Legal Education Calendar

Writs of Certiorari

List of Court of Appeals' Opinions

Clerk Certificates


2006-NMSC-026, No. 28,950: State v. Nyce


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Family Court Open Judges Meeting Canceled

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Special Insert:
Alliance Program
To raise funds, Equal Access to Justice is holding a Silent Auction during the State Bar’s Annual Meeting in Taos on July 21 at the Taos Convention Center.

The Equal Access to Justice Campaign is a program that helps New Mexico families and individuals get the civil legal service help they need.

We are looking for items such as:
- beauty/spa services
- sporting goods
- theatre and entertainment
- artwork
- food and wine
- travel
- jewelry
- clothes
- home decorating items
- or anything you think would be of interest

You may also make a money donation and we will buy an auction item on your behalf.

As a contributor to our silent auction, you and/or your organization will be promoted throughout the State Bar’s three-day Annual Meeting, in the event program, and in the State Bar’s weekly Bar Bulletin. Your donation is tax deductible.

If you would like to donate an item or have a lead for us to contact, please contact Wendy Basgall at 797-6051, or wbasgall@nmbar.org.
2006 Updates to the NMSA 1978™ are now available!

The 2006 updates to the New Mexico Statutes Annotated 1978™ are published by the New Mexico Compilation Commission in the cost effective binder format you have relied on for 25 years! Protect your investment in the NMSA 1978™ by purchasing the 2006 updates with official history notes and authoritative compiler notes and cross references.

New Mexico Compilation Commission
Marketed to the Private Bar by Conway Greene Company

Contact us at 1-866-240-6550
www.conwaygreene.com

State agency and local public body subscribers to the NMSA 1978™ and NMRA will automatically receive updates to the full sets of the NMSA 1978™. If you have any questions about how to update your set, please contact the New Mexico Compilation Commission at 505 827-4821.

The Only Official Source for New Mexico Laws and Rules

Also Available:

• New Mexico Advance Legislative Service 2006
• New Mexico One Source of Law™
• 2006 New Mexico Rules Annotated
Free Management Advice on the Web
(For Law Offices)

Provided by the State Bar’s Law Office Management Committee

Visit www.nmbar.org, select Attorney Services/Practice Resources, then Law Office Management to find information on the following topics and more:

 AVR Business of a Law Office
 AVR Client Relations
 AVR Employment Issues
 AVR Forms
 AVR Malpractice
 AVR Marketing
 AVR Products & Service Directory
 AVR Risk Management
 AVR Solo Handbook
 AVR Technology (Document Assembly)

Submit questions or comments to the Law Office Management Committee through membership@nmbar.org
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From the New Mexico Supreme Court

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Professionalism Tip

With respect to the courts and other tribunals:

I will attempt to resolve, by agreement, my objections to matters contained in my opponent’s pleadings and discovery requests.

Meetings

July

5
Employment and Labor Law Section Board of Directors, noon, State Bar Center

8
Ethics Advisory Committee, 10 a.m., State Bar Center

11
Committee on Diversity in the Legal Profession, 3 p.m., State Bar Center

12
Children’s Law Section Board of Directors, noon, Juvenile Justice Center

13
Public Law Section Board of Directors, noon, Risk Management Division, Santa Fe

17
Public Legal Education Committee, noon, State Bar Center

18
Solo and Small Firm Practitioners Section Board of Directors, 11:20 a.m., Section Meeting, noon, State Bar Center

State Bar Workshops

July

26
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

27
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

August

9
Immigration Workshop 6 p.m., State Bar Center, Albuquerque

23
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

24
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

September

27
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS

NM Supreme Court Address Changes

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information should be e-mailed to the Supreme Court at suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848. Information should be e-mailed to the State Bar at address@nmbar.org; faxed to (505) 828-3755; or mailed to PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

Law Library

For the convenience of state employees, the judiciary and the general public, the Supreme Court Law Library is open extended hours:

- Monday-Friday, 8 a.m.–5:30 p.m.
- Saturday, 10 a.m.–3 p.m.
- Closed holiday weekends

The library has statutes, rules, regulations, etc., plus free computer access to Westlaw and Lexis. It also has many other computer-based research tools.

Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Web site: www.supremecourtlawlibrary.com.

NM Court of Appeals Open Meeting of Committee on Administrative Appeals

An ad hoc committee of district and appellate judges and lawyers practicing in the area of administrative appeals will meet at 1:30 p.m., July 11, at the State Bar Center. The purpose of the meeting is to evaluate practice and procedures under Section 39-3-1.1 now that the statute is over five years old. Some of the problems that have been noted include: (1) the time for appeal needs clarification; (2) the definition and manner of preparation of the record needs clarification; (3) the rules governing statements of issues could be improved; (4) decisions by administrators, particularly city and county governments, are sometimes inadequate for review; (5) the standards of review do not seem to be complied with; (6) some cases should go directly to the Court of Appeals; and (7) administrative decision makers, district and appellate judges and practitioners could benefit from education on the issues related to Section 39-3-1.1. Those who have interest in this area of law or who have noted these or additional problems should attend this meeting. For more information, contact Judge Lynn Pickard at (505) 827-4903 or coalp@nmcourts.com.

First Judicial District Court

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic,
Incompetency/Mental Health, Adoption and Probate Cases
1977 to 1988

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the lst Judicial District Court will destroy exhibits filed with the court in Criminal, Civil, Children’s courts, domestic, incompetency/mental health, adoption and probate cases for years 1977 to 1988, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Aug. 18. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Destruction of Tapes

Criminal, Civil, Children’s Court, Domestic,
Incompetency/Mental Health, Adoption and Probate Cases
1991 to 1995

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the lst Judicial District Court will destroy tapes filed with the Court in Criminal, Civil, and Children’s courts, domestic, incompetency/mental health, adoption and probate cases for years 1991 to 1995, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel who may have cases with exhibits should verify exhibit information with the Special Services Division, (505) 841-7596/5452, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court

Case Reassignment

Judge Ernesto Romero, Division XI, will be transferring from the Domestic Relations Court to the Criminal Court at the 2nd Judicial District Court. Effective July 3, Judge Romero will assume Criminal Court cases assigned to Judge James F. Blackmer. Parties who have not previously exercised their right to challenge or excuse will have ten (10) days from July 3 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Destruction of Exhibits

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy exhibits filed with the Court in criminal cases for years 1984 to 1989 and LR (Metro Court cases) for years 1987 to 1996, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through July 27. Counsel who may have cases with exhibits should verify exhibit information with the Special Services Division, (505) 841-7596/5452, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Family Court Open Judges Meeting

The July 10 meeting of the Family Court Open Judges, scheduled for noon, has been cancelled. The next meeting will be held at noon, Sept. 12, at the 2nd Judicial District Court, 3rd Floor Conference Center, 400 Lomas NW, Albuquerque. We apologize for any inconvenience and look forward to seeing interested participants in September.

Judicial Appointment

Governor Bill Richardson has appointed Stanley Whitaker to fill the vacancy in Division II at the 2nd Judicial District Court
Effective July 3, Judge Whitaker will assume Domestic Relations Court cases assigned to Judge Ernesto Romero. Parties who have not previously exercised their right to challenge or excuse will have ten (10) days from July 3 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Notice To Attorneys

The 2nd Judicial District Court wants to remind attorneys that an Order Setting Conditions of Release shall be filed whenever a Waiver of Arraignment is filed waiving a defendant's presence at a criminal felony arraignment (see Rule 5-401 NMRA and LR 2-403B NMRA). Cases set for arraignment are simultaneously set for conditions of release hearings. Defendants will be required to appear at a conditions of release hearing if an Order Setting Conditions of Release has not been filed with a Waiver of Arraignment. The court highly encourages attorneys to file both documents at the same time.

Third Judicial District Nominating Commission

The District Court Judicial Nominating Commission convened June 19 in Las Cruces and completed its evaluation of the nine applicants for the vacancies on the 3rd Judicial District Court. The commission recommends the following three applicants (in alphabetical order) to Governor Bill Richardson:

William R. Babington, Jr.
Fernando R. Macias
Michael T. Murphy

Eleventh Judicial District Court Address Change

Effective July 17, all correspondence for the Honorable John A. Dean, Jr. should be sent to 920 Municipal Dr., Ste. 1, Farmington, NM 87401.

Destruction of Exhibits

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 11th Judicial District Court, McKinley County, will destroy exhibits filed with the Court in the civil and criminal cases for the years of 1986 through 2003, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning June 8 to August 17. Counsel who have cases with exhibits should verify exhibit information with the judicial lead worker, (505) 863-6816, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

STATE BAR NEWS

2006-07 Bench and Bar Directory

The 2006-07 Bench and Bar Directory has been mailed to all active members. Members who do not receive a copy by June 30 should call (505) 797-6062. For directory-related questions, call (505) 797-6039 or e-mail vcordova@nmbar.org. Directories are available for purchase online at www.nmbar.org or at the State Bar Center. To avoid shipping and handling charges, pick up directories at the State Bar Center.

To receive a member discount, online purchases require a member login: username (Bar ID number) and password (last name).

Attorney Support Group

The next Attorney Support Group meeting will be held at 5:30 p.m., July 3, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Bankruptcy Law Section

BAPCPA Brownbag Meeting

The Bankruptcy Law Section will present BAPCPA-Where Are We Now? Part 2 at noon, July 14, at the Office of the Chapter 13 Trustee. The discussion (continuing from the June 23 brownbag session) will focus on issues that are arising under BAPCPA, including how the plan is working and the means test (form B22C). Contact Kelley Skehen, (505) 243-1335, ext. 3013 for more information.

Fair Credit Reporting Act Training

The Bankruptcy Law Section will present a free training on the Fair Credit Reporting Act from 10 a.m. to noon, Aug. 11, at the State Bar Center. This training is open to all attorneys. Bankruptcy attorneys nationwide have discovered that post-discharge debtors often face problems that can be remedied through a Fair Credit Reporting Act claim. Consumer law attorneys Richard N. Feferman and Rob Treinen, of Feferman & Warren, along with consumer bankruptcy attorney Alfred M. Sanchez, will present. For further information, call Alfred M. Sanchez, (505) 242-1979. Materials will be provided.

Board of Bar Commissioners

Commissioner Vacancy

Third District

A vacancy exists in the 3rd Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties, due to the resignation of Commissioner Robert D. Castille, who is relocating to Oregon. The Board of Bar Commissioners will make an interim appointment at its July 20 meeting to fill the vacancy until the next regular election of commissioners is held in November. The remainder of the unexpired term to end in December 2007 will be filled at that time. Active status members with a principal place of practice in the 3rd District are eligible to apply. Applicants should plan to attend the three remaining board meetings scheduled for Sept. 15 in Tucumcari, Nov. 2 in Roswell and Dec. 15 in Albuquerque. Anyone interested should submit a letter of interest and resume to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199 or jconte@nmbar.org by July 7.

Casemaker

Coming Soon for New Mexico Lawyers

The State Bar of New Mexico is proud to offer its newest member benefit, Casemaker. Casemaker is online legal research made available to State Bar members at no charge. That’s free legal research. Casemaker will be available from the State Bar’s Web site at www.nmbar.org with an anticipated launch date of summer 2006. Watch for more information about Casemaker and visit www.casemaker.us. Contact Veronica Cordova, vcordova@nmbar.org, or (505) 797-6039, with questions.

ENews Launched June 8

ENews is a weekly e-mail newsletter that will be sent every Thursday to active
State Bar members and Paralegal Division members. *ENews* was designed to curtail the amount of e-mail that members receive from the State Bar with one weekly communication that compiles information, news and resources. Members who have not received *ENews* and wish to do so must submit their e-mail address to the State Bar at address@nmbar.org.

### Paralegal Division

**Monthly Brownbag CLE for Attorneys and Paralegals**

The Paralegal Division invites members of the legal community to bring a lunch and attend *Preparing for the Expert Witness Deposition*, presented by Daniel Ulibarri, Attorney at Law. The program will be held from noon to 1 p.m., July 12, at the State Bar Center and offers 1.0 general CLE credits. Registration begins at the door at 11:30 a.m. and costs $16 for attorneys and $15 for paralegals, legal assistants and secretaries.

For more information, contact Cheryl Passalaqua at Butt, Thornton & Baehr, P.C., (505) 884-0777.

### Senior Lawyers Division

**Annual Meeting**

The Senior Lawyers Division will hold its annual meeting at 10 a.m., July 22, during the State Bar’s annual meeting in Taos. Agenda items should be sent to Chair Carolyn Ramos, scramos@bbblaw.com or (505) 884-0777.

### Professional Clothing Drive

The Young Lawyers Division is collecting professional clothing to donate to both Dismas House, a nonprofit organization that transitions nonviolent offenders from incarceration to parole, and The Crossroads, a nonprofit organization that assists homeless women and children. Professional clothing donations are being accepted at the following four locations:

- **13th Judicial District Attorneys Office, Cibola County**
  - 515 High Street, Grants
- **Cuddy, Kennedy, Albert, & Ives, L.L.P.**
  - 1701 Old Pecos Trail, Santa Fe
- **State Bar of New Mexico**
  - 5121 Masthead NE, Albuquerque
- **The Romero Law Firm**
  - 1001 5th Street NW, Albuquerque
  - Butt, Thornton & Baehr, PC.
  - 4101 Indian School Road NE
  - 1701 Old Pecos Trail, Santa Fe

Other agenda items should be sent to Chair Barbara Éverage, EvenageLawFirm@aol.com or (505) 842-1248.

### Proposed Bylaws Amendments

At their April 21 meeting, the Board of Bar Commissioners reviewed the proposed amendments to the Senior Lawyers Division bylaws. The Board removed the requirement that amendments be made only at annual meetings. Visit www.nmbar.org, select *Divisions/Sections/Committees* and navigate to the Senior Lawyers Division page and review the proposed amendments that will be on the Board of Bar Commissioner’s July 20 agenda. Send comments by July 7 to Christine Morganti at the State Bar, cmorganti@nmbar.org, or by fax to (505) 828-3765.

### Young Lawyers Division

**Annual Meeting**

The Young Lawyers Division will hold its annual meeting at 10 a.m., July 22, during the State Bar’s annual meeting in Taos. Agenda items should be sent to Chair Carolyn Ramos, scramos@bbblaw.com or (505) 884-0777.

### Other Bars

#### Albuquerque Bar Association

**Monthly Luncheon and CLE**

The Albuquerque Bar Association’s monthly luncheon will be held at noon, July 11, at the Albuquerque Petroleum Club. *Everything You Wanted to Know about the ACLU Bar Were Afraid to Ask* will be presented by George Bach, staff attorney, and Peter Simonson, executive director for the American Civil Liberties Union of New Mexico (ACLU-NM).

From 1:30 to 2:30 p.m., the CLE, *Update on Lesbian, Gay, Bisexual and Transgender Law*, will be presented by George Bach, ACLU-NM staff attorney, and will qualify for 1.0 general CLE credits. This short CLE will provide a historical overview and general update on legal issues, including employment discrimination, same sex marriage and domestic partnerships. The CLE should be of particular interest to counsel for employers, personnel directors or any practitioner in the areas of civil rights and employment law.

Lunch only: $20 members/$25 non-members; lunch and CLE: $40 members/$55 non-members; CLE only: $20 members/$30 non-members.

Register for lunch by noon, July 10. Lunch is an additional $5 without reservations. Register at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

#### Roast Aug. 26

The Albuquerque Bar Association invites members of the legal community to join them for an evening of laughter, merriment and irreverence as they roast Bruce Hall of Rodey, Dickason, Sloan, Akin, & Robbins, PA. The event will be held at 6 p.m., Aug. 26, at the Hotel Albuquerque, Old Town (former Sheraton Old Town).

By reservation only: $65 individual; $650 table of ten (includes program recognition)

Register at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

#### NM Defense Lawyers Association (NMDLA)

The NMDLA Board of Directors is proud to announce William Gralow as the 2006 Civil Defense Lawyer of the Year. He will be honored at the 2006 NMDLA Annual Meeting on Oct. 19 at the National Hispanic Cultural Center in Albuquerque. Visit www.nmdla.org for more information.

