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COMMERCIAL LAW

I. INTRODUCTION

During the survey period, which covers 1988 through mid-1989, several major changes occurred in the field of commercial law. Notably, the courts have expanded their protection of consumers,[1] employees,[2] and tenants.[3] In addition, other areas of the law, while not changed dramatically, were clarified. By providing a brief review of each of the important cases, along with analysis of the import of each case, this article will bring the reader up to date on the state of commercial law in New Mexico.

II. PREMATURE RELEASE OF MORTGAGE

In *Los Alamos Credit Union v. Bowling*,[4] the supreme court held that the release of a mortgage resulting from clerical error does not necessarily relieve a mortgagor's obligation on the note.[5] A prior supreme court decision held that "it is the intent with which the release is made, not the making of the release, which controls."[6] The *Bowling* decision clarifies the issue of mistaken release by adopting the law of other jurisdictions and holding that a cancellation, release, or surrender of an instrument is invalid if it is unauthorized or done by mistake.[7]

Defendants borrowed $65,000 from plaintiff, executing a promissory note and residential first mortgage as security.[8] To make payments on the note, defendants preauthorized automatic deductions from their credit union account.[9] Through a clerical error, an employee marked the original note and mortgage "Paid."[10] Under the mistaken belief that defendants had paid the note, the assistant treasurer executed a release of mortgage and forwarded the original note, mortgage, and release documents to defendants.[11] One week later, defendants recorded the release.[12]

Plaintiff discovered its error the following month and requested that the note be reaffirmed and the mortgage reinstated.[13] Defendants refused,

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1. Waisner v. Jones, 107 N.M. 260, 755 P.2d 598 (1988); Ashlock v. Sunwest Bank of Roswell, 107 N.M. 100, 753 P.2d 346 (1988). *See infra* notes 63-82 and 169-89 and accompanying text.
2. Newberry v. Allied Stores, 108 N.M. 424, 773 P.2d 1231 (1989); Kestenbaum v. Pennzoil, 108 N.M. 20, 766 P.2d 280 (1988). *See infra* notes 83-122 and accompanying text.
3. Ramirez-Eames v. Hovar, 108 N.M. 520, 775 P.2d 722 (1989); Easterling v. Peterson, 107 N.M. 123, 753 P.2d 902 (1988). *See infra* notes 298-324 and accompanying text.
4. 108 N.M. 113, 767 P.2d 352 (1989).
5. *Id.* at 114, 767 P.2d at 353.
6. Eldridge v. Salazar, 81 N.M. 128, 131, 464 P.2d 547, 550 (1970).
7. *Bowling*, 108 N.M. at 114, 767 P.2d at 353.
8. *Id.* at 113, 767 P.2d at 352.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

and they made no further payments toward the outstanding balance.[14] Plaintiffs re-recorded the original mortgage and a foreclosure suit followed.[15] The trial court granted plaintiff's motion for summary judgment.[16] Defendant appealed.[17]

The New Mexico Commercial Code provides that a "holder of an instrument may even without consideration discharge any party."[18] However, the court held that "a cancellation, release, or surrender of the instrument is ineffective if it is unauthorized, unintentional, or done by mistake."[19] Plaintiff closed defendants' original account through clerical error, and plaintiff's employees stated, by affidavit, that they would not have executed a release had they known that the note remained unpaid.[20] Since defendants did not dispute these statements,[21] there was no genuine issue regarding the existence of the obligation.[22] Although plaintiff was negligent in cancelling and discharging the instrument, the court held that defendants could not retain a gratuitous benefit to which they were not entitled.[23]

The most significant aspect of this case is the court's application of Section 55-3-605 of the New Mexico Commercial Code to the situation where a release is given without consideration. Because the court interpreted the statute to mean that a release is ineffective if unauthorized, unintentional, or done by mistake, there is an additional burden placed on the discharged party if the release is challenged by the lending institution. Instead of merely relying on the release document, the party to be discharged must also demonstrate that the instrument was not released through error, i.e., that the debt had actually been paid. The *Bowling* decision offers new protection to New Mexico lenders who negligently release debtors of their obligations.

III. SECURED TRANSACTIONS

A. Commercially Reasonable Disposition Of Secured Collateral

During the survey period, New Mexico courts addressed the commercial reasonableness of a sale in two cases. In one case the court established some of the factors that will be considered in evaluating the reasonableness

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14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. N.M. STAT. ANN. § 55-3-605 (1978).
19. *Bowling*, 108 N.M. at 114, 767 P.2d at 353. *See also* Guaranty Bank & Trust Co. v. Dowling, 4 Conn. App. 376, 494 A.2d 1216 (1985); First Galesburg Nat'l Bank & Trust Co. v. Martin, 58 Ill. App. 3d 113, 373 N.E.2d 1075 (1978); Richardson v. First National Bank of Louisville, 660 S.W.2d 678 (Ky. Ct. App. 1983); Reid v. Cramer, 24 Wash. App. 742, 603 P.2d 851 (1979).
20. *Bowling*, 108 N.M. at 114, 767 P.2d at 353.
21. *Id.*
22. *Id.*
23. *Id.*

of a sale,[24] while in another case the court put those factors to the test.[25]

1. *Villella Enterprises v. Young*

In *Villella Enterprises v. Young*,[26] the supreme court held that there was a genuine issue of material fact as to whether disposition of secured collateral was commercially reasonable.[27] The court was not convinced that following a default the secured party had conducted a public sale of the collateral in a commercially reasonable manner as a matter of law when he reacquired assets for $150,000 less than a recent offer and publicized the sale only in a weekly legal periodical.[28] In so doing, the court established some of the factors that will be considered in determining the commercial reasonableness of the sale of collateral.[29]

After the defendant had been delinquent in making payments on a loan secured by personal property, plaintiff sent letters to the defendant concerning the pattern of the delinquent payments and demanding timely payments in the future.[30] When the defendant's business ceased operation in late August, plaintiff notified defendant of his election to accelerate the maturity of the note and repossessed the collateral.[31]

Plaintiff informed defendant by letter that all collateral would be sold at a public sale and published two notices of the sale in the *Health City Sun*, a weekly legal periodical.[32] Plaintiff, the only buyer at the sale, purchased the assets for a bid of $80,000.[33] Plaintiff filed an action for the deficiency.[34] The trial court granted a motion for summary judgment in plaintiff's favor, and defendant appealed.[35]

The supreme court held that when suing for a deficiency, a creditor must allege and, unless admitted, prove that the disposition of the collateral was commercially reasonable.[36] The court stated that

> [i]n determining commercial reasonableness, . . . evidence adduced by the debtor as to any aspect of the sale, including the amount of advertising done, normal commercial practices in disposing of particular collateral, the length of time elapsing between repossession and

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24. Villella Enters. v. Young, 108 N.M. 33, 766 P.2d 293 (1988). *See infra* notes 26-46 and accompanying text.

25. Sec. Fed. Sav. & Loan v. Prendergast, 108 N.M. 572, 775 P.2d 1289 (1989). *See infra* notes 47-62 and accompanying text.

26. 108 N.M. 33, 766 P.2d 293 (1988).

27. *Id.* at 36, 766 P.2d at 296. The court was not convinced that following a default, the secured party had conducted a public sale of the collateral in a commercially reasonable manner when he reacquired the assets for $150,000 less than a recent offer and publicized the sale only in a weekly legal periodical. *Id.* at 37, 766 P.2d at 297.

28. *Id.* at 37, 766 P.2d at 297.

29. *Id.* at 35, 766 P.2d at 295 (citing Clark Leasing Corp. v. White Sands Forest Prods., Inc., 87 N.M. 451, 455, 535 P.2d 1077, 1081 (1975)).

