DEFENSE *news*

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NMDLA

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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 our members include, but are not limited to:

- Exceptional continuing legal education opportunities, including online seminars, and self-study tapes, with significant discounts for DLA members;
- A newsletter, the "Defense News," the legal news journal for New Mexico Defense Trial Lawyers;
- Members' lunches that provide an opportunity to socialize with other civil defense lawyers, share ideas, and listen to speakers, 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.

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A Message from the President

by Bryan Garcia, Narvaez Law Firm, P.C.

Fellow DLA Members:

I am honored to be elected President of the New Mexico Defense Lawyer's Association for 2010. I must admit some trepidation in following Carolyn Ramos' footsteps. Her leadership and time commitment during the events of last year were remarkable. She clearly was the right person for the job. Our new Executive Director Kendra Yevoli deserves special accolades for seeing us through the difficult times. Thank you, Kendra. We would not be here today without you. I am also grateful for the strong Executive Committee consisting of Nancy Franchini (President-Elect) and Michelle Hernandez (Treasurer). Finally, I would also like to thank Joe Conte and his staff at the State Bar. The State Bar graciously provided administrative and financial assistance while we recovered from a difficult year.

As you are no doubt aware, 2009 had many challenges, including the death of our Executive Director, Rhonda Hawkins. An insurance claim has been tendered on behalf of the DLA under an employee misconduct provision. I would like to thank Board member Scott Eaton for taking the lead on this. I would also like to recognize exiting Board members Jim Johansen and Paul Grand. Each admirably served the DLA for many years. I am honored that I had the privilege of their tutelage. Trent Howell takes Mr. Grand's place on the Board. We are excited to have his perspective on the board.

Although much work remains to fully resolve last year's issues, I am pleased to announce that we have put the compounding tragedies of last year behind us. The DLA is financially sound and we are providing all of the services the defense bar has come to expect. 2010 will see many new developments, including a complete revamping of the DLA website with the objective of making it more attractive and user-friendly. We will continue to provide the CLEs that have become the cornerstone for the New Mexico defense bar. Last year's Civil Rights Seminar had the largest crowd ever. I would like to see this year's program grow even larger. Special thanks to Steve French for his tireless efforts setting up this annual program. The DLA newsletter, *Defense News*, continues to provide timely and engaging articles to our membership. Thank you Board-of-Editors.

On behalf of the DLA Board, I leave you with the message that we are standing strong and ready to serve the defense bar. I wish you each peace and prosperity in the new year. Like all of my predecessors, I welcome any questions, comments or observations from my fellow defense bar colleagues as to how we can best serve you.

Bryan Garcia
Narvaez Law Firm, P.C.
NMDLA President

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 and publication of peer accomplishment. As part of that continuing effort, we ask each of you to bring your accomplishments to DLA's attention. Submissions might include a good result at trial, a favorable appellate decision, a successful motion at the trial court level, or a recommended expert or mediator.

Email your information to nmdefense@nmdla.org, with the subject line "DLA Sharing." 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, and it will take input from all members to make it a real success.

Defense News welcomes contributions and annoucements, but reserves the right 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 of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the New Mexico Defense Lawyers Association of the product or service involved.

Interview of The Honorable Alan Malott, Second Judicial District Court Judge

Interviewed by Alex Walker, Modrall, Sperling, Roehl, Harris & Sisk, P.A. ("A.W.") and Carlos Martinez, Butt Thornton & Baehr PC ("C.M.")

A.W. **Why don't we get just a little bit about your history before you took the Bench.**

Malott Ok. Well, I graduated from Arizona State University in 1975 with a Bachelor of Science in Criminal Justice and then I went to Law School at Loyola University in L.A. and at University of New Mexico. I graduated from UNM in May of '79 and, roughly, I think it was January of '79 actually, might have been in the end of '78, I went to work at Butt, Thornton, & Baehr and worked with Carlos Martinez and a couple of other people. That's where I met my wife – she was the only one in the word processing unit who could read my handwriting and that's how we met – and we worked together, the three of us for a while doing worker's comp, subrogation, general tort defense, etc.

In February '81, I went out more or less on my own, shared space with another attorney for about a year or two, and then started my own practice, which was in varying incarnations between a solo practice and at one point I had 7 lawyers working for me, somewhere around the middle '80s. In that practice, a trial practice, it was about 90% Plaintiffs' tort work. There were some other areas, but that was the bulk of my work. I did that until I took the bench. I've been a certified civil trial advocate through the National Board of Trial Advocacy since '94. That's about it. I've done other public service, I've been active in both the State Bar and the NMTLA, those kinds of things. That pretty much covers it.

C.M. **What brought you to New Mexico?**

Malott My parents. I was living in Arizona and my parents had moved here. In fact, my dad had started a restaurant named Fat Humphrey's over here in what's now Nob Hill. And so I came over to visit and I liked it here. The weather, the climate--it's a lot nicer here than it is in Phoenix. At any rate, I learned that the University of New Mexico had a clinical program which was, even then, considered to be pretty outstanding. I was at the time going to Loyola in Los Angeles, and I just could not afford it, in plain English. I met with Peter Wintergrad, who told me if I came out somewhere in the top 10% of my class at Loyola, I had a good chance at transferring. So I put an application in. I had originally come here planning just to stay through school and then go back to Phoenix, where I had some pretty good connections. But I liked it here and, frankly, Duke Thornton offered me a job, so I stayed. That's really it. And I have no regrets. This is a wonderful place.

The Honorable Alan Malott

A.W. **What prompted you to apply for the judgeship after all those years in practice?**

Malott Just that, in plain English. No, seriously. I am in some ways maybe a little naïve. I believe very strongly in the system. The system requires people who have experience to do these kinds of jobs and it requires us, quite honestly, to step up, take the pay cuts, and do things like that to give back to the community. This community has given me a lot. I did very well in private practice and so, as I got older and I was approaching 30 years in practice (my kids are in college and my older kid has now graduated) -- it gives you some freedom that you don't really have during the younger years, both economically and otherwise. And so I was looking for something that was a different challenge and a broader challenge and that would be an opportunity to do more community-oriented work, as opposed to worrying about my income. So I put my name in, I think, 3 times. On the third it hit, so here I am. Sometimes I still look around and go, "How did I get here?" I frankly hope that sense of awe never goes away.

A.W. **Talk about your docket if you can.**

Malott Sure. On average for the civil judges, the docket runs about 1,400-1,500 files. That sounds somewhat more imposing than it is because a number of them are small creditor matters and foreclosures which, while extremely serious, don't require as much time. The foreclosure and creditor cases frequently end up in defaults. Three out of four is my rough guess, so the numbers are not quite as imposing as they might seem, but they are still pretty imposing. We are still able in this division -- we're still working real hard to get people in for hearings within 6 weeks on a request, and sometimes shorter. I have a rule that even when I do a trial, a bench trial or a ruling, that you either get a

ruling that day or, if it's really complicated, you'll have it within 3-5 days. And so far so good, but I don't know how long I'll be able to keep that up based on how we're facing increased caseloads and reduced budgets.