#### NM Women’s Bar Association

**Bi-Monthly Networking Lunch**

The next networking luncheon of the NM Women’s Bar Association will be held from noon to 1:30 p.m., July 12, at NYPD Pizza, 215 Central Avenue, NW, Albuquerque. Guest speakers are judicial candidates: The Honorable Ken Martinez (2nd Judicial District Court), The Honorable Julie Altweis (Metropolitan Court, Division 18) and attorney Sanford Siegel. Each candidate will give a brief presentation.
and respond to questions from the floor.

Lunch is ordered off the restaurant menu with payment made directly to NYPD Pizza. Register for the luncheon no later than July 6 with Rendie Baker-Moore, womenbarNM_admnasst@msn.com or Sue Chappell, sgc@sutinfrm.com. The luncheons are open to all interested persons.

UNM SCHOOL OF LAW
Library Summer Hours
Closed July 4
Monday–Thursday 8 a.m.–9 p.m.
Friday 8 a.m.–6 p.m.
Saturday 9 a.m.–6 p.m.
Sunday Noon–9 p.m.

OTHER NEWS
Business and Employer Workshops
The New Mexico Taxation and Revenue Department and the Internal Revenue Service are offering free, one-day workshops in Albuquerque for businesses with or without employees. These workshops are designed to address the tax requirements for new and existing businesses.

The New Business Workshops are for all new business owners. Items to be covered include New Mexico gross receipts tax, IRS filing requirements and a brief summary of other new business issues. New Business Workshops are offered the first, second and third Tuesday of every month.

The New Employer Workshops are for small businesses that have employees or plan to have employees. Regulatory and tax filing requirements from six different federal and state agencies will be covered. New Employer Workshops are offered the fourth Tuesday of every month.

All workshops will be held at the New Mexico Taxation and Revenue Department, 5301 Central, NE (Bank of the West building), 10th Floor, Conference Room A, 8:15 a.m. to 3:45 p.m., with a one-hour lunch break. The workshops are free of charge and no advance registration is required.

Workshops scheduled for new businesses are: June 20; July 11 and 18; Aug. 1, 8 and 15; Sept. 5, 12 and 19; Oct. 3, 10 and 17; Nov. 7, 14 and 21; Dec. 5, 12 and 19.

Workshops scheduled for new employers are: June 27; July 25; Aug. 22; Sept. 26; Oct. 24; Nov. 28; and Dec. 26.

For additional information, contact the State of New Mexico Taxation and Revenue Department, (505) 841-6200.

Legal FACS Fundraising Event
Legal FACS is excited to present its first annual fundraising event, A Celestial Celebration: An Evening to Shine.

Legal FACS (Forms and Courthouse Services) is a nonprofit organization whose mission is to provide access to justice by empowering and educating self-represented litigants and victims of domestic violence with legal and victim support services. Founded by concerned lawyers within the Albuquerque Bar Association to provide access to the legal system, Legal FACS has provided free legal services since 1971 and social services to children and victims of domestic violence in Bernalillo, Sandoval, Valencia and Torrance Counties since 2002.

The Friends of Legal FACS, a group of concerned New Mexicans dedicated to the notion that all members of society deserve access to our legal system, invites all to be a part of this very special black tie gala from 6 to 10 p.m., November 4, at the LodeStar Astronomy Center in Albuquerque’s historic Old Town. There will be hors d’oeuvres, a cash bar and live music by the Rodney Bowe Jazz Quartet.

For sponsorship and ticket information, contact Legal FACS, (505) 256-0417.

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.
CONGRATULATIONS TO THE
2006 STATE BAR OF NEW MEXICO
ANNUAL AWARD RECIPIENTS

COURAGEOUS ADVOCACY AWARD
Gary C. Mitchell

OUTSTANDING CONTRIBUTION AWARD
Mary Ann Romero

OUTSTANDING JUDICIAL SERVICE AWARD
Judge James W. Counts

OUTSTANDING PROGRAM AWARD
State Bar of New Mexico
Consumer Issues Workshops

OUTSTANDING YOUNG LAWYER OF THE YEAR AWARD
Hector H. Balderas

PROFESSIONALISM AWARD
Graham Browne (Posthumously)
Alice Tomlinson-Lorenz

SETH D. MONTGOMERY DISTINGUISHED JUDICIAL SERVICE AWARD
Judge Peggy J. Nelson

DISTINGUISHED BAR SERVICE AWARD
Andrew G. Schultz
Norman S. Thayer

OUTSTANDING CONTRIBUTION TO PEOPLE WITH DISABILITIES AWARD
Gail S. Stewart

OUTSTANDING BAR AWARD
New Mexico Black Lawyers Association

OUTSTANDING COMMITTEE AWARD
New Mexico Medical Review Commission

QUALITY OF LIFE—LAWYER AWARD
B. Paul Briones

QUALITY OF LIFE—LEGAL EMPLOYER AWARD
Little & Gilman-Tepper, P.A.

SETH D. MONTGOMERY DISTINGUISHED JUDICIAL SERVICE AWARD
Judge Peggy J. Nelson

FIFTY-YEAR PRACTITIONERS
Anthony F. Avallone
Paul A. Cooter
James G. Chakeres
Louis J. Vener
Eliu E. Romero
Elvin Kanter

The State Bar of New Mexico will present the awards during the Friday, July 21, luncheon in Taos. Use the form on page 11 to register for the luncheon and annual meeting. For a detailed list of programs/events for the annual meeting, see the May 15 Bar Bulletin insert or visit the State Bar’s Web site at www.nmbar.org.
## Reaching for Excellence

**July 20-22, 2006 • Taos Convention Center - Taos, NM**

9.0 General, 2.0 Ethics and 1.0 Professionalism CLE Credits

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<thead>
<tr>
<th>Name ____________________________________________</th>
<th>NM Bar No. ________________</th>
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### Early Registration Fee (Must be postmarked by July 1)

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<tr>
<td>Standard</td>
<td>$280</td>
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<tr>
<td>Daily</td>
<td>$150</td>
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<tr>
<td>Guest (includes all of the above except CLE tuition and materials)</td>
<td>$40</td>
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<tr>
<td>Add $10 to registration fee if postmarked after July 1.</td>
<td>$10</td>
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### Separately Ticketed Events

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<tbody>
<tr>
<td>Awards Luncheon, Friday, July 21</td>
<td>$15</td>
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<tr>
<td>Dinner &amp; Entertainment, Friday, July 21</td>
<td>$35</td>
<td>______</td>
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<tr>
<td>Child Dinner (12 &amp; Under), Friday, July 21</td>
<td>$15</td>
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<tr>
<td>Luncheon, Saturday, July 22</td>
<td>$15</td>
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<tr>
<td>Golf Tournament (18-hole), Saturday, July 22 (1:30-5:30 p.m.)</td>
<td>$65</td>
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Total ______

### Payment Options

- Enclosed is my check in the amount of $ ________________ (Make Checks Payable to: State Bar of NM)
- VISA ☐ Master Card ☐ American Express ☐ Discover ☐ Purchase Order (Must be attached to be registered)

Credit Card Acct. No. ___________________________________________________________ Exp. Date ________________

Signature ______________________________________________________________________

Internet:  www.nmbar.org

| Phone: (505) 797-6020; Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready) |
| Fax: (505) 797-6071; Open 24 Hours (Please include credit card information) |

MCLE Credit Information: Courses have been approved by the New Mexico MCLE Board. CLE will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.

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## WRITS OF CERTIORARI
### As Updated by the Clerk of the New Mexico Supreme Court

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective July 3, 2006**

### Petitions for Writ of Certiorari Filed and Pending:

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### Certiorari Granted but not yet Submitted to the Court:

(6/23/06)

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**WRITS OF CERTIORARI**

**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**EFFECTIVE JULY 3, 2006**

**WRIT OF CERTIORARI**

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**Petition for Writ of Certiorari Denied:**

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**Writ of Certiorari Dismissed:**

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**Certiorari Granted and Submitted to the Court**

(Submission = date of oral argument or briefs-only submission)

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### Unpublished Opinions

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Opinion

Justice Edward L. Chávez

{1} This case explores the res judicata and collateral estoppel effects of the dismissal of a federal lawsuit on subsequent state court proceedings. Plaintiff originally sued her former employer, Danka Corporation, Inc., in the United States District Court for the District of New Mexico for sex discrimination in violation of Title VII, 42 U.S.C. §§ 2000e-2, 2000e-3 (2000), and in violation of the Equal Pay Act, 29 U.S.C. § 206(d) (2000). Plaintiff also brought two state law claims for negligent retention and supervision and intentional infliction of emotional distress in her federal lawsuit. All claims in the federal lawsuit were based primarily on the actions of Danka employees. The federal district court granted Danka’s motion for summary judgment, and the Tenth Circuit Court of Appeals affirmed. DeFlon v. Danka Corp., 1 Fed. Appx. 807 (10th Cir. 2001). Plaintiff then filed suit against Defendants, who were all Danka employees, in state court for intentional infliction of emotional distress, intentional interference with a contract, defamation, prima facie tort, and civil conspiracy. Finding that the doctrines of res judicata and collateral estoppel barred Plaintiff’s claims, the district court dismissed Plaintiff’s complaint with prejudice. Plaintiff appealed the dismissal of two claims—intentional interference with a contract and civil conspiracy—and the Court of Appeals affirmed that dismissal. DeFlon v. Sawyers, No. 23,013, slip op. at 2 (Ct. App. July 28, 2004). Plaintiff now asks this Court to reverse the Court of Appeals and reinstate her claims for intentional interference with a contract and civil conspiracy. We hold that res judicata does not bar Plaintiff’s claims because Defendants, who allegedly acted outside the scope of their authority, are not in privity with the defendant in the federal suit. Collateral estoppel does not bar Plaintiff’s claims because the Tenth Circuit did not actually and necessarily decide issues which would bar the present claims.

1. Res judicata does not bar Plaintiff’s claims because Defendants are not in privity with the defendant in the federal suit

{2} Res judicata prevents a party or its privies from repeatedly suing another for the same cause of action. See Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), overruled on other grounds by Universal Life Church v. Coxon, 105 N.M. 57, 58, 728 P.2d 467, 469 (1986). Or, as the Court of Appeals explained, “Res judicata bars relitigation of the same claim between the same parties or their privies when the first litigation resulted in a final judgment on the merits.” DeFlon, No. 23,013, slip op. at 4 (citing Ford v. N.M. Dep’t of Pub. Safety, 119 N.M. 405, 407, 891 P.2d 546, 548 (Ct. App. 1994)). Because the first final judgment in this case came from federal court, the Court of Appeals indicated that federal law governs the preclusive effect that the prior federal judgment should have on these state court proceedings. Id. at 4 (citing Ford, 119 N.M. at 409, 891 P.2d at 548 and Edwards v. First Fed. Sav. & Loan Ass’n, 102 N.M. 396, 402-04, 696 P.2d 484, 490-92 (Ct. App. 1985)). We agree with the importance of recognizing and granting appropriate deference to federal court judgments but note that “[f]ederal law and New Mexico law are not divergent on claim preclusion doctrine.” Moffat v. Branch, 2005-NMCA-103, ¶ 11, 138 N.M. 224, 118 P.3d 732. Therefore, we employ both federal and state precedent in analyzing this case.

{3} Because the parties do not dispute the facts in this case, we review the legal issue presented by the district court’s application of res judicata de novo.
cause of action must be involved in both suits." Baxters v. Olson, 100 N.M. 745, 747, 676 P.2d 822, 824 (1984) (cited authority omitted). The only element at issue in this case is whether Defendants are in privity with Danka, the defendant in the federal litigation. See DeFlon, No. 23,013, slip op. at 4-5.

[4] Determining whether parties are in privity for purposes of res judicata requires a case-by-case analysis. In St. Louis Baptist Temple, Inc. v. FDIC, the Tenth Circuit provided insight into the flexible definition of privity:

There is no definition of "privity" which can be automatically applied in all cases involving the doctrines of res judicata and collateral estoppel. Thus, each case must be carefully examined to determine whether the circumstances require its application. This is so, notwithstanding the general assumption that res judicata applies only if the parties in the instant action were the same and identical parties in the prior action resulting in a judgment. Privity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same.

605 F.2d 1169, 1174 (10th Cir. 1979) (citing Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) and Green v. Bogue, 158 U.S. 478 (1895)). St. Louis Baptist further explained that parties have been found in privity where they represent the same legal right or where they have a "mutual or successive relationship to the same rights of property." Id. at 1175. Lowell Staats Mining Co. v. Philadelphia Electric Co., 878 F.2d 1271 (10th Cir. 1989), clarifies and expands the St. Louis Baptist discussion. "Privity has been held to exist in the following relationships: concurrent relationship to the same property right (i.e. trustee and beneficiary); successive relationship to the same property or right (i.e. seller or buyer); or representation of the interests of the same person." Lowell Staats, 878 F.2d at 1275. Because none of these relationships exist in the present case, we will next consider those cases where privity was found not to exist.

[5] The Tenth Circuit has indicated that privity does not exist where an initial lawsuit is brought against an employer and a second lawsuit is then brought against an employee acting in his or her individual capacity. Morgan v. City of Rawlins, 792 F.2d 975, 980 (10th Cir. 1986) (stating, "We fail to see how Mr. DeHerrera's employee/employer relationship bars his presence in this suit when he is named for actions for which he allegedly was personally responsible.") (citing Smith v. Updegrove, 744 F.2d 1354 (8th Cir. 1984)). The case of Lowell Staats echoes this proposition, finding that the plaintiff's claims against two employee defendants would have survived res judicata if those claims had been brought against the employee defendants in their individual capacities, instead of in their official capacities as corporate officers or agents. 878 F.2d at 1276, 1278. Lowell Staats found the fact that the plaintiff had "failed to allege any other basis of common law liability" against one of those two employee defendants to be of particular importance. Id. at 1278.

[6] Plaintiff in the present case asserts the basis of common law liability that was lacking in Lowell Staats: intentional interference with a contract. "Parties to a contract cannot bring an action for tortious interference with an existing contract against each other." Salazar v. Furr's, 629 F.Supp. 1403, 1410 (D.N.M. 1986) (citing Wells v. Thomas, 569 F.Supp. 426, 434 (E.D.Pa. 1983)). The appropriate cause of action between parties to the same contract would be breach of contract. Thus, in the present case Plaintiff could not have sued Danka for interfering with her employment contract.

[7] Plaintiff can only bring an intentional interference with a contract claim against the present Defendants in their individual capacities. In Salazar, the United States District Court for the District of New Mexico held that the president of a corporation was not liable for tortious interference with a contract for firing a pregnant employee before her pension benefits could vest. 629 F.Supp. at 1406, 1410. Although Salazar offered little discussion on this issue, its holding was presumably based on the implicit finding that the president was acting as an agent of the corporation, and therefore was not a third party to the contract. Id. at 1410. A corporate officer acting outside the scope of authority, however, may be liable for interfering with a corporate contract. Ettenson v. Burke, 2001-NMCA-003, ¶¶ 16-17, 130 N.M. 67, 17 P.3d 440.

[8] In Ettenson, a former employee sued the defendant, the president and CEO of a magazine company, for civil conspiracy and tortious interference with a contract. The defendant allegedly offered the plaintiff stock in the company and assurances of long-term employment in lieu of salary increases, but then suddenly fired the plaintiff and tried to “squeeze him financially and force him to waive whatever legal claims he had arising out of the termination.” Ettenson, 2001-NMCA-003, ¶ 7. Discussing the tortious interference with a contract claim, the Court of Appeals acknowledged “the theory that a corporate officer is absolutely immune from suit for interfering with the contracts of his own corporation.” Id. ¶ 16. Under that theory, the corporate agent breaks the contract on behalf of the corporation and does not merely interfere with the contract as a third party. Id. (quoting Said v. Butt, 3 L.R. 497, 505-06 (K.B.1920)). Nevertheless, the Court of Appeals found the absolute immunity theory to be a minority view. Id. The majority view is “that a corporate officer is privileged to interfere with his corporation’s contracts only when he acts in good faith and in the best interests of the corporation, as opposed to his own private interests.” Id. ¶ 17.

