

COMMERCIAL
LENDING LAW
IN
NEW MEXICO

2008 VERSION



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Disclaimer

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I. INTRODUCTION

This is a general outline of many of the laws of New Mexico that govern commercial lending, commercial real estate finance, commercial equipment leasing and related areas. The guide gives greater attention to real estate lending law because that law is more state-specific than the law dealing with loans secured by personal property and with equipment leasing.

This guide assumes a basic working knowledge of secured commercial financing transactions. It is necessarily general in scope and meant as a brief introduction to the subjects discussed. It should not be relied upon in a specific transaction without legal advice tailored to that transaction.

This guide was last revised on October 1 of 2008 and does not consider the effect of any changes since then nor does it anticipate changes that might be expected in the future except for certain legislation that has been prepared for introduction in the January, 2009 session of the New Mexico legislature.

New Mexico is in the Mountain (GMT - 7:00) Time Zone. It observes Daylight Savings Time.

II. EXCLUDED LAWS

This guide does NOT address:

- Federal and international law;
- Indian law and rights, except see III D below (most Indians in New Mexico prefer to be referred to as “Indians,” not as “Native Americans”);
- Local law, which is the law of counties, municipalities and other political subdivisions; and
- State law dealing with:
 - Consumers and consumer rights;
 - Most criminal law, including, but not limited to loan sharking, but the guide does cover usury;
 - Unfair trade practices, torts and similar doctrines;

- Construction law;
- Water and water rights; and
- Environmental matters, except see XII. D. below.

III. BASIC LEGAL STRUCTURE

New Mexico was formerly governed by several Indian entities, then by Spain and later still, by Mexico. When it became a territory of the United States, New Mexico adopted the English common law, which completely supplanted the civil law of Spain and Mexico, except insofar as the latter was incorporated into the statutes of New Mexico. *Field v. Otero*, 35 N.M. 68, 290 P. 1015 (1930). As noted above, Indian law is generally excluded from this guide, except see III D below.

A. Statutes

The general law of New Mexico is contained in its Constitution and the 1978 Compilation of the New Mexico Statutes Annotated (“NMSA”). The NMSA is divided into 77 chapters. Relevant chapters include:

- 39 Judgments, Costs, Appeals
- 42 Actions and Proceedings Relating to Property
- 45 Uniform Probate Code
- 46A Uniform Trust Code
- 47 Property Law
- 48 Liens and Mortgages
- 53 Corporations (including Limited Liability Companies)
- 54 Partnerships
- 55 Uniform Commercial Code
- 56 Commercial Instruments and Transactions
- 58 Financial Institutions and Regulations

59A Insurance Code

Many of New Mexico's laws are uniform laws, promulgated by the Uniform Law Commission, formerly known as the National Conference of Commissioners on Uniform State Laws. New Mexico has more uniform laws than any other jurisdiction.

The NMSA is not available on any free website, but is available on LexisNexis and Westlaw. The unannotated version of the New Mexico Statutes is available free at <http://www.conwaygreene.com/newmexico.htm> or at [http://nxt.ella.net/NXT/gateway.dll?f=templates\\$fn=default.htm\\$vid=nm:all](http://nxt.ella.net/NXT/gateway.dll?f=templates$fn=default.htm$vid=nm:all)

B. Administrative Law

Most state agencies have promulgated regulations. They are found in the New Mexico Administrative Code. The New Mexico Administrative Code is available free at <http://www.nmcpr.state.nm.us/nmregister>

C. Local Law

New Mexico has 33 counties and 102 incorporated municipalities, which have their own ordinances and codes. As noted above, local law is excluded from this guide.

D. Indian Law

New Mexico has one Indian Nation, several Tribes and many Pueblos, all of which regard themselves as sovereigns. As stated above, coverage of their law is beyond the scope of this guide. Lending to them or their entities or making loans secured by collateral on a reservation or in "Indian Country," defined in *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993) and the cases cited therein, requires special care and loan documents may be governed by Indian law and may require enforcement in Indian courts under Indian procedures, including customary, unwritten law and procedures. Principles of sovereign immunity may bar suit against the Indian Nation, Tribes, Pueblos or their constituent entities, unless the immunity is effectively waived.

E. Court Rules

New Mexico's courts of general jurisdiction are the district courts. The district courts are used by most lenders for suits to collect commercial loans, to foreclose mortgages and to appoint receivers. The New Mexico Rules of Civil Procedure for the District Courts are derived from the Federal Rules of Civil Procedure. The New Mexico Rules of Evidence are derived from the Federal Rules of Evidence.

In addition, each county has magistrate courts, except that Bernalillo County, in which Albuquerque is located, has a metropolitan court. Many other cities and towns have municipal courts.

The New Mexico Court of Appeals is the appellate court of right for most appeals. It sits in panels of three in Albuquerque, the state's largest city, in Santa Fe, the state capitol, and in Las Cruces, in the southern part of the state. The New Mexico Supreme Court hears most of its cases on certiorari from the Court of Appeals. It usually sits in Santa Fe. It issues rules governing procedure and practice in all of New Mexico's state courts.

The federal district court in New Mexico is the United States District Court for the District of New Mexico. Most of its judges sit in Albuquerque; two sit in Santa Fe; and one, in Las Cruces. The United States Bankruptcy Court in New Mexico sits in Albuquerque. New Mexico is within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, which sits primarily in Denver, Colorado.

