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MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

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FROM SURVIVING TO THRIVING IN PRIVATE PRACTICE

State Bar Center, Albuquerque • Tuesday-Wednesday, August 19-20, 2008
10.0 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits

Co-Moderators: Catherine Baker Stetson, Esq. & Donald D. Becker, MBA, JD
SBNM Law Office Management Committee
❑ Standard Fee $339  ❑ Solo & Small Firm Practitioners Section Member $309
❑ State Bar of New Mexico Student Member No Charge

Whether you have always wondered what it would be like to ‘fly solo’ or you are an experienced solo or small firm practitioner who could potentially benefit from a law practice management tune-up, this seminar may be for you. While covering many of the business basics of private practice, this program is also designed to give attendees a broad glimpse of what it takes to potentially thrive in that practice. These two days are intended to challenge you to think about flying solo through a different lens.

DAY ONE - August 19
8:30 a.m.  Registration
8:55 a.m.  Introductory Remarks
Donald D. Becker, MBA, JD
Co-Chair, SBNM Law Office Management Committee
9:00 a.m.  Why Go Into Private Practice? A Panel Discussion
Donald D. Becker, MBA, JD, Moderator
9:30 a.m.  Trust Accounting (1.0 E)
Donald D. Becker, MBA, JD
10:30 a.m.  Break
10:45 a.m.  Developing Your Business Plan
Joseph Sapien, Esq., Sapien Law Firm
Chair, Solo & Small Firm Practitioners Section
12:30 p.m. Lunch (provided at the State Bar Center)
1:15 p.m.  Understanding Mission, SWOT, and Other Essentials
Donald D. Becker, MBA, JD
2:00 p.m.  Risk, Strategy, and the Defining Power of Saying ‘No’
Rob Koonce, MA, MBA, Director, Center for Legal Education
2:30 p.m.  Break
2:45 p.m.  What Clients Really Want: It’s Not About You
Catherine Baker Stetson, Esq., Stetson Law Offices
Co-Chair, SBNM Law Office Management Committee
3:45 p.m.  Break

4:00 p.m.  Q & A Session
Donald D. Becker, MBA, JD, Moderator
4:30 p.m.  Adjourn and
Solo & Small Firm Practitioners Networking Reception
(State Bar Lobby) Host: Solo & Small Firm Practitioners Section

DAY TWO - August 20
8:30 a.m.  Registration
9:00 a.m.  Personnel Issues
Presenter TBA
10:00 a.m.  Break
10:15 a.m.  Technology: Don’t Leave Home Without It
Ian Bezpaliko, Esq., The Bezpaliko Law Firm
11:15 a.m. Insurance Issues
Lawyers Professional Liability Committee
12:15 p.m. Lunch
1:00 p.m.  Time Management
Donald D. Becker, MBA, JD
2:00 p.m.  Legal Research: A Low Cost, High Results Toolbox
Robert Mead, Esq., NM Supreme Court Law Librarian
3:00 p.m.  Break
3:15 p.m.  Having Those Difficult Conversations:
Personality and Professionalism (1.0 P)
Gini Nelson, Esq., Gini Nelson Law Office
4:15 p.m.  Adjourn

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10.0 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits
Co-Moderators: Catherine Baker Stetson, Esq. & Donald D. Becker, MBA, JD
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• Professionalism Tip •

With respect to opposing parties and their counsel:
I will clearly identify, for other counsel or parties, all changes that I have made in all documents.

Meetings

August

11 Taxation Section Board of Directors, noon, via teleconference
12 Quality of Life Committee, noon, State Bar Center
13 Children’s Law Section Board of Directors, noon, Juvenile Justice Center
13 Membership Services Committee, noon, State Bar Center
14 Public Law Section Board of Directors, noon, Risk Management Division, Santa Fe

State Bar Workshops

August

13 Estate Planning/Probate Workshop
6 p.m., State Bar Center, Albuquerque
21 Consumer/Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces
27 Consumer/Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

September

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

Cover Artist: Larry Smith is an accomplished painter, photographer and retired art teacher. He works in acrylics, photography and watercolors. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
NOTICES

COURT NEWS

N.M. Supreme Court
Board Governing the
Recording of Judicial
Proceedings

Reporter Monitor Problems
The Supreme Court Board Governing the Recording of Judicial Proceedings ensures that outstanding reporting/recording services are provided to members of the State Bar and to hearing agencies. If any user of recording services encounters a reporter/monitor problem, the Board requests counsel notify it with the following information: the date and type of hearing, the person or service that recorded the hearing and the nature of the problem. E-mail notifications to Board Administrator Linda McGee, ccr@ccrboard.com; mail to PO Box 92648 Albuquerque, NM 87199-2648; or call (505) 821-1440.

N.M. Court of Appeals
Announcement of Vacancies
The Appellate Court Judicial Nominating Commission will meet beginning Oct. 15 to interview applicants for two (and potentially three) pending vacancies on the Court of Appeals. One vacancy will occur on Sept. 17 due to the retirement of the Honorable Ira Robinson. One vacancy will occur on Jan. 1, 2009, due to the expiration of the term of the Honorable Joseph Alarid. A potential third vacancy, to be confirmed before the end of September, may occur in November.

The chair of the Appellate Court Judicial Nominating Commission solicits applications for these positions from lawyers who meet the statutory qualifications in Article VI, Section 28, of the New Mexico Statutes Annotated 1978. Application forms may be obtained from the Judicial Selection Web site at http://lawschool.unm.edu/judsel/application.php, or via e-mail by contacting Sandra Bauman at (505) 277-4700. The deadline for all applications is 5 p.m., Sept. 26. Applications received after that time will not be considered. The Judicial Nominating Commission will meet at the New Mexico Supreme Court Building in Santa Fe to evaluate the applicants for these positions. The Commission meeting, which may continue through Oct. 16 if necessary, is open to the public.

First Judicial District Court

Brown-Bag Meeting
The 1st Judicial District Court Criminal Law Bench and Bar will have a brown-bag meeting at noon, Aug. 12, in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to Sally or Kim in the Criminal Division, (505) 827-5047.

Second Judicial District Court
Electronic Storage of Closed Case Files
On Aug. 18, the 2nd Judicial District Court will begin implementation of an electronic content management system for court records. This does not include the filing of new pleadings and only addresses electronic storage of existing closed case files. In addition, this in no way infers or construes electronic storage of new case files.

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for 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.

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<th>Court</th>
<th>Exhibits</th>
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<td>7th Judicial District Court</td>
<td>Exhibits filed with the Court in civil cases</td>
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<td>(575) 835-0050</td>
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Judicial Appointment
Governor Bill Richardson has announced the appointment of Reed Sheppard to fill the vacancy in Division XIV at the 2nd Judicial District Court. Effective Aug. 4, Judge Sheppard is assigned criminal court cases previously assigned to Judge J. Michael Kavanaugh. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Aug. 4 to challenge or excuse Judge Sheppard pursuant to Supreme Court Rule 1-088.1.

Twelfth Judicial District Court
Announcement of Vacancy
A vacancy on the 12th Judicial District Court will exist in Alamogordo as of Jan. 1, 2009, upon the retirement of the Honorable Frank K. Wilson. The chair of the Judicial Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site at http://lawschool.unm.edu/judsel/application.php, or via e-mail by calling Sandra Bauman at (505) 277-4700. The deadline for applications is 5 p.m., Sept. 19. Applications received after that date will not be considered. The District Judicial Nominating Commission will meet at 9 a.m., Oct. 3, in Alamogordo to evaluate the applicants for this position. The Commission meeting is open to the public.

Judicial Nominating Commission information is available at http://lawschool.unm.edu/judsel/commissions/index.php. The links will only be viable when a vacancy exists and a commission meeting is pending in the respective court. Information is updated on the Web site as it becomes available.

Judicial Records Retention and Disposition Schedules

Brown-Bag Meeting
The Judicial Nominating Commission infor-
U.S. Court of Appeals for the Tenth Circuit
2008 Bench & Bar Conference

The Honorable Carlos F. Lucero, Circuit Judge for the U.S. Court of Appeals for the 10th Circuit, is pleased to invite members of the legal community to attend the 10th Circuit 2008 Bench and Bar Conference to be held Sept. 4–6 at the Broadmoor Hotel, Colorado Springs. Attendees will have an opportunity to earn approximately 14 hours of CLE credits, including two hours of ethics credits.

Feature appearances are planned by Justice Stephen Breyer, Jeffrey Rosen, Jan Greenberg, Stuart Taylor, Erwin Chemerinsky, Stephan Saltzberg, Douglas Berman, and many other professionals and experts in their fields. There will be substantive sessions on electronic discovery, Islamic law, Daubert issues, Indian law, bankruptcy, criminal sentencing, ethics, and much more.

In addition to on-line registration, a schedule of activities and hotel information is available through the conference Web site at http://www.ca10.uscourts.gov/conference/index.php?id=4 judconf/index.php. General registration is $325; court staff registration is $175. Note that registering for the conference does not register one for the hotel. To make a hotel reservation call 1-800-634-7711 and ask to register with 10th Circuit 2008 Bench and Bar Conference. Direct questions to the Judicial Resources Team: Julie, (303) 335-2826; Kaitlin, (303) 335-3038; or Sheila, (303) 335-3014.

U.S. District Court District of New Mexico
Reappointment of Magistrate Judge

The current term of office for incumbent part-time U.S. Magistrate Judge Robert W. Ionta will expire Feb. 10, 2009. The U.S. District Court has established a panel of citizens, as required by law, to consider the reappointment of Magistrate Judge Ionta to a new four-year term.

The duties of Magistrate Judge Ionta are defined in 28 U.S.C. § 636(a) and involve the trial of federal petty and minor offenses as per 18 U.S.C. § 3401; imposition of conditions of release under 18 U.S.C. § 3146; conducting arraignments, non-guilty pleas, and felony guilty pleas; upon designation, conducting hearings and submitting to the judges proposed findings of fact and recommendations for dispositive motions or prisoner petitions; trial and disposition of civil cases upon consent of the litigants; and performing such other duties as conferred or imposed by law or by the Federal Rules of Criminal Procedure and/or the Rules of the United States District Court for the District of New Mexico.

The public and members of the bar are invited to submit comments as to whether the reappointment of Magistrate Judge Ionta to a new term of office should be considered. Submit comments to William B. Keleher, Chairman, U.S. Magistrate Merit Selection Panel, PO Box AA, Albuquerque, NM 87103. All comments will be kept confidential and should be postmarked no later than Aug. 15.

STATE BAR NEWS
Appellate Practice Section Annual Meeting

The Appellate Practice Section will hold its annual membership meeting at 12:45 p.m., Aug. 15, in conjunction with the 19th Annual Appellate Practice Institute. Details on the CLE may be found in the July 28 Bar Bulletin, “CLE At-a-Glance.” To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199. To place an item on the agenda, contact Chair Jonathan Sperber, jonathan.sperber@state.nm.us.

PRO BONO COMMITTEES HELP ATTORNEYS MEET PROFESSIONAL RESPONSIBILITY

On Jan. 22, the New Mexico Supreme Court approved amendments to Rule 16-601 NMRA of the Rules of Professional Conduct and Rule 24-108 NMRA of the Rules Governing the New Mexico Bar, effective March 15, 2008. These rules address the legal profession’s responsibility to provide legal services without fee or expectation of fee to persons of limited means. Rule 24-108 suggests a lawyer aspire to render at least fifty hours of pro bono legal services per year or, in the alternative, to contribute financial support to organizations that provide legal service to persons of limited means. The rule also requires annual certification whether the lawyer has satisfied this professional responsibility.

Judicial districts across New Mexico have set up pro bono committees to identify the unique needs of the low income population and to establish programs that will enable attorneys to help solve those needs. Some of the opportunities being established include:

• classes for pre-screened financially eligible persons;
• advice-and-counsel-only for financially eligible persons;
• court appearances on behalf of financially eligible clients whose cases have been screened for merit;
• “recycling” work already done to serve as training tools (i.e., sharing best pleadings or memoranda of law as models for other attorneys accepting pro bono clients); and
• drafting and/or reviewing community legal information provided to the public.

Contact Nita Taylor, pro bono coordinator, (505) 797-6077, or ntaylor@nmbar.org, for additional information regarding the work of pro bono committees in New Mexico’s judicial districts.

ATTORNEY SUPPORT GROUP

The Attorney Support Group offers two meeting opportunities:

• Afternoon groups meet regularly on the first Monday of the month:
  Sept. 1, 5:30 p.m.
• Morning groups meet regularly on the third Monday of the month:
  Aug. 18, 7:30 a.m.

Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners
Commission on Judicial Advancement

The Commission on Judicial Advancement is moving into the stage where it will be evaluating various ideas to make the
More than 80 indexed, summarized ethics advisory opinions are archived on the State Bar Web site at http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html. Original questions regarding one's own conduct may be sent to rspinello@nmbar.org.

civil litigation system more cost effective and faster. The Commission has received previous suggestions about how to accomplish these goals and is formally soliciting additional ideas for improving the civil litigation process. Forward suggestions to the Commission on Judicial Advancement in New Mexico, c/o Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860, or jconte@nmbar.org.

Children’s Law Section Annual Art Contest

Over 200 children are competing in the sixth annual Children’s Law Section Art Contest. Each artist was asked to design and decorate a tee-shirt with this year’s theme, “Looking Forward, Looking Back.” The artists are children who are improving their lives through court-ordered programs in Bernalillo, Santa Fe, Valencia, Sandoval, Cibola and San Juan counties. The contest provides the children with a positive opportunity to express their struggles, look toward the future, and celebrate artistic effort. Each year the Children’s Law Section sponsors the contest with the generous help of community donations. Members of the New Mexico Art Therapy Association help organize the event as well as instruct and assist the children in creating their entries. A panel of judges who are professional artists themselves will select the winners. The awards will be announced at an exhibition to be held from 3 to 5:30 p.m., Nov. 7, at the Juvenile Justice Center, Conference Rooms A and B, 5100 Second Street NW, Albuquerque.

Tax-deductible monetary donations to fund contest supplies and prizes for the children may be made by Aug. 11 to: Children’s Law Section, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860. Donations are tax-deductible through the New Mexico State Bar Foundation. For more information, contact Beth Collard (505) 259-7387 or beth.childrenslaw@gmail.com.

International and Immigration Law Section CLE and Silent Auction

The International and Immigration Law Section, the Children’s Law Section, and the Criminal Law Section are co-sponsoring the first annual CLE program focused on the intersections of immigration law and each of the sections’ respective fields and the resulting challenges of representing immigrant clients. Practicing Law on the Border: The Challenges of Immigrant Representation will take place Oct. 10 at the State Bar.

A silent auction that will fund the UNM School of Law service learning opportunities aimed at improving the representation of indigent immigrants in New Mexico will be held the day of the program. Donations to the auction may include items such as vacation home getaways, handcrafted art or jewelry, gift certificates to spas, Rapid Rewards tickets, dinners at restaurants, etc. To make a cash donation, send a check to the State Bar International and Immigration Section and specify that the donation is for the “UNMSOL Immigrant Defense Fund.” All donations will be housed at the New Mexico State Bar Foundation and are tax deductible.

Contact Jennifer Landau, jlandau@dmrs-ep.org, to make a silent auction or cash donation.

Paralegal Division Monthly Brown-Bag CLE for Attorneys and Paralegals

The Paralegal Division invites members of the legal community to bring a lunch and attend Election Laws presented by Jim Noel, Esq., Judicial Standards Commission. The program will be held from noon to 1 p.m., Aug. 13, at the State Bar Center and is approved for 1.0 general CLE credit for attorneys and paralegals. Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys, $15 for paralegals, and $10 for Paralegal Division members. For more information, contact Cheryl Passalaqua, (505) 872-7469, or Evonne Sanchez, (505) 222-9356.

Technology Committee Google Apps for Lawyers

The Technology Committee will hold a free workshop from noon to 1 p.m., Aug. 15, at the State Bar Center. The workshop will demonstrate the use of Google Apps, which covers the various service applications provided by Google, including Google Docs, Google Sites and Google Talk. These tools will assist lawyers to collaborate to a greater degree and with increased efficiency. Paralegals, attorneys, and support staff are invited to attend. Class is limited to 11 attendees. Reservations should be made by Aug. 13 with Tony Horvat, membership coordinator, thorvat@nmbar.org or (505) 797-6033.

Young Lawyers Division Dismas House Project Seeks Attorney Volunteers

The New Mexico Young Lawyers Division (YLD) is seeking volunteers to provide legal presentations to the residents of Dismas House, a transition home for non-violent parolees. Attorneys are needed to provide presentations on Oct. 16 (topic: drivers’ license restoration) and on Nov. 13 (topic: child custody and family law issues). To volunteer, e-mail Briana Zamora, zamoralawfirm@yahoo.com.

Lunch with Federal Judiciary

The Young Lawyers Division will host a lunch at noon, Sept. 24, at the Federal District Courthouse in Albuquerque. A panel of federal district court judges will be providing insight into practicing law in federal court. Lunch will be provided, but space is limited. To make a reservation contact Briana Zamora, zamoralawfirm@yahoo.com.

UNM School of Law Library Hours

| Building and Circulation | Monday–Thursday | Friday | Saturday | Sunday
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When You Vote in Judicial Retention Elections, Make an Informed Decision

By Felix Briones, Jr.
Chair, New Mexico Judicial Performance Evaluation Commission

This year has been hailed as historical in terms of national politics, but it is also historical in terms of New Mexico judicial retention elections. This year, voters will decide whether one Supreme Court justice, one judge on the Court of Appeals, and as many as 76 district court judges spread throughout 12 of New Mexico’s 13 judicial districts should remain on the bench.

When evaluating most candidates running for office, you can listen to their speeches, attend their debates, check out their Web sites or even read the mail they send to your home. What about the judges who have already won a partisan election and are not running against another candidate? Under our state’s constitution, these judges are standing for retention and must receive 57 percent voter approval to remain on the bench. If you’ve never met them or been in their courtroom, how can you make a decision about whether they deserve your approval? Where do you go to find out more about them?

The New Mexico Judicial Performance Evaluation Commission (JPEC) was created to help. In 1997, the New Mexico Supreme Court created JPEC as a nonpartisan volunteer commission, in part to provide useful, credible information to voters so that they can make informed decisions regarding the performances of justices and judges.

This year is particularly important because of the role district courts play and the number of district judges being evaluated. Of the 88 full-time district court judges in New Mexico, JPEC will make recommendations to voters on whether to retain more than four-fifths of them. The district court is a trial court of general jurisdiction and plays a vital role in communities. Judges on a district court hear cases involving juveniles, domestic relations and criminal and civil cases that are not excluded by the state’s constitution or by law.

JPEC uses an objective, carefully-monitored process to evaluate justices and judges in four main areas: legal ability; fairness; communication skills; and preparation, attentiveness, temperament and control over proceedings. We do not base our evaluations on specific opinions or rulings issued by the justice or judge. A review of opinions or rulings is the responsibility of the appellate courts. Instead, we focus on an overall evaluation of the justice’s or judge’s performance on the bench.

