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COMMERCIAL LAW

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I. INTRODUCTION

In an article about developments in the law, it might be unorthodox to cite steps backward in the law. Two decisions of the New Mexico Supreme Court, however, take decidedly backward steps in the development of the law of contracts. Both decisions are grounded in a misapplication of the Uniform Commercial Code ("U.C.C.").

Counterbalancing the two contracts cases, the supreme court logically applied the U.C.C. in a bulk transfer case of first impression. Furthermore, the court made significant steps forward in the area of covenants not to compete and in advancing the law of corporations and the rights of parties dealing with real estate contracts. In addition, the New Mexico Court of Appeals made significant advances in the law of corporations and the law of securities.

II. CONTRACT FORMATION: Steps Backward in Applying the U.C.C.

In *Data General Corp. v. Communications Diversified, Inc.*,[1] the court held that a fully executed, partially performed contract providing for the future delivery of goods was not a contract for the sale of goods. Accordingly, the court applied the six year statute of limitations that is applicable to written contracts in general.[2] The court rejected the four year limitation period which would have applied[3] had the contract been deemed a contract for the sale of goods.[4]

Communications Diversified, Inc., had contracted to purchase a minimum of eleven computers in fifteen months in order to qualify for quantity discounts from the seller, Data General Corp.[5] The buyer ordered only one computer, and the seller sued to recover the portion of the discount which the buyer had not earned.[6] The seller's complaint was filed more than four years, but less than six years, after the breach.[7] The buyer defended on the basis of the statute of limitations, claiming that the four year, not the six year, limitation period applied to the case.[8]

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1. 105 N.M. 59, 728 P.2d 469 (1986).
2. N.M. STAT. ANN. §37-1-3 (1978); 105 N.M. at 62, 728 P.2d at 472.
3. N.M. STAT. ANN. §55-2-725 (1978); 105 N.M. at 62, 728 P.2d at 472.
4. 105 N.M. at 62, 728 P.2d at 472.
5. *Id.* at 60, 728 P.2d at 470.
6. *Id.*
7. *Id.* at 61, 728 P.2d at 471.
8. *Id.*

The statute of limitations issue turned on whether the contract was one for the sale of goods.[9] The majority held that a contract for the sale of goods had not been formed and, therefore, applied the six year period of limitations.[10] It appears that the majority did not dispute that computers are goods.[11] Nevertheless, the court held the contract not to rise to the level of a U.C.C. transaction on the basis of three propositions: (1) A sale consists in the passing of title from seller to buyer; (2) delivery of possession is required to form a contract for the sale of goods; and (3) the contract in question was one for a discount schedule, not a sale of goods.

First, the majority reasoned, "[a] 'sale' consists in the passing of title from seller to buyer."[12] The court found this test had not been met because the parties contemplated only sales in the future.[13] In his dissenting opinion, Justice Stowers correctly points out, however, that a contract for sale of goods under Section 55-2-106 includes both a "present sale of goods" and a "contract to sell goods at a future time."[14] The majority's misconception of the law is all the harder to understand in light of the fact that the buyer did take title to one of the computers.[15] At least in part, the contract satisfied the very proposition which the majority cites to remove the case from the scope of the U.C.C.

The court's second premise was that delivery of possession was required to form a contract for the sale of goods: "Since there was no specific exchange of equipment with this agreement, no title passed."[16] The majority implied that delivery of possession is necessary to passage of title, and therefore to this formation of a contract for the sale of goods. Were this so, only those contracts which were fully performed would come within the scope of the U.C.C. Fully performed contracts rarely give rise to litigation; it is generally the contract which is not performed which gives rise to a suit. By requiring, in essence, the passage of title and a present exchange of goods to come within the U.C.C., the court greatly reduced the chances that the U.C.C. will be applied to contract litigation in New Mexico.

Finally, the majority interpreted the contract to provide that the buyer had no duty to buy even one computer.[17] Accordingly, the majority characterized the contract as an agreement to provide a discount schedule rather than a contract for sale of goods.[18] The court apparently ignored the portion of the contract which provided, "Buyer must purchase upon the date of this Agreement and take delivery during the first 3 months of this Agreement at least 5% of the minimum number."[19] In dissent, Justice Stowers correctly points out that characterizing the contract as one that provides merely for a discount schedule un-

9. *Id.*; "Goods" are defined at N.M. STAT. ANN. §55-2-105(1) (1978).
10. 105 N.M. at 62, 728 P.2d at 472.
11. *Id.*
12. *Id.* at 61, 728 P.2d at 471 (citing N.M. STAT. ANN. §55-2-106 (1978)).
13. *Id.*
14. *Id.* at 62, 728 P.2d at 472.
15. *Id.* at 60, 728 P.2d at 470.
16. *Id.* at 61, 728 P.2d at 471.
17. *Id.*
18. *Id.* at 62, 728 P.2d at 472.
19. *Id.* at 63, 728 P.2d at 473.

dercuts the U.C.C.'s purpose of promoting uniform application of modern business practices as well as the uniform application of the U.C.C. itself.[20]

The *Data General* case presents an interpretation of the U.C.C. that is unduly restrictive and that is apt to create, rather than to resolve, disputes. The choice between applying the common law of contracts in non-goods cases and the U.C.C. in goods cases affects such issues as risk of loss,[21] whether the contract must be in writing,[22] and the existence or non-existence of implied warranties.[23] The supreme court has, with *Data General,* invited further litigation on these once-settled issues.

