DEFENSE LAWYERS
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DEFENSE *news*

The Legal News Journal for New Mexico Civil Defense Lawyers

Fall 2008

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NMDLA

Board of Directors

The New Mexico Defense Lawyers Association is the only New Mexico organization of civil defense attorneys. We currently have over 350 members. A common misconception about NMDLA is that its membership is limited to civil defense attorneys specializing solely in insurance defense. However, membership in NMDLA is open to all attorneys duly licensed to practice law in New Mexico, who devote the majority of their time to the defense of civil litigation. Our members include attorneys who specialize in commercial litigation, employment, civil rights, and products liability.

The purpose of NMDLA is to provide a forum where New Mexico civil defense lawyers can communicate, associate, and organize efforts of common interest. NMDLA provides a professional association of New Mexico civil defense lawyers dedicated to helping its members improve their legal skills and knowledge. NMDLA attempts to assist the courts to create reasonable and understandable standards for emerging areas of the law, so as to make New Mexico case law dependable, reliable, and a positive influence in promoting the growth of business and the economy in our State.

•The services we provide to our members include, but are not limited to:

•Exceptional continuing legal education opportunities, including online seminars, and self study tapes including 5 Professionalism seminars – significant discounts for DLA members;

•A quarterly newsletter, the "Defense News", the legal news journal for New Mexico Defense Trial Lawyers;

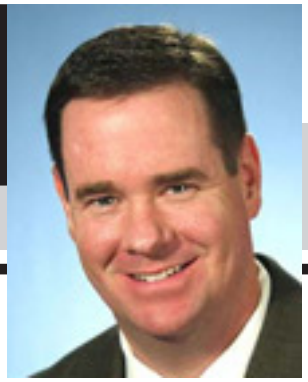
•Quarterly members' lunches that provide an opportunity to socialize with other civil defense lawyers, share ideas, and listen to speakers, who discuss a wide range of issues relevant to civil defense attorneys;

•An e-mail network and website, where members can obtain information on judges, lawyers, experts, jury verdicts, the latest developments in the law, and other issues; and

•An Amicus Brief program on issues of exceptional interest to the civil defense bar.

Contributions and announcements to Defense News are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the New Mexico Defense Lawyers Association or the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the NM Defense Lawyers Association of the product or service involved.

A Message from the President



by Gary J. Van Luchene - Keleher & McLeod, P.A.

Dear NMDLA Member:

Because of the terrific work of the Defense News Editorial Board and the gracious efforts of volunteer authors, this issue includes a lot of useful information that will assist you in your defense practice. Jeff Martin's interview of Judge Louis E. DePauli, Jr., from the Eleventh Judicial District Court provides insight into Judge DePauli's expectations of lawyers and how he runs his court. Sean Olivas, Mariposa Sivage, and Neil Bell analyze a recent U.S. District Court ruling that may affect whether a public employee's actions fall within the scope of his duty under the New Mexico's Tort Claims Act. Brad Berge and Robert Sutphin discuss recent developments in the critical topic of venue in New Mexico, as it relates to corporate clients. Also, don't miss the important articles by Nancy Franchini on audit letters and by Alex Walker on the new federal rule of evidence regarding waiver of attorney client privilege.

I also would like to take this opportunity to remind you of NMDLA's upcoming events. We have several excellent CLE opportunities before the end of the year, so stock up on credits. Our annual meeting is on October 9th at the Marriott Pyramid, and will include our member lunch and five hours of CLE. Other events include an insurance law seminar (November 13th), our annual Civil Rights Update featuring Professor Erwin Chemerinsky (December 5th), and Jim McElhaney's "A New Day in Discovery" seminar (December 12th). More details are available on the NMDLA website, www.nmdla.org.

Finally, I would like to draw your attention to Chief Justice Edward Chavez's message regarding Supreme Court committees and boards on page 10 of the September 29, 2008 Bar Bulletin. You will notice in particular that there are vacancies on the committees for the Rules of Civil Procedure for District Courts, the Rules of Evidence, and Uniform Jury Instructions – Civil. It is critical that the civil defense bar be adequately represented on these committees so our voices may be heard in the formulation of rules and jury instructions. Please consider applying for one of these or the other committees and boards with vacancies if you have time. The deadline for applying is October 24th.

Thank you for your continuing membership and support. As always, contact me or any board member with ideas or suggestions for our organization. If you have ideas for articles or wish to contribute an article to the Defense News, co-editors Theresa Parrish or Lisa Pullen would like to hear from you.

Best regards,

Gary J. Van Luchene

SHARE YOUR SUCCESSES - Over the last few years we have been able to enhance the value of membership in the NMDLA by way of electronic access to a variety of information---especially through the use of email inquiries for information. As part of that continuing effort we ask each of you to share with the rest of the membership---be that a good result at trial; a good appellate decision; a successful motion at the trial court level; a good expert; a good mediator; etc. In turn, we will use the broadcast email capability of the DLA to quickly and efficiently disseminate your news or information to the rest of the membership. All members benefit from such a system; but it will take input from all members to make it a real success.

Lawyers' Responses to Auditors' Requests For Information

by Nancy Franchini - Gallager, Casados & Mann, P.C.

As defense lawyers, we sometimes receive written requests from clients asking us to inform their accountants about litigation or potential future litigation that the client is, or will be, involved in. Information may also be requested regarding any obligations the client has contractually assumed. The American Bar Association has a Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information. **This Statement of Policy can be found on the ABA website and should be reviewed by lawyers before they provide information to clients' accountants**.[1] The purpose of this article is to provide a brief overview of the ABA's Statement of Policy ("the Policy") and is not, by any means, a comprehensive review or analysis of the Policy.

Preamble

The preamble of the Policy sets out the competing public interests of protecting the confidentiality of lawyer-client communications and of having confidence in published financial statements. Taking these two public interests into account, the preamble distinguishes between pending litigation or litigation that the client believes is imminent based on a third party's claim manifestation and other matters that have a legal aspect to them. As for pending or imminent litigation, the Policy states that the lawyer representing the client probably has the best information regarding what the litigation/claim is about, the client's position on the litigation/claim and the client's potential financial exposure in the litigation. As for other matters that have a legal aspect to them, the Policy states that it is not in the public interest for a lawyer to be required to respond to general inquiries from auditors concerning possible claims.