Confidential surveys are distributed by an independent research firm to those individuals who have had direct contact or interaction with the justice or judge being evaluated. In the case of appellate court judges (Supreme Court and Court of Appeals) this group includes attorneys with direct experience, fellow appellate judges, trial court judges whose cases have been appealed, court staff, and current and former law clerks. In the case of district court judges, this group includes lawyers who have had direct interaction with the judge, jurors, court staff and resource personnel such as law enforcement, probation officers, psychologists, adult and juvenile probation/parole officers, citizen review volunteers, social workers, and others. In addition, we also conduct confidential, one-on-one interviews with each judge or justice being evaluated to review survey results and his or her self-assessment of performance. Once the evaluation is completed, we make one of four recommendations to voters:

1) Retain – Recommend voting to retain judge
2) Do Not Retain – Recommend voting against retaining judge
3) No Opinion – Not enough information available to make a recommendation
4) Insufficient Time in Current Position to Evaluate – Judge has not served at least two years in current position

By law, we are required to disseminate our recommendations to voters at least 45 days before the general election. This year, we will publish our recommendations on our Web site and through a Judicial Retention Report to Voters in newspapers statewide. Our recommendations will be available to the public beginning Sept. 18. Absentee voting begins Oct. 7. Early voting begins Oct. 18, and Election Day is Nov. 4.

JPEC believes that judges and justices must be accountable to you, the voters, for doing a good job. We also believe that you, as voters, should have reliable, unbiased, accurate information upon which to make your decision about whether to retain them. Your vote does count, and we encourage you to do your part in improving our judiciary by making your voice heard. For more information, visit the JPEC Web site, www.nmjpec.org, or call Louise Baca-Sena at the Administrative Office of the Courts, (505) 827-4960.

About the Author:
Felix Briones, Jr., is a Farmington attorney who serves as chair of JPEC. He has been a member of JPEC since 1997 and has practiced law since 1959.
The 2008 Annual Meeting of the State Bar of New Mexico emphasized the theme *From Crisis to Courthouse*. “As attorneys, we have a professional duty to be ready to counsel our clients and community when tragedy strikes,” said State Bar President Craig Orraj.

Offering insight into understanding and being prepared for such events, Keynote Speaker Ken Feinberg discussed the 9/11 attacks and the ensuing Victim Compensation Fund. Feinberg, managing partner and founder of The Feinberg Group, LLP, in Washington, D.C., is recognized as one of the nation’s leading experts in mediation and alternative dispute resolution. He told compelling stories of the families and victims of the 9/11 attacks. Every applicant had the right to a hearing and Feinberg conducted 1500 hearings. He spoke about the ways in which grief paralyzes people, so much so that some could not even cope with filing a claim. The lowest payout was $500 to a worker in the Pentagon who had a broken finger; the largest payout was $8 million to a woman who received third-degree burns on 85 percent of her body. There was also no distinction between Americans and illegal immigrants, who thought they would be deported, fined or their children would be taken away if they filed a claim. Treatment was quite the opposite. Those who filed claims were given green cards.

Plenary Speaker Donna Beegle spoke about generational poverty and urged attendees not to look at personalities but rather the circumstances that lead an impoverished individual to steal. She asked that attendees take action following the presentation and volunteer their time to assist those in legal need.

Two special awards acknowledged the ongoing service of two friends of the State Bar. Orraj presented the President’s Award to The Honorable Alan C. Torgerson for “dedicated service to the State Bar of New Mexico.” Joe Conte, who has completed five years as executive director, was recognized by the Board of Bar Commissioners “with appreciation for your ongoing dedication and commitment” to the State Bar of New Mexico.

The Honorable Alan C. Torgerson received the special President’s Award for his dedicated service to the State Bar.
Chief Justice Edward Chávez reports on an assessment by the American Bar Association which found that the New Mexico judicial system needed improvement in the following areas: judicial selection, judicial education, public defender staffing, and court staffing adequacy.

Jon Feder (above) leads the CLE breakout on Update on Family Law.

Peter Ossorio (left) leads a CLE breakout on Beyond the Fourth Amendment: Article II Section 10, Protections and Practice Tips.

CorVault, a member of the State Bar Alliance Program, was one of several exhibitors.

The Honorable John Pope, The Honorable Charles Currier, Justice Charles Daniels, and Elizabeth Vencill participate in one of several Bench and Bar Relations Committee presentations.

Jocelyn Torres leads a panel in one of several ADR committee presentations.
From Crisis to Courthouse

**RECEPTIONS, FUNDRAISERS, AND FUN**

**EAJ Auction Raises $6K**


**Art Class**

**Cooking Class**

**The Woodpeckers**

**Auction Bidders**

State Bar Secretary-Treasurer Jessica Pérez and Baby Ella Grace.

The Honorable Nan Nash and Briana Zamora with Baby Addison.

**Arizona Diamondbacks Game**

**Eldest Practicing Attorney Thomas Foy, Sr., gives advice to Craig Orraj.**

**Entertainer Mike Rayburn**
2008 ANNUAL AWARDS
PRESENTED AT THE ANNUAL MEETING BY
STATE BAR PRESIDENT CRAIG A. ORRAJ

JUSTICE PAMELA B. MINZNER PROFESSIONALISM AWARD
Michael Schwarz
Thomas D. Haines, Jr. (1956–2008)

OUTSTANDING YOUNG LAWYER OF THE YEAR AWARD
Marcus J. Rael, Jr. Vincent J. Ward

OUTSTANDING CONTRIBUTION AWARD
Ian Bezpalko

SETH D. MONTGOMERY DISTINGUISHED
JUDICIAL SERVICE AWARD
Judge A. Joseph Alarid
Judge Lynn Pickard

OUTSTANDING JUDICIAL SERVICE AWARD
The Honorable Celia Foy Castillo
Carolyn L. Cochran

DISTINGUISHED BAR SERVICE NON-LAWYER AWARD

OUTSTANDING SECTION/COMMITTEE AWARD
Committee on Women and the Legal Profession: (l to r) Craig Orraj, Jocelyn Castillo, Katie Lockamy, Patricia Gallindo, Elizabeth Garcia.

OUTSTANDING PROGRAM AWARD
Chaves County Bar Association
Law Day Program

(Not Pictured)
Outstanding Contribution to People with Disabilities Award
Dennis M. Drucker

OUTSTANDING LOCAL BAR AWARD
San Juan County Bar Association
Doug Echols (Accepting)

QUALITY OF LIFE—LEGAL EMPLOYER AWARD
Peacock Myers, P.C.

ROBERT H. LAFOLLETTE PRO BONO AWARD
Matthew T. Byers

JUSTICE PAMELA B. MINZNER OUTSTANDING ADVOCACY FOR WOMEN AWARD
Ann F. Badway

OUTSTANDING LOCAL BAR AWARD
Peacock Myers, P.C.
### LEGAL EDUCATION

#### AUGUST

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<td>12</td>
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<td>Trusted Lawyer</td>
<td>Albuquerque</td>
<td>Likeable Lawyer</td>
<td>2.5 E, 1.0 P</td>
<td>(800) 524-2396</td>
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<td>19th Annual Appellate Practice Institute</td>
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G = General  E = Ethics  P = Professionalism  VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
## August

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## September

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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 August 11, 2008**

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</table>
| **Marte D. Lightstone**  
Modrall, Sperling, Roehl, Harris & Sisk, P.A.  
P.O. Box 2168  
500 Fourth St., NW,  
Ste. 1000 (87102)  
Albuquerque, NM 87103-2168  
505-848-1847  
505-848-1889 (telemcopier)  
mlichtstone@modrall.com |
| **Kathleen J. Love**  
MCML, P.A.  
201 Broadway, SE  
Albuquerque, NM 87102  
505-843-6161  
505-242-8227 (telemcopier)  
kathy@mcginnlaw.com |
| **Anna Nigel Marketto**  
6148 Balboa Court  
Rancho Cucamonga, CA  
91701  
575-496-4867 |
| **Bruce S. McDonald**  
The Law Offices of Bruce S. McDonald  
8018 Menaul Blvd., NE  
Albuquerque, NM 87110  
505-254-2854  
505-254-2853 (telemcopier) |
| **Patricia McDonald**  
2327 Black Mesa, SW  
Albuquerque, NM  87105  
505-873-0029 |
| **Randi McGinn**  
MCML, P.A.  
201 Broadway, SE  
Albuquerque, NM 87102  
505-843-6161  
505-242-8227 (telemcopier)  
randi@mcginnlaw.com |
| **Andrea Elicia Montoya**  
MCML, P.A.  
201 Broadway, SE  
Albuquerque, NM 87102  
505-843-6161  
505-242-8227 (telemcopier)  
elician@mcginnlaw.com |
| **Keri E. Paniagua**  
1948 Tanner Valley Circle  
Las Vegas, NV  89123 |
| **Mark Lee Pickering**  
The Law Offices of Bruce S. McDonald  
8018 Menaul Blvd., NE  
Albuquerque, NM 87110  
505-254-2854  
505-254-2853 (telemcopier) |
| **Salvador C. Ramirez**  
5959 Gateway West Blvd.,  
Ste. 439  
El Paso, TX  79925  
915-771-8525  
915-771-8741 (telemcopier)  
ramara525@yahoo.com |
| **Peter Ramiscal**  
3857 Peachgate Ave.  
Las Vegas, NV  89120  
702-451-5565  
pramiscal@hotmail.com |
| **Paul J. Rubino**  
5501 Superstition, No. 7  
Las Cruces, NM  88001-2522  
575-647-8433  
575-647-8458 (telemcopier)  
paulrubino@comcast.net |
| **Eric A. Samler**  
Samler & Whitson, P.C.  
1127 Auraria Parkway, #201B  
Denver, CO  80204  
303-670-0575  
303-670-0574 (telemcopier)  
esamler@colorado-appeals.com |
| **Elliott J. Schuchardt**  
Schuchardt Law Firm  
9710 Grove Lake Way, Ste. 302  
Knoxville, TN  37922  
505-688-7579  
e_schuchardt@yahoo.com |
| **Lucinda R. Silva**  
The Law Offices of Bruce S. McDonald  
8018 Menaul Blvd., NE  
Albuquerque, NM 87110  
505-254-2854  
505-254-2853 (telemcopier) |
| **Patricia L. Simpson**  
500 West Main St., Ste. 200  
Farmington, NM  87401  
505-325-0380  
505-325-4550 (telemcopier)  
patricia@simpsonlawoffice.com |
| **Mary L. Sinton**  
9124 Sabinal Dr., NW  
Albuquerque, NM  87114  
505-306-6973  
msinton1@comcast.net |
| **Jon K. Stanford**  
Office of the U.S. Attorney  
P.O. Box 607  
201 Third St., NW, Ste. 900  
Albuquerque, NM 87103-0607  
505-346-7274  
505-346-7296 (telemcopier)  
Jon.Stanford@usdoj.gov |
| **Kristin Potter Thal**  
Law Office of Marcus Garcia  
6700 C Jefferson St., NE,  
Ste. 1  
Albuquerque, NM 87109  
505-345-0806  
505-923-1961 (telemcopier)  
kthal@sandialaw.com |
| **Mary T. Torres**  
Beall & Biehler, P.A.  
6715 Academy Rd., NE  
Albuquerque, NM 87109  
505-828-3600  
505-828-3900 (telemcopier)  
mторres@beall-biehler.com |
| **Hon. Deborah Jacobson**  
Van Vleck  
Social Security Administration  
Office of Disability Adjudication  
4400 Westown Parkway,  
Bldg. 7, Ste. 300  
West Des Moines, IA  50266  
515-223-5038  
515-223-0371 (telemcopier)  
Deborah.Van.Vleck@ssa.gov |
ADVANCE OPINIONS
FROM THE NEW MEXICO SUPREME COURT AND COURT OF APPEALS

From the New Mexico Supreme Court

Opinion Number: 2008-NMSC-041

Topic Index:
Constitutional Law: Fourth Amendment; Suppression of Evidence; and Other: State Constitution
Criminal Law: Weapons Offenses
Criminal Procedure: Detention or Custody; Exigent Circumstances; Motion to Suppress; Probable Cause; Search Warrant; Search and Seizure; Warrantless Search; and Other: Search Incident to Arrest

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
versus
RICHARD ROWELL,
Defendant-Respondent.
No. 30,380 (filed: June 26, 2008)

ORIGINAL PROCEEDING ON CERTIORARI
PEGGY J. NELSON, District Judge

C. DAVID HENDERSON
DOWNING & HENDERSON, P.C.
Santa Fe, New Mexico
for Respondent

GARY K. KING
Attorney General
JAMES W. GRAYSON
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

OPINION

CHARLES W. DANIELS, JUSTICE

{1} In this case, we are called upon to determine whether either the search incident to arrest exception or the exigent circumstances exception to the New Mexico warrant requirement authorized a police officer to conduct an entry into an automobile on the grounds of a high school to seize a loaded shotgun and other weapons without first obtaining a search warrant. We hold that while the action could not be justified as a search incident to arrest, it was reasonable for the officer to take immediate action once he learned of the presence of the shotgun. In doing so, we reaffirm the constitutional principles set forth in State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1, that absent a valid exception to the warrant requirement, such as the combination of probable cause and exigent circumstances in this case, a warrant is required for a search of an automobile under Article II, Section 10 of the New Mexico Constitution.

I. BACKGROUND

{2} The suppression hearing before the district court was based on the stipulated facts contained in the written report of the arresting officer, Taos Police Department Officer E. Thomas. On May 11, 2005, during the lunch recess, Officer Thomas stopped Defendant Richard Rowell for speeding in the visitor’s parking lot of Taos High School. When Defendant leaned over to retrieve his papers from the glove box, the officer observed in plain view a clear plastic bag of marijuana protruding from Defendant’s left front shirt pocket. The officer reached into the car and seized the marijuana, removed Defendant from the car to place him under arrest, and handcuffed him. During a contemporaneous search incident to arrest, the officer found a marijuana pipe and a lighter in Defendant’s pockets. The officer asked Defendant if he had any guns, knives or other dangerous weapons. Defendant first denied having any weapons, but as he was being led to the patrol car in handcuffs he told the officer that there was a shotgun in the back seat of his car.

{3} Officer Thomas secured Defendant in his patrol car and then searched Defendant’s car to inventory its contents in anticipation of having it towed and impounded. He seized from the passenger compartment a loaded shotgun, a loaded revolver, a two-foot long wooden club, a straight-blade knife, nineteen shotgun shells, two box-cutter blades, and a package of Zig-Zag rolling papers. A multi-tool knife was seized from the trunk.

{4} Officer Thomas called for a back-up unit to assist with transporting Defendant to jail and for a tow truck to remove Defendant’s vehicle from the high school grounds. After the officer learned that no tow truck was available, he contacted Defendant’s mother and arranged for her to take custody of her son’s car.

{5} Defendant was indicted on four felony counts of possession of a deadly weapon on school premises, contrary to NMSA 1978, Section 30-7-2.1 (1994). See State v. Rowell, 2007-NMCA-075, ¶ 7, 141 N.M. 783, 161 P.3d 280. The additional misdemeanor charges for which he was also arrested, speeding in a school zone, possession of marijuana, possession of drug paraphernalia and driving on a suspended license, were not included in the felony indictment. Id. ¶ 7. Defendant moved to suppress all the drug and weapons evidence, arguing that it was unlawful for the officer to have seized any of it without a warrant. Id. ¶ 7.

The State conceded that the record did not establish the legal requirements for a pre-impoundment inventory search, but argued that both the exigent circumstances and the search incident to arrest exceptions justified all of the warrantless seizures. The district court suppressed the marijuana on the ground that it was unlawful for the officer to reach inside the car without a warrant and retrieve the bag of marijuana protruding in plain view from Defendant’s pocket. Id. ¶ 1. The court suppressed the weapons and all other evidence as fruits of the initial warrantless seizure of the marijuana. Id. ¶ 8.

{6} The State appealed the suppression order to the Court of Appeals. Id. ¶ 1. In a
holding not challenged before this Court by Defendant, the Court of Appeals concluded that the seizure of marijuana observed in plain view in the possession of a person who was in control of a vehicle and could drive away before a warrant could be obtained was lawful under the exigent circumstances exception to the warrant requirement. Id. ¶¶ 10-11. The seizure of the drug paraphernalia on Defendant’s person was upheld as the result of a lawful search incident to his arrest for marijuana possession. Id. The subsequent seizures of the weapons from the car were held to be constitutionally impermissible, although for different reasons than the fruit of the poisonous tree analysis used by the district court. Id. ¶ 12. The Court of Appeals concluded that the suppression hearing record failed to sustain the State’s burden of showing that the warrantless weapons seizures were justified by either the exigent circumstances exception or the search incident to arrest exception to the warrant requirement. Id. ¶ 16.

[7] We granted the State’s petition for writ of certiorari to review the constitutional reasonableness of the weapons seizures from the automobile. Defendant did not cross-petition for certiorari with regard to the initial seizure of the marijuana from his pocket, his resulting arrest for marijuana possession, nor the seizure of the paraphernalia during the search of his person incident to that arrest, and we start from the premise that those procedures were all lawful.

II. STANDARD OF REVIEW
[8] Appellate review of a district court’s ruling on a motion to suppress involves “a mixed question of fact and law.” State v. Vandenbarg, 2003-NMSC-030, ¶ 17, 134 N.M. 566, 81 P.3d 19. We review the contested facts in a manner most favorable to the prevailing party and defer to the factual findings of the district court if substantial evidence exists to support those findings. State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. In this case, the parties stipulated to the report of the arresting officer as the factual basis for the suppression ruling, so we need address only the purely legal question of the objective constitutional reasonableness of the officer’s actions, in light of the totality of the circumstances. See Vandenbarg, 2003-NMSC-030, ¶ 19. “Although our inquiry is necessarily fact-based it compels a careful balancing of constitutional values, which extends beyond fact-finding,” and is conducted by this Court through a de novo review. State v. Ryon, 2005-NMSC-005, ¶ 11, 137 N.M. 174, 108 P.3d 1032.

III. DISCUSSION
[9] The State advances two related but doctrinally distinct arguments to justify the warrantless weapons seizures from Defendant’s automobile: (1) that the seizures occurred during a search incident to Defendant’s custodial arrest for marijuana possession, and (2) that the seizures were justified by the exigent circumstances exception to the warrant requirement.

A. A Warrantless Search is Presumptively Unreasonable.
[10] Any warrantless search analysis must start with the bedrock principle of both federal and state constitutional jurisprudence that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable,” subject only to well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357 (1967). “Warrantless seizures are presumed to be unreasonable and the State bears the burden of proving reasonableness.” State v. Weidner, 2007-NMCA-063, ¶ 6, 141 N.M. 582, 158 P.3d 1025.

[11] Despite the constitutional preference for interposing a neutral judicial officer between the police and the citizen before a search may be conducted, our courts have historically recognized that it is not always reasonable to require a warrant and have developed a number of well-established exceptions to the warrant requirement, including the search incident to arrest and exigent circumstances exceptions relied on by the State in this case. See State v. Duffy, 1998-NMSC-014, ¶ 61, 126 N.M. 132, 967 P.2d 807.