[9] The idea behind the qualified immunity theory is that an officer acting on behalf of a corporation should have the authority to breach a corporation’s contract, leaving the corporation to answer for the authorized breach in a breach of contract action. See id. ¶ 16. An officer acting outside the scope of his or her employment and in his or her own private interest has no authority to breach the corporation’s contract, and that officer should not be able to hide behind a corporate shield for unauthorized conduct. See id. ¶ 17. We agree with the Court of Appeals that “[a] qualified privilege is more attune with our case law than a blanket privilege of absolute immunity would be,” id. ¶ 20, and we adopt the Court of Appeals’ analysis. In New Mexico, corporate officers may be liable for interfering with corporate contracts if such interference is in bad faith and against the best interests of the corporation. Id. ¶¶ 18, 19.

[10] Determining whether a corporate officer’s actions fall outside the scope of authority “requires a court to delve into the motivating forces behind the officer inducing his corporation to breach its contractual obligations.” Id. ¶ 18. In other words, our trial courts must examine whether the corporate officer “acted to satisfy personal feelings . . . or to serve his own private interest with no benefit to the corporation.” Id. ¶ 18 (quoting Ong Hung v. Ariiz. Harness Raceway, Inc., 459 P.2d 107, 115 (1960)). Because we interpret Plaintiff’s complaint as alleging that Defendants acted outside
from the federal court. However, Plaintiff was not required to do so. See Fed. R. Civ. P. 19, 20. This remains a case, like Salazar, where the current issues between Plaintiff and Defendants have not been litigated. See Salazar, 66 N.M. at 30, 340 P.2d at 1079. Therefore, “[t]he rule that a judgment between the same parties or their privies bars a second action as to what was litigated and also as to all matters that might have been litigated clearly has no application in a situation such as the one here present.” Id. at 30, 340 P.2d at 1079. We hold that res judicata does not bar Plaintiff’s claims for intentional interference with a contract and the attendant civil conspiracy.

II. COLLATERAL ESTOPPEL DOES NOT APPLY BECAUSE PLAINTIFF’S INTENTIONAL INTERFERENCE WITH A CONTRACT AND CIVIL CONSPIRACY CLAIMS WERE NOT ACTUALLY AND NECESSARILY DECIDED IN FEDERAL COURT

{13} Like res judicata, collateral estoppel promotes judicial economy and protects parties from endless litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). Unlike res judicata, collateral estoppel “does not require that both suits be based on the same cause of action.” Adams v. United Steelworkers of Am., 97 N.M. 369, 373, 640 P.2d 475, 479 (1982). Instead, collateral estoppel, also called issue preclusion, prevents a party from relitigating “ultimate facts or issues actually and necessarily decided in a prior suit.” Id. (emphasis added). Because the initial judgment in the present case comes from federal court, we will apply the federal law of collateral estoppel unless doing so conflicts with precedent from this Court. See Edwards, 102 N.M. at 404, 696 P.2d at 492. However, because we find little difference between federal and state law on the collateral estoppel elements important to this case, we rely on both federal and state precedent.

{14} Collateral estoppel traditionally has four elements. The wording of these four elements differs somewhat between New Mexico and the Tenth Circuit. Compare Shovelin v. Central N.M. Elec. Coop., Inc., 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993), with Lombard v. Axtens, 739 F.2d 499, 502 (10th Cir. 1984). Nevertheless, it is clear that a party attempting to use non-mutual defensive collateral estoppel in either court system must establish that the issue to be estopped has been actually litigated and necessarily determined, or actually and necessarily decided. Shovelin, 115 N.M. at 297, 850 P.2d at 1000; see also Lombard, 739 F.2d at 502 (stating, “The doctrine of collateral estoppel precludes relitigation of issues actually and necessarily decided in a prior action.”) (citing Parklane, 439 U.S. 322). The main concern is that a party against whom collateral estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior action. See Shovelin, 115 N.M. at 297, 850 P.2d at 1000; Lombard, 739 F.2d at 502.

{15} The Court of Appeals concluded that Plaintiff’s claims for intentional interference with a contract and civil conspiracy were “actually and necessarily decided” by the federal court and that Plaintiff had a full and fair opportunity to litigate those issues. DeFlon, No. 23,013, slip op. at 11. According to the Court of Appeals, because the state suit is grounded on the same set of facts as the federal suit, and because the federal court did not think those facts were sufficient to establish the causes of action that Plaintiff brought in federal court, collateral estoppel bars Plaintiff’s state court claims for intentional interference with a contract and civil conspiracy. Id. Reviewing this legal issue de novo, see Anaya, 1996-NMCA-092, ¶ 5, we disagree and reverse the Court of Appeals.

A. CURRENT STATE CLAIMS

{16} In her state complaint, Plaintiff alleged that Defendants “deliberately and intentionally drove Plaintiff away from her employment at Danka by using improper means.” In order to prove intentional interference with a contract, a plaintiff must establish that the defendant, “without justification or privilege to do so, induces a third person not to perform a contract with another.” Wolf v. Perry, 65 N.M. 457, 461, 339 P.2d 679, 681 (1959). In Ettenson, the Court of Appeals clarified the elements of intentional interference with a contract. 2001-NMCA-003, ¶ 14. To succeed, Plaintiff must prove: (1) Defendants had knowledge of the contract; (2) Plaintiff was unable to fulfill her contract obligations; (3) Defendants played an active and substantial part in causing Plaintiff to lose the benefits of the contract; (4) Plaintiff suffered damages resulting from the breach;

We do not decide whether Plaintiff has met her burden to show that Defendants were acting outside the scope of their authority. This is in part a question of fact which we leave for the district court to determine.
and (5) Defendants induced the breach without justification or privilege to do so. See id. As will be discussed below, these elements differ considerably from each of the claims Plaintiff raised in federal court and do not require the same findings in order to succeed. Because Plaintiff’s claim for civil conspiracy is not actionable by itself and survives only if the underlying claim for intentional interference with a contract survives, Ettenson, 2001-NMCA-003, ¶ 12, we will only discuss the intentional interference with a contract claim in this collateral estoppel portion of the opinion.

**B. FEDERAL TITLE VII CLAIMS**

{17} Examination of the sexual discrimination standards applicable to Plaintiff’s Title VII claims reveals that her present claim for intentional interference with a contract could not have actually and necessarily decided in federal court for two reasons: (1) a substantial portion of Plaintiff’s evidence was excluded in federal court but would not be excluded in state court, and (2) the threshold showing for Title VII claims is different from what is needed to establish intentional interference with a contract. As to the first reason, the Tenth Circuit found that the federal district court had properly excluded much of Plaintiff’s evidence as falling outside of the Title VII period of limitations. DeFlon, 1 Fed. Appx. at 812-15. There are exceptions to this limitations period, but the Tenth Circuit found that Plaintiff had not satisfied them here. Id. at 813-15. Therefore, the Tenth Circuit did not consider any evidence outside of the 300-day range, including Plaintiff’s allegations that Defendant Sawyers called Plaintiff into his office almost every morning for roughly one year “belittling her work performance and threatening to fire her, while pacing in front of Plaintiff and waving his finger in her face”; that Defendant Lasky demeaned Plaintiff; and that Defendant Hartley made inappropriate comments directed at Plaintiff, shunned Plaintiff by refusing to speak to her or acknowledge her for a period of time, and ignored company policy by denying Plaintiff compensation for commissions that coworkers stole from her. This evidence would not be excluded in Plaintiff’s state court action because no similar limitations period applies in intentional interference with contract cases.

{18} The second reason supporting our conclusion that Plaintiff’s claim for intentional interference with a contract was not actually and necessarily decided in federal court is the fact that the threshold showing for Title VII claims is different from what is needed to establish intentional interference with an employment contract. The Tenth Circuit approached Plaintiff’s allegations of sexual discrimination under Title VII as four separate causes of action: (1) sexual discrimination based on a hostile work environment; (2) sexual discrimination resulting in constructive discharge; (3) sexual discrimination based on disparate compensation; and (4) sexual discrimination based on a failure to promote. DeFlon, 1 Fed. Appx. at 810. These sexual discrimination claims required Plaintiff to demonstrate either sexually discriminatory conduct or retaliation following a complaint of sexual discrimination, not that Defendants unjustifiably played an active and substantial part in causing Plaintiff to lose the benefits of her employment. Ettenson, 2001-NMCA-003, ¶ 14. We examine each of Plaintiff’s federal sexual discrimination claims in greater detail below.

**1. HOSTILE WORK ENVIRONMENT**

{19} In order to prove sexual discrimination based on a hostile work environment theory, Plaintiff needed to establish that the alleged conduct “stemmed from a sexual animus” and “was severe or pervasive enough to create a work environment that was objectively and subjectively abusive and hostile.” DeFlon, 1 Fed. Appx. at 816. Considering only conduct tied to gender, the Tenth Circuit concluded that the district court had properly dismissed this claim; Plaintiff failed to “show that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” Id. (quoting Penny v. Fed. Home Loan Bank, 155 F.3d 1257, 1261 (10th Cir. 1998)). While proving sexual discrimination under this standard might suffice to prove interference with an employment contract, we decline to hold that a plaintiff must show sexual discrimination in order to establish intentional interference with a contract. Therefore, the Tenth Circuit did not actually and necessarily decide Plaintiff’s current claims by dismissing her federal hostile work environment claim.

**2. CONSTRUCTIVE DISCHARGE**

{20} To succeed on her constructive discharge claim, Plaintiff needed to show that “the employer by its discriminatory acts has made working conditions so difficult that a reasonable person in the employee’s position would feel compelled to resign.” DeFlon, 1 Fed. Appx. at 819 (quoting Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986)). The Tenth Circuit explained that Plaintiff could establish a prima facie case of constructive discharge in two ways: (1) Plaintiff “was forced to resign from her job due to sex discrimination” or (2) Plaintiff was the object of retaliatory discrimination following a complaint of sexual discrimination. Id. at 819.

{21} The Tenth Circuit found that the first of these constructive discharge theories failed because Plaintiff had not demonstrated a sexually hostile work environment, id., which it had previously defined as sexual harassment “severe or pervasive enough to create a work environment that was objectively and subjectively abusive and hostile.” Id. at 816. We have already indicated that Plaintiff did not have to prove sexual harassment creating an abusive and hostile work environment in order to succeed on her intentional interference with a contract claim. Therefore, the Tenth Circuit’s holding on this issue does not preclude Plaintiff’s present claims.

{22} Regarding Plaintiff’s second theory for constructive discharge, based on retaliatory discrimination, to establish a prima facie case of retaliatory discrimination in federal court, Plaintiff needed to show: “(1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action.” Id. at 819 (citing Sauers v.
Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993)). Plaintiff was unable to establish the requisite causal connection because the retaliatory conduct she alleged occurred before she filed an Equal Employment Opportunity Commission complaint, not after. Id. There would be no similar time limitation in the state case, and Plaintiff would not have to show any retaliation. Plaintiff simply needs to show that Defendants unjustifiably interfered with her employment obligations and played an active and substantial part in causing Plaintiff to lose the benefits of her employment. Ettenson, 2001-NMCA-003, ¶ 14. We conclude that the Tenth Circuit’s analysis on constructive discharge did not actually and necessarily decide Plaintiff’s intentional interference with a contract claim.

**3. DISPARATE PAY AND FAILURE TO PROMOTE**

{23} To prove her claims for disparate pay and failure to promote, Plaintiff needed to demonstrate that Danka paid her less than similarly situated male employees and passed her over for promotions in favor of male employees. DeFlon, 1 Fed. Appx. at 817-18. The Tenth Circuit concluded that Plaintiff failed to show that Danka actually paid her less than similarly situated male co-workers, id. at 817, or that Danka denied Plaintiff a promotion, Id. at 818. Both of these causes of action focus on the conduct of Plaintiff’s corporate employer, not on the issue of whether Defendants unjustifiably caused Plaintiff to lose the benefits of her employment at Danka. See Ettenson, 2001-NMCA-003, ¶ 14. Thus, the Tenth Circuit’s rulings on the disparate pay and failure to promote claims did not actually and necessarily decide Plaintiff’s present claims.

**C. FEDERAL EQUAL PAY ACT CLAIM**

{24} As was the case with the disparate pay claim above, the elements of intentional interference with a contract differ from what is needed to establish an Equal Pay Act violation. To succeed on her Equal Pay Act claim, Plaintiff needed to show that she performed work “substantially equal to that of the male employees” under similar working conditions for less pay. DeFlon, 1 Fed. Appx. at 820. The Tenth Circuit held that Plaintiff failed to establish that the jobs of the higher paid men with whom she sought to compare herself were “substantially equal” to her job. Id. We fail to see how a holding that Plaintiff did not perform the same job as higher paid male co-workers actually and necessarily decided the issue of whether Defendants interfered with her employment.

**D. NEGLIGENT SUPERVISION AND RETENTION CLAIM**

{25} Analyzing New Mexico law, the Tenth Circuit stated that in order to survive summary judgment on her negligent supervision and retention claim Plaintiff had to show: (1) that a wrongful act committed by a Danka employee injured Plaintiff, and (2) that Danka’s supervision and retention of that employee was negligent. DeFlon, 1 Fed. Appx. at 820. After concluding that Plaintiff’s Title VII allegations failed to prove that a wrongful act committed by a Danka employee injured Plaintiff, the Tenth Circuit examined whether Plaintiff’s allegations of common law sexual harassment would satisfy this “wrongful act” requirement. Id. at 821. Relying on New Mexico case law, the Tenth Circuit held that Plaintiff could not succeed because in New Mexico evidence of “sexual groping, sexual assault and battery or other substantial overt sexual conduct toward a female employee” is required to prove sexual harassment. Id. (citing Coates v. Wal-Mart Stores, 127 N.M. 47, 51, 976 P.2d 999, 1003 (1999)). We need not examine whether the Tenth Circuit correctly interpreted New Mexico law on sexual harassment. However, we find it important that the Tenth Circuit focused on sexually inappropriate conduct. While Plaintiff alleges facts of sexual discrimination in her state claim, Plaintiff need not establish sexual harassment in order to prove that Defendants, without justification or privilege, played an active and substantial part in causing her to lose the benefits of her employment. Ettenson, 2001-NMCA-003, ¶ 14. Therefore, we conclude that the Tenth Circuit did not actually and necessarily decide Plaintiff’s intentional interference with a contract claim.

**CONCLUSION**

{27} Because privity does not exist between the present Defendants and the defendant in the federal lawsuit, res judicata does not bar Plaintiff’s state court lawsuit. We similarly find that collateral estoppel does not apply because Plaintiff’s claims for intentional interference with a contract and civil conspiracy were not actually and necessarily decided in federal court. We remand to state district court for proceedings consistent with this opinion.

**IT IS SO ORDERED.**

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
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From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-026

Topic Index:
Criminal Law: Controlled Substances
Criminal Procedure: Affidavit for Search Warrant; Probable Cause; Search and Seizure; and Search Warrant

STATE OF NEW MEXICO, Plaintiff-Respondent, versus HEATHER R. NYCE, Defendant-Petitioner.
No. 28,950 (filed: May 22, 2006)

ORIGINAL PROCEEDING ON CERTIORARI
FRANK K. WILSON, District Judge

GARY C. MITCHELL
Ruidoso, New Mexico for Petitioner

PATRICIA A. MADRID
Attorney General
M. ANNE KELLY
Assistant Attorney General
Albuquerque, New Mexico for Respondent

OPINION

RICHARD C. BOSSON,
CHIEF JUSTICE

[1] Two police officers observed Defendant Heather Nyce shopping for tincture of iodine and hydrogen peroxide, merchandise which among other things can be used in the manufacture of methamphetamine. Based on the officers’ training and experience, they grew suspicious. They submitted an affidavit to a magistrate judge and obtained a search warrant for the residence where Defendant delivered her purchases. After Defendant was arrested and charged with conspiracy for trafficking methamphetamine, she filed a motion to suppress incriminating evidence obtained inside the residence. The district court denied the motion to suppress, and the Court of Appeals affirmed. We granted certiorari to examine inferences that may fairly be drawn from the lawful, yet suspicious, purchase of common merchandise that is capable of use in the manufacture of methamphetamine. We now reverse, holding that the affidavit did not establish probable cause for the search warrant.

