BAR BULLETIN

Official Publication of the State Bar of New Mexico

February 8, 2017 • Volume 56, No. 6

Teton Dawn, by Robert A. Martin (see page 3)

Inside This Issue

Notices 4

Corrections to the *2016–2017 Bench & Bar Directory* 5

Disciplinary Quarterly Report: October-December 2016 ... 6

Rules/Orders: No. 04-2016-742:
In the Matter of Merrie L. Chappell, Esq. 14

From the New Mexico Supreme Court

2016-NMSC-035, No. S-1-SC-35101:
Dalton v. Santander Consumer USA, Inc. 15

2016-NMCA-036, No. S-1-SC-35446:
State Engineer v. Diamond K Bar Ranch, LLC 19

NEW MEXICO Lawyer

Current Issues in Tax Law

STATE BAR of NEW MEXICO

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February 8, 2017, Vol. 56, No. 6

Table of Contents

Notices 4
Corrections to the *2016–2017 Bench & Bar Directory* 5
Disciplinary Quarterly Report: October-December 2016 6
Continuing Legal Education Calendar 7
Court of Appeals Opinions List 9
Recent Rule-Making Activity 10
Rules/Orders
No. 04-2016-742: In the Matter of Merrie L. Chappell, Esq. 14
Opinions
From the New Mexico Supreme Court
2016-NMSC-035, No. S-1-SC-35101: Dalton v. Santander Consumer USA, Inc. 15
2016-NMCA-036, No. S-1-SC-35446: State Engineer v. Diamond K Bar Ranch, LLC 19
Advertising 23

Meetings

February

8
Children's Law Section Board
Noon, Juvenile Justice Center, Albuquerque

8
Taxation Section Board
11 a.m., teleconference

9
Public Law Section Board
Noon, Montgomery & Andrews, Santa Fe

9
Business Law Section Board
4 p.m., teleconference

10
Criminal Law Section Board
Noon, Kelley & Boone, Albuquerque

10
Prosecutors Section Board
Noon, State Bar Center

15
Real Property Trust and Estate Section Board: Trust and Estate Division
Noon, State Bar Center

17
Family Law Section Board
9 a.m., teleconference

17
Trial Practice Section Board
Noon, State Bar Center

21
Appellate Practice Section Board
Noon, teleconference

Workshops and Legal Clinics

February

9
Common Legal Issues for Senior Citizens
Workshop Workshop (POA/AHCD)
10 a.m.–noon, Villa Consuelo Senior Center, Santa Fe, 1-800-876-6657

15
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

22
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

March

1
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

1
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

15
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

Cover Artist: Robert A. Martin began photographing at 8 years old and continues into his eigth decade, enjoying a wide variety of subjects. Martin was a member of the State Bar, practicing from 1967–2002. He enjoys traveling extensively. View more of his work online at https://www.flickr.com/photos/94779902@N00/.

Notices

Court News

New Mexico Supreme Court Board of Bar Examiners

New Office Location

The New Mexico Board of Bar Examiners is moving. After Feb. 15, send all correspondence to the Board, including application and reinstatement materials, to 20 First Plaza NW, Suite 710, Albuquerque, NM 87102. The Board's website and phone number remain the same: www.nmexam.org and 505-271-9706.

New Mexico Court of Appeals

Investiture Ceremony for Judge Julie J. Vargas

Members of the legal community are invited to the investiture ceremony for Hon. Julie J. Vargas of the New Mexico Court of Appeals. The ceremony will be at 4 p.m., Feb. 17, at the National Hispanic Cultural Center, Bank of America Theater, 1701 4th St. SW, Albuquerque. A reception will immediately follow at the National Hispanic Cultural Center Salon Ortega.

Third Judicial District Court

Announcement of Vacancy

A vacancy on the Third Judicial District Court will exist as of Feb. 1 due to the resignation of Hon. Darren M. Kugler effective Jan. 31. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Alfred Mathewson, chair of the Third Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Download applications at lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., Feb. 16. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Third Judicial District Court Judicial Nominating Commission will meet at 9 a.m. on Feb. 23 to interview applicants for the position in Las Cruces. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to my clients:

In appropriate cases, I will counsel my client regarding options for mediation, arbitration and other alternative methods of resolving disputes.

Bernalillo County Metropolitan Court

Change in Civil Summons

Effective Dec. 31, 2016, the general Civil Summons (Form 4-204) for the Metropolitan Court has changed. New forms can be found at: www.nmcourts.gov/forms.aspx or lawlibrary.nmcourts.gov/official-new-mexico-court-forms.aspx or at the Self-Help Office, 2nd Floor, Room 210.

State Bar News

Attorney Support Groups

- Feb. 13, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Feb. 20, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- March 6, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Practice Sections

Proposed Veterans Law Section

Are you interested in a Veteran's Law section to serve the needs of attorneys who focus their practice on veterans-related matters, including VA Disability Benefits? The proposed section will pledge to promote professionalism, excellence, understanding and cooperation among those attorneys engaged in this area of practice. The section would be committed to addressing the professional interests of veterans law counsel by informing members about issues of particular interest to them, identify and share best practices through various forms of information sharing, and offering social and professional networking opportunities. If you are interested in a section, email Breanna Henley at bhenley@nmbar.org.

Solo and Small Firm Section

Random Walk Through Jurisprudence with Judge Kennedy

Judge Roderick T. Kennedy, recently retired after 16 years on the New Mexico Court of Appeals, will discuss "A Random Walk Through Jurisprudence, Science and the Liberal Arts" from noon–1 p.m., Feb. 21, at the State Bar Center. Judge Kennedy's talk is part of the Solo and Small Firm Section luncheon presentation on unique law-related subjects. All are welcome and lunch will be provided. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

Young Lawyers Division

Veterans Legal Clinic

The Veterans Legal Clinic seeks volunteer attorneys to provide brief legal advice (15-20 minutes) to Veterans in the areas of family law, consumer rights, bankruptcy, landlord/tenant, and employment during. The remaining clinic dates and times for 2017 are: March 14, June 13 and Sept. 12 from 8:30-11 a.m. For more information or to volunteer contact Keith Mier at KCM@sutinfirm.com.

Volunteers Needed: Wills for Heroes in Albuquerque

YLD is seeking volunteer attorneys for its Wills for Heroes event for APD officers from 9 a.m.-noon, Feb. 25, at the Albuquerque Police Academy, located at 5412 2nd St in Albuquerque. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Volunteers need no prior experience with wills. Paralegal and law student volunteers are also needed to serve at witnesses. Contact Allison Block-Chavez at ablockchavez@abqlawnm.com to volunteer.

UNM

Law Library

Hours Through May 13

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.

School of Law

'The Constitution at a Crossraods' with Akhil Reed Amar

Leading legal scholar and "West Wing" consultant Akhil Reed Amar will present "The Constitution at a Crossroads" (1.0 G), an engaging 45 minute talk and 20 minute Q&A at 6:15 p.m., Feb. 16, at the UNM School of Law, located at 1117 Stanford NE, Albuquerque. A reception will follow. Early registration is advised. Visit goto.unm.edu/amar or call 505-277-8184.

Women's Law Caucus

Justice Mary Walters Award

Each year the Women's Law Caucus at UNM School of Law chooses two outstanding women in the New Mexico legal community to honor in the name of former Justice Mary Walters, the first woman appointed to the New Mexico Supreme Court. In 2017 the WLC will honor Chief Judge Nan Nash of the Second Judicial District and First Assistant Federal Public Defender Margaret Katze at the Awards Dinner on March 22 at the Student Union Building on UNM's main campus. Individual tickets for the dinner can be purchased for $50. Tables can be purchased for $400 and seat approximately 10 people. To purchase tickets and receive additional information, http://goto.unm.edu/walters. R.S.V.P. by March 14. For more information, email WLC President, Lindsey Goodwin goodwili@law.unm.edu.

Other Bars

State Bar of Arizona

Free Webinar on Dementia

Every 66 seconds, someone in the U.S. develops Alzheimer's disease. If dementia hasn't already impacted a colleague, friend or family member, it likely will soon. The State Bar of Arizona is offering a free webcast on this topic at 10–11:15 a.m. on Feb. 15. The program will address how to recognize dementia; responsibilities and opportunities when faced with dementia of a colleague, client, family member or yourself; and available resources. To register, visit https://azbar.inreachce.com/Details/Information/c07acd37-d3e1-46f4-9a28-9a077989a0f8.

Women's Bar Association

2017 Henrietta Pettijohn Award

The New Mexico Women's Bar Association is now accepting nominations for its Henrietta Pettijohn Award. The Award was established by the NMWBA to honor an attorney, female or male, who over the previous year(s), has done an exemplary job of advancing the causes of women in the legal profession. Send nominations to Margaret Graham at mgraham@pbwslaw.com. The deadline for nominations is Feb. 12. For more information about the award, visit www.nmwba.org.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges 888-502-1289
www.nmbar.org/JLAP

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court
Email: attorneyinfochange@nmcourts.gov
Fax: 505-827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
Email: address@nmbar.org
Fax: 505-797-6019
Mail: PO Box 92860
Albuquerque, NM 87199
Online: www.nmbar.org

Corrections to the *2016–2017 Bench and Bar Directory*

Luna County Magistrate Court

Judge Ray W. Baese
912 S Silver
Deming NM 88030
575-546-9321 F 575-546-4896

Sixth Judicial District Attorney

Luna
108 E Poplar
Deming NM 88030
575-546-6526 F 575-546-0336

Note: Information for members is current as of April 6, 2016. Visit www.nmbar.org/FindAnAttorney for the most up-to-date information. To submit a correction, contact Pam Zimmer, pzimmer@nmbar.org.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: Oct. 1–Dec. 31, 2016

Final Decisions

Final Decisions of the New Mexico Supreme Court 3

Matter of James Corey Stackhouse, Esq. (Disciplinary No. 05-2016-744). The New Mexico Supreme Court accepted a conditional agreement and entered an order suspending Respondent from the practice of law for trust account violations, failing to communicate, and general neglect. The Court deferred the suspension and placed Respondent on probation with conditions.

Matter of Troy Wayne Prichard, Esq. (Disciplinary No. 07-2014-695 and 10-2015-730). The New Mexico Supreme Court entered an order disbarring Respondent from the practice of law for trust account violations.

Matter of Michelle Renee Mladek, Esq. (Disciplinary No. 08-2016-747). The New Mexico Supreme Court accepted a conditional agreement and entered an order permanently disbarring Respondent from the practice of law for incompetence, lack of diligence, failure to communicate, lack of candor to a court, violation of a duty of fairness to opposing counsel or parties, bringing meritless claims or causes of action, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, lawyer acting as a witness, and engaging in conduct that was prejudicial to the administration of justice.

Summary Suspensions

Total number of attorneys summarily suspended 0

Administrative Suspensions

Total number of attorneys administratively suspended..... 0

Disability Suspensions

Total number of attorneys placed on disability suspension 0

Charges Filed

Total number of attorneys that had charges filed against them 0

Petitions for Administrative Suspension Filed

Petitions for administrative suspension filed 1

The Office of Disciplinary Counsel filed a petition for administrative suspension against an attorney who repeatedly failed to respond to requests for information.

Petitions for Reciprocal Discipline Filed

Petitions for reciprocal discipline filed 0

Petitions for Reinstatement Filed

Petitions for reinstatement filed 0

Formal Reprimands

Total number of attorneys formally reprimanded 1

Matter of Jacqueline Bennett, Esq. (Disciplinary No. 03-2016-741) a Formal Reprimand was issued at the Disciplinary Board meeting of November 18, 2016, for violations of Rule 16-101, failing to provide competent representation; Rule 16-103, failing to act with reasonable diligence and promptness in representing a client; Rule 16-104 (A)(3), failing to keep the client reasonably informed about the status of the matter; Rule 16-801(B), failing to timely respond to a lawful demand for information from a disciplinary authority; Rule 16-803(D), failing to give full cooperation and assistance to disciplinary counsel; Rule 16-804(A), violating the Rules of Professional Conduct; and 16-804(D), by engaging in conduct prejudicial to the administration of justice. The Formal Reprimand was published in the State Bar of New Mexico *Bar Bulletin* issued Dec. 7, 2016.

Informal Admonitions

Total number of attorneys admonished 0

Letters of Caution

Total number of attorneys cautioned 9

Attorneys were cautioned for the following conduct: (1) general incompetence (threw letters of caution issued); (2) bank overdraft (two letters of caution issued); (3) conflict of interest (two letters of caution issued); (4) general neglect; and (5) contact with opposing party.

