of its shareholders against the corporation's insurance company and its claims adjuster claiming improper payment of insurance proceeds. The trial court granted summary judgment for the insurance company, finding that it had no duty to the shareholder and that any duty owing to the insured was fulfilled by the insurance company as a matter of law.[313]

The plaintiff corporation, of which the Bozzas and the Ruzzos were shareholders, purchased a truck and insured it with defendant insurance company.[314] The truck was stolen, proof of loss by the corporation was filed and the adjuster issued two drafts made payable to the corporation in settlement of the claim.[315] Ruzzo endorsed the drafts on behalf of the corporation, cashed the checks and absconded with the money.[316] Bozza stated in affidavits that he notified the adjuster of his suspicion that Ruzzo would abscond with the insurance money and requested that Bozza be notified when the drafts were ready to be picked up.[317] The corporation's attorney affied that he notified the insurance company that the insurance proceeds were to be paid through his office.[318]

The court of appeals affirmed the summary judgment dismissing the shareholder's claim, saying he was not a party to the insurance contract.[319] On the issue of liability to the insured corporation, the insurance company argued that Ruzzo had the apparent authority to act on behalf of and to bind the corporation.[320] The Bozzas argued that the insurance company had notice and knowledge of the limitations on Ruzzo's authority or possessed information which required them to make further inquiry before delivering the drafts to Ruzzo.[321] The court of appeals agreed that this

310. *Id.*
311. *Id.*
312. 103 N.M. 200, 704 P.2d 454 (Ct. App. 1985).
313. *Id.* at 201, 704 P.2d at 455.
314. *Id.* at 202, 704 P.2d at 456.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 203, 704 P.2d at 457.

issue raised a factual question as to whether the insurance company could rely on Ruzzo's apparent authority and reversed the summary judgment.[322]

IV. BANKING

Landrum v. Security National Bank of Roswell,[323] deals with the issue of whether the "adverse claims" statute applies to a bank's dishonoring of checks based upon forged endorsement claims.[324] Plaintiff deposited several checks on which he was one of several payees into his account at Security National Bank of Roswell.[325] Six months later, after receiving affidavits from the other payees stating that plaintiff had forged the endorsements, the bank put a "hold" on the account and refused to honor checks which were presented during the period of the "hold".[326] The affidavits proved to be false, and plaintiff sued the bank for wrongful dishonor, relying on section 58-1-7.[327] That section deems ineffective a claim against a deposit unless the adverse claimant "supplies indemnity deemed adequate by the bank or the bank is served with process or order issued by a court of competent jurisdiction in an action in which the adverse claimant and the person or persons nominally entitled to the deposit are parties . . . ."[328] The bank argued that the statute did not supplant the common law allowing the bank upon proper notice to hold the deposit a sufficient length of time to afford the claimant an opportunity to assert his claim.[329]

The trial court ruled that there was wrongful dishonor as a matter of law.[330] The New Mexico Court of Appeals recognized that the statute modifies the common law, but nevertheless found that it did not apply to the forged endorsement claim.[331] The court reasoned that the payees were not making an adverse claim to the deposit but rather were claiming liability on the part of the bank for conversion.[332] Therefore, upon proper notice of the forged endorsement claims, the bank could properly place a "hold" on plaintiff's checking account in order to inquire into the claims.[333] The bank's liability for wrongful dishonor would depend upon reasonableness of both its inquiry into the claims and the length of the hold, both questions of fact.[334] The judgment of the trial court was reversed and the cause remanded for a new trial.[335]

V. PARTNERSHIPS

Benton v. Albuquerque National Bank,[336] presents a wealth of law on

322. *Id.* at 204, 704 P.2d at 458.
323. 104 N.M. 55, 716 P.2d 246 (Ct. App. 1985), *cert. quashed,* 103 N.M. 798, 715 P.2d 71 (1986).
324. N.M. STAT. ANN. § 58-1-7 (1978).
325. *Landrum,* 104 N.M. at 56, 716 P.2d at 247.
326. *Id.*

assignment of partnership interests. Plaintiff's father had entered into a partnership with his future wife (defendant's predecessor in interest) and then assigned his partnership interest to plaintiff.[337] Subsequently, the father purported to quitclaim his interest in the partnership real estate to the wife, and she then sold the real estate to defendants.[338] Prior to the sale, plaintiff recorded the father's assignment in the county records.[339] The trial court found that the assignment was ineffective as an invalid testamentary transfer and that waiver, laches and estoppel barred plaintiff's claim in any event.[340]

The New Mexico Court of Appeals reversed and remanded for new trial, holding that the father's assignment of his partnership interest was valid and divested him of his partnership interest.[341] The court said that because a partnership must consist of at least two parties, the assignment effectively dissolved the partnership, and the remaining partner should have wound up the partnership's affairs and given plaintiff his due portion of the partnership property and assets.[342] The court of appeals held that upon new trial, the lower court should redetermine if plaintiff's claim was defeated by waiver, laches or estoppel.[343] The opinion does not address the validity of the sale of partnership assets to defendants.

327. *Id.* Plaintiff's argument is as follows: Under N.M. Stat. Ann. § 55-4-402 (1978) the bank is liable for damages proximately caused by wrongful dishonor; however, wrongful dishonor does not include any permitted or justified dishonor. The Adverse Claim statute, § 58-1-7, permits the dishonoring of checks by following specified procedures. The bank, however, withheld payment on the basis of forged endorsement claims and did not comply with the required procedure. Therefore, the bank, as a matter of law, wrongfully dishonored plaintiff's checks when the dishonor's justification rested upon noncompliance with the Adverse Claim Statute.