The Statement of Policy provides as follows:

(1) Client Consent to Response—Lawyers may properly respond to the auditor's request for information concerning loss contingencies… subject to the following:

a. If a lawyer receives a letter from the client, which is signed by an authorized agent of the client, asking the lawyer to provide specific information to the auditor, the lawyer may do so without further consent from the client unless the information sought will disclose a confidence or requires an evaluation of a claim.

b. The initial letter received from the client generally does not provide the client's necessary consent to disclose a confidence or the evaluation of a claim.

c. Lawyers should remember that if they provide their evaluation of a claim, an adverse party may assert that an evaluation of potential liability is an admission.

d. Lawyers may wish to have the client review and approve a draft of the letter to the auditor prior to it being sent to secure the client's consent to disclose a confidence or evaluation of a claim.

(2) Limitation on Scope of Response—It is appropriate for lawyers to state the scope of a client's engagement of a lawyer's services. Lawyers may state a timeframe in which the information is being provided. It is also appropriate for lawyers to state that they are not providing any information that they may learn about outside the stated timeframe.

(3) Response may be Limited to Material Item—It is appropriate for lawyers to limit their responses to "items which are considered individually or collectively material to the presentation of the client's financial statements." (¶3 of Statement of Policy).

(4) Limited Responses—When lawyers limit their responses as stated above, that limitation should be clearly stated in the response to avoid any inference that the lawyer has responded to all aspects.

(5) Loss Contingencies[2] —When the client so requests, when a lawyer has been hired by the client to represent him on a matter and when the lawyer has devoted substantial attention to providing the client with legal representation or consultation on a matter, a lawyer may provide the auditor information on:

a. Overtly threatened or pending litigation, whether or not specified by the client;

b. A contractually assumed obligation which the client has specifically identified and specifically requested the lawyer to comment to the auditor about the obligation;

c. An unasserted possible claim or assessment which the client has specifically identified and specifically requested the lawyer to comment to the auditor about the claim.

The information that lawyers may properly tell the auditor about the above includes an "identification of the proceedings or matter, the stage of the proceedings, the claim(s) asserted, and the position taken by the client."(¶5 of Statement of Policy). Additionally, the Policy states that lawyers generally should avoid stating what they believe will be the outcome of a matter unless it is clear that an unfavorable outcome is either 'probable' or 'remote'. Both words are specifically defined in the Policy.

The Policy states that lawyers should avoid providing an amount or range of loss in the event of an unfavorable outcome. However, a lawyer may provide this information if "he believes the probability of inaccuracy of the estimate of the amount or range of potential loss is slight." (¶5 of Statement of Policy).

(6) Lawyer's Professional Responsibility—Depending upon the nature of a lawyer's representation of a client, a lawyer may have an obligation to advise the client as to

whether a matter should be publically disclosed. The Policy states that a lawyer shall not knowingly participate in any violation by the client of the disclosure requirements of the securities laws.

(7) Limitation on Use of Response—The Policy provides language, which lawyers should have in their response letters to auditors, that the response letter should only be used for the auditor's information in connection with the audit of the client's financial condition and is not to be quoted or referred to in any financial statements of the client and it is not to be filed with any governmental agency without the prior approval of the lawyer.

(8) General—The Policy states that it was created for the general guidance of the legal profession and may be incorporated by reference in a lawyer's response letter.

The Policy and the Commentary to the Policy provide additional issues and definitions to be used by attorneys who write response letters to an auditor's request for information. Additionally, Annex A to the Policy provides illustrative form response letters that can be used by attorneys.

In my view, the two most important issues that a lawyer needs to consider before drafting a response letter are: 1. Am I revealing any confidential attorney-client communications in the response letter?, and 2. Is it my professional responsibility to advise the client that certain matters should be disclosed under the securities laws? If confidential attorney-client communications will be revealed in the letter, make sure that your client consents in writing to the communications being revealed and is fully aware of the legal consequences of the communications being revealed. If you do not know the disclosure requirements under securities laws, you may want to advise your client in writing to consult with an attorney that does have such knowledge.

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[1] Go to http://www.abanet.org/litigation/committees/professional/links.html and type in "AU Section 337C " into the search box to obtain a full copy of the Policy.

[2] A loss contingency is an "existing condition, situation or set of circumstances involving uncertainty as to possible loss to an enterprise that will ultimately be resolved when one or more events occur or fail to occur. Resolutions of the uncertainty may confirm the loss or impairment of an asset or the incurrence of a liability." (Paragraph 5 of Commentary to Statement of Policy).

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Calendar of Events

October 9 - Annual Meeting

November 13 - Insurance Law Seminar

December 5 - Civil Rights Law Update

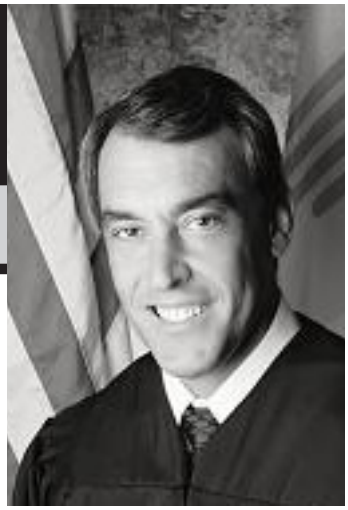
December 10 - Member Luncheon

December 12- A New Day In Discovery

Watch your email for information on these events.

Interview with The Honorable Louis E. DePauli, Jr.

Interviewed by Jeffrey Martin, II - Montgomery & Andrews, P.A.



JM: *This is Jeff Martin (JM). Today is August 21st, 2008. I'm in the chambers of The Honorable Louis DePauli, Junior, for the New Mexico Defense Lawyers Association to conduct an interview of Judge DePauli for the publication. It's a little after three o'clock.*

Judge, thanks for joining me for this.

JUDGE DePAULI: Oh, you're quite welcome.

JM: *Could you please describe for us the nature of your private practice before taking the bench?*

JUDGE DePAULI: Sure. My private practice began in 1989 and basically evolved from a classic small town practice, that is, general civil practice, contracts, probate, family law, property, and some criminal defense, to almost exclusively criminal defense beginning about 2001.