Complaints Received

Allegations	Number of Complaints
Trust Account Violations	4
Conflict of Interest	0
Neglect and/or Incompetence	77
Misrepresentation or Fraud	11
Relationship with Client or Court	18
Fees	10
Improper Communications	1
Criminal Activity	0
Personal Behavior	11
Other	2
Total number of complaints received	134

Legal Education

February

8 **2017 Ethics Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Essentials of Employment Law**
5.6 G
Live Seminar, Las Cruces
Sterling Education Services Inc.
www.sterlingeducation.com

10 **Drugs in the Workplace (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Controversial Issues Facing the Legal Profession—Annual Paralegal Division CLE (2016)**
5.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Gender and Justice (2016 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Estate Planning for Digital Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Use of Trust Protectors in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Ethics in Billing and Collecting Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics in Negotiations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Justice with Compassion—Facility Dogs Improving the Legal System (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **2016 Employment and Labor Law Institute**
6.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **The Ethics of Managing and Operating an Attorney Trust Account (2016 Ethicspalooza)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

24 **Lawyers' Duties of Fairness and Honesty (Fair or Foul: 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Estate Planning for Retirement Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

March

1 **Trusts and Distributions: All About Non-Pro-Rata Distributions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **Management and Information Control Issues in Closely Held Companies: Strategies, Conflicts and Drafting Consideration**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

3 **32nd Annual Bankruptcy Year in Review Seminar**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Advanced Workers Compensation**
5.6 G
Live Seminar, Albuquerque
Sterling Education Services, Inc.
www.sterlingeducation.com

10 **Reforming the Criminal Justice System**
6.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Indian Law 2016: What Indian Law Practitioners Need to Know**
1.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **Journalism, Law and Ethics (2016 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10 **New Mexico DWI Cases: From the Initial Stop to Sentencing (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

March

14 **Planning to Prevent Trust, Estate and Will Contests**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Lawyer Ethics and Investigations for and of Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Demand Letters**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Wildlife/Endangered Species on Public and Private Lands (2016)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Keynote Address with Justice Ruth Bader Ginsburg (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Lawyers Duties of Fairness and Honesty (Fair or Foul 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Environmental Regulations/Oil and Gas Industry (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Fear Factor: How Good Lawyers Get Into Ethical Trouble (2016)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **BDITs: Beneficiary Defective Inheritor's Trusts—Reducing Taxes, Retaining Control**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **SALT: How State and Local Tax Impacts Major Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

April

4 **Retail Leases: Drafting Tips and Negotiating Traps**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **All About Basis Planning for Trust and Estate Planners**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Ethics of Representing the Elderly**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Settlement Agreements in Employment Disputes and Litigation**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

May

5 **Lawyer Ethics and Client Development**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Undue Influence and Duress in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Ethics of Co-Counsel and Referral Relationships**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective January 27, 2017

Published Opinions

No. 34667	2nd Jud Dist Bernalillo CR-14-1344, STATE v A NAVARRO-CALZADILLAS (reverse and remand)	1/24/2017
No. 34620	2nd Jud Dist Bernalillo CR-14-4221, STATE v B SEIGLING (reverse)	1/24/2017

Unpublished Opinions

No. 35370	2nd Jud Dist Bernalillo CR-15-1927, STATE v E BISHOP (affirm in part, reverse in part)	1/23/2017
No. 35605	5th Jud Dist Lea JQ-14-16, CYFD v DAVID H (affirm)	1/23/2017
No. 35806	2nd Jud Dist Bernalillo LR-15-27, STATE v J DIAZ (affirm)	1/23/2017
No. 35431	11th Jud Dist San Juan LR-15-50, CITY OF FARMINGTON v B SCOTT (affirm)	1/23/2017
No. 35664	3rd Jud Dist Dona Ana JQ-14-8, CYFD v JEFFERY V (affirm)	1/23/2017
No. 35586	3rd Jud Dist Dona Ana CR-15-277, STATE v R GONZALEZ (affirm)	1/24/2017
No. 35906	10th Jud Dist De Baca LR-13-2, STATE v M BALTES (affirm)	1/24/2017
No. 34955	10th Jud Dist Quay CR-14-108, STATE v M ROMERO JR (affirm in part, reverse in part and remand)	1/24/2017
No. 35240	13th Jud Dist Valencia CR-13-121, STATE v J CHAVEZ (affirm)	1/24/2017
No. 35987	WCA-15-62591, M TAFOYA v NALS APARTMENT (dismiss)	1/25/2017
No. 34274	8th Jud Dist Taos CR-10-127, STATE v R RODRIGUEZ (affirm)	1/26/2017
No. 35166	2nd Jud Dist Bernalillo CV-08-3459, WM SPECIALITY v G JOHNSON (dismiss)	1/26/2017
No. 35444	2nd Jud Dist Bernalillo CV-13-3523, ESTATE of B MAESTAS v A LEON (dismiss)	1/26/2017
No. 35547	11th Jud Dist San Juan LR-15-11, STATE v J STEVENS (affirm)	1/26/2017
No. 35744	5th Jud Dist Eddy JQ-15-5, CYFD v NYCHOLE G (affirm)	1/26/2017
No. 35826	5th Jud Dist Lea CR-15-661, STATE v D GOMEZ –AGUILERA (affirm)	1/26/2017
No. 35723	2nd Jud Dist Bernalillo JQ-14-23, CYFD v REBECCA D (affirm)	1/26/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective February 8, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 NMRA:

Effective Date
(except where noted differently: 12/31/2016)

Rules of Civil Procedure for the District Courts

1-005.2	Electronic service and filing of pleadings and other papers	01/01/2017
1-007.2	Time limit for filing motion to compel arbitration	
1-009	Pleading special matters	07/01/2017
1-017	Parties plaintiff and defendant; capacity	07/01/2017
1-023	Class actions	
1-054	Judgments; costs	
1-055	Default	07/01/2017
1-060	Relief from judgment or order	07/01/2017
1-079	Public inspection and sealing of court records	05/18/2016
1-083	Local rules	
1-093	Criminal contempt	
1-096	Challenge of nominating petition	
1-104	Courtroom closure	
1-120	Domestic relations actions; scope; mandatory use of court-approved forms by self-represented litigants	
1-128	Uniform collaborative law rules; short title; definitions; applicability	
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
1-128.1	Collaborative law participation agreement; requirements	
1-128.2	Initiation of collaborative law process; voluntary participation; conclusion; termination; notice of discharge or withdrawal of collaborative lawyer; continuation with successor collaborative lawyer	
1-128.3	Proceedings pending before tribunal; status report; dismissal	
1-128.4	Emergency order	
1-128.5	Adoption of agreement by tribunal	
1-128.6	Disqualification of collaborative lawyer and lawyers in associated law firm	
1-128.7	Disclosure of information	
1-128.8	Standards of professional responsibility and mandatory reporting not affected	
1 128.9	Appropriateness of collaborative law process	
1-128.10	Coercive or violent relationship	
1-128.11	Confidentiality of collaborative law communication	
1-128.12	Privilege against disclosure for collaborative law communication; admissibility; discovery	
1-128.13	Authority of tribunal in case of noncompliance	

Rules of Civil Procedure for the Magistrate Courts

2-110	Criminal contempt
2-114	Courtroom closure
2-305	Dismissal of actions
2-702	Default
2-705	Appeal

Rules of Civil Procedure for the Metropolitan Courts

3-110	Criminal contempt
3-114	Courtroom closure
3-204	Service and filing of pleadings and other papers by facsimile
3-205	Electronic service and filing of pleadings and other papers
3-702	Default

Civil Forms

4-204	Civil summons	
4-226	Civil complaint provisions; consumer debt claims	07/01/2017
4-306	Order dismissing action for failure to prosecute	
4-309	Thirty (30) day notice of intent to dismiss for failure to prosecute	
4-310	Order of dismissal for failure to prosecute	
4-702	Motion for default judgment	
4-702A	Affirmation in support of default judgment	
4-703	Default judgment; judgment on the pleadings	
4-909	Judgment for restitution	
4-909A	Judgment for restitution	
4-940	Notice of federal restriction on right to possess or receive a	05/18/2016
4-982	Withdrawn	
4-986	Withdrawn	
4-989	Withdrawn	
4-990	Withdrawn	

Rules of Criminal Procedure for the District Courts

5-102	Rules and forms	
5-104	Time	
5-112	Criminal contempt	
5-123	Public inspection and sealing of court records	05/18/2016
5-124	Courtroom closure	

5-304	Pleas	
5-511	Subpoena	
5-511.1	Service of subpoenas and notices of statement	
5-614	Motion for new trial	
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/2016
5-801	Reduction of sentence	

Rules of Criminal Procedure for the Magistrate Courts

6-102	Conduct of court proceedings	
6-109	Presence of the defendant	
6-111	Criminal contempt	
6-116	Courtroom closure	
6-201	Commencement of action	
6-209	Service and filing of pleadings and other papers	
6-506	Time of commencement of trial	05/24/2016
6-601	Conduct of trials	

Rules of Criminal Procedure for the Metropolitan Courts

7-109	Presence of the defendant	
7-111	Criminal contempt	
7-115	Courtroom closure	
7-201	Commencement of action	
7-209	Service and filing of pleadings and other papers	
7-304	Motions	
7-506	Time of commencement of trial	05/24/2016
7-606	Subpoena	

Rules of Procedure for the Municipal Courts

8-102	Conduct of court proceedings	
8-108	Presence of the defendant	
8-110	Criminal contempt	
8-114	Courtroom closure	
8-201	Commencement of action	
8-208	Service and filing of pleadings and other papers	
8-506	Time of commencement of trial	05/24/2016
8-601	Conduct of trials	

Criminal Forms

9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
9-611	Withdrawn	
9-612	Order on direct criminal contempt	
9-613	Withdrawn	

Children's Court Rules and Forms

10-103	Service of process	
10-163	Special masters	
10-166	Public inspection and sealing of court records	05/18/2016*
10-168	Rules and forms	
10-171	Withdrawn	05/18/2016*
10-315	Custody hearing	11/28/2016
10-318	Placement of Indian children	11/28/2016
10-322	Defenses and objections; when and how presented; by pleading or motion	
10-325	Notice of child's advisement of right to attend hearing	
10-340	Testimony of a child in an abuse or neglect proceeding	
10-408A	Withdrawn	
10-413	Withdrawn	
10-414	Withdrawn	
10-417	Withdrawn	
10-502	Summons	
10-521	ICWA notice	11/28/2016
10-560	Subpoena	
10-570	Notice of child's advisement of right to attend hearing	
10-571	Motion to permit testimony by alternative method	
10-604	Withdrawn	05/18/2016*
10-701	Statement of probable cause	
10-702	Probable cause determination	
10-703	Petition	
10-704	Summons to child Delinquency Proceeding	
10-705	Summons to parent or custodian or guardian – Delinquency Proceeding	
10-706	Order of appointment of attorney for child and notice and order to parent(s), guardian(s), or custodian(s)	
10-707	Eligibility determination for indigent defense services	
10-711	Waiver of arraignment and denial of delinquent act	
10-712	Plea and disposition agreement	
10-713	Advice of rights by judge	
10-714	Consent decree	
10-715	Motion for extension of consent decree	
10-716	Judgment and Disposition	
10-717	Petition to revoke probation	
10-718	Sealing order	
10-721	Subpoena	
10-722	Affidavit for arrest warrant	
10-723	Arrest warrant	
10-724	Affidavit for search warrant	
10-725	Search warrant	
10-726	Bench warrant	
10-727	Waiver of right to have a children's court judge preside over hearing	
10-731	Waiver of arraignment in youthful offender proceedings	
10-732	Waiver of preliminary examination and grand jury proceeding	
10-741	Order for evaluation of competency to stand trial	
10-742	Ex parte order for forensic evaluation	
10-743	Order for diagnostic evaluation	
10-744	Order for pre dispositional diagnostic evaluation	
10-745	Order for evaluation of amenability to treatment for youthful offender (requested by defense counsel)	
Rule Set 10 Table	Table of Corresponding Forms	

*On June 27, 2016, the Court issued Order No. 16-8300-003 provisionally approving amendments to Rule 10-166 NMRA and provisionally approving new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. On November 28, 2016, the Court issued Order No. 16-8300-037, withdrawing the provisionally-approved amendments to Rule 10-166 NMRA and the provisionally-approved new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. Accordingly, Rule 10-166 NMRA has been restored to the version approved by

Order No. 11-8300-010, and Rule 10-171 and Form 10-604 have been withdrawn.

Rules of Evidence

11-803	Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness

Rules of Appellate Procedure

12-101	Scope and title of rules
12-201	Appeal as of right; when taken
12-202	Appeal as of right; how taken
12-203	Interlocutory appeals
12-203.1	Appeals to the Court of Appeals from orders granting or denying class action certification
12-204	Appeals from orders regarding release entered prior to a judgment of conviction
12-206	Stay pending appeal in children's court matters
12-206.1	Expedited appeals from children's court custody hearings
12-208	Docketing the appeal
12-209	The record proper (the court file)
12-302	Appearance, withdrawal, or substitution of attorneys; changes of address or telephone number
12-305	Form of papers prepared by parties.
12-309	Motions
12-310	Duties of clerks
12-317	Joint or consolidated appeals
12-318	Briefs
12-319	Oral argument
12-320	Amicus curiae
12-321	Scope of review; preservation
12-322	Courtroom closure
12-402	Issuance and stay of mandate
12-403	Costs and attorney fees
12-404	Rehearings
12-501	Certiorari from the Supreme Court to the district court regarding denial of habeas corpus
12-503	Writs of error
12-504	Other extraordinary writs from the Supreme Court
12-505	Certiorari from the Court of Appeals regarding district court review of administrative decisions
12-601	Direct appeals from administrative decisions where the right to appeal is provided by statute
12-602	Appeals from a judgment of criminal contempt of the Court of Appeals
12-604	Proceedings for removal of public officials within the jurisdiction of the Supreme Court
12-606	Certification and transfer from the Court of Appeals to the Supreme Court
12-607	Certification from other courts to the Supreme Court
12-608	Certification from the district court to the Court of Appeals

Uniform Jury Instructions – Civil

13-1830	Measure of damages; wrongful death (including loss of consortium)

Uniform Jury Instructions – Criminal

14-301	Assault; attempted battery; essential elements
14-303	Assault; attempted battery; threat or menacing conduct; essential elements
14-304	Aggravated assault; attempted battery with a deadly weapon; essential elements
14-306	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14-308	Aggravated assault; attempted battery with intent to commit a felony; essential elements
14-310	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14-311	Aggravated assault; attempted battery with intent to commit a violent felony; essential elements
14-313	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14-351	Assault upon a [school employee] [health care worker]; attempted battery; essential elements
14-353	Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements
14-354	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements
14-356	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
14-358	Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements
14-360	Aggravated assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14-361	Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements
14-363	Assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14-371	Assault; attempted battery; "household member"; essential elements
14-373	Assault; attempted battery; threat or menacing conduct; "household member"; essential elements
14-374	Aggravated assault; attempted battery with a deadly weapon; "household member"; essential elements
14-376	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; "household member"; essential elements
14-378	Aggravated assault; attempted battery with intent to commit a felony; "household member"; essential elements
14-380	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; "household member"; essential elements
14-381	Assault; attempted battery with intent to commit a

	violent felony; "household member"; essential elements
14-383	Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements
14-990	Chart
14-991	Failure to register as a sex offender; 1999 and 2000 versions of SORNA; essential elements
14-992	Failure to register as a sex offender; 2005, 2007, and 2013 versions of SORNA; essential elements
14-993	Providing false information when registering as a sex offender; essential elements
14-994	Failure to notify county sheriff of intent to move from New Mexico to another state, essential elements
14-2200	Assault on a peace officer; attempted battery; essential elements
14-2200A	Assault on a peace officer; threat or menacing conduct; essential elements
14-2200B	Assault on a peace officer; attempted battery; threat or menacing conduct; essential elements
14-2201	Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements
14-2203	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly weapon; essential elements
14-2204	Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements
14-2206	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements
14-2207	Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements
14-2209	Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14-3106	Possession of a dangerous drug
14-4503	Driving with a blood or breath alcohol concentration of eight one hundredths (.08) or more; essential elements
14-4506	Aggravated driving with alcohol concentration of (.16) or more; essential elements
14-5120	Ignorance or mistake of fact

Rules Governing Admission to the Bar

15-104	Application
15-205	Grading and Scoring
15-302	Admission to practice

Rules of Professional Conduct

16-108	Conflict of interest; current clients; specific rules

Rules Governing Discipline

17-202	Registration of attorneys
17-204	Trust accounting
17-208	Incompetency or incapacity
17-214	Reinstatement

Rules Governing the Client Protection Fund

17A-005	Composition and officers of the commission

Rules Governing the Unauthorized Practice of Law

17B 005	Civil injunction proceedings
17B 006	Determination by the Supreme Court

Rules Governing the Recording of Judicial Proceedings

22-101	Scope; definitions; title
22-204.1	Temporary Certification for Court Reporters

Supreme Court General Rules

23-107	Broadcasting, televising, photographing, and recording of court proceedings; guidelines

Rules Governing the New Mexico Bar

24-101	Board of Bar Commissioners
24-102	Annual license fee
24-110	"Bridge the Gap: Transitioning into the Profession" program
24-111	Emeritus attorney

Recompiled and Amended Local Rules for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth Judicial District Courts

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's Web Site at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx

Before the Disciplinary Board of the Supreme Court of the state of New Mexico

Disciplinary No. 04-2016-742

In the Matter o f **Merrie L. Chappell, Esq.,** an attorney licensed to practice law before the Courts of the State of New Mexico

Formal Reprimand

You are being issued this Formal Reprimand pursuant to the Conditional Agreement Admitting the Allegations and Consent to Discipline which was approved by both a Hearing Committee and a Disciplinary Board Panel.