IV. AUTHORITY TO TRANSACT BUSINESS

A. Required Qualification to Do Business

Most out-of-state-lenders are able to avoid having to qualify to do business here because of one of two New Mexico statutes. First, NMSA § 38-1-8 provides that a "foreign corporation, foreign bank or foreign real estate trust without being admitted to do business in this state, may loan money in this state only on real estate mortgages, deeds of trust and notes in connection therewith, and take, acquire, hold and enforce the notes, mortgages or deeds of trust given to represent or secure money so loaned or for other lawful consideration. All such notes, mortgages or deeds of trust taken, acquired or held are enforceable as though the foreign corporation, foreign bank or foreign real estate trust were an individual, including the right to acquire the mortgaged property upon foreclosure or under other provisions of the mortgage or deed of trust, and to dispose of the same." Unless its shares, certificates or deposits are insured by an agency of the United States, the foreign corporation, bank or trust must appoint the Secretary of State as its agent for service of process. The statement of appointment must be signed by the institution's president, secretary, treasurer or general manager.

Second, there is the general state law applicable to the various types of business entities. NMSA § 53-17-1 lists examples of activities that a foreign corporation may engage in without having to procure a certificate of authority. They include:

- Creating as borrower or lender, or acquiring, indebtedness or mortgages or other security interest in real or personal property

- Securing or collecting debts or enforcing any rights in property securing them
- Selling through independent contractors
- Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance outside this state before becoming binding contracts
- Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes
- Maintaining bank accounts
- Transacting business in interstate commerce
- Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

Foreign limited liability companies have virtually identical requirements. NMSA §53-19-54. So do foreign business trusts. NMSA § 54-20-3.

There is no provision for registration of foreign general partnerships, except for foreign limited liability partnerships, which have an even longer list of activities that do not constitute transacting business here. NMSA §54-1A-1104. On the other hand, the ownership of most income-producing real property or tangible personal property in the state by a limited liability partnership does constitute doing business here.

Foreign limited partnerships have the same laundry list as limited liability partnerships of activities that do not constitute transacting business here. NMSA §54-2A 903. During the statutory drafting process, the uniform list of ten excluded activities was expanded to 14 by the author of this guide in order to conform to the limited liability partnership statute. As with limited liability partnerships, the ownership of most income-producing real property or tangible personal property in the state by a limited partnership constitutes doing business here.

Even if a lender is not required to qualify to do business here in order to enforce a mortgage or security interest in property, the subsequent operation of the property acquired by the creditor, such as completion of construction or leasing of vacant space, may require qualification.

Transacting business without registering does not impair the validity of an entity's contracts, nor does it create liability for the entity's partners or members, but the entity is prohibited from maintaining any court action in New Mexico, and is subject to the payment of past-due filing fees, interest and penalties.

To qualify to transact business in New Mexico, a foreign entity must apply to the appropriate state agency, maintain a registered office in New Mexico, which is often that of a professional corporate services company, and designate a registered agent for service of process, which is also often the same professional corporate services company.

The appropriate state agency for foreign corporations, limited liability companies and business trusts is the Public Regulation Commission ("PRC"). The website for the Corporations Bureau of the PRC which handles these matters is <http://www.nmprc.state.nm.us/corporations/corpsforms.htm>. The website contains forms for corporations and limited liability companies and a mailing address as well as a list of requirements for these two types of entities. There appears to be nothing on their website about qualifying foreign business trusts, so the reader should call them at 505-827-4502 if this is of interest.

The appropriate state agency for foreign limited liability partnerships and limited partnerships is the Secretary of State ("SCC"). The website for the Operations Division of the SCC which handles these matters is <http://www.sos.state.nm.us/part.htm>. The website contains a list of requirements, telephone numbers and a mailing address, but no forms.

B. Licensing and Regulation of Financing

As a general rule, out-of-state commercial lenders and equipment lessors are not required to obtain licenses in order to engage in commercial lending and leasing activities in New Mexico. There are, however, certain exceptions and certain regulatory statutes of which lenders should be aware, including the following:

- Certain mortgage loan companies and loan brokers must register with the director of the Financial Institutions Division of the Regulation and Licensing Department. NMSA § 58-21-3. Exempt from this requirement are banks, trust companies, savings and loan associations, credit unions, insurance companies, certain real estate investment trusts, and certain other persons. NMSA § 58-21-6.
- Each person purchasing motor vehicle retail installment sales contracts from retail sellers in the state must obtain a license from the director of the Financial Institutions Division of the Regulation and Licensing Department. NMSA § 58-19-3. Banks authorized to do business in the state are exempt from the licensing requirement, but

must comply with the other provisions of the Motor Vehicle Sales Finance Act. Id.

V. TAXATION

New Mexico's gross income tax and gross receipts laws are broad and sweeping. Literally read, they would reach the income and gross receipts of out-of-state lenders and equipment lessors from loans made in New Mexico, although we are not aware of any collection activity in this regard, unless the out-of-state lender or lessor has an office or employee or properties here. The reason for this lack of collection activity is that it would probably produce little or no tax revenue for the state. This fact is demonstrated by the following analysis for each tax.

A. Income Tax

The New Mexico income tax on corporations, business trusts, and banks ranges from 4.8% to 7.6%, depending on the amount of the income. Income of taxpayers operating in New Mexico and elsewhere is allocated between New Mexico and the foreign jurisdiction or jurisdictions according to the Uniform Division of Income for Tax Purposes Act. NMSA §§ 7-4-1 *et seq.*

The good news about this act for foreign corporations is that it apparently allocates interest and dividends to New Mexico only if the taxpayer's principal executive office is here. NMSA § 7-4-8.

The bad news may be that this section may be limited to interest and dividends from investments, while interest from loans may be subject to apportionment as business income according to the formula in NMSA § 7-4-10 which requires consideration of the property, payroll and sales of the taxpayer in New Mexico compared with those factors elsewhere.