JM: *And why did you decide to make the transition from arguing cases to presiding over them?*

JUDGE DePAULI: Well, I made the decision based upon what I would like to think were altruistic reasons, as well as some pragmatic considerations. I thought that I had the right temperament for the job and thought I could do a good job for the bar. And I wanted to give back to the bar and to the law and to the profession that had given me so much over the years, and I thought judicial service would be a way to do that. I am blessed to be a part of this community, and I wanted to give back to it in a way that I thought productive.

Also, I decided to seek the position because the timing was right in a political sense. When Judge Rich decided to retire, his decision fell in between the general and the primary elections at the time in 2006. And so, the procedure was the Governor would appoint someone, there would be no primary election, and I thought I had a good chance to be appointed. After the appointment, there would not be opposition in the general election. So, I thought if I could get the appointment, I wouldn't have to run in a contested general election, which I thought was attractive to me, because I'm not a politician. And so, those are the pragmatic reasons I decided at the time to seek the job.

JM: *You mentioned the temperament for the job. What is it about your temperament that made you think you'd be well suited for being a judge?*

JUDGE DePAULI: I'm easygoing, and it's hard to rile me, and I think I have patience, and I would like to think I'm a good listener. And that's what I always thought good about the judges that I have appeared in front of. Number one, they'll listen to your argument. They may not agree with you on it or about it, but they will definitely listen to you and give you your opportunity to make your case, and they'll be patient with you and fairly easygoing.

JM: *Judge, is there anything that you did in the courtroom as an attorney that you wish you could go back and change now that you have experienced the courtroom from the bench?*

JUDGE DePAULI: Well, sure. Running late; forgetting to turn my cell phone off; talking with clients or co-counsel or other lawyers when the judge is speaking; interrupting other counsel as they're arguing or presenting a case; speaking objections; and probably a whole lot of other things that I did that I wish I wouldn't have done as a lawyer. But I think failing to always observe simple courtesies is one thing that I wish I hadn't done as a lawyer in my day, because I see that it's really obvious when you don't. It's different, I think, seeing it from the bench as opposed to being in the trenches and doing it there, perhaps not realizing you're doing it.

JM: *Was there any learning curve that you found presiding over the civil side of your docket, since your private practice was primarily criminal defense, I mean, at least in the latter years of that practice?*

JUDGE DePAULI: Well, I'll tell you what, I'm learning every day. I am always on the learning curve. I learn new substantive law, procedural law. I learn new things about evidence and other rules on a daily basis. And, you know, I don't know if I'll ever get ahead of the curve on learning all the law out there. But with regard to repetitive things that arise in civil litigation especially, things like discovery, dealing with jury instructions and potential trial issues that might arise, I'm becoming more and more comfortable. And with regard to repetitive things, there was a learning curve, but in the last couple of years, I think I've gotten ahead of that one.

JM: *Currently, approximately how many cases are on your docket, and what's the rough breakdown between civil, criminal and DR or domestic relations?*

JUDGE DePAULI: July's statistical review that the judges get on a monthly basis shows that I have 710 open cases. I opened 64 in the month of July and closed 42. And that breaks down to approximately 40 percent civil, 30 percent criminal, and 30 percent family.

JM: *Well, Judge, you better get those numbers flipped around, or if you stay on the bench for another ten years, you'll have a docket of 1,500 cases, and you'll be buried.*

JUDGE DePAULI: Well, I'm opening more than I'm closing right now, but occasionally I'll close more than I open. So, it all kind of works out. Except when I came on board, I think I was right at 600 open cases, and that was two years ago. So, yeah, I'm a hundred ahead of two years ago.

JM: *Judge, are you able to estimate how long between the filing of a civil case that is assigned to your docket and the trial docket for that case?*

JUDGE DePAULI: That's a hard estimate to make. Complicated cases, two years from opening to closing, and non-complicated cases, a year to 18 months. And some are even longer, though. Some cases that are still open are longer than my tenure on the bench. They've been here for years, and they're still not to trial yet. But I would say average probably 18 months to trial on a fairly complex, and they all seem complex anymore.

JM: *And maybe the better way to have asked that question was, if two lawyers come into your chambers and say, both plaintiff and defendant, "We've got a complex civil case here, but we're both ready to get after it; both our clients want a trial as soon as you could give it to us," I mean, with that kind of approach even, what's the soonest you can really get someone on a docket?*

JUDGE DePAULI: Oh, no later than six months. No later.

JM: But does that ever happen? I mean, do two attorneys really ever come to you and say, "We're both ready to go"?

JUDGE DePAULI: Sometimes. Well, the usual way it works is that when one party is ready to go, and what I mean by that is discovery is pretty much done, counsel will request a scheduling conference, and from the scheduling conference, I can set a trial date for the parties.

JM: *How do you manage your docket, and what is the role of court-ordered mediation in that management?*

JUDGE DePAULI: I manage my docket by reviewing every pleading that comes through the door. My clerks, when a pleading is filed, will pull the file and attach that pleading to it and bring it to me to look at. I then determine what action I need to take. Commonly a motionseeking relief is filed, along with a request for setting. I'll review the motion, determine how much time is necessary for the other side to respond and then to receive a reply, which is dictated by the rules, of course, and I will set a setting accordingly, usually well in advance of the other party's response even being filed. And I'll set the hearing just enough in advance to allow the parties to respond and reply. And that keeps motion practice moving along rather quickly.

Now, regarding mediation, we have a child custody mediation service, and the court contracts with private custody mediators, and I utilize them frequently. That's the only mediation that this court utilizes. I usually do not schedule or order mediation as a matter of course. I usually get to know the parties a little bit before ordering mediation, and I get to know them through bringing them in for a hearing and determining whether mediation would be appropriate.

JM: *So, am I understanding correctly, then, it's not a matter of course that in your scheduling order there's a date for when the parties shall mediate by?*

JUDGE DePAULI: As a matter of course, there is no scheduled mediation order. I do not order mediation as a matter of course in any case, and I really only order mediation in the civil litigation context when the parties have asked me to. I've never been one to order parties into mediation. I don't feel that I should. I don't see that I have that authority. I can see a court ordering that if the parties want to mediate, they shall have mediated by a certain date, but I would never presume to order parties to mediate.