The civil docket, as you guys know, has been revised. It's everything from probate to personal injury to employment. We cover pretty much the whole gamut. One of the things that are even scarier to me from the budget standpoint is the criminal backup, because those cases are six month rule cases. [On the civil matters] I can push you out. I can tell you, "I'm sorry Carlos, it's going to take me 6 months to get you a hearing date." Everybody's upset about it, but nothing adverse happens. In the criminal cases people are being denied due process. The State is being denied the opportunity to prosecute cases in a timely manner. The whole system just takes a lot and it's probably worse in the domestic relations division. It's a similar problem in that they already have an overload and they're dealing with people who are at each other's throats, in most situations. Or they're dealing with custody and child support issues that are extremely delicate and important to people and can put them in a spiral. If you don't get your child support, next thing you can't make your rent, next thing you can't make your car payment, and then you're in a foreclosure. Those scenarios are worse than a civil docket.

C.M. **Is there some concern that there may have to be a shifting of judges to the criminal docket because of the 6 month rule?**

Malott There's been no discussion as of yet, but there have been some discussions about some of the civil judges trying to pitch in for warrant periods. The criminal judges, they rotate on nighttime warrants. There are a number of stories of judges who are getting 8, 10 calls a night and they're on for a month at a time. None of us are spring chickens anymore and we need our rest. When you get interrupted 8 or 10 times in a night, then you have to go in and start a murder trial the next morning, that's a quality of justice issue and a significant issue. And so some of the discussions have centered around whether some of the civil judges would be able to do that, to do the warrants. It's still up in the air. Like I said, we're going down and doing filing in the court clerk's office. My belief is, I'm here to help keep the boat afloat and whatever needs to be done, I will do it. My concern in shifting to criminal is I have a degree in criminology from 1975, but that's the extent of my criminal work. I'm not qualified to be deciding whether people go to prison or not right now. Could I be trained for it? Probably. But that in itself causes a problem. And, frankly, I'm not trained for it and I'm not personally inclined. That's why I didn't apply for a criminal spot. That's why I didn't practice in the criminal arena. It's a difficult area. It's different than what I do. And for most of us on the civil bench, we don't have much experience with it. It's a difficult situation where if we do have to pitch in, everyone will do it if it has to be done. In many of the districts, as you know, judges do general work and if that's what has to happen, that's what will happen. I'm more than willing to do it with some guidance and help to make sure I don't mess anything up. But it's a short-term solution. It's not going to solve the problem. The filings continue to go up and the resources are going down.

C.M. **Are you concerned that with the furloughs, you might lose some employees? Some employees may say, "Look, I have certain economic needs and I have to be earning a certain amount of money a month and I'm earning less. I like working here, I like what I'm doing, but I have a certain standard of living, basic rent, you know groceries, I may have to get another job to pay for?"**

Malott Well, first of all, we deal with that on a regular basis anyway. We lose people to other agencies and especially to the Federal court system because their pay is higher and the benefits are bigger. I think [the budget cuts and furloughs] will only exacerbate it. My TCAA came with me and she took an almost 1/3 pay cut to take the job in the first place. If you cut her another 10% or 15%, I am concerned that she will leave. My bailiff is vested in his retirement age. He's already in his 60's. He may or may not want to stay if we cut his pay 10%. So, yes, I think those are certainly part of the overall issue. What I'm more worried about is we won't be able to recruit new people. If somebody is looking at a job that only pays $30,000 on the books and you tell them it's actually 12% less than that, they might have a whole different opinion about the job. The judges, all of us, had a meeting on Monday. We did our general judges meeting and talked about the furlough system, the budget problem, and it was pretty much standing room only in the ceremonial courtroom. So quite a few people were there. The judges and the hearing officers are exempt from the furlough system. None of us are happy about that in any way, shape, or form. There are people who work in this building who work very hard to provide a service, and we're worried about the ability to do that and we're worried about the people that have been here many years and are very dedicated and are coming in on Saturdays, as I said, to do the work that they need to do. And, at a certain point, everybody breaks and you're right, they're going to go ahead and have to look elsewhere. There are going to be people that that happens to. There are going to be people who will not come to the court system because the pay is in flux right now. So, yeah, it's a serious concern for all of us.

A.W. **Other than having to deal with all of these budgetary concerns, what have been some surprising things about taking on the role of a judge?**

Malott When Valerie Huling took the bench about 6 years ago – Valerie and I knew each other since she was an

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Interview Honorable Alan Malott

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adjuster and I was an attorney in the late '70's and had had trials together, etc. And so I was here and stuck my head in her door, sort of a goodwill thing, and said, "How are you doing?" and she said, "Alan, I have to tell you something. There are other areas besides tort law." So not so much a surprise, but an experience and a challenge has been the breadth of what we cover in the civil division. I have had to learn law which I didn't know anything about. I am going to preside on Monday over a three-day child abuse trial that got sent to me from the children's court judges being disqualified. You have to learn a lot of areas; you have to know a lot of areas. That has been challenging. One of the other huge challenges - or surprises - has been the number of people who throw up their hands and default. I had no idea how frequently people would just give up their homes, give up their cars, whatever, and not even come to the court system. They are scared, especially in the foreclosure/creditor situation. They do that before they ever get here and it's disturbing to watch people lose their homes and lose their property simply because they can't fight back. One of the ways of dealing with it (and it's mostly been Clay Campbell's effort) has been to develop the volunteer panel and that has helped some. It has given us a number of volunteers to get *pro se* people some representation – at least some advice. But every morning I sit down and sign somewhere between 8 and 12 default judgments and most of them are foreclosure actions, and it is sad and it was surprising to me. I am used to being in the tort arena where there are insurers and institution clients and almost nobody ever defaults except if there's been a paperwork or a clerical error or something like that. But this happens all the time and it is upsetting. That's probably the biggest challenge. The other significant area to me is everybody keeps calling me Judge and sometimes I just go "Who?" That's probably going to continue, but I think it is a good thing that we continue to be awed by the position we have been given. I hope I don't lose that entirely. I would like to stop doing double-takes every time somebody calls me judge though.

C.M. **When an attorney comes before you as the judge, what are some of the, shall we say, likes or dislikes that you've seen during your short period as a judge? If you would be giving tips to an attorney that was going to appear before you, what are some of the recommendations you would make if they were going to create a favorable impression? What habits or things would you recommend as things to avoid if they, you know, as they say, get off on the wrong foot?**

Malott There are probably a number of subparts to that answer but the most sweeping or broad statement is, I've been doing this for 30 years. I have tried a bunch of cases. I have litigated hundreds, if not thousands of cases. So do not pee on my leg and tell me it's raining. That will not work. When I have attorneys who come in and tell me that they couldn't find their file or they didn't get notice, and it's their 4th of 5th time in 6 months that they have not appeared because they didn't get notice, those are some of the things that experienced attorneys have. We know what's going on so, number one is: be honest. If you've got a problem, if you made a mistake, if you've missed a deadline, if you have little or no position other than equity and a prayer, say so. If you come in and tell me that I missed a date and my kid was sick, we're all human and most of us will be happy to try to deal with that in a way that's fair and equitable to all the parties. But if you come in and tell me that you know, "John did this" and "Joe took my puppy who ate my homework" or any of those kind of stories, we've heard them all and we don't generally believe them.