In *Watson v. Tom Growney Equipment, Inc.*,[24] the supreme court seems to have struggled just as hard to find a contract for the sale of goods as it struggled not to find one in the *Data General* case. The focus of *Growney* is not upon the nature or characterization of the contract, however, but on the sufficiency of the seller's assent to the contract.[25]

Watson's representative went to Growney shopping for a used backhoe and met with Growney's sales agent to discuss the purchase.[26] The two agents settled on a backhoe at a price of $15,818.65, each subject to the approval of his principal.[27] After being notified later that day that Growney had approved the deal, Watson came to Growney's to sign the purchase order.[28] All relevant information regarding the backhoe to be purchased by Watson had been typed in on the blanks in the pre-printed purchase order.[29] Growney, however, never signed the form; the acceptance line was left blank.[30] Growney wanted to avoid the deal, presumably because the purchase price was almost exactly half of what the trial court later found the backhoe to be worth.[31] Growney denied any intention to be bound by the purchase agreement.[32]

The trial court decided the case on a summary judgment motion. The trial court ruled that filling out a purchase agreement on a form pre-printed with Growney's name, coupled with the salesman's assurances that the deal had been approved, constituted Growney's authentication of the contract as a matter of law.[33] Growney's denial of any intent to be bound by the purchase agreement did not, apparently, create a genuine issue of material fact either for the trial court or the majority of the supreme court.[34] Justice Stowers dissented on the basis that issues of fact were present.[35]

20. *Id.*
21. N.M. STAT. ANN. §§55-2-509 to -2-510 (1978).
22. *Id.* §55-2-201.
23. *Id.* §55-2-314.
24. 104 N.M. 371, 721 P.2d 1302 (1986).
25. *Id.* at 373, 721 P.2d at 1304.
26. *Id.* at 372, 721 P.2d at 1303.
27. *Id.*
28. *Id.*
29. *Id.* at 373, 721 P.2d at 1304.
30. *Id.*
31. *Id.* at 374, 721 P.2d at 1305.
32. *Id.* at 373, 721 P.2d at 1304.
33. *Id.*
34. *Id.*
35. *Id.* at 374, 721 P.2d at 1305.

The supreme court's opinion sets a dangerous precedent for sellers who use pre-printed forms. The court implies that whenever a seller's agent fills out such a form and assures the purchaser that the deal has been approved, the seller is bound by the terms of the form even though the agent may not be personally empowered to approve the contract, and even though no person who is actually empowered to sign the contract did so. Automobile dealerships, many of whose salesmen take filled in contracts to a sales manager for final approval, will be surprised to learn that the court may imply such approval as a matter of law—despite the sales manager's rejection of the deal.

Admittedly, a party to a contract may exhibit his intent to be bound by the contract through his conduct. As the majority pointed out, a document is "signed" within the contemplation of the U.C.C. when "any symbol" is "executed or adopted by a party with present intention to authenticate a writing."[36] It is doubtful, however, that a pre-printed form, even one completely filled in by a salesman, constitutes such a symbol as a matter of law. Lawyers representing sellers who use pre-printed forms would be well advised to counsel those sellers to insert language stating that the seller is not bound by the contract without the seller's signature, and that salesmen lack the authority to confer the seller's consent.

III. BULK TRANSFERS: Article 6 Construed in Light of Business Reality.

If the foregoing contracts cases do not appear to have been grounded in the reality of the business world, the supreme court reversed that trend in *Republic Steel Corp. v. Canyon Culvert Co., Inc.*[37] In a case of apparent first impression in any jurisdiction, the court analyzed a question of statutory interpretation in light of commercial practice and reached a common sense solution.

Canyon Culvert Co. owned equipment to manufacture steel culverts.[38] It acquired its inventory of rolled steel on an open account from Republic Steel Corp.[39] In separate transactions, Canyon Culvert Co. disposed of all of its assets.[40] It sold its equipment to Armco, Inc. and, within one month thereafter, sold its inventory to a newly formed sister corporation, Canyon Steel Co.[41]

Republic Steel Corp. sued Armco, Inc. to set aside the sale of the equipment under the Bulk Transfer Act.[42] A bulk sale of the inventory clearly had been made to Canyon Steel Co.: a sale of a major part of the *inventory* of an enterprise engaged in the sale of merchandise from stock is a bulk transfer.[43] A transfer of a substantial part of the *equipment* of such an enterprise is a bulk transfer, however, "if it is made in connection with a bulk transfer of inventory, but not otherwise."[44] The issue before the court was whether Canyon Culvert's sale of

36. N.M. STAT. ANN. §55-1-201(39) (1978); 104 N.M. at 373, 721 P.2d at 1304.
37. 104 N.M. 396, 722 P.2d 647 (1986).
38. *Id.* at 397, 722 P.2d at 648.
39. *Id.* at 396, 722 P.2d at 647.
40. *Id.* at 397, 722 P.2d at 648.
41. *Id.*
42. N.M. STAT. ANN. §§55-6-101 to -110 (1978); 104 N.M. 396, 722 P.2d 648.
43. N.M. STAT. ANN. §55-6-102(1) (1978); 104 N.M. at 397, 722 P.2d at 648.
44. N.M. STAT. ANN. §55-6-102(2) (1978); 104 N.M. at 397, 722 P.2d at 648.

equipment to Armco, Inc. was "made in connection with" its subsequent sale of inventory to Canyon Steel Co.[45]

Relying both on pre-U.C.C. law and the state of the buyer's awareness, the court found no bulk transfer to Armco, Inc.[46] Recourse to pre-Code law is rare in modern U.C.C. decisions, largely because most questions that arise under the U.C.C. are answered by the Code itself or by the case law construing the Code.[47] In *Republic Steel,* however, no modern day authorities existed. Thus, the court turned to the common law notion of free alienability of property existing before the Code was enacted.[48] The majority of jurisdictions have held that statutes in derogation of the common law should be strictly construed.[49] Therefore, the court gave the "in connection with" language its strictest meaning, one that excluded the transfer to Armco, Inc.[50]

Moreover, the court looked at the transaction "from the *buyer's* point of view,"[51] thereby looking at the transaction from the point of view of the one charged with compliance with the Act.[52] Because the buyer of the equipment had no reason to know that large-scale sales of inventory were about to begin,[53] its purchase of equipment gave it no clue that it would be required to comply with the notice requirements of the Act.[54] Had the court looked at the transaction from the point of view of the seller, it is likely that the court would have reached a different conclusion. The seller may have contemplated the sale of its inventory when it sold the equipment to Armco, Inc. By looking at the Act from the point of view of the party charged with compliance, however, the court took a realistic look at the transaction and at the way lawyers for the parties to a sale generally would act.