JM: *Interesting. I should have asked this question a little bit earlier, after you told me how many cases were on your docket, but we do like to get just a little bit of personal information about you, not just strictly, you know, professional. So, the question is, with a caseload of 710 cases that's slowly growing, how do you find balance in your life?*

JUDGE DePAULI: Well, I get a lot done at the office. I do not have to take nearly as much work home with me as I did when I was in private practice. I do not wake up nearly as much in the middle of the night thinking about a case as a judge as when I was a defense attorney, but it still happens. When I do have trouble with a hard decision, it usually doesn't trouble me much longer after I've made the decision, because there's so many more decisions to make after that in other cases.

But to answer your question, I'm an outdoors person. I run about 20—25 miles a week, and so that helps. I just finished running in one of the toughest half-marathons, so I'm told, in the nation, and I did it in under two hours. And then I hunt, and I fish, and I golf. And I spend a lot of time with my four kids who are still at home and my wonderful, independent, strong wife, who tolerates me fairly well. So, I'm fairly balanced. My wife beat me by 3 minutes, by the way, in that half-marathon.

JM: *Good for you. What are your top three expectations of attorneys who appear before you?*

JUDGE DePAULI: Well, my answer to that is there's really only one expectation that I have, and that is for a lawyer to be a professional. You know, professionalism is basically what our business is all about. When you're professional, you're prepared, you know your case, and you know the law, and you know how to educate the judge. And when you're professional, you're a person of integrity. You're honest with the court, and you're honest with your clients, and you're honest with opposing counsel. And I think you're courteous. You're courteous in your pleadings, you're courteous in your letters back and forth, and you're courteous in court. And so, all that is kind of subsumed in professionalism. So, that's all I really expect.

And I will say just for the readers out there, I have found the defense bar to be very, very professional. I do not mind, and I rather enjoy, hearing civil cases that are brought before this court because of the lawyers just being extremely professional.

JM: *Do you find that oral arguments by attorneys is especially helpful to you when deciding motions, and if so, in what way?*

JUDGE DePAULI: I don't find oral arguments that helpful, because most of the time lawyers stand on their briefs or simply tell me again what their brief says. But sometimes a lawyer will ask me if I have any questions about their motions and briefs, and that's when it's helpful to have a

Interview with Judge DePauli Continued

give and take with lawyers, just almost question and answer-wise, about the issue. And then it's helpful, but overall, I think I can make most of my decisions based upon briefs.

JM: *Do you ever do that? I know some district court judges in the state court system, even though you don't have the benefit of clerks, or law clerks, which I think you should, but that's a whole different topic, some district court judges will decide on the briefs and issue letter opinions. Do you ever do that, or do you pretty much afford everyone an oral argument as a matter of course under motions practice on the civil side?*

JUDGE DePAULI: If I do not need a brief and feel it would be not a good use of time, I will make a decision on the briefs alone and not afford lawyers oral argument. I have done that frequently, many times. I don't do a letter decision. I issue an order with findings and conclusions. So, I do it in pleading form. I'll make a decision in pleading form with findings and conclusions.

JM: *Now, there is a long family connection to this bench. Could you please tell us that story?*

JUDGE DePAULI: Well, it started in 1956, I suppose, with my father practicing law here in Gallup, New Mexico. He started the law firm of Lebeck & DePauli. And then in 1961 it became Lebeck, DePauli & Rich. And at the time, well in the early 60's, my dad was also the district attorney. In those days, you could be district attorney and have a private practice. And in 1975, he was appointed to the bench by Governor Anaya, and he remained on the bench until 1988. And then in 1988, Judge Rich, Judge Joseph Rich, my uncle, was appointed to the bench. I think it was by Governor King. And then he won by election, and he remained on the bench until 2006, when I took the bench over. Judge Rich is my uncle through being married to my dad's sister. And then even prior to my dad being judge, his dad was a judge here in McKinley County in the probate court.

JM: *Oh, I wasn't aware of that.*

JUDGE DePAULI: Yeah, there've been a lot of DePauli judges in McKinley County.

JM: *Well, excellent. So, since 1975, 33 years one way or another, a DePauli or Rich was sitting in that chair on that bench.*

JUDGE DePAULI: From 1975 on, there's been a DePauli or a relation to a DePauli on the district court bench.

JM: *Now, does that family connection have anything to do with that rather large New Mexico state map on your wall?*

JUDGE DePAULI: Well, this map has been on the wall - I'm sure it was on the walls of Lebeck, DePauli & Rich law office, and then it was kept by Judge Rich. And it's just this huge, 3-D map of New Mexico that shows rivers and streams and creeks and canyons and valleys and towns and stuff like that. But Judge Rich put it in this office that I'm in now, and when he retired, he took the map with him to his house. And I told him, "Whenever you want to give it back to the office, I'll take it." And so, I ultimately got possession of the map again, and it's sitting here in my office.

JM: *It's a great map. Judge, if you were to give one piece of advice to attorneys who are not from this district and they're going to appear before you for the very first time, what would that be?*

JUDGE DePAULI: Expect me to know a lot about your case and why you are there or why you are coming into my courtroom on that particular day, because I owe it to you to know what your case is all about. And what I'll expect from you when you come into my court is to basically educate me on what I don't know or don't understand about your case.

JM: *Judge, thank you for your time, your candor, and your service.*

JUDGE DePAULI: Oh, you're welcome. Thank you for coming.

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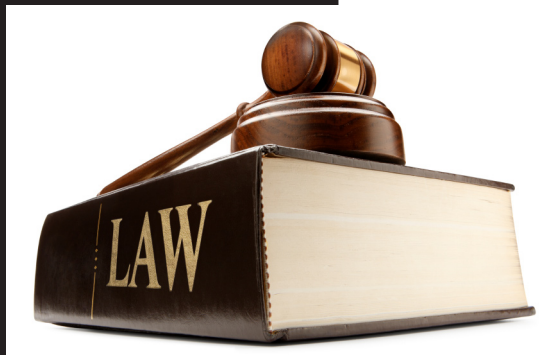
INSURANCE LAW IN NEW MEXICO



- •Basic Outline of an Insurer's Duties in New Mexico
- •Detailed Discussion of an Insurer's Duty to Defend
- •Detailed Discussion of an Insurer's Duty to Settle Cases on Behalf of its Insured
- •Stacking of Uninsured/Underinsured Motorist Benefits – Current Status
- •Rejection of Uninsured Motorist Benefits/Election of Limits Lower than Liability Limits
- •Current Status of Statutory and Contractual Offsets of Liability Payments
- •Conflicts of Law in Uninsured/Underinsured Motorist Claims
- •New Developments in Insurance Law in New Mexico

Thursday, November 13, 2008

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5121 Masthead Blvd.
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DEFENSE LAWYERS new mexico DLA ASSOCIATION

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Register online at www.nmdla.org

Soto v. Galvan - McBrayer's "Scope of Duty" Is Limited

by Sean Olivas, Mariposa Padilla Sivage, Neil Bell - Keleher & McLeod, P.A.