In 2004-2006, you were doing business as the Law Office of Merrie L. Chappell, of which you were president. In 2004, an employee of yours was injured. You did not then maintain the statutorily required workers' compensation insurance for your employees. The employee's workers' compensation complaint for benefits—against your firm and against the New Mexico Uninsured Employers' Fund (UEF) of the New Mexico Workers' Compensation Administration (WCA)—was deemed valid and compensable; UEF paid the employee's medical bills and indemnity payments.

In late 2004, as president of the Law Office of Merrie L. Chappell, you formally agreed to reimburse $3,943.02 to the UEF. However, you did not pay despite UEF's repeated efforts to obtain payment. Eventually, the UEF filed a civil lawsuit in state district court to collect the debt; you were served, but you did not respond; UEF obtained a Default Judgment against you for the original amount owed plus interest. Still, you took no action to address the debt. Consequently, UEF obtained and served on you a *Writ of Execution*. Finally, after the UEF filed its disciplinary complaint, you paid the debt to UEF.

Also, in response to the disciplinary complaint and to subsequent questions, you gave two separate and inconsistent explanations for your failure to pay the debt; when asked about the inconsistency, you failed to respond. However, you finally did fully cooperate, and you expressed great remorse for your conduct.

Your conduct violated the following Rules of Professional Conduct: Rule 16-304(C), by knowingly disobeying an obligation under the rules of a tribunal; Rule 16-803(D), by failing to give full cooperation to disciplinary counsel; Rule 16-804(C), by engaging in conduct involving negligent misrepresentation; and Rule 16-804(D), by engaging in conduct that was prejudicial to the administration of justice.

You are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The formal reprimand will be filed with the Supreme Court in accordance with 17-206(D), and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. In addition, in accordance with Rule 17-206(D), the entire text of this formal reprimand will be published in the State Bar of New Mexico Bar Bulletin.

Dated January 20, 2017

The Disciplinary Board of the
New Mexico Supreme Court

By

Margaret A. Graham, Esq.
Board Vice-Chair

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-035

No. S-1-SC-35101 (filed September 22, 2016)

EILEEN J. DALTON,
Plaintiff-Respondent,
v.
SANTANDER CONSUMER USA, INC.,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Sarah M. Singleton, District Judge

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Tulsa, Oklahoma

JENNIFER BENNETT
PUBLIC JUSTICE, P.C.
Oakland, California
for Respondent

Opinion

Edward L. Chávez, Justice

{1} Eileen Dalton purchased two used cars under separate finance contracts which contained provisions that retained self-help remedies for both parties, and that allowed either party to compel arbitration of any claim or dispute arising out of the contracts that exceeded the jurisdiction of a small claims court, which in New Mexico is $10,000. Dalton contends that the arbitration clause is substantively unconscionable on its face, and therefore is unenforceable because the self-help and small claims carve-out provisions are unreasonably one-sided. We hold that the arbitration provision in this case is not substantively unconscionable because (1) lawful self-help remedies are extrajudicial remedies, and (2) the small claims carve-out is facially neutral because either party must sue in small claims court if its claim is less than $10,000, or arbitrate if its claim exceeds $10,000; as a result, the small claims carve-out is neither grossly unfair nor unreasonably one-sided on its face.

I. BACKGROUND

{2} In 2010, Dalton entered into several finance contracts to purchase a 2003 Cadillac CTS (the Cadillac) and a 2010 Pontiac G6 (the Pontiac) from a used car dealer in Santa Fe. One or more of these contracts were sold to Santander Consumer USA, Inc. (Santander). The purchase price of the Cadillac was $13,297.93, for which Dalton received financing for $11,074.93 of the purchase price with a 24.99% annual interest rate and monthly payments of $325 for sixty months. The purchase price of the Pontiac was $15,965.37, for which she received $14,305.74 financing at a 25.99% annual interest rate with monthly payments of $398.36 for seventy-two months.

{3} Each finance contract contained an identical arbitration clause. The arbitration clause provided that "[a]ny claim or dispute, whether in contract, tort, statute or otherwise" arising out of or relating to the "credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship" would, at the election of either party, "be resolved by neutral, binding arbitration and not by a court action." However, the arbitration clause also stated that both parties "retain any rights to self-help remedies, such as repossession," as well as "the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction." In New Mexico, small claims actions are those in which the value of the claim does not exceed $10,000, exclusive of interest and costs. NMSA 1978, § 35-3-3(A) (2001); NMSA 1978, § 34-8A-3(A)(2) (2001).

{4} Dalton did not make her first payment on the Pontiac contract and the Pontiac was almost immediately repossessed without judicial action in February 2011. Later that month, Dalton filed a complaint in district court against a number of defendants alleging fraud, violations of the New Mexico Uniform Commercial Code, unfair trade practices, conversion, breach of contract, breach of the covenant of good faith and fair dealing, and breach of warranty of title. These claims related to the circumstances under which she purchased the vehicles and signed the finance contracts, as well as the alleged wrongful repossession of the Pontiac. Her complaint sought equitable, injunctive, and declaratory relief, as well as actual and punitive damages. She added Santander as a defendant to the suit in July 2012.

{5} In January 2013, Santander filed a motion to compel arbitration of Dalton's claims based on the arbitration clause contained in the finance contracts. Dalton opposed this motion by arguing in part that the arbitration clause was unenforceable because it was substantively unconscionable under New Mexico law. After analyzing the effect of the small claims and self-help provisions, the district court agreed with Dalton, as did the Court of Appeals. *Dalton v. Santander Consumer USA, Inc.*, 2015-NMCA-030, ¶ 2, 345 P.3d 1086, *cert. granted*, 2015-NMCERT-003. We reverse both the district court and the Court of Appeals.

II. DISCUSSION

A. The Equitable Defense of Unconscionability

{6} Courts may render a contract or portions of a contract unenforceable under

the equitable doctrine of unconscionability when the terms are "unreasonably favorable to one party while precluding a meaningful choice of the other party." *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 21, 146 N.M. 256, 208 P.3d 901; *see also* NMSA 1978, § 55-2-302(1) (1961) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."). Unconscionability is a legal question. *B & B Inv. Grp.*, 2014-NMSC-024, ¶ 12. Accordingly, we review a district court's determination of unconscionability de novo. *Id.*

{7} "[U]nconscionability is an affirmative defense to contract enforcement," and thus the party claiming that defense bears the burden of proving that a contract or a portion of a contract should be voided as unconscionable. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶¶ 24, 39, 48, 304 P.3d 409. The burden of proving unconscionability refers only to "the burden of persuasion, i.e., the burden to persuade the factfinder" and not "the burden of production, i.e., the burden to produce evidence." *Id.* ¶ 24. A contract can be procedurally or substantively unconscionable. *Cordova*, 2009-NMSC-021, ¶ 21.

{8} Only the issue of substantive unconscionability is before us, which requires us to consider "whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns" to determine "the legality and fairness of the contract terms themselves." *Id.* ¶ 22. Substantive unconscionability requires courts to examine the terms on the face of the contract and to consider the practical consequences of those terms. *See State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 32, 329 P.3d 658 ("[S]ubstantive unconscionability can be found by examining the contract terms on their face."). Thus, the party bearing the burden of proving substantive unconscionability need not make any particular evidentiary showing and can instead persuade the factfinder that the terms of a contract are substantively unconscionable by analyzing the contract on its face.

{9} As we explained in *Cordova*, "[c]ontract provisions that unreasonably benefit one party over another are substantively unconscionable." 2009-NMSC-021, ¶ 25. In that case, a purportedly bilateral arbitration clause between a lender and a borrower contained a unilateral carve-out provision exempting the lender from mandatory arbitration when it sought remedies, "including[,] but not limited to, judicial foreclosure or repossession" in the event of a default by the borrower. *Id.* ¶¶ 3-4 (internal quotation marks omitted). The borrower argued that the arbitration clause rendered the finance contract "grossly unfair and one-sided" because it allowed the lender to require the borrower to arbitrate any of the borrower's claims while reserving to the lender "the exclusive option of seeking its preferred remedies through litigation." *Id.* ¶ 20. We agreed and held that the arbitration provision was "grossly unreasonable and against our public policy under the circumstances" of that case, *id.* ¶ 31, and was therefore substantively unconscionable. *Id.* ¶ 32.

{10} Similarly, in *Rivera v. American General Financial Services, Inc.*, we analyzed an arbitration provision between a lender and a borrower that required the borrower to arbitrate any claims against the lender while exempting from mandatory arbitration the lender's "self-help or judicial remedies" relating to the property securing the transaction and any claims that the lender might have "[i]n the event of a default." 2011-NMSC-033, ¶ 3, 150 N.M. 398, 259 P.3d 803 (internal quotation marks omitted). In *Rivera* we again concluded that it was unreasonably one-sided that the lender "retained the right to obtain through the judicial system the only remedies it was likely to need," while "forcing [the borrower] to arbitrate any claim she may have" through an arbitration carve-out applying only to the lender. *Id.* ¶ 53. In the circumstances of that case, the arbitration provision was substantively unconscionable and void under New Mexico law. *Id.* ¶ 54. Notably, both *Cordova* and *Rivera* involved unilateral carve-outs that explicitly exempted any judicial remedies a lender was likely to need from mandatory arbitration while providing no such exemption for the borrower.

{11} With this background in mind, we turn to the arbitration clause in this case and discuss its carve-outs exempting self-help remedies and small claims actions from mandatory arbitration.

B. The Explicit Exclusion of Self-Help Remedies from Mandatory Arbitration Is Irrelevant to Assessing Unconscionability in this Case

{12} Santander contends that the bilateral self-help carve-out in the arbitration clause merely "recognizes the existence" of self-help remedies, which "exist *outside* of the judicial system." (Emphasis in original.) We agree. New Mexico has codified the right of a secured creditor to repossess collateral after default "without judicial process" if the creditor can proceed without a breach of the peace. NMSA 1978, § 55-9-609(b)(2) (2001). This is self-help repossession. As we have previously recognized, if this process is carried out in compliance with relevant statutory provisions and without any involvement by the police, the courts, or any other state actor, it is a permissible "purely private" remedy. *See, e.g.*, *Waisner v. Jones*, 1988-NMSC-049, ¶ 10, 107 N.M. 260, 755 P.2d 598. However, if the secured creditor seeks to repossess the collateral after default "pursuant to judicial process" under Section 55-9-609(b)(1), the creditor has initiated judicial repossession, which is not a private remedy.

{13} As Santander concedes, judicial repossession is not a self-help remedy, and therefore it would not be exempted from arbitration by the contracts' reservation of self-help remedies. Importantly, this distinguishes the arbitration carve-out here from those discussed in *Rivera* and *Cordova* because in those cases the lender retained the right to pursue judicial repossession in the event of a default. *Rivera*, 2011-NMSC-033, ¶ 3; *Cordova*, 2009-NMSC-021, ¶ 4. Thus, we disagree with Dalton's contention that this Court's opinion in *Rivera* held that self-help repossession is a remedy that must be obtained through an arbitral forum if the parties have agreed to arbitrate all disputes. Instead, *Rivera* clarified that the remedy of *judicial* repossession, although highly regulated by statute, could be granted by an arbitrator. 2011-NMSC-033, ¶¶ 51-52. In so holding, we noted that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution *in an arbitral, rather than a judicial, forum*.' " *Id.* ¶ 51 (emphasis added) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Hence, the exemption of all foreclosure and repossession actions from mandatory arbitration in *Rivera*

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Current Issues in

Taxation Section

The **401(k)** as a Pivotal Point in the Movement Towards **Defined Contribution Plans**

By Michael J. Thomas

The 401(k) has been closely associated with the shift among qualified retirement plans from defined benefit (DB) plans, (i.e. traditional pensions), to defined contribution (DC) plans. *See* Samuel Estreicher and Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 Lewis & Clark L. Rev. 331, 331-333 (2007). This article highlights the growth of DC plans with a 401(k) salary deferral feature, first available in 1980.[1]

Shift From Defined Benefit Plans to Defined Contribution Plans

When the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001-1461, became law in 1974, DB plans involving a fairly secure monthly benefit were the predominant type of employer-sponsored, qualified retirement plan by number of participants.[2] *See* Barry Kozak, *The Cash Balance Plan: An Integral Component of the Defined Benefit Plan Renaissance,* 37 J. Mar. L. Rev. 753, 802 (2004). At the time, DC plans (commonly a profit sharing plan) were primarily viewed as a way to supplement a participant's anticipated pension benefit. Janice Kay McClendon, *The Death Knell of Traditional Defined Benefit Plans: Avoiding a Race to the 401(k) Bottom*, 80 Temp. L. Rev. 809, 814 (2007). The view that DC plans should be viewed primarily as supplementary to DB plans is still asserted in recent times. *See, e.g.,* Chase A. Tweel, *Retirement Savings in the Face of Increasing Longevity: The Advantages of Deferring Retirement*, 14 N.C. Banking Inst. 103, 123 (2010).