IV. REAL ESTATE CONTRACTS: A Vendor's Right to Forfeiture Is Thwarted

A case involving a vendor's right to forfeit a defaulted real estate contract purchaser has reached the New Mexico Supreme Court at least five times in the last five years.[55] The court enforced forfeiture in two cases, and refused forfeiture in the other three cases.[56] In the case which reached the court in 1986, *Martinez v. Logsdon,*[57] the court denied forfeiture.

45. 104 N.M. at 396, 722 P.2d at 647.

46. *Id.* at 399, 722 P.2d at 650.

47. *Id.* at 398, 722 P.2d at 649.

48. *Id.*

49. Annotation, *Bulk Transfers: Construction and Effect of U.C.C. Article 6, Dealing with Transfers in Bulk,* 47 A.L.R.3d 1114, 1124 (1973); 104 N.M. at 398, 722 P.2d at 649.

50. 104 N.M. at 398, 722 P.2d at 649.

51. *Id.*

52. *See, e.g.,* N.M. STAT. ANN. §55-6-105 (1978).

53. 104 N.M. at 398, 722 P.2d at 649.

54. *Id.*

55. Martinez v. Logsdon, 104 N.M. 479, 723 P.2d 248 (1986); Russell v. Richards, 103 N.M. 48, 702 P.2d 993 (1985); Paperchase Partnership v. Bruckner, 102 N.M. 221, 693 P.2d 587 (1985); Manzano Indus. v. Mathis, 101 N.M. 104, 678 P.2d 1179 (1984); Huckins v. Ritter, 99 N.M. 560, 661 P.2d 52 (1983).

56. *Martinez,* 104 N.M. 479, 723 P.2d 248 (forfeiture denied); *Russell,* 103 N.M. 48, 702 P.2d 993 (forfeiture enforced); *Paperchase Partnership,* 102 N.M. 221, 693 P.2d 587 (forfeiture denied where property was sold to subpurchasers and payments were kept current); *Manzano Indus.,* 101 N.M. 104, 678 P.2d 1179 (forfeiture enforced); *Huckins,* 99 N.M. 560, 661 P.2d 52 (forfeiture denied) .

57. 104 N.M. 479, 723 P.2d 248 (1986).

Martinez v. Logsdon involved three pyramided real estate contracts.[58] For simplicity, A sold to B, who sold to C, who sold to D—all on real estate contracts.[59] B defaulted to A, and A declared a forfeiture and recorded the special warranty deed from B to A which had been held in escrow.[60] As A was required to do under the contract, he sent notice of default to B, but not to C or D, although C received a copy of the notice from the escrow agent.[61] Yet A knew of D's existence and apparently knew that D would lose his title if B's interest was forfeited.[62] A also knew that D was in possession of the land.[63] Moreover, D had paid C in full and had received a special warranty deed to the property, had made substantial improvements, and would have been willing and able to pay B's default if only he had known of it.[64]

Predictably, neither the trial court nor the supreme court was willing to allow A to re-take title to the property under these circumstances.[65] Unpredictably, the court had to circumvent traditional notions of privity of contract to reach this result.[66] The issue arose under D's complaint for specific performance of A's contract with B.[67] The court granted specific performance despite A's objection that A and D were not in privity of contract.[68] In other words, the court held that the lack of privity between D and A did not relieve A from his duty to accept D's payments to cure the arrearages.

The court focused particularly on two factors which distinguished this case from the established rule that a vendor need not give notice of default to a subpurchaser.[69] First, D was not in default.[70] Second, D was not aware of A's demand on B.[71] A vendor has no duty to notify an *unknown* subpurchaser of the original purchaser's default.[72] The *Martinez* court, however, seems to have created a duty to give notice to a subpurchaser when the vendor knows or has "constructive notice" of the subpurchaser's interest.[73] In such a case, the court appears to treat a vendor-subpurchaser relationship as one involving privity of contract as well as privity of estate.[74]

In representing subpurchasers, practitioners may wish to give notice to the original vendor of their client's purchase of the property. Under *Martinez*, a vendor with such notice may be obligated to give notice of default to the remote

58. *Id.* at 480, 723 P.2d at 249.
59. *Id.*
60. *Id.* at 481, 723 P.2d at 250.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 482, 723 P.2d at 251.
65. *Id.*
66. *Id.*
67. *Id.* at 481, 723 P.2d at 250.
68. *Id.*
69. Shindledecker v. Savage, 96 N.M. 42, 627 P.2d 1241 (1981); Campbell v. Kerr, 95 N.M. 73, 618 P.2d 1237 (1980).
70. 104 N.M. at 481, 723 P.2d at 250.
71. *Id.*
72. Campbell v. Kerr, 95 N.M. 73, 79, 618 P.2d 1237, 1243 (1980).
73. 104 N.M. at 481, 723 P.2d at 250.
74. *See, e.g., id.* at 481-82, 723 P.2d at 250-51 (discussing *Ex Parte Robinson*, 244 Ala. 313, 13 So. 2d 402 (1943)).

vendee despite technical lack of privity.[75] Real estate contract sellers, on the other hand, may attempt to avoid any duty to provide notice of default to a remote purchaser by inserting appropriate language in the contract.[76] While no assurance can be given that such language will defeat the duty of notice, the language should at least give a court pause to think that a subpurchaser acquires his interest *subject* to the terms of the underlying contract, including the forfeiture provisions.[77]

V. CORPORATIONS: A Logical Application of the Uniform Fraudulent Conveyance Act

In *Allied Products Corp. v. Arrow Freightways, Inc.*,[78] the supreme court held that (1) former shareholders of a defunct corporation were not liable to creditors of the corporation because of the corporation's failure to file a notice of cancellation of shares[79] and (2) the conversion of equity into secured debt was not a fraudulent conveyance under three sections of the Uniform Fraudulent Conveyance Act,[80] and consequently, the transaction was not unconscionable.[81] *Allied Products* is a notable advance in the law of corporations as the court recognized that certain common law protections for creditors have no place in modern commercial practice and have been replaced by statutory protections.[82]