Risk Management Division v. McBrayer[1] made it seemingly impossible for the defendant to win summary judgment on the issue of whether a public employee's tortious or criminal conduct falls outside the aegis of the New Mexico Tort Claims Act ("TCA or "the Act"). [2] Under the TCA, the State, through the Risk Management Division ("RMD"), must defend and indemnify any public employee who, while acting within the scope of his duty, commits certain enumerated torts or violates an individual's constitutional rights.[3] *McBrayer* was the first case to construe the phrase "scope of duty" as used in the TCA, and the Court articulated an expansive definition that arguably brings even the private actions of public employees under the Act.[4] Indeed, since *McBrayer* stated its inclusive standard, no appellate court has rendered a decision holding as a matter of law that a defendant public employee's contested actions were beyond the scope of the employee's duty.[5] However, in the recent case of *Soto v. Galvan*, Federal District Judge William F. Downes[6] granted summary judgment in favor of RMD, holding that the defendant's actions were beyond the scope of his duties as a public employee.[7] This article will 1) describe the *McBrayer* standard and its effects, 2) summarize the unsuccessful arguments in cases that have applied the *McBrayer* standard, and 3) outline the arguments that were successful in limiting that standard for the first time in *Soto*.

McBrayer effectively eliminated the argument at the summary judgment stage that any of a defendant public employee's actions are outside of the scope of his duties. Under the definition, whether a public employee is acting within the scope of his duties at a particular moment is a question of fact. As a result, summary judgment is inappropriate on this issue when a public employee commits a tort or constitutional violation so long as the conduct is arguably connected to a duty that is requested, required, or authorized by his employer. [8] The facts of *McBrayer* itself demonstrate that the court does not require much evidence of a connection to create an issue of material fact that is sufficient to deny a motion for summary judgment. There, a university instructor sexually assaulted and tortured a female student after luring her to his apartment under the pretext of giving her a make-up assignment.[9] Reversing the trial court's grant of summary judgment on the scope of duty question, the Court held that "[b]ecause it appears that [the tortfeasor] used this authorized duty as a subterfuge to accomplish his assault, we find that a reasonable fact finder could determine that his actions were within the scope of the duties that [his employer] requested, required, or authorized him to perform."[10] Thus, *McBrayer* makes it clear that the definition of scope of duty is an inclusive one. Summary judgment is inappropriate on the issue even when the contested actions of a public employee are criminal in nature and occur on his private time and on his private property.

The New Mexico Supreme Court gave its stamp of approval to *McBrayer in Celaya v. Hall* under circumstances that made it clear that the Court agreed with the inclusive standard set forth in *McBrayer*. In *Celaya*, a volunteer chaplain for the county sheriff's department ran over the plaintiff's foot in a store parking lot while driving a department vehicle.[12] The Supreme Court agreed with the Court of Appeals that summary judgment was not appropriate on whether the defendant "was acting within the scope of his duties at the time of the incident." [13] According to the Supreme Court, although the defendant could not recall whether he was "performing his chaplain's duties for the Department" when he stopped off at the store, the defendant raised a sufficient issue of material fact by testifying that it was his custom and habit to drive the department vehicle only when he was on official business.[14] The Court held that the defendant's testimony was sufficient to create a fact question of whether there was "a connection between the public employee's actions at the time of the incident and the duties the public employee was requested, required or authorized to perform."[15] As such, *Celaya* demonstrates that an unsubstantiated claim of habit is enough to preclude summary judgment under the *McBrayer* definition of scope of duty.

For defense practitioners, the *McBrayer* standard has been a mixed blessing. The definition is helpful if the defendant is a public employee sued for a tort that falls outside of the TCA's waiver of immunity. In such a scenario, *McBrayer* makes it much easier to argue that the defendant was acting within the scope of his duties and thus to assert the defense of sovereign immunity—even when the tortious conduct had little to do with the defendant's job.[16] However, if the defendant's actions were either included within the TCA's waiver of immunity or were an alleged violation of an individual's constitutional rights, the rule makes it virtually impossible to win summary judgment on the issue that the defendant's actions were beyond the scope of his duties.[17] As such, from a defense practitioner's perspective, the rule makes it easier to raise the shield of sovereign immunity when available, but it makes it next to impossible to contest RMD's duty to defend and indemnify a public employee on the grounds that his actions were outside of the scope of his duties.

Since *McBrayer*, defendants have made several unsuccessful arguments to convince the courts to award summary judgment on the issue that the defendant was acting beyond the scope of his duties when he committed the acts in question. For example, in *McBrayer* itself, RMD argued that the criminal nature of the defendant's actions dictated that he was acting beyond the scope of his duties as a university tutor.[18] The Court rejected that argument, reasoning that the indemnification provisions of the TCA show that the legislature clearly contemplated that a public employee

could commit "malicious, even criminal acts that were unauthorized, yet incidental to the performance of [his] duties."[19] Similarly, in *Seeds v. Hall* the Court rejected the argument that the "malicious motives" of the defendant city officials removed their actions from the scope of their duties.[20] There, the Court held that "[t]he City Defendants' wrongful motive is simply irrelevant" as long as the *McBrayer* "connection" is established.[21] Thus, neither the nature of the contested actions nor the motivation behind them is sufficient to place a public employee's conduct beyond the scope of his duties.