BACKGROUND

[2] The following information is taken from the affidavit for the search warrant. Defendant purchased tincture of iodine and hydrogen peroxide at two stores. Both ingredients are used in the manufacture of methamphetamine. When purchasing the iodine at Wal-Mart with her infant daughter in the shopping cart, Defendant proceeded immediately to the pharmaceutical aisle and bought four 1-ounce bottles, all the iodine that was on the shelf. She placed the iodine in her shopping cart and covered it with a large box that was already in her cart. Defendant first proceeded to an automated, self-pay register with the iodine. When she noticed a line, she went to a register staffed by a cashier. Although hydrogen peroxide was available at Wal-Mart, Defendant then went to an Allsup’s and purchased a 1-pint bottle of hydrogen peroxide.

[3] New Mexico State Police Agents Carr and Suggs, the officers who observed Defendant, became suspicious of her purchases for a number of reasons. In the affidavit, Agent Carr noted that in his experience observing purchases of tincture of iodine, most people buy only one bottle. He also stated that it was his experience that persons who shop for methamphetamine ingredients will often buy the items at more than one store to avoid being detected by law enforcement. Agent Carr noted that persons who are buying drug precursors know where in the store the items are located, and spend little time in those aisles to avoid detection. Defendant went immediately to the aisle where the iodine was located, got it off the shelf, and walked quickly toward the registers to make the purchase.

[4] Defendant took the iodine and peroxide to the home of her boyfriend, Peter Cook. The agents suspected that Cook was involved in the manufacturing of methamphetamine because allegedly he had been seen approximately one year before stealing and purchasing methamphetamine ingredients. Also, about a year before Defendant’s purchase, Agent Suggs saw Defendant at the home of an individual who Agent Carr knew had been arrested for involvement in methamphetamine manufacture and whose girlfriend had been convicted of the same crime.

[5] The agents presented their affidavit to a magistrate judge and requested a warrant to search Cook’s home. The magistrate determined there was probable cause and issued the warrant. At the Cook house, the agents found ingredients and paraphernalia that are used to make methamphetamine as well as small amounts of the drug. They arrested both Cook and Defendant.

[6] After her arrest, Defendant moved to suppress items seized during the search. She argued that (1) the affidavit was insufficient to establish probable cause, (2) the affidavit contained false statements, (3) there was no nexus between Defendant and the place to be searched, and (4) the affidavit contained stale information that allegedly had occurred a year before. The district court concluded that the paragraphs which Defendant claimed were stale did “not add any information that establishes probable cause,” and then held that the af-

The affidavit appears to use methamphetamine “ingredients” and methamphetamine “precursors” interchangeably. However, under the Drug Precursor Act, NMSA 1978, §§ 30-31B-1 to -18 (2004), none of the items purchased by Defendant were “precursors.” See n.3, infra.

The stale information, not considered by the district court, was contained in three paragraphs of the affidavit. These included Cook having been observed stealing and purchasing methamphetamine ingredients, and Defendant having been associated with known methamphetamine manufacturers, both occurring a year or so before Defendant was observed making these purchases.
The affidavit established probable cause to search even without those paragraphs. Following the denial of her motion to suppress, Defendant pleaded no contest to conspiracy for trafficking methamphetamine by manufacturing, but reserved her right to appeal the suppression issue. See NMSA 1978, § 30-31-20(A)(1) (1990).

The Court of Appeals affirmed in a memorandum opinion. However, in its review of the sufficiency of the affidavit, the Court considered the stale evidence which the trial court found did not add to the probable cause determination. The Court also limited its decision to Defendant’s first issue: whether the affidavit was factually sufficient to establish probable cause. The Court ruled that Defendant abandoned the other three issues by failing to respond to the proposed disposition to affirm. See State v. Johnson, 107 N.M. 356, 358, 758 P.2d 306, 308 (Ct. App. 1988). The State argues those issues were not preserved at trial. Since our resolution of the first issue mandates reversal, we limit our review as well to the issue of probable cause. However, we review the affidavit as the district court did, without the stale information concerning Cook’s prior behavior and Cook and Defendant’s former association with alleged methamphetamine manufacturers. See State v. Gonzales, 2003-NMCA-008, ¶ 13, 133 N.M. 158, 61 P.3d 867.

DISCUSSION

Standard of Review

We apply a de novo standard of review to a magistrate’s determination that an affidavit for a search warrant alleges facts sufficient to constitute probable cause. Gonzales, 2003-NMCA-008, ¶ 13; see also State v. Ochoa, 2004-NMSC-023, ¶ 5, 135 N.M. 781, 93 P.3d 1286. This review is limited to the contents of the affidavit. State v. Duquette, 2000-NMCA-006, ¶ 11, 128 N.M. 530, 994 P.2d 776. “We review the affidavit by giving it a common-sense reading, considering the affidavit as a whole, to determine whether the issuing judge made an . . . independent determination of probable cause,” based upon sufficient facts. State v. Garcia, 2002-NMCA-050, ¶ 7, 132 N.M. 180, 45 P.3d 900 (quoting State v. Whitley, 1999-NMCA-155, ¶ 3, 128 N.M. 403, 993 P.2d 117); see also Rule 5-211(E) NMRA 2006 (requiring probable cause to be based on substantial evidence); State v. Cordova, 109 N.M. 211, 213, 784 P.2d 30, 32 (1989) (same).

The Probable Cause Requirement

The Fourth Amendment to the United States Constitution and article II, section 10 of the New Mexico Constitution both require probable cause to believe that a crime is occurring or isizable evidence exists at a particular location before a search warrant may issue. See also Rule 5-211(A). Accordingly, law enforcement officials must present an affidavit to a “neutral and detached magistrate” demonstrating probable cause. Johnson v. United States, 333 U.S. 10, 14 (1948); accord State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982). A magistrate is required, not because officers cannot make reasonable inferences from evidence, but because the constitutional prohibition against unreasonable searches and seizures prefers an independent review of the evidence, rather than one from police who are “engaged in the often competitive enterprise of ferreting out crime.” Johnson, 333 U.S. at 14. It follows then, that the magistrate’s role is not simply to rubber stamp an officer’s conclusion about probable cause. State v. Hughes, 532 P.2d 818, 822 (Or. Ct. App. 1975). Rather, “[t]he constitutionally mandated role of magistrates and judges in the warrant process requires them to make an ‘informed and deliberate’ determination whether probable cause exists.” Cordova, 109 N.M. at 213, 784 P.2d at 32 (quoting Aguilar v. Texas, 378 U.S. 108, 110 (1964)) (emphasis added).

Probable cause exists when there are reasonable grounds to believe an offense has been or is being committed in the place to be searched. State v. Snedeker, 99 N.M. 286, 290, 657 P.2d 613, 617 (1982); Gonzales, 2003-NMCA-008, ¶ 11. Probable cause is not subject to bright line, hard-and-fast rules, but is a fact-based determination made on a case-by-case basis. See State v. Aull, 78 N.M. 607, 612, 435 P.2d 437, 442 (1968) (stating no two cases are precisely alike); People v. Miller, 75 P.3d 1108, 1113 (Colo. 2003) (en banc) (stating that probable cause analysis “does not lend itself to mathematical certainties or bright line rules”). “The degree of proof necessary to establish probable cause for the issuance of a search warrant ‘is more than a suspicion or possibility but less than a certainty of proof.’” Gonzales, 2003-NMCA-008, ¶ 12 (quoting State v. Donaldson, 100 N.M. 111, 116, 666 P.2d 1258, 1263 (Ct. App. 1983)). When ruling on probable cause, we deal only in the realm of reasonable probabilities, and look to the totality of the circumstances to determine if probable cause is present. State v. Garcia, 79 N.M. 367, 368, 443 P.2d 860, 861 (1968); see United States v. Basham, 268 F.3d 1199, 1203 (10th Cir. 2001).

Search warrant pursuant to a warrant that has an affidavit lacking in probable cause is unreasonable. 2 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 3.3(a), at 83 (2d ed. 1999). Accordingly, while we give deference to a magistrate’s decision, and to an officer’s observations, experience, and training, their conclusions must be objectively reasonable under all the circumstances. See State v. Attaway, 117 N.M. 141, 149, 870 P.2d 103, 111 (1994) (“In New Mexico, the ultimate question in all cases regarding alleged search and seizure violations is whether the search and seizure was reasonable.”); see also State v. Gutierrez, 116 N.M. 431, 444, 863 P.2d 1052, 1065 (1993) (noting that “Article II, Section 10 of the New Mexico Constitution expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions”).

The possession of objective reasonable-ness is especially important when dealing with the search of a home. See State v. Ryon, 2005-NMSC-005, ¶ 22, 137 N.M. 174, 108 P.3d 1032 (noting “a search within a home raises unique concerns”); Snedeker, 99 N.M. at 288, 657 P.2d at 615 (“The fourth amendment . . . is intended to protect the sanctity of a person’s home.”); Payton v. New York, 445 U.S. 573, 589-90 (1980) (same). The privacy of a home is afforded the highest level of protection by our state and federal constitutions. State v. Monteleone, 2005-NMCA-129, ¶ 9, 138 N.M. 544, 123 P.3d 777, cert. granted, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565. Both the state and federal constitutions ascribe a textual basis for protection of a home. See N.M. Const. art. II, § 10 (“The people shall be secure in their . . . homes . . . from unreasonable searches and seizures . . . “) (Emphasis added.); U.S. Const. amend. IV (“The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated . . . “) (Emphasis added.). Therefore, we give due weight to the fact that it is a home to be searched and its privacy invaded when we consider the objective reasonableness of a magistrate’s warrant based on probable cause.

The Redacted Affidavit Did Not Establish Probable Cause

Without the stale information re-acted by the district court, the affidavit alleges that Defendant purchased two products, tincture of iodine and hydrogen peroxide, that are legal yet capable of being used illegally. One of those products, iodine, was purchased in an amount potentially inconsistent with personal use. Both products were purchased in a lawful
yet suspicious manner, and were taken to the home in question. While these events appropriately may have been suspicious to an officer trained in the detection and interdiction of clandestine methamphetamine manufacturing, that suspicion does not necessarily equate to probable cause. See United States v. Drake, 673 F.2d 15, 18 (1st Cir. 1982) ("The purchase in a single order of all the requisite chemicals ... for the manufacture of [methamphetamine] is a 'red flag' fact which arouses suspicion, although not necessarily establishing probable cause."); cf. Ochoa, 2004-NMCA-023, ¶ 14; State v. Flores, 1996-NMCA-059, ¶ 15, 122 N.M. 84, 920 P.2d 1038. [14] The key is whether the circumstances surrounding a lawful purchase are significant enough to give rise to probable cause. Our inquiry should be particularly exacting when both the purchase and its manner are equally consistent with legal activity. See State v. Anderson, 107 N.M. 165, 169, 754 P.2d 542, 546 (Ct. App. 1988) (stating officer’s observation of facts consistent with drug courier profile was not enough to establish probable cause when those facts were just as consistent with innocent activity). Mere suspicion about ordinary, non-criminal activities, regardless of an officer’s qualifications and experience, does not satisfy probable cause. See Ochoa, 2004-NMCA-023, ¶ 14; Flores, 1996-NMCA-059, ¶ 15. But cf. State v. Van Dong, 2005-NMCA-033, ¶ 16, 138 N.M. 408, 120 P.3d 830 (stating officer’s training and experience can assist the evaluation of whether reasonable suspicion exists). However, ordinary, innocent facts alleged in an affidavit may be sufficient if, when viewed together with all the facts and circumstances, they make it reasonably probable that a crime is occurring in the place to be searched. United States v. Dishman, 377 F.3d 809, 811 (8th Cir. 2004); see State v. Steinzig, 1999-NMCA-107, ¶ 39, 127 N.M. 752, 987 P.2d 409; State v. Jones, 107 N.M. 503, 504, 760 P.2d 796, 797 (Ct. App. 1988). But see Anderson, 107 N.M. at 169, 754 P.2d at 546 (holding drug courier profile, which was consistent with innocent explanation, along with other innocent facts was not sufficient for probable cause); State v. Brown, 96 N.M. 10, 13, 626 P.2d 1312, 1315 (Ct. App. 1981) ("[A]n aggregate of discrete bits of information, each of which is defective, does not add up to the establishment of probable cause."). When all the suspicious activity observed does not make it reasonably probable that the manufacture of a controlled substance is occurring at a home, further investigation is needed to justify a search warrant. [15] In considering the inferences that one can reasonably draw from Defendant’s purchases, we first note that these products are not currently considered “drug precursors” or “immediate precursors” under the Drug Precursor Act, Sections 30-31B-1 to 30-31B-18 (2004). See §§ 30-31B-2(L), (M), -3; 16 NMAC 19.21.35 (2005). The Act lists several items that are “precursors” in Section 30-31B-3, and defines an “immediate precursor,” in part, as “a substance which is a compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance.” Section 30-31B-2(M). Pursuant to the Act, the New Mexico Board of Pharmacy has listed several items which are “immediate precursors.” See § 30-31B-4(A); 16 NMAC 19.21.35. For instance, pseudoephedrine (sudafed) is an “immediate precursor” of methamphetamine. 16 NMAC 19.21.35(W); see Commonwealth v. Hayward, 49 S.W.3d 674, 676 (Ky. 2001) (“The precursor, and main ingredient, of methamphetamine is ephedrine or pseudoephedrine.” (Emphasis added). However, neither hydrogen peroxide nor tincture of iodine is listed as a “precursor” or “immediate precursor” either in the Act, or in Board of Pharmacy regulations. They are simply ingredients. [16] The distinction between ingredients and precursors is directly relevant to the probable cause analysis in this case. While a product such as hydrogen peroxide or tincture of iodine can potentially have a limited use in the methamphetamine manufacturing process, a product that is an “immediate precursor” is, according to our Legislature, “a substance . . . commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance.” Section 30-31B-2(M) (emphasis added). In the realm of reasonable probabilities, therefore, it is more likely that the purchase of methamphetamine “precursors” or “immediate precursors” would be for an illicit purpose and give rise to an incriminating inference, as compared to the purchase of mere ingredients like iodine and hydrogen peroxide. The Legislature, along with the Board of Pharmacy, appears to have said as much, and we give those official classifications great weight when considering the appropriate inferences to be drawn from the purchase or possession of those products. [17] In a given case, the purchase of even a legal product may be sufficiently large or otherwise suspicious to rise to the level of probable cause. See Harper, 105 P.3d at 889 (stating defendant purchased one gallon of tincture of iodine); cf. State v. Brenn, 2005-NMCA-121, ¶ 15, 138 N.M. 451, 121 P.3d 1050 (holding the jury could infer attempt to manufacture methamphetamine from possession of over 5000 pseudoephedrine pills and 7 gallons of iodine because there is no legal purpose to possess such large amounts). The purchase of one single 1-pint bottle of hydrogen peroxide falls far
short of the mark.  
{18} Admittedly, Defendant’s purchase of the iodine casts a darker shadow. Four 1-ounce bottles might appear excessive, and more impressive still, was it all the iodine on the shelf. But see 2 Wayne R. LaFave, Search and Seizure § 3.7(d), at 412 (4th ed. 2004) (explaining that a statement in an affidavit that an item can be used to manufacture illegal drugs is only a truism and adds nothing to probable cause). However, the officers’ remaining observations—Defendant covering the iodine in her shopping cart, her attempt to use the self-pay register, her hurried pace, and her purchase of hydrogen peroxide at another store—all serve to “highlight the ordinary, rather than the sinister,” in terms of what one can observe daily in shopping centers throughout the state. Anderson, 107 N.M. at 169, 754 P.2d at 546. These remaining observations may be suspicious to the trained eye, but even when considered as a whole they do not give rise to probable cause. Notably, the officers provided no additional relevant information in the affidavit to demonstrate why these two purchases made it reasonably probable that Defendant was manufacturing methamphetamine.  
{19} In addition, the officers were seeking a warrant to search not just Defendant, but the house to which she delivered her purchases. When officers believe controlled substances are being manufactured in a residence, there must be a sufficient nexus in the affidavit between the activities observed, and the officers’ belief that manufacture is occurring at that home. 2 LaFave, supra, § 3.7(d). We have already explained why Defendant’s purchases did not create probable cause. The mere fact Defendant brought those same items to her home does not make it any more or less probable that she would use those items for an illicit purpose. In other words, it adds nothing to elevate her suspicious purchases from mere suspicion to probable cause, except that the officers needed more information to establish a reasonable belief that methamphetamine was being manufactured at the house. Thus, there was not a sufficient nexus between her purchases and this belief. Absent other probative information, the state and federal constitutions do not permit law enforcement, and especially the reviewing magistrate, to make the leap from suspicious, albeit legal, purchases of items that may be used to manufacture methamphetamine to the actual manufacture of that substance at that particular location.  
{20} Failure to draw this nexus was fatal to the affidavit in People v. Kazmierski, 25 P.3d 1207, 1213 (Colo. 2001) (en banc). There, the Colorado Supreme Court considered evidence that two suspects purchased known precursors to methamphetamine over a period of five months, one of the suspects was seen in a car smoking something in a glass pipe similar to those used for methamphetamine, and the two suspects lived together. The Court held the evidence was insufficient to establish probable cause to search their residence. Id.  
{21} The Colorado Supreme Court’s foremost concern was the failure to “reiterate any other facts that would support probable cause to believe that the defendants were manufacturing methamphetamine inside the home.” Id. at 1212 (emphasis added). The Court noted additional factual allegations that might have sufficed, such as a distinctive odor associated with methamphetamine manufacture emanating from the home. Id.; see also United States v. Failla, 343 F. Supp. 831, 835 (W.D.N.Y. 1972) (holding no probable cause existed despite suspiciousness of purchase of a chemical commonly used in the manufacture of illegal drugs, because defendant was never observed either making or selling illegal drugs). The mere purchase of precursors without more, the Court found, was insufficient because it failed to establish a nexus between that activity and the alleged manufacturing in the home to be searched. Kazmierski, 25 P.3d at 1212-13. “This was not a circumstance in which the crime occurred off site, and the affidavit had merely to establish a reasonable basis for believing that evidence of the crime would be located at the home. Rather, the crime consisted of the manufacture of methamphetamine—a crime requiring a location.” Id. at 1212. We note that the affidavit in Kazmierski contained more incriminating information than the affidavit presented to the magistrate in the case before us.  
{22} In the main, observed suspicious activity should be the beginning, not the end, of the investigation. In Defendant’s case, the officers did not observe anything additional at the residence that would support a conclusion that methamphetamine was being manufactured inside. The officers reported no smells emanating from the house, no presence of equipment, supplies, or other methamphetamine ingredients or precursors other than the two small purchases Defendant brought to the house. The affidavit does not suggest that Defendant or Cook had previous arrests for the manufacture, sale, or possession of controlled substances, and contained nothing recent pointing to incriminating activities on their part. No individuals known to have been involved in the manufacture, sale, or possession of methamphetamine were seen at the household.  
{23} The officers did not speak with neighbors to ask if they had observed any suspicious activities. There was no informant’s tip or an undercover buy at the house. The officers did not attempt to gain consent to search the residence or perform a “knock and talk” to try and gain information. See Florida v. Bostick, 501 U.S. 429, 434-35 (1991) (indicating that officers do not need any basis of suspicion to ask general questions of an individual, including asking for consent to search); United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000) (opining that the “‘knock and talk’ investigative technique is legal in the absence of suspicion as a ‘firmly-rooted notion in Fourth Amendment jurisprudence’”).  
{24} These are examples only, not an exhaustive list of what officers commonly do to complete a proper investigation. Absent some additional investigative effort of this kind, we are compelled to conclude that the affidavit did not sufficiently connect Defendant’s activities to the manufacture of methamphetamine at this particular residence. The officers acted prematurely in obtaining the warrant.  
{25} Most judicial opinions brought to our attention concerning the manufacture of methamphetamine appear to require additional investigative activity, similar to the foregoing suggestions before a warrant will issue. See State v. Ballweg, 670 N.W.2d 490, 498 (N.D. 2003) (holding affidavit sufficient where defendant purchased ingredients used to manufacture methamphetamine, including pseudoephedrine, and purchased supplies used to make and cut methamphetamine, and detached