Buttressed by the generally favorable investment market, the 401(k) flourished through the 1980s and 1990s, becoming perhaps the most important retail product of the financial services industry. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 484-85 (2004). By the mid-to-late 1990s, DC plans with a 401(k) feature were the predominant plan type by number of participants,[3] with such plans often adopted by growing companies in the technology, financial and similar "new economy" sectors. *See* McClendon, *supra*, at 820. While older businesses could offer a DC plan, they could not easily move away from their core DB plan. This shift occurred as many older companies in the mining, manufacturing, and other labor-intensive sectors, associated with DB plans in the post-World War II era, were declining in relative influence. *Id.* The trend towards DC plans was even more pronounced among smaller employers.[4]

Historically, the lack of investment diversification was a major pitfall in many 401(k) plans, often exacerbated by a participant's short time horizon until retirement. In 2004, in large 401(k) plans with five thousand or more participants, the employer's stock accounted for 34% of total assets. *See* Estreicher and Gold, *supra*, at 337-38, n. 15. Disproportionate investment in the employer's stock, often the employer's contribution, resulted in lack of diversification, which can have substantial, if not catastrophic, financial consequences to participants, as seen in the Enron stock collapse in 2001. Lorraine Schmall, *Defined Contribution Plans After Enron,* 41 Brandeis L.J. 891, 891-93 (2003). General market risk is present as well. If the stock market experiences an appreciable drop in the last year before retirement, participants will find themselves with a 401(k) account value that is much less than it was months previously. *See* Zelinsky, *supra*, at 460 (noting that "investments' variability may strike on the downside at an inopportune time").

In a traditional pension, the investment risk falls upon the employer. Zelinsky, *supra*, at 458-60 (discussing the major aspects of investment strategy in a DB plan trust, including the longer time horizon and inherent economies of scale). For many reasons, it is inherently easier for a pension plan, managing millions or even billions of dollars in assets, to diversify and weather market downturns, compared to typical participants self-managing their investments. *Id.* at 459 (contrasting economies of scale inherent in DB plans and the "dispersed" nature of "self-directed" DC plans). Additionally, the participant's expectations of a monthly payment are at least partially insured by the Pension Benefit Guaranty Corporation, although that adds to the costs of such plans. *Id.* at 503.

Pension Protection Act of 2006

The Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, 120 Stat. 780, codified in various sections of the U.S. Code, was described as the "most sweeping reform of America's pension laws in over 30 years." *See* Remarks by President George W. Bush at the August 17, 2006 signing ceremony, *reprinted in*

2006 U.S.C.C.A.N. S39. Of relevance here, the PPA encouraged diversification in DC plans by requiring that an employer offer at least three investment options other than employer's stock, "each of which is diversified and has materially different risk and return characteristics." 26 U.S.C. §401(a)(35)(D) (providing for three investment options other than employer's stock); 29 U.S.C. §1054(j) (parallel ERISA provision). Plan sponsors were required to notify participants of their diversification rights, effective for plan years beginning after 2006. 29 U.S.C. §1021(m).

As noted, the increased utilization of the 401(k) feature, and DC plans generally, has been particularly evident among small employers, often newer businesses which never set up a traditional pension. The PPA contained at least one provision to encourage the establishment of DB plans among smaller employers, by authorizing, for plan years beginning on or after Jan. 1, 2010, the so-called "DB(k)" plan, essentially a simplified DB plan with a 401(k) feature.[5]

It warrants observing that 401(k) plans also involve the risk of "pre-retirement leakage," the relative ease with which DC plan participants may withdraw funds from their account prior to retirement. That may occur upon an employee's pre-retirement departure or through a loan against the account, often allowed by such plans. *See* Estreicher and Gold, *supra*, at 334; Department of Labor, Employee Benefits Security Administration, Report of The Working Group on Retirement Plan Leakage (November 13, 1998).

Pre-retirement leakage has not historically been an issue with DB plans, although the PPA authorized such plans to allow pre-retirement distributions for older employees. That is, PPA §905, codified at 26 U.S.C. §401(a)(36), permits, but does not require, DB plans to allow in-service distributions to employees who have reached age 62. Previously, such plans could not begin paying benefits until the employee had terminated employment, assuming that the employee was vested and met the plan's retirement age. *See* Zelinsky, *supra*, at 456, n. 6.

Conclusion

The 401(k), a key factor—along with demographic and economic changes—in the trend away from DB plans, is one, albeit popular, feature within the qualified retirement plan system influenced by ERISA and federal tax law and policy. This is not intended to argue that one plan type is always better for every individual than another plan.

In early 2009, around the beginning of the recent recession, a *Kiplinger* writer posed the following:

> Since the stock market's peak in October 2007, investors have lost as much as $2.5 trillion in their 401(k) and IRA accounts. Layer that anguish on top of existing frustrations with 401(k) plans – that hidden fees nibble away at returns, balances are inadequate, and less than half of U.S. workers even have access to one – and the question arises: Are 401(k)s a failed experiment, or are they just in need of tweaking?[6]

While that rhetorical question may seem stark, participants should be aware of the advantages and drawbacks of any particular plan relative to others, given their investment time horizon and other factors. Although an employer has a continuing fiduciary duty to monitor fund investment options, *Tibble v. Edison International*, 575 U.S. ____ (2015), proactive participants should monitor their 401(k), as with other investments, to ensure diversification, remaining aware of any particular plan's characteristics relevant to their situation. ■

Endnotes

[1] 26 U.S.C. §401(k), titled "Cash or deferred arrangements," was added to the Internal Revenue Code in 1978 but was not effective until 1980. *See* Employee Benefits Research Institute, "History of 401(k) Plans: An Update" (2005), *available at* https://www.ebri.org/pdf/publications/facts/0205fact.a.pdf. While commonly termed a 401(k) "plan," it refers to a cash or deferral feature allowing the employee to elect to defer income by opting to have some of his or her salary placed into a 401(k) account. It does not technically exist as its own free-standing plan but rather as a component feature of a DC plan, typically a profit-sharing plan. *See* Joint Committee on Taxation, Technical Explanation of H.R. 4, The "Pension Protection Act of 2006," as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006, JCX-38-06 at 231, n. 257 (August 3, 2006), *available at* http://www.house.gov/jct/x-38-06.pdf. It was designed to address constructive receipt issues posed by employees choosing to defer income, despite their ability to receive the income currently as cash or cash equivalents (e.g. payroll check). *See* Colleen E. Medill, Introduction To Employee Benefits Law: Policy and Practice 97 (2d ed. 2007).

[2] Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs* December 2009 (hereafter "2009 DOL Bulletin") at Table E1, *available at* http://www.dol.gov/ebsa/pdf/1975-2007historicaltables.pdf; Table E5 (slightly over 33 million participants covered by DB plans in 1975 compared to about 11.5 million covered by DC plans that year).

[3] *See* Estreicher and Gold, *supra*, at 332; *see also* 2009 DOL Bulletin, *supra* note 2, at Table E5 (in 2007, there were about 42 million employees covered by DB plans compared to over 81 million covered by DC plans).

[4] *See, e.g.,* Zelinsky, *supra*, at 482 (referring to the "death of the small-employer defined benefit plan"); Department of Labor, Employee Benefits Security Administration, Report of the Working Group on the Merits of Defined Contribution vs. Defined Benefit Plans with an Emphasis on Small Business Concerns at Part III (November 13, 1997).

[5] The DB(k) was authorized by PPA §903 ("Treatment of Eligible Combined Defined Benefit Plans and Qualified Cash or Deferred Arrangements"), adding Code subsection 414(x), available to employers with at least two but no more than five hundred employees. *See also* 26 U.S.C. §414(x)(6)(B) (single plan for 26 U.S.C. §§6058, 6059); 29 U.S.C. §1060(e)(5)(B) (corollary amendments to ERISA). Despite contemporaneous coverage, the DB(k) continues to be relatively unknown. *See, e.g.*, David Pitt, *Hybrid Retirement Plan in the Works; DB(k) Alongside 401(k) Would Provide Security, Guaranteed Pension*, Wash. Post, Nov. 15, 2009 at G3.

[6] Anne Kates Smith, *The Future of your 401(k)*, February 2009, *available at* http://www.kiplinger.com/article/retirement/T001-C000-S002-the-future-of-your-401-k.html.

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Use of Trusts in Planning for *Distribution of IRA's to a Spouse*

By Dean B. Cross

I. Introduction

Articles discussing the complex planning for the distribution of retirement assets held in qualified plans and individual retirement accounts (IRAs) are plentiful. Central to the planning process is determining the appropriate mechanism for distributing an IRA to the surviving spouse (Spouse). This article explains the required minimum distribution (RMD) rules applicable to distributing IRA's, in trust, to a Spouse. For a valid analysis, however, the tremendous tax deferral a Spouse enjoys as the outright beneficiary of the deceased spouse's (Owner's) IRA must be compared to and balanced against the non-tax reasons for designating a marital trust as the distributee of the Owner's IRA.

II. Spouse as IRA Beneficiary

As of 2012, investments in IRA assets totaled more than $4.7 trillion. The accumulation of assets in qualified plans and IRAs is attributable, in part, to the tax free growth that is allowed until withdrawals must commence, which for the purposes of this article, begins after the death of the Owner, with the Spouse or a trust benefitting the Spouse, as the designated beneficiary.[1]

The Spouse, as the designated beneficiary of the Owner's IRA, may continue the tax deferral benefits implicit in the IRA but must elect to roll the Owner's IRA into an IRA owned by the Spouse. IRC §401(c)(4), (9); PLR 9311037. RMDs, from the Owner's IRA rolled into an IRA owned by the Spouse, do not have to begin until the Spouse reaches the age of 70½. Reg. §1.401(a)(9)-5, A-1. As the new owner of the IRA, the Spouse may choose different beneficiaries from those originally chosen by the Owner.

As the new owner of the IRA, the Spouse's RMDs are calculated using the Uniform Life Table, which are calculated using the joint life expectancy of the Spouse and a presumed beneficiary who is not more than 10 years younger. Reg. § 1.409(a)(9)-9, A-2. Use of the Uniform Life Table delays the beginning date for RMD's to age 70 ½ and in most cases assures that the IRA will not be exhausted during the Spouse's lifetime.

If the Spouse does not elect to roll over the Owner's IRA, the Owner's IRA becomes an "inherited IRA" and the Spouse is treated as a beneficiary, not an owner. IRC §408(d)(3); Reg. § 54.4981A-T, A-d(10)(b). As a beneficiary, the date upon which RMD's begin depends not on when the Spouse attains the age of 70 ½ but on whether the Owner had attained 70 ½ prior to death. If the Owner had attained the age of 70 ½ prior to the date of death, distributions would begin on or before Dec. 31 of the year after the Owner's death. Reg. § 1.401(a)(9)-2, A-5. If the Owner had not attained age 70 ½, distributions would begin on the later of the year after the Owner died or the year in which the Owner would have attained 70 ½ years of age. Reg. § 1.401(a)(9)-3, A-3(b).

One advantage exists that may outweigh the loss of the tax deferral available through the spousal rollover if the Spouse treats the IRA as an inherited IRA. If the Spouse is younger than 59 ½ and elects the spousal rollover to maximize deferral, any distributions prior to 59 ½ will be subject to a 10 percent penalty. IRC §72(t)(2)(A)(ii). Electing to hold the IRA as an inherited IRA will enable the Spouse to take distributions prior to 59 ½ without penalty. IRC §72(t)(2)(A)(i). In such an instance, the Spouse should treat estimated distributions needed prior to age 59 ½ as an inherited IRA and treat the remainder of the IRA as a spousal rollover.

As an inherited IRA, the Spouse does not have the option of delaying RMD's until the Spouse attains the age of 70 1/2, which maximizes the deferral period before which RMD's must commence. Instead, RMD's are calculated based on the Spouse's life expectancy using the Single Life Table. Reg. §1.401(a)(9)-9, A-1. Assuming the Spouse lives as long as expected under the Single Life Table and that only the required minimum distributions are taken annually, the assets of the inherited IRA will probably be completely distributed by the Spouse's death. A second disadvantage, often overlooked, is that after the death of the Spouse, successor beneficiaries must continue to take distributions based on the Spouse's life expectancy and not the life expectancy of the successor beneficiary.

III. Trust As IRA Beneficiary

Circumstances such as blended families, disability and other non-tax considerations may argue against naming the Spouse as the designated beneficiary[2]. In such situations, the Owner must name the Spouse, individually, as the sole beneficiary of a trust, subject to satisfaction of "see through trust" rules.[3] During the Spouse's lifetime, the Spouse must receive all distributions from the IRA and no distributions from the IRA can be accumulated in the trust. Although not defined in the Code, a trust in which the spouse, or any other individual, is the sole lifetime beneficiary is known as a conduit trust.[4]

Distributions to the Spouse must begin on the later of the year after the Owner's death, or the year in which the Owner would have reached 70 ½ and the Spouse's

life expectancy, for RMD purposes, is recalculated annually. IRC § 401(a)(9)(B)(iv). If the Spouse dies before attaining 70 ½ years of age, the Spouse is treated as the participant for calculating distributions to beneficiaries named to receive IRA benefits after the Spouse's death.

Naming the Spouse as the sole beneficiary of a trust funded with IRA benefits may satisfy non-tax considerations but is not a panacea. The significant tax deferral opportunity enjoyed by the Spouse, individually, as the sole owner of the IRA is lost because the trust is named as the IRA beneficiary and not the Spouse. Reg. § 1.408-8, A-5(a). For example, if the Spouse is named as the beneficiary of the Owner's IRA and makes the election to treat the IRA as the Spouse's IRA, distributions from the IRA are taken over 27.4 years beginning at age 70, thus preserving the tax deferred growth of assets within the IRA. Conversely, a 61 year old Spouse that is the sole beneficiary of a conduit trust at the time of the Owner's death, has a life expectancy, for distribution purposes, of 24.4 years and must begin taking the distributions no later than the year after the Owner's death, thereby losing the tax deferral benefit of treating the Owner's IRA as being owned by the Spouse. Reg. § 1,401(a)(9)-9, A-1.

IV. Credit Shelter Trust and QTIP Trust as IRA Beneficiary

A credit shelter trust is created when the deceased spouse provides, in a Will or the IRA Owner's revocable trust, for funding, at death, of a trust with the available estate tax exclusion amount. QTIP trusts, on the other hand, are created to qualify assets for the marital deduction and also provide for remainder beneficiaries other than the Spouse. IRC § 2056(b)(7); Rev. Rul. 2000-2. If either the credit shelter trust or the QTIP trust are drafted as a conduit trust and funded with the Owner's IRA, distributions over the Spouse's life expectancy will, effectively, liquidate the Owner's IRA. From an estate tax perspective, use of a conduit credit shelter or QTIP trust is not beneficial because distributions to the Spouse from the Owner's IRA would be included in the Spouse's estate on the Spouse's death.

Conversely, a different set of rules applies if the Spouse is named as a lifetime beneficiary of a trust, funded by the Owner's IRA, with children of the Owner or others individuals, named as the identifiable remainder beneficiaries. Credit shelter or QTIP trusts may be drafted as accumulation trusts. Distributions from the Owner's IRA are accumulated within the trust and delivered to the Spouse, as needed for the Spouse's health, education, support, and maintenance, thus the name "accumulation trust". Reg. § 1.401(a)(9)-5, A-7(c)(3) ex. 1.

