

## New Mexico State Law of Guaranties

### *Highlights*

1. **New Mexico has little law relevant to guaranties, so its courts usually fill the gaps with law from the Restatement (Third) of Suretyship and Guaranty (1996).**
2. **New Mexico courts employ freedom-of-contract principles to uphold extensive waivers of a guarantor's rights, which impair or eliminate rights of recourse against collateral and coguarantors.**
3. **New Mexico is a community property state. Its law is unclear about whether there is recourse against any community property for a guaranty executed by only one spouse. The law may reflect the state's public policy. If it does, the uncertainty may extend to a guaranty governed by the law of another jurisdiction.**

### *Introductory Notes*

*Terminology:* In order to standardize our discussion of the law of guaranties, we use the following vocabulary to refer to the parties to a guaranty and their obligations.

**“Guarantor”** means a person who agrees to satisfy an underlying obligation of another to an obligee upon a primary obligor's default on that underlying obligation. We do not draw a distinction between a guarantor and a surety, as the terminology in New Mexico has been combined, at least for most purposes.<sup>1</sup>

**“Guaranty”** means a contract by which a guarantor agrees to satisfy an underlying obligation of a primary obligor to an obligee if the primary obligor defaults on the underlying obligation.

**“Obligee”** means a person to whom an underlying obligation is owed. For example, a lender under a loan agreement is an obligee vis-à-vis the borrower.

**“Primary Obligor”** means a person who incurs an underlying obligation to an obligee. For example, a borrower under a loan agreement is a primary obligor.

**“Underlying Obligation”** means an obligation incurred by a primary obligor and owed to an obligee. For example, a borrower's obligation to make payments to a lender of principal and interest on a loan constitutes an underlying obligation.

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<sup>1</sup> See, e.g., *American Bank of Commerce v. Covolo*, 88 N.M. 405, 407, n.3, 540 P.2d. 1294, 1296, n.3 (1975) (citing UCC Article 1, now amended and recodified at NMSA 1978, § 55-1-201(b)(39) (2005) (“‘Surety’ includes a guarantor or other secondary obligor.”)); see also Restatement (Third) of Suretyship & Guaranty § 1 cmt. c (1996).

*Introduction and Sources of Law:* New Mexico has little law relevant to guaranties. In the absence of relevant New Mexico authority, New Mexico courts usually, but not always,<sup>2</sup> turn to the Restatement (Third) of Suretyship and Guaranty for guidance.<sup>3</sup> The Restatement provides “authoritative guidance on the common law” of guaranties.<sup>4</sup> Articles 3<sup>5</sup> and 9<sup>6</sup> of the Uniform Commercial Code (UCC), as well as their Official Comments,<sup>7</sup> provide supplemental guidance for the secondary obligations to which they apply. If either Article 3 or 9 applies to a transaction, then the general provisions of Article 1 also come into play.<sup>8</sup>

## § 1 *Nature of the guaranty arrangement*

**Under New Mexico law, a guaranty is a collateral agreement to pay a debt or perform a duty for another in case of default, which may be enforced separately from the primary obligation, and when the guaranty exists, it is not necessary to proceed directly against the primary obligor.<sup>9</sup>**

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<sup>2</sup> *McAlpine v. Zangara Dodge, Inc.*, 2008-NMCA-064, ¶ 19, 144 N.M. 90, 183 P.3d 975 (Castillo J.) (declining to follow the Restatement (Third) of Suretyship & Guaranty § 67(3) on the effect upon the liability of a surety of a default judgment against the principal).

<sup>3</sup> *Randles v. Hanson*, 2011-NMCA-059, ¶ 14, 150 N.M. 362, 258 P.3d 1154 (Fry, J.).

<sup>4</sup> *Venaglia v. Kropinak*, 1998-NMCA-043, ¶ 12, 125 N.M. 25, 956 P.2d 824 (Hartz, C.J.). *Venaglia* was the first New Mexico case to provide modern law about guaranties.