Soto, however, posed a factual scenario that allowed RMD to successfully argue that the defendant's actions were outside his scope of duty as a public employee. In that case, the plaintiff ("Soto") sought damages from the defendant, a state-court magistrate judge ("Galvan"), for civil rights violations under 42 U.S.C. § 1983 and for battery, false imprisonment, and intentional infliction of emotional distress. There, Soto was celebrating her 21st birthday with a friend at a bar in Las Cruces when she recognized Galvan who had performed a "proxy" wedding for her and her husband several weeks earlier. Galvan, who was also out with a friend, approached the plaintiff to engage in friendly conversation. Soto's husband was in jail at the time pending a hearing, and she thought it was a good opportunity to talk with the judge. When Soto asked Galvan if he remembered performing her wedding, Galvan admitted that he did not. The two had several drinks and flirted with each for approximately thirty minutes. During that time, Soto attempted to speak with Galvan about her husband's case, which she believed would be before Galvan. Galvan covered his ears and indicated that he did not want to hear anything about her husband's situation. Instead, Soto and Galvan talked primarily about magistrate court procedure. Soto claimed that during this conversation, Galvan offered to help obtain her husband's release from prison if she had sex with him. Galvan denied making such an offer. According to both of them, however, they left the bar with the mutual understanding that they would have sex later that evening. The two walked outside to look at Galvan's Porsche. Galvan then took Soto for a ride, and, while they were out, they stopped in the parking lot of an apartment complex and had sex in his car. Soto claimed that at some point while they were in the Porsche, she changed her mind as to the *quid pro quo* arrangement and that she decided not to have sex with Galvan. Accordingly, she alleged that the sex was not consensual and sued Galvan. RMD intervened and filed a complaint in intervention seeking a declaratory judgment that it had no duty to defend or indemnify Galvan because he was acting outside the scope of his duty as a judge at all times relevant to the plaintiff's complaint.

RMD's argument focused on the lack of any connection between Galvan's actions and the duties that he was requested, required, or authorized to perform as a magistrate judge. Specifically, RMD argued that Galvan's actions leading up to the alleged battery were wholly unrelated to duties that he was requested, required, or authorized to perform. RMD distinguished *Soto* from *McBrayer* by highlighting the fact that, unlike the tutor who used his duty to provide homework as a subterfuge to lure the plaintiff to his apartment in *McBrayer,* Galvan was not performing a professional duty by drinking, flirting, or talking with Soto at the bar prior to having sex with her. Instead, RMD argued that the alleged unlawful conduct came about through an unplanned social "pick-up" at a bar. RMD asserted that Galvan was at a bar on a personal outing near midnight drinking with a friend when he approached Soto without recognizing her as someone who had appeared before him in his courtroom. Additionally, RMD argued that even if the conversation in the bar was within the scope of Galvan's judicial duties, all discussion of legal proceedings ended before the couple left the bar. RMD also contended that if Galvan actually offered to procure freedom for Soto's husband in exchange for sex, this was not requested, required or authorized and was, in fact, illegal. RMD finally argued that Galvan's intervening "unofficial" actions of walking out to the parking lot to show Soto his Porsche, offering her a ride, flirting with her in the car, parking, and having sex with her severed whatever "connection" there may have been to duties that he was requested, required, or authorized to perform. Absent a connection, Galvan was acting outside his scope of duty and was not entitled to defense and indemnification from RMD.

Judge Downes agreed and granted summary judgment in RMD's favor. He held that under the standard of *McBrayer* and its progeny, "a government employee acts within his scope of duties if the employee demonstrates a connection between the acts in question at the time of the incident and duties that the employee is requested, required, or authorized to perform regardless of tortious or criminal intent."[22] Applying this standard, Judge Downes held that "no reasonable trier of fact could find that Plaintiff's allegations of battery, false imprisonment and IIED were connected to actions by Defendant that were requested, required, and authorized by law."[23] The court acknowledged that the discussion regarding the magistrate court proceedings "appear[ed] to be authorized by law."[24] However, the court held that there was "no connection between the authorized act of describing the magistrate court proceedings and the battery, false imprisonment, and IIED under any circumstances presented by the parties."[25] Furthermore, the court focused on the unauthorized and illegal nature of the conduct that Soto alleged Galvan engaged in to convince her to have sex with him, namely the alleged *quid pro quo* arrangement. The court ruled that because the alleged conduct leading up to the acts complained of was illegal, the alleged civil rights violations, battery, false imprisonment, and IIED themselves were not within Galvan's scope of duties as a magistrate judge. In reaching this conclusion, the court surveyed the entire *McBrayer* line of cases and distinguished them, holding that, unlike those cases,

> where defendants performed *authorized* acts that directly affected the plaintiffs' rights, here the Court cannot discern a scenario in the present case where the exercise of a magistrate court judge's responsibility of explaining court procedures could lead to the alleged conduct. The only connection

Soto v. Galvan - McBrayer's "Scope of Duty" Is Limited - Continued

> between defendant's conduct and Plaintiff's allegations is temporal: shortly after describing the function of the magistrate court, the parties had sex, whether consensual or not.[26]

Thus, unlike *McBrayer*, where the tutor "used [his] authorized duty as a subterfuge to accomplish his assault,"[27] Galvan's alleged offer of lenient treatment for Soto's husband was not authorized and was, in fact, illegal. As a result, because the antecedent to Galvan's allegedly tortious conduct was not within the scope of his duties, his subsequent actions, which formed the basis of Soto's complaint, were not within the scope of his duties, either.

Soto stands alone as the only written opinion since the inception of the *McBrayer* standard to hold as a matter of law that a defendant public employee was acting outside of the scope of his duties when he engaged in the conduct that formed the basis of the lawsuit. The success of *Soto* teaches that the chink in the armor of *McBrayer* is not the nature of the public employee's contested actions or the motivation underlying them. Rather, the proper argument, if it is available, is the absence of any connection between the public employee's tortious conduct and any duties that s/he was requested, required, or authorized to perform. *Soto* held, as a matter of law, that if the conduct leading up to the public employee's contested actions was not requested, required or authorized, then the contested actions themselves were not within the scope of his duties. Perhaps *Soto* can be persuasive in convincing a New Mexico appellate court to similarly limit the expansive rule of *McBrayer.*

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* Sean Olivas and Mariposa Padilla Sivage represented RMD in *Soto v. Galvan*. Neil Bell is a third year law student at the University of New Mexico School of Law who clerked for Mr. Olivas and Ms. Sivage during the summer of 2008.

[1] 2000-NMCA-104, 14 P.3d 43.

[2] NMSA 1978, §§ 41-4-1 to -29 (1999).

[3] *See* NMSA 1978, § 41-4-4 (2001). *See also* NMSA 1978, § 15-7-3 (1997).

[4] *See McBrayer*, 2000-NMCA-104, ¶ 20, 14 P.3d at 49 ("Because it appears that [the tortfeasor] used this authorized duty as a subterfuge to accomplish his assault, we find that a reasonable fact finder could determine that his actions were within the scope of the duties that [his employer] requested, required, or authorized him to perform.").