For RMD purposes, the measuring life is the oldest of the Spouse and the identifiable remainder beneficiaries, which in most cases would be the life expectancy of the Spouse. Reg. § 1.401(a)(9)-5, A-7(c)(3). Upon the death of the Spouse, the remainder beneficiaries of the trust would continue to receive RMD's based, not on each remainder beneficiary's life expectancy, but on the life expectancy of the Spouse. Any significant age disparity between the Spouse and the remainder beneficiaries reduces the tax deferral available under the Single Life Table.[5]

As an accumulation trust, any income retained in the trust would be subject to income tax at the trust's marginal tax rate, which reaches 39.6 percent on income of $12,400. Income distributed to the Spouse would be taxed at the Spouse's marginal tax rate.

Funding the credit shelter trust or the QTIP Trust with all or a portion of the Owner's IRA has some distinct disadvantages. With required RMD's and the potential that the Spouse may have a long life, the Owner's IRA, could be entirely distributed due to the Spouse's decreasing life expectancy. IRC § 651; IRC § 661. Unless expended by the Spouse, the distributed IRA benefits held by either trust would be included in the Spouse's estate for estate tax purposes. IRC § 2033.

V. Trust as Beneficiary

Even though an IRA may be left to a trust, a Spouse, under certain circumstances, may still have an opportunity to obtain the maximum tax deferral under IRC §408 available through a spousal rollover. PLR 200549021. To be eligible for the spousal rollover, distributions from the IRA held in trust cannot be subject to a distribution standard, such as health, education, support and maintenance and no other person or entity must be able to exercise discretion with respect to the distribution. *Id.* In such an instance, the Service recognizes and treats a "deemed" transfer of the IRA to the trust followed by the transfer into an IRA set up and maintained in the Spouse's name as spousal rollover. *Id.*

VI. Conclusion

Some experts believe that 40 percent of America's wealth is represented by investments in retirement plans, such as IRA's and qualified plans. *See* Wilcenski and Pleat, "*Dealing with Special Needs Trust and Retirement Benefits*", Special Needs, Vol. 36, No. 2, p. 9, (Feb. 2009) Distributing the wealth represented by the investment in retirement benefits requires that estate planning practitioner balance opportunities for tax deferral of IRA and qualified plans against family estate planning issues. ■

Endnotes

[1] IRC § 401(c)(4), (9); McCullough, II, McCullough III, McCullough IV, *How a Trusteed IRA Can Improve Your Retirement Plan*, 29 Utah Bar J. 26 (2016). All references and citations to the Code are to the Internal Revenue Code of 1986 as amended.

[2] Designated Beneficiary, under RMD Rules, is defined as a beneficiary having a life expectancy greater than zero and takes by reason of a death beneficiary designation or governing Plan document. See, Reg. § 1.401(a)(9)-4, A-3.

[3] The "see through trust" rules require that the trust be valid under state law, that the trust is or will become irrevocable upon the death of the participant, the trust beneficiaries named to receive the retirement benefits must be identifiable, plan documents must be provided to the IRA custodian or IRA trustee, and all trust beneficiaries must be individuals. See, Reg. § 1.401(a)(9)-4, A-5(b); Reg. §1.401(a)(9)-4, A-1.

[4] PLR 200537044; Suma V. Nair, *The Basics of Estate Planning with Retirement Benefits*, Boston Bar Association-Trusts and Estates Section, Pg. 6, May 3, 2012.

[5] Life Expectancy for a 60 year old Spouse is 25.2 years while a 30 year old child has a life expectance of 53.3 years. Assuming an IRA with a principal balance of $100,000, distributions to the child based on the Spouse's life expectancy would be $3,968 per year. Distributions based on the child's life expectancy would be $1,876 per year.

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Proposed Internal Revenue Code Section 2704 Regulations—

Will They be Implemented?

By Barbara F. Applegarth

On Aug. 4, 2016, proposed regulations under Internal Revenue Code (IRC) Section 2704 were published in the Federal Register. Following publication of the proposed regulations, there was widespread concern that the proposed regulations would negatively impact intergenerational transfers of closely held family businesses because they eliminated certain valuation discounts on gift and estate transfers to family members (making those transfers cost-prohibitive). There was also concern that the proposed regulations introduced an element of uncertainty into the tax system.

Even with those concerns, a treasury secretary under Hillary Clinton would have undoubtedly supported finalization of the proposed regulations because Clinton had announced increases in the estate tax rate and a reduction in the estate tax credit as part of her tax plan. The 2016 election of Donald Trump as president, however, may result in a delay in finalization or even withdrawal of the proposed regulations. Unless the proposed regulations are withdrawn, however, potential issues with the proposed regulations remain.

Background

Congress enacted IRC Section 2704 in 1990 in response to the Tax Court decision in *Estate of Harrison v. Commissioner*, T.C. Memo. 1987-8 (1987).[1] In *Estate of Harrison,* Daniel Harrison and his two sons organized a limited partnership. Harrison received all limited partnership interests and a one percent general partnership interest. His sons each received a 10.6 percent general partnership interest. Each of the general partners could dissolve the partnership, but this right terminated on death. On dissolution, each general and limited partner would receive a proportionate share of partnership assets.

Harrison's sons, as co-executors of his estate, filed a Federal estate tax return for the estate reflecting the value of Harrison's limited partnership without consideration of Harrison's general partnership right to dissolve the partnership and receive a proportionate share of partnership assets. The Internal Revenue Service challenged the valuation, arguing that the right to dissolve the partnership should be considered in valuing the limited partnership interests. The valuation difference was $26,555,020.

The Tax Court determined that the value of Harrison's limited partnership interests which passed "at the instant of death" did not include the right to dissolve the partnership. Assuming the sons received the limited partnership interests, they held the power to receive all of the value in the partnership. However, the value subject to Federal estate tax was less than the value of all of the partnership assets. The result was that the sons could have immediately liquidated the limited partnership and received all of the limited partnership assets, but the assets subject to Federal estate taxes were determined as if they did not have this right.

Following the decision in *Estate of Harrison* there was substantial concern that wealthy taxpayers could control assets to the "instant of death" while reducing the Federal estate tax value of the assets through rights which lapse at death. Decreasing the Federal estate tax value of assets will decrease any Federal estate tax payable as was the case in *Estate of Harrison*. To avoid this result, IRC Section 2704 limited valuation discounts on certain direct and indirect transfers among family members by treating certain lapses as transfers (IRC Section 2704(a)) and ignoring certain restrictions in valuing entity interests for transfer tax purposes (IRC Section 2704(b)).

Treasury Regulations under IRC Section 2704 were finalized in 1992[2]. Although by 2004 the Treasury Department indicated that revisions might be made to the Regulations[3], the Treasury Department did not formally propose revisions until Aug. 4, 2016, with publication of the proposed regulations in the Federal Register.

Proposed Changes to Current IRC Section 2704 Regulations

The proposed regulations under IRC Section 2704 apply both to lapses under IRC Section 2704(a) and to transfers subject to restrictions under IRC Section 2704(b). As with the statute and the current regulations, the proposed regulations are intended only to apply to transfers or deemed transfers of family owned and controlled entities.

Changes from the current regulations include the following:

1. Expanding the definition of entities subject to IRC Section 2704 and what constitutes control.
2. Eliminating discounts where a family member receives an assignee interest.
3. Including of the value of an extinguished liquidation or voting right in the decedent's Federal gross estate if death occurs within three years of the loss of the right.
4. Limiting Federal and state law restrictions excluded from the definition of applicable restrictions.
5. Creating a wholly new class of restrictions called "disregarded restrictions."

The proposed regulations assumed that most intrafamily transfers of closely held business interests were gifts and that the

transferor and other family members owning interests in the business would permit the transferee to enjoy the benefit of the transferred interest without restriction. Consequently, restrictions which had real economic effect were ignored, and the Federal gift or estate tax cost of transferring a business within the family could exceed the value of what the transferee received. This clearly could have a chilling effect on the transfer of closely held business interests within family groups.

The proposed regulations also did not fully address how the new provisions would be applied. For example, the proposed regulations included the value of the loss of a liquidation or voting right occurring within three years of the transferor's death in the transferor's Federal gross estate. There was no indication as to how this adjustment would affect the transferee. Would the transferee increase the basis of the asset received or would the basis remain unchanged? This and other questions caused concern among tax practitioners that the proposed regulations, if finalized, would introduce an element of unnecessary uncertainty into the Federal tax provisions.

Tax Effect

Estate and Gift Taxes—Federal estate and gift taxes are only imposed on individuals making total transfers in excess of $5 million. Consequently, most taxpayers will not pay any additional Federal estate or gift taxes as a result of finalization of the proposed regulations under IRC Section 2704. Since many states have repealed their gift and estate tax provisions, including New Mexico, state gift and estate taxes are not an issue.

Income Taxes—Although the Federal income tax statutes are not always consistent with Federal gift and estate tax statutes, there are specific income tax provisions which are dependent upon Federal gift and estate tax statutes. These include the Federal income tax basis provisions under IRC Sections 1014 and 1015. Federal gift and estate valuations are used as the starting point in calculating Federal income tax basis in IRC Section 1014 and as a maximum basis in IRC Section 1015. Basis in turn is a measure for gain or loss on disposition of property, depreciation deductions and other Federal income tax calculations.

IRC Section 1014(a)(1) provides generally that the basis of property acquired from a decedent is its fair market value at date of death. For Federal income tax purposes the question is whether the fair market value of property subject to IRC Section 2704 is the value before or after application of IRC Section 2704. This is an unanswered question. If there is complete parity between IRC Section 2704 and IRC Section 1014, it is likely that the proposed regulations will provide a greater opportunity for basis increase on transfers at death of interests in many family controlled businesses even if no Federal estate tax is imposed on the transfer.

IRC Section 1015 generally provides that where property is transferred by gift, the transferee's basis is the lesser of the transferor's basis or fair market value. In situations where the transferor's basis is greater than fair market value, it is unclear whether the IRC Section 2704 adjustment will increase value. Further if a lapse right is included in the transferor's Federal gross estate, it is unclear whether the transferee's basis will be increased by the lapse value.

Other Federal income tax provisions may be directly or indirectly affected by the proposed regulations. Without additional guidance from the Treasury Department, the effect of the proposed regulations, if finalized, on Federal income taxes will be determined by later administrative and judicial determinations.

If Finalized, Can the Regulations Withstand Judicial Scrutiny?

The Administrative Procedure Act (5 USC Sections 551-559) governs rule making by Federal agencies, including the Treasury Department, and rules promulgated by agencies are subject to judicial review as provided in 5 USC Section 706. Judicial review of agency regulations is very limited under the terms of 5 USC Section 706.

Despite the limitation on judicial review of agency regulations, the Tax Court recently held that Treasury Regulations at issue in the case were invalid. *Altera v. Commissioner*, 145 T.C. 91 (2015). The Tax Court concluded that the Treasury Regulations that the Treasury Department's actions did not reflect "reasoned decision making" because**:**

1. The regulation lacked a basis in fact;
2. There was no rationale connection between the regulation and the facts found;
3. The Treasury Department failed to respond to significant comments relating to the regulation when proposed; and
4. The Treasury Department's conclusions were contrary to the evidence before it.

It is unclear whether the proposed regulations under IRC Section 2704, if finalized, will survive judicial scrutiny. The comment period for the proposed regulations ended on Nov. 2, 2016, and hearings were held on Dec. 1, 2016. A total of 28,886 comments were received through Dec. 16, 2016, including criticisms that the proposed regulations are overbroad, confusing, exceed agency authority and will have unintended consequences for closely held family businesses.

Effect of the 2016 Elections

The secretary of treasury heads the Department of Treasury and is a member of the incumbent president's cabinet. The role of the secretary of treasury includes advising the president and implementing the president's tax planning as well as overseeing the operations of the Department of Treasury. With each new administration the Treasury Department's objectives often change.

Changes to the Regulations under IRC Section 2704 were identified as a priority by the Obama Administration which stated its intent to make changes to IRC Section 2704 as early as 2009.[4] Changes were incorporated into the proposed regulations published on Aug. 4, 2016.

With the election of Donald Trump as president, it is the Trump Administration which will support or disavow the proposed regulations. It is unlikely that a treasury secretary serving under the Trump Administration will support finalization of the proposed regulations, as two of President Trump's stated policy goals are to eliminate the Federal estate tax (and presumably also the Federal gift tax) and to reduce the number of Federal regulations.[5] Finalizing regulations which potentially increase Federal estate and gift taxes and increase the number of regulations is inconsistent with these goals.

While the proposed regulations under IRC Section 2704 are unlikely to be finalized during the Trump Administration, the issues raised regarding the proposed regulations are still relevant unless the proposed regulations are withdrawn. Staff at the Treasury Department may defer further action on the proposed regulations until a change of administration.

continued on page 10

Basis Reporting Requirements for Property Received From a Decedent

By Vanessa C. Kaczmarek

In 2015, Congress added two new provisions to the Internal Revenue Code that relate to the basis of property received from a decedent, which the IRS began implementing in the middle of 2016. If estates are required to file estate tax returns, then Section 6035 of the Internal Revenue Code[1] requires executors to provide the IRS and beneficiaries of the estate with information about the value of the property as reported on the estate tax return.[2] This is done on the new Form 8971 and Schedule A, Information Regarding Beneficiaries Acquiring Property From a Decedent. Section 1014(f) requires beneficiaries to use the value reported on the estate tax return as their basis in certain instances. The intent is to prevent the IRS from being whipsawed by executors reporting a low value on the estate tax return to minimize estate tax, and a beneficiary claiming a higher value as the basis of the same property to minimize income tax. However, the proposed regulations and reporting requirements are confusing and unduly increase the administrative burden on executors.[3]

The first thing to note is that the requirements of both Sections 1014(f) and 6035 only apply if an executor is *required* to file an estate tax return. If a gross estate plus adjusted taxable gifts is under the estate tax exclusion amount—currently $5.49 million, then Form 8971 does not need to be filed. The proposed regulations under Section 6035 make it clear that Form 8971 is not required if the executor *chooses* to file an estate tax return for purposes such as making a portability election to allow the surviving spouse to use a deceased spouse's unused estate tax exclusion.

Where it gets confusing is that Section 1014(f) only applies to property included in a decedent's estate that actually increases estate tax liability. This means that if all of a decedent's property is passed to the decedent's spouse so that the marital deduction eliminates the entire estate tax liability, Section 1014(f) does not apply. If you were to read Section 1014(f) without looking at Section 6035, you could get the impression that Form 8971 is not required for property that does not increase estate tax liability. However, Section 6035 is broader than Section 1014(f) and requires Form 8971 to be filed if the gross estate exceeds the applicable exclusion amount even though no estate tax is owed.