In *Allied Products*, the Voldens, who were the sole shareholders of Arrow Freightways, Inc. ("Arrow"), sold their shares of stock in Arrow to the Wards.[83] In the first transaction the Voldens sold 367 shares of Arrow to the Wards.[84] The Wards made a cash down payment and executed a promissory note for the balance which was secured by Arrow's guaranty.[85] In the second transaction, Arrow redeemed the remaining 733 shares of stock from the Voldens and executed a promissory note.[86] The note was guaranteed by the Wards and was secured by liens on Arrow's equipment and by a second mortgage on Arrow's real property.[87] Arrow did not file a statement of cancellation of Arrow's shares with the State Corporation Commission.[88]

When the Wards defaulted on their payments to the Voldens, the Voldens sold Arrow's equipment and applied the proceeds to the indebtedness owed to them

75. 104 N.M. at 481-82, 723 P.2d at 250-51.

76. A provision could be added to the effect that any subpurchaser acquiring an interest in the property takes his interest with express knowledge that the seller undertakes no duty to provide notice of default to him.

77. Campbell v. Kerr, 95 N.M. 73, 79, 618 P.2d 1237, 1243 (1980); 104 N.M. at 481, 723 P.2d at 250.

78. 104 N.M. 544, 724 P.2d 752 (1986).

79. *Id.* at 547, 724 P.2d at 755.

80. *Id.* at 548, 724 P.2d at 756.

81. *Id.*

82. *Id.* at 546, 724 P.2d at 754.

83. *Id.* at 545, 724 P.2d at 753.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

by the Wards and Arrow.[89] Certain judgment creditors of Arrow filed suit against the Voldens, seeking to hold the Voldens personally liable on their claims. The issues presented to the court were two-fold: (1) were the Voldens personally liable for the creditors' claims for failing to file a statement of cancellation of shares and (2) could the stock sales transaction be overturned under the Uniform Fraudulent Conveyance Act?

Plaintiffs, the judgment creditors, first argued that the Voldens were liable because they failed to file a statement of cancellation as required by the New Mexico Business Corporation Act in 1982.[90] The court rejected plaintiffs' argument and held that the failure to file the notice of cancellation of shares did not give rise to personal liability of the shareholders.

First, the court found that the New Mexico Business Corporation Act is silent as to whether the duty to file the statement of cancellation falls on the corporation or on the shareholders.[91] Before the legislature repealed this section of the Business Corporation Act, it was generally thought that the corporation had the burden of filing the statement.[92] The usual practice at the time was to have an officer of the corporation file the statement on behalf of the corporation. The court refused to find the duty was a personal duty, rather than a corporate duty.[93]

Second, the court observed that under the "trust fund doctrine" of corporate law, a corporation's capital is held in trust for the creditors of the corporation.[94] The corporation must file a statement of cancellation to give notice to its creditors that its capital has been reduced and that fewer assets remain to satisfy the creditors' debts.[95] The court stated, however, that this theory is "outmoded," and "a more useful form of notice was given to the world by recording with the Bernalillo County Clerk the . . . financing statements . . . by which the debts from Wards and Arrow to Voldens were secured."[96]

Furthermore, both forms of notice are intended to give creditors information about the financial condition of the corporation; that is, whether the corporation has a sufficient amount of unencumbered assets to satisfy the creditors' claims. Any action for failure to give such notice is against the corporation, not personally against the corporation's shareholders. The court, therefore, found no basis for holding the Voldens personally liable under this section of the Business Corporation Act.[97]

The court's holding in *Allied Products Corp.* is consistent with the notice filing concept of Article 9 of the Uniform Commercial Code[98] and modern business practice. In their lending activities, creditors search the Uniform Commercial Code records of the office of the Secretary of State and the offices of County Clerks to discover security interests and other encumbrances of record.

89. *Id.* at 546, 724 P.2d at 754.
90. *Id.*; N.M. STAT. ANN. §53-13-10(A) (1978) (Repealed 1983).
91. 104 N.M. at 546, 724 P.2d at 754.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 547, 724 P.2d at 755.
98. N.M. STAT. ANN. §§55-9-101 to -507 (1978).

Creditors do not search the records of the State Corporation Commission to discover certificates of cancellation. More importantly, creditors typically do not lend money or sell goods or services based on the security of a corporation's stated capital. A properly perfected security interest affords much better protection.

Failing to prevail on the issue of the Voldens' personal liability under the Business Corporation Act, the plaintiffs then sought to have the court find that the stock sales transaction was a fraudulent conveyance under the Uniform Fraudulent Conveyance Act.[99] The court applied the Uniform Fraudulent Conveyance Act and held that the conversion of equity into secured debt was not a fraudulent conveyance, and, therefore, the transaction was not unconscionable.[100]

The court based part of its analysis on its holding in *First National Bank in Albuquerque v. Abraham*[101] that (1) to prove a conveyance was fraudulent the plaintiff must show both that the conveyor was insolvent before or because of the transaction and that there was no consideration for the transaction and (2) that insolvency can be proved with the "balance sheet" test.[102] Under the balance sheet test, the trial court found that Arrow had a net worth before the stock transaction of $1,637,934; subtracting the $1,000,000 debt to the Voldens left a net worth in Arrow of $637,934.[103] The supreme court upheld the trial court's finding that Arrow was not insolvent before or immediately after the stock transaction.[104] Consequently, plaintiffs failed to prove one of the essential elements of a fraudulent conveyance.