[12] Because both the United States and the New Mexico Constitutions provide overlapping protections against unreasonable searches and seizures, we apply our interstitial approach set forth in Gomez, 1997-NMSC-006, ¶¶ 19-23. Gomez requires that we first consider whether the United States Constitution makes the challenged police procedures unlawful under the United States Constitution. Id. ¶ 19. If so, the fruits usually must be suppressed as evidence. If not, we next consider whether the New Mexico Constitution makes the search unlawful. Id.

B. The Seizures Were Not Justified by the Search Incident to Arrest Exception.
[13] One of the most firmly established exceptions to the warrant requirement is “the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested.” Weeks v. United States, 232 U.S. 383, 392 (1914). Warrantless searches incident to arrest have been considered reasonable because of the practical need to prevent the arrestee from destroying evidence or obtaining access to weapons or instruments of escape, without any requirement of specific probable cause to believe weapons or evidence are present in a particular situation. State v. Paul T., 1999-NMSC-037, ¶ 11, 128 N.M. 360, 993 P.2d 74.

[14] Until relatively recently, the federal search incident to arrest exception was construed in the same fashion as the New Mexico exception, as a rule of reasonable necessity to keep the arrestee from accessing any potential weapons or evidence. In Chimel v. California, 395 U.S. 752 (1969), the United States Supreme Court specifically recognized that the scope of a lawful search incident to arrest was defined and limited by its supporting justification. The search was therefore limited to “the area from which [the arrestee] might gain possession of a weapon or destructible evidence.” Id. at 763. This was consistent with the established principle that a warrantless search should “be strictly circumscribed by the exigencies which justify its initiation.” Terry v. Ohio, 392 U.S. 1, 26 (1968).

[15] In New York v. Belton, 453 U.S. 454 (1981), however, the United States Supreme Court strayed from the traditional case-by-case analysis of whether a search was within the area that could reasonably be considered within the access of the arrestee. Instead, the Court created for the Fourth Amendment a new permissive exception with respect to searches of an automobile incident to the arrest of an occupant. In Belton, the Court allowed the search of an automobile whenever an arrestee had been stopped in a car, even if he or she no longer had any access to it at the time of the search. Id. at 460.

[16] In Thornton v. United States, 541 U.S. 615 (2004), the Court extended Belton’s “bright-line” rule further by holding that even where the secured arrestee had not been in the car at any point during the encounter with the police, a warrantless search of a car incident to his arrest could be conducted if he had been a “recent occupant” at the time of his arrest. Id. at 617, 622.

[17] Under the current Belton-Thornton interpretation of the Fourth Amendment, the police officer in this case would not have violated the United States Constitution by
searching Rowell’s car automatically as a result of the marijuana arrest, even though the officer had no reason to believe that the handcuffed and secured defendant could have escaped from the patrol car and gained access to any weapons or other evidence in his own car. Pursuant to our interstitial procedure, we therefore turn to an analysis of the protections against unreasonable searches and seizures in Article II, Section 10 of the New Mexico Constitution. See Gomez, 1997-NMSC-006, ¶ 19.

[18] Despite the fact that the search incident to arrest exception is recognized by both the United States Supreme Court and this Court in enforcing our respective Constitutions, our courts are not in lock-step with each other in those interpretations. We are careful to consider the reasoning underlying federal constitutional interpretations when construing our own New Mexico Constitution, but we have declined to adopt federal constitutional analysis where we found it unpersuasive or flawed. See, e.g., id., ¶ 20; Campos v. State, 117 N.M. 155, 158, 870 P.2d 117, 120 (1994); State v. Gutierrez, 116 N.M. 431, 436, 446-47, 863 P.2d 1052, 1057, 1068-69 (1993); State v. Cordova, 109 N.M. 211, 216-17, 784 P.2d 30, 35-36 (1989).

[19] In Gomez, this Court rejected a related but analytically different federal bright-line rule that condones warrantless probable cause searches of automobiles at any time or place, even if there is no rational basis for believing that taking the time to apply for a search warrant would compromise any legitimate law enforcement or public safety interests. Gomez, 1997-NMSC-006, ¶¶ 34-35. This federal blanket rule purportedly was based on the traditional exigent circumstances warrant exception, but the United States Supreme Court created a broadened categorical exception that did not require any inquiry into the true exigencies of a situation, so long as (1) there was probable cause for the search, and (2) the search took place in an automobile. Id., ¶ 34. As discussed in more depth in II.C., infra, Gomez rejected the federal approach and reaffirmed the continued viability of the time-honored totality of the circumstances analysis in interpreting the reasonableness requirements for warrantless searches under our New Mexico Constitution. Id., ¶ 40.

[20] We reach a similar conclusion here, and we decline the invitation of the State to follow the federal line of cases represented by Belton and Thornton. The federal use of a search incident to arrest rationale to sanction a warrantless search that has nothing to do with its underlying justification—preventing the arrestee from gaining access to weapons or evidence—is an anomaly that has been criticized widely. See, e.g., State v. Pierce, 642 A.2d 947, 959 (N.J. 1994); People v. Blasich, 541 N.E.2d 40, 44-45 (N.Y. 1989); State v. Kirsch, 686 P.2d 446, 448 (Or. Ct. App. 1984); Commonwealth v. White, 669 A.2d 896, 902 (Pa. 1995).

[21] The Belton-Thornton approach has been described in the legal literature as both being devoid of a reasoned basis in constitutional doctrine and lacking in reasonable guidance to police officers and courts who must apply it. See, e.g., Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.1(c), at 527 (4th ed. 2004) (expressing concern that Belton creates a risk “that police will make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits”); Wayne R. LaFave, The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith,” 43 U. Pitt. L. Rev. 307, 325 (1982) (stating that “the Belton result does a disservice to the development of sound fourth amendment doctrine”); George Dery & Michael J. Hernandez, Turning a Government Search into a Permanent Power: Thornton v. United States and the “Progressive Distortion” of Search Incident to Arrest, 14 Wm. & Mary Bill Rts. J. 677, 696 (2005); Catherine Hancock, State Court Activism and Searches Incident to Arrest, 68 Va. L. Rev. 1085, 1131 (1982); Leslie A. Lunney, The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny, 79 Tul. L. Rev. 365, 369 (2004); David S. Rudstein, Belton Redux: Reevaluating Belton’s Per Se Rule Governing the Search of an Automobile Incident to an Arrest, 40 Wake Forest L. Rev. 1287, 1288 (2005).

[22] In Thornton itself, five justices expressed their dissatisfaction in separate opinions. “[L]ower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of Chimel . . . . That erosion is a direct consequence of Belton’s shaky foundation.” Thornton, 541 U.S. at 624 (O’Connor, J., concurring in part). “The Court’s effort to apply our current doctrine to this search stretches it beyond its breaking point, and for that reason I cannot join the Court’s opinion.” Id. at 625 (Scalia & Ginsburg, JJ., concurring in the judgment). “[T]he Court extends Belton’s reach without supplying any guidance for the future application of its sworn rule.” Id. at 636 (Stevens & Souter, JJ., dissenting).

[23] In New Mexico, we have tried to make sure that our State constitutional jurisprudence remains true to its doctrinal foundations. With respect to the permissible scope of searches incident to arrest, the Court of Appeals held in State v. Arredondo, 1997-NMCA-081, ¶ 29, 123 N.M. 628, 944 P.2d 276, overruled in part on other grounds by State v. Steinzig, 1999-NMCA-107, 127 N.M. 752, 987 P.2d 409, that a search of an automobile under the New Mexico Constitution could not reasonably be condoned unless the area searched was at that time within the range of the arrestee’s potential ability to access any weapons, evidence or means of escape. See also State v. Pittman, 2006-NMCA-006, ¶ 7, 139 N.M. 29, 127 P.3d 1116; State v. Gutierrez, 2004-NMCA-081, ¶¶ 11-12, 136 N.M. 18, 94 P.3d 18. We agree with those decisions of the Court of Appeals. They provide sufficient latitude in allowing searches incident to arrest where they can be justified on principle, while refusing to broaden exceptions to New Mexico’s constitutional warrant requirement beyond their own justifications. When lines need to be drawn in creating rules, they should be drawn thoughtfully along the logical contours of the rationales giving rise to the rules, and not as artificial lines drawn elsewhere that are unrelated to those rationales.

[24] Our search incident to arrest exception is a rule of reasonableness anchored in the specific circumstances facing an officer. Deciding whether there is a reasonable threat of a suspect being able to gain access to an area to get a weapon or evidence is the kind of decision officers are trained to make. In Arredondo, for example, the Court of Appeals concluded that an officer was justified in searching the passenger area of a stopped automobile, even though the driver was standing outside the car when the search took place, because the driver was in a position “to gain quick access to a weapon located on the front seat or adjacent floor area of his vehicle.” Arredondo, 1997-NMCA-081, ¶ 19; see also Gutierrez, 2004-NMCA-081, ¶ 11 (upholding a search of a car incident to arrest where a passenger was in a position to access the inside of the car at the time of the search). These kinds of evaluations, both by the officer on the scene and by a reviewing court later, are
much easier determinations than having to decide instead whether an arrestee was a sufficiently “recent” occupant of a car to justify a search, without the guidance of any principled standards for applying the “recency” concept.

[25] The Court of Appeals properly declined the State’s invitation to use the search incident to arrest exception to justify the search of Defendant’s car on the facts of this case. There simply was no reasonable basis for concluding that this handcuffed defendant locked inside a patrol car was in any position to escape and get to the contents of his own car to gain access to any weapons or evidence. If the warrantless search of the car is to be upheld under these facts, it will have to be justified by a sounder theory.1

C. The Seizures Were Justified by the Exigent Circumstances Exception.

[26] The State also relies on the exigent circumstances exception to the warrant requirement, which permits a search in circumstances where it would be unreasonable to insist upon the procurement of a warrant. This concept does not depend on the fact of an arrest. It is based instead on the combined presence of (1) probable cause to believe that lawfully seizable items are present, and (2) case-specific exigent circumstances that make it reasonable to conduct the search without first going to a judicial officer and obtaining a search warrant. See Gomez, 1997-NMSC-006, ¶ 42; State v. Gallegos, 2003-NMCA-079, ¶ 10, 133 N.M. 838, 70 P.3d 1277.

[27] Probable cause existed in this case as soon as Defendant admitted that he had a shotgun in his car on the grounds of a school. New Mexico law makes it a felony to bring any deadly weapon onto school premises. See § 30-7-2.1(A) (stating that the “[u]nlawful carrying of a deadly weapon on school premises consists of carrying a deadly weapon on school premises”); see also § 30-7-2.1(B)(2) (including as school premises “public buildings or grounds, including playing fields and parking areas that are not public school property, in or on which public school-related and sanctioned activities are being performed”). Because the officer had probable cause to search the car, the only question left to be decided is whether the officer had to forego a search of the automobile to retrieve the weapon until he first obtained a search warrant, or whether instead the exigent circumstances doctrine permitted an immediate warrantless search.

[28] In Gomez, this Court reaffirmed the continuing validity of the fact-based exigent circumstances exception for automobile searches while rejecting the federal approach of a blanket automobile exception to the warrant requirement. “Our purpose [in Gomez] was to keep intact the fact-specific nature of reasonableness determinations under search and seizure principles.” State v. Bomboy, 2008-NMSC-029, ¶ 6, ___ N.M. ___, 184 P.3d 1045. As with the search incident to arrest exception under our New Mexico Constitution, the application of the exigent circumstances doctrine is guided by its justifying rationale and applied through the lens of reasonableness.

[29] The federal and New Mexico Constitutions are not a guarantee against all searches and seizures, only unreasonable ones. See Gomez, 1997-NMSC-006, ¶ 36; United States v. Sharpe, 470 U.S. 675, 682 (1985). The facts in Gomez are illustrative. The officer in that case was dispatched to investigate a disturbance at a crowded nighttime party. Gomez, 1997-NMSC-006, ¶ 4. When he arrived, he witnessed the defendant attempting to conceal something in his car, and he detected the odor of marijuana. Id. ¶ 5. The officer therefore had probable cause to believe the car contained contraband. Id. ¶ 41. While it would have been permissible for the officer to arrest the defendant and leave the car unattended while he left to obtain a search warrant, this Court rejected the notion that the Constitution prohibited the officer from choosing to secure the evidence immediately, given the realistic danger that someone might remove the car or the drug evidence in the interim. Id. Gomez therefore affirmed the district court’s denial of the suppression motion and held that under the specific facts and circumstances, the officer reasonably determined exigent circumstances justified his warrantless search of the vehicle. Id. ¶ 46.

[30] The reasonableness inquiry looks at the particular facts of a situation to evaluate whether an objectively reasonable, well-trained officer could have determined that swift action was called for to prevent destruction of evidence, the escape of a suspect or undue risk to life or property. See id. ¶¶ 39, 40. The test, like so many others in both civil and criminal law, is one of objective reasonableness.

[31] Our approach protects both the legitimate constitutional protections of our citizens and our realistic needs for police protection. Where a warrant can be obtained without sacrificing legitimate law enforcement interests, it should be obtained. Conversely, where the circumstances make obtaining a warrant objectively unreasonable, an immediate warrantless search will be upheld. In Gomez itself, we emphasized that in refusing to “accept the federal bright-line automobile exception” to the warrant requirement, we still understood that “in most cases involving vehicles there will be exigent circumstances.” Id. ¶ 44. In our recent Bomboy decision, we rejected the notion that Gomez intended to place a constitutional strait-jacket on reasonable police behavior, and we specifically disapproved of decisions that tended to apply Gomez’s warrant requirement “too

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1To the extent that the opinion of the Court of Appeals in this case could be interpreted as suggesting that a warrantless search of a vehicle after a suspect is already under arrest requires a particularized belief that a suspect is armed and dangerous, it is incorrect. See Rowell, 2007-NMCA-075, ¶ 18 (“In order to justify the entry into a vehicle to seize a weapon from a vehicle when a suspect is already under arrest, there ‘must be a reasonable suspicion the suspect is both armed and dangerous.’” (quoting State v. Garcia, 2005-NMSC-017, ¶ 31, 138 N.M. 1, 116 P.3d 72)). In Garcia, this Court stated that New Mexico courts have permitted “police officers, while conducting an investigatory stop, to carry out a limited search of the car for weapons, if the officer has a reasonable belief the suspect may be armed and dangerous.” 2005-NMSC-017, ¶ 30 (emphasis added). An investigatory stop does not involve the procedures of taking a person into custody. When a full custodial arrest takes place, we do not require an officer to show particularized facts to support a belief that the suspect is either armed or dangerous. Given the exigencies always inherent in taking an arrestee into custody, a search incident to arrest is a reasonable preventative measure to eliminate any possibility of the arrestee’s accessing weapons or evidence, without any requirement of a showing that an actual threat exists in a particular case. See Pittman, 2006-NMCA-006, ¶¶ 7, 10; Arredondo, 1997-NMCA-081, ¶ 27.
broadly.” Bomboy, 2008-NMSC-029, ¶ 12.

{32} In Bomboy, we upheld the decision of a police officer to make a warrantless seizure of methamphetamine from inside a car after he observed it in plain view through the driver’s window during a traffic stop. Id. ¶ 2. Taking the defendant into custody would not have resolved the exigencies presented by the obvious drugs in the car. This Court recognized that if the officer had not secured the evidence promptly, it easily could have been tampered with or destroyed by others. Id. ¶ 13. We therefore reversed a decision of the Court of Appeals that had interpreted Gomez to require that the drugs be left in the car in plain view while the officer went to obtain a search warrant. Id. ¶ 2.

{33} We reach a similar result in the circumstances of the case before us. The officer was faced with a situation where he knew that a car he had just stopped on school premises during the lunch recess contained an extremely dangerous weapon. Bringing a shotgun or other deadly weapon onto school grounds poses such a high risk of danger that the Legislature specifically has made it a felony offense. See § 30-7-2.1. It was certainly not unreasonable for the Legislature to conclude that the presence of dangerous weapons on school property is an intolerable threat to the safety of students and teachers, and it was not objectively unreasonable for Officer Thomas to act immediately to remove the weapons from the car and the school grounds. Even without the dramatic examples of recent tragedies involving firearms on school campuses, the very real dangers of deadly weapons on school grounds are obvious.

{34} Defendant’s lack of personal access to the vehicle at the time of the search did not resolve all the exigencies of the continuing presence of the firearm. Just as the automobile and its contraband remained accessible to others in Gomez, the deadly contents of Defendant’s car remained accessible to students and others until the officer took prompt steps to secure the weapons.

{35} Once Officer Thomas knew that there was at least one firearm in the car, he was justified in searching every place inside where a weapon and its explosive ammunition might be located. He was not obligated to stop his search as soon as he found the first weapon. Finding an additional loaded firearm, other weapons and spare ammunition only served to enhance the good cause the officer had to continue his search of both the passenger compartment and the trunk to make sure he would secure the entire arsenal of weapons. None of the items observed and seized during that search should have been excluded from consideration as evidence on the basis of their having been found during a warrantless search of the car. We therefore reverse the contrary determinations of the district court and the Court of Appeals.

IV. CONCLUSION

{36} We hold that the weapons search of Defendant’s car on school grounds was reasonable under the exigent circumstances exception to the warrant requirement. To the extent that the opinion of the Court of Appeals affirmed the suppression of evidence ordered by the district court, we reverse and remand to the district court for further proceedings consistent with this Opinion.

{37} IT IS SO ORDERED.