30. *Villella*, 108 N.M. at 35, 766 P.2d at 295.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

> resale, whether deterioration of the collateral has occurred, the number of persons contacted concerning the sale, and even the price obtained, will be pertinent.[37]

Plaintiff made a prima facie showing that he was entitled to summary judgment because the disposition of the collateral was commercially reasonable.[38] However, defendant presented evidence that the fair market value of the lounge as a closed business was $230,000 and that potential buyers were willing to pay that amount.[39] The court stated that a debtor cannot rebut a prima facie case of commercial reasonableness merely by contending that the price obtained for collateral was too low.[40] The price obtained is a relevant factor in determining commercial reasonableness, but in this case, "the price at which the secured party repurchases the collateral is not a reliable indicator of its fair market value because the transaction is self-serving."[41] Defendant presented other evidence against plaintiff's prima facie case including the fact that plaintiff never contacted the individuals who had offered to purchase the lounge for $230,000, even though plaintiff knew their identities.[42] Defendant also alleged that those people who are in the market for purchasing restaurants and lounges do not generally look in legal periodicals for notice of sale.[43] The court found defendant's assertions sufficient to establish reasonable doubt that plaintiff was entitled to summary judgment as a matter of law and reversed and remanded for trial.[44]

Villella clarified the standards by which to measure the commercial reasonableness of the sale of collateral. Any evidence regarding the sale, normal commercial practices, number of persons contacted concerning the sale, and even price obtained, will be considered in deciding the commercial reasonableness of a sale.[45] Even more importantly, the court now requires the secured party to take steps, including advertising in the proper place, to assure that potential buyers are present at a public sale.[46]

2. *Security Federal Savings & Loan v. Prendergast*

In *Security Federal Savings & Loan v. Prendergast*,[47] the supreme court held that despite the lack of advertising for the private sale of a mobile home after repossession, the sale was commercially reasonable.

In 1983, the defendants borrowed over $8,000 from the plaintiff and signed a promissory note giving the plaintiff a security interest in a 1976

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37. *Id.*
38. *Id.* at 36, 766 P.2d at 296.
39. *Id.*
40. *Id.* at 36-37, 766 P.2d at 296-97.
41. *Id.* at 37, 766 P.2d at 297.
42. *Id.*
43. *Id.*
44. *Id.* at 38, 766 P.2d at 298.
45. *See supra* note 41 and accompanying text.
46. *See supra* note 44 and accompanying text.
47. 108 N.M. 572, 775 P.2d 1289 (1989).

mini-mobile home.[48] The defendants defaulted on the note and voluntarily gave the mobile home to the plaintiff.[49] The plaintiff notified the defendants that it intended to dispose of the mobile home by private sale.[50] The plaintiff did not advertise the vehicle for sale but placed the vehicle on the premises of a used auto dealer.[51] The plaintiff sold the mobile home and then brought suit to collect a $4,286.02 deficiency.[52] The trial court awarded the plaintiff the amount of the deficiency, plus interest and reasonable attorney fees.[53] The defendant appealed.[54]

The court first outlined the general approach of the Uniform Commercial Code (UCC) to decide whether the lack of advertising made the sale commercially reasonable.[55] Under the UCC every aspect of the disposition of secured collateral must be commercially reasonable.[56] As in *Villella Enterprises*, the court then stated the determination of commercial reasonableness will turn on the particular facts of each case.[57]

The court then went on to discuss how advertising affects the commercial reasonableness of a sale. The court found that adequate notice (such as advertising) to a relevant public is essential in the public sale of collateral.[58] The court stated that advertising may even play an important role in certain private sales.[59]

The court found that the UCC specifically recognizes that a private sale may be used to dispose of collateral, as long as every aspect of the sale is commercially reasonable.[60] The UCC encourages the sale of repossessed collateral through regular commercial channels, such as through a dealer, as opposed to public auctions, which often yield disappointing results.[61] The court went on to hold that a satisfactory sale through an automobile dealer can be negotiated without the need for advertising, and that notice to the public, through advertising or other means, is not always essential when a sale of collateral is privately negotiated.[62]

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48. *Id.* at 573, 775 P.2d at 1290.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 573-74, 775 P.2d at 1290-91.
53. *Id.* at 574, 775 P.2d at 1291.
54. *Id.* at 573, 775 P.2d at 1290.
55. N.M. STAT. ANN. § 55-9-504 (Repl. Pamp. 1987). The court limited its review to this question, although the issue on appeal was whether there was substantial evidence to support the trial court's findings. The defendants, however, did not build their argument in terms of substantial evidence. Neither a transcript of the proceedings before the trial court nor the trial exhibits were provided on appeal. Therefore, the court's review was limited to deciding whether the lack of advertising was determinative. *Prendergast*, 108 N.M. at 574, 775 P.2d at 1291.
56. N.M. STAT. ANN. § 55-9-504(3) (Repl. Pamp. 1987).
57. *Prendergast*, 108 N.M. at 574, 775 P.2d at 1291 (citing *Villella*, 108 N.M. 33, 35, 766 P.2d 293, 295 (1988)).
58. *Prendergast*, 108 N.M. at 574, 775 P.2d at 1291.
59. *Id.*
60. *Id.* at 575, 775 P.2d at 1292. *See also* N.M. STAT. ANN. § 55-9-504(2) (Repl. Pamp. 1987).
61. *Prendergast*, 108 N.M. at 575, 775 P.2d at 1292.
62. *Id.*

B. A Limitation on Self-Help Repossessions

In *Waisner v. Jones*,[63] the supreme court held that the introduction of a law enforcement officer into a self-help repossession constituted state action and resulted in an unconstitutional deprivation of the defaulting debtor's rights.[64]

Credit Union One hired defendant Jones to repossess a pickup truck from plaintiff Waisner after plaintiff had defaulted on a loan secured by the truck.[65] The defendant went to the plaintiff's place of employment, Holloman Air Force Base, to repossess the truck.[66] The base policy required that a Holloman security police officer accompany the defendant.[67] The defendant and an armed, uniformed, security sergeant encountered the plaintiff during the repossession, and the sergeant informed the plaintiff that they were there for the truck.[68] The plaintiff relinquished possession of the truck to the defendant, later claiming that she feared that the sergeant might arrest her if she refused.[69]

Plaintiff subsequently sued Credit Union One, Otero Federal Credit Union (the institution which stored the truck following the repossession), and the defendant for unlawful repossessing and retaining a motor vehicle.[70] The trial court granted a directed verdict in favor of Otero Federal, and the jury returned a verdict in favor of Credit Union One and the defendant.[71] Waisner appealed and the court of appeals affirmed the trial court.[72] The supreme court granted certiorari.[73]

In reversing both the trial court and the court of appeals, the supreme court majority stated that the self-help repossession statute[74] normally falls outside of the constitutional strictures of due process because it is private in its execution.[75] However, when a law enforcement officer is introduced into the repossession and that officer confronts the defaulting party, the private nature of the repossession is compromised.[76] When the officer makes his official presence known to the debtor, the officer has crossed the line of benign attendance at the repossession and there is state action.[77] As such, the due process requirements of notice and an opportunity to be heard, as dictated by the fourteenth amendment, are

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63. 107 N.M. 260, 755 P.2d 598 (1988).
64. *Id.* at 264, 755 P.2d at 602.
65. *Id.* at 261, 755 P.2d at 599.
66. *Id.* at 262, 755 P.2d at 600.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 261, 755 P.2d at 599.
74. N.M. STAT. ANN. § 55-9-503 (Repl. Pamp. 1987). This section provides that "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral . . . without judicial process if this can be done without breach of [the] peace." *Id.*
75. *Waisner*, 107 N.M. at 263, 755 P.2d at 601.
76. *Id.*
77. *Id.* at 265, 755 P.2d at 603.

invoked.[78] The majority stated that under these circumstances, the creditor must seek repossession through judicial process.[79]

The dissent in *Waisner* argued that while a repossessor may not actively solicit a third person to aid in a self-help repossession, the mere presence of an officer conducting passive surveillance to assure the safety of the repossessor does not necessarily compromise the private nature of a self-help repossession.[80] In this case, since base policy required the military escort, and the defendant did not solicit the officer's help, and since the officer had no authority to arrest the plaintiff or assist in the repossession, the dissent found no constitutional violation.[81]

Waisner is the first New Mexico case to consider whether the involvement of a law enforcement officer in a self-help repossession compromised the private nature of that repossession.[82] *Waisner* places a limitation on the use of self-help repossessions in New Mexico that is consistent with the spirit of protecting consumers. However, the holding might harm one class of consumers, i.e., military personnel. The holding could have a chilling effect on the extension of credit to marginally credit-worthy military personnel by creditors who may fear more expensive and time consuming judicially authorized repossessions upon a debtor's default.