The court next turned to the requirement of consideration and examined the definition of the term under the Uniform Fraudulent Conveyance Act. The court upheld the trial court's finding that Arrow received fair consideration in the stock sales transaction. Evidence that the parties dealt in good faith and that "the value of the company is a fair equivalent, not disproportionately small, for the purchase price" was sufficient to support a finding of fair consideration.[105]

Under the Uniform Fraudulent Conveyance Act, the plaintiffs also failed to prove intent to defraud or the presence of any of "the commonly accepted badges of fraud in the transaction."[106] The court observed that, among other things, the fact that the transaction was entered into at arms-length by the parties, who were each represented by counsel, tended to negate any inference of intent to defraud.[107]

99. *Id.* §§56-10-1 to -13 (Repl. Pamp. 1986).

100. 104 N.M. at 548, 724 P.2d at 756.

101. 97 N.M. 288, 292, 639 P.2d 575, 579 (1982).

102. Under the "balance sheet" test for insolvency, assets are balanced against liabilities. This test differs from the equity test for insolvency. The inquiry under the equity test is whether the corporation can meet its debts as they mature.

103. *Allied*, 104 N.M. at 547, 724 P.2d at 755.

104. *Id.*

105. *Id.*

106. *Id.* at 548, 724 P.2d at 756. The commonly recognized badges of fraud include the insolvency or indebtedness of the debtor, the lack of consideration for the conveyance, the retention by the grantor of possession of the property, the close relationship between the transferor and the transferee and the threat or pendency of litigation. First National Bank in Albuquerque v. Abraham, 97 N.M. 288, 293, 639 P.2d 575, 580 (1982).

107. 104 N.M. at 548, 724 P.2d at 756.

The court further upheld the trial court's findings that the challenged stock transfers were not unconscionable.[108] The court stated that plaintiffs' theories of common law equitable subordination and the trust fund doctrine "have been effectively subsumed by statute."[109] To show the transactions were unconscionable, "plaintiffs would have had to prove the same insolvency, lack of fair consideration, or intent to defraud as required by the [Uniform Fraudulent Conveyance] Act."[110] While the leveraged buy-out of Arrow may have "shocked the common sense," the court observed that "we cannot set aside every contract which we deem to be insensible, only those which are unconscionable."[111]

Allied Products Corp. is in line with modern commercial practice and represents a significant advance in the development of corporate law. As the court recognized, the common law theories of equitable subordination and the trust fund doctrine are "outmoded." The protection, if any, once afforded to creditors by these common law theories is now provided by statute. The conveyances at issue were clearly within the ambit of the Uniform Fraudulent Conveyance Act, and the court, to its credit, logically applied the statute, rather than resorting to an exercise of the court's equitable powers.

VI. CORPORATIONS: Going Beyond the Statutory Remedy of Dissolution To Avoid Harshness

In *McCauley v. Tom McCauley and Sons, Inc.*,[112] the Court of Appeals of New Mexico held that the remedies both of partition and reorganization and of redemption of minority shares are available to redress oppressive conduct of majority shareholders in the close corporation context, even in the absence of express statutory authority.[113] Like its decision in *Allied Products Corp.*, the court's decision in *McCauley* represents an advance in the law of corporations. The court recognized that termination of a corporation's existence is not always the most appropriate form of relief for oppressed minority shareholders.[114]

LaVerne and Fred McCauley were married and owned 6,070 shares of stock in Tom McCauley and Sons, Inc. ("TM&S"),[115] a closely held family corporation, involved in cattle ranching.[116] LaVerne was a director and an officer of TM&S, kept the books, managed the accounts and provided cooking and cleaning for the ranch hands.[117] Due to marital strife, LaVerne left the ranch and petitioned for a dissolution of marriage.[118]

After LaVerne departed, Fred learned that LaVerne had withdrawn corporate

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. 104 N.M. 523, 724 P.2d 232 (Ct. App. 1986).
113. *Id.* at 527, 724 P.2d at 236.
114. *Id.*
115. *Id.* at 525, 724 P.2d at 234.
116. *Id.*
117. *Id.*
118. *Id.* at 526, 724 P.2d at 235.

funds for her own benefit.[119] Fred conveyed this information to the other shareholders of TM&S.[120] LaVerne was not re-elected as an officer and director of TM&S, apparently as a result of this information.[121] Furthermore, TM&S ceased to provide corporate benefits to LaVerne.[122] LaVerne demanded that the corporation declare a dividend.[123] The majority shareholders refused to do so, even though funds were available for a dividend.[124]

LaVerne filed suit against the corporation and the majority shareholders, seeking involuntary liquidation under the New Mexico Business Corporation Act, as well as damages for fraud and breach of fiduciary duty, on the grounds that the majority shareholders had engaged in oppressive conduct.[125] The trial court found that defendants' conduct was oppressive and proposed three alternative remedies: liquidation, re-organization or redemption of plaintiff's shares.[126] The defendants chose to purchase plaintiff's shares of TM&S.[127]

On appeal, the court of appeals first considered whether there was substantial evidence to support the trial court's finding of oppressive conduct.[128] In doing so, the court relied on Section 53-16-16(A)(1)(b) of the Business Corporation Act[129] which provides, in part: "A. The district courts may liquidate the assets and business of a corporation: (1) in an action by a shareholder when it is established that: . . . (b) the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent."[130]

The court observed that "oppressive conduct" is not defined in the Business Corporation Act or in the ABA Model Business Corporation Act[131] from which New Mexico's statute is derived.[132] Oppressive conduct is an "expansive term," and "the absence of a rigidly defined standard enables courts to determine, on a case-by-case basis, whether the acts complained of serve to frustrate the legitimate expectations of minority shareholders."[133] The court referred to *In Re Application of Topper*[134] for the proposition that there is a distinction between oppressive conduct and illegal or fraudulent behavior.[135] Oppressive conduct might be shown by an "arbitrary, overbearing and heavy-handed course of conduct."[136] The court also cited the case of *Dilaconi v. New Cal Corp.*[137] for the

