**NMDLA Civil Case Summaries**
**April – June 2010**

## State Court Opinions

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### UM/UIM Coverage

NM Bar Bulletin – April 5, 2010
Vol. 49, No. 14

*Romero v. Progressive Northwestern Insurance Co.*
No. 28,720 (N.M. Ct. App., filed October 26, 2009)

The insured was involved in an accident caused by an uninsured motorist. The insured made a demand against his automobile policy for UM/UIM coverage in the amount of $300,000, which represented UM/UIM coverage at the liability limits of his policy - $100,000 stacked for each of the insured's three vehicles covered under the policy. The insurer tendered, and the insureds accepted UM coverage of $150,000, representing the undisputed UM benefits due under the policy, which was $50,000 UM/UIM per person, stacked for the three insured vehicles. The insured brought suit in district court seeking declaratory relief, asking the court to declare that he had not made a written rejection of UM coverage equal to his liability limits and that the maximum total of UM coverage limits available to him under the policy was $300,000 per person.

The Court of Appeals affirmed the district court's ruling that New Mexico law requires insurers to offer UM/UIM coverage up to the liability limits in an automobile insurance policy. The insured's selection of a lesser amount of UM/UIM coverage constituted a rejection of UM/UIM coverage equal to the difference between the two types of coverage (UM/UIM and liability). However, because the insurer failed to obtain a valid written rejection of that coverage, UM/UIM coverage equal to the liability limits of the insured's policy is read into the policy.

## Medical Malpractice

NM Bar Bulletin – April 5, 2010
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*Summers v. Ardent Health Services LLC*
No. 28,605 (N.M. Ct. App., filed January 11, 2010)

Dr. Summers brought suit for damages against defendants after his medical privileges were suspended. The defendants filed a motion for summary judgment arguing that under the Health Care Quality Improvement Act of 1986 (HCQIA), they were immune to suit because the professional review process leading to the suspension was reasonably conducted. The district court denied summary judgment, finding that a question existed as to the reasonableness of the efforts taken by the defendants to obtain certain facts relevant to the professional review, and the Court of Appeals affirmed. The facts in the record indicated that ultimately, Dr. Summers' suspension hinged on a patient's allegations, and that a reasonable jury, viewing these facts in the best light for Dr. Summers, could conclude by a preponderance of the evidence that Defendants were unreasonable in their fact finding efforts.

## Insurance and Settlement

NM Bar Bulletin – April 12, 2010
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*Truong v. Allstate Insurance Co.*
No. 31,013 (N.M. S.Ct., filed March 4, 2010)

In this class action case, the issue for determination was the applicability of an exemption to the Unfair Practices Act (UPA) that bars UPA suits based on "actions or transactions expressly permitted under laws administered by a regulatory body of New Mexico." Section 57-12-7. A class of Allstate insureds alleged that Allstate had violated the UPA by using claims processing computer programs, collectively referred to as "Colossus", that were programmed to underestimate and underpay their insurance claims below their true value. The district court agreed with Allstate's defense that the UPA claim was barred because the New Mexico Public Regulation Commission's Superintendent of Insurance had "expressly permitted" its use of colossus by adopting an independent market conduct examination (MCE) that spot-checked and noted no objections to Allstate's general claims handling practices within the historical period in which the class members' claims had arisen.

The New Mexico Supreme Court reversed the Court of Appeals, vacating the district court's partial judgment barring Plaintiff's UPA claims, holding that the MCE did not create the kind of express permission that would exempt Allstate's challenged conduct from UPA scrutiny. Neither the conduct of the MCE, nor its adoption by the Superintendent, satisfied the "expressly permitted" requirement of the UPA exemption with respect to any aspect of Allstate's general or particularized use of Colossus. In order for an action or transaction to be deemed expressly permitted and thereby exempted from the coverage of the UPA, the permission must be within the authority of the Superintendent to grant and must be specifically articulated in some form of public document.

## Statute of Limitations

NM Bar Bulletin – April 12, 2010
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*City of Santa Fe v. Travelers Casualty & Surety Co.*
No. 31,549 (N.M. S.Ct., filed February 16, 2010)

The City of Santa Fe contracted with Lone Mountain Contracting, who obtained a performance bond from Travelers, to repair a water tank. The contract did not contain a time-to-sue provision, but the bond contained a two-year time-to-sue provision. Santa Fe declared the contractor to be in default and demanded performance by Travelers on September 29, 2004. Santa Fe sued Travelers on May 14, 2007. The district court granted summary judgment to Travelers, holding that the two-year time-to-sue provision in the bond applied and barred the lawsuit for being untimely. The Court of appeals affirmed. The New Mexico Supreme Court reversed, holding that unless the governmental entity directly contracts for a shorter time-to-sue provision with either the contractor or the surety, a shorter time-to-sue provision contained in a performance bond is unenforceable.