IV. EMPLOYMENT CONTRACTS

A. Employment Terminable-At-Will

In *Kestenbaum v. Pennzoil*,[83] the supreme court expanded the exceptions to the employment-at-will doctrine and held that an employment relationship is not terminable-at-will if oral statements are made to the employee implying that termination will not occur without cause. The oral statements create an implied contract and alter the at-will presumption.[84]

Defendant and its subsidiary, Vermejo Park Corporation, employed plaintiff as the vice-president in charge of guest operations at Vermejo Park, a northern New Mexico ranch.[85] During initial employment negotiations, plaintiff's supervisor clearly stated that the employment would be long-term, and neither the insurance benefits manual nor the severance pay plan mentioned the possibility of termination without cause.[86] De-

78. *Id.* at 263, 755 P.2d at 601.
79. *Id.* at 264, 755 P.2d at 602.
80. *Id.* at 265, 755 P.2d at 603 (Stowers, J., dissenting).
81. *Id.*
82. In reaching its decision, the court was persuaded by similar holdings in Arizona and Washington. *Id.* at 263, 755 P.2d at 601 (citing Walker v. Walthall, 121 Ariz. 121, 588 P.2d 863 (Ct. App. 1978); Stone Machinery Co. v. Kessler, 1 Wash. App. 750, 463 P.2d 651 (1970)).
83. 108 N.M. 20, 766 P.2d 280 (1988).
84. *Id.* at 25, 766 P.2d at 285. Prior to the *Kestenbaum* decision, exceptions to the employment-at-will doctrine were based only upon provisions included in an employee handbook or personnel manual. *See* Forrester v. Parker, 93 N.M. 781, 606 P.2d 191 (1980); Francis v. Memorial Gen. Hosp., 104 N.M. 698, 726 P.2d 852 (1986).
85. *Kestenbaum*, 108 N.M. at 21, 766 P.2d at 281.
86. *Id.* at 22, 766 P.2d at 282.

fendant conceded it had a management practice of not terminating employment without good cause.[87]

During the seventh year of plaintiff's employment, defendant received an anonymous letter accusing plaintiff of sexual harassment, illegal conduct, and mismanagement of the ranch.[88] Defendant initiated an investigation.[89] Plaintiff had the opportunity to comment about each allegation and call witnesses to speak on his behalf.[90] Despite plaintiff's denial of the sexual harassment charge, defendant terminated plaintiff's employment.[91]

Plaintiff claimed that he had been terminated without a fair investigation.[92] Defendant asserted that plaintiff's oral employment agreement was for an indefinite period and he was an employee-at-will, who could be discharged for any or no reason.[93] Defendant further maintained that even if cause were required, defendant had reasonable grounds to believe that sufficient cause existed.[94] The district court entered judgment in plaintiff's favor.[95] Defendant appealed.[96]

Defendant argued that the statute of frauds barred this action because it was based on an oral employment contract for employment until retirement, which could not be performed within one year.[97] The court disagreed, holding that indefinite permanent employment contracts fall outside the statute of frauds because they are capable of full performance within one year.[98]

Defendant also maintained that no implied contract of employment existed because, as an exception to the employment-at-will doctrine, implied contracts must be based on the provisions included in an employee handbook or personnel manual.[99] However, the court held that the implied contractual duties of an employer based upon representations or conduct were not limited to those flowing from handbooks or manuals.[100] Following decisions in other jurisdictions, the court held that "[o]ral statements made by an employer may be sufficient to create an implied contract which provides that an employee shall not be discharged except for cause."[101] The court found substantial evidence to support the jury finding

87. *Id.* at 26, 766 P.2d at 286.
88. *Id.* at 21, 766 P.2d at 281.
89. *Id.* at 22, 766 P.2d at 282.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 21, 766 P.2d at 281.
96. *Id.* at 23, 766 P.2d at 283.
97. *Id.*
98. *Id.*
99. *Id.* at 24, 766 P.2d at 284.
100. *Id.*
101. *Id.* (citing Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981)).

that an implied employment provision existed between the parties to only terminate employment for good cause.[102]

Defendant argued that the jury should have been instructed that an employer needs only a good faith belief regarding an employee's inappropriate conduct and that a finding of illegal conduct by the employee is cause for discharge.[103] The court rejected this contention and articulated a middle ground, holding that although employers must base their decision to terminate employment on information available at the time of discharge, the employer may be relieved of liability under its implied contract provided it had reasonable grounds to believe that good cause existed.[104] The court held, however, that defendant had not acted upon reasonable grounds because the investigator admitted that she did not distinguish first-hand knowledge from mere gossip or rumor, and that the trial court had properly rejected an instruction suggesting that the jury could find good cause for termination of employment from the employer's subjective good faith belief as opposed to an objective standard of reasonable belief.[105]

The *Kestenbaum* decision has far reaching implications for employers who previously could fire employees-at-will without good cause as long as there was nothing in writing to the contrary. Under *Kestenbaum*, there will be few employees who are truly terminable-at-will. Employers can still discharge employees subject to an implied contract as long as they can clearly demonstrate that there were reasonable grounds to believe that sufficient cause existed to discharge the employee.[106] Standards to determine whether reasonable grounds exist for discharge remain undefined and will probably be the focal point of future cases.

B. Further Consideration of Implied Employment Contracts

The far reaching implications of the court's holding in *Kestenbaum*[107] were quickly demonstrated in *Newberry v. Allied Stores,*[108] where the supreme court held that an employment manual and an employer's conduct created an implied employment contract.[109] Since the employee was not an employee-at-will, he could be terminated only for good cause.[110]

Plaintiff Newberry was terminated from his employment at defendant Allied Stores for allegedly violating company policy, for stealing company property, and for gross insubordination.[111] The plaintiff filed suit alleging, *inter alia*, breach of an implied employment contract.[112] The defendant

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102. *Id.* at 26, 766 P.2d at 286.
103. *Id.* at 27, 766 P.2d at 287.
104. *Id.*
105. *Id.* at 28, 766 P.2d at 288.
106. *See supra* note 104 and accompanying text.
107. 108 N.M. 20, 766 P.2d 280 (1988).
108. 108 N.M. 424, 773 P.2d 1231 (1989).
109. *Id.* at 428, 773 P.2d at 1235.
110. *Id.* at 427, 773 P.2d at 1234.
111. *Id.* at 425-26, 773 P.2d at 1232-33.
112. *Id.* at 426, 773 P.2d at 1233.

answered by claiming that the plaintiff did not have an employment contract; hence he was an employee-at-will who could be terminated for any reason.[113] The trial court determined that the plaintiff was not an employee-at-will and found for the plaintiff on the breach of the employment contract issue.[114] The defendant appealed.[115]

The supreme court agreed with the trial court that the plaintiff was not an employee-at-will, and that he could only be terminated for good cause.[116] The court found that the defendant's implied employment contract with the plaintiff was formed by statements in the defendant's policy manual that an employee could be discharged for rule violations, poor performance, and other "cause"[117] and by defendant's statement to the plaintiff that the manual was "his bible."[118] The court found that this suggested that employees would only be terminated for a reason.[119] Notwithstanding its holding, the court reversed the trial court's judgment in favor of the plaintiff because the plaintiff was terminated for good cause.[120]

Newberry must be read with *Forrester v. Parker*,[121] which stated that a personnel manual can give rise to an implied employment contract, and with the more recent holding in *Kestenbaum v. Pennzoil*,[122] which stated that parties can create an implied employment contract based on their intent and conduct. The result in *Newberry* sends a clear warning to employers that their personnel manuals and the emphasis placed on the employee's use of those manuals can legally reclassify an at-will employee as a contract employee who can only be terminated for cause.