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 534, 724 P.2d at 243.
127. *Id.*
128. *Id.* at 527, 724 P.2d at 235.
129. N.M. STAT. ANN. §53-16-16 (Repl. Pamp. 1983).
130. 104 N.M. at 526, 724 P.2d at 235.
131. MODEL BUSINESS CORP. ACT §97 (1969).
132. 104 N.M. at 526, 724 P.2d at 235.
133. *Id.* at 527, 724 P.2d at 236.
134. 107 Misc. 2d 25, ___, 433 N.Y.S.2d 359, 365 (N.Y. Sup. Ct. 1980).
135. 104 N.M. at 528, 724 P.2d at 237.
136. *Id.* (quoting Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, ___, 285 N.E.2d 574, 581 (Ct. App. 1972)).
137. 97 N.M. 782, 643 P.2d 1234 (Ct. App. 1982).

precaution that Section 16 of the New Mexico Business Corporation Act[138] "does not provide that disagreement warrants liquidation."[139]

The court reviewed the trial court's findings that for seven years after organization of the corporation, LaVerne reasonably expected to participate in the management and decision-making processes of the corporation and share in the income and other corporate benefits.[140] After marital problems began between LaVerne and Fred, LaVerne was deprived of almost all corporate benefits and was removed as a director and an officer of TM&S.[141] From the onset of the marital problems between LaVerne and Fred, until the date of trial, the only benefits which LaVerne received from TM&S were (1) a declared but unpaid dividend of $600 and (2) "gifts" of a few sides of beef.[142] The court concluded that these factual findings, among others, "touch on virtually all of the issues which may properly be considered by a court in determining whether the acts of the majority have constituted oppressive conduct."[143] The court found substantial evidence in support of the trial court's findings and held that these findings supported the conclusion that the defendants had engaged in oppressive conduct.[144]

The court of appeals approved the trial court's recognition of remedies not specifically provided in the oppressive conduct statute.[145] The court reasoned that "an order of corporate dissolution is a drastic remedy and should be utilized sparingly, after consideration of other alternative forms of relief."[146] The trial court properly had drawn upon its "reservoir of equitable powers" to find "other remedies to avoid the harshness of dissolution," including the remedies of reorganization and redemption.[147]

Dissolution is the termination of the legal existence of the corporation. In New Mexico's oppressive conduct statute[148] the legislature has mandated dissolution without reference to whether dissolution will be in the best interests of the corporation, and without allowing for other less drastic remedies. In *McCauley,* the statute may have fit the equities demanded by the facts, but the remedy was too harsh given the facts presented. The court took an enlightened approach to the problem of minority oppression by recognizing the interests of the corporation and, thus, allowing for an alternate form of relief.[149]

The court's "expansive" definition of the term "oppressive conduct" is, how-

138. N.M. STAT. ANN. § 53-16-16 (Repl. Pamp. 1983).

139. 104 N.M. at 529, 724 P.2d at 238 (quoting Dilaconi v. New Cal Corp., 97 N.M. at 788, 643 P.2d at 1240).

140. 104 N.M. at 529, 724 P.2d at 238.

141. *Id.* at 530, 724 P.2d at 239.

142. *Id.* at 531, 724 P.2d at 240.

143. *Id.*

144. *Id.* at 532, 724 P.2d at 241.

145. *Id.* at 527, 724 P.2d at 236.

146. *Id.*

147. *Id.* at 534, 724 P.2d at 243.

148. N.M. STAT. ANN. § 53-16-16 (Repl. Pamp. 1983).

149. 104 N.M. at 534, 724 P.2d at 243. In going beyond the express statutory remedy of dissolution, the court did, however, engage in a form of judicial legislation. In the absence of statutory authorization of remedies apart from dissolution, some courts have held dissolution to be the only remedy available. *See* Harkey v. Mobley, 552 S.W.2d 79 (Mo. Ct. App. 1977); Gruenberg v. Goldmine Plantation, Inc., 360 So. 2d 884 (La. Ct. App. 1978).

ever, bothersome. Under such a broad definition, virtually any conduct could be construed as "oppressive," including the otherwise reasonable acts of majority shareholders when they attempt to deal with the misconduct of a minority shareholder or when they try to contend with a litigious and disruptive minority shareholder. Although it is true that "oppressive conduct" is not defined in the Model Act,[150] "the terms 'illegal,' 'oppressive' or 'fraudulent' . . . have somewhat limited definitions within all jurisdictions."[151] All jurisdictions, that is, except New Mexico. Indeed, the judicial interpretation in *McCauley* of the term "oppressive" is so broad that even "gifts" of a few sides of beef are brought under the court's scrutiny.[152] One wonders if ten sides of beef would have been sufficient and whether, in hindsight, the extra precaution of an additional smoked ham or two might not have been advisable.

VII. COVENANTS NOT TO COMPETE: Non-competition Clauses in the Context of Business Acquisitions and Dispositions

In *Bowen v. Carlsbad Insurance & Real Estate, Inc.*,[153] the supreme court considered the enforceability of a covenant not to compete contained in a contract for the sale of an insurance business.[154] The supreme court held that a fifteen-year non-competition clause in a buy-sell agreement was not unreasonable.[155] *Bowen* is a well-reasoned decision and provides useful guidelines concerning the factors a court will consider in determining the reasonableness of a restrictive covenant ancillary to the sale of a business.