The timing of when Form 8971 must be filed and furnished under the proposed regulations creates potential issues. If a Form 8971 is required, it must be filed no later than the earlier of: (i) 30 days after the due date of the estate tax return, including extensions, or (ii) 30 days after the estate tax return is actually filed. The executor must provide each beneficiary receiving property with a Schedule A. Most estates will not be ready to distribute the estate assets by the time Form 8971 is due. If this is the case, then any asset that may be used to satisfy the bequest to a beneficiary has to be listed on Schedule A. This means that the same property may be included on more than one Schedule A, and Schedule A may include more assets that each particular beneficiary will receive. In these situations, which will be common, the executor may, but is not required to, file a supplemental Form 8971 and Schedule A's once the actual distributions for each beneficiary are known. This will be a confusing system for beneficiaries, especially if the executor chooses not to provide supplemental Schedule A's. A beneficiary will receive a Schedule A listing certain assets, and then when the property is actually distributed the beneficiary may not receive all of the listed assets. This has the potential for increased litigation. A system that required basis information to be furnished to beneficiaries at the same time as the assets are actually distributed to the beneficiaries would likely avoid these issues and would be easier for executors to administer.

Once the Form 8971 has been filed, that is not the end of the executor's obligation. The executor may have to file a supplemental Form 8971 and Schedule A's. The value reported on the initial Form 8971 and Schedule A's is the fair market value of the property as reported on the estate tax return. However, the final value of the property may change in instances when the IRS redetermines the value, when a court redetermines a value, or when the estate enters into a settlement agreement with the IRS regarding the value of the property. If the final value of the property changes from what is initially reported, the executor is required to supplement Form 8971 and the affected Schedule A's. The supplements must be furnished 30 days after the adjustment to the initial value to the IRS and affected beneficiaries.

Not only does the executor have an obligation to file supplemental Form 8971 and Schedule A's, beneficiaries may also have to file additional Schedule A's as well. This obligation arises if the

beneficiary transfers property subject to Form 8971 reporting to a related transferee where the transferee takes a carryover basis. For these purposes, a related transferee is a family member, a controlled entity, and any trust that the transferor is deemed the owner of for tax purposes. The beneficiary has to file a supplemental Schedule A with the IRS and provide it to the transferee within 30 days of the date of the transfer. If the subsequent transfer happens before the executor has filed a Form 8971, then the transferor must file a Schedule A indicating the change of ownership, but not the value of the property, and provide the executor with a copy. Then when the Form 8971 is filed, the executor must provide the transferee the Schedule A for the transferred property. If the transfer happens after Form 8971 has been filed but before a final value is determined, the transferor must provide a copy of the supplemental Schedule A to the executor so that the executor can provide any required supplemental Schedule A to the transferee.

One of the harshest provisions under the proposed regulations under Section 1014(f) is the zero basis rule. If estate property is discovered after a Form 8971 has been filed or if the property was omitted and the statute of limitations to assess estate tax has run, the final value of the property is zero. The beneficiary gets no basis in the property so that when the property is sold, all of the proceeds are taxable, potentially increasing the beneficiary's income tax liability. This penalizes beneficiaries. Accordingly, it may behoove executors to provide beneficiaries, whether they request it or not, with the inventory of estate assets to help ensure all assets are reported on the timely filed estate tax return by prompting beneficiaries to alert executors if assets are missing from the inventory.

It makes sense to provide beneficiaries information about the value of the property they receive from an estate so that they know what their basis in the property is. However, there are many logistical concerns with the proposed regulations that make it difficult and time consuming for practitioners to administer. As Steve Akers has noted, most estate planners are not aware of situations where the beneficiaries have used bases that differ from what was reported on estate tax returns.[4] It seems unlikely that it is such a prevalent issue that it warrants the administrative burden created by the proposed regulations. Hopefully, a number of the administrative challenges will be addressed in the final regulations. However, until that is done, these are the rules that apply for decedents' estates for whom estate tax returns must be filed after July 31, 2015. ■

Endnotes

[1] All section references herein shall be to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

[2] The Internal Revenue Code uses the term "executor," and although in New Mexico the term "personal representative" is used instead, this article follows the language of the Internal Revenue Code.

[3] For a detailed summary of each provision in the proposed regulations, see the Journal of Taxation's July 2016 article: "IRS Issues Proposed Regulations Regarding 'Consistent Basis Reporting Rules'" by Jennifer Wioncek, Lyubomir Georgiev, Rodney Read, and Ceci Hassan.

[4] See e.g., Steve Akers, "Estate Planning: Current Developments and Hot Topics," December 2016, available at http://www.bessemertrust.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/Hot%20Topics%20Current%20Developments_website.pdf , (last accessed on December 14, 2016).

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Proposed Internal Revenue Code Section 2704 Regulations—Will They be Implemented?

continued from page 8

Conclusion

It is unlikely that the proposed regulations under IRC Section 2704 will be finalized during the Trump Administration. Even if later finalized in their present form, challenges to their implementation are likely. There are few proposed regulations which have generated as much controversy as those under IRC Section 2704, and the tax practitioners who have raised concerns about the proposed regulations will likely lead the challenge to any final regulations. For tax practitioners and their clients the question is whether any action should be taken in anticipation of finalization of the proposed regulations in their current form. If the proposed regulations are finalized at a later date, will transactions taking place prior to the effective date but incomplete at that date be affected? Unfortunately, there is no clear guidance.

To further create uncertainty with the proposed rule, the House will begin consideration of H.R. 5, the Regulatory Accountability Act of 2017. Among other things, this bill will modify the APA to require agencies to choose the lowest-cost alternative for meeting a statutory requirement, will expand public input and vetting of information, will repeal the judicially created doctrines of deference to agency interpretation, and will demand that agencies account for the impact on small businesses. ■

Endnotes

[1] See discussion in letter from Ways and Means Committee members to Jacob Lew, Secretary of Treasury dated November 3, 2016 at https://waysandmeans.house.gov/wp- content/uploads/2016/11/110316_WM_Treasury_ValuationReg.pdf; H. Conf. Rept. 101-964, at 1137 (1990), 1991-2 C.B. 560, 606.

[2] T.D. 8395, 57 FR 4277, Feb. 4, 1992; T.D. 8395, 57 FR 11265, Apr. 2, 1992.

[3] See Department of Treasury Third Quarterly Update of the 2003-2004 Priority Guidance Plan issued April 23, 2004 which added IRC Section 2704 as an area under consideration and succeeding Priority Guidance Plans.

[4] General Explanation of the Administration's Fiscal Year 2010 Revenue Proposals (May 2009).

[5] https://www.donaldjtrump.com/policies

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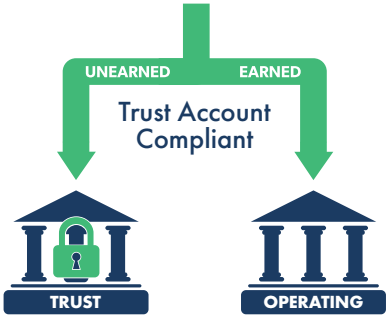

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meant that the defendant "retained the right to obtain *through the judicial system* the only remedies it was likely to need" while "extinguishing [the plaintiff's] right to *access the courts* for any reason." *Rivera*, 2011-NMSC-033, ¶ 53 (emphasis added).

{14} By contrast, the arbitration clause in this case does not specifically retain Santander's right to seek judicial repossession through the courts.[1] Although parties to a contract could specifically agree to forego any self-help remedies in favor of arbitration, in the absence of such a provision, self-help remedies are not otherwise subject to mandatory arbitration. Thus, the contract's recognition that the parties retained private self-help remedies in this case does not bear on whether the arbitration clause is one-sided. *See Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 756 (Cal. 2015) ("[A]rbitration is intended as an alternative to litigation, and the unconscionability of an arbitration agreement is viewed in the context of the rights and remedies that otherwise would have been available to the parties. Self-help remedies are, by definition, sought outside of litigation . . . ." (citation omitted)).

{15} Dalton cites *Preston v. Ferrer*, 552 U.S. 346 (2008) to support her assertion that a valid agreement to arbitrate "waives the right to pursue all other dispute resolution mechanisms—judicial or not." In *Preston*, the United States Supreme Court determined that an agreement to arbitrate all disputes regarding the terms of a contract required that the parties' claims be submitted to an arbitrator rather than the state administrative agency where such disputes would normally be adjudicated under state law. *Id.* at 350-53, 355, 363. The *Preston* Court specifically disapproved of "the distinction between judicial and administrative proceedings" adopted by the lower court in that case and clarified that "[w]hen parties agree to arbitrate all questions arising under a contract, the [Federal Arbitration Act] supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id*. at 359. However, self-help remedies, which are private and nonadjudicatory by their very nature, are categorically different from the administrative and judicial proceedings addressed by *Preston*. Therefore, we do not interpret *Preston* to compel a particular result in this case.

{16} Having established that the carve-out provision's reservation of self-help remedies is irrelevant to the question of substantive unconscionability in this case, we next assess the small claims carve-out.

C. The Arbitration Provision Is Not Unconscionable on Its Face

{17} At the hearing on Santander's motion to compel arbitration, the district court acknowledged that the bilateral carve-out provision in this case was neutral on its face. Both parties provided argument as to the practical effect of the small claims carve-out in the context of an automobile finance contract. According to Dalton, it was self-evident that consumers would be most likely to bring claims alleging "[a]uto fraud" or "financing fraud," which were "cases that clearly have [a] value over $10,000," apparently based on the personal experience of Dalton's attorney in bringing such cases in the past.

{18} The district court concluded that the small claims provision was one-sided "if common sense is employed and practical realities are considered" because consumers would most likely have to arbitrate consumer fraud claims, claims for unfair practices, or other auto fraud or financing fraud claims, while Santander's most likely remedies were related to repossession after a default on the loan and could be pursued through self-help or in small claims court rather than arbitration. On that basis, the district court determined that the bilateral language in the carve-outs was "subterfuge" and that the exemptions actually operated in an unfairly one-sided manner. We disagree.

{19} No New Mexico appellate decision has determined that a bilateral small claims carve-out was unreasonably one-sided or grossly unfair. Indeed, in *Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*, the Court of Appeals assumed that an exemption from mandatory arbitration for claims under $2,500 granted "some judicial rights" to nursing home residents. 2013-NMCA-077, ¶ 29, 306 P.3d 480. Other jurisdictions have similarly determined that a small claims carve-out is not unfairly one-sided in favor of the lender. *See Mansfield v. Vanderbilt Mortg. & Fin., Inc.*, 29 F. Supp. 3d 645, 656 (E.D.N.C. 2014) (assuming that a bilateral small claims exception to a mandatory arbitration agreement was not unreasonably one-sided in favor of either party); *Sanchez*, 353 P.3d at 756 (assuming that a small claims carve-out in an automobile finance contract likely favored the consumer). In fact, Dalton's counsel conceded at oral argument that the bilateral small claims provision would be insufficient on its own to establish substantive unconscionability.

{20} In recent cases where this Court has voided an arbitration provision for substantive unconscionability, there was little ambiguity as to the one-sided operation of the examined provision or the exclusive benefits that inured only to the drafting party. In *Cordova*, the lender explicitly reserved for itself judicial remedies in *all instances* of default by the borrower, while leaving the borrower with no ability to go to court "*for any reason whatsoever*." 2009-NMSC-021, ¶¶ 26-27 (emphasis added). Thus, the arbitration provision was unreasonably beneficial to the lender because it was "highly unlikely" that the lender would ever be prevented from bringing any of its claims in its chosen forum, whether through arbitration or litigation, while as a practical matter, the borrower would never have that option. *See id.* ¶ 27; *see also Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 10, 133 N.M. 661, 68 P.3d 901 (determining that a provision was substantively unconscionable because it granted appeal rights in situations where only an insurer would logically appeal, and it provided no appeal rights whatsoever in situations where only an insured would logically appeal). Further, in *Rivera*, an arbitration provision was unreasonably beneficial to the lender where the lender had the option of choosing its forum in *all cases* where it sought to enforce its rights to the collateral securing the loan, while the borrower did not have this option with respect to "*any claim* she may have [had]." 2011-NMSC-033, ¶ 53 (emphasis added). In this case, the arbitration provision and its carve-outs do not unambiguously benefit the drafting party alone, unlike the clauses discussed in *Padilla*, *Cordova*, and *Rivera*.

{21} Gross unfairness is a bedrock principle of our unconscionability analysis. *See Rivera*, 2011-NMSC-033, ¶¶ 48-49. We are not persuaded that allowing both parties in this case complete access to small claims proceedings, even if one party is substantially more likely to bring small claims actions, is at all unfair. Santander points out that there are "legitimate, neutral

[1]If Santander were to pursue a judicial repossession pursuant to the contracts in this case, whether the value of the vehicle exceeded $10,000 would dictate when Santander must pursue judicial repossession in small claims court or through arbitration.

reasons" for the parties to exclude small claims actions from arbitration, including streamlined pretrial and discovery rules, *compare, e.g.*, Rule 1-026 NMRA (setting forth detailed rules for discovery procedures in district court), *with* Rule 2-501 NMRA (setting forth simplified discovery procedures for actions in magistrate court), and the cost-effectiveness of small claims actions compared to arbitration. *See Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389, 394-97 (N.Y. Civ. Ct. 2001), *order aff'd as modified* (Oct. 9, 2002) (refusing to compel arbitration of a consumer claim brought in small claims court, despite a mandatory arbitration clause, due to the greater expense and inconvenience of arbitration procedures for resolving small claims). Moreover, private arbitration organizations also recognize the importance of bilateral small claims carve-outs in consumer contracts as a matter of basic fairness. It is one of the guiding due process principles of the American Arbitration Association (AAA) that arbitration agreements should "make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction." AAA National Consumer Disputes Advisory Committee, *Consumer Due Process Protocol Statement of Principles*, Principle 5 at 2, https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 (April 17, 1998) (last accessed August 25, 2016). Likewise, Judicial Arbitration and Mediation Services, Inc. (JAMS) requires as a minimum standard of procedural fairness that "no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction." *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, Minimum Standard 1(b) at 3 (July 15, 2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer _Min_Stds-2009.pdf (last accessed August 25, 2016).