B. Gross Receipts Tax

New Mexico imposes a tax on the gross receipts received by almost anyone from selling almost anything, including services. See the Gross Receipts and Compensating Tax Act. NMSA §§ 7-9-1 *et seq.* The rate of tax imposed by the state is 5%. NMSA § 7-9-4. By law, counties and municipalities and other political subdivisions are allowed to add to this tax, so that the rate of the tax varies greatly in different parts of the state. The highest rate is slightly less than 8%.

Fortunately for lenders, interest on money loaned is exempt from the gross receipts tax. NMSA § 7-9-25. Some miscellaneous receipts of lenders might be taxable, however.

C. Intangibles Tax

New Mexico has no intangibles tax, recording tax, stamp tax or similar tax on mortgages, loans or the like. Fees for recording mortgages and other records are nominal and vary according to the number of pages recorded.

VI. INTEREST AND USURY

Usury is generally not a concern for most commercial lenders in New Mexico. Our general usury statute (former NMSA § 56-8-11-1) was repealed in 1991. The result is that, with a few exceptions, the maximum rate of interest for commercial loans is the rate agreed to in writing by the parties. Absent such an agreement, the rate “shall be not more than 15%.” NMSA § 56-8-3.

There are several vestiges of New Mexico’s usury laws that remain in its statutes. First, the rate of commission chargeable by anyone for “negotiating or securing” any loan is limited to 6% for any loan of more than \$50,000 (and lesser rates for smaller amounts). NMSA § 56-8-7. Violation of this section is a misdemeanor punishable by a fine and imprisonment and the violator is liable for damages of double the amount charged for negotiating or securing the loan. NMSA § 56-8-8.

Second, lenders may charge a premium or points of not more than 3% of the face amount of an interim construction loan. NMSA § 56-8-9 D. The principal is liable for the acts of its agent. NMSA § 56-8-12. The penalty for violating § 56-8-9 D is forfeiture of all interest agreed to be paid, and if any interest has been paid, recovery of twice the amount of that interest. NMSA § 56-8-13. Violation is a misdemeanor, punishable by a fine.

The recovery of interest on interest prior to judgment is not permitted absent a contract or statute authorizing it. *Southern Union Exploration Co. v. Wynn Exploration Co., Inc.* 95 N.M. 594, 624 P.2d. 536 (Ct. App. 1981).

VII. TYPES OF BORROWERS

Unlike most states, the New Mexico Public Regulation Commission, not its Secretary of State, regulates corporations and limited liability companies. Just to keep things interesting, the Secretary of State does regulate partnerships. The noting of certain documents by title below is intended only to assist out-of-state lenders in obtaining certain documents with unusual names from state agencies, and is not intended to be a complete list of all of the documents that prudent lenders customarily obtain from borrowers in underwriting and closing New Mexico loans.

A. Corporations

New Mexico business corporations are governed by its Business Corporation Act. NMSA Chapter 53, Articles 11 through 18. Nonprofit corporations are governed by Article 8 and Professional Corporations, by Article 6, also in Chapter 53. The Business Corporation Act is derived from the American Bar Association's Model Business Corporations Act, but many amendments have been made and many of the recent changes to the model act have not been enacted.

When making a loan to a corporate borrower organized in New Mexico, lenders customarily obtain from the state Public Regulation Commission a "Certificate of Good Standing and Compliance" and a certified copy of the corporation's "Certificate of Incorporation," to which is attached the corporation's "Articles of Incorporation." Business Corporation bylaws are not filed with the Public Regulation Commission.

Corporate seals are not required and most business corporations do not have one. Failure to have or affix a corporate seal does not affect the validity of any instrument. NMSA § 53-11-4 C.

B. Limited Liability Companies

New Mexico limited liability companies are governed by its Limited Liability Company Act. NMSA Chapter 53, Article 19. New Mexico limited liability companies may be member-managed or manager-managed. Single-member LLCs are permitted. Members and managers have no more liability for the obligations of the LLC than the shareholders or officers of a corporation have for the obligations of the corporation. NMSA § 53-19-13.

Lenders dealing with a New Mexico LLC customarily obtain from the state Public Regulation Commission a certified copy of its "Articles of Organization" and a "Certificate of Good Standing and Compliance" with respect to the LLC. New Mexico LLCs do not file their Operating Agreements with the Public Regulation Commission.

C. Partnerships

New Mexico partnership law is different from that of other states in one important way. Our partnership law is based on the uniform partnership laws, like the laws of most other states. Unlike almost every other state, however, when we have adopted new versions of this uniform partnership law, we have allowed existing partnerships to remain governed by the old partnership law, unless they affirmatively elect to be governed by the new law. The reason for this anomaly is that our legislature did not wish to require every partnership to consult an attorney every time our partnership laws were restated. For the sake of simplicity, this guide refers only to the current partnership law of the state.

Unlike corporations and limited liability companies, New Mexico's partnerships are regulated by its Secretary of State. New Mexico's current partnership law permits the formation of three types of partnerships: (1) general partnerships, (2) limited liability partnerships, which are formed under the general partnership act but afford limited liability to its partners, (3) limited partnerships, and (4) beginning on July 1, 2009, limited liability limited partnerships, or Triple LPs. New Mexico also continues to recognize registered limited liability partnerships, which were a non-uniform precursor of limited liability partnerships.

The Uniform Partnership Act (1994) is codified at Chapter 54, Article 1A of the New Mexico Statutes Annotated. It was promulgated by the uniform law commissioners in 1994. It governs New Mexico general partnerships and limited liability partnerships formed after July 1, 1997, and those formed on or before that date that elect to be governed by the act.

General partners in a general partnership are personally liable for the debts of the partnership. Absent an agreement to the contrary, however, a creditor is usually required to exhaust its remedies against the partnership assets before seeking recourse against the partner's personal assets. NMSA § 54-1A-307. This was one of the major changes in the 1994 revision of the Uniform Partnership Act by the Uniform Law Commission. As noted, however, it can be avoided by a simple agreement between the creditor and the partner.