C.M. **So Grandma can only die once.**

Malott We only get two grandmas and so two grandmas only can die. I think if people were more honest and upfront, both with themselves with the Court, that would help them. The second thing to me is be prepared. I'm shocked, going back to Alex's surprise question, I'm shocked at how many people fail to file responses to motions. That has been on a day-to-day kind of basis. I sit down, I have my files pulled ten days before the hearings and I make a point of reading them at least twice. I try to read them three times - to go through and make sure I've read the background because, being new, some of the cases predate me. I try to read the background and read the motions and briefs and some of the cases if I don't know them or I'm not familiar with the general line of law. Most of the people who have been down here in the last six months will tell you, I usually give you a ruling before I leave because I know what I'm going to do and I know what the alternatives are from the minute I walk through that door because I try to be prepared. Be prepared. If you file a motion, it should be on some sort of grounds, not simply well, the defense attorney isn't doing what I wanted him to do or the plaintiff's attorney hasn't returned my phone call. If you file a motion, if you've had a motion filed in your case, you have 15 days to respond and you should file some sort of response. Technically under the rules, I can go ahead and decide the case without a response, but it certainly is helpful when I sit down and read things and I go, "Well, what's the other side's position? They haven't filed a response." It's very difficult for me to look at the specifics of the case when you're looking at so many cases. Sometimes I can be better at it than others but, as a whole, file responses, be prepared, show up reasonably on time or call and tell me you're stuck in traffic. Those are some of the biggest rules. But the biggest single one is, as I said, be honest with the Court. And that's not just from me, that's from everyone else in this building. We've all been around the block and lying to us does not help your case; does not help your reputation.

C.M. Let's just say you have a well prepared case in the sense that both sides did brief their positions. Is it your practice to address the attorneys and tell them any questions that you might have regarding the matters in the brief, or do you just simply allow the attorneys to decide what particular points we should emphasize?

Malott When I come out, I tell people I have read everything. For most experienced attorneys that means don't read your brief back to me. I don't quite say that but for what this interview is worth, yes – I don't want you to read the brief to me. I've read it, but I want the attorneys to get out and give me the highlights of their argument because sometimes in a 20 page brief there are really 2 or 3 cogent points you really want to make that you think are pivotal and I want to hear those. I don't like to micro-manage people in their litigation, so I try to let them make the argument they think is appropriate. But if you file the paperwork, you should assume I have read it; you should assume we have all read it. Everybody works really hard. You know, lots of nights we go home with boxes in the back seat of the car to be able to read stuff. So on the civil bench, all of us talk about this and we all read the stuff and try to be prepared. So it's most helpful if people come out and have their cogent or pivotal points and then are prepared for questioning, as there are frequently questions. They could be specific legal questions. For example, in the child abuse case I'm about to preside over, we have a polygraph issue. I had never dealt with a polygraph issue before so I had counsel come in and we talked about the polygraph issue and that was helpful for everyone. Sometimes it is more equitable for application issues: "Mr. So and So, why should I strike the Defendant's witness list that was 12 hours late? What's the prejudice from getting him the witness list 12 hours late?" I realize that everybody is supposed to follow a court order and everything but still, when people have a variance, the law is pretty clear that you have to have been prejudiced. If you file a motion and you don't have any prejudice, you have wasted everyone's time. That's not professional and it's not appropriate. So sometimes it's more on equitable or application issues. Sometimes it's on substandard issues, but I usually come out – I take out these little 4x3 sticky pads and as I read the cases, I make notes and stick them on the inside of the jacket and so when I go back a second time, I'm looking for my questions again because everything is familiar this time. And then the third time is usually when I have specific notes of what I want to ask the lawyers and that can vary.

A.W. Is there any sort of behind-the-scenes, round-tabling of questions or issues among the judges where you seek out advice from other judges on cases?

Malott Yes there's really both. First of all, once a month or so, we have a civil judges meeting. Each of the divisions has a monthly meeting and at those meetings we usually will discuss particular issues, not so much individual cases. In fact, I can't remember any individual cases being discussed, but particular issues come up. For example, in the context of foreclosure, the First District passed a mediation rule that's pretty forceful and it came to our attention – some of the local creditor lawyers brought to our attention, [asking], "Well, are you going to do this kind of a program?" So we talked about if we want to have a mandatory mediation program for foreclosure. We talked about specific types of issues. I had a case come up where the case was on appeal when I was appointed and the question was, did the parties have to file their disqualification at the time the appeal was still pending or could it wait until the mandate came out. And we were going to discuss that at the next meeting. I'm not sure what the exact answer is but we talked about that. The second part of your answer is there's no formal roundtable of specific questions but we do talk to each other. We know and we recognize each other's backgrounds. I go next door to Beatrice Brickhouse to ask employment questions with some regularity and she asks me tort questions because that's the difference in our basic background and experience, and we very frequently will get two or three judges and go, "Well, what do you think about this?" So there is a certain amount of collaboration. I think we all try really hard not to tell anybody what to do, but we do a lot of collaborative work in small groups. We have buddy judge systems. You may be familiar with that, where each of us has a judge that is supposed to be our buddy to cover if someone is sick or if you have a real problem with something and we take advantage of that. One of the nice things after having been "the boss" is the collaborative nature of what goes on here. It has been a really wonderful experience to get to know a lot of the other judges in a different context. I knew them all, I'd appear in front of them all, [and] I think I have tried cases in front of everybody. I'm not 100% sure on that, but I certainly was pretty well-known. And so now it's a little bit different as a colleague, but it is very interesting to get a chance to get other people's perspectives and other people's approaches to how you deal with these cases. Some of these folks have practiced about the same time as me, [but] they've been judges maybe 9, 10, 15 years. Judge Lang was a phenomenal help in just setting a "put one foot in front of the other" kind of approach to getting the cases done, and I'll always owe Bill for that. He is very helpful and very concerned and came down the hall pretty much every day until maybe the last week or so. So yeah, we do, we do talk and we do collaborate and we do try to be within certain perimeters to be reasonably consistent with what we give you guys so that you don't have to balance too much within the general process of the bench.

C.M. Have you received any concerns by the defense bar that you might be a "plaintiff's judge"?