Bowen and Carlsbad Insurance and Real Estate, Inc. ("Carlsbad") entered into a stock purchase agreement under which Carlsbad was to redeem all of Bowen's stock.[156] The purchase agreement contained the following covenant not to compete:

> The Seller agrees not to compete, directly or indirectly, with the Buyer in the insurance and real estate business within a radius of 15 miles from Carlsbad, New Mexico, for a period of 15 years. In the event the Seller reacquires ownership of the Buyer by exercising his option as above provided, then and in that event, Oran Means covenants and agrees not to compete with the seller in the insurance and real estate business within a radius of 15 miles of Carlsbad, New Mexico, for a period of 15 years. In the event of the breach of this covenant, the breaching party agrees to pay the sum of $100,000 as liquidated damages.[157]

150. MODEL BUSINESS CORP. ACT § 97 (1969).
151. *Id.*, comment.
152. 104 N.M. 531, 724 P.2d at 240. *McCauley* also provides a useful discussion of the appropriate factors to consider in establishing the fair value of shares of stock in close corporations and discount factors which may be applied in determining the value of non-controlling shares in such corporations. *Id.* at 532-36, 724 P.2d at 241-45.
153. 104 N.M. 514, 724 P.2d 223 (1986).
154. *Id.* at 515, 724 P.2d at 224.
155. *Id.* at 517, 724 P.2d at 226.
156. *Id.* at 515, 724 P.2d at 224.
157. *Id.*

Litigation commenced when Bowen set up an insurance office in Carlsbad, New Mexico, and then petitioned the court for a declaratory judgment against Carlsbad. Bowen argued that the covenant not to compete was unreasonable because of the time limitation.[158] The trial court found that the fifteen-year restrictive covenant was reasonable and enforceable.[159] The supreme court affirmed this finding, reasoning that "a restrictive covenant is valid if it is within reasonable limits of time and space and ancillary to the sale of a business."[160] Further, the court observed, "courts are more reluctant to disturb restrictive covenants in buy-sell agreements than those in employment contracts."[161]

As the court noted, the protection which the covenant provided was the main inducement for paying a high price for the business.[162] Bowen had developed a substantial clientele and a prominent reputation in a specialized insurance business in a small community.[163] That business easily could have been destroyed by competition from Bowen.[164]

The *Bowen* court's decision demonstrates that the New Mexico courts may enforce covenants not to compete more liberally in the context of business transfers than in the context of employment contracts. The policy considerations in the two situations necessarily differ. In the employment case, courts are more likely to interfere to protect a person's right to earn a living. In the sale of business case, courts are more likely to approve the restriction because of the value of the goodwill purchased, especially if the transaction is entered into at arms length, in good faith, and the parties are represented by counsel.[165] In either case, however, the longer the time period of the restraint and the larger the territorial limitation, the more likely a court will be to find the covenant unenforceable. The special facts of the *Bowen* case led the court to enforce a fifteen-year restriction. In *Bowen*, the transaction involved an insurance business in a small community.[166] The goodwill of the business could easily have been destroyed by competition from the insurance agent who built that goodwill.[167]

158. *Id.* Bowen did not challenge the reasonableness of the geographic restriction. *Id.*

159. *Id.*

160. *Id.* at 516, 724 P.2d at 225. The court held that the trial court properly had considered the following factors to determine whether the covenant was reasonable: the fifteen-year amortized payout of the purchase price, which matched the fifteen-year covenant; the total price paid for the business; the size of the community in which the business was located; the parties involved; and the nature of the business. *Id.* at 517, 724 P.2d at 236.

161. *Id.* at 516, 724 P.2d at 225. *See also* Gann v. Morris, 122 Ariz. 517, 518, 596 P.2d 43, 44 (Ct. App. 1979) in which the Court of Appeals of Arizona pointed out the distinction between covenants incidental to employment contracts and those incidental to business sales. The court noted that an employee who is subject to a restrictive covenant is restricted from utilizing his skills and experience which may seriously limit his ability to earn a living. Given the potential hardship and uneven bargaining position of the parties, courts will scrutinize employment contracts more closely than buy-sell transactions. *Id.*

162. 104 N.M. at 516, 724 P.2d at 225.

163. *Id.* at 517, 724 P.2d at 226.

164. *Id.* The court also found that the restrictive covenant was not void as against public policy or as a restraint of trade, and the contract was negotiated in good faith as evidenced by the reciprocal provision in the covenant. The court rejected Bowen's contention that he had the option of paying liquidated damages and then engaging in the insurance business. The court found that "the parties did not intend the liquidated damages clause to constitute a payable privilege to engage in conduct which was forbidden by the contract," but rather intended to include the provision to assure performance of the restrictive covenant. *Id.*

165. *Id.* at 516, 724 P.2d at 225.

166. *Id.* at 517, 724 P.2d at 226.

167. *Id. Bowen* also indicates that it may be useful in drafting non-compete provisions for buy-

Because of these special facts, the court was willing to enforce a long time restraint.

VIII. SECURITIES: The Test for an Investment Contract

In *State v. Shade*[168] the New Mexico Court of Appeals held that the sale of a condominium time-share contract met the requirements for the sale of an "investment contract." The *Shade* court significantly advanced the law of securities by adopting the test for determining the existence of an investment contract that the United States Supreme Court established in *Securities and Exchange Comm. v. W. J. Howey Co.*[169]

Vincent organized Ruidoso Condo Shares ("RCS") to sell time-shares in condominium units.[170] The contracts that RCS purchasers signed provided that the purchaser was buying a time-share for personal use, not for investment purposes.[171] The evidence indicated, however, that representations that the time-shares were a good investment induced the purchasers to buy.[172] Neither RCS nor any of its affiliates registered the sale with the New Mexico Securities Bureau.[173]

Under Section 58-13-41(A) of the New Mexico Securities Act, it is a felony to sell a security or to offer it for sale without first registering the transaction with the New Mexico Securities Bureau.[174] The Act includes "investment contracts" in its definition of a security.[175] The trial court found that Vincent was guilty of selling and offering for sale investment contracts without first registering them.[176] On appeal, Vincent challenged the sufficiency of the evidence to show that the time-shares constituted investment contracts and, thus, securities.[177] To resolve this issue, the court of appeals adopted the *Howey* test for determining the existence of an investment contract.[178]

Under the *Howey* test,[179] an investment contract is a contract: (1) where an individual invests his money in a common enterprise; (2) with an expectation of profits; (3) based solely on the efforts of a promoter or third party.[180] In determining whether the RCS transactions met the *Howey* test, the court looked

sell agreements to include a reciprocal provision in the covenant as an indication of good faith negotiations and to match the period of a deferred payment of the purchase price with the period of the restriction to show reasonableness. *Id.*

168. 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986).