<sup>5</sup> *Id.* ¶ 11. The guarantors in *Venaglia* signed the note as accommodation parties, bringing Article 3 of the UCC into play. Judge Hartz spent many pages analyzing the differences between the Restatement and Article 3 as it existed then. Article 3 has since been amended. One of the purposes of the amendments was to conform it to the Restatement. See Uniform Commercial Code, Drafting Committee to Amend Uniform Commercial Code Articles 3 & 4, Prefatory Note, 2 U.L.A. ¶ 4, at 6 (2004) (“Amendments to UCC §§ 4-419 and 3-605 generally conform those provisions to the rules in the *Restatement of Suretyship and Guaranty*.”). New Mexico enacted these amendments in 2009. NMSA 1978, §§ 55-3-101 to -605 (1992), as amended.

<sup>6</sup> Article 9 of the UCC was not mentioned in *Venaglia* because the guarantors had not pledged any personal property as collateral to support the principal obligor’s debt. After *Venaglia* was decided, Article 9 was completely rewritten. Professor Neil B. Cohen, the reporter for the Restatement of Suretyship and Guaranty, served as a member of the drafting committee to revise Article 9. This cross-membership better assured consistency between the Restatement and revised Article 9. New Mexico, along with every other state, has adopted the revised version of Article 9. NMSA 1978, §§ 55-9-101 to -709 (2001), as amended. Recently, Article 9 has been revised yet again. New Mexico will take up this latest revision in the forthcoming 2013 session of its legislature.

<sup>7</sup> Official Comments are “persuasive,” although not “controlling authority.” *First State Bank v. Clark*, 91 N.M. 117, 119, 570 P.2d 1140, 1142 (1977) (interpreting the UCC). Official Comments are especially helpful in New Mexico because of its paucity of reported cases and its complete absence of legislative history.

<sup>8</sup> NMSA 1978, § 55-1-102 (2005) (“Chapter 55, Article 1 NMSA 1978 applies to a transaction to the extent that it is governed by another article of the Uniform Commercial Code.”). Of relevance to this discussion are the provisions of Article 1 containing the definition of good faith, *see infra* § 6.5, and choice-of-law rules, *see infra* § 17.

<sup>9</sup> *Joe Heaston Tractor & Implement Co. v. Sec. Acceptance Corp.*, 243 F. 2d. 196 (10<sup>th</sup> Cir. 1957) (applying New Mexico law).

## 1.1 Guaranty relationships

A guaranty is a contract of secondary liability under which a guarantor has an obligation to pay an obligee after a default by a principal obligor.<sup>10</sup> The relationship between a primary obligor and a guarantor arises as a matter of law, and it is based in the notion that, while a guarantor is liable to an obligee, it is the principal obligor who ultimately should bear the underlying obligation.<sup>11</sup>

## 1.2 Other suretyship relationships

While not the focus of this discussion, a suretyship relationship may also arise because of a pledge of collateral.<sup>12</sup> As such, a guaranty-type relationship arises to the extent of the collateral pledged when one party grants to a creditor a security interest in property to secure the obligation of another.<sup>13</sup> New Mexico statutes prohibit or regulate certain indemnity agreements in transactions relating to construction; mining; drilling wells for oil, gas, or water; and leasing or renting of equipment.<sup>14</sup> These matters are also beyond the focus of this discussion.

## § 2 *State law requirements for an entity to enter into a guaranty*

**A business corporation or a nonprofit corporation can grant a guaranty. A state bank generally cannot. New Mexico has no statutory authority or common law relevant to this issue with respect to a partnership or a limited liability company.**

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<sup>10</sup> *Randles*, 2011-NMCA-059, ¶ 11.

<sup>11</sup> NMSA 1978, § 55-3-419(f) (2009); Restatement (Third) of Suretyship & Guaranty § 1 cmt. b.

<sup>12</sup> See Restatement (Third) of Suretyship and Guaranty § 1(1)(a) (noting that a person is a surety when “pursuant to contract . . . an obligee has recourse against [that] person . . . or that person’s property with respect to an obligation . . . of another person . . . to that obligee” (emphasis added)).

<sup>13</sup> Compare NMSA 1978, § 55-9-102(a)(28)(A) (2005) (definition of “debtor” under Article 9 of the UCC, which debtor, among other things not relevant to this discussion, has “an interest other than a security interest or other lien” in the collateral, “whether or not the debtor is an obligor”) with NMSA 1978, 55-9-102(59)(A) (2005) (definition of “obligor” under Article 9, which obligor, among other things not relevant to this discussion, “owes payment or other performance of the obligation”).