V. DISSOLUTION OF PARTNERSHIPS

In *Levy v. Disharoon*,[123] the supreme court interpreted the rights and liabilities of a dissolving partnership as issues of first impression under the Uniform Partnership Act,[124] and held that (1) in a suit in equity for accounting between partners, the court has jurisdiction to enter a money judgment against one of the partners;[125] (2) a partner who voluntarily terminates his contractual relationship with the other partner is not entitled to any net profits accrued after the date he left the partnership;[126] and (3) an award of a money judgment to a third party before all the

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 427, 773 P.2d at 1234.
117. *Id.* at 428, 773 P.2d at 1235.
118. *Id.*
119. *Id.*
120. *Id.*
121. 93 N.M. 781, 606 P.2d 191 (1980).
122. 108 N.M. 20, 766 P.2d 280 (1988). *See supra* notes 83-106 and accompanying text.
123. 106 N.M. 699, 749 P.2d 84 (1988).
124. *Id.* at 699, 749 P.2d at 84 (interpreting N.M. STAT. ANN. §§ 54-1-1 to 54-1-43 (1978)).
125. *Id.* at 704, 749 P.2d at 89.
126. *Id.*

partnership affairs have been settled is appropriate where the third party is a corporation which is the alter ego of the liquidating partner.[127]

Plaintiff owned eighty-five percent of Turbine Eagle Charters (TEC), a Subchapter S corporation created for the purpose of flying aircraft charters.[128] Defendant, president and director of Crestview Aviation, entered into an oral agreement with plaintiff by which defendant obtained a share of TEC's profits as consideration for reducing service rates.[129] As part of another business venture, the defendant also told plaintiff that they could purchase a Lear jet for $963,000, which they could then lease.[130] After approval of the purchase, the parties borrowed money from Sunwest Bank and assigned the jet as collateral.[131] Sunwest wired the money to the title company to consummate the sale for a total purchase price of $963,000.[132] Defendant, on behalf of Crestview Aviation, entered into a purchase agreement with the seller to purchase the jet for $860,000 and instructed the escrow agent for the title company to wire the balance of $103,000 to the defendant's personal banking account.[133]

A few months after the partnership was formed, defendant stated by letter that he wanted to terminate his contract with TEC and asked for a distribution of TEC profits.[134] Four months later, defendant again wrote plaintiff and advised him that all business relationships had terminated effective April 16, 1985.[135] Plaintiff informed defendant he would continue to have obligations until all of the partnership affairs were completely wound up.[136] Plaintiff filed suit in equity seeking a partnership accounting.[137] The district court entered judgment in plaintiff's favor.[138] Defendant appealed.[139]

Defendant argued that the trial court could not award a personal judgment to a partner in an action for an accounting.[140] The supreme court disagreed, stating that "[a] court of equity has power not only to state the account between the parties, but to enter judgment in favor of one and against another as the state of the account may require."[141] Defendant maintained that the court could not enter a judgment against him because TEC owed him money for his share of the profits.[142] The

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127. *Id.*
128. *Id.* at 700, 749 P.2d at 85.
129. *Id.*
130. *Id.* at 701, 749 P.2d at 86.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 702, 749 P.2d at 87.
139. *Id.*
140. *Id.* The judgment included $70,000 damages for fraud, $100,000 punitive damages, and one-half of the expenses, interest payments and continuing obligations of the partnership. *Id.*
141. *Id.* (quoting Holman v. Cape, 45 Wash. 2d 205, 206, 273 P.2d 664, 665 (1954) (per curiam) (quoting Yarwood v. Billings, 31 Wash. 542, 543, 72 P. 104, 105 (1903))).
142. *Id.*

court found this position untenable because the partnership's obligations to TEC exceeded any profits TEC owed to defendant.[143] Because defendant voluntarily terminated his contractual relationship with TEC, he was not entitled to any net profits accrued after the termination date.[144] According to the Uniform Partnership Act, the dissolution of a partnership does not terminate the partnership's obligations until the winding up of its affairs is complete.[145] Plaintiff was entitled to a personal judgment because, through TEC, he continued to pay the interest on the bank note and the operating costs of the jet in order to preserve the partnership's assets.[146]

The court stated that a personal judgment in favor of one partner against another for outstanding obligations to third parties is generally improper until all the partnership assets have been liquidated and the debts have been paid.[147] However, the court conceded that "[t]he circumstances of a case may sometimes require a court of equity to disregard the corporate entity and to look to the owner as the real party in interest."[148] Because TEC and plaintiff were essentially one and the same, it was not improper for plaintiff to obtain a money judgment for expenses and interest payments made by TEC prior to the final balance being ascertained.[149]

The court held that although partners cannot sue each other at law for acts relating to the partnership unless there is an accounting or prior settlement, this action was not one at law, but one in equity seeking a partnership accounting and settlement.[150] Moreover, "[w]hen there is a partnership accounting and defendant is charged with fraud and misconduct, defendant is answerable in that proceeding for all damages sustained by plaintiff on account of defendant's breach of duty to the firm."[151]

In *Disharoon*, the court interpreted the Uniform Partnership Act of New Mexico and clarified important concepts relating to partnership liabilities and responsibilities upon dissolution of the partnership, accounting of partnerships, and the award of money judgments prior to a final accounting. It is most important to note that under *Disharoon* a court of equity, in a suit for an accounting, may render a money judgment against one of the parties if one partner incurred expenses while preserving the assets of the partnership between the dissolution and termination of the business.[152]

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143. *Id.*
144. *Id.*
145. N.M. STAT. ANN. § 54-1-30 (1978).
146. *Levy*, 106 N.M. at 703, 749 P.2d at 88.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 704, 749 P.2d at 89.
151. *Id.*
152. *See supra* note 151 and accompanying text.

VI. ENFORCEABLE SETTLEMENT AGREEMENTS

In *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick,*[153] the supreme court held that in-court settlements are enforceable if the attorney has apparent authority to enter into the agreement. The court based its holding on the public policy of New Mexico favoring settlement agreements.[154] The court also held that the failure of the tribe's representative to object to the settlement gives an attorney the apparent authority needed to make a settlement agreement.[155] Prior to *Hanosh*, a New Mexico attorney needed specific authority to bind a client to a settlement agreement, unless there was an emergency or an overriding reason for enforcing the settlement.[156] The *Hanosh* decision deviates from the past and provides new strength to the doctrine of apparent authority.

Plaintiff filed suit against Hanosh Chevrolet-Buick and General Motors alleging breach of contract and conversion of monies for vehicles the tribe had purchased.[157] The parties reached a proposed settlement agreement on the day of trial.[158] The proposed settlement was read into the record, with all of the parties approving the terms of the settlement in open court.[159] A representative of the tribe stated that he understood and agreed to the terms of the settlement.[160] Later, plaintiff rejected the proposed settlement and requested a new trial.[161] The court granted the defendant's motion to enter a stipulated settlement.[162] Plaintiff appealed.[163]

In determining whether the district court erred in entering the stipulated settlement order, the supreme court emphasized that the public policy of New Mexico is to favor settlement agreements.[164] Furthermore, as other jurisdictions have recognized, for public policy reasons courts must enforce settlement agreements entered into by attorneys who have apparent authority to settle.[165]

Apparent authority is "that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing under such circumstances as to estop the principal from denying

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153. 106 N.M. 705, 749 P.2d 90 (1988).
154. *Id.* at 707, 749 P.2d at 93.
155. *Id.*
156. *Id.* at 707, 749 P.2d at 93 (citing Bolles v. Smith, 92 N.M. 524, 591 P.2d 278 (1979)). *See also* Augustus v. John Williams & Associates, 92 N.M. 437, 589 P.2d 1028 (1979) (client bound by attorney's settlement where client accepts benefits of settlement before attempting to treat settlement as unauthorized and unenforceable).
157. *Hanosh*, 106 N.M. at 706, 749 P.2d at 91.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 706-07, 749 P.2d at 91-92.
163. *Id.* at 707, 749 P.2d at 92.
164. *Id.*
165. *Id.* (citing Glazer v. J.C. Bradford & Co., 616 F.2d 167 (5th Cir. 1980); Miotk v. Rudy, 4 Kan. App. 2d 296, 605 P.2d 587 (1980); Hallock v. State, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178 (1984), Johnson v. Tesky, 57 Or. App. 133, 643 P.2d 1344 (1982)).

its existence."[166] In general, an attorney does not have actual, implied, or apparent authority to compromise his client's case.[167] However, the court held that if the record reveals, as it did in this case, that an in-court settlement was reached and accepted by a representative of the party, apparent authority to settle can be inferred.[168]

After *Hanosh*, a litigant no longer has to expressly give his or her attorney the authority to settle if he knowingly permits his attorney to exercise such authority on his behalf. As a result, parties who do not expressly reject in-court settlement agreements, or who give their attorneys apparent authority to settle, may be bound by settlement agreements that they did not want to make.

