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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:

Conversion and Fiduciary Duty

Alcantar v. Sanchez, 2011- NMCA- 073

Appellants are father and sons that opened a joint account in response to the passing of the Mother of the family. In an attempt to help facilitate the family finances, the joint account named the father as the "Primary Joint Owner", with the sons each serving as "Secondary Joint Owners"; each having access to the funds deposited in the account. Several months later, Appellees obtained a judgment against one of the sons and a writ of garnishment was issued and given to the Bank. The writ identified the son as the judgment debtor and stated a judgment amount that was nearly twice the amount of money in the joint account. The Bank took immediate possession of the funds in the account; preventing all joint owners from accessing the funds. The father contended the funds seized were not solely the son's and filed a complaint against the Bank, advancing claims of conversion and breach of fiduciary duty, among others.

In its motion for summary judgment, the Bank contended that its seizure of funds was in accordance with the terms of the consumer account agreement and the law pertaining to garnishment. The Bank also denied the existence of a fiduciary duty between the joint account holders and the Bank. The District Court found in the Bank's favor and awarded summary judgment with respect to all of the father's claims.

The Court reversed the Bank's award of summary judgment for the claim of Conversion by the Father. In regard to the claim for Breach of Fiduciary Duty, the Court rejected the father's claim and upheld the award of summary judgment.

Importance to BLS members: Though no cases in New Mexico specifically address garnishment of funds in a joint account, the Court looks to the case law related to *ownership* in joint accounts and borrows from the principle of "net contribution" in determining garnishment in a joint account. "Net contribution" is defined in pertinent part as "the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party." NMSA 46-6-211(A).

In defining ownership rights to a joint account, the Court used the principle of "net contribution" to determine the funds available to seizure. The Court found that because a writ of garnishment can only seize property that belongs to the judgment debtor, only the son's net contributions to the accounts should have been subject to the seizure. When looking to the burdens

placed on banks in these scenarios, the Court states as an alternative the process of interpleader, together with the payment of all disputed monies into the court registry or the placing of a brief hold on the account until a reasonable investigation can be completed. It is clear that the act of seizing all funds in a joint account, irrespective of the interests of the other joint owners, is contrary to New Mexico law.

The Court failed to find evidence of a fiduciary duty between the Bank and the joint account holders, instead finding a commercial relationship between the parties. A bank will not be found to owe a fiduciary duty to its account holders absent a heightened advisory role to that account holder.

Time Limitations and Third-Party Beneficiaries

City of Santa Fe v. Travelers Casualty & Surety Company, 2010-NMSC-010, 147 N.M. 699, 228 P.3d 483

The City of Santa Fe contracted with a company for the repair of a water tank. In accordance with the Little Miller Act, the contracting company obtained a performance bond from Travelers Casualty and Surety Company. The agreement provided a two-year time-to-sue provision. The City ultimately sued Travelers and the District Court granted summary judgment for Travelers; holding that the two-year time-to-sue provision in the bond applied to the City and barred the suit from being timely. The Court of Appeals agreed. The Supreme Court reversed and held the provision in the performance bond was unenforceable.

In reaching its decision, the Court found that the City did not have any agreement with Travelers, and the performance bond agreement was between Travelers and the contracting company, with the City serving as a third-party beneficiary. The City's status as a third-party beneficiary does not imply the City had the opportunity to negotiate the time-to-sue provision and thus, was not able to bargain on its behalf. Holding otherwise would allow the surety to unilaterally limit its exposure to the City.

Importance to BLS members: The Court looks to the public policy considerations of freedom to contract in reaching its decision. The ability to contract involves the ability to protect oneself and reduce the risk associated with the agreement. The inability of a third-party beneficiary to bargain for terms on its behalf prevents these types of provisions from being enforceable. Third-party beneficiaries are not considered to be in privity of contract and it follows accordingly that they are not in a position to actively negotiate a contract's terms. Provisions between two parties may be rendered unenforceable on a third-party beneficiary when the inability to negotiate the terms of the agreement exists.

Summaries of recent changes to New Mexico business law can be found at the following link:

<http://www.nmbar.org/AboutSBNM/sections/BusinessLaw/nmbusinesslawupdates.html>

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