<sup>14</sup> NMSA 1978, § 56-7-1(2005) (construction); *Id.* § 56-7-2 (2003) (mining; drilling oil, gas, and water wells); *Id.* § 56-7-3 (2007) (equipment leases and rentals).

## 2.1 Corporations

Under the Business Corporation Act, a New Mexico business corporation may, within the scope of its general corporate powers, “make contracts and guarantees.”<sup>15</sup> The Nonprofit Corporation Act grants the same powers to a New Mexico nonprofit corporation.<sup>16</sup>

## 2.2 Partnerships

New Mexico’s Uniform Partnership Act and Uniform Revised Limited Partnership Act<sup>17</sup> neither expressly empower a partnership to issue a guaranty nor expressly regulate or prohibit such an activity. There is no example in the case law of a partnership issuing a guaranty.

## 2.3 Limited liability companies

New Mexico’s Limited Liability Company Act<sup>18</sup> neither expressly empowers a limited liability company (LLC) to issue a guaranty nor expressly regulates or prohibits such an activity. There is no example in the case law of an LLC issuing a guaranty.

## 2.4 Banks and trust companies

A New Mexico state-chartered bank may not be a guarantor, except for minor exceptions not relevant to this discussion.<sup>19</sup>

## 2.5 Subsidiary guaranties

New Mexico has no law about whether a subsidiary has the corporate or other entity power to guarantee or otherwise become liable for indebtedness incurred by its parent or to encumber its assets to secure this indebtedness, except to the extent that the subsidiary may be determined to have benefited from the incurrence of the indebtedness by its parent, or whether this benefit may be measured other than by the extent to which the proceeds of the indebtedness incurred by the parent are directly or indirectly made available to the subsidiary for its corporate or other entity purposes.<sup>20</sup>

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<sup>15</sup> NMSA 1978, § 53-11-4 (1987).

<sup>16</sup> NMSA 1978, § 53-8-5 (1975).

<sup>17</sup> NMSA 1978, §§ 54-1A-101 to -1206 (1996), as amended; NMSA 1978, §§ 54-2A-101 to -1206 (2007), as amended.

<sup>18</sup> NMSA 1978, §§ 53-19-1 to -74 (1993), as amended.

<sup>19</sup> NMSA 1978, § 58-1-31 (1963).

<sup>20</sup> See Donald W. Glazer et al., Glazer and FitzGibbon on Legal Opinions § 8.3.2, at 245 (3d ed. 2008).

## 2.6 *Individuals*

### 2.6.1 *Individuals versus corporate officers*

Confusion can sometimes arise in the case of a corporate officer signing a guaranty in a closely held corporation. In such an instance, a case-by-case inquiry determines whether an individual intended to be personally bound or, instead, issued a guaranty only on behalf of the corporation, and thus only in an official employment capacity.<sup>21</sup> When an individual signs the individual's title as well as the individual's name, these facts are not dispositive of an intention not to issue a personal guaranty.<sup>22</sup>

### 2.6.2 *Marital property*

In 1983 a Supreme Court case construed one community property statute and ruled that a guaranty signed by one spouse encumbered only the community property interest of that spouse and not that of the other spouse.<sup>23</sup> Ten years later the case was overruled on this point.<sup>24</sup>

Another New Mexico statute, Section 40-3-4, provides that a "contract of indemnity" that is not signed by both spouses does not "obligate" the community property of either spouse.<sup>25</sup> In 1987 the Supreme Court held that this statute does not apply to a promissory note given as collateral for corporate indebtedness.<sup>26</sup> The court stated in what may be dictum that this statute applies only to "contracts of indemnity with surety companies."<sup>27</sup> New Mexico has no other case construing this statute.

The Sample Opinion of the Opinion Task Force of the Real Property, Probate and Trust Law Section of the State Bar of New Mexico contains exclusion with respect to this statute. The exclusion states, "No community property shall be liable for any indebtedness incurred as any contract of indemnity, unless both husband and wife sign the contract of indemnity. § 40-3-4"<sup>28</sup> This exclusion is stated in connection with a sample loan transaction involving a guaranty in which no surety company is a party and in which no document is titled an indemnity agreement.