VII. EXPANSION OF THE UNFAIR TRADE PRACTICES ACT

In *Ashlock v. Sunwest Bank of Roswell,*[169] the supreme court, as it did in *Waisner v. Jones,*[170] announced a holding favoring the rights of consumers. The court held that a bank's failure to pay interest due on a customer's checking account, which the bank had solicited, violated the New Mexico Unfair Trade Practices Act.[171] Although the bank's error was unintentional, the court stated that an action for violation of the act could succeed even though there was no intent to mislead.[172]

In 1981, plaintiff Ashlock opened a high interest checking account at defendant Sunwest Bank of Roswell in response to a mail solicitation.[173] Because of defendant's error, the defendant did not pay the plaintiff any interest on the account for approximately five years.[174] When the plaintiff discovered the error, he made several unsuccessful attempts to persuade bank officials to pay back the interest due on the account.[175] When these efforts failed, the plaintiff sued, alleging that the defendant had violated the Unfair Trade Practices Act (the Act).[176] The trial court found that the defendant had violated the Act by failing to pay interest and the court awarded the plaintiff $20,081.98 in damages.[177] The defendant appealed.[178]

In affirming the trial court, the supreme court outlined the four elements which a complaining party must establish to prove a violation of the Act: 1) the party charged must have made a false or misleading rep-

166. *Id.* at 707, 749 P.2d at 92 (quoting Tabet v. Campbell, 101 N.M. 334, 337, 681 P.2d 1111, 1114 (1984) (quoting Segura v. Molycorp, Inc., 97 N.M. 13, 19, 636 P.2d 284, 290 (1981))).
167. *Id.* at 707, 749 P.2d at 92.
168. *Id.*
169. 107 N.M. 100, 753 P.2d 346 (1988).
170. *See supra* notes 63-82 and accompanying text.
171. *Id.* at 103, 753 P.2d at 349 (citing N.M. STAT. ANN. §§ 57-12-1 to -21 (Repl. Pamp. 1987)).
172. *Id.* at 101, 753 P.2d at 347.
173. *Id.* at 100-01, 753 P.2d at 346-47.
174. *Id.* at 101, 753 P.2d at 347. The trial court calculated that the back interest which Ashlock had not been paid amounted to approximately $20,000. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 100, 753 P.2d at 346.

resentation; 2) the false or misleading statement must have been knowingly made in connection with the sale, lease, rental or loan of goods or services in the extension of credit or collection of debts; 3) the conduct must have occurred in the regular course of the representor's trade or commerce; and 4) the representation must have been of the type that may, tends to, or does deceive or mislead any person.[179] Further, the court pointed to language in the Act that states that descriptions of unfair or deceptive trade practices include the failure of a party to deliver the quality of services contracted for.[180] The court held that all of these elements existed when the defendant solicited the plaintiff and failed to pay interest on the account as advertised.[181]

More significantly, the court held that none of the elements listed in the Act require that the party charged have the willful intent to mislead.[182] The court said that if the legislature desired such an intent, they would have so specified.[183] Given that the legislature allowed for treble damages if a deceptive party is found to have willfully engaged in a deceptive practice, the court reasoned that the legislature must also have anticipated unintentional violations of the Act which could result in damages to a consumer.[184] The court further reasoned that if purity of intent were a defense to a deceptive act committed by a representing party, the Act would become toothless due to the difficulty of proving willful intent.[185]

The court in *Ashlock* also held that although the defendant was organized under and regulated by federal law, the state law (the Unfair Trade Practices Act) was not preempted by the federal legislation.[186] Relying on the principle that federal legislation will not necessarily preempt state legislation merely because the two address the same area of law, the court found no conflicts in the laws; hence both were applicable, and the defendant was subject to the New Mexico Act.[187]

The holding in *Ashlock* regarding intent is not new. Prior to *Ashlock* the court of appeals had stated that intent to deceive is not a requirement of the Unfair Trade Practices Act.[188] *Ashlock* is significant in that it provides a rationale for that holding, thereby further clarifying the proper use of the Unfair Trade Practices Act. However, as pointed out in the concurring opinion, the holding virtually excises the language used in the

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179. *Id.* at 101, 753 P.2d at 347. This language comes directly from the Unfair Practices Act, N.M. STAT. ANN. § 57-12-2(C) (Repl. Pamp. 1987).

180. *Ashlock*, 107 N.M. at 101, 753 P.2d at 347. This language is taken from the Act. *See* N.M. STAT. ANN. § 57-12-2(C)(17) (Repl. Pamp. 1987).

181. *Ashlock*, 107 N.M. at 102, 753 P.2d at 348.

182. *Id.* at 101, 753 P.2d at 347.

183. *Id.*

184. *Id.*

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

186. *Id.*

187. *Id.* at 102-03, 753 P.2d at 348-49.

188. In Richardson Ford Sales v. Johnson, 100 N.M. 779, 782, 676 P.2d 1344, 1347 (Ct. App. 1984), the court of appeals stated "[a]n intent to deceive is not a requirement under the New Mexico [Unfair Trade Practices] statute."

Act that a false or misleading statement must be "knowingly made."[189]

VIII. VIOLATION OF USURY LAW REQUIRES CONSCIOUS INTENT

In *Maulsby v. Magnuson*,[190] as in *Ashlock*,[191] the supreme court considered whether the word "knowingly" equates with conscious intent. In *Maulsby*, the court, overruling a previous supreme court decision,[192] held that a promissory note with an interest rate that was three percent above the maximum rate allowed by law was not facially usurious, because no party to the note intended a usurious interest rate.[193] The court, however, limited the interest that could be collected on the note to the maximum legal interest rate.[194]

Plaintiff Maulsby filed suit against defendant Magnuson to recover a one-third share of money due on a $45,000 promissory note signed by the defendant and two others.[195] Under the terms of the note, the defendant and the other signers agreed to repay the plaintiff the $45,000 plus thirteen percent interest per year from the date of the note until full payment.[196] The thirteen percent interest rate was suggested by the signers, but at the time the note was signed, that rate was three percent above the maximum legal interest rate for secured debts.[197] When the note became due, all of the signers to the original note signed new separate promissory notes to the plaintiff except the defendant.[198] The plaintiff subsequently filed suit to recover the one-third share of the original note owed by the defendant.[199] The trial court granted summary judgment in favor of the plaintiff, and the defendant appealed.[200]

In affirming the trial court's decision that the note was not usurious, the supreme court recognized that the key element in the case was whether the term "knowingly done" as used in the usury statute meant that the lender must have had a conscious intent to violate the law.[201] The court acknowledged that in a previous case, *Hays v. Hudson*,[202] the court

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189. *Ashlock*, 107 N.M. at 103, 753 P.2d at 349 (Stowers, J., specially concurring).

190. 107 N.M. 223, 755 P.2d 67 (1988). *See supra* notes 169-189 and accompanying text.

191. 107 N.M. 100, 753 P.2d 346 (1988).

192. *Id.* at 225, 755 P.2d at 69. The court overruled Hays v. Hudson, 85 N.M. 512, 514 P.2d 31 (1973), in which the court held that a party could violate usury laws without having the conscious intent to violate the law. *Id.* at 513, 514 P.2d at 32.

193. *Maulsby*, 107 N.M. at 226, 755 P.2d at 70.

194. *Id.*

195. *Id.* at 223, 755 P.2d at 67.

196. *Id.*

197. *Id.* at 224, 755 P.2d at 68. The maximum legal interest rate of 10 percent for secured loans was set by statute, N.M. STAT. ANN. § 56-8-11 (1978), *repealed*, 1981 N.M. Laws, ch. 263 § 4. Under the new provisions, the maximum legal interest shall be the rate agreed to in writing by the parties, subject to disclosure provisions. N.M. STAT. ANN. §§ 56-8-11.1 to -11.3 (Repl. Pamp. 1986).

198. *Id.*

199. *Id.*

200. *Id.* at 223, 755 P.2d at 67.

201. *Id.* at 225, 755 P.2d at 69.