328. N.M. STAT. ANN. § 58-1-17 (1978).

329. *Landrum*, 104 N.M. at 57, 716 P.2d at 248.

330. *Id.* at 56, 716 P.2d at 247; *see supra* note 327.

331. 104 N.M. at 59, 716 P.2d at 250.

332. *Id.* at 60, 716 P.2d at 251.

333. *Id.* at 62, 716 P.2d at 253.

334. *Id.*

335. *Id.*

336. 103 N.M. 5, 701 P.2d 1025 (Ct. App. 1985).

337. *Id.* at 8, 701 P.2d at 1028.

338. *Id.* He was quitclaiming his interest which he had already given to plaintiff.

339. *Id.*

340. However, because it was not properly executed the assignment was null and void as a testamentary transfer because it was not duly executed as a will. Waiver, laches and estoppel applied to plaintiff's claim because, after the assignment, plaintiff failed to assert any claim against or ownership of the property. After the property was quitclaimed to the wife, she sold it to the defendants. Although she could have informed herself of the assignment by doing a title search, she had not done so and plaintiff had done nothing to exercise his "rights" under the assignment. Plaintiff sued to establish his interest in an apartment building which his father assigned to him in 1956 and then quitclaimed to someone else in 1959. Even though he had recorded his father's assignment, he did not pursue his claims against the property by making his father's wife aware of the assignment. *Id.*

341. *Id.* at 11, 701 P.2d at 1031.

342. *Id.* An assignee cannot become a partner without the consent of the other partners. Hammond Oil Co. v. Standard Oil Co., 259 N.Y. 312, 181 N.E. 583 (1932).

VI. ANTI-TRUST

In *Smith Machinery Corp. v. Hesston, Inc.*,[344] the issue presented was whether a manufacturer's requirement that a dealer stock certain products constitutes an illegal tying arrangement in violation of the New Mexico Anti-Trust Act.[345] In this case, the dealer sued the manufacturer for injunction and declaratory relief, alleging practices in restraint of trade.[346] The manufacturer wanted to add a new tractor to its product line, and, as part of its strategy, required the dealer to stock the new tractor pursuant to the dealership contract.[347] After the dealer refused to do so, the manufacturer sought to limit the dealer's purchases of certain popular equipment and machinery and then sought to terminate the dealer's distributorship altogether.[348] The dealer claimed that the manufacturer conditioned or tied the sale of the popular equipment to the sale of the new tractor line and that this practice was illegal *per se*.[349] He also sued under the Motor Vehicle Dealers Franchising Act.[350] The trial court had dismissed all of the dealer's claims.[351]

After holding that the Motor Vehicle Dealers Franchising Act did not apply to the equipment in question,[352] the supreme court reiterated the elements[353] necessary to prevail on a *per se* tying claim: "(1) a scheme involving two distinct products whereby a buyer must purchase the undesired ("tied") product in order to obtain the desired ("tying") product; (2) a seller possessing sufficient economic power in the tying product market to appreciably restrain competition in the tied product market; and (3) an arrangement affecting a 'not insubstantial' amount of commerce."[354] The court stated that once these three elements have been shown, some courts[355] have said in dicta that a defendant involved in a *per se* tying arrangement may defend itself by affirmatively demonstrating a clear, legitimate business justification.[356] Examples of business justifications for tying arrangements include quality control and preservation

343. *Landrum*, 103 N.M. at 12, 701 P.2d at 1032.
344. 102 N.M. 245, 694 P.2d 501 (1985).
345. N.M. STAT. ANN. § § 57-1-1 to -19 (1978).
346. *Smith*, 102 N.M. at 246, 694 P.2d at 502.
347. *Id.* at 249, 694 P.2d at 505 (1985).
348. *Id.*
349. *Id.*
350. *Id.* at 246, 694 P.2d at 505; N.M. STAT. ANN. §§ 56-16-1 to -12 (1978).
351. *Smith*, 102 N.M. at 246, 694 P.2d at 505.
352. The Act applies to motor vehicles. The equipment in question was not a vehicle since it was not self-propelled.
353. The elements have been set out in federal court cases. *See, e.g.*, N. Pac. Ry. v. United States, 356 U.S. 1 (1958).
354. *Smith*, 102 N.M. at 250, 694 P.2d at 509.
355. *See e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
356. 102 N.M. at 250, 694 P.2d at 509.

of goodwill, establishment of an entire new industry, and introduction of a new product by a small company attempting to break into a new market.[357] The court analyzed several federal anti-trust cases[358] dealing with the *per se* rule and concluded that there is no well-established exception of the *per se* rule which could be applied in the case at bar.[359] The court held that the dealer had presented a *prima facie* case of a *per se* anti-trust violation and overturned the district court's dismissal of the anti-trust claim.[360]

CONCLUSION

This survey period proved prolific in the commercial law area. The majority of the cases simply delineate elements of particular doctrines and reiterate or clarify the law. The practitioner should be wary, however, of the conflicting case law created by the court's decision in *GMAC*.

357. *Id.*

358. Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); Brandeis Machinery & Supply v. Barber-Greene Co., 1973-2 Trade Cas. (CCH) ¶74-672 (W.D.Ky. 1973), *aff'd*, 503 F.2d 503 (6th Cir. 1974); Earley Ford Tractor, Inc. v. Hesston Corp. 556 F. Supp. 544 (W.D. Mo. 1983).

359. *Smith*, 102 N.M. at 253, 694 P.2d at 508.

360. *Id.* at 254, 694 P.2d at 513.