6The dissent indicates that it would follow the Court of Appeals opinion in State v. Donaldson, 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983). See infra, ¶ 34. The dissent argues that “law enforcement had just as much if not more incriminating information,” than in this case. Id. In fact, the affidavit in Donaldson, as the dissent notes, was supported by an informant’s tip. No such tip existed in this case. Moreover, the suspects in Donaldson used fictitious names to board an airplane, purportedly to obtain drugs. The use of fictitious names is highly suspicious activity, and no similar allegations were made in this case. We do not find Donaldson persuasive.
garage at residence had covered windows and a tarp which prevented ability to look inside); *State v. Bowles*, 18 P.3d 250 (Kan. Ct. App. 2001) (noting purchase of precursors and other items used to manufacture methamphetamine, *along with defendant’s prior conviction for possession and sale of same, smell of ether emanating from house, and tip from informant that house was being used for manufacture established probable cause*).  

[26] We note one case from North Dakota particularly close to the facts before us. In *State v. Lewis*, 527 N.W.2d 658, 662-63 (N.D. 1995), the North Dakota Supreme Court found that an affidavit did not establish probable cause to believe the suspects were growing marijuana in their home. The affidavit indicated that over a seven-month period Lewis had purchased several pieces of equipment commonly used for growing marijuana. Officers then performed surveillance on the Lewis house, an investigative step omitted in the case before us, using a device that showed excessive heat loss from one side of the house, and the officers noticed the windows on that side were covered with insulation. The officers knew that covering windows is a common tactic used by marijuana growers to prevent visual observation and heat loss. Also, heat loss beyond the normal amount for a household suggested an indoor growing operation. Nonetheless, the North Dakota Supreme Court found the information was insufficient to establish probable cause because insulating windows during the winter was common in North Dakota, and the heat loss and growing equipment were equally capable of a benign explanation—the indoor cultivation of other plants. *Id.*  

[27] Applying the holding in *Lewis* to the present case strongly suggests that Defendant’s purchases and other suspicious activity, without additional investigation, cannot rise to the level of probable cause necessary for a warrant to search a home. *Cf. Ballweg*, 670 N.W.2d at 498 (holding affidavit sufficient where defendant purchased ingredients used to manufacture methamphetamine, *including pseudoephedrine, and* purchased supplies used to make and cut methamphetamine, and detached garage at residence had covered windows and a tarp which prevented ability to look inside).  

[28] Accordingly, we conclude that Defendant’s suspicious activities did not give rise to probable cause to search the Cook residence. Because no other information was presented in the affidavit to confirm the officers’ suspicions and establish the crucial link to the residence to be searched, the affidavit was insufficient. The warrant was therefore unconstitutionally defective, and the evidence seized as a result of the search should have been suppressed.  

CONCLUSION  

[29] We reverse the order of the Court of Appeals affirming the district court’s denial of Defendant’s motion to suppress.  

[30] IT IS SO ORDERED.  

RICHARD C. BOSSON,  
Chief Justice  

WE CONCUR:  

PAMELA B. MINZNER, Justice  
PETRA JIMÉNEZ MAES, Justice  
EDWARD L. CHÁVEZ, Justice  
PATRICIO M. SERNA (dissenting)  

SERNA, Justice (dissenting).  

[31] I respectfully dissent. I would affirm the district court and the unanimous Court of Appeals panel. As a preliminary matter, I prefer the *State v. Gómez* interstitial analysis in adjudicating overlapping state and federal constitutional claims. 1997-NMSC-006, ¶¶ 19-22, 122 N.M. 777, 932 P.2d 1. “Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined.” ¶ 19. Applying independent and adequate state law to a defendant’s motion to suppress could likely create a different outcome than applying federal law (such as the application of the good faith exception to the exclusionary rule), which is why a separate analysis and

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7 See also *United States v. Swanger*, No. Crim.A.05-53-JBC., 2005 WL 2002441, at *6 (E.D. Ky. Aug. 18, 2005) (stating warrant to search hotel room upheld when defendants were seen purchasing two precursors to manufacture of methamphetamine, drug dog alerted to their vehicle, hotel was known for drug activity, and room was registered to one of defendants); *Dishman*, 377 F.3d at 810-11 (holding an individual’s purchase of substance sometimes used in the manufacture of methamphetamine and transporting substance in a truck registered to an individual who was involved in the sale and manufacture of methamphetamine to the defendant’s residence, in conjunction with defendant’s previous criminal charge involving another methamphetamine precursor, observation of several items that are used in the manufacture of methamphetamine at the residence, and other information established probable cause); *State v. Eshnaur*, 106 S.W.3d 571, 576 (Mo. Ct. App. 2003) (stating affidavit was sufficient when it stated that residence had previously been closed due to presence of methamphetamine lab, police observed ingredients and supplies used to make methamphetamine, and defendant was on probation for manufacturing); *Drake*, 673 F.2d at 18 (holding purchase in single order of all chemicals necessary to make methamphetamine, plus purchase of equipment and cutting materials used for the same, in conjunction with viewing of lab equipment inside place to be searched, and defendant’s suspicious activity of driving in an evasive manner established probable cause); *United States v. Coppage*, 635 F.2d 683, 686 (8th Cir. 1980) (noting probable cause existed where the defendant purchased under a false name a number of different precursors, an odor of one of the precursor chemicals was detected, and the defendant discarded a seal identical to that found on the container of another precursor chemical)  

8 The dissent argues, “This case does not compel invocation of the exclusionary rule.” *See infra*, ¶ 36. For this proposition, the dissent cites to *United States v. Leon*, 468 U.S. 897, 916 (1984) (“[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.”). *Leon*, of course, is the seminal Supreme Court decision that created the good-faith exception to the exclusionary rule. There, the Court concluded the rule, which is in place solely to deter police misconduct, would not apply when “an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.” 468 U.S. at 920. This Court squarely rejected the application of the good-faith exception to warrants which lack sufficient probable cause under the New Mexico Constitution’s counterpart to the Fourth Amendment, article II, section 10. *See State v. Gutierrez*, 116 N.M. 431, 445, 863 P.2d 1052, 1066 (1993). We did so, because we believed the purpose of the exclusionary rule in New Mexico is “not . . . deterrence or judicial integrity . . . instead, [the] focus is to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure.” *Id.* at 446, 863 P.2d at 1067. In New Mexico, when law enforcement fails to establish probable cause in an affidavit, we do not make any inquiry as to whether the exclusionary rule should be applied because “we will not sanction that conduct by turning the other cheek.” *Id.*
conclusion regarding these two distinct approaches is important. Even in the context of the majority’s combined state-federal analysis and outcome, I ultimately agree with the trial court and the Court of Appeals that the affidavit presented by law enforcement satisfied the probable cause standard and that there was a sufficient nexus between the affidavit’s allegations and the house searched.

[32] The first issue is whether the affidavit presented to the magistrate satisfied probable cause for a search. The affidavit detailed how Defendant took all four 1-ounce bottles of iodine available at the store off the shelf and hid it under something else in her cart before purchasing it. Defendant then went to another store to purchase hydrogen peroxide, even though hydrogen peroxide was available at the first store very near the iodine. The majority states that this highlights the ordinary; I cannot agree that this is ordinary behavior, especially given the fact that the law enforcement affiant knew through training and experience that “most people purchasing tincture of iodine generally buy only one bottle” and “persons shopping for methamphetamine precursors often buy the items at more than one store in order to avoid detection by law enforcement.”

[33] The Majority Opinion, ¶ 16, states, “[t]he distinction between ingredients and precursors is directly relevant to the probable cause analysis in this case.” It is too formalistic to argue that a judge’s probable cause determination should be affected by the fact that tincture of iodine and hydrogen peroxide are ingredients to create an immediate precursor, but are not formally listed as immediate precursors. It goes against common sense and the facts presented to the magistrate. State v. Donaldson, 100 N.M. 111, 116, 666 P.2d 1258, 1263 (Ct. App. 1983). Law enforcement presented the magistrate with the following information:

Affiant knows through training and experience that tincture of iodine is used to make iodine crystals, which are a main ingredient used in the manufacture of methamphetamine. . . . Affiant knows through training and experience that hydrogen peroxide is a main ingredient used to crystallize iodine from tincture of iodine. Affiant also knows through training and experience that iodine cannot be used in the tincture form for the manufacturing of methamphetamine, rather it must first be crystallized using hydrogen peroxide.

The affidavit is clear that law enforcement knew that tincture of iodine and hydrogen peroxide are ingredients that easily become iodine crystals, a main ingredient for methamphetamine. Iodine crystals are formally called an immediate precursor in New Mexico’s administrative code. 14 NMAC 16.19.21.35. How are we advancing state and federal constitutional protections by concluding that tincture of iodine and hydrogen peroxide, which are combined to create the immediate precursor of iodine crystals, are in a totally different category from the already-formed iodine crystals, and do not give rise to probable cause even when bought on the same day by a suspect? Perhaps the Legislature ought to consider amending the Drug Precursor Act to clarify its intent regarding whether multiple ingredients that combine to become immediate precursors bought by a suspect on the same day should be treated differently than immediate precursors per se.

[34] In addition to the inferences that can be drawn from the affidavit, our courts have previously decided this issue in Donaldson, 100 N.M. at 111, 666 P.2d at 1258. The police in Donaldson acted on an informant’s tip and observed suspicious but legal activities by the defendants, such as paying cash for airplane tickets to Las Vegas, Nevada; boarding the plane under fictitious names; returning home to Albuquerque a few days later; and transferring packages between two cars while outside the residence to be searched. Id. at 114, 666 P.2d at 1261. Law enforcement obtained a search warrant and seized drug contraband from the residence. Id. The Donaldson defendants moved to suppress the evidence on the basis that the affidavit did not support probable cause. The trial court and the Court of Appeals disagreed and found that the affidavit sworn to by a narcotics agent was sufficiently detailed to support probable cause. Id. at 115-16, 666 P.2d at 1262-63. In the pending case, law enforcement observed Defendant’s suspicious purchase of known methamphetamine ingredients and delivery of the contraband to the house. Law enforcement had direct evidence so an informant’s tip regarding illegal substances was not necessary to complete the inference. Because law enforcement and the judge had just as much if not more incriminating information, I would follow Donaldson and also find that the affidavit merited issuance of the search warrant.

[35] The second issue is whether the information in the affidavit created a sufficient nexus to the home to be searched. The Majority Opinion, ¶ 19, states a proposition and uses the term “sufficient nexus” without any citation to case law authority to support the proposition or explain the term so that it can be consistently applied in future cases. The facts are that Defendant delivered the methamphetamine ingredients to the house that was searched on the same day as her purchase.

The female subject returned to her vehicle and Affiant along with Agent Suggs observed her to a residence located at 18 Sage, Boles Acres, Otero County, New Mexico, as described above. Affiant and Agent Suggs observed the female, believed to be Heather Nyce, along with Peter Cook unload the shopping bags from the vehicle and carry them inside the residence.

Common sense tells me this is sufficient nexus. Common sense is also a controlling consideration in determining if probable cause existed. Donaldson, 100 N.M. at 116, 666 P.2d at 1263. Furthermore, in People v. Kazmierski, 25 P.3d 1207 (Colo. 2001) (en banc), the out-of-state case upon which the majority relies to argue that lack of nexus between the alleged criminal activity and house to be searched is fatal to the probable cause determination, is not applicable. The Kazmierski court, in finding a lack of nexus to the house searched, stated “not only did the investigator not see the items transported into the home, but more importantly, the investigator did not recite any other facts . . . .” 25 P.3d at 1212-13. In the pending case, the affidavit details that law enforcement did witness Defendant deliver the methamphetamine ingredients to the house searched, which renders Kazmierski unpersuasive for the nexus reasoning.