{22} New Mexico public policy is also relevant to our analysis of a claim of substantive unconscionability and counsels against an unconscionability determination in this case. *See Strausberg*, 2013-NMSC-032, ¶ 33. New Mexico public policy favors economical and efficient judicial proceedings. For example, our procedural rules must be "construed and administered to secure the just, speedy and inexpensive determination of every action." Rule 1-001(A) NMRA. The Uniform Arbitration Act likewise recognizes that a " 'disabling civil dispute clause' " includes a clause requiring a consumer to "assert a claim . . . in a forum that is less convenient, more costly or more dilatory than a judicial forum established in this state for resolution of the dispute." NMSA 1978, § 44-7A-1(b)(4)(a) (2001). The Uniform Arbitration Act provides that such clauses in arbitration agreements are "unenforceable against and voidable by [a] consumer, borrower, tenant or employee." NMSA 1978, § 44-7A-5 (2001). Both parties benefit from the economy and efficiency of a small claims court when either party has a claim worth less than $10,000. When a claim exceeds $10,000, the additional expense of an arbitration may be justified. We are hesitant to adopt a holding that might discourage bilateral small claims carve-outs, and thereby curtail the availability of small claims proceedings to New Mexico consumers or otherwise frustrate New Mexico's broad public policy favoring economy and efficiency in dispute resolution.

{23} As we have discussed, both the Court of Appeals and the district court erred as a matter of law by concluding that the arbitration provision in this case was substantively unconscionable on its face. However, we note that the district court's order in this case relied solely on substantive unconscionability without addressing Dalton's other affirmative defenses that the Pontiac contract is unenforceable because it was procured by coercion or duress and that judicial estoppel bars Santander from enforcing the arbitration provision in the Pontiac contract. We express no conclusions regarding those defenses.

III. CONCLUSION

{24} The self-help and small claims carve-out provisions in the arbitration clause of the finance contracts are not substantively unconscionable. Therefore, Dalton did not satisfy her burden of proving a facial challenge to the arbitration clause. We reverse the Court of Appeals and remand to the district court for proceedings consistent with this opinion.

{25} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
BARBARA J. VIGIL, Justice
JUDITH K. NAKAMURA, Justice

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-036

No. S-1-SC-35446 (filed September 22, 2016)

STATE ENGINEER OF NEW MEXICO,
Plaintiff-Respondent,
v.
DIAMOND K BAR RANCH, LLC,
and RAYMOND L. KYSAR, JR. and PATSY SUE KYSAR, In their capacity as Trustees of THE RAYMOND L. AND PATSY SUE KYSAR, JR. LIVING TRUST,
Defendants-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
DAYLENE A. MARSH, District Judge

VICTOR RITON MARSHALL
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& ASSOCIATES, P.C.
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OFFICE OF THE STATE ENGINEER
Santa Fe, New Mexico

Opinion

Charles W. Daniels, Chief Justice

{1} Water is both a scarce and a vital resource in New Mexico, and its responsible management is crucially important to all New Mexicans. In this appeal, we address the scope of the New Mexico State Engineer's regulatory authority over use of surface water in New Mexico when it has been diverted from the Animas River into an acequia in Colorado and accessed from that ditch by Petitioners and others in New Mexico.

{2} We reject Petitioners' arguments that the State Engineer lacks statutory authority over waters initially diverted outside of New Mexico and has no jurisdiction to enjoin Petitioners from irrigating an area of farmland not subject to an existing adjudicated water right or a permit from the State Engineer. We hold that the State Engineer is authorized by New Mexico law to require a permit for new, expanded, or modified use of this water and to enjoin any unlawful diversion.

I. FACTS AND PROCEDURAL BACKGROUND

{3} The Animas River, running south from Colorado into New Mexico, is a tributary of the San Juan River and part of the larger Colorado River system. In *Echo Ditch Co. v. McDermott Ditch Company*, No. 01690 (1948), the First Judicial District Court of New Mexico adjudicated water rights for the San Juan River and its tributaries in New Mexico, resulting in what is known as the Echo Ditch Decree. Among the rights adjudicated were those rights to water for irrigation from the Ralston Ditch. The Ralston Ditch diverts water from the Animas River at a headgate located in Colorado approximately one and one-half miles north of the New Mexico border.

{4} As recognized by the decree, the Ralston Ditch delivers Animas River surface water to irrigate 364.2 acres of land in New Mexico. The decree details the allowable purposes of water use. For each property owner with an adjudicated water right, the decree also specifies the allowable quantity of annual water use and notes that "the right to use of said water shall be confined to use upon the lands described" on the individual ownership forms. The Echo Ditch Decree gives the State Engineer, as statutory water master, exclusive authority to measure waters delivered from a main diversion or distributing system, to monitor waste, and to ensure water is delivered in "the respective quantities which the lands and said water users are entitled to receive."

{5} Petitioner Diamond K Bar Ranch, LLC (Diamond K), an asset of the Raymond L. and Patsy Sue Kysar, Jr. Living Trust, and trustees Raymond L. Kysar, Jr. and Patsy Sue Kysar (collectively Petitioners), own and operate a farm in San Juan County, New Mexico. The Diamond K farm property includes a large portion of the 364.2 acres of land and its appurtenant water rights for the Ralston Ditch adjudicated in the Echo Ditch Decree.

{6} The State Engineer filed a three-count complaint against Petitioners pertaining to their alleged illegal use of Animas River surface water. In the second count, the only count currently before this Court, the State Engineer sought to enjoin Petitioners' illegal use of Animas River surface water to irrigate additional acreage that was not part of the adjudicated acreage under the Echo Ditch Decree and for which Petitioners have no permit. *See* NMSA 1978, § 72-5-39 (1965) ("The [S]tate [E]ngineer may apply for and obtain an injunction in the district court of any county in which water is being diverted or the land affected is located, against any person, firm or corporation who shall divert water . . . in violation of statute, or who shall cause or permit the application of said water upon lands or to purposes for which no valid water right exists.").

{7} Petitioners filed a motion to dismiss all three counts against them, primarily relying on *Turley v. Furman*, 1911-NMSC-030, 16 N.M. 253, 114 P. 278, to support their contention that the State Engineer lacks the authority to regulate the use of surface water from the Animas River for irrigation purposes when that water is diverted in Colorado and transported into New Mexico by the Ralston Ditch.

{8} Petitioners further argued that Article XVI, Section 2 of the New Mexico Constitution limits the State Engineer's regulatory authority over unappropriated "natural waters" flowing within New Mexico's boundaries and that any attempt by the State Engineer to exert jurisdiction over waters diverted from the Animas River in Colorado, which are appropriated

and brought through a "constructed" ditch for beneficial use in New Mexico, violates Colorado's right to regulate diversions in its state.

{9} Finally, Petitioners argued that the Ralston Ditch, as a community ditch constructed in the 1880s, is exempt from the permit requirements of NMSA 1978, Section 72-5-1 (1941) as stated in NMSA 1978, Section 72-5-2 (1913). *See* § 72-5-1 (requiring application to the State Engineer for a permit to appropriate water); § 72-5-2 ("None of the provisions of the preceding [S]ection [72-5-1] . . . shall apply to community ditches which are already constructed.").

{10} The Eleventh Judicial District Court denied the motion to dismiss, concluding that "the State Engineer has legal jurisdiction to enforce the [Petitioners'] adjudicated water right on the Ralston Ditch notwithstanding the Ditch's diversion point within . . . Colorado." The district court reasoned that *Turley* was inapplicable to the facts of this case, stating that if there was ever a question whether *Turley* had any application to preclude the State Engineer's authority on the Ralston Ditch, the issue was resolved by the 1948 Upper Colorado River Basin Compact codified at NMSA 1978, Section 72-15-26 (1949); and the court confirmed that the Echo Ditch Decree explicitly recognized the exclusive regulatory authority of the State Engineer over "'waters to be delivered to any water user' in the San Juan River Stream System, the Ralston Ditch included." *See* § 72-15-26 & Article XV(b) (determining the rights and obligations of each of the upper basin states of Colorado, New Mexico, Utah and Wyoming for the use and delivery of water of the upper basin of the Colorado River and its tributaries and affirming "the right or power of any signatory state to regulate within its boundaries the appropriation, use and control of water, the consumptive use of which is apportioned and available to such state by th[e] [C]ompact"). Nevertheless, the district court certified its ruling for interlocutory appeal on the grounds that "the meaning and application of *Turley* . . . is a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this order may materially advance the ultimate termination of the litigation."

{11} The Court of Appeals granted Petitioners' unopposed application for an interlocutory appeal but after full briefing by both parties decided to quash the appeal. *See N.M. State Engineer v. Diamond K Bar Ranch*, No. 34,103, order quashing interlocutory appeal, ¶¶ 8-10 (N.M. Ct. App. June 25, 2015). We granted Petitioners' unopposed petition for writ of certiorari to clarify the extent of the State Engineer's statutory authority to administer the use of Animas River surface waters when the waters are diverted into an acequia in Colorado and applied to lands in New Mexico in the absence of a vested water right or permit. *See Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 11, 147 N.M. 157, 218 P.3d 75 (granting a petition for writ of certiorari after the Court of Appeals denied interlocutory review).

II. STANDARD OF REVIEW

{12} We review de novo a district court's order granting or denying a motion to dismiss under Rule 1-012(B)(6) NMRA. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. The district court's denial of Petitioners' motion to dismiss was based on its interpretation of the regulatory authority of the State Engineer. The State Engineer's power derives from statute and is "'limited to the . . . authority expressly granted or necessarily implied by those statutes.'" *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 13, 289 P.3d 1232 (citation omitted). "We review questions of statutory and constitutional interpretation de novo." *Id.* ¶ 11.

III. DISCUSSION

A. Relevant Constitutional, Statutory, and Administrative Framework for Surface Water Rights in New Mexico

{13} Water law in New Mexico is governed by the doctrine of prior appropriation. *Id.* ¶ 40. "Under the doctrine of prior appropriation, water rights are both established and exercised by beneficial use, which forms 'the basis, the measure and the limit of the right to use of the water.'" *Walker v. United States*, 2007-NMSC-038, ¶ 22, 142 N.M. 45, 162 P.3d 882 (quoting N.M. Const. art. XVI, § 3). New Mexico adopted the prior appropriation doctrine rather than the common law riparian doctrine in part because "'[o]ur entire state has only enough water to supply its most urgent needs'" so that "'[i]ts utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.'" *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 34, 135 N.M. 375, 89 P.3d 47 (citation omitted). Consequently, water holds a unique place within our Constitution that is distinct from other natural resources. *See id.*

{14} The New Mexico Constitution broadly provides that "[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state." N.M. Const. art. XVI, § 2; *see also* NMSA 1978, § 72-1-1 (1941) (codifying N.M. Const. art. XVI, § 2 and similarly stating, "All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use."). To effect this mandate, the Legislature delegated to the State Engineer the wide-ranging authority to manage New Mexico's water resources. *Tri-State Generation & Transmission Ass'n, Inc.*, 2012-NMSC-039, ¶ 34; *see also Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 24, 147 N.M. 523, 226 P.3d 622 (discussing the "general purpose of the water code's grant of broad powers to the State Engineer").

{15} The duties of the State Engineer include "general supervision of waters of the state and of the measurement, appropriation, [and] distribution thereof and such other duties as required." NMSA 1978, § 72-2-1 (1982). "The [S]tate [E]ngineer shall . . . supervis[e] . . . the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts." NMSA 1978, § 72-2-9 (1907).

{16} The diversion or application of water to lands in New Mexico absent a valid water right or permit is unlawful. *See* § 72-5-39 ("No person shall divert water or apply water to land without having a valid water right to do so, or apply it to purposes for which no valid water right exists."). Accordingly, the Legislature also gave the State Engineer the authority to apply for an injunction in the district courts against anyone unlawfully diverting water or applying water to land without a valid right to do so. *See id.*

B. The State Engineer Has Statutory Authority to Regulate the Use of Surface Waters in New Mexico Regardless of Their Diversion Location

{17} Relying primarily on dicta in *Turley*, Petitioners argue that the State Engineer lacks the authority to require a permit or otherwise regulate Petitioners' use of Animas River surface waters for irrigation purposes when those waters have been diverted in Colorado and transported into

New Mexico by the Ralston Ditch. They assert that because the Ralston Ditch is not a natural watercourse, *see* § 72-1-1, the waters it carries become private at the point of diversion in Colorado and thereafter are not part of the public waters of New Mexico subject to the State Engineer's jurisdiction. Not only is Petitioners' interpretation of *Turley* erroneous, but *Turley* is inapposite to the facts of this case.

{18} In *Turley* the Territorial Supreme Court held that the territorial engineer of New Mexico lacked the authority to grant a permit for a proposed diversion from the Animas River in Colorado that would have conveyed water into New Mexico via an artificial ditch because the jurisdiction of the territorial engineer did not extend beyond the territorial boundaries of New Mexico. *See* 1911-NMSC-030, ¶¶ 1, 4-5. As the district court in this case correctly noted, *Turley*'s holding limiting the State Engineer's extraterritorial authority is still good law but inapplicable here. Unlike in *Turley*, the State Engineer in this case is not seeking to exercise jurisdiction over appropriation of water in Colorado or construction of a diversion in Colorado but instead seeks to regulate the appropriation of surface waters in New Mexico for use on New Mexico lands.

{19} The Territorial Supreme Court in *Turley* never reached the question Petitioners raise. *Id.* ¶ 2. Instead, it determined that whether the use of waters diverted in Colorado that entered New Mexico through an artificial ditch would be subject to regulation in New Mexico by the New Mexico territorial engineer was a "moot question" because the proposed ditch in *Turley* did not yet exist. *See id.* ("No part of the waters of the Animus [sic] [R]iver has come into New Mexico except by the natural channel. The proposed ditch for bringing it in exists only on paper and may never have any more substantial being . . . ."). In response to this hypothetical question, the *Turley* Court reiterated New Mexico's law of prior appropriation stating, "It is well settled that [natural waters] lose that character at the point of diversion as soon, at least, as they are applied to beneficial use." *Id.* Petitioners misapprehend this statement to support their claim that once the waters of the Animas River are diverted into the Ralston Ditch they become "artificial" and "private" and outside the jurisdiction of the State Engineer.

{20} Diversion alone is not appropriation and does not create a water right. *See State ex rel. Martinez v. McDermett*, 1995-NMCA-060, ¶¶ 12-13, 120 N.M. 327, 901 P.2d 745 ("[M]ere diversion of water into a canal or ditch, without applying water to irrigating a crop or other valid use, does not satisfy the requirement of beneficial use."). Rather, an appropriation of water in New Mexico requires both a lawful diversion of water and application of that water to a beneficial use. *Snow v. Abalos*, 1914-NMSC-022, ¶¶ 10-11, 18 N.M. 681, 140 P. 1044. It is the application to beneficial use that gives an appropriator the perfected right to use the water. *City of Las Vegas*, 2004-NMSC-009, ¶ 34. This is a limited right subject to restrictions on "how [the water] may be used," the "quantity of water" used, a "specified purpose" of its use, and the "place of use." *Tri-State Generation & Transmission Ass'n, Inc.*, 2012-NMSC-039, ¶¶ 41-42 (internal quotation marks and citations omitted) ("'[T]he right to change point of diversion or place of use . . . cannot impair other existing rights and it may be enjoyed only when done in accordance with statutory procedure.'" (citation omitted)).