## Disability Insurance

NM Bar Bulletin – May 3, 2010
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*Kirby v. Guardian Life Insurance Co. of America*
No. 31,329 (N.M. S.Ct., filed March 4, 2010)

A former employee, who was a participant in her employer's long-term disability plan, was wrongfully denied her disability benefits and sought to enforce that judgment by a writ of garnishment against the insurer whose insurance policy funded the employer's disability plan. The district court permitted the garnishment, but the Court of Appeals reversed. The Supreme Court reversed the Court of Appeals, holding, inter alia, that the participant acquired the plan's

right of action under ERISA. The participant could garnish the plan's right of action against the insurer. The insurer's refusal to pay benefits provided the plan a valid right of action against the insurer for breach of policy. The Supreme Court ordered Guardian to reinstate the plaintiff's benefits and to pay all benefits it had denied.

## Standing

NM Bar Bulletin – May 10, 2010
Vol. 49, No. 19

*McNeill v. Rice Engineering & Operating, Inc.*
No. 31,686 (N.M. S.Ct., filed March 4, 2010)

The plaintiff landowners brought an action for trespass resulting from the operation of a salt water disposal well on their property. The district court granted summary judgment in favor of the defendants and the Court of Appeals affirmed, holding that the landowners lacked standing to assert a claim for trespass and unjust enrichment for acts that occurred before the landowners owned the property. The New Mexico Supreme Court agreed, holding that an action for trespass to real property is an action in personam, not in rem, and does not run with the land. For a party to have standing to sue for trespass, it must have a possessory interest in the land at the time of the trespass. Although the discovery of the trespass is what begins the statute of limitations to run, discovery is not what makes a party an aggrieved party for purposes of standing.

## Employer-Employee Relationship

NM Bar Bulletin – May 10, 2010
Vol. 49, No. 19

*Korba v. Atlantic Circulation, Inc.*
No. 28,774 (N.M. Ct. App., filed January 11, 2010)

The estates of sales managers and salespersons sued a magazine subscription processing company for the deaths and injuries the sales managers and salespersons suffered while they were passengers in a van driven and owned by the sales managers or salespersons. The Suburban van was overloaded with fifteen people when a rear tire blew out, resulting in a single-vehicle accident. The Court of Appeals affirmed the district court's grant of summary judgment on behalf of the defendant on the basis that the defendant was not the employer of the sales managers and salespersons.

The facts established that the sales managers and salespersons were independent contractors rather than employees of the company. The plaintiffs did not raise a genuine issue of material fact as to the defendant's right to exercise essential control over the work of the sales managers or salespersons

such that a jury could find an employee-employer relationship. The facts were 1) the sales managers entered into independent contractor agreements with the defendant, the terms of which expressly defined the relationship; 2) there was no evidence that the defendant controlled the details of how the sales managers operated daily; 3) the defendant did not determine where sales crews operated, how long they operated in one location, or how many hours they worked; 4) the defendant provided no supervision or direction; 5) the sales crews operated autonomously; 6) the salespersons were expressly hired by each sales manager to work for that sales manager; 7) the details of the salesperson's work was directed and controlled by the sales manager of each crew, not the defendant.

## UM/UIM Coverage

NM Bar Bulletin – May 17, 2010
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*Farmers Insurance Co. of Arizona v. Chen*
No. 28,859 (N.M. Ct. App., filed January 26, 2010)

This lawsuit arose from an automobile insurer's denial of an insured's claim for uninsured motorist/under-insured motorists (UM/UIM) coverage up to limits of liability of $100,000 per person. The district court entered summary judgment in the insured's favor. The Court of Appeals affirmed, holding that the insureds rejected UM/UIM coverage up to limits of their liability policy when they purchased UM/UIM coverage of $30,000 per person. However, the insurer did not obtain a valid written rejection of UM/UIM coverage, and the insurer did not comply with the statutory requirement that written notification of rejection of UM/UIM coverage must be attached to the liability policy.

Where a valid rejection of UM/UIM coverage has not been obtained by the insurer, New Mexico law requires UM/UIM coverage to be read into the policy at the liability limits, regardless of the intent of the parties or the fact that a premium has not been paid. Because the insurer did not obtain a valid rejection of UM/UIM coverage from the insureds, the district court was correct in reading UM coverage at the liability limits into the insureds' policies.

## Sovereign Immunity

NM Bar Bulletin – May 24, 2010
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*Hoffman v. Sandia Resort and Casino*
No. 28,444 (N.M. Ct. App., filed January 26, 2010)

This case examined the extent of tribal sovereign immunity. After exhausting administrative remedies, the plaintiff brought suit in district court claiming that Sandia Resort and Casino wrongfully refused to pay him $1,597,244.10 allegedly won on the Mystical Mermaid slot machine. The casino did not pay any prize money to the plaintiff because, according to the casino, the machine had malfunctioned and the malfunction voided all play on the machine. The District Court granted the tribe's motion to dismiss for lack of subject matter jurisdiction under the doctrine of tribal sovereign immunity. The Court of Appeals affirmed that sovereign immunity bars his claims.