Malott Sure, I think that's always an issue whenever someone comes on the bench – whether you're a "plaintiff's

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judge" or a "defense judge". The issue of excusals is an ongoing issue and more problematic in some districts than this one because there are enough judges. But it's interesting to me that I haven't had that many disqualifications. Most of the defense bar knows me pretty well. I was a very aggressive advocate, but I don't think I was ever known to be unfair or unreasonable. The unfortunate thing about it is that labeling a judge either way is really unfair to everybody. The fact is that I have 30 years experience out there in the tort and insurance and general litigation area, which seemed a qualification, not a disqualification. The difference between the attitude of a judge from private practice to the bench is huge. I took an oath that I take really seriously, and that's to be fair to everybody and keep a level playing field. It is, to a certain extent -- it's insulting to any of us to say, "Oh, well, you're going to rule only for Plaintiffs because you are plaintiff's lawyer." Don't you think in 30 years that I found out that a lot of plaintiffs may be full of bologna just as much as a lot of defendants? So that issue is sort of disturbing at times because it's sort of a prejudgment of prejudice against the judge simply because it's in their background. It's not reasonable or right to do that just based on speculation. The fact that I may have had a case against State Farm doesn't necessarily prejudice me against State Farm. It doesn't, and to the extent – if anything, to the extent that I have encountered defendants that I have dealt with before, especially institutional defendants, I have really tried hard to talk to other judges to make sure that I'm not letting anything leak in from before. But the truth of the matter is everybody who comes down here had prior experience and a certain amount of bipartisan support. Without bipartisan support, none of us would be here and it's important to realize that we all take this oath real seriously and that it is our job and it is our mission to make sure the playing field stays level. It's much more interesting to me to watch two good attorneys go on a level playing field than it is for me to try to play God and try to tip the scales. I'm not real interested in doing that. I'm here to make sure the system keeps working because, naively, after 31 years, I still believe in it.

A.W. **Is there anything you miss or maybe don't miss from private practice?**

C.M. **Besides the income?**

Malott I, uh, yeah the income was an issue. What I don't miss is the business side. What I loved most about this job and what I appreciate most and what just tickles me every day is I only have to come in and do one job now and that is look at the files, make the best decision I can, as promptly as possible, and move to the next case. I have not broken into a cold sweat about my credit line in eleven months. I have not had to do payroll or taxes and try to figure out what that's about. So I don't miss running the business at all. I miss walking to work with my dog, which I used to do when my office was in Nob Hill and I lived a mile away. I miss that. I'm still getting use to wearing a tie everyday because I usually didn't. You know, in all seriousness, the thing I love the most is I can now focus on just doing what I was trained and experienced to do and to try to help to keep things moving. It's so important that we keep things moving in the system. Sometimes, you know, we make a joke and sometimes it's better to have a decision you don't like than no decision at all. It's so important to keep people's cases going so that if I make a mistake, there are people in Santa Fe that are there to straighten me out. I cannot be afraid to make a decision. Otherwise I don't belong here. You've got to make decisions and move the cases. So being able to simply focus on the legal work, on the legal process and the substantive law, it's really kind of fun after 30 years of trying to do 6 different jobs and make sure you do them all reasonably well. So that's the part I like to focus on.

C.M. **As you know, this article is going to appear in the newsletter for the defense bar. Is there anything that we haven't covered, or any comments that you would like to make to the defense bar?**

Malott Not specifically other than to touch back on what we talked about a moment ago about the disqualifications. It is probably inaccurate to assume that a person's mere background is going to dictate how they make their decisions. It's not necessarily conducive to moving the cases and it's not necessarily correct. Most of us really take the oath—I say most of us—all of us take the oath very seriously and really try hard to balance. Those of us who have particular experience, we may know, for example how the flow of the court case works and all the ins and outs beyond just the legal issues that can affect how they work. But that doesn't mean we have a predisposition as to how case a, b, or c is supposed to work out. And so my biggest issue is: don't prejudge anybody, whether it's me, Judge Brickhouse, just anybody. There are going to be new judges coming in over the next few months and that's, probably, a fairly ongoing situation. It is best to find out how you interact with a particular judge (because everybody's got their own personality) before you decide that that judge can or cannot give you a fair hearing. We can't reduce free will.

A.W. **Okay, thank you very much.**

UM Coverage – Comment on *Mountain States Indemnity Co. v. Allstate Mechanical, Inc., et al.*

by Andrew Johnson, Johnson Law Firm

In *Mountain States Indemnity Co. v. Allstate Mechanical, Inc, and Larry Kolek,* No. 28,686 (N.M. Ct. App.), *cert quashed,* No. 31,364 (N.M. 2009), Larry Kolek, the owner and operator of an incorporated family business, Allstate Mechanical, was injured while he was hunting feral hogs in Texas. Kolek was not in an Allstate Mechanical vehicle at the time of the accident. Nonetheless, Kolek attempted to stack coverage of all the vehicles insured under the Allstate Mechanical commercial policy. The named insured on the policy was Allstate Mechanical, not Larry Kolek. The District Court determined that there was no coverage under the policy because Kolek was a Class II insured and was not in an Allstate Mechanical vehicle at the time of the accident. The Court of Appeals affirmed.

Plaintiff's counsel, David Berardinelli, petitioned the Supreme Court for a writ of certiorari on three primary issues. The first issue was whether the UM statute required corporate business insurance policies to provide Class I bodily injury coverage even though no individuals were named insureds. The second issue was whether *Rehders v. Allstate Ins. Co.*, 2006-NMCA-058, 139 N.M. 536, 135 P.3d 237 contradicted the Supreme Court's ruling in *Montano v. Allstate Indemnity Co.,* 2004-NMSC-020, 135 N.M. 681, 92 P.3d 1255. Finally, Plaintiff argued that multiple premiums paid by a corporate named insured should result in automatic stacking if no rejection of UM coverage is obtained as required by *Montano*. The Supreme Court granted the petition for writ of certiorari.

Plaintiff argued that because the corporation was a small, family-held corporation, Kolek should be considered the named insured even though he was not listed as such. Plaintiff vehemently argued that Class I coverage was required for corporate commercial auto policies because a corporation cannot "get what it paid for" unless the officers of the corporation are treated as named insureds. Lastly, Plaintiff contended that a failure to reject stacking had the additional effect of creating Class I coverage.

The Supreme Court initially granted certiorari and then heard oral arguments. Soon after oral arguments, the Supreme Court quashed the writ. As a result, it appears that Class I coverage will not be created if an insurer fails to obtain a rejection of stacking as required by *Montano*, the Court of Appeals' decision in *Rehders* will remain good law, and that when a corporation is the named insured, the owners of the corporation will not be considered named insureds, unless the declarations sheet states differently.

Upcoming Events

Spring CLE Seminars

- Advanced Trial Practice, with Mark Riley, will be May 13 at the State Bar in Albuquerque.
- Women in the Courtroom, with Carolyn Ramos, is scheduled for June 4, at the Jewish Community Center in Albuquerque.

Look for more information on other planned 2010 CLE Seminars

- Annual Meeting with special speakers and awards will be held in October.
- Civil Rights 2010, with Stephen French, will be held in December.

We're also making plans for a national speaker in November 2010.

Premises Liability – Comment on *Romero v. Giant Stop-N-Go of New Mexico, Inc.*

by Lisa Ortega, Rodey, Dickason, Sloan, Akin & Robb, P.A.

The New Mexico Court of Appeals in *Romero v. Giant Stop-N-Go of New Mexico, Inc.,* 2009-NMCA-059,146 N.M. 520, 212 P.3d 408, *cert. denied,* 2009 – NMCERT – 005, 146 N.M. 728, 214 P.3d 793, provides protection to business owners against premises liability claims that stem from certain targeted criminal behavior of third parties. The New Mexico Court of Appeals held that when the intentional act giving rise to the harm cannot be reasonably foreseen by a business proprietor, there is no duty on the part of the business owner to protect against it.