{21} The New Mexico State Engineer is charged with regulation and enforcement of New Mexico water rights. NMSA 1978, § 72-2-18 (2007). In New Mexico, exercising an irrigation water right by putting water to beneficial use for irrigation of specified lands vests that irrigation right as appurtenant to those lands. NMSA 1978, §72-1-2 (1907) ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes . . . shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water."); *see also Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 18, 143 N.M. 142, 173 P.3d 749 ("The legislature has decreed, as an exception to the general rule [which makes water rights separate and distinct from land], that water rights are appurtenant to *irrigated* land." (emphasis added)).

{22} Petitioners' contention that diversion and conveyance of waters "by artificial means" such as a ditch renders the use of those waters private and not subject to the State Engineer's regulatory authority because they "never flow in a natural stream within the boundaries of New Mexico" is entirely without merit. To support this argument, Petitioners quote language from statutes and a number of cases addressing artificial waters. *See, e.g.*, NMSA 1978, § 72-5-27 (1941); *Hagerman Irrigation Co. v. E. Grand Plains Drainage Dist.*, 1920-NMSC-008, ¶ 15, 25 N.M. 649, 187 P. 555. Artificial surface waters are "waters whose appearance or accumulation is due to escape, seepage, loss, waste, drainage or percolation from constructed works." Section 72-5-27. Authorities addressing artificial waters are inapplicable here. No authority holds that conveyance of waters "by artificial means" changes the source or character of those waters. The waters in the Ralston Ditch are diverted directly from the Animas River, a natural watercourse, and remain unappropriated natural surface waters upon entry into New Mexico.

{23} Moreover, water is incapable of full private ownership. *See Walker*, 2007-NMSC-038, ¶ 27 ("[W]ater rights are not considered ownership in any particular water source, but rather a right to use a certain amount of water to which one has a claim via beneficial use."). For over a century, New Mexico law has provided that what is owned by the water user is not the water itself but only the right to the use of a certain amount of water for a specified purpose. *See Snow*, 1914-NMSC-022, ¶ 11 ("The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose."). "All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use." *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 23, 62 N.M. 264, 308 P.2d 983; *see also Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) (applying New Mexico law and affirming that "[t]he state controls the use of water because it does not part with ownership; it only allows a usufructuary right to water").

{24} Accordingly, the Animas River waters diverted into New Mexico by the Ralston Ditch remain natural, unappropriated, public waters of the State. Water is transformed from unappropriated to appropriated by putting the water to beneficial use, which requires an existing water right or a permit from the State Engineer. *See* § 72-5-1; § 72-5-39. The State Engineer has jurisdiction to regulate Petitioners' application to beneficial use of Animas River surface waters diverted in Colorado to the Ralston Ditch which conveys their flow to New Mexico. The regulatory role of the State Engineer includes its lawful authority to require Petitioners to apply for a permit

to use this water where there is no existing water right.

C. Petitioners Are Not Exempt from the Requirement to Obtain a Permit for New, Expanded, or Modified Use of Waters from the Ralston Ditch

{25} Petitioners alternatively claim that the Ralston Ditch as a community ditch constructed in the 1880s does not require a lawful permit to divert water from it and that Petitioners' pre-1907 water right also exempts them as individual users of that water from a permit requirement. We agree that the Ralston Ditch is an existing community ditch that does not require a permit to divert water under Section 72-5-2. But even for an existing community ditch, this exemption does not extend to changes in the amount of water appropriated or the location of use. *See* § 72-1-2 (stating that the rightful use of the water appropriated for irrigation purposes "shall be appurtenant to specified lands"); NMSA 1978, § 73-2-63 (1912) (stating that a community acequia established prior to March 19, 1907, need not apply for a permit to change the place of diversion "provided that by such change no increase in the amount of water appropriated shall be made beyond the amount to which the acequia was formerly entitled"). It is the acequia users that hold the rights to use water, not the ditch itself, which is the "carrier system" for those waters. *Snow*, 1914-NMSC-022, ¶ 14; *see also Wilson v. Denver*, 1998-NMSC-016, ¶¶ 18-19, 125 N.M. 308, 961 P.2d 153 (distinguishing between an interest in water rights which are dependent on the amount of water the individual users of the acequia water put to beneficial use and an interest in ditch rights based on the contributions of the individual users of the water to the construction of the ditch). The rights of users of the acequia water are limited and remain subject to regulation by the State Engineer, *see Tri-State Generation and Transmission Ass'n*, 2012-NMSC-039, ¶ 41-42, despite that an acequia has an elected commission and mayordomo, *see* NMSA 1978, § 73-2-21(B)(2) ("The mayordomo . . . shall, *under the direction of the commissioners*, . . . perform . . . duties in connection with the ditch *as may be prescribed by the rules and regulations* of the same or as may be directed by the commissioners." (emphasis added)); § 73-2-21(A)(6) ("The commissioners shall . . . provide bylaws, rules and regulations *not in conflict with the laws of the state* for the government of the ditch or acequia." (emphasis added)). That is, "[i]f the water rights of an acequia have been adjudicated, then the State Engineer must approve *any change*, regardless of whether or not it is a community acequia." *Honey Boy Haven, Inc. v. Roybal*, 1978-NMSC-088, ¶¶ 2-3, 6-7, 92 N.M. 603, 592 P.2d 959 (emphasis added) (reviewing disputes over changes in an acequia's point of diversion from a creek, place of use of the water, and purpose of use of the water that were made without permits from the State Engineer).

{26} It is undisputed that the waters of the Ralston Ditch were adjudicated in the Echo Ditch Decree. As set forth in the decree, Petitioners hold a valid water right and are not required to apply for a permit to exercise their pre-1907 water right, whether or not that right had been adjudicated. *See* NMSA 1978, § 72-1-3 (1961) (stating that a holder of a pre-1907 water right may file a declaration of the right); § 72-5-1 (requiring anyone "hereafter intending to acquire the right to the beneficial use of any waters" to apply for a permit to appropriate water). Petitioners' vested right is still subject to regulation by the State Engineer. NMSA 1978, § 72-9-1 (1941) (stating that the water code shall not be construed to impair existing vested rights, although such rights "shall be subject to regulation, adjudication and forfeiture for nonuse as provided in this article").

{27} The State Engineer is attempting to enjoin Petitioners' alleged improper use of a valid water right. Petitioners are alleged to be improperly irrigating land to which their valid water right is not appurtenant because it is not part of the acreage adjudicated by the Echo Ditch Decree. Petitioners are also alleged to be improperly using a quantity of water that exceeds the amount appropriated for use on the acreage adjudicated by the Echo Ditch Decree. It is within the jurisdiction of the State Engineer, and it is the regulatory responsibility of the State Engineer, to prevent any such illegal use. *See* NMSA 1978, § 72-2-8(A) ("The [S]tate [E]ngineer may adopt regulations and codes to implement and enforce any provision of any law administered by [the State Engineer]."). If Petitioners wish to acquire a new water right or modify their existing right to allow use of an additional quantity of irrigation water or to allow irrigation on new land, Petitioners must obtain a permit from the State Engineer for a new appropriation or for a change in the place of use of their irrigation water. *See* § 72-5-1 (requiring an application to the State Engineer for a permit to appropriate the stated amount of water); *see also* NMSA 1978, § 72-5-23 (1985) (requiring an application to the State Engineer for approval of any change of place of use of water for irrigation purposes). Nothing in the permit exemptions Petitioners rely on suggests that they would not need a permit to use more water from the Ralston Ditch than they have a vested right to use or to use that water on land to which that vested right is not appurtenant.

IV. CONCLUSION

{28} The use of waters diverted from the Animas River in Colorado that enter New Mexico in the Ralston Ditch is subject to regulation by the State Engineer. The State Engineer has the statutory authority to require a permit for new, expanded, or modified use of this water and, when such changes are made without its approval, to enjoin the illegal use. Accordingly, we affirm the district court's denial of Petitioners' motion to dismiss and remand this case for trial on the pending claims.

{29} IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice
JUDITH K. NAKAMURA, Justice

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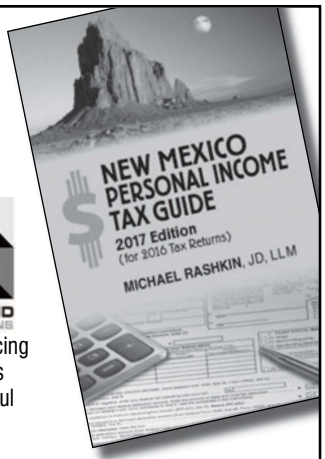

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Request for Proposal Number: 17-0002

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For small but extremely busy law firm. 20 Hours per week. Must have personal injury experience which includes preparing demand packages. Salary DOE. Fax resume to 314-1452

Legal Assistant
Legal Assistant with experience needed for small law office located in Old Town area of Albuquerque. Commercial transactions and commercial litigation. Need a self-motivated person with attention to detail and good writing and document review/revision skills. Compensation DOE. Full or part time. No overtime required. Medical coverage available. Please visit www.oldtownlawoffice.com/hiring for further information.

Paralegal
Seeking applicants for a Paralegal; experience needed for busy, growing, plaintiffs personal injury law firm. We offer great pay and generous benefits (health/dental/401K/bonus plan) for the right candidate. Mission: To work together with the attorneys as a team to provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients and files the attention and organization needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Success: Litigation experience (on plaintiff's side) preferred. Organized. Detail-oriented. Meticulous but not to the point of distraction. Independent / self-directed. Able to multitask. Proactive. Take initiative and ownership. Courage to be imperfect, and have humility. Willing / unafraid to collaborate. Willing to tackle the most unpleasant tasks first. Willing to help where needed. Willing to ask for help. Acknowledging what you don't know. Eager to learn. Integrate 5 values of our team: Teamwork; Tenacity; Truth; Talent; Triumph. Compelled to do outstanding work. Know your cases. Strong Work ethic. Work Hours: Monday to Friday 8AM to 5PM. Barriers to success: Lack of fulfillment in role. Treating this as "just a job." Not enjoying people. Lack of empathy. Thin skinned to constructive criticism. Not admitting what you don't know. Guessing instead of asking. Inability to prioritize and multitask. Falling and staying behind. Not being time-effective. Unwillingness to adapt and train. Waiting to be told what to do. Overly reliant on instruction. We need to see superior grades, or achievement and longevity in prior jobs. 8AM-5PM M-F. Email cover letter, resume and any recent transcripts to James@ParnallLaw.com and print "Apples" in the subject line.

Services

Albuquerque/Santa Fe Paralegal
Civil Litigation Paralegal with over 25 years of experience available for all case management and litigation tasks including jury selection. For resume and references - newmexicoparalegal@gmail.com.

Office Space

Santa Fe Office Wanted
Attorney seeks office share/office in Santa Fe. 930-2407

Downtown Office Building For Rent
1001 Luna Circle. Charming converted casa in small cul-de-sac on Lomas. Hardwood floors, fireplace, large reception area, 4 offices, kitchenette, Free parking in private lot and street side. Basement storage. Walking distance to Courthouses and downtown. $1650/mo. Call Ken at 505-238-0324 or 505-243-0816

Office Space For Rent
Virtual office space or traditional office space for rent. 1516 San Pedro Dr. NE (near Constitution). Updated offices with work station(s) if needed. Includes front Welcome greeter, fax, internet, copy machine, conference room, janitorial service, utilities, alarm service, etc. If leased, then furnished is an option. Free parking and friendly environment. Virtual office $75 per day or $550 per month. Call 610-2700.

Two Offices For Rent
Two offices for rent, one block from courthouses, all amenities: copier, fax, printer, telephone system, conference room, high speed internet, and receptionist, office rent $400 and $700, call Ramona @ 243-7170.

Miscellaneous

Searching for a Will
Searching for a Will for Amelia Dimas Lesperance. Deceased. Please call Robert Archibeque @ 505 850-2117.

Currently accepting advertising space reservations for the upcoming Bench & Bar Directory!

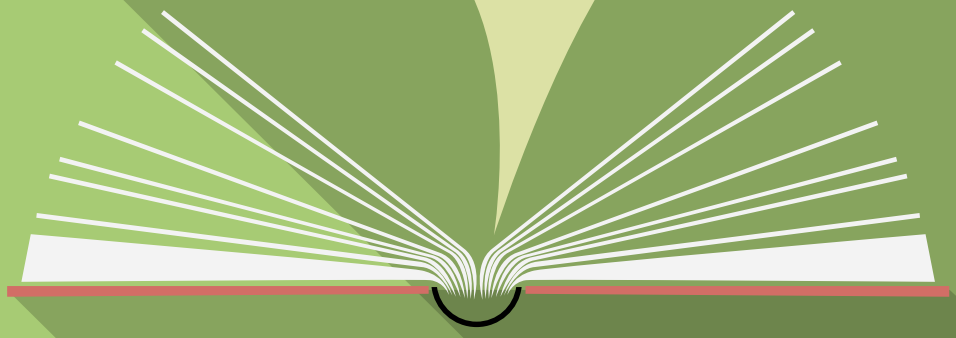
2017–2018 Bench & Bar Directory

Be visible to New Mexico attorneys, Judges, courts administration and the public.

- Attorney Firm Listings
- Court Reporter Listings
- Section Dividers
- Full, half, and third page ads available

Advertising space reservation deadline: March 24, 2017

Directory starts to deliver the first week of June.



For more information, contact Marcia Ulibarri
505-797-6058 • mulibarri@nmbar.org

State Bar of New Mexico

www.nmbar.org

We are proud to announce the opening of our new personal injury firm, Blazejewski & Hansen, LLC.

Our practice centers on helping injured New Mexicans with their personal injury claims of all shapes and sizes. We offer our clients personalized, compassionate, ethical, and aggressive representation.

We are grateful to be a part of the New Mexico legal community, and we look forward to continuing our positive relationships with our colleagues.

Blazejewski & Hansen, LLC
503 Slate Ave NW
Albuquerque, NM 87102
(505) 554-1660
www.blazehansenlaw.com

BLAZEJEWSKI & HANSEN

YOUR LAWYERS, BY YOUR SIDE