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<sup>21</sup> See, e.g., *Ricker v. B-W Acceptance Corp.*, 349 F.2d 892 (10<sup>th</sup> Cir. 1965) (applying New Mexico law).

<sup>22</sup> *Id.*; *Ellis v. Stone*, 21 N.M. 730, 158 P. 480 (1916).

<sup>23</sup> *First State Bank v. Muzio*, 100 N.M. 98, 99, 666 P. 2d 777, 778 (1983) (construing NMSA 1978, § 40-3-12(A) (1973)).

<sup>24</sup> *Huntington Nat'l Bank v. Sproul*, 116 N. M. 254, 264, 861 P. 2d 935, 945 (1993).

<sup>25</sup> NMSA 1978, §40-3-4 (1965).

<sup>26</sup> *Lubbock Steel & Supply, Inc. v. Gomez*, 105 N.M. 516, 517, 734 P.2d 756, 757 (1987).

<sup>27</sup> *Id.* at 518, 734 P.2d 758.

<sup>28</sup> *Lawyers' Opinions in Mortgage Loan Transactions*, Qualification ¶ 22, at 50 (2003).

The exclusion may serve as an indication of the concerns that some New Mexico practitioners have about the importance of the statute; the dire consequences of a violation, even inadvertent; and uncertainty about its interpretation.

In view of the subject matter of the statute, it is not completely out of the question that a court could find that it reflects the public policy of New Mexico. If a court should find that it does reflect the public policy of New Mexico, then the court might also apply the statute to a guaranty that chooses the law of another state.<sup>29</sup>

### 2.6.3 *Execution requirements*

New Mexico has no special execution requirements for individual guarantors, married or not.

#### **§ 3 *Signatory's authority to execute a guaranty***

**New Mexico has no law dealing with this issue.**

#### **§ 4 *Consideration***

**New Mexico has only two cases dealing with consideration in the context of a guaranty. These cases were tried without questioning the fact that consideration was necessary and applied standard contract principles to the analysis.<sup>30</sup> However, consideration is required for the modification of a guaranty.<sup>31</sup> New Mexico has no cases deciding whether consideration flowing to a borrower is sufficient consideration for a guarantor.**

#### **§ 5 *Notice of acceptance***

**New Mexico has no law dealing with this issue.**

#### **§ 6 *Interpretation of guaranties***

**Courts in New Mexico strictly construe the obligations of the guarantor. In other regards, courts will interpret a guaranty in the same manner by which they would interpret the language of any other contract.**

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<sup>29</sup> See *infra* § 17; Piña v. Gruy Petroleum Mgmt. Co., 2006-NMCA-063, ¶ 1, 139 NM 619, 136 P.3d 1029 (construing NMSA 1978, § 56-7-2 (2003), an indemnity-limiting statute applicable to oil and gas drilling, holding that the statute reflects the public policy of New Mexico, and applying the statute to a contract that chose the law of Texas).

<sup>30</sup> Gonzales v. Gauna, 28 N.M. 55, 206 P. 511 (1922); Valley Bank of Commerce v. Hilburn, 2005-NMCA-004, ¶ 24, 136 N.M. 741, 105 P.3d 294 (filed 2004) (Pickard, J.).

<sup>31</sup> See *infra* § 7.3.2.

## 6.1 General principles

On one hand, New Mexico courts state that they recognize the principles that a guarantor is a favorite of the law and that the obligations of a guarantor are to be strictly construed.<sup>32</sup> On the other hand, the courts recognize the principle of freedom of contract.<sup>33</sup> The courts apply the latter principle to construe broadly, not strictly, a waiver by a guarantor of the guarantor's suretyship defenses, with the result that the guarantor's liability is actually expanded.<sup>34</sup> Outside of these principles, the same principles of construction that apply generally to contracts also apply to guaranties.<sup>35</sup>

## 6.2 Absolute guaranty versus conditional guaranty

New Mexico classifies guaranties as either absolute or conditional. An absolute guaranty imposes automatic liability on a guarantor upon the default of an obligor, and an obligee is neither required first to seek payment from a principal nor to notify a guarantor of a default.<sup>36</sup>