Facts and Procedural Background

Eric Tollardo, Alfredo Rael, and Nathaniel Maestas were shot and killed in their vehicle at a Giant gas station in Taos. Their female companion, Cassandra Martinez, was injured in the shooting. The assailant, Jason Perea, was apprehended shortly thereafter and was prosecuted for the murders.

Perea was deposed in the case of *Hartford v. Estate of Eric Tollardo* No. CIV 04-0997 (D.N.M. filed Sept. 3, 2004), which involved questions of uninsured/underinsured coverage and other insurance issues relating to the use of the vehicle in the crime ("insurance litigation"). In his deposition, Perea revealed an ongoing dispute with Tollardo. According to Perea's deposition testimony, Tollardo had approached him approximately one week before the shooting in an attempt to create an association between Perea's illegal drug dealing business and a "prison gang" connected with Tollardo. The dispute intensified when Perea rejected this proposed association. After Perea had other encounters with Tollardo's associates throughout the week, Tollardo and others arrived at Perea's apartment, where Tollardo threatened Perea with a gun. When Tollardo and his associates left Perea's apartment, Perea contemplated the threat and set out to find Tollardo. After hours of looking, Perea had almost abandoned his search when, by chance, he spotted Tollardo's vehicle at the defendants' convenience store. Perea immediately turned his vehicle around, jumped over the curb, and knocked over a sign as he entered the store parking lot. He ran out of his vehicle with a loaded gun in each hand. Perea immediately began firing both of his guns at Tollardo's vehicle until he ran out of bullets. Perea testified that it was his intention to harm Tollardo.

Following the conclusion of the insurance litigation, the plaintiffs filed claims of wrongful death on behalf of Tollardo and Nathaniel Martinez and personal injury on behalf of Cassandra Martinez for the defendants' failure to provide security and for other alleged omissions that they claim caused or contributed to the harm that resulted from the shooting.

Relying in large part on Perea's deposition testimony from the insurance litigation, the defendants filed a motion for summary judgment on two grounds: 1) no duty and 2) no proximate cause. Judge William Lang granted summary judgment in the defendants' favor holding that they owed no duty to the plaintiffs to protect against the targeted homicide. The appeal followed.

The Appellate Court's Decision

The analysis of the New Mexico Court of Appeals began with the general rule that "a person does not have a duty to protect another from harm caused by the criminal acts of third persons." It was the special relationship between the defendants and their customers that created a duty to protect customers against criminal conduct by third parties. By narrowly defining the scope of that duty to the question of whether there was a duty to prevent a sudden, deliberate, targeted shooting, the New Mexico Court of Appeals upheld the trial court's decision reasoning that business owners have a duty to protect their patrons only for "foreseeable conduct and the resultant harm." In reaching its decision, the Court considered the history of crime at the subject location which included "reports of thefts of gasoline and alcohol, physical altercations involving loiterers, domestic violence, harassment, traffic accidents, vandalism, trespassing, suspicious persons and wild and stray animals" as well as "commercial robberies and incidents involving narcotics." The Court reasoned that the reported criminal activity "may have rendered future events of a similar character foreseeable" but concluded that the victims in the instance case "were not injured in the course of a similar subsequent event." In reaching its decision that the targeted shooting was not foreseeable to the defendants, the Court reasoned that there was "no evidence of anything remotely similar to the deliberate, targeted shootings" that gave rise to the claim.

The Court also pointed out that there was no legal authority to support the plaintiffs' contention that a business owner "had a duty to prevent a sudden, deliberately targeted assassination of customers on its premises." It cited a series of cases from outside the jurisdiction which concluded that there was no duty owed by business owners to protect against targeted assassinations and other targeted attacks that occur on their premises. *See Wiener v. Southcoast Childcare Ctrs., Inc.,* 12 Cal. Rptr. 3d 615, 624 (Cal. 2004); *Toscano Lopez v. McDonald's Corp.,* 238 Cal. Rptr. 436, 445 (Cal. Ct. App. 1987); *Jones v. Williams,* 408 N.W. 2d 426 (Mich. Ct. App. 1987); *Faheen ex rel.*

Hebron v. City Parking Corp., 734 S.W. 2d 270 (Mo. Ct. App. 1987); *Guerro v. Mem'l Med. Ctr.*, 938 S.W. 2d 789 (Tex. App. 1997); *Gragg v. Wichita State Univ.*, 934 P.2d 121 (Kan. 1997). The Court also cited to cases that supported its decision that no duty was owed to Tollardo's companions, even if they were not necessarily Perea's targeted victims. *See Hillcrest Foods, Inc. v. Kiritsy*, 489 S.E. 2d 547 (Ga. Ct. App. 1997); *Thai v. Stang*, 263 Cal. Rptr. 202 (Cal. Ct. App. 1989).

Conclusion

While the *Romero* decision is significant and supports dispositive motions in favor of premises owners for some of the more egregious actions that occur on their property at the hands of third parties, the protection afforded is somewhat limited. Although not discussed at length in the opinion, the striking aspect of the case was the sudden nature of Perea's attack, which provided the defendants no opportunity to take steps to stop him. While the "timing" issue is more a question of proximate cause, the Court likely would not have granted summary judgment on the question of duty had the plaintiffs had the opportunity to present any evidence that the defendants had a reasonable opportunity to take steps to stop the "dispute" between the parties once it began.

Another question is whether courts will extend the holding in *Romero* to insulate premises owners from liability for sudden, *negligent* or *reckless* actions by third parties, such as a vehicle driven into the premises that causes harm to patrons. Provided that the premises owner can demonstrate that there was "no evidence of anything remotely similar" and the particular event was unforeseeable, the entry of summary judgment in favor of the premises owner would seem a logical extension of the *Romero* opinion.

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Mandatory Arbitration in Health Care Claims

by Matt W. Park, Modrall, Sperling, Roehl, Harris & Sisk, P.A. and Kevin D. Pierce[1]

In the realm of contract law, lawyers often deal with various long-arm transactions between sophisticated commercial entities. Often, these contracts contain binding arbitration clauses in an effort to mitigate the time and cost of going to court over disputes. In the health care arena, the contracts are often drafted with similar arbitration provisions. The difference, of course, is that the patient signing the contract is normally not a shrewd business person and may be suffering from serious medical conditions. These discrepancies can create a potentially difficult situation for attorneys defending the mandatory arbitration language in the contract. To that end, the subject of mandatory arbitration clauses is much larger than can be discussed in this space. However, this article will discuss some of the most common challenges considered by courts when deciding whether an arbitration clause is enforceable.