CHARLES W. DANIELS,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
From the New Mexico Supreme Court

Opinion Number: 2008-NMSC-042

Topic Index:
Civil Procedure: Class Actions; Conflict of Laws; Forum-Selection Clause (New); and Venue
Jurisdiction: Choice of Law

JOAN FERRELL, MARIA C. CAPPUZZELLO,
ELIZABETH MARTINEZ, AND H. JAKE SALAZAR,
Plaintiffs-Petitioners,
versus
ALLSTATE INSURANCE COMPANY and
ALLSTATE INDEMNITY COMPANY,
Defendants-Respondents.
No. 30,165 (filed: June 6, 2008)

ORIGINAL PROCEEDING ON CERTIORARI
LOUIS P. MCDONALD, District Judge

DAVID ALAN FREEDMAN
JOSEPH GOLDBERG
ALEXANDRA FREEDMAN SMITH
MARTHA E. MULVANY
FREEDMAN, BOYD, HOLLANDER,
GOLDBERG & IVES, P.A.
Albuquerque, New Mexico

JOHN M. EAVES
KAREN S. MENDENHALL
EAVES & MENDENHALL, P.A.
Albuquerque, New Mexico

FLOYD D. WILSON
DENNIS M. MCCARY
MCCARY, WILSON & PRYOR
Albuquerque, New Mexico

ALAN KARL KONRAD
Albuquerque, New Mexico

ALAN R. WILSON
WILSON LAW FIRM, P.C.
Albuquerque, New Mexico

CHARLES R. PEIFER
ROBERT E. HANSON
PEIFER, HANSON & MULLINS, P.A.
Albuquerque, New Mexico

JOHN STOIA
LEN SIMON
TIM BLOOD
LERACH, COUGHLIN, STOIA, GELLER, RUDMAN & ROBBINS, L.L.P.
San Diego, California
for Petitioners

LISA MANN
JENNIFER A. NOYA
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Albuquerque, New Mexico

JEFFREY LENNARD
MARK L. HANOVER
SONNENSCHIEIN, NATH & ROSENTHAL, L.L.P.
Chicago, Illinois
for Respondents

ANN MALONEY CONWAY
DERON BRADLEY KNENER
MILLER STRATVERT, P.A.
Albuquerque, New Mexico
for Amicus Curiae

Property Casualty Insurers Association of America

GEORGE RUHLEN
MAYER, BROWN, ROWE & MAW, L.L.P.
Santa Fe, New Mexico
for Amici Curiae

American Council of Life Insurers

RUTH FUESS
MILLER STRATVERT, P.A.
Albuquerque, New Mexico
for Amici Curiae

Chamber of Commerce of the United States of America

RANDAL WILLIAM ROBERTS
SIMONE, ROBERTS & WEISS, P.A.
Albuquerque, New Mexico
for Amici Curiae

Offices of Insurance Regulation
when an insured chooses to pay the policy in premium; instead, the fees are imposed that the installment fees are not part of the total premium calculation. Allstate counters the premium in monthly installments in the are charged when an insured opts to pay for failing to include installment fees that Plaintiffs are Allstate insureds who contend state class in New Mexico for the purposes district court’s decision to certify a multi- The district court “retain[ed] jurisdiction to create tion about installment fees. The district in those states contained specific informa- in thirteen states, the insurance policies issued because, unlike the policies from the other plaintiffs from either Hawaii or Washington The district court declined to certify the The district court, in its Findings of Fact and Conclu- sions of Law, certified a class of thirteen states and found that there was no conflict among the laws of the thirteen states such that application of New Mexico law to the plaintiffs from those states was appropriate. The district court declined to certify the plaintiffs from either Hawaii or Washington because, unlike the policies from the other thirteen states, the insurance policies issued in those states contained specific information about installment fees. The district court “retain[ed] jurisdiction to create subclasses or otherwise alter or amend [the certification order] before a decision on the merits.” Allstate appealed the class certification to the Court of Appeals pursuant to Rule 1-023(F) NMRA, which permits the Court of Appeals to hear an appeal arising from an order granting or denying certification of a class. The Court of Appeals first reviewed the laws of the states connected to the dispute and determined that the laws of the thirteen states potentially conflicted with one another, due to unresolved ambiguities in each state’s law. Ferrell v. Allstate Ins. Co., 2007-NMCA-017, ¶ 29, 141 N.M. 72, 150 P.3d 1022. Based upon this conclusion, the Court determined it would be inappropriate to apply New Mexico law to the entire multi-state class. Id. ¶ 30. Having determined that New Mexico law could not apply to the entire class, the Court undertook a conflict-of-laws analysis and determined that the laws of the state where each insurance contract was entered into would separately apply to the plaintiffs from that state. Id. ¶¶ 31-47. In other words, if the multi-state class action were to proceed, the district court would have to apply the laws of each of the thirteen states connected to the dispute. Id. ¶ 47. Because the “need to apply the ambiguous laws of the other class states would render [the] case unmanageable and not superior as a matter of law,” id. ¶ 47, the Court of Appeals decertified the class with respect to all out-of-state class members, id. ¶ 54. The Court of Appeals affirmed the certification with respect to New Mexico class members only, and remanded the case to the district court to proceed as a single-state class action, subject to the district court’s discretion. Id. We granted certiorari to review significant, novel issues relevant to New Mexico class action jurisprudence that are implicated in the Court of Appeals opinion.

**DISCUSSION**

The district court’s certification was appropriate if the court properly considered the requirements of our class action rule, portions of which can only be satisfied in a multi-state class action by considering conflict-of-laws principles. We begin our discussion with an overview of our class action rule, which forms the backdrop of this appeal. We then discuss the Court of Appeals’ determination that the laws of the thirteen states connected to this dispute conflicted. In so doing, we consider as a vital threshold inquiry whether the class proponent has the burden of affirmatively disproving a hypothetical conflict between the laws of the relevant states, as the Court of Appeals held, or whether the party opposing certification has the burden of affirmatively proving that the laws of the relevant states actually conflict.

**Class Actions in General**

To put our discussion in context, we set out the relevant portions of our class action rule, Rule 1-023(A) and (B):

A. **Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. the class is so numerous that joinder of all members is impracticable;
2. there are questions of law or fact common to the class;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. the representative parties will fairly and adequately protect the interests of the class.

B. **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of Paragraph A of this rule are satisfied, and in addition:

1. the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
2. New Mexico’s current class action rule mirrors the federal rule upon which it is based. Compare Rule 1-023, with Fed. R. Civ. P. 23; see also Berry, 2004-NMCA-116, ¶ 27 (noting that Rule 1-023 is “[i]n

1Plaintiffs acknowledge that the underlying issue in this case may, in fact, be moot based on the Court of Appeals’ recent decision in Nakashima v. State Farm Mutual Automobile Insurance Co., 2007-NMCA-027, 141 N.M. 239, 153 P.3d 664, cert. denied, 2007-NMCERT-003, 141 N.M. 401, 156 P.3d 39. Despite the similarities between Nakashima and this appeal, Plaintiffs believe that their facts are distinguishable from Nakashima. Class certification, however, is not the appropriate time to decide the merits of a case. See Berry v. Fed. Kemper Life Assurance Co., 2004-NMCA-116, ¶ 51 n.2, 136 N.M. 454, 99 P.3d 1166. Because the validity of class certification is the only issue on appeal, we do not reach the question of mootness.
dental to its federal counterpart”). Thus, we may seek guidance from federal law applying the rule. Accord Romero v. Philip Morris Inc., 2005-NMCA-035, ¶ 35, 137 N.M. 229, 109 P.3d 768.

[8] The district court certifies a class in the first instance. Rule 1-023(C)(1) (“As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.”). The court “must engage in a rigorous analysis of whether the Rule’s requirements have actually been met.” Brooks v. Norwest Corp., 2004-NMCA-134, ¶ 9, 136 N.M. 599, 103 P.3d 39.

In deciding whether the requirements of Rule 1-023 have been met, a district court may look beyond the pleadings. See Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996). “This ‘probe behind the pleadings’ is necessary because the district court must understand the elements of the plaintiffs’ causes of action—and the likely defenses—in order to assess what kind of proof will be necessary to decide the issues.” Berry, 2004-NMCA-116, ¶ 50; accord Castano, 84 F.3d at 744. The district court may certify a class only for certain issues or may divide the class into subclasses. Rule 1-023(C)(4). Because, in this case, the district court’s decision to certify the class was appropriate only if the class met the requirements of Rule 1-023(A) and the requirements of at least one of the subdivisions of subsection B of Rule 1-023, we now turn to a discussion of those sections of our class action rule.

**Rule 1-023(A): Prerequisites to a Class Action**

[9] Rule 1-023(A) lists four prerequisites to certification of a class action:

1. the class is so numerous that joinder of all members is impracticable;
2. there are questions of law or fact common to the class;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. the representative parties will fairly and adequately protect the interests of the class.

These four requirements are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. See Berry, 2004-NMCA-116, ¶ 40; see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) (same). In this case, the district court concluded that the class met the four requirements of Rule 1-023(A). Neither party appealed this finding, and the Court of Appeals did not address it. Therefore, we assume, without deciding, that the four threshold requirements of Rule 1-023(A) were satisfied.

**Rule 1-023(B): Class Actions Maintainable**

[10] In addition to meeting all of the threshold requirements of Rule 1-023(A), a district court may only certify a class if the class meets the requirements of one of the categories contained in Rule 1-023(B). See 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 3:1, at 210 (4th ed. 2002). Of the three categories of Rule 1-023(B), only subsection (B)(3) is relevant to this appeal because it is the category that generally applies when class members seek monetary damages. See Rory Ryan, Comment, Uncertifiable?: The Current Status of Nationwide State-Law Class Actions, 54 Baylor L. Rev. 467, 472 (2002) (“As a practical matter, nationwide state-law class actions seeking damages invariably will be brought under Rule 23(b)(3).”). Rule 1-023(B)(3) provides that a class action is maintainable only if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”

“Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” 1 Conte & Newberg, supra, § 3:1, at 214 (quoting Rules Advisory Committee to 1966 Amendments to Rule 23); accord Berry, 2004-NMCA-116, ¶ 47.

[11] The requirements contained in subsection (B)(3) are commonly referred to as predominance and superiority. Our class action rule does not define predominance and superiority, but the rule contains several factors to consider when making a determination about whether predominance and superiority have been met. Those relevant factors include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
(d) the difficulties likely to be encountered in the management of a class action.

Rule 1-023(B)(3).

[12] Class actions involving plaintiffs from multiple states present particular challenges for district courts, and may “implicate the predominance and superiority requirements . . . because of the combination of individual legal and factual issues that need to be determined.” 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1780.1, at 202 (3d ed. 2005). If too many separate state laws must be applied, then the class proponent may have a difficult time persuading the district court that common questions of law predominate and that a class action is the superior method of litigation. See Castano, 84 F.3d at 741 (“In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.”). A determination that the district court will have to apply the laws of multiple states also impacts the court’s ability to manage the proposed class. See Rule 1-023(B)(3)(d); Berry, 2004-NMCA-116, ¶ 51 (“[I]f the forum state decides to apply the law of other states, the court must consider the difficulty of managing the trial of sub-classes to the same jury.”); 7AA Wright et al., supra, § 1780.1, at 211 (“[C]ourts also have found that the class device is not a superior method to adjudicate the claims [of a multi-state class] because differences in state law make the action unmanageable.”).

[13] A decision to apply the laws of several states does not, however, necessarily foreclose class certification. A court may be able to manage a class through the use of subclasses or by grouping certain issues together that can be resolved by applying one state’s law. See In re Sch. Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986) (affirming class certification under Rule 23(b)(3) because, even though “manageability [was] a serious concern . . . [m]anageability is a practical problem, one with which the district court generally has a greater degree of expertise and familiarity than does an appellate court”).

[14] Thus, a certifying court must first determine which law will apply to the class so that it can then assess the predominance and superiority of the proposed class action. See Wash. Mut. Bank, FA v. Super. Ct., 15 P.3d 1071, 1077 (Cal. 2001) (“Discerning the applicable law is an important task in
false conflict” actually has two different meanings. The first meaning of “false conflict” arises from the choice-of-law method advanced by Professor Brainerd Currie, “the governmental contacts, creating state interests, such that the states connected to the dispute actually conflict, and if the laws of the relevant states do not actually conflict, the court may avoid a conflict-of-law analysis and may apply forum law to the entire class. Under this analysis, when the laws of the relevant states do not actually conflict, the court may avoid a conflict-of-law analysis and may apply forum law to the entire class. See Phillips, 472 U.S. at 816 (“We must first determine whether [forum] law conflicts in any material way with any other law which could apply. There can be no injury in applying [forum] law if it is not in conflict with that of any other jurisdiction connected to this suit.”). If, however, the laws of the relevant states actually conflict, or if the laws of certain of the relevant states conflict, then the forum court must resolve that conflict using the choice-of-law rules contained in the forum state’s conflict-of-laws doctrine. See Ferrell, 2007-NMCA-017, ¶ 40.

17 A district court’s conclusion that the laws of the various states do not actually conflict is particularly important in multistate class actions. If the law of a single state can be applied to the entire class, it is more likely that the class will meet the predominance and superiority requirements of our class action rule. The converse is true as well. If the laws of the states connected to the dispute actually conflict, and if the court’s choice-of-law analysis provides that the laws of several states must apply to the class, then it is less likely that the class will meet the certification requirements.

When can the laws of the interested states be said to actually conflict such that application of forum law is inappropriate?

18 In the instant appeal, the Court of Appeals concluded that a district court may only apply forum law to class members from other states if the laws of the states connected to the dispute “are identical, or different, but produce identical results.” Ferrell, 2007-NMCA-017, ¶ 9 (emphasis added) (quoting Scoles et al., supra, § 2.9, at 28 n.16). While acknowledging the apparent similarities among the states’ laws, the Court of Appeals was nevertheless troubled because “[n]one of the class states [had] appellate court opinions interpreting the statutory definition of premium or otherwise deciding whether fees constitute premium in the context of a breach of contract issue.” Id. Despite the lack of evidence that the difference in state law would actually influence the outcome of a trial on the merits, the Court of Appeals concluded that where the laws of the relevant states “could produce different results,” id. ¶ 21 (emphasis added), it would be inappropriate to apply New Mexico law to the entire class, id. ¶ 30.

19 The Court limited its analysis to a comparison of the statutory definition of premium. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985) (“There can be no injury in applying [forum] law if it is not in conflict with that of any other jurisdiction connected to this suit.”). Alternatively, a forum’s choice to apply its own law is constitutional even if the laws of the states connected to the dispute actually conflict, and if the states connected to the dispute actually conflict, such that choice of its law is neither arbitrary nor fundamentally unfair.” Id. at 818 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)). The parties to this appeal have focused their arguments on whether the Court of Appeals correctly found an actual conflict between New Mexico law and the laws of the other twelve states. We will concentrate our analysis in a similar fashion.

Conflict-of-Laws

16 The Court of Appeals in this case adopted the “false conflict” doctrine as the initial step that a district court must undertake when making the determination about what law applies to the claims of a multistate class. See Phillips, 472 U.S. at 816 (“We must first determine whether [forum] law conflicts in any material way with any other law which could apply. There can be no injury in applying [forum] law if it is not in conflict with that of any other jurisdiction connected to this suit.”). If, however, the laws of the relevant states actually conflict, or if the laws of certain of the relevant states conflict, then the forum court must resolve that conflict using the choice-of-law rules contained in the forum state’s conflict-of-laws doctrine. See Ferrell, 2007-NMCA-017, ¶ 40.

15 In this case, the district court’s decision to certify the class was proper if the district court correctly determined that New Mexico law applied to the entire class. A district court’s choice to apply forum law is appropriate if (1) the choice to apply forum law is constitutional or (2) an application of the forum’s choice-of-law rules leads to the selection of forum law. A forum’s choice to apply its own law is constitutional if the law of the forum does not actually conflict with the law of any other jurisdiction connected to the dispute. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985) (“There can be no injury in applying [forum] law if it is not in conflict with that of any other jurisdiction connected to this suit.”). Additionally, a forum’s choice to apply its own law is constitutional, even if the laws of the states connected to the dispute actually conflict, if the forum state has “‘a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.’” Id. at 818 (quoting Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986) (quoting In re Sch. Asbestos Litig., 789 F.2d at 1010). If the defendant wishes to contest the plaintiff’s characterization of the laws of the relevant states, the defendant must “inform the district court of any errors they perceive.” Berry, 2004-NMCA-116, ¶ 80. If the defendant fails to bring any “clearly established” contradictory law” to the court’s attention, the district court cannot be faulted if it concludes that the laws of the jurisdictions connected to the dispute do not conflict such that a single state’s law may be applied to the entire class. Id. (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 730-31 (1988)).

2We use the term “actual conflict” throughout this Opinion, rather than the term “false conflict” used by the Court of Appeals, because “false conflict” actually has two different meanings. See Robert A. Leflar et al., American Conflicts Law, § 92, at 270 (4th ed. 1986). The first meaning of “false conflict” arises from the choice-of-law method advanced by Professor Brainerd Currie, “the governmental interest” analysis. Id. at 270-71. Under Currie’s method, a false conflict arises when “only one of the involved states would be interested in applying its law.” Eugene F. Scoles et al., Conflict of Laws § 2.9, at 28 (4th ed. 2004). The second meaning of the term “false conflict” is “no conflict of laws.” Leflar et al., supra, § 92, at 272. The analysis undertaken by the Court of Appeals is consistent with the “no conflict of laws” approach, rather than the governmental interest analysis approach. To avoid any confusion, we use the term “actual conflict” throughout this Opinion when referring to the “no conflict of laws” approach.
substantially higher burden for certification of multi-state class actions" when it held that a New Mexico court may only apply New Mexico law to class members from other states when the law of the other states can be shown to produce identical results. Rather than requiring identical results, Plaintiffs argue that they need only demonstrate that the laws of the states connected to the dispute are substantially similar. Importantly, a New Mexico court need not wait for an appellate decision construing the particular statute in question. Rather, the forum court should only consider the laws of the relevant states in their current form; it should not be required to speculate on the form those laws may take in the future. Finally, Plaintiffs argue that, even where the law is uncertain, a district court may nevertheless apply New Mexico law under certain circumstances.

{21} The question before us, then, is whether an actual conflict exists when the laws of the other states could hypothetically produce different results or whether an actual conflict requires a showing of something more. In answering that question, we examine whether the uncertainty created by the lack of appellate precedent necessarily creates an actual conflict. We also consider who must demonstrate the existence of an actual conflict and who carries the burden of failing to prove that an actual conflict exists.

{22} We begin our discussion with Phillips and Sun Oil, two U.S. Supreme Court cases relied upon by Plaintiffs in this appeal, before turning our attention to Plaintiffs' arguments premised on Berry, a case similar to Ferrell, involving appellate review of a district court's decision to certify a multi-state class. In Phillips, the U.S. Supreme Court reviewed the constitutionality of the Kansas court's decision to apply principles of Kansas law to the claims of a multi-state class. 472 U.S. at 815-23. As discussed above, the Court held that a court may apply forum law when that law does not "conflict[] in any material way with any other law which could apply." Id. at 816 (emphasis added). Alternatively, the forum court may apply its own state law, even if forum law conflicts with the laws of the other states connected to the dispute, as long as the forum has "a significant contact or aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Id. at 818 (quoting Allstate Ins. Co. v. Garfinkel, 449 U.S. at 312-13). "Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." Id. at 822. Having so concluded, the Supreme Court reversed the Kansas court's decision to apply Kansas law and remanded the case for the Kansas court to apply the laws of the other states connected to the dispute. Id. at 823; see also Sun Oil, 486 U.S. at 721 ("We reversed that part of [Phillips] which held that Kansas could apply its substantive law to claims by residents of other States concerning properties located in those States, and remanded that case to the Kansas Supreme Court for application of the governing law of the other States to those claims.").

{23} In Sun Oil, the U.S. Supreme Court had the opportunity to review how the Kansas court complied with the constitutional mandates set forth in Phillips. Sun Oil, 486 U.S. at 730-34. The Kansas court in Sun Oil again chose to apply principles of Kansas law to the entire class to determine the prejudgment interest rate with respect to the plaintiffs' claim for royalties. See Sun Oil, 486 U.S. at 722 (stating that the U.S. Supreme Court was reviewing the Kansas court's "decision that the other States' pertinent substantive legal rules were consistent with those of Kansas"); see also Wortman v. Sun Oil Co., 755 P.2d 488, 490 (Kan. 1987) (district court reviewed the laws of the other states connected to the dispute and concluded that "[i]t was not a conflict of the laws of Kansas with the laws of those other states which was involved in this case"); Phillips, 486 U.S. at 730. The Court noted that, as an initial step, "courts dealing with multistate class actions must consider and evaluate how the laws of the various states apply to the class claims." Phillips, 486 U.S. at 721 (quoting district court's holding)). On appeal, to the U.S. Supreme Court, the defendant-oil company argued that the Kansas trial court had "unconstitutionally distorted" the laws of the other states when it concluded that the laws of those states did not materially conflict with the law of Kansas. Sun Oil, 486 U.S. at 730.