202. 85 N.M. 512, 514 P.2d 31 (1973). *See supra* note 187 and accompanying text.

adopted the view that no conscious intent to violate the usury law was necessary; the lender need only take an amount of interest in excess of the maximum allowed by law.[203] In *Maulsby*, the court recognized that *Hays* was out of line with the general rule regarding usury and New Mexico law prior to the *Hays* decision.[204]

The court's rationale was that usury laws are meant to protect the needy from paying exorbitant interest rates or suffering from other exploitation due to unsavory lending practices.[205] In this case, none of the parties were needy, and in fact the signers set the interest rate.[206] Since the lender never intended a usurious interest rate, it should not be barred from collecting interest on the loan.[207]

The holding in *Maulsby* was not a dramatic departure for the court. Instead, the court merely corrected what appears to have been a deviation from its previous holdings regarding usury. Prior to *Hays*, the law in New Mexico was well settled that usury violations required intent.[208] The realignment in *Maulsby* with this previously settled principle prevents accidental violations of usury laws by unsuspecting lenders.

IX. THE EFFECT OF A CONDITION PRECEDENT ON CONTRACT FORMATION

In *Western Commerce Bank v. Gillespie*,[209] the supreme court held that a settlement offer was a valid contract that could not be repudiated on the grounds that a condition precedent existed to its formation.[210] The court held that performance of the contract, not its formation, was conditional.[211]

As creditor of an estate, plaintiff Western Commerce Bank sued the defendants, the personal representatives and heirs of the estate, for payment on an unpaid promissory note.[212] The defendants offered to settle the suit "subject to the [defendants] obtaining . . . financing."[213] The plaintiff accepted the settlement offer but repudiated two months later because the defendants had not secured the financing.[214] On motion by the defendants, the trial court ordered enforcement of the settlement and the plaintiff appealed.[215]

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203. *Maulsby*, 107 N.M. at 225, 755 P.2d at 69.
204. *Id.*
205. *Id.* at 226, 755 P.2d at 70.
206. *Id.*
207. *Id.*
208. *See, e.g.*, Priestley v. Law, 33 N.M. 176, 181, 262 P. 931, 934 (1927); American Inv. v. Lyons, 29 N.M. 1, 9, 218 P. 183, 185 (1923); Armijo v. Henry, 14 N.M. 181, 192, 89 P. 305, 308 (1907).
209. 108 N.M. 535, 775 P.2d 737 (1989).
210. *Id.* at 538, 775 P.2d at 740.
211. *Id.*
212. *Id.* at 536, 775 P.2d at 738.
213. *Id.*
214. *Id.*
215. *Id.*

In affirming the trial court's decision that the settlement agreement was enforceable, the supreme court rejected the plaintiff's argument that the defendants' arrangement of financing constituted a condition precedent to formation of the contract.[216] Instead, the court recognized that "[g]enerally, a condition precedent is an event occurring *subsequently* to the formation of a valid contract,"[217] i.e., it conditions performance of the contract.[218]

While not changing the law of contracts, *Western* is significant in that the court used the case to explain two previous decisions which could be misread to imply that a condition precedent does qualify formation of a contract.[219] The court stated that despite the language in *Elephant Butte Resort Marina v. Woolridge*[220] and in *Wyrsch v. Milke*,[221] neither case, the court said, supported the proposition that a condition precedent qualified the formation of the contract.[222] The court further held that, while the parties could agree to conditions to the formation of a contract, the general rule is that a condition precedent normally qualifies performance of the contract.[223]

X. CORPORATIONS

A. The Test for Piercing the Corporate Veil

In *Scott v. AZL Resources*,[224] the supreme court reiterated guidelines for piercing the corporate veil in New Mexico.[225] This equitable relief will be available when three requirements are satisfied: 1) a showing of instrumentality or domination; 2) improper purpose; and 3) proximate causation.[226] The court stated that the limited liability granted to the owners of corporate entities is a basic principle of corporate law and "[o]nly under special circumstances will the courts disregard the corporate entity to pierce the corporate veil holding individual shareholders or a parent corporation liable."[227] While it is not clear what circumstances would allow a court to disregard the limited liability of shareholders,

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216. *Id.* at 538, 775 P.2d at 740.
217. *Id.* at 537, 775 P.2d at 739 (emphasis added).
218. *Id.*
219. *Id.*
220. 102 N.M. 286, 694 P.2d 1351 (1985). The language in *Elephant Butte* to which the court was referring was "a condition precedent is a condition . . . which must be met before the contract is formed." *Elephant Butte*, 102 N.M. at 289, 694 P.2d at 1354.
221. 92 N.M. 217, 585 P.2d 1098 (Ct. App. 1978). The language in *Wyrsch* to which the court was referring was: "[The defendants] did not obtain [the cross-claimant's] consent within a reasonable time to fulfill the condition precedent which would have given rise to a binding contract." *Wyrsch*, 92 N.M. at 221, 585 P.2d at 1102.
222. *Western*, 108 N.M. at 537, 775 P.2d at 739.
223. *Id.*
224. 107 N.M. 118, 753 P.2d 897 (1988).
225. *Id.* at 119, 753 P.2d at 898. The court of appeals had previously set out this three-part test in Harlow v. Fibron, 100 N.M. 379, 382, 671 P.2d 40, 43 (Ct. App.), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983).
226. *Scott*, 107 N.M. at 121, 753 P.2d at 900.
227. *Id.*

the court held that in this case there was not substantial evidence to support piercing the corporate veil.[228]

Plaintiff Scott claimed that Baca Grande Corporation, a corporation wholly-owned by defendant AZL, breached an employment contract with Scott.[229] The trial court pierced the corporate veil and found the defendant and several of its wholly-owned subsidiary corporations jointly and severally liable for the judgment against Baca Grande.[230] In support of its conclusion, the trial court found that defendant's subsidiary corporations were used for an improper purpose and that defendant's control over its subsidiaries proximately caused plaintiff's damages.[231]

The supreme court reversed, holding that there was not substantial evidence to support the finding that AZL used the subsidiary corporation for an improper purpose,[232] even if the subsidiary was an "alter ego" of AZL.[233] The court stated that a basic proposition of corporate law is that a corporation will ordinarily be treated as a legal entity separate from its shareholders.[234] The court stressed that "[m]ere control by the parent corporation is not enough to warrant piercing the corporate veil, [and that] some form of moral culpability attributable to the parent, such as use of the subsidiary to perpetrate a fraud is required."[235]

B. Forged Proxies as Newly Discovered Evidence

In *Pena v. Westland Development Co.*,[236] the court of appeals ruled on five issues: 1) whether the trial court erred by not allowing plaintiffs to challenge the proxies they had earlier agreed not to challenge; 2) whether all owners of jointly owned shares must sign a proxy in order to make it valid; 3) whether the votes reflecting Class B shares should have been counted in the election of the board of directors; 4) whether a second proxy submitted revokes an earlier submitted proxy; and 5) to what extent a shareholder's intent controls how his proxies are counted.[237]

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228. *Id.* at 120, 753 P.2d at 899.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 122, 735 P.2d at 901.
233. *Id.*
234. *Id.* at 121, 753 P.2d at 900. Piercing the corporate veil in any but the most extreme circumstances could discourage economic growth and activity.
235. *Id.* at 122, 753 P.2d at 901 (citing *Harlow*, 100 N.M. at 382, 671 P.2d at 43). Although the plaintiff showed that Baca Grande was undercapitalized during its existence, there was no evidence that it was undercapitalized at the time of its incorporation. *Id.* The plaintiff also showed that Baca Grande used a "zero-balance account" and AZL took all excess funds from the account. *Id.* However, the supreme court stated that because there was no commingling of funds and evidence was presented that AZL used the account "to avoid having money sitting idle," no improper purpose existed. *Id.* Further, in order to show improper purpose, a plaintiff must prove that the "financial set-up of the corporation is a sham and causes an injustice." *Id.* The facts that AZL's subsidiaries did business in their own names, received income in their own accounts and owned valuable assets proved to the court that the subsidiaries were not sham corporations. *Id.*
236. 107 N.M. 560, 761 P.2d 438 (Ct. App.), *cert denied*, 107 N.M. 413, 759 P.2d 200 (1988)).
237. *Id.* at 563-67, 761 P.2d at 441-44.