General partnerships are not required to file anything with the Secretary of State. Neither are limited liability partnerships. A partner in a limited liability partnership is no more liable for the obligations of the limited liability partnership than is an officer or shareholder of a corporation for those of the corporation.

Joint ventures are general partnerships formed for a single transaction.

The Uniform Revised Limited Partnership Act is codified at Chapter 54, Article 2A of New Mexico Statutes Annotated. It was promulgated by the uniform law commissioners in 2001. It applies to limited partnerships formed in New Mexico on or after January 1, 2008 and those formed before that date, which elect, after that date, to be governed by the provisions of the act applicable to limited partnerships. It applies to limited liability limited partnerships, or Triple LPs, formed in New Mexico on or after July 1, 2009, and those formed before that date, which elect, after that date, to be governed by the provisions of the act applicable to Triple LPs. All limited partnerships formed in New Mexico on or after July 1, 2009 are automatically Triple LPs. This is a nonuniform statutory provision. Another nonuniform statutory provision dispenses with the requirement that domestic Triple LPs and foreign limited partnerships file annual reports with the Secretary of State.

The limited partnership agreement is not filed with the Secretary of State.

General partners of a Triple LP are NOT liable for the debts or obligations of the partnership. This is a major change, or not a major change, depending on your point of view. In the past, most general partners were shell corporations with no assets.

D. Proprietorships and Individuals

A sole proprietor engages in business without forming a separate entity. New Mexico has no “fictitious name” statute that requires the registration of a “doing-business” name, although it does have a trade name statute, discussed below, that permits the registration of such a name as intellectual property. Accordingly, loans to proprietorships in New Mexico are treated in the same manner as loans to the individual owners of the business.

1. Community Property Laws

New Mexico is a community property state. Our community property statutes are modeled on the civil law of Spain and Mexico. *McDonald v. Senn*, 53 N.M. 198, 204 P.2d 990 (1949). Lenders must be aware of community property in underwriting and making loans and in accepting personal guaranties and indemnity agreements from married people who live in New Mexico, who are New Mexico residents, or whose agreements are governed by New Mexico law. Most of New Mexico’s community property statutes are contained in its Community Property Act of 1973, which is codified at NMSA §§ 40-3-6 *et seq.*

Married people may hold separate property or community property as tenants in common or as joint tenants with each other and with other persons. NMSA §§ 40-3-8 F, 47-1-36. Dower and curtesy have been abolished (NMSA § 45-2-112) as have tenancies by the entirety (*Swink v. Fingado*, 115 N.M. 275, 279 n. 9, 850 P.2d 978, 982 n. 9 (1993)).

Separate property is (a) property acquired before marriage or after the entry of a decree of dissolution of marriage, (b) property acquired after permanent separation and the entry of a decree of division of property unless the decree provides otherwise, (c) property designated as separate property by a court judgment, (d) property acquired during marriage by gift or inheritance and (e) property designated as separate property in an agreement between the spouses. NMSA § 40-3-8 A. There is no requirement that the instrument be recorded or otherwise be made a public record. In addition, property acquired during marriage by a woman before July 1, 1973, is presumed to be her separate property, if the property was acquired by a written instrument, in her name alone, or in her name and the name of another person not her husband. NMSA § 40-3-12. Finally, upon dissolution of marriage the community property becomes separate property. If it is not awarded to one spouse or the other, but remains jointly owned, the former spouses own it as tenants in common. *Atlas Corp. v. DeVilliers*, 447 F.2d 799 (10th Cir. 1971), cert. denied 405 U.S. 933.

Generally, all property acquired during marriage by either spouse or by both spouses is community property, except separate property. Property acquired by a married couple by a written instrument, whether as tenants in common, joint tenants or otherwise, is presumed to be community property unless the property is separate property. NMSA § 40-3-8 B.

The rules for management of community property differ depending on whether the property is real property or personal property.

Except for purchase money mortgages, both spouses must sign all conveyances, mortgages, leases for terms longer than ten years, and all contracts to make the same, of real estate that is community property or that is owned by the spouses as tenants in common or as joint tenants. Any such instrument not signed by both spouses is void. NMSA § 40-3-13.

Either spouse, acting alone, has full power to manage, control, dispose of and encumber the entire community personal property, except that special rules apply when only one spouse or both spouses are (i) named in a document evidencing ownership of community personal property, or (ii) named in a written agreement between that spouse and another person and a third party as having authority to manage, control, dispose or encumber the community personal property that is described in the agreement. NMSA § 40-3-14. Again, there is no rule that the document or agreement must be recorded or otherwise be made a public record.

One spouse need not join with the other when the other gives a power of attorney. NMSA § 40-2-3.

A “contract of indemnity” that is not signed by both spouses does not create recourse to the community property of either spouse. NMSA § 40-3-4. Although the application of the statute to ordinary guaranties is by no means clear, some lenders, out of an abundance of caution, obtain the signatures of both spouses on all guaranties, at least to the extent necessary to create recourse to the community property and so much of the separate property as is necessary to assure repayment of the loan. Of course, they must also comply with the federal Equal Credit Opportunity Act (15 U.S.C. § 1691 *et seq.*) and Regulation B promulgated thereunder (12 CFR part 202).

A separate debt is (a) a debt incurred before marriage or after entry of a decree of dissolution of marriage, (b) a debt incurred after permanent separation and the entry of a decree of division of property unless the decree provides otherwise, (c) a debt designated as a separate debt of a spouse by a court judgment, (d) a debt contracted by a spouse during marriage that is identified by a spouse to the creditor at the time of its creation as the separate debt of the contracting spouse, (e) a debt arising from a tort committed by a spouse before marriage or after entry of a decree of dissolution of marriage or a separate tort committed during marriage or (f) a debt declared unreasonable by the court as between the parties if it was incurred by a spouse while the spouse was living apart and the debt did not

contribute to the benefit of both spouses or their dependents. NMSA §§ 40-3-9 A, 40-3-10.1.