{24} The U.S. Supreme Court acknowledged that the statutes of the relevant states were facially different, yet upheld the Kansas court's decision to apply Kansas law to determine the prejudgment interest rate for the entire class. Id. at 731-34. The oil company had failed to present the court with any clearly established case law demonstrating that, under similar circumstances, the other states would apply their state's statutory rate, rather than the rate chosen by the Kansas court. Id. The U.S. Supreme Court held that the Kansas court's interpretation of unsettled law was valid, even though the highest court of a sister state had yet to rule on the issue. See id. at 731 n.4 (relying on a previous opinion where the Court had stated that "[t]here was neither a reasonable nor a possible example to support a state competing result in Louisiana that the question of an agreement of the parties")...to decide the question according to their independent judgment" (quoted authority omitted); see also Berry, 2004-NMCA-116, ¶ 78 (relying on Phillips and Sun Oil for the proposition that "the forum court [is] not required to try to match or judge the result of the case as if it were being decided in the other state"). Additionally, the Supreme Court noted that simply because a forum court must interpret the laws of a sister state does not necessarily mean that the forum court is foreclosed from applying forum law, if the court interprets that law to be similar to the forum law. See Sun Oil, 486 U.S. at 732-33 (noting that the Kansas court was called upon to interpret a Texas appellate court decision and, in so doing, distinguished that case from the case at bar based on the "eminently reasonable ground" that the disputes did not involve the same legal claim).

{25} We now turn to a discussion of Berry, which Plaintiffs cite as additional support for their position that they only need to demonstrate that the laws of the relevant states are substantially similar. In Berry, the district court certified a nationwide class seeking damages against a life insurance company based on breach of contract and breach of the duty of good faith. 2004-NMCA-116, ¶ 1. In its conflict-of-laws analysis, the Berry court relied on Phillips and Sun Oil as a framework for determining whether the district court appropriately considered the differences between the laws of the various states when it decided to apply New Mexico law to the claims of the entire multi-state class. Berry, 2004-NMCA-116, ¶¶ 76-78, 82. From those cases, the Berry Court distilled several overarching principles that a court should consider when making a determination about whether a conflict exists.

{26} The Court noted that, as an initial step, "courts dealing with multistate class actions must consider and evaluate how the laws of other states apply to the class claims." Id. ¶ 78. While "[t]he forum court cannot simply assume that its law will govern[,] . . . the forum court [is not] required to try to match or divine the result of the case as if it were being decided in the other states. The forum court is only bound by 'clearly established' law brought to its attention." Id. (quoted authority omitted).
After setting forth these general principles, the Court then utilized them to analyze the plaintiffs’ claims arising under both breach of contract, id. ¶¶ 82-88, and breach of good faith and fair dealing, id. ¶¶ 89-94.  

[27] With respect to the breach of contract claim, the Berry court focused on the significance of the demonstrated conflicts, not on potential conflicts. Rather than requiring an affirmative showing that the laws would produce identical results, the court noted that “the law in this area was uniform enough,” there was “no significant variation in the cases from the standard approach to interpretation of insurance contracts,” id. ¶ 82 (emphasis added), and there were “no fatal contradictions of law,” id. ¶ 87 (emphasis added). Significantly, the Berry court rejected the defendant’s argument that it would be improper to apply New Mexico law to the entire class because a determination of “whether the policy would be deemed ambiguous ‘could’ vary from state to state.” Id. ¶ 88.  

[28] The Berry court rejected this argument for two reasons, which we find persuasive. Id. First, the court noted that the district court had yet to decide that an ambiguity existed. Id. Second, the court stated that it saw “no significant variation among the states concerning how [the] decision [about ambiguity] is made.” Id. Thus, the court rejected the defendant’s argument—that the laws could potentially produce different results—because “there is no need to forecast how the inquiry would actually be resolved in any other court because the case is here, and the decision is to be made here in accordance with reasonably uniform rules.” Id. Because the laws of the relevant states were sufficiently uniform to allow the application of New Mexico law, the Court affirmed the district court’s certification decision with respect to the breach of contract claim. Id. ¶ 102.  

[29] The Berry court’s discussion of the breach of good faith and fair dealing claim is illustrative of the level of proof required by a defendant to establish that an actual conflict exists. See id. ¶¶ 89-94. In its analysis, the court relied on actual variations among the laws of certain states in making the determination that the laws of the various states were not sufficiently uniform to apply New Mexico law. Id. ¶¶ 90-94. Significantly, the defendant cited established cases from the class states with holdings that were contrary to New Mexico law. Id. Because the laws of the states were not sufficiently uniform, the court decertified the class with respect to the breach of good faith and fair dealing claim. Id. ¶ 94.  

[30] Having reviewed both Ferrell and Berry, it is clear that the two New Mexico Court of Appeals’ opinions set forth conflicting standards for what constitutes an actual conflict. Plaintiffs argue that Berry and Sun Oil set forth rules that a court should follow when determining whether the laws of the states connected to the dispute can be said to conflict. The Ferrell court disagreed and did not rely on Sun Oil for what constitutes an actual conflict, because that court concluded that Sun Oil “does not say anything about when the laws of two jurisdictions can be said to ‘conflict.’” Ferrell, 2007-NMCA-017, ¶ 37.  

[31] Because the court was not persuaded that Sun Oil applied, the Court of Appeals turned to two non-class action cases from other jurisdictions for guidance. Ferrell, 2007-NMCA-017, ¶¶ 24-26. In both Fioretti v. Massachusetts General Life Insurance Co., 53 F.3d 1228 (11th Cir. 1995) and Dugan v. Mobile Medical Testing Services, Inc., 830 A.2d 752 (Conn. 2003), the appellate courts criticized the district court’s determination that the laws of the relevant states did not actually conflict for many of the reasons voiced by our Court of Appeals in this case: “[W]ithout any . . . precedent it is, quite simply, impossible to say with certainty what the law of these states actually is, not to mention whether these states’ laws are identical.” Ferrell, 2007-NMCA-017, ¶ 28 (quoting Fioretti, 53 F.3d at 1235) (second alteration in original); see also Fioretti, 53 F.3d at 1234-35 (concerned by lack of appellate precedent); Dugan, 830 A.2d at 758 (same).  

[32] Despite the procedural similarities with the instant appeal, we do not find these opinions particularly helpful. First, the facts of Ferrell and Dugan are distinguishable from Fioretti and Dugan because in those two cases there was no binding authority, whereas in the instant appeal a majority of the relevant states have statutes defining premium, some of which are identical to the New Mexico statutory definition, while others vary only slightly. See Ferrell, 2007-NMCA-017, ¶ 19 (concluding that the statutes were, in fact, “superficially identical”), ¶ 28 (acknowledging that the facts of Fioretti and Dugan differ from the facts of the instant appeal).  

[33] Further, a fair reading of Berry suggests that the Court considered, and resolved, the issue of what a New Mexico court should do when faced with unsettled or unclear law in a manner different from Fioretti and Dugan. In Berry, our Court of Appeals rejected the defendant’s argument that was premised on the possibility that the laws of the other states “could” conflict with New Mexico law, which was the same argument set forth in Fioretti and Dugan. Rather than concluding that the possibility of a potential conflict could defeat the application of forum law, the court indicated that only proof of an actual conflict will preclude a district court from making a determination that it may apply forum law. Berry, 2004-NMCA-116, ¶ 78 (“The forum court is only bound by clearly established law brought to its attention.” (quoted authority omitted)).  

[34] Finally, with respect to the level of proof required to defeat a court’s decision to apply one state’s law over another, the Connecticut Supreme Court’s rationale in Dugan comports with the rationale in Berry. The Connecticut court rejected the plaintiff’s contention that Connecticut law should apply, in part because the plaintiff had not adequately argued that New York law should apply to the dispute rather than Connecticut law. Dugan, 830 A.2d at 758 (noting that the plaintiff did not “adequate[ly] challenge . . . the trial court’s decision . . . to apply New York law”). This conclusion by the Dugan court is consistent with the Berry court’s determination that New Mexico law could apply to the claims of the entire class arising under a breach of contract theory because the defendant had not adequately demonstrated that the other states’ law should apply. See Berry, 2004-NMCA-116, ¶¶ 82-88 (addressing and rejecting the defendant’s arguments that the laws of the relevant states conflicted). Having considered the two cases relied on by the Court of Appeals, we conclude that Berry better sets forth the framework for analyzing an alleged conflict between New Mexico law and the laws of the other class members’ states.  

[35] In addition to reading Sun Oil differently, Berry and Ferrell diverge on the issue of who bears the risk of ambiguity in the law. Both opinions appropriately place the initial burden of persuasion on the class proponent by requiring the plaintiffs to persuade the district court that there are no significant variations among the laws of the states connected to the dispute. However, the opinions apportion the risk of ambiguity differently. The Berry court places the risk of ambiguity on the party opposing certification by requiring that party to demonstrate that the laws of the various states actually conflict. The Ferrell court, on the other hand, places the risk of ambiguity on the party seeking certification by requiring that party to disprove all hypothetical
conflicts before a court can conclude that forum law applies.

{36} By placing the risk of ambiguity on the party seeking certification, the Court of Appeals’ opinion in Ferrell can be read as holding that the party seeking certification cannot meet its burden if the laws of the other states are unclear or unsettled, despite significant facial similarities between the statutes at issue. Such a holding places an intolerable burden on the party seeking certification. Multi-state class actions might never be possible if courts must await final appellate court decisions in each state resolving all hypothetical conflicts.

{37} We agree with Plaintiffs that Berry sets forth the preferable analysis. The party opposing certification must establish that the laws of the relevant states actually conflict. Sun Oil, 486 U.S. at 731-34. If the class proponents have met their burden and the party opposing certification fails to show that the laws of the relevant states actually conflict through clearly established, plainly contradictory law, then the district court cannot be faulted if it concludes that there is no material conflict between the laws of the relevant states. See Berry, 2005-NMSC-116, ¶ 80.

{38} The Berry court’s approach is consistent with the principles underlying our class action rule—judicial economy and fairness to the parties. See Brooks, 2004-NMCA-134, ¶ 9 (“The core policy behind the Rule is to provide a forum for plaintiffs with small claims who otherwise would be without any practical remedy. At the same time, the district court must ensure that a class action is not only efficient, but that it is a fair method to all parties, including absent class members and defendants.”) (citation omitted). This approach, while not necessarily favoring certification in all situations, does not act as an undue impediment to certification. Similarly, it ensures that the class certification is fair to all parties. Defendants cannot complain about the application of forum law if they have not presented law from another state to the contrary demonstrating a real, irreconcilable, and material conflict. Further, the plaintiffs will not face the unduly burdensome task of having to disprove all hypothetical conflicts.

Was an actual conflict proven such that it was inappropriate for the district court to determine that New Mexico law could apply to the entire class?

{39} With these general principles in mind, we now review whether the district court’s decision to apply New Mexico law to the entire class was appropriate. We re-

view a district court’s decision to certify a class under an abuse of discretion standard. Berry, 2004-NMCA-116, ¶ 25. “An abuse of discretion standard appropriately recognizes the practical, fact-bound, and case-specific nature of the class certification process. The judge who will handle the case is best able to craft the most efficient, manageable, and just means of providing all parties a reasonable forum and remedy.” Id. ¶ 26. Under an abuse of discretion standard, we will reverse the district court’s ruling only if “the court’s ruling exceeds the bounds of all reason . . . or [if] the judicial action taken is arbitrary, fanciful, or unreasonable.” Meiboom v. Watson, 2000-NMSC-004, ¶ 29, 128 N.M. 536, 994 P.2d 1154 (quoted authority omitted) (omission in original). The district court’s interpretation of Rule 1-023, as well as the district court’s choice-of-law analysis, are matters of law, which we review de novo.

{40} In this case, the district court found that the class met the requirements of Rule 1-023(B). The district court made its determination based on its understanding of the various states’ laws as presented by the parties. Plaintiffs presented the court with surveys detailing the laws from various states involved in an attempt to meet their burden of showing that the predominance and superiority requirements of Rule 1-023 were met. These surveys consisted of: (1) excerpts from the relevant statutory provisions, (2) statutory definitions of “premium,” and (3) case citations for various legal propositions relating to breach of contract. Allstate submitted a memorandum in opposition, which included a discussion regarding variations among the states’ laws. In its memorandum, Allstate specifically argued that the relevant states differed with respect to certain affirmative defenses as well as contract interpretation, including the use of extrinsic evidence to resolve an ambiguity in the contract. Allstate also argued that the definition of premium varied from state-to-state.

{41} Appropriately, the district court held a multi-day certification hearing. During the hearing, Plaintiffs again argued that the laws of the relevant states did not materially conflict. Allstate countered that significant conflicts existed among the laws of the various states and presented demonstrative exhibits for the court to review during the certification hearing. These demonstrative exhibits, however, are not part of the record because they were not entered into evidence.

{42} Plaintiffs suggested that the variations among the laws of the states con-

nected to the dispute were either irrelevant or did not rise to the level of constitutional significance. For example, in its briefing, Allstate contended that the states differed with respect to authorizing or implying a private right of action for violations of the state insurance code. Plaintiffs countered that they were not seeking a private right of action under any state insurance code, but rather were suing under a common-law theory of breach of contract. Further, Plaintiffs noted that many of the conflicts discussed by Allstate arose in states other than those implicated in the proposed class. More to the point, Plaintiffs insisted that the definition of premium did not vary materially from state to state, and this went to the heart of Plaintiffs’ class-wide claims for breach of contract. Additionally, Plaintiffs noted that the affirmative defenses that Allstate argued defeated class certification were simply “hypothetical.”

{43} After the hearing, the district court concluded that “a class action is a superior method of litigation instead of individual lawsuits in each member’s respective state.” The court also concluded that the case was manageable because “there [was] no debilitating conflict of law among the thirteen (13) states on the issues of contract interpretation, right to jury trial, and the definition and specification of insurance policy premiums, the issues to be adjudicated under the breach of contract claim.” (Emphasis added.) Significantly, the district court excluded the plaintiffs from Hawaii and Washington, which demonstrates that the court considered the differences between the policies, and the breach of contract claims premised on those policies, in the relevant states.

{44} And, while Allstate argues that certain states may take a different approach with respect to the “four corners” rule for resolving an ambiguity in the contract, the district court’s decision about whether an ambiguity exists would again be made using relatively uniform rules. If the district court determines that an ambiguity exists in some contracts, and that the states where those contracts were entered into vary significantly in their approach to the “four corners” doctrine, the district court may revisit its certification decision. Until that time, “there is no need to forecast how the inquiry would actually be resolved in any other court because the case is here, and the decision is to be made here in accordance with reasonably uniform rules.” Berry, 2004-NMCA-116, ¶ 88.

{45} Thus, Plaintiffs met their burden of
showing that the laws of the class states were similar enough to support certification. The statutes at issue do not present “fatal contradictions of law.” *Berry*, 2004-NMCA-116, ¶ 87. And while Allstate presented evidence of some differences between the laws of the class states, the district court was not persuaded that the differences rose to the level of constitutional significance. In a case such as this one, where the statutes of the other states have yet to be definitively construed by a state appellate court, any conflict will likely be hypothetical. A hypothetical conflict should not preclude the district court from deciding, on balance, that forum law may be applied to the entire class. Instead, under *Berry* and *Sun Oil*, the party opposing class certification must provide the district court with evidence that an actual conflict exists before a court will be faulted for concluding that forum law may apply to the entire class. In this case, the Court of Appeals implicitly acknowledged that Allstate had not met this burden when it stated “that if a New Mexico court were to apply New Mexico’s statutory definition of premium to plaintiffs from other states, doing so would not run afoul of [*Sun Oil*].” The court would not be ruling in contravention of the clearly established laws of other jurisdictions because “there is no clearly established law from any of the jurisdictions on the issue of whether fees constitute premium.” *Ferrell*, 2007-NMCA-017, ¶ 39.

{46} Thus, we conclude that the district court’s decision to apply New Mexico law, in the absence of a demonstrated, material conflict, was proper. Because the district court’s decision to apply New Mexico law to the entire class was appropriate, we conclude that the court did not abuse its discretion when it certified the class, and we remand to the district court for further proceedings consistent with this Opinion.

{47} On remand the district court retains jurisdiction over the class and may revisit its certification decision. See Rule 1-023(C)(1). Thus, the court may need to consider changes in the laws of the class states that may have occurred while this appeal has been pending to ensure that class certification is still appropriate. See *Ferrell*, 2007-NMCA-017, ¶ 52 (“If the court has second thoughts on any issue, it can reconsider and either decertify or modify certification if the manageability of damages adjudication or distribution proves to be an intolerable burden on the judicial system or otherwise proves to create a situation that is less fair and efficient than other available techniques.”) (quoting *Romero*, 2005-NMCA-035, ¶ 98)).

**Continued Viability of the Restatement (First) of Conflict of Laws for Multi-State Class Action Lawsuits**

{48} After determining that an actual conflict existed in this case, the Court of Appeals correctly relied on the Restatement (First) of Conflict of Laws and the place of contracting rule contained within the Restatement (First) to determine what law ought apply to the class members from states other than New Mexico. See *Ferrell*, 2007-NMCA-017, ¶¶ 30, 31; Restatement (First) of Conflict of Laws § 311, at 395 (1934). However, we note that the Court of Appeals’ adoption of the actual conflict doctrine represents a divergence from the analysis traditionally undertaken under the Restatement (First) because, as discussed below, the Restatement (First) does not contemplate a comparison of the laws of the states involved.

{49} Despite being contrary to a traditional choice-of-law analysis, the Court’s decision to adopt the actual conflict doctrine is consistent with the procedures required by our class action rule. As discussed above, a district court must undertake an analysis of the laws of the relevant states to ensure that the predominance and superiority requirements of the class action rule are met. If a court finds that the laws of the relevant states are similar enough to meet the predominance requirement, but then has to apply the laws of the state where the insured entered into the contract, the district court’s analysis regarding predominance would have been in vain. Thus, a strict adherence to the traditional principles espoused by the Restatement (First) may render multi-state class actions a virtual nullity. Because we reverse the Court of Appeals’ determination that an actual conflict exists in this case, we could stop at this point. However, because the doctrine we currently follow may no longer be appropriate for multi-state class action litigation, we resolve this potential problem in this Opinion for the benefit of our class action jurisprudence.

{50} New Mexico has traditionally followed the Restatement (First). *See United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 469, 775 P.2d 233, 235 (1989). The Restatement (First) consists of rules for each substantive area of the law, which are based on a particular pre-determined contact. Thus, under the Restatement (First), a court does not choose between competing laws, but simply chooses between competing jurisdictions. *See Scoles et al., supra*, § 2.7, at 21. If a party argues that the laws of the state where the right vested conflict with a fundamental public policy of New Mexico, a New Mexico court may refuse to apply that state’s law. *See United Wholesale Liquor Co.*, 108 N.M. at 470, 775 P.2d at 236.