[36] Defendant has convinced a majority of this Court to apply the exclusionary rule and suppress the evidence against her on the basis that the evidence was illegally obtained. Because I conclude that probable cause existed and Defendant’s constitutional rights were not trampled upon, I consider the rationale for the exclusionary rule. A purpose of the exclusionary rule is to deter police misconduct by excluding evidence that law enforcement acquired through unconstitutional means. In discussing the scope of the exclusionary rule, the United States Supreme Court stated “the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.” United States v.
Leon, 468 U.S. 897, 916 (1984). See also Stone v. Powell, 428 U.S. 465, 486 (1976); State v. Gutierrez, 116 N.M. 431, 447, 863 P.2d 1052, 1068 (1993) (“deterrence of future constitutional violations is a critical state interest that is a by-product of the exclusionary rule”). Defendant has not alleged egregious law enforcement behavior nor alleged that the judge reviewing the affidavit for the warrant did not perform as a detached and neutral judicial officer. In considering the affidavit in light of the motion to suppress, the district court judge even struck certain portions, which would indicate a thoughtful review rather than a rubber stamp. This case does not compel invocation of the exclusionary rule, as the lower courts have previously determined.

What more does the judiciary want from law enforcement besides peaceable, constitutionally compliant observation of suspicious behavior, coupled with approval from a detached and neutral judge? The Majority Opinion, ¶ 23, suggests different approaches law enforcement could have taken. Aside from the fact that as a court it is not within our power to advise law enforcement officials as to how they should conduct an investigation, the suggestions are unrealistic given the circumstances. If law enforcement officers spoke with neighbors or performed a “knock and talk” at the suspected residence to gain information, law enforcement would be just as likely to tip off criminals to the fact that they were being investigated and therefore hinder the interdiction. It is not our role to concoct requirements beyond what the constitutions demand.

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Instead, we have an opinion that relies upon non-binding precedent that the parties did not argue to the Court in order to come to a conclusion that will hamper law enforcement’s efforts in eradicating methamphetamine from New Mexico’s communities. Ironically, we do so in a case in which the Defendant pled no contest to manufacturing methamphetamine, which suggests that law enforcement’s suspicions were right on target. It is a pyrrhic victory for the constitutional protections against unreasonable search and seizure and for the exclusionary rule.

PATRICIO M. SERNA, Justice
OPINION

RICHARD C. BOSSON,
Chief Justice

Plaintiffs, owners of a mining property in southwestern New Mexico, claim their land interest has been effectively “taken” from them through application of state mining regulations without the payment of just compensation. They also argue that the State has impaired their contractual obligations in violation of the Contracts Clause. The Court of Appeals held that Plaintiffs’ compensatory claims against two state regulatory agencies are barred by state constitutional sovereign immunity. We granted certiorari to address an issue of first impression: whether state constitutional sovereign immunity bars the rights and remedies found in the Takings Clause and the Contracts Clause of the United States Constitution when those rights and remedies are asserted against a state agency. Concluding that such claims are barred under the Contracts Clause, but not the Takings Clause, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

(2) Plaintiffs, the Manning family, own land in southwestern New Mexico which was used for mining, milling and smelting operations. The mine operated between 1979 and 1985, and then was shut down. In 1992, the Mannings began to prepare the mine to reopen.

(3) Then, in 1993, prior to the mine being reopened, the State passed the New Mexico Mining Act (the “Mining Act”). NMSA 1978, §§ 69-36-1 to -20 (1993, as amended through 2001). The Mining Act increases mining regulation to “promot[e] responsible utilization and reclamation of lands affected by exploration, mining or the extraction of minerals.” Section 69-36-2. The New Mexico Mining and Minerals Division of the Energy, Minerals, and Natural Resources Department and the New Mexico Environment Department (the “State agencies”) are the agencies responsible for enforcing the Mining Act. See § 69-36-14.

(4) The Mannings have a long, litigious history regarding the application of the Mining Act to their property. In this lawsuit the Mannings claim they cannot determine the bonding and reclamation requirements for the mine unless they are allowed to operate, and yet state regulations will not allow them to operate without first meeting reclamation requirements. Thus, the Mannings argue that the State agencies have effectively taken their property, making it impossible to mine, without justly compensating them. They also argue that these uncertainties, and the additional expenses required under the Mining Act, have prevented them from meeting their contractual obligations and entering into new contracts. The Mannings request compensation for their loss in the amount of $6,500,000.00, plus interest.

(5) In the district court the State agencies moved for summary judgment based on ripeness and constitutional sovereign immunity. Without addressing immunity, the district court granted summary judgment on the basis of ripeness, concluding
that the Mannings’ difficulties in operating the mine were due to other legal issues that pre-dated the state regulatory scheme. The Court of Appeals affirmed, but based its holding solely on sovereign immunity. Manning v. Mining & Minerals Div. of the Energy, Minerals, & Natural Res. Dep’t, 2004-NMCA-052, ¶ 1, 135 N.M. 487, 90 P.3d 506. We granted certiorari to analyze the sole question of whether constitutional sovereign immunity bars the Mannings’ Takings and Contracts Clause claims. We do not address whether the Mining Act, as applied to the Mannings, constitutes a regulatory taking, nor do we address the issue of ripeness.

DISCUSSION

[6] The proper division of power between state and federal governments is a debate that has waged since the founding of this nation. James Madison highlighted the debate in The Federalist Papers, pointing out the potential dangers of a centralized federal government to the states. The Federalist No. 39, at 256-63 (James Madison) (M. Walter Dunne ed. 1901) (adoption of republican principles in the new Constitution), No. 45, at 314-20 (discussion of possible dangers to state governments from the federal government), No. 46, at 321-28 (comparison of the powers of the state and federal government). Ultimately, states ceded their autonomy as part of a balanced, federalist system in which they retained a level of sovereignty, including a corresponding level of sovereign immunity.

[7] The degree of immunity retained by the states today is one outcome of this historical debate over the balance of power between the states and the federal government. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 398-400 (4th ed. 2003) (discussing the sovereign immunity debates at the state ratification conventions). Under the Eleventh Amendment, the doctrine of constitutional sovereign immunity historically barred individual claims against a state when brought in federal court. See Alden v. Maine, 527 U.S. 706, 730 (1999). Since the United States Supreme Court’s holding in Alden, constitutional sovereign immunity may also bar certain individual claims for damages against a state in state court. See id. at 728, Cockrell v. Bd. of Regents of N.M. State Univ., 2002-NMSC-009, ¶¶ 1, 14, 132 N.M. 156, 45 P.3d 876 (state constitutional sovereign immunity bars an individual claim for monetary damages under the Fair Labor Standards Act filed against the state in state court).

[8] As will be further discussed in this opinion, the effect of Alden, if any, upon claims filed in state court under the Takings and Contracts Clauses lies at the heart of this controversy. Before analyzing Alden in detail, however, we begin our analysis by reviewing the Takings Clause and its history of enabling claims similar to those brought by the Mannings in this case. We will then separately address the Contracts Clause claim.

Standard of Review

[9] Whether constitutional sovereign immunity can shield a state, in state court, from claims based on the Takings and Contracts Clauses is an issue of law we review de novo. Hasse Contracting Co. v. KBK Fin., Inc., 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641.

Takings Clause Claims Against State Governmental Agencies

[10] The Takings Clause is found in the Fifth Amendment to the United States Constitution and prevents the government from taking private property, overtly or through regulation, without justly compensating the lawful owner. U.S. Const. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (“while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”). As an essential element of individual liberty, the Takings Clause was included in the Bill of Rights to ensure the protection of private property from an overreaching government. See D. Benjamin Barros, The Police Power and the Takings Clause, 58 U. MIAMI L. REV. 471, 512-13 (2004) (James Madison’s intent in drafting the Fifth Amendment was to protect individual property rights in the Constitution based on the belief that such individual rights may not be adequately protected by the political process). The constitutional framers selected just compensation as their specific remedy for enforcement of that right. See generally Cannon v. State, 807 A.2d 556, 566-69 (Del. 2002) (Holland, J., dissenting) (discussing the early origins of the Takings Clause and the purpose behind its incorporation into the Bill of Rights) (citing JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed.1998)).

[11] For over a century, the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment’s guarantee of due process. Chicago B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 235-42 (1897). In regard to the Takings Clause, the state must provide a “reasonable, certain and adequate provision for obtaining compensation,” both when property is physically taken as well as when a regulation greatly reduces the economic viability of the property. Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (quoted authority omitted).

[12] Historically, the United States Supreme Court has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause for just compensation. Three such cases merit discussion.

[13] In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-30 (1992), a landowner brought a takings claim against the state agency responsible for implementing regulations that restricted private development on state beaches to prevent beach erosion. The Supreme Court held that the state could be held accountable to the owner for just compensation if, on remand, the state court found that the development regulations were restrictive enough to amount to a taking of the beachfront property. Id. at 1027-28.

[14] A second case, Palazzolo v. Rhode Island, 533 U.S. 606, 614-15 (2001), also involved restrictions on development of beachfront property, this time due to regulations protecting salt marshes and other coastal areas from environmental damage. In remanding the case to examine the takings question, the Supreme Court tacitly assumed, as in Lucas, that the landowner could sue the state for just compensation in the event the development regulations were so restrictive that they amounted to a taking. Palazzolo, 533 U.S. at 632.

[15] Most recently, in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 306-09 (2002), the takings claim was brought against an interstate regional planning agency, created by legislation in both

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2 "The Judicial power to the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." U.S. Const. amend. XI.
California and Nevada, and comprised of individuals from both states. After the planning agency imposed a moratorium on development around Lake Tahoe to protect its crystalline waters, landowners sued the planning agency alleging a taking and demanding just compensation. \textit{Id.} at 307-14. Although the Court held that the moratorium did not constitute a taking in this instance, it also set forth the analysis to be applied in temporary taking situations as the one described. \textit{Id.} at 341-42.

[16] Even though the Supreme Court did not explicitly address the issue of state sovereign immunity, these three cases demonstrate the Court’s thinking, and inform our own on that subject, because in each case the possibility of a compensatory claim against the state was at the center of the controversy. And these three recent opinions do not stand alone. Even before \textit{Lucas}, the Supreme Court suggested that the Takings Clause provides a justiciable remedy for individuals to assert against the state in state court.

[17] In \textit{First English Evangelical Lutheran Church of Glendale v. Los Angeles County}, 482 U.S. 304, 316 n.9 (1987), the Supreme Court suggested that the Fifth Amendment’s Takings Clause trumps state sovereignty. \textit{See generally} 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-38, at 1272 (3d ed. 2000) (suggesting that based on \textit{First English} the Takings Clause “trumps state (as well as federal) sovereign immunity”). The Court made clear that “the compensation remedy is required by the Constitution,” and rejected the argument that the Takings Clause could only be enforced by injunctive relief. \textit{First English}, 482 U.S. at 316.

[18] Applying this constitutional framework to the case before us, we acknowledge the close resemblance between the Mannings’ situation and the facts in \textit{Lucas, Palazzolo}, and \textit{Tahoe}. Like the property owners in each of these cases, the Mannings are contending with state agencies responsible for implementing legislation intended to protect land from certain uses. In the Mannings’ case, the regulations require that owners of existing mines complete an in-depth mining operation site assessment, including certain reclamation requirements. \textit{See} § 69-36-7. These regulations are intended to ensure that mine owners properly reclaim land that has been mined. Section 69-36-2. Looking not to the merits of their takings claim, but to the broader question of whether the Mannings may even assert such a claim in state court, this precedent from the United States Supreme Court strongly suggests that the court below erred in rejecting the Mannings’ claim.

[19] Importantly, New Mexico constitutional and statutory law also supports the proposition that sovereign immunity does not bar takings claims when asserted against the state for just compensation, at least in certain situations. Both the constitution and laws of New Mexico include provisions requiring just compensation when the state takes private property for public use. N.M. CONST., art. II, § 20 (“Private property shall not be taken or damaged for public use without just compensation.”); NMSA 1978, § 42A-1-29 (1981) (authorizing inverse condemnation proceedings against any government agency of the state that is authorized to exercise eminent domain). Although these legal authorities do not apply directly to the Mannings’ case, because this is not an instance of eminent domain, they nonetheless demonstrate that the State provides compensation under similar circumstances, and can be sued in state court if it does not. Sections 42A-1-23, -29; \textit{see also} Seamon, supra, at 1118 n.249 (arguing that New Mexico has waived its immunity from certain just compensation suits through its enactment of these laws).

[20] In response, the State argues a radical position that creates a paradox. The State acknowledges that if a state agency has the power of eminent domain, like the Transportation Department, then the State must provide just compensation for a taking. However, if the agency is not given the power of eminent domain, like the agencies here, but is guilty of a regulatory taking like that alleged by the Mannings, then the private individual is without a remedy in state court, even though both the State and Federal Constitutions obligate the State to pay.

[21] We are not suggesting that the legislature cannot prescribe terms and conditions that govern recovery under the Takings Clause, such as Section 42A-1-29. When a statutory framework provides for recovery, individuals must abide by it. However, such legislation cannot insulate the state from providing just compensation for takings that do not involve formal eminent domain powers, which is the effect of Section 42A-1-29. Holding otherwise would expose more citizens to takings without adequate compensation, contrary to the protections our Constitution provides. When a taking occurs, just compensation is required by the Constitution, regardless of state statute. \textit{See First English}, 482 U.S. at 321 (“where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective”).

[22] If we were to relieve the state from paying for takings when agencies do not have statutory eminent domain authority, then paradoxically we would bar practically every regulatory taking claim against a state agency. A regulatory takings claim, by definition, does not invoke eminent domain powers because the state claims only to regulate the use of land and not to condemn its title. But the protections of the Fifth Amendment do not rest on such formalistic distinctions. A regulatory taking can be just as devastating to property rights as a taking by eminent domain, and the right of the landowner to compensation is just as central to the promise of the Bill of Rights in either instance.

\textbf{The State’s Argument Under \textit{Alden v. Maine}}

[23] In the face of so much authority favoring the Mannings’ position, the State agencies base their argument primarily on \textit{Alden}, 527 U.S. 706 (1999), and the shift in federalist principles discussed in that opinion. The critical question for this Court is whether \textit{Alden} even applies. To answer that question, we must resolve what effect, if any, \textit{Alden} has when immunity is asserted against claims for just compensation that are brought directly under the text of the

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3 In a later case, a plurality of the Supreme Court noted it was not yet decided if sovereign immunity was a bar to Takings Clause claims. \textit{City of Monterey v. Del Monte Dunes}, 526 U.S. 687, 714 (1999) (plurality opinion) (citing \textit{First English}, 482 U.S. at 316, n. 9). \textit{See generally} Richard H. Seamon, The Asymmetry of State Sovereign Immunity, 76 WASH. L. REV. 1067, 1077 (2001) (arguing that the Supreme Court has left the issue open).

The Mannings originally attempted to bring their claim under Section 42A-1-29. That claim was dismissed because the State agencies here do not have a statutory grant of eminent domain power. Thus, the claim did not fall under the provisions of Section 42A-1-29.
Fifth Amendment, as opposed to claims for damages under statutory rights created by Congress. Accordingly, we turn to an analysis of Alden in light of the Mannings' claim.

[24] Alden and its progeny stand for the proposition that state constitutional sovereign immunity bars individual claims for damages that are based on legislation passed by Congress pursuant to its Article I powers. Alden, 527 U.S. at 754; Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 59 (1996); see also Gill v. Pub. Employees Ret. Bd., 2004-NMSC-016, 135 N.M. 472, 90 P.3d 491 (discussing the holding in Alden while evaluating a claim for injunctive relief asserted against the State under the federal Age Discrimination in Employment Act); Cockrell, 2002-NMSC-009, ¶ 14-15 (holding that sovereign immunity barred a post-Alden claim under the Fair Labor Standards Act for money damages asserted against the state in state court). Specifically, the issue in Alden, 527 U.S. at 711-13, was whether an individual’s claim for damages against the state, under the Fair Labor Standards Act (FLSA), filed in state court, was barred by sovereign immunity. Congress passed the FLSA under the constitutional authority of the Commerce Clause, which is part of the United States Constitution. U.S. CONST., art. I, § 8, cl. 3 (“The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States . . . .”). In Alden, 527 U.S. at 754, the Court held that a private individual cannot sue an unconsenting state in state court for money damages under a law created by Congress pursuant to its Article I powers, such as the FLSA. Critical to the holding, the Court determined that the several states did not cede all of their inherent sovereignty, including immunity from suit, simply by adopting Article I of the Constitution. Id. The Court concluded that immunity “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.” Id. at 713.