## Intentional Torts - Spouses

NM Bar Bulletin – May 24, 2010
Vol. 49, No. 21

*Papatheofanis v. Allen*
No. 28,079 (N.M. Ct. App., filed March 16, 2010)

The defendant appealed from a jury verdict finding her liable for fraud, breach of fiduciary duty, malicious abuse of process, and defamation. The jury subsequently awarded the Plaintiff, Defendant's ex-husband, $257,500 in compensatory and punitive damages. On appeal, the defendant argued there was insufficient evidence to support the elements of a fraud claim and that New Mexico's public policy either prohibits spouses from recovering against each other for intentional torts or requires that there be sufficiently outrageous conduct before spouses can bring intentional tort claims against each other. The Court of Appeals affirmed, finding sufficient evidence to support fraud and declining to find that spouses cannot recover against one another for intentional torts.

## Workers' Compensation

NM Bar Bulletin – May 31, 2010
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*Ortiz v. Overland Express*
No. 31,612 (N.M. S.Ct., filed April 30, 2010)

The worker's estate was denied Workers' Compensation benefits based on a finding that the sole cause of the worker's death in a motor vehicle accident was the worker's illegal use of methamphetamine and amphetamine. The New Mexico Supreme Court held that Legislature did not intend to exclude methamphetamine and amphetamine from the prohibited drugs set forth in Sections 52-1-12 and 52-1-12.1 of the Workers' Compensation Act. The Supreme Court also held that there was insufficient evidence to support a finding that these drugs were the sole cause of Worker's death and reversed the Workers' Compensation Judge's findings. The worker's estate was entitled to full workers' compensation under the Act.

## Sovereign Immunity

NM Bar Bulletin – June 7, 2010
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*Village of Angel Fire v. Board of County Commissioners of Colfax County*
No. 28,227 (N.M. Ct. App., filed March 25, 2010)

The Village of Angel Fire brought an action based on the county's alleged breach of the joint powers agreement (JPA), in which the village promised to collect trash for certain county residents in exchange for $50,000 annually. The county made scheduled payments until July 15, 2004. After the county stopped making payments, the county made no further payments, but promised it would after restructuring its finances. Based on these representations, the village claimed that it refrained from filing suit and continued to collect trash. On April 10, 2007, the village filed a complaint based on the JPA for breach of contract, equitable estoppel and quantum meruit. The district court granted the county's motion for judgment on the pleadings because the plaintiff's claims were barred by the statute of limitations. The Court of Appeals affirmed, holding that equitable estoppel did not toll the statute of limitations and the county was entitled to sovereign immunity on the village's quantum meruit claim.

## Workers' Compensation

NM Bar Bulletin – June 7, 2010
Vol. 49, No. 23

*Potter v. Patterson UTI Drilling Co.*
No. 29,566 (N.M. Ct. App., filed April 8, 2010)

The worker in this case was injured while working on a drilling rig in Pennsylvania and sought workers' compensation benefits in New Mexico. The worker was offered and accepted the job at his home in New Mexico. The Workers' Compensation Administration denied the plaintiff's benefits on the ground of lack of jurisdiction. The Court of Appeals reversed, holding that New Mexico had jurisdiction to award workers' compensation benefits for a work-related injury in Pennsylvania, and the employer's policy requiring drug and safety testing upon arriving at the work site in Pennsylvania did not negate the formation of an employment contract executed in New Mexico.

## Medical Malpractice

NM Bar Bulletin – June 21, 2010
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*Provencio v. Wenrich*
No. 28,882 (N.M. Ct. App., filed March 18, 2010)

This medical malpractice action sought damages for the cost of raising a child after an unsuccessful sterilization procedure. The district court granted the defendant's motion for judgment as a matter of law after the close of the parent's case because proof of the defendant's failure to notify the plaintiffs was an essential element of the "wrongful conception" tort and it was undisputed that defendant informed the plaintiff that she was still fertile. The Court of Appeals reversed, holding that the doctor's disclosure to the parent that an attempted sterilization procedure was unsuccessful did not automatically bar the parents' medical malpractice case from going to jury. "Wrongful Conception" is not a distinct tort in New Mexico, and failure to disclose is therefore not an essential element of plaintiff's cause of action. The issue of the extent to which the parents' knowledge of continued fertility contributed to the unwanted pregnancy and damages was a question for the jury, as was the issue of whether the parents' negligence in failing to change their behavior contributed to the conception of their fifth child.