{51} As the Court of Appeals correctly noted, if an actual conflict exists, a court presiding over a multi-state class action lawsuit in a Restatement (First) jurisdiction must make an initial determination of which state or states’ law applies to the controversy, based upon the traditional principles of the Restatement (First). See *Ferrell*, 2007-NMCA-017, ¶¶ 30-31. Following this traditional approach literally, when faced with a multi-state class action, a court could not consider the laws of the other states connected to the dispute; instead the court would be required to apply the rule from the Restatement (First) that pertains to the claim alleged. See *Leflar* et al., *supra*, § 86, at 256 (noting that a court in a state that has adopted the Restatement (First) “ha[s] only to determine . . . the nature of the issue before it . . ., look up the choice-of-law rule conceptually appropriate to that type of case, then apply the rule to the facts”).

{52} Thus, with respect to the instant appeal, the district court would have simply applied the Restatement (First) § 311, at 395, “the [law of] ‘the place of contracting.’” Assuming that the place of making the contract was the state where the insured entered into the contract, the district court would have been required to apply the separate law of each of the thirteen states involved in the class action, without considering the competing laws and policies of the other states connected to the suit. This leads to problems and could conflict with the policy behind class actions, i.e., the district court would have no choice but to apply the thirteen states’ laws, which may make the class action unmanageable.

{53} Because of the mechanical nature of its application, the Restatement (First) has been widely criticized as being inflexible, rigid, and leading to unjust results. *See Scoles et al., supra*, § 2.7, at 21-22. Another criticism levied against the Restatement (First) is that it does not recognize choice-of-law provisions. Scoles et al., *supra*, § 18.14, at 989. Currently only eleven states, including New Mexico, continue to follow the choice-of-law rules set forth in the Restatement (First) with respect to contract claims. Scoles et al., *supra*, § 2.21, at 87.

{54} Twenty-four states have rejected the Restatement (First) in favor of the Restatement (Second) of Conflict of Laws (1971)
with respect to contract conflicts. Scoles et al., supra, § 2.23, at 99. The Restatement (Second) eschews a rigid, mechanical selection of a particular jurisdiction and, instead, focuses on the content of the laws of the states connected to the dispute. As such, a court does not choose between two competing jurisdictions, but between competing bodies of law, and competing public policies. See Leflar et al., supra, § 100, at 282-84. Additionally, the Restatement (Second) proceeds issue by issue, rather than by an entire claim, so one issue may be resolved under the law of one jurisdiction, while another issue may be resolved under the law of a different jurisdiction. Further, the Restatement (Second), unlike the Restatement (First), acknowledges the realities of modern contracts and respects party autonomy by allowing the parties to choose the law that will govern the dispute. Restatement (Second) § 187, at 561; see also Symeon C. Symeonides, Oregon’s Choice-of-Law Codification for Contract Conflicts: An Exegesis, 44 Willamette L. Rev. 205, 222 (2007) (“[T]he drafters of the First Restatement rejected party autonomy . . . . Recognizing this reality, the Restatement (Second) formally sanctioned and codified the principle of party autonomy.”). If the contract has a valid choice-of-law provision, that law presumptively applies. Restatement (Second) § 187, at 561.  

In the absence of an enforceable choice-of-law provision, and if the rules regarding specific types of contracts or specific issues in contract do not supply the law to be applied, the Restatement (Second) relies on the “most significant relationship” test which is used to determine which state has the most significant relationship to the transaction and to the parties. Id. § 188(1), at 575. A court considers a variety of contacts when making a determination about which state’s law applies to the dispute. See id. (listing the following relevant contacts “(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties”). Significantly, a court must consider both the number of contacts in a given jurisdiction, and even more importantly, the quality of those contacts. See id. (“These contacts are to be evaluated according to their relative importance with respect to the particular issue.”). The qualitative nature of a particular contact is determined by reference to the “Choice-of-Law Principles” set forth in Section 6, which include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. Id. § 6, at 10.  

After comparing the Restatement (First) and the Restatement (Second), it is apparent that the rigidity of the Restatement (First) is particularly ill-suited for the complexities present in multi-state class actions. It does not allow a court to consider the competing policies of the states implicated by the suit. We conclude that the Restatement (Second) is a more appropriate approach for multi-state contract class actions. See, e.g., Chrysler Corp. v. Skyline Indus. Servs., Inc., 528 N.W.2d 698, 703 n.28 (Mich. 1995) (declining to “explicitly abandon” the traditional approach but acknowledging that such an approach “may prove to be unworkable under certain factual situations, such as those presented [in the appeal at bar], which demand a more extensive review of the relative interests of the parties and the interested states”).  

Thus, if a district court determines that the laws of the states implicated in a multi-state contract class action actually conflict, the court should then apply the principles of the Restatement (Second) to determine which law applies to the disputed issue. Once the court determines which law applies, the court must then determine whether the application of that chosen law is constitutional. See Phillips, 472 U.S. at 821-22 (holding that, in the presence of an actual conflict, the choice to apply a single state’s law is constitutional so long as the chosen state has a “significant contact or significant aggregation of contacts” to the claims asserted by each member of the plaintiffs class, contacts “creating state interests,” in order to ensure that the choice of [forum] law is not arbitrary or unfair.” (quoting Allstate Ins. Co., 449 U.S. at 312-13)). Only then may a district court determine whether the class meets the requirements of our class action rule.

Forum-Selection Clause  

In the instant case, some class member policies, issued in certain states, contain forum-selection clauses designating the state where the insured entered into the policy as the forum. Allstate contends that these forum-selection clauses preclude class certification in New Mexico. We reach this issue because, unlike the Court of Appeals, we affirm the district court’s certification decision. See Ferrell, 2007-NMCA-017, ¶ 5.

Our courts have been willing to consider the Restatement (Second) approach in other circumstances. See Fed. Deposit Ins. Corp. v. Hiatt, 117 N.M. 461, 470, 872 P.2d 879, 888 (1994) (Montgomery, C.J., dissenting) (“I wish to register my continuing objection to our rigid adherence to the lex loci contractus rule.”) (footnote omitted); id. at 470 n.3, 872 P.2d at 885 n.3 (noting that “[i]n State Farm Mutual Insurance Co. v. Conyers...[the New Mexico Supreme Court] displayed a willingness to consider an approach, such as that embodied in Section 6 of the Restatement (Second) of Conflict of Laws (1971), other than the strict lex loci contractus rule.”) (citation omitted); State Farm Mut. Ins. Co. v. Conyers, 109 N.M. 243, 247, 784 P.2d 986, 990 (1989) (“In any event, in this case it is not necessary for us either to reaffirm a lex loci contractus rule categorically or to adopt or reject for all cases the Restatement (Second) ‘significant relationship’ tests. Even were we to apply a Restatement (Second) analysis, New Mexico law would still govern the outcome of this particular dispute.”). In Re Gilmore, 1997-NMCA-103, ¶ 20, 124 N.M. 119, 946 P.2d 1130 (“The approach, if not the result, [taken by the New Mexico Supreme Court] in Torres is consistent inewith the Restatement Second. . . . Although our Supreme Court has followed the Restatement Second in some respects—principally, with regard to forum non conveniens, and jurisdiction—we are well aware that it has not embraced the Restatement Second with respect to choice-of-law issues in either tort or contract.”) (citations omitted); Scoles et al., supra, § 2.21, at 90 (“New Mexico’s highest court has recently acknowledged its past adherence to the lex loci deiicti rule but did not in fact apply it.” (citing Torres v. State, 119 N.M. 609, 894 P.2d 386 (1995)).
Plaintiffs argue that Allstate waived this defense by not raising it in its first responsive pleading because forum-selection clauses are properly treated as venue defenses under Rule 1-012(B)(3) NMRA. The district court agreed and concluded that Allstate had waived the defense. Allstate counters that forum-selection clauses are properly brought as motions to dismiss for failure to state a claim under Rule 1-012(B)(6), which may be raised at any time. See Rule 1-012(H)(2). While our courts have discussed in general terms the nature and effect of forum-selection clauses, our courts have yet to determine whether a forum-selection clause should be brought as a motion to dismiss for failure to state a claim or as a motion to dismiss based on improper venue. Thus, we now consider the proper analysis for a forum-selection clause defense.

Courts disagree about the proper procedural mechanism a party must use to raise a forum-selection clause defense. The majority of circuit courts that have considered the issue have concluded that forum-selection clauses are properly raised under Federal Rule of Civil Procedure 12(b)(3), improper venue. See Sucampo Pharm., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 550 (4th Cir. 2006); Silva v. Encyclopedia Britannica Inc., 239 F.3d 385, 387 n.3 (1st Cir. 2001) (noting that the Seventh, Ninth, Eleventh, and District of Columbia Circuits “consider[] such motions as based on Rule 12(b)(3)”). Calchem Corp. v. Activesa USA LLC, No. CV-06-1585, 2007 WL 2127188, at *1 n.2 (E.D.N.Y. 2007) (noting that courts in the Fifth Circuit have considered motions to dismiss based on forum-selection clauses “as falling under Rule 12(b)(3) based on improper venue”). The First and Third Circuits have decided that forum-selection clauses are properly raised in Rule 12(b)(6) motions to dismiss, see Silva, 239 F.3d at 387 n.3, while the Second Circuit has concluded that a motion to dismiss based on a forum-selection clause should be brought as a Rule 12(b)(1) motion. See AVC Nederland B.V. v. Atrium Inv. P’ship, 740 F.2d 148, 153 (2d Cir. 1984). The Tenth Circuit, while not specifically deciding that such a defense must be raised as a Rule 12(b)(3) motion, has noted that “[a] motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed. R. Civ. P. 12(b)(3).” K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft (“BMW”), 314 F.3d 494, 497 (10th Cir. 2002) (quoted authority omitted).

We find the Fourth Circuit’s analysis in Sucampo, 471 F.3d at 547-49 persuasive and conclude that forum-selection clauses are properly treated as venue defenses. In Sucampo, the court rejected an analysis of such a motion under Rule 12(b)(1), in part, because “a motion to dismiss under Rule 12(b)(1) is non-waivable and may be brought at any time—even on appeal—regardless of whether a litigant raised the issue in an initial pleading.” Sucampo, 471 F.3d at 548. The court expressed its concern that a litigant’s choice to wait to assert a forum-selection clause “could result in a waste of judicial resources and allow defendants to ‘test the waters’ of the plaintiff’s chosen forum, before invoking their rights under the forum-selection clause.” Id. at 549. The court rejected an analysis of such a motion under Rule 12(b)(6) because Rule 12(b)(6) motion can be raised at any time before an adjudication on the merits and “would present some of the same timing concerns as in the 12(b)(1) context.” Sucampo, 471 F.3d at 549. The court also noted that “[U.S.] Supreme Court precedent suggests that 12(b)(6) is not the appropriate motion for enforcing a forum-selection clause.” Id.

Having rejected an analysis under Rule 12(b)(1) and Rule 12(b)(6), the court determined that a motion to dismiss based on a forum-selection clause is properly treated as a Rule 12(b)(3) motion. Id. The court concluded that such an analysis “would avoid the . . . timing disadvantages of utilizing Rule 12(b)(1) or (6) and [would] be consistent with Supreme Court precedent.” Id. One particular benefit of utilizing Rule 12(b)(3), noted the court, is judicial efficiency because “defendant will have to raise the forum selection issue in her first responsive pleading or waive the clause.” Id. “This will result in an efficient disposition of cases involving forum-selection clauses and not waste judicial resources on a case that ultimately will have to be dismissed and relitigated in another forum.” Id.

We find this reasoning particularly persuasive when dealing with multi-state class actions certified under Rule 1-023(B)(3) of our class action rule. Allowing a defendant to wait to raise a forum-selection clause defense until after certification, i.e., “testing the waters” of the class proponents’ chosen forum, is inefficient and may result in a waste of judicial resources. The district court would have spent unnecessary time and effort analyzing the laws of each implicated state to ensure that the predominance and superiority requirements were met. Thus, allowing a defendant to raise a forum-selection clause defense at any time during the litigation undermines the “economies of time, effort, and expense” sought to be achieved by Rule 1-023(B)(3). See Steward v. Up N. Plastics, Inc., 177 F. Supp. 2d 953, 958 (D. Minn. 2001) (“[D]efendants failed to raise any objection to venue in their first responsive pleading, as required under the rules. Additionally, a significant amount of time and motion practice has already taken place, including the filing of a motion for summary judgment, thus further establishing defendants’ waiver.”).

CONCLUSION

We reverse the Court of Appeals and affirm the district court’s certification decision. We remand to the district court for proceedings consistent with this Opinion.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMÉNEZ MAES, Justice
RICHARD E. RANSOM (Pro Tem)
From the New Mexico Supreme Court

Opinion Number: 2008-NMSC-043

Topic Index:
Appeal and Error: Appellable Order; Appellate Rules and Procedure; Right to Appeal; and State’s Right to Appeal
Criminal Procedure: Final Order

STATE OF NEW MEXICO,
Plaintiff-Petitioner,

versus

BILL A. MONTOYA
Defendant-Respondent.
No. 30,225 (filed: June 27, 2008)

ORIGINAL PROCEEDING ON CERTIORARI
GRANT L. FOUTZ, District Judge

GARY K. KING
Attorney General
ANN M. HARVEY,
Assistant Attorney General
Santa Fe, New Mexico

for Petitioner

PAUL J. KENNEDY
MARY Y.C. HAN
GRIETA A. GILCHRIST
KENNEDY & HAN, P.C.
Albuquerque, New Mexico

for Respondent

OPINION

PETRA JIMENEZ MAES, JUSTICE

[1] We granted the State’s petition for certiorari review of the Court of Appeals’ memorandum opinion in this case and conduct our review pursuant to Rule 12-216(B) NMRA (jurisdictional questions are excepted from the rule requiring preservation for appellate review). We are called upon to examine a magistrate court’s written order to determine whether it is an appealable final order of dismissal or a non-final unappealable, order of suppression. The Court of Appeals determined that the order from the magistrate court was not an appealable final order. We disagree. The order, on its face, is a final order. The State was entitled to appeal this order to the district court. For the reasons discussed below, we reverse the Court of Appeals.

I. FACTS AND PROCEEDINGS BELOW

[2] A criminal complaint was filed in the magistrate court charging Defendant for driving while under the influence (DWI) pursuant to NMSA 1978, Section 66-8-102 (2004); failure to follow railroad grade crossing devices pursuant to NMSA 1978, Section 66-7-343 (2003); and consumption or possession of alcoholic beverages in open containers in a motor vehicle pursuant to NMSA 1978, Section 66-8-138 (2001). That court issued a Notice of Probable Cause/Bench Trial to the parties. Because the magistrate court proceedings are not recorded, what actually transpired at this setting is not of record.

[3] After the Probable Cause/Bench Trial, the magistrate court entered an order captioned “Notice of Dismissal of Criminal Complaint,” which read in its entirety: TO: Defendant BILL MONTOYA

You are hereby notified that the complaint filed in the above-styled cause is dismissed without prejudice due to the following:

NO PROBABLE CAUSE

It is hereby ordered that the complaint filed in the above styled cause be dismissed without prejudice from further prosecution in this matter as a result of the

dice.

From the entry of this Order, the State timely filed an appeal to district court. See Rule 6-703 NMRA.

[4] Defendant filed a Motion To Dismiss Appeal or, in the Alternative, to Remand for Entry of Order Suppressing Evidence. Defendant claimed that the magistrate court order was a de facto suppression order, and that the State had no entitlement to an appeal in district court of such an order. Further, Defendant asserted that he should not be required to defend the suppression at a de novo proceeding. The State’s written response did not challenge Defendant’s factual characterization that the magistrate court’s ruling suppressed the evidence, but, rather, sought to factually distinguish the Court of Appeals decision in State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff’d 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040. See id., ¶ 16 (concluding a magistrate court’s order to suppress evidence is not a final order appealable to the district court). The State distinguished Heinsen by arguing that in this case “the magistrate not only suppressed the evidence, but also dismissed the case. Thus, unlike Heinsen, the State is not able to continue the prosecution of the case.”

[5] Defendant replied that the State’s argument that the form of the magistrate court’s order effectively barred the State from further prosecution in this matter was a “distinction . . . without significance” because the magistrate court order was actually “de facto a non-final order of suppression.” Defendant asked the district court to “decline to exercise jurisdiction over this appeal under Heinsen and Rule 6-703,” or, “[a]lternatively, this Court should exercise its authority to remand this matter to the [m]agistrate [c]ourt with instructions that the [m]agistrate [c]ourt rescind its order of dismissal, enter an order of suppression, and permit the State to proceed with any evidence that was not unconstitutionally obtained.” The district court, finding that Defendant’s motion was “well-taken and should be granted,” dismissed the State’s appeal. The State appealed to the Court of Appeals.

[6] Reviewing the magistrate court record, the Court of Appeals found that, as a matter of law, the only “probable cause” determination that could have been before that court was whether or not the officer had probable cause to arrest Defendant, see Rule 6-203 NMRA, and further determined that the magistrate court proceeded to try the case. State v. Montoya, No. 26,067, slip op. at 3...
Constitution provision: 1998-NMCA-158, ¶ 9, 12-216(B). Claiming that it “may appeal a right to an appeal of the dismissal to the district court. Therefore, the State argues, the Court of Appeals erred in upholding the district court’s determination that it had no jurisdiction to hear an appeal in this case. We agree.

II. DISCUSSION
A. Standard of Review

9 Whether the district court properly dismissed the State’s appeal is a question of subject matter jurisdiction. Heinsen, 2005-NMSC-035, ¶ 1, 6 (“This Court has authority to review the subject matter jurisdiction of the district court . . . .”). Jurisdiction questions are questions of law which are subject to de novo review. See State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (“We review questions of law de novo.”).

B. State’s Right to Appeal

10 “Generally, the State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case as a constitutional provision or statute conferring that right.” State v. Giraudo, 99 N.M. 634, 636, 661 P.2d 1333, 1335 (Ct. App. 1983); accord Heinsen, 2005-NMSC-035, ¶ 7 (stating that the State’s right to appeal exists only by constitutional provision, statute, or rule). The State’s right to appeal an adverse ruling in a criminal proceeding is conferred in our State Constitution, Article VI, Section 27, entitling parties to appeal “final judgments and decisions” from the magistrate court. Giraudo, 99 N.M. at 636, 661 P.2d at 1335. This right is codified in our statutes and addressed in our Rules of Criminal Procedure for the Magistrate Courts and Criminal Forms. See § 35-13-1 (authorizing appeals from a final order issued by the magistrate court); Rule 6-703 (right to appeal an order from the magistrate court, procedure); see also Rule 9-607 NMRA (Notice of Appeal form). The right to appeal is predicated on a final order, decision, or judgment from the magistrate court. See N.M. Const. art. VI, § 27 (“Appeals shall be allowed in all cases from the final judgments and decisions . . . .”); § 35-13-1; Rule 6-703; see also Rule 9-607 (showing in our form Notice of Appeal that a party appealing from a magistrate court should appeal “to the district court from the (judgment) (final order) of the magistrate . . . .”).

11 An order of dismissal is a type of appealable final order. Particularly, an order of dismissal on procedural grounds or in a manner that does not amount to an acquittal is an appealable final order. See State v. Lohberger, 1008-NMSC-033, __ N.M. __, __ P.3d __ (reversing dismissal of State’s appeal from metropolitan court because State was entitled to appeal a final order dismissing its case for failure to comply with the court’s discovery order, a procedural ground); Smith v. Love, 101 N.M. 355, 355-56, 683 P.2d 37, 37-38 (1984) (construing dismissal of criminal action for failure to prosecute as appealable final order); Giraudo, 99 N.M. at 636, 661 P.2d at 1335 (holding that “dismissal for failure to timely prosecute is a final judgment” that the State may appeal to the district court).