I. Arbitration in New Mexico

There is no question that New Mexico endorses public policy favoring arbitration. *Fernandez v. Farmers Ins. Co.,* 115 N.M. 622, 625, 857 P.2d 22, 25 (1993); *Santa Fe Techs. Inc. v. Argus Networks,* 2002-NMCA-30, ¶ 51, 131 N.M. 772, 42 P.3d 1221 (noting that "[a]rbitration is a form of dispute resolution highly favored in New Mexico.") Accordingly, New Mexico's courts generally enforce arbitration agreements, unless the agreement is determined to have been invalid when executed. *See* New Mexico Uniform Arbitration Act (hereafter the "UAA"), N.M. Stat. Ann. § 44-7A-7(a) (2009) (explaining that an agreement to arbitrate generally is "valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.").

Because an arbitration agreement constitutes a contractual remedy, the determination of its validity is a matter of state contract law. *See Santa Fe Techs.,* 2002-NMCA-30, ¶ 52; *but see Salazar v. Citadel Commc'ns Corp.,* 2004-NMSC-013, ¶ 8, 135 N.M. 447, 90 P.3d 466 (holding that the Federal Arbitration Act preempts provisions of state law that are hostile to arbitration agreements). In accordance with the UAA, "[a] legally enforceable contract is a prerequisite to arbitration; without such a contract, parties will not be forced to arbitrate." *Heye v. Am. Golf Corp.,* 2003-NMCA-138, ¶ 8, 134 N.M. 558, 80 P.3d 495 *(citing First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944-45 (1995)). Thus, the contract of which the arbitration agreement is a part "must be factually supported by an offer, an acceptance, consideration and mutual assent." *Heye,* 2003-NMCA-138, ¶ 9. To establish whether an arbitration clause is, in fact, enforceable, requires the court to assess contract formation and the patient's ability to contract.

Defense attorneys are no doubt familiar with the following maxim: parties who enter into and execute a contract have a duty to read the contract and generally are presumed to know, understand and agree to its terms. *Smith v. Price's Creameries, a Div. of Creamland Dairies Inc.,* 98 N.M. 541, 545, 650 P.2d 825, 829 (1982). As such, parties are ordinarily bound by the terms of a signed contract. *Id.* However, under certain circumstances courts will relieve a party of its contractual obligation. These circumstances may include a finding that the contract is illusory, a contract of adhesion, procedurally unconscionable and substantively unconscionable. *See generally Guthman v. La Vida Llena,* 103 N.M. 506, 709 P.2d 675 (1985); *Heye*, 2003-NMCA-138 (illusoriness). Accordingly, each of these grounds for unenforceability constitute a potential challenge to the validity of an arbitration agreement. While the topic of arbitration is too large to fully explore in this article, the discussion below will address common challenges in turn.

A. Illusoriness

Parties challenging the validity of an arbitration agreement commonly allege that the agreement is illusory, i.e. that it is not supported by consideration. *See Heye,* 2003-NMCA-138, ¶ 12. Mutuality of obligation, meaning a mutual provision of consideration, is an essential element of a valid contract in New Mexico. *Id.* New Mexico courts, in accordance with the Restatement (Second) of Contracts, define consideration as "consist[ing] of a promise to do something that a party is under no legal obligation to do or to forebear from doing something he has a legal right to do." *Id.* (citing Restatement (Second) of Contracts §§ 73, 74 at 179, 185 (1981)). A promise is generally sufficient consideration for another promise if it is "lawful, definite, and possible." *Piano v. Premier Distrib. Co.,* 2005-NMCA-018, ¶ 6, 137 N.M. 57, 107 P.3d 11. "However, a promise that puts no constraints on what a party may do in the future – in other words, when a promise, in reality, promises nothing – it is illusory, and it is not consideration." *Id.* (quoting *Heye*, 2003-NMCA-138, ¶ 12) (internal quotation marks omitted).[2]

Although there is scant published law in New Mexico that concerns illusoriness within the healthcare context, our courts have addressed this principle in the employment context. For example, in *Heye*, the New Mexico Court of Appeals held that the disputed arbitration agreement was illusory because the court found that the plaintiff's employer had retained "unfettered discretion to terminate arbitration at any time, while binding Plaintiff to arbitration." *Id.* ¶15. In so holding, the court noted language from the employer's handbook that allowed the employer to "amend, supplement, rescind or revise any policy, practice or benefit described in [the] handbook – other than employment at-will provisions – as it deem[ed] appropriate." *Id.* ¶13. Thus, the court concluded that the employer had retained the ability to abide selectively by its promise to arbitrate thereby rendering that promise illusory. *Id. ¶* 15.

Similarly, in *Piano v. Premier Distrib. Co.,* 2005-NMCA-018, ¶ 8, 137 N.M. 57, 107 P.3d 11, the New Mexico Court of Appeals found

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that an employer's promise of continued at-will employment and a reciprocal promise to arbitrate that was subject to unilateral modification provided insufficient consideration to support the arbitration agreement at issue. There, the employer presented the plaintiff-employee with an arbitration agreement nearly three months after she commenced her employment. In consideration for her acceptance of the arbitration agreement, the employer promised the plaintiff-employee continued at-will employment "with the understanding that if she did not sign [the agreement] she would be fired." *Id.* ¶ 2. In holding the arbitration agreement invalid, the court noted that the promise of continued at-will employment was essentially meaningless because it provided nothing beyond what the plaintiff already possessed. *Id*. ¶ 8-9.

Conversely, in *Sisneros v. Citadel Broad. Co.,* 2006-NMCA-102, ¶ 33-35, 140 N.M. 266, 142 P.3d 34, the New Mexico Court of Appeals upheld an arbitration agreement that required the employer to forfeit its right to terminate or amend the arbitration agreement upon the accrual of an employee's claim. In rejecting the plaintiff's argument that the agreement was illusory, the court distinguished the agreement at issue from those invalidated in previous cases, noting that while the employer retained a right to modify the agreement, it forfeited that right upon the accrual of an employee's claim and was thus obligated to arbitrate. Accordingly, the employer had provided consideration for the agreement to arbitrate, making that agreement valid and enforceable.

While each of these cases arose in the employment context, their instructive value extends into the present context of health care contracts. Administrators and attorneys drafting arbitration agreements for admission contracts can take from that decision that the health care facility can retain an element of flexibility in its contracts such that over time it may reconsider its policy toward arbitration and prospectively effect any desired changes. The drafter of the admission contract can find the specific language of an arbitration agreement that affords flexibility in the *Sisneros* contract.[3]

B. Contract of Adhesion

Parties may also seek to invalidate an arbitration agreement on the basis that the agreement constitutes a contract of adhesion. An adhesion contract is a 1) standardized contract; 2) imposed and drafted by the party who has superior bargaining strength; and 3) which relegates the weaker party to a take-it-or-leave-it proposition, without the opportunity for bargaining. *Guthman*, 103 N.M. at 506 (internal citations omitted).