A community debt is a debt incurred during marriage by either or both spouses that is not a separate debt. NMSA § 40-3-9 B.

When collecting unsecured judgments against married people, the creditor is faced with statutory priorities ranking the assets which may be sold to satisfy the judgment. These priorities depend on whether the debt is a separate or a community debt.

Both sets of priorities have one thing in common concerning the marital residence: If both spouses do not sign an obligation created after marriage, the interest of the non-signing spouse in the marital residence is not liable for the debt. NMSA §§ 40-3-10 B and 40-3-11 B.

Generally speaking, a spouse's separate debts must be satisfied first from the spouse's separate property, excluding that in which each spouse owns an undivided equal interest as joint tenant or tenant in common; then from the spouse's one-half interest in the community property or property in which each spouse owns an undivided equal interest as joint tenant or tenant in common, except for the marital residence, subject to the limitation stated above; and then from the spouse's one-half interest in the marital residence. The separate property of a spouse and the spouse's interest in community property are not liable for the satisfaction of the separate debt of the other spouse. NMSA § 40-3-10.

Generally speaking, community debts must be satisfied first from community property and all property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the marital residence; second from the marital residence, subject to the limitation stated above; and then from the separate property of the spouse who incurred the debt. If both spouses incurred the debt, the separate property of both spouses is jointly and severally liable for it. NMSA § 40-3-11.

Because of the uncertainties created by New Mexico's community property laws, most lenders require the joinder of both spouses in obligations and encumbrances created by married persons. Of course, they must also comply with the federal Equal Credit Opportunity Act (15 U.S.C. § 1691 *et seq.*) and Regulation B promulgated thereunder (12 CFR part 202).

2. Property Exempt from Claims of General Creditors

Individual debtors may hold certain assets exempt under state law from seizure to satisfy the judgments of general creditors. The homestead exemption is \$30,000 for each person owning the homestead. NMSA § 42-10-9. If a person does not own a homestead, an additional \$2,000 exemption for real or personal property is allowed. NMSA § 42-10-10.

In addition, the following personal property is exempt: personal property valued at up to \$500, one motor vehicle valued at up to \$4,000, clothing, furniture, tools of trade valued at up to \$1,500, books, medical-health equipment, jewelry valued at up to \$2,500, proceeds from pension or retirement plan (NMSA §§ 42-10-1 & 1.2) and benevolent association benefits of up to \$5,000 payable to a member's family (NMSA § 42-10-4). These exemptions do not apply to certain debts, including debts secured by a mortgage encumbering the homestead or by a security interest encumbering personal property that would otherwise be exempt. NMSA §§ 42-10-6, -7 & -10. There is no provision for waiving these exemptions in advance.

E. Trusts and Estates

New Mexico has enacted the Uniform Trust Code, including all uniform amendments, but with several non-uniform amendments and omissions. NMSA Chapter 46A.

The Uniform Trust Code protects third parties who deal in good faith with a trustee. Among other things, third parties need not inquire into the extent of a trustee's powers or the propriety of their exercise. NMSA § 46A-10-1011 B. If the third party, in good faith and for value, deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, the third party is protected from liability as if the trustee had properly exercised the power. NMSA § 46A-10-1011 A. In addition, the third party may rely upon the certification by a trustee of the material provisions of the trust and of certain material facts about it, without being charged with reviewing and interpreting the entire trust instrument and with investigating the facts surrounding the trustee's exercise of powers under it. NMSA § 46A-10-1012.

New Mexico has enacted the Uniform Probate Code ("UPC"), without many of the technical uniform amendments since 1993, but with a number of non-uniform amendments. NMSA Chapter 45. The author of this guide has prepared a bill for introduction in the 2009 session of the New Mexico legislature to bring our Probate Code up to date, except for the 2008 amendments promulgated by the Uniform Law Commission, which are still under study by the bar association.

All claims against a decedent's estate that arose before the decedent's death must be presented within the shorter of one year after the decedent's death, or two months after notification to creditors by delivery, mail or publication. NMSA § 45-3-803. The claims may be presented either to the personal representative (the term used in the UPC instead of "executor" or "executrix") of the estate or filed with the court. NMSA § 45-3-8-4.

The UPC does not require court approval for sale of real estate by the personal representative of the estate. Title insurance companies routinely insure title to such real property as soon as the estate has been opened, the personal representative has been

appointed and qualified and the personal representative has signed and acknowledged a deed in proper form. If necessary, this can often be accomplished in a few days under the proper circumstances.

F. Real Estate Trusts

Real estate trusts are governed by the Real Estate Trust Act. NMSA §§ 47-2-1 *et seq.* A real estate trust is an unincorporated business trust. NMSA § 47-2-2 A. Its purpose is to invest in real estate. NMSA § 47-2-3. It is a separate entity. NMSA § 47-2-6 A. The trustees and beneficial owners of a real estate trust are not liable for its obligations except for their own bad faith, willful misfeasance, gross negligence, or reckless disregard of their duties. *Id.* A real estate trust is established by recording a declaration of trust with the county clerk of the county in which its principal office in this state is located. NMSA § 47-2-3. A foreign real estate trust may adopt the provisions of the Real Estate Trust Act by recording a document conforming to the act with the county clerk of the county in which the trust has its principal office in New Mexico. NMSA § 47-2-6 D.