[25] Based on Alden, this Court in Cockrell, 2002-NMSC-009, ¶ 1, found that New Mexico’s constitutional sovereign immunity shielded the state from private FLSA suits brought in state court. We held that New Mexico did not waive its sovereign immunity in regard to the constitutionally created remedies found in the FLSA, as the FLSA was created pursuant to Congress’ Article I powers. Id. ¶¶ 14-15; see also Gill, 2004-NMSC-016, ¶ 49 (holding a claim for injunction, but not money damages, against a state officer for a violation of the Age Discrimination in Employment Act, enacted under Article I, Section 8 of the United States Constitution, was not barred by sovereign immunity under the Ex partee Young exception).

[26] The question in this case, however, differs from that in Alden and Cockrell. Here, the question is focused on a form of monetary relief—“just compensation” for a taking—that is not the result of congressional action under Article I. The Mannings’ claim does not rely at all on congressional action. Rather, the just compensation claim stems directly from the text of the Constitution through the Fifth and Fourteenth Amendments. See U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”). Whereas under Article I Congress is allowed to assert its control over states only to a certain point, rights recognized in the people within the text of the Constitution know no such limitation. And as we shall see, the Court in Alden intended no such limitation.

[27] The Court in Alden, 527 U.S. at 740, acknowledged the difference between a claim asserted against a state under a congressional statute as opposed to one derived directly from the Bill of Rights. Although sovereign immunity may shield states from liability under certain Article I obligations created by Congress, the balance of power shifts when “the obligation arises from the Constitution itself.” Id. (distinguishing Reich v. Collins, 513 U.S. 106 (1994), from the facts presented in Alden); see also Cent. Virginia Cnty. Coll. v. Katz, 126 S.Ct. 990, 1004 (2006) (holding that state sovereign immunity did not bar a claim based on bankruptcy proceedings under Article I, Section 8, Clause 4 because “States agreed in the plan of the Convention” to be subject to such suits). The Court in Alden, 527 U.S. at 713, found that while state constitutional sovereignty is a right the states “retain today,” that right can be “altered by the plan of the Convention or certain constitutional Amendments.”

[28] Alden, therefore, lends encouragement to the concept before us now that a right and a remedy textually rooted in the Constitution supersedes or “trumps” state constitutional sovereign immunity, although Congressional remedies fashioned under the Commerce Clause powers of Article I, Section 8 do not. Alden, 527 U.S. at 740; see also Boise Cascade Corp. v. State ex rel. Or. State Bd. of Forestry, 991 P.2d 563, 568 (Or. Ct. App. 1999) (“[T]he [Supreme Court, in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some constitutional claims are actionable against a state . . . due to the nature of the constitutional provision involved.”). Where failure to provide a remedy is unconstitutional, then under the Fourteenth Amendment’s due process guarantee, the State must provide “the remedy it has promised.” Alden, 527 U.S. at 740. In the Mannings’ case, the state has failed to provide the remedy of just compensation, “the remedy it has promised” under both the Fifth and Fourteenth Amendments.

[29] In its discussion of Reich v. Collins, 513 U.S. 106 (1994), the Alden opinion emphasizes the point, central to our case, that failure to provide a promised remedy in the state courts may lead to a violation of due process. 527 U.S. at 740. In Reich, 513 U.S. at 108-09, the petitioner brought
suit against the State of Georgia seeking recovery of state income taxes unconstitutionally imposed. Conceding the illegality of the tax, the state nonetheless construed its refund statute not to allow the claim in state trial court and dismissed the action. Id. at 109. In a unanimous opinion, the Supreme Court held that the lack of any refund provision denied due process, because the taxes were imposed and paid, in part, on the understanding that illegal taxes would be refunded; that, in the Court’s words, taxpayers “pay first, litigate later.” Id. “’[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment, the sovereign immunity States traditionally enjoy in their own courts notwithstanding.” The State agencies must provide that remedy or risk violating the due process clause. The only remedy for an erroneous tax collection is returning the tax. The only remedy for a taking of private property is just compensation, exactly as promised in the Constitution.

{32} The holding in Alden did nothing to alter this outcome, and in fact signaled its acceptance of that same result. We hold, therefore, that Alden did not alter the historical practice of applying the Takings Clause to the states, and nothing in that opinion permits a state to bar a claim for “just compensation” from its courts.

Other Jurisdictions
{33} Importantly, no other jurisdiction post-Alden, federal or state, has held that Takings Clause claims are barred by state constitutional sovereign immunity. In addressing a takings claim against the State of Kentucky in federal court, the Sixth Circuit noted that, notwithstanding constitutional sovereign immunity, the “Fifth Amendment’s requirement of just compensation forces the states to provide a judicial remedy in their own courts.” DLX, Inc. v. Kentucky, 381 F.3d 511, 527 (6th Cir. 2004). The Sixth Circuit specifically noted that Alden did not bar just compensation claims as asserted against the States. Id. at 528 (arguing that Alden only dealt with remedies created by Congress under Article I and that the just compensation remedy was different because it is required by the Constitution itself). The court found that the Eleventh Amendment barred the claim in federal court, but if brought in state court, the court would have been required to hear it. Id. But see Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1993) (takings claim against the city based directly on the Constitution was barred because 42 U.S.C. § 1983 could be utilized instead), cert. denied, 506 U.S. 1081 (1993).

{34} The South Dakota Supreme Court and the Oregon Court of Appeals also examined the same question that we address here. See Benson v. State, 710 N.W.2d 131 (S.D. 2006); Boise Cascade, 991 P.2d 563; SDDS, Inc. v. State, 650 N.W.2d 1, 9 (S.D. 2002). Both held that sovereign immunity does not bar just compensation claims brought against the state in state court, even after the Alden decision. See also First Union Nat. Bank v. Hi Ho Mall Shopping Ventures, Inc., 869 A.2d 1193, 1197-98 (Conn. 2005) (holding a foreclosure claim on a municipal tax lien asserted against the state was barred by sovereign immunity, but sovereign immunity would not bar the bank from seeking “just compensation for the state’s taking of its property as a result of the allegedly unpaid taxes” under the Takings Clause as applied to the states under the Fourteenth Amendment).

{35} In Boise Cascade, 991 P.2d at 565, a state agency prohibited logging on a portion of a landowner’s property because an endangered species was nesting in the location. The landowner claimed that not being allowed to log the site, which was purchased specifically for that purpose, constituted a taking under both the United States and Oregon Constitutions. Id. The Oregon court held that the United States Supreme Court, based on its statements in First English and its discussion of Reich in Alden, “did not intend to abandon the notion that at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved.” Boise Cascade, 991 P.2d at 568.

{36} Three years later, relying in large part on the reasoning in Boise Cascade, the South Dakota Supreme Court similarly held that sovereign immunity did not bar a just compensation claim against the state in state court based on a regulatory taking similar to the Mannings’ claim here. See SDDS, 650 N.W.2d at 9 (“[T]he holdings in the Alden trilogy apply only to congressional attempts to abrogate a state’s sovereign immunity through Article I legislation. The Alden trilogy does not suggest that Fifth Amendment takings claims that originate from the Constitution itself are barred by the Eleventh Amendment.”).

{37} Boise Cascade, DLX, and SDDS inform this case. Just as in Boise Cascade, the actions of the State agencies here impose environmental regulations which arguably have the effect of taking the Mannings’ property, for which they may be entitled to compensation. All three of these opinions support the Mannings’ claim that the Takings Clause creates a cause of action against a state which is actionable in state court and to which the state may not assert immunity. Most importantly, these cases support the conclusion that Alden did nothing to alter this outcome.

Self-Executing Nature of the Takings Clause
{38} The State agencies offer still another argument. They argue that the Fifth Amendment is not self-executing, and creates no claim for compensation without further congressional action.

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(39) In examining specifically whether the Takings Clause is self-executing, we note that there are currently two views on the subject. One view agrees with the State agencies that the Takings Clause is not self-executing and that congressional action is required to enforce the rights protected in the Takings Clause. The other view is that congressional action is not necessary to enforce the attendant rights in state courts, because the Takings Clause is self-executing and creates both a right and remedy. See Manning, 2004-NMCA-052, ¶ 11 (citing Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 VAND. L. REV. 57, 138 n.344 (1999)).

(40) The State agencies assert that the first view is correct and as support they cite to the Tucker Act. The Tucker Act, 28 U.S.C. § 1491(a)(1), was passed in 1887 to give the federal court of claims jurisdiction over a wide variety of claims against the United States government, including claims for compensation. See Lion Raisins, Inc. v. United States, 57 Fed. Cl. 435, 437-38 (2003). Prior to its passage, owners who had property taken by the federal government had to petition Congress for compensation, or had to prove they had a contract claim against the United States. Id. at 438. Because the federal courts lacked jurisdiction over such claims before the Tucker Act, many were left with a right to compensation but no court in which to enforce that right. Id. at 437-38.

(41) The State asserts that the Tucker Act provides support for the assertion that the Fifth Amendment by itself never abrogated sovereign immunity. Under this theory, the State argues the Tucker Act both provides jurisdiction and waives sovereign immunity for Takings Clause claims against the federal government. Accordingly such a statutory waiver of immunity must be obtained before takings claims can be brought against the states. See, e.g., Soriano v. United States, 352 U.S. 270, 273 (1957) (“the Congress in the Act creating the Court of Claims gave the Government’s consent to be sued therein only in certain classes of claims”); Lion Raisins, 57 Fed. Cl. at 437-38.

(42) The Mannings, on the other hand, assert that Congress never gave “permission” for the government to be sued under the Fifth Amendment, but rather the Tucker Act was only necessary to create federal jurisdiction over takings claims against the federal government. The Fifth Amendment itself created a remedy for unconstitutional takings that superseded governmental immunity. See, e.g., Hair v. United States, 350 F.3d 1253, 1257 (Fed. Cir. 2003) (“It is true that sovereign immunity does not protect the government from a Fifth Amendment Takings claim because the constitutional mandate is ‘self-executing.’” (citing United States v. Clark, 445 U.S. 253, 257 (1980)); Preseault v. Interstate Commerce Comm’n, 494 U.S. 1, 12 (1990) (takings claims are “founded on the Constitution” but the jurisdiction of the Court of Claims is based on the Tucker Act (quoting United States v. Causby, 328 U.S. 256, 267 (1946)); Jacobs v. United States, 290 U.S. 13, 16 (1933) (takings claims are “founded upon the Constitution”). The Tucker Act is a complex jurisdictional statute that provides the federal courts, courts of limited jurisdiction, with the ability to hear several specific types of claims against the federal government, including those founded upon the Constitution. See supra note 6; U.S. CONST. art. III, § 2 (outlining the jurisdiction of the federal courts).

(43) On its face, the Tucker Act only applies to federal takings claims filed against the federal government. No court has applied the Tucker Act to the States. See Benson, 710 N.W.2d 131; Boise Cascade, 991 P.2d 563; SDDS, 650 N.W.2d 1; First Union Nat. Bank, 869 A.2d 1193. No court has applied the State’s argument to state court proceedings, that because the Tucker Act was necessary to waive federal sovereign immunity for federal compensation claims, or so it is argued, then congressional action is necessary to abrogate state sovereign immunity for state compensation claims. We do not agree with the State’s assertion that there must be a specific waiver of immunity before the state can be sued for “just compensation” under the Takings Clause. In our view, the Fifth Amendment is “self-executing.” Requiring further governmental action when it is the government that has effected the taking is contrary to the very reason for the Fifth Amendment: a check against abusive governmental power. If we were to accept the State’s argument, New Mexico would be the first and only jurisdiction in the nation to apply this Tucker Act analysis to state court proceedings. We decline to do so.

(44) The State agencies do not rest with the previous argument. They further contend that the Takings Clause is not self-executing as applied to the states because it is applied through Section 1 of the Fourteenth Amendment, and only Section 5 of the Fourteenth Amendment can abrogate sovereign immunity. See Seminole Tribe of Fla., 517 U.S. at 59 (holding Section 1 of the Fourteenth Amendment includes prohibitions on traditional state power). Section 1 says, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. Section 5 says, “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Id. The just compensation provision of the Takings Clause is made applicable to the states through the Fourteenth Amendment. Chicago B. & Q. R. Co., 166 U.S. at 235-42. The Fourteenth Amendment’s effect, at least in part, is to apply most of the first ten Amendments to the States. See Adamson v. California, 332 U.S. 46, 71-72 (1947), overruled in part on other grounds by Malloy v. California, 378 U.S. 1 (1964). Thus, the State agencies return to their point, discussed above, that Congressional action is necessary to enforce the Takings Clause against the states.

(45) We do not find the argument persuasive. It is Section 1 of the Fourteenth Amendment in conjunction with the “just compensation” remedy found in the Takings Clause that abrogates state sovereign immunity. Section 5 gives Congress the power to create remedies, if Congress

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5 The Tucker Act states in pertinent part,

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491. Early precedent found that Takings Clause claims fell under the Tucker Act only if the claim could be classified as an “implied contract.” Seamon, supra, at 1092 (quoting authority omitted). However, the Supreme Court later found that the clause itself creates a cause of action founded upon the Constitution, thus that section of the Tucker Act could be utilized rather than the implied contract section to obtain federal court jurisdiction. Id. at 1092-93.
decides any are necessary, to enforce the rights found in the Fourteenth Amendment, including those found in Section 1. An example of such legislation, protecting against the denial of due process is Title II of the Americans with Disabilities Act. 42 U.S.C. § 12101; see also Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (holding that Title II of the ADA was a valid use of Congress’ power under Section 5 of the Fourteenth Amendment). The ADA provides the remedy under Section 5 to be applied when a state violates the Fourteenth Amendment by depriving an individual of due process and equal protection as found in Section 1. Congressional action is necessary under Section 5 because the Constitution does not contain a specific remedy for the rights it has created under Section 1: due process and equal protection. However, the Takings Clause is different; it does have its own remedy within the text of the Fifth Amendment: just compensation.

{46} The Framers of the Constitution explicitly referred to remedies only twice in the Constitution, one being the just compensation provision of the Takings Clause. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 796-97 (5th ed. 2003) (stating that the second mention of a remedy is that of habeas corpus which is protected from interference by Congress). The Takings Clause creates an individual right to the remedy of just compensation. More specifically, as incorporated through the Fourteenth Amendment, the Takings Clause mandates that states have made, at the time of the taking, “reasonable, certain and adequate provision for obtaining compensation.” Williamson County Reg’l Planning Comm’n, 473 U.S. at 194 (citations and internal quotation marks omitted). See generally Seamon, supra, at 1108 (stating that a taking without a procedure for obtaining compensation violates the due process right found in Section 1 of the Fourteenth Amendment (citing Reich, 513 U.S. at 109)). This is the remedy intended by the Framers of the Constitution, and the remedy thereafter applied to the states through Section 1 of the Fourteenth Amendment.

{47} These factors lead us to conclude that the Takings Clause is self-executing, at least as applied to the states through the Fourteenth Amendment. We have found no judicial opinion specifically holding that it is not self-executing, and no case has held that to apply the Takings Clause to the states requires congressional action under Section 5 of the Fourteenth Amendment. The dearth of precedent used to support the State agencies’ position speaks in favor of a contrary view. See, e.g., Alden, 527 U.S. 706.

The Contracts Clause Claim

{48} The Mannings also seek compensatory damages for a violation of the Contracts Clause of the United States Constitution, asserting that their future and current contractual obligations are impaired by the Mining Act. The Contracts Clause says, “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. CONST. art. I, §10. The State agencies again claim that state constitutional sovereign immunity bars the Mannings’ claim.

{49} The Supreme Court in Alden discussed the Contracts Clause and sovereign immunity as related to its opinion in Hans v. Louisiana, 134 U.S. 1 (1890). In Hans, 134 U.S. at 10, the Supreme Court held that Louisiana was immune from suit in federal court based on a claim for money damages under the Contracts Clause. While we note that the holding in Hans is highly disputed, it has not yet been overturned. See Seminole Tribe of Fla., 517 U.S. at 86 (Stevens, J., dissenting) (arguing that Hans “served only to establish a presumption against jurisdiction that Congress must overcome, not an inviolable jurisdictional restriction that inheres in the Constitution itself”); Welch v. Tex. Dep’t of Highways & Pub. Transp., 483 U.S. 468, 477-93 (1987) (rejecting the urging of Justices Brennan, Marshall, Blackmun and Stevens to overrule Hans). The Supreme Court in Alden revived the holding in Hans, referring to it as a case in which it had “sustained [a state’s] immunity in a private suit arising under the Constitution itself.” Alden, 527 U.S. at 732 (citing Hans, 134 U.S. 1).