With respect to the second element, the party challenging the agreement may establish that it was unable to avoid doing business by demonstrating that the "dominant contracting party has monopolized the relevant geographic or product market [or] that all of the competitors of the dominant party use essentially the same contract terms." *Albuquerque Tire Co. v. Mountain States Tel. & Tel. Co.,* 102 N.M. 445, 448, 697 P.2d 128, 131 (1985). As to the third element, the challenging party may establish a lack of opportunity to bargain by "showing that the dominant party has been granted a monopoly, or that it afforded no opportunity to negotiate, or that the party attempted to negotiate and failed." *Guthman*, 103 N.M. at 509. This element is only relevant where the weaker party "objects or has reason to object" to the agreement or one of its provisions. *Id.*

However, establishing the three *Guthman* elements does not *per se* invalidate the agreement. *Id.* Instead, a court will only invalidate a contract of adhesion when the contract or certain of its provisions are found to be unconscionable. *Padilla v. State Farm Mut. Auto. Ins. Co.,* 2003-NMSC-011, ¶ 14, n.3, 133 N.M. 661, 68 P.3d 901. Thus, "[t]he determination that a contract is one of adhesion is simply the first step in deciding whether it should be enforced." *Guthman*, 103 N.M. at 509.

For example, in *Thompson v. THI of N.M. at Casa Arena Blanca, LLC,* 2006 U.S. Dist. LEXIS 95188, *39-40, Judge Browning, applying New Mexico state contract law, found that although the nursing home admission contract at issue was a standard form contract, it was not a contract of adhesion. In reaching that holding, Judge Browning noted that the plaintiff had failed to establish both the second and third *Guthman* elements. *Id.* With respect to the second element, Judge Browning found that although the town in which the plaintiff and his deceased wife lived had only one long-term care facility, a neighboring city only sixty miles away provided other suitable alternatives. *Id.* at *39. Accordingly, plaintiff's and his wife's choice of facility was a matter of convenience rather than necessity, which Judge Browning held did not satisfy the second *Guthman* element. *Id.* As to the third element, Judge Browning found that the plaintiff neither demonstrated a lack of opportunity to bargain nor a failed attempt to bargain. *Id.* at *40. Instead, the plaintiff only offered affidavit testimony that he did not negotiate the terms of the contract, which Judge Browning held insufficient to establish the third *Guthman* element. *Id.* Accordingly, Judge Browning rejected the argument that the admission contract was a contract of adhesion.

It is important for facilities and those preparing their contracts to remember that a contract of adhesion may still be found valid and enforceable if it is not unconscionable. *Padilla*, 2003-NMSC-011, ¶ 14, n.3. This principle affords health care facilities a certain degree of protection in the preparation of their contracts to the extent that they will not be forced to negotiate away important business principles and policies at every patient admission.

C. Unconscionability

Unconscionability is an important contract defense which is related to adhesion. The New Mexico Supreme Court defines an unconscionable contract as "sufficient if the provision is grossly unreasonable and against our public policy under the circumstances." *Cordova v. World Fin. Corp.,* 2009-NMSC-21, ¶ 31. "The doctrine of unconscionability was intended to prevent oppression and unfair surprise, not to relieve a party of a bad bargain." *Drink, Inc. v. Martinez,* 89 N.M. 662, 665, 556 P.2d 348, 351 (1971). A contract may be found unconscionable if the party challenging its enforceability demonstrates that it lacked meaningful choice in the formation of the contract and that the terms of the contract are "unreasonably favorable to the other party." *Guthman*, 103 N.M. at 510. This standard incorporates the two types of unconscionability found under New Mexico law: procedural unconscionability and substantive

unconscionability. *See id.* "The weight given to procedural and substantive considerations varies with the circumstances of each case." *Id.* While "there is a greater likelihood of a contract being invalidated for unconscionability if there is a combination of both procedural and substantive unconscionability, there is no absolute requirement in our law that both must be present to the same degree or that they both be present at all." *Cordova v. World Fin. Corp.,* 2009-NMSC-21, ¶ 24.

1. Procedural Unconscionability

Procedural unconscionability concerns the element of meaningful choice, and is "determined by examining the circumstances surrounding the contract formation, including the particular party's ability to understand the terms of the contract and the relative bargaining power of the parties." *Guthman*, 103 N.M. at 510. A mere disparity in bargaining power is insufficient to establish procedural unconscionability. *Id.* Instead, the inequality in bargaining power must be so significant that the weaker party's choice is essentially non-existent. *Id.* When assessing claims of procedural unconscionability, courts generally consider whether the party seeking to enforce the arbitration agreement used "sharp practice[s] or high pressure tactics" in addition to the "relative education, sophistication or wealth or the parties, as well as the relative scarcity of the subject matter of the contract." *Id.* (noting that businessmen and middle income consumers are less likely to experience the kind of "gross advantage-taking" that constitutes unconscionability).

The form of the arbitration clause is very important. Courts will frequently analyze the placement of the arbitration clause relative to a signature page, the size and shading of the text, the length of the clause, and the type of wording used. An unpublished case often cited by plaintiff's attorneys is *Adkins v. Laurel Healthcare of Clovis, LLC,* No. 26,957 (N.M. Ct. App., Dec. 19, 2007). The *Adkins* Court noted that the admission agreement was thirty-nine pages long, was written in small type, and contained a multitude of sections and provisions. Id. at 4-5, 11. Also, the Court observed that the arbitration agreement did not appear until page thirty of the contract and was more than three pages long. *Id.* at 5.

Moreover, an admission contract can be procedurally unconscionable if a patient's poor physical and mental health could prevent the patient from the ability to understand the contractual terms. To support its finding of procedural unconscionability, the *Adkins* Court first noted that at the time the decedent reviewed and signed the admission contract, she was suffering from congestive heart failure, chronic obstructive pulmonary disease, arterial fibrillation, and ischemic heart disease, which required the decedent to carry a portable oxygen tank and take numerous prescription medications. *Id.* at 5-6, 11. The evidentiary record also indicated that the decedent appeared extremely tired and short of breath on the day she signed the contract. *Id.* at 11. Furthermore, the evidentiary record established that the decedent had only a tenth-grade education and that her mental health had been progressively deteriorating for almost one year. *Id.* In accordance with all of these findings, the Court found that the decedent lacked the ability to understand the contract terms. *Id.* (citing *Guthman*, 103 N.M. at 510 for the proposition the procedural unconscionability looks to a party's ability to understand a contract term).

Adkins provides significant guidance for health care facilities in their future dealings with potential patients. Disclosing the arbitration agreement in the admission contract, e.g. by positioning the agreement prominently in the contract and flagging the pages containing the agreement, may be beneficial to the facility. Similarly, the limited discussion of the contract and failure to provide the materials on the day before the decedent signed the contract both proved fatal in *Adkins*. The court's criticism of such conduct indicates that presenting all contract materials sufficiently in advance of the contract signing, alerting patients to important documents or sections in the materials, like an arbitration agreement, and comprehensively reviewing the materials with the potential patient and his or her family at the time the contract is signed, are important. These actions would likely weigh strongly in favor of the facility and the enforceability of the arbitration agreement.

2. Substantive Unconscionability

Substantive unconscionability addresses the particular terms of the contract, specifically those that are allegedly "illegal, contrary to public policy, or grossly unfair." *Guthman*, 103 N.M. at 510. "The touchstone appears to be gross unfairness." *Garley*, 111 N.M. at 390. However, what is grossly unfair depends on the context and circumstances in which the contract was formed. *Guthman*, 103 N.M. at 511 (internal citations omitted). Therefore, the terms of the contract should be analyzed "in light of the general commercial background and the commercial needs of the particular trade or case." *Id.* Regardless of the context though, the threshold for demonstrating substantive unconscionability is high. *Monette v. Tinsley,* 1999-NMCA-40, ¶ 19, 126 N.M. 748, 975 P.2d 361.