The case gave the court its first opportunity to settle these numerous issues for New Mexico.

The facts of the case were fairly complex. Clara Pena, Barbara Page, and Polecarpio Anaya (plaintiffs) ran as a nonmanagement slate in the election to select the defendant's board of directors.[238] Some shareholders cast ballots at the November 16, 1985, shareholders' meeting, and other shareholders voted by proxy.[239] While the ballots were being counted, disputes arose between the management and nonmanagement factions.[240] On December 4, 1985, Pena filed a complaint requesting a temporary restraining order to halt the counting of the votes, and she requested the appointment of a special master to count the votes and to deal with the numerous challenges to the proxies.[241] On December 5, the trial court granted the TRO.[242] Afterwards, the trial court ordered the counting to continue, subject to certain restrictions.[243] Still more disputes arose and Pena requested further intervention from the trial court.[244] The trial court imposed more restrictions by granting another TRO.[245]

On January 3, 1986, the court appointed a special master to supervise the proceedings.[246] After numerous special master meetings, both sides agreed that 966 nonmanagement proxies and 918 management proxies would not be challenged.[247] None of the proxies were challenged on the basis of forgery.[248]

On January 31, 1986, the trial court held a hearing to rule on the parties' objections to the proxies.[249] Afterwards, the ballots and proxies were given to a private accounting firm to be counted.[250] On April 29, Pena moved to allow a renewal of her objections to the uncontested proxies based on the fact that after the special master's proceedings a number of forgeries had been discovered.[251] It had taken Pena until the end of April to obtain copies of enough of the forged proxies to change the results of the election.[252] The trial court denied Pena's motion.[253]

The trial was held on July 15, 1986, with most of the time taken up by plaintiffs' offer of proof concerning the forged proxies.[254] The trial court entered judgment establishing the management slate as the winners

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238. *Pena*, 107 N.M. at 562, 761 P.2d at 440.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* The court of appeals did not say what the restrictions were.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* The court of appeals did not discuss the reasons for the denial of the motion.
254. *Id.* at 563, 761 P.2d at 441.

of the election.[255] A change of 500 votes (out of 300,000 votes total) from management candidates to nonmanagement candidates would have elected two nonmanagement candidates.[256]

As to the first issue, whether the trial court erred by not allowing plaintiffs to challenge the proxies they had earlier agreed not to challenge, the court found the situation analogous to a motion for a new trial based on newly discovered evidence or a Rule 60(B) motion to set aside a judgment based on such evidence.[257] This case involved evidence discovered after the conclusion of the special master proceeding, and the plaintiffs were in effect asking the court of appeals to reopen that proceeding to change the result.[258] The court held that the applicable principle of review would therefore be that of a motion for a new trial.[259]

The court held that a motion for a new trial based on newly discovered evidence is within the discretion of the trial court.[260] The court's review was therefore limited to determining whether the trial court abused its discretion in refusing to allow plaintiffs to raise the forgery issue with respect to the unchallenged proxies.[261]

The court named six prerequisites for granting a motion for a new trial based on newly discovered evidence: (1) the new evidence would probably change the result; (2) it has been discovered since the trial; (3) it could not have been discovered before the trial through the exercise of due diligence; (4) it is material to the issues in the case; (5) it is not merely cumulative; and (6) it is not merely impeaching or contradictory.[262]

The court found that the new evidence in this case would have probably changed the result had it been accepted by the trial court.[263] There was evidence of over 3500 invalid votes.[264] The new evidence was discovered after the last special master meeting.[265] It was also material as to who legitimately won the election.[266] According to the court, the evidence was not cumulative, as it was the only evidence concerning the forged proxies, nor was it merely contradictory or impeaching.[267]

The court found room for contention, however, over whether the forgeries could have been discovered before the end of the special master meetings through the exercise of due diligence.[268] The plaintiffs had two months from the date of the election to the end of the special master

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255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 564, 761 P.2d at 442.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*

proceedings to uncover the alleged forgeries.[269] Given the short period of time to act, and the fact that there was no reason to suspect that forgeries had occurred, the court found that plaintiffs exercised due diligence in making their challenges to proxies.[270]

Under the circumstances, the court found that the plaintiffs met the requirements for a new trial.[271] The trial court denied plaintiffs the opportunity to verify the 1800 signatures on the proxies due to the amount of time it would take.[272] While recognizing concerns for expediency the court held that those concerns could not overcome the requirement that each side be allowed a full and fair opportunity to litigate all material issues.[273]

To ensure a fair election and to deter future conduct of this sort, the court held that the plaintiffs should have been allowed to raise the issue of the forged proxies and have the trial court rule on them.[274] The court ordered that on remand, both sides should have a chance to conduct discovery regarding the alleged forgeries and to cross-examine all witnesses.[275]

As to the second issue, whether all owners of jointly owned shares must sign a proxy in order to make it valid, the court held that a fair and reasonable approach would be that a proxy signed by only one joint owner is presumptively valid.[276] They held that this presumption could be overcome by a showing that the nonsigning joint owners did not agree with the vote on the proxy.[277] The court stated that this approach comported with the policy that stockholders should not be disenfranchised unless their purported vote is meaningless.[278]

Plaintiffs next argued that the proxies with "signatures" printed on them instead of being signed were void as a matter of law. In answering this contention, the court relied on *Costilla Estates Development v. Mascarenas*,[279] where the court stated: "Generally a signature, if adopted as such, may be printed, lithographed, or typewritten, as well as written."[280] Based on that language, the court held that if a party intends the purported signature to be a signature, it will be treated as such.[281] Thus, the trial court had correctly ruled that the proxies were presumptively valid, and plaintiffs had the opportunity to rebut that presumption, which they did not do.[282]

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269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 564-65, 761 P.2d at 442-43.
273. *Id.* at 565, 761 P.2d at 443.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. 33 N.M. 356, 267 P. 74 (1928).
280. *Id.* at 364, 267 P. at 77.
281. *Pena*, 107 N.M. at 565, 761 P.2d at 443.
282. *Id.* at 566, 761 P.2d at 444.

As to the third issue, whether the votes reflecting Class B shares should have been counted in the election of the board of directors, the court held that not including Class B shareholders in the vote disenfranchised them.[283] The court found that plaintiffs had the opportunity to solicit votes from the Class B owners and were not prejudiced by the omission of the Class B shares from the list of voters and shares entitled to vote.[284]

The fourth issue, concerning double proxies, was raised by Westland Development. Twenty-three shareholders had indicated support for the nonmanagement slate on their first proxy.[285] On the subsequently submitted management proxies, the shareholders indicated they did not support the management slate.[286] Westland argued that the second proxy was in effect an abstention and revoked the earlier submitted proxy.[287] The court held that a presumption by the trial court that the shareholders intended to vote for the nonmanagement candidates appeared to have carried out the shareholders' intent.[288] This equitable result was in accordance with the rationale that proxies of small shareholders of a corporation should be scrutinized and evaluated so that the shareholders' wishes are not frustrated.[289]

The last issue, concerning what extent a shareholder's intent controls how his proxies are counted, related to two separate shareholders. First, an individual shareholder voted for the management candidates in his first proxy and for the nonmanagement candidates in his second proxy.[290] The court held that consistency required that the shareholder's intent control.[291] An examination of the shareholder's deposition demonstrated a clear intent to vote for the management candidates.[292] The court held that on remand, these votes were to be counted in favor of management.[293] Finally, another shareholder attempted to split his votes among the three nonmanagement candidates and one of the management candidates.[294] There was no authority shown which would prevent him from splitting his votes.[295] On remand, the trial court was directed to determine the shareholder's intent and enter a decision accordingly.[296]

XI. LEASES

A. Court Imposed Modification of Residential Lease

New Mexico courts have been reluctant to interfere with the right to contract. "When discerning the purpose, meaning, and intent of the

283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 567, 761 P.2d at 445.
289. *Id.* (citing Cupo v. Community National Bank & Trust Co. of N.Y., 324 F. Supp. 1390 (E.D.N.Y. 1971), *rev'd on other grounds*, 438 F.2d 108 (2d Cir. 1971)).
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*

parties to a contract, the court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement for the parties."[297] However, in *Ramirez-Eames v. Hovar*,[298] the supreme court held that the Uniform Owner-Resident Relations Act[299] (the Act) modified the contract rule by allowing a court to selectively enforce a lease agreement to obtain an equitable result.[300]