{50} The Supreme Court’s interpretation of Hans in Alden makes clear that the Mannings’ Contracts Clause claim is barred by sovereign immunity because the Contracts Clause does not provide for claims for money damages. We have found no authority to the contrary. In that respect, the Contracts Clause differs from the Takings Clause because only the latter contains its own remedy enforceable upon all those who take property without just compensation.

CONCLUSION

{51} For the foregoing reasons, we reverse the Court of Appeals regarding the Takings Clause claim and affirm regarding the Contracts Clause claim. We remand this case to the Court of Appeals to address ripeness issues.

{52} IT IS SO ORDERED.

RICHARD C. BOSSON, Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice
EDWARD L. CHAVEZ, Justice
PAMELA B. MINZNER, Justice (dissenting)
PETRA JIMENEZ MAES, Justice (dissenting)

MINZNER, JUSTICE (dissenting).

{53} I respectfully dissent. The majority, in taking up this constitutional question, has followed the Court of Appeals away from a clear path for resolution of this dispute and into what appears to be a thicket of constitutional jurisprudence. I prefer to stay on a safer path and leave the task of cutting through the mass of federalism, takings, and sovereign immunity holdings for another day, and another court. I would simply hold, as the district court did, that this case is not yet ripe.

{54} “Ripeness doctrine is rooted in the same general policies of justiciability as standing and mootness.” 13A CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532.1, 130 (2d ed. 1984). Lack of ripeness, like lack of standing, is a potential jurisdictional defect, which “may not be waived and may

7The cases cited in the Mannings’ brief allow Contracts Clause actions to be asserted against the respective states, but neither claim is for individual money damages for impairment of private contracts. Renaud v. Wyoming Department of Family Services, 203 F.3d 723, 725-28 (10th Cir. 2000), did not involve an independent claim for money damages based on the Contracts Clause alone, but rather a breach of contract action. Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400, 408 (1983), was a request for declaratory judgment based on the Contracts Clause, not a request for money damages. Sovereign immunity did not bar these claims because neither sought money damages from the state directly under the Constitution, as was the situation in Hans.

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be raised at any stage of the proceedings, even sua sponte by the appellate court.”


As compared to standing, ripeness assumes that an asserted injury is sufficient to support standing, but asks whether the injury is too contingent or remote to support present adjudication. . . . Ripeness cases have generated a functional approach that directly weighs the importance of the interest advanced; the extent of the injury or risk; the difficulty of deciding the substantive issues and the allied need for specific factual illumination; and the sensitivity of the issues in relation to future cases, the states, and other branches of the federal government.

WRIGHT, MILLER, & COOPER, supra, at 130. “The values of avoiding unnecessary constitutional determinations and establishing proper relationships between the judiciary and other branches of the . . . government lie at the core of ripeness policies.” Id. at 120; see also Gunaji, 2001-NMSC-028, ¶ 20 (“constitutional rights should not be litigated unnecessarily”’’ (quoting Lewis v. Iowa Dist. Ct., 555 N.W. 2d 216, 219 (Iowa 1996))). “The basic purpose of ripeness law is and always has been to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems.” N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm’n, 111 N.M. 622, 629-30, 808 P.2d 592, 599-600 (1991) (quoting 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 25.1 (2d ed. 1983)); see also City of Las Cruces v. El Paso Elec. Co., 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72 (“We avoid rendering advisory opinions.”).

[55] The district court held that the Mannings’ mining operations were subject to a federal injunction stemming from separate federal litigation, see Manning v. United States, 146 F.3d 808 (10th Cir. 1998), and that mining operations could not resume until federal requirements were met. The Mannings argued on appeal that the federal injunction could not be used to defeat ripeness because one element of compliance with the federal law was compliance with applicable state regulations. In this situation, they argued, their claim might never be considered because the state regulations would not be subject to review. The federal injunction indicates that the Mannings must file an operating plan with the Forest Service, including a plan for reclamation of operations and a bond to cover clean-up costs of mining and milling on public lands. No such plan or bond was filed with the Forest Service. Thus, New Mexico laws and regulations were not the only obstacles to the Mannings’ mining operations; even in the absence of any New Mexico regulation, mining operations would be limited by federal law. In addition, it appears that the Mannings have not received a final decision from the relevant state agencies, and in fact withdrew their permit applications prior to commencement of this suit. The Mannings’ argument, that the permitting process was unreasonably delayed, is not borne out by the record. Even if it were, it would not be a sufficient basis for a takings claim. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 334-335 (2002) (rejecting “the extreme categorical rule” that normal delays in obtaining permits could constitute a taking because such a rule would “undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power”); see also id. at 337 nn.31-32 (recognizing that permitting delays are similar to temporary moratoria and further noting that even a total moratorium on new development for a limited time period is not a taking). I conclude the case is not ripe for decision. Under these circumstances, any ruling by this Court would be both speculative and advisory.

[56] Although this Court has the power to grant standing in exceptional cases presenting a matter of great public importance, and may waive objections for mootness when an issue is capable of repetition yet may avoid review, Gunaji, 2001-NMSC-028, ¶ 10, I am not persuaded it is appropriate to waive the issue of ripeness in this appeal. As explained above, the ripeness doctrine serves important judicial interests: protecting the court from issuing advisory opinions by requiring a present controversy between the parties, ensuring that facts are sufficiently developed for decision, avoiding intrusion on the powers of other branches of government and reserving judicial resources for present, rather than hypothetical questions. This case presents a question which may arise in the future, but can be resolved or reviewed at that time and is unlikely to evade such review. In light of the Court’s strong interest in avoiding unripe cases, I conclude that this case does not warrant any exception to our general rules, limiting our jurisdiction to ripe cases.

[57] A decision on ripeness grounds would have the effect of vacating the Court of Appeals decision and I believe it is not necessary to remand the case for further proceedings. See WRIGHT, MILLER, & COOPER, supra, at § 3532.2, 137 n.42 and accompanying text. I would therefore affirm the district court’s dismissal on ripeness grounds.

PAMELA B. MINZNER,
Justice

I CONCUR:
PETRA JIMENEZ MAES, Justice
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Immediate opening for Associate Attorney to do civil and criminal work in Silver City, New Mexico. Call (505) 538-2925 or send resume to Lopez & Associates, P. C., P. O. Box 1289, Silver City, New Mexico 88062. Fax (505) 388-9228.

**Personal Injury Associate**
We are a medium size Personal Injury Law Firm with extensive experience handling million-dollar plus injury cases. Seek an Associate with 0-5 years experience for Las Cruces Office. Personal Injury litigation experience strongly preferred. Strong people and academic skills required. Salary consists of base with percentage of recovery. Benefits paid. Seeking long term candidate to acquire shareholder status. All inquiries kept confidential. Send resume to: crucosoffice@yahoo.com.

**New Mexico Legal Aid**
**Staff Attorney**
**Silver City Office & Taos Office**
New Mexico Legal Aid (NMLA) seeks attorney with a strong commitment to public interest and social justice advocacy to provide advice, brief service, and representation in domestic relations proceedings focusing on domestic violence to low income persons, in addition to family law, handling cases in other areas of general poverty law including housing, public benefits, and consumer that affect all sectors of the low-income, with focus on domestic violence persons; handling telephone intake; participating in community education and outreach to domestic violence victims and providers; participating in recruitment of pro bono attorneys. Qualifications: Dedication and commitment to serving the needs of domestic violence victims and persons living in poverty, excellent research, writing and interviewing skills. Proficiency in Spanish is a plus. New Mexico bar license required, with at least one year of experience. Excellent fringe benefits include 100% employer paid. State of the art communication technology, Excellent supervision, training, mentorship and oversight provided by firm experts across the state through use of technology. Send resume, references and writing sample to: Gloria A. Molinar, New Mexico Legal Aid, 300 N Downtown Mall, Las Cruces, NM 88001, or email: gloriam@nmlgalaid.org. Salary: DOE. NMLA is an EEO/AA Employer. Closing date: July 21, 2006.

**Deputy General Counsel**
**New Mexico Corrections Department**
The New Mexico Corrections Department is accepting applications for the position of Deputy General Counsel at its Central Office in Santa Fe. Applicants must have at least one (1) year of experience in criminal, employment, civil rights and/or tort law. The position is responsible for representing the Department in defense of in-mate pro se civil suits, in employee disciplinary actions and in miscellaneous civil and criminal matters. The position is also responsible for reviewing and approving contracts and policies. Some interaction with inmates is required. Starting salary will range from approximately $43,000 to $68,000 per year, depending upon experience and qualifications. Maximum possible salary for this position is approximately $76,550 per year. Please send a copy of your resume or your State Personnel Office application to JoAnne Parish, Office of General Counsel, NMCD, PO Box 27116, Santa Fe, NM 87502-0116 or by e-mail to JoAnne.Parish@state.nm.us. The deadline for submitting application/resume is July 14, 2006.

**Receptionist**
Full time receptionist needed for front desk. Light secretarial, and courier duties required. Salary DOE. Send resume to Cassutt, Hays & Friedman, P.A., Attn: Amelia J. Martinez, 530-B Harkle Road, Santa Fe, New Mexico 87505.

**Full Time Legal Assistant**
Guebert, Bruckner & Bootes, P. C., is now accepting applications for a full time legal assistant with strong writing skills. The successful candidate will be organized, self motivated, detail oriented, resourceful and be able to take direction from others. Excellent communication skills and are a must in this busy office. Computer experience including Microsoft Word and Microsoft Outlook is strongly desired. Benefits package includes medical, disability, cafeteria plan, vacation and 401K.

**Experienced Santa Fe Paralegal**
Small collegial Santa Fe firm needs a bright, energetic, mature, meticulous and experienced (3+ years) paralegal. Very substantial client contact. Civil practice. Excellent writing, communication and organizational skills required. Computer intensive, informal non-smoking office. Paralegal degree or Certificate desirable. Recent law firm experience required. Firm offers a fun small office workplace. Competitive Compensation Pkg. $45K+ DOE (salary + monthly bonus), 100% paid Medical/Hosp; parking; paid holidays + sick and personal leave. All responses are confidential. Resume with cover letter please to P.O. Box 4817, Santa Fe, NM 87502-4817.

**Paralegal**
Successful, growing insurance defense firm, with a laid back boss, seeks sharp, energetic paralegal who is self-disciplined, well organized, a team player, and committed to providing the highest quality services to the firm’s clients. The position requires a four-year college degree, at least 5 years insurance defense/employment/products liability experience, and excellent communication skills. Successful candidate will be required to bill 125 hours per month. You’ll like the views, the pay, and benefits too. Please mail resume to Arturo Ricardo Garcia, Esq., John S. Stiff & Associates, LLC, 400 Gold Ave. S.W., Suite 1300-West, Albuquerque, New Mexico 87102.
**Positions Wanted**

**Part-time or Contract Work**
New Mexico attorney, who is currently working on a certificate in Public Health, seeking part-time or contract work -- or flexible associate position -- for one year or less. Enjoy research and writing. Interests include but not limited to: health law, HIPAA, medical malpractice, elder law, employment, gaming, Federal / Indian law; administrative law. Would be interested in supporting civil trial work. Background includes: Federal/Indian law; administrative hearings; employment law; recent course in Indian gaming. Very flexible in compensation needs. Contact: attorney@contract-legal-services.com.

**Certified Bookkeeper / Legal Assistant**

**Legal Assistant/Paralegal**
Legal Assistant/Paralegal needed for personal injury firm. Minimum 3 years experience in litigation. Duties include drafting pleadings, correspondence, drafting settlement packages, organizing files, scheduling & communicating with clients. Must have excellent writing & organizational skills. Looking for dependable, accurate and detail oriented person. Competitive Salary & Benefits. Please send resume to Office Manager, PO Box 92860, Abq., NM 87199, Attn: Box D or e-mail to loosearrow@prodigy.net.

**Accountant**

**Consulting**
**Forensic Psychiatrist**
Board certified in adult and forensic psychiatry, available for psychiatric evaluations, consultation, case review, and expert testimony. Licensed in New York, Connecticut and New Mexico. Please call 1-866-317-7959 and leave message for Dr. Kelly.

**Services**

**Contract or Permanent PT - Paralegal**

**EDGAR Filings**

**Office Organization**
Piles of paper and filing getting in your way? THE OFFICE ANGEL can make it history in one day Business system design & de-cluttering. 20 years experience. Robin Bergner, M.A. @ 670.6740 or officeangel505@earthlink.net

**Research And Writing Services**
Licensed attorney offers research and writing services. Recipient of awards for legal research and writing. Prefers civil cases. Contact Thomas Lane, 505-450-9601, tlane@swcp.com.

**Transcription**
For your tape, CD and electronic transcription needs, call Legal Beagle @ 883-1960.

**Office Space**

**Albuquerque Offices For Rent**
Albuquerque offices for rent 820 2nd NW, one block from courthouses, copier, fax, high speed internet, off street parking, library, statutes up to date, telephone system, conference room, receptionist, rates depending on space rented $500 to $1,000 monthly. Call Ramona @ 243-7170 for appointment.

**Rio Grande Office Space**
Convenient location with ample fenced parking, Reception area. Wood flooring. Contact Tom Hooker at 505-843-8070.

**Downtown Albuquerque**
620 Roma Avenue N.W. $550.00 per month. Includes office, all utilities (except phones), cleaning, conference rooms, access to full library, receptionist to greet clients and take calls. A must see. Call 243-3751.

**Two Offices Available**
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

**Louisiana Candelaria Corner**
Very desirable location in Uptown. Executive suite and separate staff area. Shared conference room, copier/kitchen area, reception area. 889-3899.

**Downtown**
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $300 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

**Professional Office Spaces for Rent**
(Midtown/San Mateo & I-40)
4 beautiful spacious non-smoking office(s) for rent. Office rent includes additional space for staff member(s), use of conference rooms and employee lounge. Receptionist and copier service are also available. Excellent opportunity for attorneys interest in referrals. Call 244-3861 for more information.

**Executive Offices Downtown**
The number one building in Albuquerque is now offering Executive Offices. Relocate to the 22 story, Class A Albuquerque Plaza in the heart of downtown. This BOMA “Building of the Year” Award winner offers month to month leasing starting at $200 per month, conference rooms, utilities, janitorial, 24 hour security and card access system, fiber optics and much more. Great views from the 16th floor of the city. Contact Yasmin Gonzales at 242-2000 for more information.
2ND ANNUAL CLE AWARDS

CLE Pinnacle Award (General Credit)
Professor Nathalie Martin
21st Annual Bankruptcy Year In Review - March 10, 2006

CLE Summit Award (Ethics Credit)
Bruce R. Rogoff
16th Annual Appellate Practice Institute - August 19, 2005

CLE Zenith Award (Professionalism Credit)
John A. Bannerman
Public Health Emergencies - October 14, 2005

CLE Crest Award (Young Lawyers Division)
Marjorie Ann Martin
Metropolitan Court Civil Procedure and Landlord / Tenant Law - April 25, 2006

CLE Meridian Award of Honor
Hon. Richard C. Bosson
Hon. Edward L. Chavez
Hon. Petra Jimenez Maes
Hon. Pamela B. Minzner
Hon. Patricio M. Serna
Hon. Lynn Pickard
Rocky Mountain Regional Young Lawyers Conference - March 3, 2006

CLE Peak Award of Excellence
Hon. Robert E. Robles
On-Going Program Support

Honorable Mention (National Speaker, Non-Member)
Jack Marshall
Ethics Rock! – Annual Meeting, Ruidoso - September 24, 2005

Congratulations and a sincere thanks to all who give of their time and effort for CLE Seminars!

Awards will be handed out at the President’s Reception at the State Bar’s Annual Meeting in Taos, on Friday, July 21, 2006 at the Taos Convention Center.
Coming Soon for New Mexico Lawyers

New Mexico

Casemaker
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