12 The State claims that the order in this case is an appealable final order of dismissal and Defendant counters that it is a non-final, unappealable order of suppression based on “no probable cause to arrest Defendant.” Defendant advances that the order from the magistrate court should have been an order of suppression of the State’s evidence flowing from the “unlawful arrest” pursuant to Hawkins, 1999-NMCA-126, ¶ 16 (“Fruit of the poisonous tree’ doctrine generally requires suppression of . . . evidence obtained after an arrest made without probable cause.”).

13 By contrast, in Heinsen, this Court held that “there is no constitutional or statutory basis for an appeal by the State from a suppression order of a magistrate court.” 2005-NMSC-035, ¶ 1. We stated that “New Mexico has traditionally viewed suppression orders as interlocutory rulings on evidentiary matters, rather than final, appealable orders.” Id. ¶ 12 (citing State v. Alvarez, 113 N.M. 82, 83-84, 823 P.2d 324, 325-26; Giraudo, 99 N.M. at 636, 661 P.2d at 1335; State v. Garcia, 91 N.M. 131, 571 P.2d 123 (Ct. App. 1977)). Because there is no authority providing for an appeal of a suppression order to the district court from the magistrate court, district courts are without jurisdiction to entertain such an appeal. Id. ¶ 1.

C. The Order in this Case is an Appealable Final Order

14 On its face, it is hard to imagine a more confusing order than the “Notice of Dismissal of Criminal Complaint” entered in this case. The order purports to capture the court’s determination that there was “no probable cause” and then goes on to dismiss the underlying complaint both with and without prejudice. The State claims this “brought about a final disposition of the matter.” Defendant claims that the clear language finding “no probable cause” on this “Notice of Dismissal” makes the order operate as a “de facto suppression order.” We are compelled by the reasoning behind each argument: we understand on one hand the State’s concern that it is entitled to prosecute this case with evidence which is not subject to the “no probable cause” determination,
and we also recognize that Defendant is correct that the suppression of particular evidence pursuant to the finding of “no probable cause” is not subject to appellate review. See State v. Armijo, 118 N.M. 802, 805, 887 P.2d 1269, 1272 (Ct. App. 1994) (concluding that the State is entitled “to appeal any order dismissing one or more counts of a complaint, indictment, or information, regardless of whether the dismissal is with prejudice”); Heinsen, 2005-NMSC-035, ¶ 1 (“[T]here is no constitutional or statutory basis for an appeal by the State from a suppression order of a magistrate court.”).

To resolve this conundrum, we turn to the structure and purpose of judicial orders. We recently explained the significance of “requiring a clearly recognizable final order that will serve its intended function as an avenue for appellate review of the issues in a case” because an ambiguous order can be “a focus for additional litigation that serves no beneficial purpose.” Lohberger, 2008-NMSC-033, ¶ 30. We have long expressed a preference for orders that are individuated to their subject matter; that is, specific. See generally Criminal Forms, Rules 9-101 to 9-902 NMRA (comprehensive form directory). Further, the orders are designed to be “simple and expedient” even to the extent of providing “order forms containing boxes that can be checked off over a space reserved for a judge’s signature.” Lohberger, 2008-NMSC-033, ¶ 35. Within this directory are three examples of dismissal orders, none of which contain any provision for suppression of evidence. See Rules 9-414 to 415A. Separating these two subjects in our rules makes sense because a suppression order is not a final order and an order of dismissal is an appealable final order. Compare Armijo, 118 N.M. at 805, 887 P.2d at 1272 (holding that the State is entitled to appeal any order of full or partial dismissal), with Heinsen, 2005-NMSC-035, ¶ 1 (holding that the State is not entitled to appeal a non-final order of suppression).

The record in this case, inclusive of the Order of Dismissal, does not fully reveal what happened in the proceedings below other than discovery proceeded, the matter was set for two pre-trial conferences, and then for a “probable cause/bench trial.” The “probable cause/bench trial” was reset once on Defendant’s motion to continue the trial setting, and then heard at the second setting where the Order of Dismissal was entered on that same day. The parties disagree on what happened at the “probable cause/bench trial.” The State claims that the matter did not go to trial. Defendant claims that the State presented its case, the magistrate court found there was no probable cause for the arrest and the court then suppressed the evidence flowing from the illegal arrest.

From this record, we discern three actions the magistrate court could have taken that resulted in this Order of Dismissal. First, the magistrate court could have heard the State’s evidence, determined that the evidence did not support probable cause to arrest and entered the Order of Dismissal intending that it be a suppression order. This would be a mistaken act. The parties initially agreed that the magistrate’s court’s order was supposed to be a suppression order. If this is accurate, then:

[the trial court’s ruling was in no sense a decision on the quantum of proof offered by the [State], on its probative value, on the credibility of the evidence, or on any other question relating to the sufficiency of the [State’s] case; it was purely and simply a ruling on the legality of defendant’s arrest and the consequent admissibility vel non of the prosecution’s evidence.

County of Los Alamos v. Tapia, 109 N.M. 736, 739, 790 P.2d 1017, 1020 (1990). If the magistrate court intended to suppress evidence in the State’s case, the order should have ruled only on the legality of Defendant’s arrest and the suppression or admissibility of the particular evidence relevant to that arrest. Id. Then the State could invoke judicial review of the magistrate court supression order by filing a nolle prosequi to dismiss some or all of the charges in the magistrate court after the suppression order is entered and refining in the district court for a trial de novo. Heinsen, 2005-NMSC-035, ¶ 1.

Second, the magistrate court heard evidence and anticipated that the State could not prove its case and intended to enter an order dismissing the State’s case. This, of course, would be an improper act because once some evidence is suppressed, the State is entitled to determine, for example, whether to pursue its case with its remaining evidence, dismiss its case with prejudice or dismiss its case and refile it in district court. Id. ¶ 25.

Third, the magistrate court could have heard the State’s evidence, asked the State about any additional evidence and, if it determined that the State’s evidence was insufficient to convict Defendant, acquit Defendant on the merits of the State’s case. This would be the equivalent of a dismissal under State v. Lizzol, 2007-NMSC-024, 141 N.M. 705, 160 P.3d 886. See id. ¶ 7 (“[W]ether a defendant was acquitted depends on whether the trial court’s ruling, however labeled, correctly or incorrectly resolved some or all of the factual elements of the crime.”). Of course, such a ruling would be unappealable by the State because a “verdict of acquittal is final, and could not be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the constitution.” United States v. Ball, 163 U.S. 662, 671 (1896).

Without speculating on which of the above three possibilities, or a hybrid thereof, occurred, we cannot dispute that the Order of Dismissal is indeed, on its face an order dismissing the State’s case. Although the State does not have a right to appeal an order of suppression, Heinsen, 2005-NMSC-035, it does have the constitutional right to appeal from a dismissal, Armijo, 118 N.M. at 802, 887 P.2d at 1272, unless that order was predicated on a finding of acquittal. Ball, 163 U.S. at 671; see Lizzol, 2007-NMSC-024, ¶ 29 (holding that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars the State’s appeal if substantive act of court was to acquit a defendant). Therefore, the State is entitled to a de novo trial in the district court.

D. CONCLUSION

Parties are entitled to clear communication from the orders issued by all courts, including courts of limited jurisdiction. Lohberger, 2008-NMSC-033, ¶ 34 (“The rights of litigants and the integrity of our system of justice depend on a reasonable level of certainty in recording the final decisions of our courts.”). Thus, magistrate courts must clearly separate findings, holdings, and conclusions of law in its orders because one function of final orders is as an avenue for appellate review of the issues in a case.

The magistrate court’s order in this case dismissed the State’s case of action against Defendant, and the State is entitled to file its appeal of this ruling for a de novo review in the district court. This case is remanded for proceedings consistent with this Opinion.

IT IS SO ORDERED.

PETRA JIMENEZ MAES,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. SERRA, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2008-NMCA-094

GARY A. GRANBERRY and MONICA SANCHEZ, Plaintiffs-Appellants,
versus
ALBUQUERQUE POLICE OFFICERS ASSOCIATION, Defendant-Appellee.
Nos. 26,898 and 27,026 (consolidated) (filed: June 5, 2008)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CLAY CAMPBELL, District Judge

PATRICIA G. WILLIAMS
LORNA M. WIGGINS
WIGGINS, WILLIAMS & WIGGINS, P.C.
Albuquerque, New Mexico
for Appellants

John James D'Amato, Jr.
Albuquerque, New Mexico
for Appellee

OPINION

LYNN PICKARD, Judge

{1} Police Lieutenants Gary Granberry (Granberry) and Monica Sanchez (Sanchez) (collectively Appellants) appeal the district court’s grant of summary judgment against them on their breach of fair representation claim against their union, Albuquerque Police Officers Association (APOA). Appellants contend that when APOA settled a prohibited practices complaint (PPC) with the City of Albuquerque (the City) on behalf of four other police sergeants but failed to include Appellants in the settlement, APOA breached its duty of fair representation to Appellants. On appeal, Appellants argue that genuine issues of material fact preclude summary judgment on their claim. We agree, and we reverse.

BACKGROUND

{2} In September 2002, Appellants were sergeants with the Albuquerque Police Department (APD) who qualified to participate in a promotion process for the rank of lieutenant. Granberry is a black male over the age of forty; Sanchez is a Hispanic female. Appellants participated in the process by taking the required tests, but neither one was named on the list of those eligible for promotion to lieutenant. At all times relevant to this action, Appellants were members of APOA. When APOA discovered that the City had apparently reinterpreted the rules and regulations governing a police officer’s eligibility to participate in the promotion process without giving notice to APOA and that, as a result, the City had allowed two ineligible sergeants to participate in the process, APOA filed a PPC against the City alleging a violation of the collective bargaining agreement (CBA) between the City and APOA.

{3} Prior to a hearing on the PPC, APOA obtained settlements from the City on behalf of four Anglo male sergeants who were aggrieved by the allegedly flawed promotional process. Settlements were not obtained for Appellants, and Appellants were not notified by APOA that the union was pursuing a settlement on behalf of a few of its members. Sergeant Daniel Torgrimson, who is not a party to this case, notified APOA prior to settlement that as soon as the list for promotion to lieutenant came out, everyone who participated in the process who was not on the list would complain about the fact that ineligible sergeants had been allowed to participate. Appellants contend that as a result of their exclusion from the settlement, they lost promotional opportunity, income and fringe benefits, and opportunity for advancement and also suffered damage to their careers. They claim that APOA’s actions were “arbitrary, discriminatory, and in bad faith.”

{4} Appellants did not learn about the settlement until January 2003, and therefore they did not come forward earlier to be included in the PPC. Appellants argue that they have not been required in the past to request assistance from APOA individually in order to benefit from a PPC. Sanchez states in her affidavit that she has previously benefitted from the filing and settlement of PPCs without individually coming forward and requesting APOA’s assistance, including the filing of PPCs concerning lunchtime pay and take-home cars. Granberry states that he has also benefitted in the past from the filing of PPCs without having to come forward individually and request assistance from APOA. Moreover, Appellants allege that an officer named Robert Haarhues was granted relief under the settlement without apparently requesting involvement through the APOA. Instead of approaching the union, Appellants made their complaints about the promotion process known through the chain of command by ensuring that the appropriate subject matter experts were notified of the flaws in the process. Additional facts will be included in our discussion below as necessary.

DISCUSSION

Standard of Review

{5} Our review of summary judgment is de novo. Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 12, 143 N.M. 320, 176 P.3d 309. “Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). We “view the facts in a light most favorable to the party opposing the motion and draw all reasonable inferences in support of a trial on the merits.” Handmaker v. Henney, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

APOA’s Duty of Fair Representation

{6} It is undisputed that as the exclusive bargaining agent of Appellants’ bargaining unit, APOA was under a duty to fairly represent Granberry and Sanchez. See Jones v. Int’l Union of Operating Eng’rs, 72 N.M. 322, 330, 383 P.2d 571, 576 (1963); Howse v. Roswell Indep. Sch. Dist., 2008-NMCA-__—, ¶ 7, __ N.M., __ P.3d [No. 27,171 (April 21, 2008)]. A breach of the duty of fair representation is proved only by facts that establish the union “acted arbitrarily, fraudulently or in bad faith.” Callahan v. N.M. Fed’n of Teachers–TVI, 2006-NMSC-010, ¶¶ 3, 15, 139 N.M. 201, 131 P.3d 51. Appellants argue that by filing the PPC generally on behalf of affected members of the bargaining unit, APOA, as their exclusive representative under the
CBA, undertook their representation with regard to the allegedly flawed promotion process. They contend that by obtaining settlements from the City for the four other aggrieved members of the bargaining unit, but not for them, APOA abandoned them in the settlement of the PPC, thus breaching its duty of fair representation.

{7} The district court granted summary judgment on Appellants' claims in a decision letter, noting that to accept Appellants' position would loosen the strict Callahan standard and holding that the material facts presented by Appellants established only that the APOA should have known of the possible existence of Appellants' claims before it settled the claims of the four other officers, but that to impose a duty on APOA to investigate whether members who did not come forward should obtain relief under a PPC would contravene policy considerations aimed at protecting unions. The district court correctly noted that the Callahan standard is difficult to prove. “[M]ere negligence” on the part of union counsel is not sufficient to support a claim for breach of the duty of fair representation. Moreover, our courts have long recognized that a “union has great discretion in handling the claims of its members...and the courts will interfere with the union’s decision...only in extreme cases.” Jones, 72 N.M. at 331, 383 P.2d at 577. We follow this approach “in order to limit the situations in which an employee may judicially contest the results of grievance and arbitration proceedings that are the subject of collective bargaining.” Hoffman v. Lonza, Inc., 658 F.2d 519, 522 (7th Cir. 1981), overruling on other grounds recognized by President v. Ill. Bell Tel. Co., 865 F. Supp. 1279, 1291 n.21 (N.D. Ill. 1994).

{8} While we are mindful of the general policy of deference to union decision making, we note that a union’s discretion on whether to represent a member’s complaint is not unlimited. The Callahan standard may be difficult to prove, but it is not impossible. See, e.g., Howse, 2008-NMCA-___, ¶¶ 7-13. This Court has recently noted that “[a] union’s conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation.” Id. ¶ 8 (quoting Marquez v. Screen Actor’s Guild, Inc., 525 U.S. 33, 46 (1998)). Moreover, “[un]explained union inaction” which substantially prejudices a member’s grievance may be sufficiently arbitrary to constitute unfair representation.” Id. ¶ 11 (quoting Farmer v. ARA Servs., Inc., 660 F.2d 1096, 1103 (6th Cir. 1981)). Accordingly, where a union acts or fails to act to the detriment of a member’s complaint, it must offer a rational basis or explanation for its actions. In the instant case, we hold that APOA’s duty of fair representation requires that once it assumed representation of the identifiable group of potentially aggrieved participants in the allegedly flawed promotion process by filing a PPC on the group’s behalf, it could not arbitrarily exclude some of the members of the group from the resolution of the PPC. Because the question of whether the union’s exclusion of Appellants was arbitrary hinges on a genuine issue of material fact, it is for a jury to decide whether the union has breached its duty.

Summary Judgment Was Improperly Granted

{9} APOA moved for summary judgment on the basis that Appellants failed to demonstrate that they affirmatively sought assistance from APOA in pursuing their complaints concerning the flawed promotional process. APOA argues that because it was wholly unaware of Appellants’ individual complaints about the allegedly flawed promotion process and because Appellants took no steps to notify the union that they had such complaints, APOA should not be held liable for its exclusion of Appellants from the settlement with the City. Whether this explanation was rational is to be decided on the basis of two questions: (1) whether the PPC filed by APOA was a “grievance” or a “complaint about promotion” under the CBA, and (2) whether APOA bylaws preclude recovery by Appellants for failure to come forward. We resolve the first question as a matter of law, and we hold that the second question is a genuine issue of fact to be determined by the jury.

{10} The parties in this appeal dispute the nature of the PPC filed in this case. APOA likens a PPC to a grievance that Appellants failed to properly pursue under the plain language of the CBA, whereas Appellants argue that the PPC is more akin to “complaints about promotions,” which they contend they properly pursued through the chain of command. The CBA between APOA and the City describes the procedures for pursuing grievances, but it does not appear to address the filing and resolution of PPCs. In fact, the parties have not directed us to any discussion of PPCs in the CBA whatsoever. The CBA defines grievances as “formal complaints of employees concerning actions taken by management, which result in loss of pay or seniority, or in written reprimand.” The CBA appears to contemplate that employees who wish to pursue such formal complaints must come forward and participate in their filing and resolution. According to the CBA, however, “[o]ther complaints officers have about working conditions, rules and regulations, promotions and transfers must be made through the chain of command.” Appellants argue that a PPC falls into this latter category, and that their complaints concerning the alleged flaws in the promotion process were appropriately made through the chain of command, thus satisfying their burden under the CBA.

{11} We agree with Appellants and hold as a matter of law that the PPC filed in this case was not a grievance under the CBA. The CBA’s definition of a grievance appears to cover actions taken by management that are disciplinary in nature. The PPC filed in this case did not relate to any disciplinary action taken on behalf of management. Instead, it related to loss of promotional opportunity due to the flawed promotion process and was thus a “complaint about promotion.” Under the CBA, Appellants are required to bring these complaints through the chain of command rather than taking them to the union. Appellants stated in their affidavits that they met this requirement by telling the subject matter experts who designed the promotion process about the perceived flaws, and APOA does not challenge this fact at this juncture in these proceedings. Accordingly, APOA’s stated reason why it did not include Appellants in the resolution of the PPC may be found by a jury to be irrational and thus “arbitrary” under the Callahan standard.

{12} Moreover, APOA argues that Appellants are without remedy because a union bylaw requires that when any member is “involved in an unfair labor practice, it shall be the duty of the member to notify the [APOA] Board and lend his name to any action instituted by the Board to resolve the unfair labor practice.” The district court granted summary judgment partly on the basis that Appellants’ failure to come forward violated this bylaw. However, in their summary judgment response, Appellants proffered facts based on their personal knowledge that places in dispute the requirement that union members must individually request assistance from APOA.
in order to derive benefit from the filing of a PPC. In addition, the portion of the bylaw quoted above is Paragraph 9.11. Paragraph 9.08 states that the APOA is relieved of obligations toward members when the members do not comply with the “foregoing” bylaws, thereby leading to a question of whether Paragraph 9.11 is enforceable through Paragraph 9.08.