VIII. REAL ESTATE LENDING

A. Property Laws

New Mexico real property law is contained primarily in its case law. The relevant statutes are codified primarily at NMSA Chapter 14, Article 9 (Records Affecting Real Property); Chapter 39, Article 5 (Sales under Execution and Foreclosure); Chapter 47 (Property Law) and Chapter 48, Article 7 (Mortgages) and Article 10 (Deeds of Trust).

B. Types of Security Instruments.

1. Mortgages.

Until 2007 the mortgage was the security instrument most often used to encumber real estate. With few exceptions, deeds of trusts, as well as mortgages, were required to be foreclosed judicially.

2. Deeds of Trust.

In 2007 the Deed of Trust Act (NMSA §§ 48-10-1 to -21) was amended to remove many obstacles to its use. It is expected to become the security instrument of choice in New Mexico.

C. Mineral Rights

In New Mexico, a variety of minerals can be obtained through exploration and mining, including copper, uranium, coal, oil and gas. Separate ownership of the surface and mineral estates is permitted in New Mexico. Each estate conveys distinct private property rights to its owner, and quite often, different parties own the surface and mineral estates. A mineral estate may be severed from the surface estate by reservation or by conveyance.

Generally speaking, when the surface estate and the mineral estate are owned by two different legal entities, the use and enjoyment of the respective estates are relative. The rights of each estate must be exercised with due regard for the rights of the other estate. The owner of the mineral estate has the right to appropriate the mineral estate and may dig through the surface and use so much of the surface as is reasonably necessary for mining. Further, the owner of the mineral estate may deposit minerals on the surface estate so long as the depositing is reasonable to his operations in the mining and does not unreasonably restrict use of the surface estate. The surface owner has the right to enjoy his estate free from annoyance except as may reasonably arise from the mineral owner's mining activities and may use the surface in any way not inconsistent with the rights of the mineral estate.

Under the authority of the Oil and Gas Act, NMSA, § 70-2-1 et seq., the Oil Conservation Division of the Energy, Minerals and Natural Resources Department regulates oil and gas and geothermal activity in New Mexico.

NMSA Chapter 69 and all articles thereunder govern mining operations.

D. Acknowledgments.

A deed of trust or mortgage must be acknowledged in order to be recorded. NMSA § 14-8-4. New Mexico has adopted the Uniform Law on Notarial Acts. NMSA §§ 14-14-1 *et seq.* Short, statutory forms of acknowledgments are found in NMSA § 14-4-8. The form of acknowledgment in use in the foreign state where the acknowledgment is taken is also sufficient.

E. Recordation.

Failure to properly acknowledge a document relating to real property renders its recording ineffective. NMSA § 14-8-4.

Most deeds of trust and mortgages must be recorded in the real estate records of the county clerk in each county where any encumbered real estate is located. NMSA § 14-9-1. An unrecorded mortgage does not affect the title or interest of a third party without knowledge of the unrecorded mortgage.

New Mexico has nominal recording fees. It has no intangibles tax, mortgage tax, recording tax, stamp tax or similar tax on the recording of deeds of trust or mortgages.

F. Title insurance.

Institutional lenders customarily obtain title insurance on real estate loans in New Mexico. Title insurance is heavily regulated. Only forms of policies and endorsements approved by the state may be issued. Changes in the state-approved forms are prohibited, as is the use of endorsements that have not been approved by the state, except in extremely rare circumstances. Premiums are fixed by state regulations. Price-cutting is forbidden. The 2006 ALTA loan policy form and many ALTA endorsements are used.

G. Future Advances.

Future advances may be secured by the lien of mortgages and deeds of trust. The lien of the mortgage has priority over intervening liens as to all advances, obligatory or discretionary, up to a maximum amount stated in the mortgage. NMSA § 48-7-9. This provision is very lender-friendly.

H. Assignment of Leases and Rents.

New Mexico has neither a governing statute nor a well-developed body of case law governing assignments of leases and rents.

I. Environmental Indemnities.

The same is true of environmental indemnity agreements.

J. Prepayment.

Absent equitable considerations, a promissory note may be prepaid only if the note so provides or the holder otherwise consents.

K. Due on Sale or Encumbrance Clauses.

The federal Garn-St. Germain Depository Institutions Act of 1982 (12 U.S.C. Section 1701J-3 *et seq.*) preempts the field in large part and generally holds that “due on sale” or “due on encumbrance” clauses must be enforced. To the extent that it is not preempted, New Mexico law is intricate and expert advice should be obtained.

L. Satisfaction of Deeds of Trust and Mortgages.

Upon satisfaction of a debt secured by a deed of trust or a mortgage, it is the duty of the mortgagee or trustee to cause a full satisfaction thereof to be recorded by the county

clerk of each county where the instrument is recorded that secures the debt. NMSA § 48-7-4.

M. Assignments of Deeds of Trust and Mortgages.

Like any other instrument, an assignment of a deed of trust or a mortgage must be recorded if one wishes to give constructive notice of its contents to third parties.

In addition, New Mexico follows the familiar common law rule that an assignment of an obligation automatically carries with it any security for the obligation.

N. Default and Foreclosure Remedies.

1. In General

a. Types of Foreclosure

Only judicial foreclosure is permitted for mortgages. Non-judicial foreclosure is permitted for deeds of trust. (NMSA §§ 48-10-1 *et seq.*). Such deeds of trusts also commonly provide that they may be foreclosed judicially, at the option of the beneficiary.

b. Right of Redemption

The property can be redeemed before the sale, whether foreclosure is judicial or non-judicial, by paying the full amount owed. This is obviously true of mortgages and deeds of trust.