In *Ramirez-Eames v. Hovar*, plaintiff (lessee) and defendant (lessor) entered into a residential lease agreement on August 8, 1987, providing that plaintiff would lease an apartment for a period of one year beginning October 1, 1987, at a rental of $850 per month.[301] On August 30, 1987, plaintiff informed defendant of her intention not to rent the apartment and requested a refund of the damage deposit.[302] When the defendant denied that request, plaintiff filed this action to recover her deposit.[303]

The trial court found that plaintiff repudiated a valid lease contract prior to the beginning of the lease period.[304] The trial court found that the fair market rental rate was $725 per month since that was the amount for which defendant was able to rent the apartment to a third party.[305] Therefore, in equity, the trial court held that plaintiff should not be forced to pay the difference between the contract rate and the rate actually received by defendant for the period of the contract.[306]

The supreme court affirmed the trial court's judgment, holding that the Act authorized the trial court's decision.[307] The court held that the Act allowed the trial court to make a determination of the underlying fairness of the rental agreement and allow selective enforcement of the contract to bring about an equitable result.[308] Based on its reading of the Act, the court adopted a standard of inequity rather than a standard of unconscionability in order to trigger the equitable power of the trial court to modify the contract between a residential lessor and lessee.[309] The dissent argued that the inequity standard was nebulous and that innumerable rental agreements were now fair game for litigation or renegotiation.[310]

B. Course of Dealing Waiver

In *Easterling v. Peterson*,[311] the supreme court considered whether summary judgment is appropriate when one party raises the issue of

297. CC Housing Corp. v. Ryder Truck Rental, 106 N.M. 577, 579, 746 P.2d 1109, 1111 (1987).
298. 108 N.M. 520, 775 P.2d 722 (1989).
299. N.M. STAT. ANN. §§ 47-8-1 to -52 (Repl. Pamp. 1982 & Cum. Supp. 1989).
300. *Ramirez-Eames*, 108 N.M. at 522, 775 P.2d at 724.
301. *Id.* at 521, 775 P.2d at 723.
302. *Id.* Plaintiff did offer to pay the leasing agent fee. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at 521, 522, 775 P.2d at 723, 724.
307. *Id.* at 523, 775 P.2d at 725.
308. *Id.* at 522, 755 P.2d at 724.
309. *Id.* at 522-23, 775 P.2d at 724-25.
310. *Id.* at 524, 775 P.2d at 726 (Scarborough, J., dissenting).
311. 107 N.M. 123, 753 P.2d 902 (1988).

waiver of a contractual right through a course of dealing. The supreme court had previously held that waivers can be implied by a course of dealing[312] and that the existence of a waiver is a factual issue.[313] The *Easterling* court held that questions of waiver of contractual rights between a lessee and lessor are questions of fact[314] and that it was inappropriate for the trial court to grant summary judgment on the breach of contract issues without hearing the waiver issue.[315]

Plaintiff sued defendant for breach of contract and damages resulting from defendant's entry into premises subleased by plaintiff after plaintiff failed to pay rent on time.[316] Plaintiff Easterling had assumed a lease of commercial space from defendant Peterson.[317] Over a fifteen-month period, plaintiff consistently paid her rent late with added late charges.[318] In April 1985, with plaintiff three months behind in rental payments, defendant reentered the premises and locked plaintiff out.[319] Plaintiff sued defendant for lost income and opportunity to resell her business.[320] The trial court granted summary judgment to defendant, finding there were no material issues of fact concerning default, notice, and right of reentry.[321]

The supreme court stated that "[t]he general rules are that acceptance of rent with knowledge of an existing breach constitutes a waiver of the right of forfeiture for such breach, and that if, by his words and conduct a landlord has led his tenant to believe that he would not enforce a right of forfeiture, he will be estopped to avail himself of a forfeiture."[322] Under the holding of *Easterling*, if a lessor consistently accepts late rental payments without enforcing his contractual rights, a waiver created by that course of dealing may exist and the lessor may be found to be estopped from asserting his rights. This issue was raised by the pleadings and the determination was one of fact.[323] The suit, therefore, was not subject to summary judgment.[324]

XII. NEGOTIABLE INSTRUMENTS

In *Edwards v. Mesch*,[325] the supreme court clarified the right of a holder of a negotiable instrument to sue as the real party in

312. *Id.* at 124, 753 P.2d at 903 (citing Green v. General Accident Ins. Co. of Am., 106 N.M. 523, 746 P.2d 152 (1987) and Elephant Butte Resort Marina v. Woolridge, 102 N.M. 286, 694 P.2d 1351 (1985)).
313. Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, 99 N.M. 95, 654 P.2d 548 (1982).
314. *Easterling*, 107 N.M. at 124, 753 P.2d at 903.
315. *Id.* at 124, 125, 753 P.2d at 903, 904.
316. *Id.* at 123, 753 P.2d at 902.
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 124, 753 P.2d at 903.
322. *Id.* (citing 3A G. THOMPSON, THOMPSON ON REAL PROPERTY 1329 (Repl. 1981)).
323. *See Albuquerque Nat'l Bank*, 99 N.M. at 102, 654 P.2d at 555.
324. *Easterling*, 107 N.M. at 123-24, 753 P.2d at 903-04.
325. 107 N.M. 704, 763 P.2d 1169 (1988).

interest.[326] The court held that a payee in possession of a negotiable instrument may act to collect on that instrument even if the instrument had been assigned to a third party.[327] The court stated that the defendant would not be exposed to double liability because the Uniform Commercial Code provides protection to a party who makes payment to the holder of a negotiable instrument.[328]

Defendant Mesch executed a promissory note in favor of plaintiffs Edwards.[329] Subsequently, plaintiffs transferred their interest to a closely held corporation.[330] Defendant defaulted on the note.[331] Plaintiffs sued to collect and prevailed at trial.[332] On appeal, defendant argued that plaintiffs were not the real party in interest because the plaintiffs had transferred their interest in the note and therefore did not have standing to sue.[333]

In affirming the trial court's decision, the supreme court held that a "holder" of a negotiable instrument is "a person who is in possession of . . . an instrument . . . drawn, issued or endorsed to him, to his order or to bearer or in blank."[334] The court concluded that since plaintiffs were payees and holders of the note, they could enforce payment even after they had assigned it to the corporation.[335] As the owner of the right being enforced and as the party in position to discharge the defendant from the liability, plaintiffs were indeed the real party in interest.[336]

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326. *Id.* at 705, 763 P.2d at 1170. The court had decided cases concerning the rights of holders when seeking payment on a note as far back as the last century and the early part of this century. *See, e.g.*, Spears v. Sutherland, 37 N.M. 356, 23 P.2d 622 (1933); Tompkins v. Rains, 26 N.M. 631, 195 P. 800 (1921); Leitensdorfer v. Webb, 1 N.M. 34, 51 (1853), *aff'd*, 61 U.S. 176 (1857). In *Tompkins*, the court held that ". . . when a payee had possession of a note at trial, even if the note bore the endorsement of payee to a third party, '[t]he general rule is that in such instances the payee in the note is presumed to be the owner thereof and may maintain the suit.'" *Edwards*, 107 N.M. at 706, 763 P.2d at 1171 (quoting *Tompkins*, 26 N.M. at 633, 195 P. at 800-01).

327. *Edwards*, 107 N.M. at 706, 763 P.2d at 1171.

328. *Id.* The court quoted from N.M. STAT. ANN. § 55-3-603(1) (1978): "The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument. . ." The discharge from liability does have certain specific restrictions such as bad faith. *Id.*

329. *Edwards*, 107 N.M. at 705, 763 P.2d at 1170.

330. *Id.* John Edwards owned all the shares of the corporation. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Edwards*, 107 N.M. at 705, 763 P.2d at 1170 (quoting N.M. STAT. ANN. § 55-1-201(20) (Cum. Supp. 1988)).

335. *Edwards*, 107 N.M. at 706, 763 P.2d at 1171.

336. *Id.* (citing SUP. CT. RULES ANN. 1-017(A) & (B) (1986)).