[5] S*ee Celaya v. Hall*, 2004-NMSC-005, 85 P.3d 239; *Henning v. Rounds*, 2007-NMCA-139, 171 P.3d 317; *Vigil v. State Auditor's Office*, 2005-NMCA-096, 116 P.3d 854; *Seeds v. Lucero*, 2005-NMCA-067, 113 P.3d 859; *Derringer v. State*, 2003-NMCA-073, 68 P.3d 961.

[6] Judge Downes is a visiting judge from the Wyoming federal district and frequently presides over New Mexico cases.

[7] *See* Order Granting Intervenor's Motion for Summary Judgment, *Soto v. Galvan*, No. Civ. 06-738-WFD (D.N.M. Feb. 11, 2008).

[8] *See McBrayer*, 2000-NMCA-104, ¶ 19, 14 P.3d at 49. See also NMSA 1978, § 41-4-3(G) (2007) (defining "scope of duty" under the TCA).

[9] *See McBrayer*, 2000-NMCA-104, ¶ 19, 14 P.3d at 49.

[10] *Id*. ¶ 20, 14 P.3d at 49.

[11] 2004-NMSC-005, 85 P.3d 239.

[12] *Id*. ¶ 2, 85 P.3d at 241.

[13] *Id*. ¶ 1, 85 P.3d at 241.

[14] *Id*. ¶ 27, 85 P.3d at 246.

[15] *Id*. ¶ 26, 85 P.3d at 245 (internal quotation marks and citation omitted).

[16] *See Vigil*, 2005-NMCA-096, 116 P.3d 854 (holding that state auditor was immune from liability for his allegedly defamatory statements because they were made within the scope of his duties and because the TCA does not waive immunity for defamation). *See also Henning*, 2007-NMCA-139, 171 P.3d 317 (holding that school district administrators were acting within scope of duty and were thus immune because plaintiff did not allege that their actions fell into any of the enumerated torts for which TCA waives immunity).

[17] *See*, *e.g., Celaya,* 2004-NMSC-005, 85 P.3d 239 (reversing summary judgment in favor of defendant because negligent operation of a vehicle in a store parking lot was arguably within the scope of the defendant's duties) and *McBrayer*, 2000-NMCA-104, 14 P.3d 43 (reversing sum-

New Federal Rule of Evidence on Attorney Client Privilege

by Alex Walker - Modrall, Sperling, Roehl, Harris & Sisk

On September 19, 2008, the President signed S. 2450, enacting new Federal Rule of Evidence 502 (Pub. L. No. 110-322, 122 Stat. 3537). The new rule limits waivers of attorney-client privilege and work-product protection to facilitate discovery and reduce its cost.

The law takes effect immediately. It provides that the new rule applies in all proceedings commenced after the date of enactment and, insofar as is just and practicable, in all proceedings pending on such date.

The text of the statute may be found at http://www.uscourts.gov/newsroom/2008/S2450EnrolledBill.pdf,which is also reproduced as follows.

S. 2450

One Hundred Tenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Thursday, the third day of January, two thousand and eight,

An Act to amend the Federal Rules of Evidence to address the waiver of the attorney client privilege and the work product doctrine. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT;LIMITATIONS ON WAIVER.

(a) IN GENERAL.—Article V of the Federal Rules of Evidence is amended by adding at the end the following:

''Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver ''The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

''(a) DISCLOSURE MADE IN A FEDERAL PROCEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE OF A WAIVER.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

''(1) the waiver is intentional;

''(2) the disclosed and undisclosed communications or information concern the same subject matter; and

''(3) they ought in fairness to be considered together.

''(b) INADVERTENT DISCLOSURE.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

''(1) the disclosure is inadvertent;

''(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

''(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

''(c) DISCLOSURE MADE IN A STATE PROCEEDING.—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

''(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

''(2) is not a waiver under the law of the State where the disclosure occurred.

S. 2450—2

''(d) CONTROLLING EFFECT OF A COURT ORDER.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

''(e) CONTROLLING EFFECT OF A PARTY AGREEMENT.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

''(f) CONTROLLING EFFECT OF THIS RULE.—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

''(g) DEFINITIONS.—In this rule:

''(1) 'attorney-client privilege' means the protection that applicable law provides for confidential attorney-client communications; and

''(2) 'work-product protection' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.''.

(b) TECHNICAL AND CONFORMING CHANGES.—The table of contents for the Federal Rules of Evidence is amended by inserting after the item relating to rule 501 the following:

''502. Attorney-client privilege and work-product doctrine; limitations on waiver.''.

(c) EFFECTIVE DATE.—The amendments made by this Act shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.

Speaker of the House of Representatives,

In the Venue "Balance" A Foreign Corporation Weighs More Than a New Mexico Corporation

by Brad Berge and Robert Sutphin - Holland & Hart LLP

You cannot prevent your corporate client from being sued in an unfavorable venue. You can, however, potentially limit a plaintiff's ability to obtain an unfavorable venue when bringing a lawsuit against your corporate client in a multi-defendant lawsuit: counsel them to incorporate in a state other than New Mexico **and** appoint a statutory agent for the service of process in a corporate-friendly New Mexico county. This is the teaching of the New Mexico Court of Appeals' February 1, 2008 decision in *Bank of America v. Apache Corp.*, et al., 2008-NMCA-54, *cert. denied* N.M.S. Ct. No. 30,955, 180 P.3d 1180.

Bank of America[1] involved a surface owner's common law claims against oil and gas producers for the alleged contamination of surface and subsurface soils and groundwater caused by oil and gas production operations in Lea County, New Mexico. In a lawsuit brought in Santa Fe County, the Lea County plaintiffs named various defendants, who, for purposes of venue analysis, fell into five categories:

(1) "the Santa Fe County Defendants," foreign corporations with statutory agents in Santa Fe County;

(2) "the Lea County Defendants," foreign corporations with statutory agents in Lea County;

(3) "the San Juan County Defendant," a foreign corporation with a statutory agent in San Juan County;

(4) "the foreign Defendants," foreign corporations without a New Mexico statutory agent; and,

(5) "the New Mexico Defendant," a New Mexico corporation with its principal place of business in Lea County.[2]

Interpreting and applying the defendant residence provisions of Subsections (A) and (F) of the venue statute (NMSA 1978, § 38-3-1), the district court granted the motions to dismiss for improper venue brought by the Lea County Defendants, the San Juan County Defendant, and the New Mexico Defendant, finding that "venue was improper in Santa Fe County for [plaintiffs'] claims against the foreign corporation defendants who have appointed an agent for service of process who does not reside in Santa Fe County as well as any New Mexico corporation . . . whose registered agent does not reside in Santa Fe County."