The same is true post-sale for judicial foreclosures (NMSA § 39-5-18) and non-judicial foreclosures (NMSA § 48-10-16). The statutory period of redemption after the sale is nine months for judicial sales (NMSA § 39-5-18) and for trustees' sales (NMSA § 48-10-16). Mortgagors and trustors may not waive this post-sale redemption period; they may, however, agree in the mortgage or the deed of trust to shorten it to not less than one month. NMSA § 39-5-19 (judicial sales); § 48-10-16 (trustees' sales). Even if they do shorten it, however, a court may increase the period for judicial sales only to not more than nine months upon a sufficient showing that redemption will be made. NMSA § 39-5-19.

c. Receivers

Receivership is a common procedure in the case of defaults on real estate loans. New Mexico's general receivership statute is set forth at NMSA §§ 44-8-1 *et seq.*

d. No One-Action Rule

New Mexico has no one-action rule. Like other states it does have rules against splitting causes of action and recognizes principles of res judicata and collateral estoppel, so that if a lender does commence an enforcement action against a debtor, it should consider asserting all of its claims against the debtor in the action.

e. **Deficiency Judgment**

Normally, absent an agreement to the contrary, deficiency judgments are obtainable in commercial real estate loans. This has long been established by case law for judicial foreclosures and is now provided by statute for non-judicial foreclosures under the Deed of Trust Act. NMSA § 48-10-17.

f. **Possession at Foreclosure Sale**

In New Mexico, the purchaser at a judicial foreclosure sale of commercial property is entitled to possession at the time of the sale, even though there is a right of redemption. We have no body of experience with non-judicial sales under deeds of trust.

g. **Liens of Mechanics and Material Suppliers**

Liens of construction workers and material suppliers are provided in NMSA Chapter 48, Article 2. They are superior to the lien of the mortgage if the mortgage is unrecorded at the time of commencement of the construction. NMSA § 48-2-5.

There is no “stop notice” law applicable to commercial property.

h. **Deeds in Lieu of Foreclosure**

New Mexico has no governing statute or well-developed body of case law dealing with deeds in lieu of foreclosure.

i. **Homestead**

See VII D.2. above. A consensual lien is a waiver of the homestead exemption. *Tomson v. Lerner*, 37 N.M. 546, 25 P.2d 209 (1933).

j. **Anti-Insurance-Coercion Law**

A lender may require that encumbered property be insured, but must not require that the insurance be provided by any particular company or through any particular agent or broker. Further, the lender must inform the borrower of these facts, using a state-prescribed form.

2. **Judicial Foreclosure.** Judicial foreclosure is the proper action to foreclose on a mortgage lien. In the event of borrower default, the appropriate foreclosure procedure is the following:

- (1) The lender demands all past due payments and gives the borrower the opportunity to cure, if required by the loan documents;
- (2) If the borrower fails to cure, the lender then accelerates payment of the promissory note including principal, interest, late fees, costs and expenses;
- (3) The lender files suit against borrower and the lender joins all other parties claiming an interest in or lien upon the real estate, including all junior lienholders. All parties to the lawsuit have 30 days after they are served to file an answer to the complaint, with few exceptions. If no one answers or if everyone answers admitting the indebtedness and the priority of the lien of the mortgage, a judgment can then be entered. If any party takes issue with the validity or amount of the debt or the validity or priority of the lien of the mortgage, the matter proceeds as any lawsuit until judgment is entered;
- (4) After the entry of judgment, notice of sale must be published in a newspaper of general circulation in the county where the real estate is located for four consecutive weeks. The sale may take place three days after the last publication of notice of sale and thirty days after entry of the judgment and decree of foreclosure. After the sale, the court must approve the account of the Special Master of the sale and then the property is deeded to the successful purchaser.
- (5) The time within which a foreclosure action can be concluded depends upon the case load of the judicial district in which the action is filed and whether the foreclosure is contested. An uncontested foreclosure usually can be completed within ninety days after the filing of the complaint, but the average time to complete a foreclosure ranges from three months to nine months.

3. **Non-Judicial Foreclosure.**

The legislature has just made extensive revisions to the Deed of Trust Act (NMSA §§48-10-1 *et seq.*(2007)) in order to make it usable. The bar has not had time to establish standard forms or procedures for implementing the act, as revised, let alone for foreclosing it non-judicially.

IX. PERSONAL PROPERTY LENDING

A. Revised UCC Article 9

Like every other state New Mexico adopted Revised UCC Article 9 – Secured Transactions. Like most other states, its effective date was July 1, 2001. It is codified at Article 9 of Chapter 55 of NMSA. The more significant variations are:

1. Transfers by New Mexico or any of its governmental units are excluded from Article 9. NMSA § 55-9-109 (d) (14) (excluded at request of state’s government-bond lawyers).

2. In Section 201 (b) added the following to consumer laws as laws to which Article 9 is subject: the Oil and Gas Products Lien Act; NMSA Chapter 56, Article 1; the Artists’ Consignment Act; the Pawnbrokers Act; the New Mexico Bank Installment Act of 1959; the New Mexico Small Loan Act of 1955; the Motor Vehicle Sales Finance Act; and the rules under those statutes.

3. Added a nonuniform subsection (e) to Section 201 reading:

“(e) The filing provisions set forth in the Farm Products Secured Interest Act and in the Public Utility Act are in addition to the filing provisions set forth in NMSA Chapter 55, Article 9. Failure to comply with the filing provisions in those acts has only the effect specified in those acts.”

4. Eliminated subsections (i) and (j) of Section 9-334, subsection (j) of Section 9-406, and modified subsection (e) of Section 9-406 to read:

“The provisions of this section shall prevail over an inconsistent provision of an existing or future statute or rule of this state, unless the inconsistent provision is set forth in a statute of this state that refers expressly to this section and states that the inconsistent provision shall prevail over the provisions of this section.”