In rejecting the plaintiff's substantive unconscionability arguments, the *Guthman* Court observed that by entering into the contract, the decedent assumed the risk that she might die sooner than anticipated and forfeit her entrance fee money while the defendant also undertook the risk of "a lower entrance fee against a partial refund at death, as well as that [the decedent] might live longer than seven to twelve years and thus

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use, to some extent, a portion of the fees paid by others who had died prematurely." *Id.* at 513. Accordingly, the court found that nothing about the plaintiff's decedent's untimely death rendered the admission contract unconscionable. *Id.* at 511. Furthermore, the Court held that none of the circumstances surrounding the contract formation suggested substantive unconscionability given the common usage of no-refund policies in the nursing home industry and the decedent's admitted ability to shop comparatively before choosing the defendant's facility.

Likewise, in *Thompson*, Judge Browning rejected the plaintiff's argument that the arbitration agreement at issue in that case was substantively unconscionable. *Thompson*, 2006 U.S. Dist. LEXIS 95188 *43-44. There, the plaintiff argued that the arbitration agreement was unfair because it obligated the plaintiff to arbitrate all potential claims against the nursing home, while the nursing home would only be obligated to arbitrate claims against plaintiff for debt or failure to pay. In rejecting that argument, Judge Browning held that the nursing home was required to arbitrate all claims against plaintiff and rebuffed the notion that the agreement was substantively unconscionable because the nursing home may have fewer possible claims against the plaintiff that would ultimately be subject to arbitration. *Id.*

On the other hand, the New Mexico Supreme Court's recent decision in *Fiser v. Dell Computer Corp.,* 2008-NMSC-46, 144 N.M. 464, 188 P.3d 1215, held an arbitration agreement as substantively unconscionable where a computer purchase agreement required consumers to individually arbitrate any claims against the vendor and contractually forbade consumers from seeking class action relief against the vendor in either litigation or arbitration. *Id.* at 2-3. Critical to the Court's holding was the small amount of damages alleged by the plaintiff, approximately ten to twenty dollars, because the Court noted that the prohibitive cost of litigation may prevent consumers with such small claims from seeking relief on potentially legitimate claims. *Id.* at 3, 5-7. Accordingly, the Court stated that while "Defendant's 'terms and conditions' may not rise to the level of an adhesive contract, we nevertheless conclude that the terms are unenforceable because there has been such an overwhelming showing of substantive unconscionability." *Id.* at 11.

In *Cordova v. World Fin. Corp.,* 2009-NMSC-21, ¶ 26, the New Mexico Supreme Court took exception to World Finance's "one-sided arbitration provisions." In that case, World Finance reserved a judicial forum for itself in the case of lender default. Id. The arbitration provision foreclosed the possibility of a similar election of judicial process for the lenders. *Id.* at ¶ 27. The court found this type of one-sided drafting "egregious" and substantively unconscionable because it was unreasonable and unfair. *Id.* at ¶ 32. Applying this rationale to health care contracts, a facility cannot reserve the possibility of judicial action for non-payment unless it offers a similar judicial forum election to its patients for a likely patient claim. The take-away lesson seems to be that a conservative arbitration clause drafter will send all possible claims for both parties, without reservation, to the arbitrator.

The high threshold for establishing substantive unconscionability claims should provide some comfort to health care facilities wishing to adopt arbitration agreements in their admission contracts or to facilities that already employ such agreements. As the industry-specific case law reveals, such agreements will generally be upheld and enforced so long as the agreement comports with industry custom and does not attempt in an illegal or untoward manner to bestow an advantage on the nursing home.

II. Conclusion

As the law currently stands, arbitration enjoys a bright future as a cost-effective and more efficient alternative to litigation. However, it is important for defense attorneys to understand that arbitration clauses are not afforded any exceptional protection by the courts. Rather, they are examined as though they were run-of-the-mill contractual provisions and attorneys must be prepared to analyze the arbitration clauses through the lens of New Mexico's traditional defenses to contract, i.e. illusoriness, adhesion, substantive and procedural unconscionability. Therefore, those attorneys who defend health care facilities may need to be more cautious in assessing contract execution procedures to make sure that these contract defenses do not unwittingly invalidate the facility's arbitration clause.

ENDNOTES

[1] Kevin's invaluable contributions to this article occurred while he was a summer associate at Modrall Sperling in 2008, during which time he was also juggling his assignments as an editor of the *New Mexico Law Review.*

[2] The court in *Thompson v. THI of N.M. at Casa Arena Blanca,* LLC, 2006 U.S. Dist. LEXIS 95188, *19, advances the proposition that a finding of illusoriness is insufficient by itself to invalidate a contract. In support of this proposition, the court cites another United States District Court opinion from New Mexico. *Id.* (*citing Dumais v. Am. Golf. Corp.,* 150 F. Supp. 2d 1182, 1191 (D.N.M. 2001)). However, that opinion does not appear to stand for that proposition. Instead, the *Dumais* opinion clarifies that a mere imbalance between the parties in the favorability of contract terms does not invalidate the contract unless the imbalance rises to the level of unconscionability. *See Dumais,* 150 F. Supp. 2d at 1191. Moreover, the New Mexico Court of Appeals did not articulate a rule statement in either *Heye* or *Piano* that rendered illusoriness an insufficient basis to invalidate a contract. Accordingly, the proposition advanced in *Thompson* does not appear to be followed by state courts in New Mexico.

[3] There, the contract read "[Employer] reserves the right to terminate or amend this policy at any time, except that any termination or amendment will not apply to claims which accrued before the amendment or termination." *Sisneros*, 2006-NMCA-102, ¶ 33. Hence, through that clause, the nursing home retains the ability to alter its policy toward arbitration as it sees fit while simultaneously providing the potential resident with sufficient consideration to make the overall agreement valid and enforceable.

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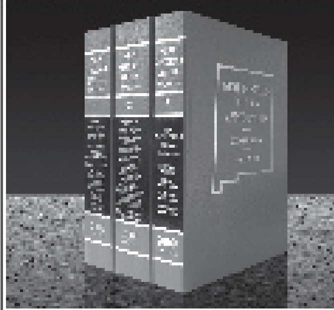

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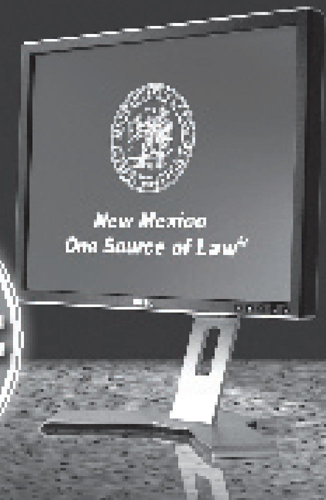

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