169. 328 U.S. 293 (1946); 104 N.M. at 716, 726 P.2d at 870.

170. *Shade*, 104 N.M. at 714, 726 P.2d at 868.

171. *Id.*

172. *Id.*

173. *Id.* at 715, 726 P.2d at 869.

174. *Id.* The case was decided under the former Securities Act, N.M. STAT. ANN. §§ 58-13-1 to -46 (Repl. Pamp. 1984 & Cum. Supp. 1985).

175. 104 N.M. at 715, 726 P.2d at 869.

176. *Id.*

177. *Id.*

178. *Id.* at 716, 726 P.2d at 870.

179. 328 U.S. at 299.

180. 104 N.M. at 716, 726 P.2d at 870. This test, in shorthand form, embodies the essential attribute that runs through all the court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profit to be derived from the entrepreneurial or managerial efforts of others. United Hous. Found. Inc. v. Forman, 421 U.S. 837, 852, (1975).

beyond the boilerplate of the promotional literature and the disclaimer and integration clauses of the time-share contracts. The important factor for the *Shade* court was the substance of the transactions, that is, what the sales people of RCS actually said: "the representations, express and implied, that RCS time-shares were a good investment."[181]

A "common enterprise," the first prong of the test, is one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.[182] The *Shade* court found that the RCS time-share arrangements constituted a "common enterprise."[183] The court reasoned that the maintenance services that RCS provided created a continuing relationship between RCS and the purchasers.[184] In addition, the court noted, "the benefits to the purchasers of time-shares, which benefits included the use and appreciation in value of the time-shares, largely depended on the managerial skills of the owners and managers."[185]

The *Shade* court next concluded that the RCS purchasers were led to expect profits and, thus, the second prong of the *Howey*[186] test was satisfied.[187] In making its determination, the *Shade* court considered all of the circumstances surrounding the transaction. Representations had been made that the time-shares were a good investment and would increase in value, and a "pitch book" indicated a glowing future for Ruidoso.[188] Thus, the court found an expectation of profits notwithstanding (1) instructions given by RCS to its sales people to tell buyers that they should not consider their purchase an investment, [189] (2) contract provisions stating that the purchase was for personal use and not investment,[190] and (3) the integration clause in the contracts.[191]

Finally, the *Shade* court held that the time-share contracts met the third prong of the test.[192] In determining whether the purchaser was led to expect profits *based solely on the efforts of a promoter or third party,* "the critical inquiry is whether the managerial efforts are functionally essential or undeniably significant to that profit."[193] In *Shade* the maintenance services and marketing efforts that RCS personnel provided were, in the court's view, "undeniably significant to that profit."[194]

In conclusion, the *Shade* court found that the time-share contracts were in-

181. 104 N.M. at 714, 726 P.2d at 868.
182. *Id. See also* Securities and Exch. Comm'n v. Glenn W. Turner Enters., Inc., 474 F.2d 476, 482, n.7 (9th Cir. 1973), *cert. denied,* 414 U.S. 821.
183. 104 N.M. at 716, 726 P.2d at 870.
184. *Id.*
185. *Id.*
186. *See supra* notes 178-79.
187. 104 N.M. at 716, 726 P.2d at 870.
188. *Id.* at 714, 726 P.2d at 868.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 717, 726 P.2d at 871. *See supra* notes 178-79.
193. 104 N.M. at 716, 726 P.2d at 870 (quoting Cameron v. Outdoor Resorts of Am., Inc., 608 F.2d 187, 193 (5th Cir. 1977)).
194. 104 N.M. at 716, 726 P.2d at 870. The Regulations of the New Mexico Securities Division embody the *Howey* test and are consistent with the *Shade* case. Securities Division Rule 86-2.01.

vestment contracts under all three prongs of the *Howey* test and thus, securities, the sale of which was subject to the registration requirements imposed by the New Mexico Securities Act. The three-prong *Howey* test is the definitive test for an "investment contract." The court's formal adoption of the *Howey* test in *Shade* will add certainty to the practice and enforcement of the securities laws in New Mexico.

The adoption of the *Howey* test has special implications for general partnerships. The third prong of the *Howey* test, that expected profits must be based "solely on the efforts of a promoter or third party," tends to exclude general partnership interests from constituting a security and thus falling under the registration requirement.[195] General partners frequently participate in the profit-making efforts of the general partnership, and, consequently, their expectation of profits is not based "solely" on the efforts of a third party.[196]

Some jurisdictions, however, have held that the word "solely" in the *Howey* test should not be taken literally.[197] For these jurisdictions, minimal participation by investors does not preclude a finding that the investment is a security.[198] The *Shade* court stated that "the critical inquiry is whether the managerial efforts are functionally essential or undeniably significant to that profit."[199] Thus, the *Shade* court appears to agree with the broad interpretation of the word "solely."

As a result, the general partnership should be organized to provide as much direct participation by the general partners as possible. Practitioners should consider carefully not only the terms of the partnership agreement, but also the nature of the partners. The general partnership agreement must be drafted to give general partners managing powers—the more powers the general partner has, the less likely his partnership interest will be found to be a security. The general partners also must understand that the nature of their position imposes ongoing duties and responsibilities—they cannot simply rely on a managing partner or management committee of partners.

195. *See* Goodwin v. Elkins & Co., 730 F.2d 99 (3d Cir. 1984).

196. *See id.*

197. Crowberg v. Montgomery Ward and Co., 570 F.2d 877, 879 (10th Cir. 1978); Cameron v. Outdoor Resorts of Am., Inc., 608 F.2d 187, 193 (5th Cir. 1977); McCowan v. Heidler, 572 F.2d 204, 211 (10th Cir. 1975); Securities and Exch. Comm'n v. Glen W. Turner Enters., Inc., 474 F.2d 476, 482 (9th Cir. 1973).

198. *See supra* note 193.

199. 104 N.M. at 716, 726 P.2d at 870 (quoting Cameron v. Outdoor Resorts of Am., Inc., 608 F.2d 187, 193 (5th Cir. 1977)).