B. Titled Motor Vehicles

Titled motor vehicles held as inventory are subject to the normal Article 9 filing rules. NMSA § 55-9-311(d). When the vehicles cease to be inventory, the financing

statement ceases to be effective, and the lender's lien must be noted on the vehicle's certificate of title. The lender should retain the certificate until the obligation secured by the lien is satisfied.

C. Other Collateral Excluded From Article 9 In Whole or In Part.

Some types of collateral are entirely excluded from Article 9. *See* 9-109(d).

Other types of collateral are covered by Article 9, but other filing rules apply. *See* 9-109(c).

D. UCC Filing Rules.

UCC Financing Statements are filed with the UCC Division of the New Mexico Secretary of State's Office, except for fixture filings, timber to be cut and as-extracted collateral, which are recorded at the county level. NMSA § 55-9-501. Forms, instructions, information about filing fees and many other things are available on the Secretary's website at

X. EQUIPMENT LEASING

New Mexico has adopted Article 2A of the UCC. NMSA Chapter 55, Article 2A. The New Mexico variations from the uniform text are collected in the State Variations volume of West's Uniform Commercial Code Reporting Service.

XI. GUARANTIES

Waiver of suretyship defenses are generally enforced in New Mexico. *See, e.g., American Bank of Commerce v. Covolo*, 88 N.M. 405, 540 P.2d 1294 (1975).

A "contract of indemnity" that is not signed by both spouses does not encumber the community property of either spouse. NMSA § 40-3-4. Although the application of the statute to ordinary guaranties is by no means clear, some lenders, out of an abundance of caution, obtain the signatures of both spouses on all guaranties, at least to the extent necessary to create recourse to the community property and so much of the separate property as is necessary to assure repayment of the loan. Of course, they must also comply with the federal Equal Credit Opportunity Act (15 U.S.C. §§ 1691 *et seq.*) and Regulation B promulgated thereunder (12 CFR Part 202).

XII. OTHER LAWS OF INTEREST

A. Fraudulent Transfer Law.

New Mexico has enacted the Uniform Fraudulent Transfer Act without substantive revision. NMSA §§ 56-10-14 *et seq.*

B. Bulk Sales.

Article 6 – Bulk Sales -- of the Uniform Commercial Code was repealed in 1992.

C. Environmental Laws.

New Mexico has extensive laws and regulations governing environmental matters. They are administered by several state agencies. Expert advice is required when dealing with these laws, regulations and agencies.

New Mexico has not adopted the Uniform Environmental Covenants Act.

D. Punitive Damages.

Punitive damages can be recovered for breach of contract in New Mexico if the breach is sufficiently culpable. The standard of culpability is still evolving. *Romero v. Mervyn's*, 109 N.M. 249, 784 P.2d 992 (1989).

Punitive damages may be awarded in arbitration proceedings. NMSA § 44-7A-2 (a).

E. Statute of Frauds.

The English statute of frauds was adopted as part of the common law of New Mexico. *Bassett v. Bassett*, 110 N.M. 559, 798 P.2d 160 (1990).

There are special statutes of frauds in the Uniform Commercial Code applicable to the sale and leasing of goods. NMSA §§ 55-2-201 & 55-2A-201.

There is a special statute of frauds applicable only to banks, savings and loan associations and credit unions authorized to transact business in New Mexico. It is further limited to transactions in an amount greater than \$25,000 not for consumer purposes. Within such limits, a contract to grant, extend or renew credit, or a modification thereof, is not enforceable unless it is in writing and signed by the creditor or the creditor's representative.

F. Cognovit Notes.

It is a misdemeanor to take or attempt to recover on a “cognovit note.” NMSA § 39-1-18. Likewise, consent to judgment in a contract or note is void. NMSA § 39-1-16.

G. Statute of Limitations.

The statute of limitations applicable to promissory notes and other written contracts is six years. NMSA § 37-1-3. The statute of limitations on oral contracts, fraud, accounts, and injury to, or conversion of, property is four years. NMSA § 37-1-4.

H. Choice-of-Law Provisions.

New Mexico courts will enforce choice-of law provisions in contracts governed by the Uniform Commercial Code, unless the application of the chosen law would offend New Mexico public policy. NMSA § 55-1-301 (A); *United Wholesale Liquor Co. v. Brown Foreman Distillers Corp.*, 108 N.M. 467, 470, 775 P.2d 233, 236 (1987).

As to contracts outside of the UCC, however, our law is muddled, because New Mexico has always followed the First Restatement of Conflicts of Laws, which did not allow party autonomy with respect to choice of laws, and we have no appellate case adopting the Second Restatement’s position, which would enforce choice-of-law provisions in contracts. *See, Reagan v. McGee Drilling Corp.*, 123 N.M. 68, 933 P.2d 867 (Ct. App. 1997).

Absent an effective choice-of law provision, the provisions of a contract are governed by the law of the place where the contract was consummated (i.e. where the last act necessary for its formation was performed). *State Farm Mut. Ins. Co. v. Conyers*, 109 N.M. 243, 784 P.2d 896 (1989). This is the First Restatement of Conflicts rule.

I. Duty of Good Faith and Fair Dealing.

New Mexico imposes a duty of good faith and fair dealing on the parties in the performance and enforcement of every contract. *Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 212 880 P.2d 300, 309 (1994) (internal quotation marks and citation omitted), *limited on oth. grds. by Sloan v. State Farm Mut. Auto Ins. Co.*, 135 N.M. 106, 85 P.3d 230 (2004). The implied covenant of good faith and fair dealing requires that neither party do anything that will injure the rights of the other party to receive the benefits of the agreement. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 714, 885 P.2d 628, 635 (1994).

XIII. CONCLUSION

This material raises numerous and complex issues. It is provided for background information only and should not be relied upon in specific transactions.