The district court's ruling framed the issues decided by the Appellate Court: whether venue that is proper as to one or more defendant foreign corporations with a statutory agent (i.e., the "Santa Fe County Defendants") may serve as the basis for venue against (1) another defendant foreign corporation with a statutory agent in a county other than that where venue is asserted; or (2) a New Mexico corporation with a statutory agent and principal place of business in a county other than that where venue is asserted.

The Court answered "NO" to the first issue, holding, "venue that is proper for one foreign corporation defendant with a statutory agent cannot establish venue for another foreign corporation defendant if the other's agent is maintained in a separate county." The Court answered "YES" to the second issue, holding that, "venue that is proper for a foreign corporation defendant with a statutory agent may indeed establish venue for a New Mexico corporation even though the New Mexico corporation maintains an agent for service of process and a principal place of business in another county."

Bank of America is the latest in a line of recent New Mexico appellate decisions considering the interplay between the defendant residence provisions of Subsections (A) and (F) of the venue statute. Subsection (A) of the venue statute (§ 38-3-1) provides:

A. First, except as provided in Subsection F of this section relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides; or second, in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.

And, Subsection (F) provides:

F. Suits may be brought against transient persons or non-residents in any county of this state, except that suits against foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides or in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred or in the county where the statutory agent designated by the foreign corporation resides.

In a loose sense, *Bank of America* is a restatement – albeit with different combinations of foreign and resident corporate defendants typical of the recent series of appellate decisions – of two recent New Mexico Supreme Court decisions: *Baker v. BP America Prod. Co.*, 2005-NMSC-11, and *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-52. Indeed, *Bank of America* found that *Baker* "inform[s] our decision" and *Gardiner* was"controlling."

Baker v. BP America Prod. Co. involved a person-

Baker v. BP America Prod. Co. involved a personal injury action against multiple defendants, the majority of whom were foreign corporations without statutory agents, and one defendant with a statutory agent in a county different than the county where venue was asserted. The Court considered whether proper venue for a foreign corporation without a statutory agent – which can be sued "in any county of this state" under Subsection (F) - could establish venue for a foreign corporation with a statutory agent in a county different than where venue was asserted. Contrasting the wording of Subsections (A), which contains language allowing the residency of one defendant to establish venue for all, with the wording of Subsection (F), which does not contain the "good for one, good for all" language, the Court interpreted Subsection (F) to "clearly designate the limited venues where a foreign corporation with a statutory agent can be sued." Accordingly, the Court held that venue for a foreign corporation without a statutory agent could not determine proper venue for a corporation with a statutory agent.

Although *Baker's* holding was stated in terms of general application, the Court explicitly limited its holding to the facts before it. The Court noted that it was not addressing "other combinations" of multiple defendants, "such as residents and foreign corporations with statutory agents or multiple foreign corporations with statutory agents in different counties." This "other combination" was therefore passed on until *Bank of America*.

Gardiner v. Galles Chevrolet Co. involved a wrongful death action against twenty foreign corporations, one of whom maintained a registered agent in the county where venue was asserted, and one resident corporation with a registered agent in a county different than the county where was venue was asserted. The Court considered whether proper venue for a foreign corporation with a statutory agent in the county where venue was asserted could establish proper venue for a New Mexico resident corporation with a statutory agent in a different county. Noting that Subsection (F) is "better understood" as "an exception" to Subsection (A), the Court held that while Subsection (F) limits venue for foreign corporations with statutory agents to the county where the statutory agent resides, Subsection (A) – with its "good for one, good for all" language - does not "so limit venue for resident defendants." Stated differently, "while a foreign corporation with a statutory agent may not be sued where another defendant resides, a resident defendant may."

Bank of America followed *Gardiner* insofar as it addressed venue for the "New Mexico Defendant." Noting that *Gardiner* was "controlling," the Court held that the New Mexico corporation could be sued in any county where venue might be proper for at least one other defendant.

Addressing venue for the foreign corporations with statutory agents in counties other than where venue was asserted (the "Lea County Defendants" and "San Juan County Defendant"), *Bank of America* followed *Baker's* reasoning, even though *Baker's* holding was expressly limited to its facts. The Court held that because these corporations had statutory agents, they could be sued where those agents reside, but they could not be joined in suits in other counties, wherein venue was premised upon a codefendant's statutory agent's residence.

Bank of America's holding does not compel a plaintiff to split her cause of action, or to pursue multiple trials for the same claims. Under *Bank of America, Baker*, and *Gardiner*, venue would always be proper in the county where any plaintiff resides or the county where the cause(s) of action arose. *Bank of America* does, however, eliminate venue options as to foreign corporations with statutory agents. In other words, the decision provides **fewer** venue options against foreign corporations with statutory agents, than against New Mexico corporations with corporate codefendants. And because New Mexico corporations can be sued wherever venue may be proper against any codefendant, the decision affords those corporations little certainty, and little comfort.

Bank of America follows the venue statute as it is written. And, according to the *Bank of America* Court, public policy supports its decision, because, as stated by the New Mexico Supreme Court in *Gardiner*, "[t]here are rewards that New Mexico obtains by inducing large foreign corporations to obtain a local agent, thereby facilitating service of process and perhaps achieving other benefits as well." While New Mexico might obtain "rewards" and "other benefits," foreign corporations with a statutory agent are rewarded and benefited too: venue against them is limited. Companies that incorporate in New Mexico obtain no reward or benefit: they are subject to a venue statute that allows them to be sued wherever venue is proper for any codefendant. Does public policy also support this result?

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[1] The *Bank of America* decision and holding also involved and applied to the case of *S&D Ranch, L.L.C. v. Chesapeake Operating, Inc. et al*., which involved similar facts and claims and was consolidated for purposes of appeal.

[2] In the *S&D Ranch* case, the "New Mexico Defendant" was a New Mexico

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