{13} Turning to the facts, Appellants contend first that the union typically files a PPC on behalf of all of its affected members, without naming individuals. We note that this is true of the PPC filed by APOA in this case, which does not name individuals and was allegedly filed after the union was told by its members that every candidate in the promotional process was affected by the unqualified candidates’ participation. Furthermore, Appellants argue that historically they have not been required to individually request assistance from APOA in order to benefit from a PPC. Sanchez states in her affidavit that she has previously benefitted from the filing and settlement of PPCs concerning lunchtime pay and take-home cars without individually coming forward and requesting APOA’s assistance. Granberry states in his affidavit that he too has benefitted from PPCs filed by the union without having to come forward. Neither Appellant is aware of what an “unfair labor practice” might be that would trigger an obligation to report to APOA. Finally, Sergeant Torgrimson, another APD officer who participated in the flawed promotional process, states in his affidavit that an officer named Haarhues was granted relief as a result of APOA’s settlement with the City under circumstances in which it did not appear that he requested involvement through the APOA.

{14} A union bylaw whose viability has been squarely disputed by Appellants’ facts does not necessarily preclude relief by Appellants on their breach of fair representation claim. Because the above facts dispute the applicability of the bylaw to the filing of a PPC, we cannot hold as a matter of law that Appellants were required to come forward in order to be included in the resolution of the PPC filed by APOA against the City. We hold that, on the basis of the summary judgment record below, it is for a jury to resolve the question of whether APOA’s actions were the proximate cause of damages suffered by Appellants. Accordingly, we reverse summary judgment and hold that it is for a jury to determine whether Appellants are precluded from recovery by the APOA bylaw. This does not rebut Appellants’ evidence, from which a jury might infer arbitrary or discriminatory union action. See Calkins v. Champion Window Co. of Albuquerque, 2007-NMCA-085, ¶ 14, 142 N.M. 209, 164 P.3d 90 (holding that arguments of counsel are insufficient to meet the burden of establishing a material fact for summary judgment purposes).

CONCLUSION

{16} We reverse the district court’s grant of summary judgment on Appellants’ claim that APOA breached its duty of fair representation. IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

JONATHAN B. SUTIN, Chief Judge

RODERICK T. KENNEDY, Judge
opinion

lynn pickard, judge

1 dana howse (howse) appeals the district court’s dismissals of her claim against her union, communication workers of america, afl-cio (cwa), for breach of its duty to represent her fairly in a pay scale grievance she wished to file against her employer, the roswell independent school district (risd), pursuant to the collective bargaining agreement (cba) between risd and cwa and her claim against risd for breach of the cba. the district court granted cwa’s motion for summary judgment and risd’s motion to dismiss. we reverse the summary judgment because there were issues of fact concerning the reasons cwa failed to file a written grievance in the pay scale dispute. we reverse the dismissal because howse’s complaint against risd in this hybrid action was timely filed pursuant to the discovery rule applicable in such actions.

background

2 howse began her employment with risd in november 1981 and spent her first sixteen years with the school district as a teacher’s aide, eventually earning $12,000 a year. at the end of her term in this position, howse was at salary step twelve on the applicable risd pay scale. when the teacher’s aide program was abolished, howse spent two years with risd as a truancy clerk earning the same salary. in 2000, she voluntarily transferred to a position as a security guard, and for the first time in her career with risd, she became a member of cwa. cwa represents risd employees in a collective bargaining unit that includes security workers. when howse joined the union, a cba was in effect between risd and cwa that named cwa the “sole and exclusive bargaining agent with respect to [the bargaining unit’s] wages, hours and other terms and conditions of employment.”

3 when risd transferred howse to her security guard position, she was assigned to salary step zero on the pay scale for campus aides, and her annual salary became $19,188. howse believed that risd had incorrectly assigned her to step zero because she had been employed by risd for many years, and in august of 2000, she spoke with pauline ponce, assistant superintendent of risd, about her step assignment. ponce told howse that she would check into the issue and get back to her. ponce never responded to howse’s inquiry. about two to three months later, howse discussed her step assignment with raul castro, a co-worker and union steward. they agreed that howse would write a letter to dr. cory butler, assistant superintendent for human resources at risd, addressing the issue. butler responded to howse in writing, stating that the cba did not apply to her because when she was transferred to her security guard position she was “neither upgraded nor downgraded within the cwa salary schedules.” he also wrote that howse had been “moved from a salary schedule not covered under the cwa agreement to a position on the cwa agreement.”

4 following receipt of butler’s letter in may 2001, howse contacted castro and requested that cwa submit a grievance addressing her salary step assignment. castro told her that he would speak with larry yankee, chief steward for the bargaining unit. at some point soon thereafter, yankee spoke directly with howse and told her that he spoke with butler, but that butler was inflexible. yankee asked howse if she would agree to a compromise step assignment. howse told him that she felt she was entitled to a step fifteen assignment and would not settle. neither castro nor yankee told howse that cwa would not follow through with her grievance on this issue at that time.

5 the initially required written grievance was never filed on howse’s step assignment. in november 2001, castro told howse that yankee had informed him that cwa could not pursue her matter any further because “the timeline had expired.” but at no point did either castro or yankee tell howse that cwa would not or could not pursue her matter any further because they had never filed the initially
required written grievance. Meanwhile, Howse was relying on CWA to pursue her grievance. CWA never told Howse that her step assignment claim was not valid, and in fact, Howse understood Yankee to have indicated that he believed her claim was valid. Howse did not learn that CWA had never filed the initially required grievance until May 9, 2002.

**DISCUSSION**

**A. CWA’s Motion for Summary Judgment**

1. **Standard of Review**


2. **Howse’s Claim Against CWA**

   [7] As the exclusive bargaining agents of the members of Howse’s bargaining unit, CWA and its officers and agents were under a duty to fairly represent Howse. See *Jones v. Int’l Union of Operating Eng’rs*, 72 N.M. 322, 330, 383 P.2d 571, 576 (1963). “The duty does not end at the bargaining table but extends throughout the contract, and, among other things, it involves a day-to-day adjustment of working rules and the protection of employee’s rights secured by the contract.” *Id.* However, [8] the union has great discretion in handling the claims of its members, and in determining whether there is merit to such claim which warrants the union’s pressing the claim through all of the grievance procedures, including arbitration, and the courts will interfere with the union’s decision not to present an employee’s grievance only in extreme cases. *Id.* at 331, 383 P.2d at 577. In fact, a “union’s refusal or failure to take the grievance to arbitration has to be arbitrary, discriminatory or in bad faith” to constitute a breach of its duty of fair representation. *Callahan v. N.M. Fed’n of Teachers–TVI*, 2006-NMSC-010, ¶ 13, 139 N.M. 201, 131 P.3d 51. Howse contends that issues of fact remain as to whether CWA’s decision not to pursue her grievance was arbitrary. We agree, and we reverse the district court’s grant of summary judgment.

   [9] “A union’s conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation.” *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46 (1998). “[A]bsent justification or excuse, a union’s negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation.” *Ruzicka v. Gen. Motors Corp.*, 649 F.2d 1207, 1211 (6th Cir. 1981). As discussed below, CWA can point to no admissible evidence that explains its reasons for not taking the basic step of filing the initially required written grievance on Howse’s behalf. Absent justification or excuse, this failure may be found under the law to be “unexplained union inaction, amounting to arbitrary treatment, [that] has barred an employee from access to an established union-management apparatus for resolving grievances.” *Id.* (internal quotation marks and citation omitted).

   [10] The district court’s written decision focused on the question of whether CWA’s decision not to pursue Howse’s grievance was without a rational basis or explanation. The court granted summary judgment because Howse admitted at her deposition that she had no facts that CWA’s decision not to pursue her grievance was based on anything other than its judgment that CWA could not prevail in arbitration. The court ruled that CWA simply disagreed with Howse based on its review of the circumstances and did not willfully and unreasonably act arbitrarily as a matter of law, finding that Yankee, who participated in the negotiations for the CBA, felt that RISD had full authority to administer an oath or affirmation. The court found that because CWA’s starting salary fit within the CBA’s salary schedule, Yankee determined that there was no meritorious grievance that CWA could file alleging that CWA’s starting salary violated the CBA and that, based on this belief, Yankee told Howse that there was nothing else CWA could do for her. [11] However, the only evidence in the record supporting these findings by the district court is contained in Yankee’s signed, written “declaration.” In his declaration, Yankee discussed why, under his reading of the CBA, Howse was not entitled to the salary step assignment she desired, and he recounted his discussions with Butler and Howse on the matter. However, Yankee’s declaration was not verified under oath by someone authorized to administer an oath. Its contents are therefore inadmissible because the document does not satisfy the affidavit requirement of Rule 1-056(E) NMRA. See *Kiehne v. Atwood*, 93 N.M. 657, 667, 604 P.2d 123, 133 (1979) (stating that an affidavit is a “written statement, under oath, sworn to or affirmed by the person making it before some person who has authority to administer an oath or affirmation”). Absent the facts stated in the declaration, there is no evidence in the record establishing CWA’s rationale for not pursuing Howse’s grievance.

   [12] Neither does Howse’s own testimony unequivocally support the reason why Yankee did not file the grievance. Her testimony was elicited by a series of questions, asking her whether she had any facts that Castro’s or Yankee’s actions were based on ill will, hostility, discrimination, or anything other than this judgment that they could not prevail, to all of which she answered in the negative. However, the state of her knowledge does not, without more, establish the reasons for the failure to file. The union’s actions therefore remain unexplained. “‘Unexplained union inaction’ which substantially prejudices a member’s grievance may be sufficiently arbitrary to constitute unfair representation.” *Farmer v. ARA Servs., Inc.*, 660 F.2d 1096, 1103 (6th Cir. 1981) (citation omitted). Because an issue of fact remains on the question of CWA’s rationale for not pursuing Howse’s grievance, we must reverse the court’s grant of summary judgment. See *Sanchez v. Shop Rite Foods*, 82 N.M. 369, 370-71, 482 P.2d 72, 73-74 (Ct. App. 1971) (holding that where summary judgment rests on facts stated in an affidavit and the affidavit is found insufficient as a matter of law, summary judgment is reversible).

   [13] In response to Howse’s challenge to the admissibility of the Yankee declaration, CWA argues that Howse did not specifically controvert the facts in the declaration discussed above by reference to specifically numbered undisputed facts, but she instead admitted them or did not challenge them. CWA contends that these facts are thus deemed admitted under Rule 1-056(D)(2). We disagree with CWA’s hypertechnical reading of our summary judgment rule. By arguing in her memorandum in opposition to summary judgment that the Yankee declaration was inadmissible and citing cases to this effect, Howse fairly invoked
a ruling on whether those facts, as they appeared in CWA’s motion for summary judgment, were controverted. Cf. Lessen v. City of Albuquerque, 2008-NMCA-__ , ¶ 10-11, __ N.M. __, ___ P.3d ___ [No. 26,361(filed April 1, 2008)] (concluding that although the plaintiff did not argue in her response to motion for summary judgment that immunity was waived under two provisions of the Tort Claims Act, the parties nonetheless invoked a ruling on these provisions below because the plaintiff alleged waiver under both provisions in her first amended complaint, and the city made arguments to the district court regarding both provisions in its motion for summary judgment).

{13} Finally, Howse’s claim of arbitrary action is not limited to the simple fact of not filing the grievance. Howse also relies on CWA’s actions in leading her to believe both that the grievance had merit and that CWA was taking steps to process it, which deprived Howse of the ability to process the grievance herself until it was too late to do so. CWA’s claim that it disagreed with the merits of Howse’s grievance (1) conflicts with Howse’s claim that it led her to believe that it thought the grievance had merit and (2) does not explain why it did not so inform Howse earlier so that she could have taken timely action herself. The summary judgment in favor of CWA is reversed.

**B. RISD’s Motion to Dismiss**

**1. Standard of Review**

{14} In reviewing an order dismissing a complaint for failure to state a claim upon which relief may be granted, we apply the following standards:

A motion to dismiss pursuant to [Rule] 1-012(B)(6) [NMRA 2003] tests the legal sufficiency of the complaint. In reviewing an order granting a motion to dismiss, we accept as true all facts properly pleaded. A complaint is subject to dismissal under [Rule] 1-012(B) (6) only if under no state of facts provable thereunder would a plaintiff be entitled to relief . . . . Under this standard of review only the law applicable to a plaintiff’s claim is tested, not the facts which support it.


**2. Howse’s Claim Against RISD**

{15} The gravamen of Howse’s claim against RISD is for breach of contract for the school district’s failure to assign her to the correct salary step under the CBA. RISD moved to dismiss on the ground that Howse’s claim was barred by the two-year statute of limitations for written contracts set forth in NMSA 1978, § 37-1-23(B) (1976), and the district court dismissed Howse’s claim against RISD on this basis.

{16} However, Howse asserts that her action against RISD is not a stand-alone breach of contract action. She instead contends that her claim against RISD is the second prong of a hybrid suit in which RISD is liable for CWA’s breach of its duty of fair representation. In the federal scheme, “[t]he ‘hybrid’ suit is a judicially created exception to the general rule that an employee is bound by the result of grievance or arbitration remedial procedures provided in a collective-bargaining agreement.” _Edwards v. Int’l Union, United Plant Guard Workers of Am._, 46 F.3d 1047, 1051 (10th Cir. 1995); _see Vaca v. Sipes_, 386 U.S. 171, 185-86 (1967). “Where an employee can prove he suffered as [the result of a] violation of a collective-bargaining agreement that would have been remedied through the grievance process had the union fulfilled its statutory duty to represent the employee fairly, federal law will provide a remedy.” _Edwards_, 46 F.3d at 1051. “In such instance, the union has effectively ceased to function as the employee’s representative.” _Aguinaga v. United Food & Commercial Workers Int’l Union_, 993 F.2d 1463, 1471-72 (10th Cir. 1993). “To leave the employee remediless under these circumstances would, in the words of the Supreme Court, ‘be a great injustice.’” _Edwards_, 46 F.3d at 1051 (quoting _Vaca_, 386 U.S. at 186). Although the CBA in this case allowed Howse to pursue her own grievance, the factual basis of her unfair representation claim described above led to the same result as occurs when a union is the sole entity entitled to bring the grievance. Therefore, this remedy is available to Howse.

{17} In a hybrid suit, the statute of limitations does not begin to run on the claim against the employer until “the plaintiff receives notice that the union will proceed no further with the grievance.” _Hersh v. Allen Prods. Co._, 789 F.2d 230, 232 (3d Cir. 1986) (internal quotation marks and citation omitted). In such cases, the cause of action against the employer accrues when “the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation].” _Hungerford v. United States_, 307 F.2d 99, 102 (9th Cir. 1962), overruled on other grounds by _Ramirez v. United States_, 567 F.2d 854, 857 (9th Cir. 1977). This rule has a sound policy rationale.

The unfair representation claim is the necessary “condition precedent” to the employee’s suit. Allowing the [breach of CBA] claim to be tolled until the unfair representation claim also accrues is consistent with the congressional goal of resolving labor disputes in the first instance through the collectively bargained grievance procedure, because the employee will be encouraged to persist in efforts to have the union act on his or her behalf. Therefore, the employee’s claim on the employer’s alleged breach of the collective bargaining agreement is tolled until it was or should have been clear to the employee that the union would not pursue the grievance.

_Vadino v. A. Valley Eng’rs_, 903 F.2d 253, 261 (3d Cir. 1990) (citations omitted); _cf. Maestas v. Zager_, 2007-NMSC-003, ¶ 21, 141 N.M. 154, 152 P.3d 141 (noting, in the medical malpractice context, that “a claim for medical malpractice accrues when the plaintiff knows of both the existence and cause of his injury and not when the plaintiff knows that the acts inflicting the injury might constitute medical malpractice. . . . A plaintiff’s ‘discovery of relevant facts is distinct from his or her discovery of legal rights’” (citations omitted)).

{18} Howse argued below that the statute of limitations on her claim against RISD did not begin to run until she became aware that the union had breached its duty of fair representation. The district court rejected this argument on the ground that no New Mexico case had established the hybrid cause of action asserted by Howse and granted RISD’s motion, finding that the statute of limitations began to run on Howse’s claim against RISD when the CBA was breached, i.e., when Howse was transferred by RISD to her security guard position on May 9, 2000, and that her claim, which was filed on October 2, 2003, was therefore barred. _See Nashan v. Nashan_, 119 N.M. 625, 633, 894 P.2d 402, 410 (Ct. App. 1995) (“The statute of limitations on a breach of contract claim runs from the date the contract is breached.”).

{19} On appeal, Howse calls our attention to _Jones_, 72 N.M. 322, 383 P.2d 571, contending that in that case, the New Mex-
The New Mexico Supreme Court recognized the hybrid cause of action. RISD argues that because Howse did not cite to Jones in the district court, we should not consider it on appeal. However, the district court is “charged with knowing and correctly applying established New Mexico precedent.” State v. Gomez, 1997-NMSC-006, ¶ 30, 122 N.M. 777, 932 P.2d 1, and as long as a party has “assert[ed] the legal principle upon which their claims are based” and “develop[ed] the facts” in the district court, id. ¶ 29, we will consider that party’s argument to have been adequately preserved below even if citation to a significant authority was not.

Moreover, although Section 37-1-23(B) provides for a two-year statute of limitations on Howse’s action against RISD, we follow the federal courts in holding that the statute of limitations on Howse’s claim did not begin to run until she was given notice that CWA would not be pursuing her grievance against RISD. RISD urges us to adopt the federal six-month statute of limitations applicable to hybrid claims in federal courts, contending that we may not “selectively ignore” the six-month statute of limitations applied in the federal line of authority on tolling of limitations. See, e.g., DelCostello v. Int’l Bhd. of Teamsters, 462 U.S. 151, 171-72 (1983). However, “New Mexico courts follow federal law only to the extent that they find that law persuasive.” State v. Long, 1996-NMCA-011, ¶ 7, 121 N.M. 333, 911 P.2d 227. In the present case, we find federal law persuasive only to the extent that, as discussed above, we adopt the federal rule for tolling of the applicable statute of limitations. We do not adopt the federal six-month statute of limitations itself. “We cite federal cases only to the extent that we find them instructive and not as binding precedent.” Lowery v. Atterbury, 113 N.M. 71, 74 n.2, 823 P.2d 313, 316 n.2 (1992). Since New Mexico already has a statutorily created statute of limitations for contract actions against the state, and since we have no statutory limitation period for actions for breach of a CBA, we see no reason to borrow from the federal labor law statute of limitations. See generally Tracy A. Bateman, Annotation, What Statute of Limitations Applies to State Law Action by Public Sector Employee for Breach of Union’s Duty of Fair Representation, 12 A.L.R.5th 950, 956-58 (1993) (noting that federal labor law does not apply to public employees and therefore states usually do not adopt federal six-month limitation period). Accordingly, we hold that the two-year statute of limitations period provided for in Section 37-1-23(B) is appropriate for hybrid claims brought in New Mexico courts.

We note that a factual issue remains as to when Howse “received notice” that CWA had breached its duty of fair representation. Howse alleges that she discovered that a grievance was never filed on her behalf around May 9, 2002. However, she also admits that Castro told her in November 2001 that the union could not pursue her grievance because the deadline for doing so had passed. In either case, Howse’s complaint, which was filed on October 3, 2002, was not barred by the two-year statute of limitations, and we reverse the district court’s order of dismissal.

CONCLUSION

We reverse the district court’s grant of summary judgment on Howse’s claims against CWA, and we reverse the court’s dismissal of Howse’s claims against RISD.

IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
MICHAEL E. VIGIL, Judge
Tracy J. Ahr
Margaret A. Foster
and
Linda M. Quezada

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