

April 2011

To: Business Law Section Members

Re: Updates of New Mexico Case Law

*This Email is a continuation of the BLS Board's efforts to keep section members informed about select changes in or clarifications to New Mexico Law that may be of interest to business lawyers. Summaries of recent case law on ambiguous contracts and antitrust follow:*

### **Ambiguous Contracts**

*City of Rio Rancho v. Amrep Southwest, Inc.*, 2010-NMCA-075, 148 N.M. 542, 238 P.3d 911.

This case arose from a dispute between a developer and the City of Rio Rancho over property located in Rio Rancho, NM. Amrep Southwest Inc. (Amrep), a developer, was the original owner of several divisions of property in Rio Rancho, including the area in which the contested ten-acre property is found. The property at issue was labeled as "Parcel F" (Parcel) on the final recorded plat (the Plat). The City of Rio Rancho (the City) claimed it was the intention of Amrep and the City that the Parcel be set aside as undeveloped open space and that the Parcel was labeled as a drainage easement specifically to accomplish that purpose. Conversely, Amrep claimed the Parcel would merely be encumbered by an easement, yet all other rights of ownership would be retained by the developer.

The City filed a complaint in District Court and requested declaratory judgment stating that fee title to the Parcel was vested in the City. In response to the City's complaint, Amrep filed a motion for partial summary judgment requesting judgment in its favor as to all counts in the City's complaint that alleged the City's ownership of the Parcel. In granting Amrep's motion, the district court found there was no issue of material fact in dispute and that it was clear and unambiguous that the Plat granted a drainage easement over the Parcel but did not convey title to the City. On appeal, the City contended the district court erred when it determined the Plat was unambiguous as to the purpose of the Parcel. The City contended the court failed to consider extrinsic evidence presented by the City to show that the Plat was ambiguous as to the true intent of the parties regarding the future of the Parcel.

The Court of Appeals of New Mexico agreed with the City and reversed the decision of the district court and remanded the case.

***Importance to BLS members:*** In reaching its decision, the Court first looked to whether the lower court should have considered extrinsic evidence in determining whether the Plat was ambiguous. The lower court ignored evidence presented by the City that supported differing interpretations of the Plat and instead relied solely on the information contained within the four corners of the Plat in making its determination. In finding the lower court should have considered extrinsic evidence when granting summary judgment, the Court used the reasoning of other State

Supreme Court decisions to find “[e]xtrinsic evidence is admissible to establish that a document does not express the true agreement of parties, even if the inconsistency cannot be detected on the face of the document and becomes clear only in light of surrounding circumstances.”. *Id.* at ¶18.

Indeed, a Court will look to the terms as contained within the agreement of the parties but this opinion seems to suggest a Court’s decision to ignore extrinsic evidence supporting a claim of ambiguity when granting summary judgment will be found to be improper.

### **Antitrust**

*Romero v. Phillip Morris, Inc.*, 2010- NMSC- 035, 148 N.M. 713, 242 P.3d 280.

This class action lawsuit stemmed from allegations of price fixing in the sale of cigarettes in violation of both Federal and New Mexico antitrust laws. The plaintiffs in the case were individuals that purchased cigarettes from the defendants in New Mexico. The defendants in this case were several cigarette companies that sold cigarettes, at least indirectly, in New Mexico. The action was brought in response to the defendants’ practice of decreasing prices to promotional levels only to raise prices in a manner described as a near “lock-step fashion” in the early 1990s.

Plaintiffs filed the lawsuit in April of 2000, alleging violations of New Mexico antitrust and consumer protection laws. In granting Defendant’s motion for summary judgment, the district court held that though Plaintiffs had met their initial burden of showing parallel behavior, Plaintiffs failed to show the existence of “plus factors” that tended to exclude Defendant’s independent conduct; preventing a determination of Defendant’s actions as price coordination or otherwise unlawful. On appeal, the Court of Appeals did not follow Federal case law by not requiring evidence of “plus factors” and instead evaluated the evidence to determine a degree of parallelism that went beyond what could be accomplished through lawful conduct.

The Supreme Court reversed the Court of Appeals and held that Plaintiffs “[M]ust present evidence that tends to exclude the possibility Defendants acted independently. . . .” *Id.* at ¶19.

***Importance to BLS members:*** To establish a violation of Section 1 of the Sherman Act, a plaintiff must show, among other things, a concerted effort to unreasonably restrain interstate commerce. To prove a violation, plaintiffs can produce direct or circumstantial effort of an illegal agreement to fix prices. When considering the environment of business and competition, there is an increasing likelihood that independent conduct is the cause of the parallel behavior. As such, if the evidence offered by the plaintiff is ambiguous and can equally lead to the conclusion that the alleged conduct was the result of independent action as opposed to illegal conduct, a court will find the plaintiff to have failed to establish a genuine issue of material fact that there was a conspiracy.

The phrase “plus factors” refers simply to the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy. The courts of New Mexico will follow Federal Antitrust law and view “plus factors” as circumstantial evidence that would tend to exclude the possibility that defendants acted independently.

This case also reiterates New Mexico courts’ commitment to construe the New Mexico Antitrust Act in harmony with judicial interpretations of federal antitrust law. The Court found the Court of Appeals erred in its use of the New Mexico summary judgment standard to overcome the strict requirements of the substantive law. The Court supported the determination that “[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a[n] [antitrust] case.” *Id.* at 22.

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