On the other hand, a guaranty is conditional when its terms state that a condition precedent must be met before a guarantor is held liable.<sup>37</sup>

## 6.3 Continuing guaranty versus restricted guaranty

Guaranties are also classified as either continuing or restricted.<sup>38</sup> A continuing guaranty is one in which either the amount of debt or the time for payment remains undefined, such as a line of credit.<sup>39</sup>

On the other hand, a restricted guaranty contemplates either a single transaction or a limited number of transactions.<sup>40</sup>

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<sup>32</sup> See, e.g., *Sunwest Bank v. Garrett*, 113 N.M. 112, 117, 828 P.2d 912, 917 (1992).

<sup>33</sup> See, e.g., *American Bank of Commerce*, 88 N.M. at 409-10, 540 P.2d at 1298-99 (provision that permitted obligee bank to release collateral construed to relieve bank from liability to perfect lien on collateral, even though failure was arguably negligent); *infra* § 7.2.

<sup>34</sup> *Id.*

<sup>35</sup> *WXI/Z Sw. Malls Real Estate Liab. Co. v. Mueller*, 2005-NMCA-046, ¶ 10, 137 N.M. 343, 110 P.3d.1080 (Fry, J.) (citing Restatement (Third) of Suretyship & Guaranty § 14 (stating that standard contract rules apply to secondary obligations)).

<sup>36</sup> *Id.* ¶ 14.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* ¶ 15.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

#### 6.4 Revocation of continuing guaranty

An offer to guarantee future obligations in a continuing guaranty may be revoked, absent a contrary provision in the guaranty instrument.<sup>41</sup>

#### 6.5. Duty of good faith

The *American Bank of Commerce* case was the first New Mexico case to address the duty of good faith in connection with a guaranty.<sup>42</sup> It relied primarily upon Articles 3 and 1 of the UCC.<sup>43</sup> The court ruled that the obligee-bank's duties of good faith and reasonableness could not be waived under the UCC, but the parties could determine the standards by which those duties could be met.<sup>44</sup> Following *American Bank of Commerce*, New Mexico courts have allowed the complete waiver of a number of surety defenses under the rubric of freedom of contract.<sup>45</sup>

After *American Bank of Commerce*, the Supreme Court held that there is implied in every New Mexico contract a "duty of good faith and fair dealing upon the parties in the performance and enforcement of the contract."<sup>46</sup> The breach of this covenant requires a showing of bad faith or that one party wrongfully and intentionally used the contract to the detriment of the other party.<sup>47</sup>

This implied covenant of good faith and fair dealing requires that neither party do anything that will injure the rights of the other to receive the benefit of their agreement.<sup>48</sup> This implied covenant applies to guaranties.<sup>49</sup>

New Mexico has no reported cases construing the modern definition of "good faith" in Article 1 of the UCC,<sup>50</sup> or the recent amendments to the suretyship provisions of Article 3,<sup>51</sup> or the suretyship provisions that were added with the 2001 revision of Article 9.<sup>52</sup>

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<sup>41</sup> FDIC v. Moore, 118 N.M. 77, 79, 879 P.2d 78, 80 (1994).

<sup>42</sup> *American Bank of Commerce*, 88 N.M. at 407, n.6, 540 P.2d. at 1296 n.6.

<sup>43</sup> *Id.* Curiously, the court gave no indication why UCC Articles 3 and 1 might apply to the guaranties in that case. *See supra* n. 5.

<sup>44</sup> *Id.*

<sup>45</sup> *See infra* § 7.2.

<sup>46</sup> Paiz v. State Farm Fire & Cas. Co., 118 N.M. 203, 212, 880 P.2d 300, 309 (1994) (internal quotation marks & citation omitted), limited on other grounds by Sloan v. State Farm Mut. Auto Ins. Co. (In re Sloan), 2004-NMSC-004, ¶12, 135 N.M. 106, 85 P.2d 230.

<sup>47</sup> *Id.*

<sup>48</sup> Planning & Design Solutions v. City of Santa Fe, 18 N.M. 707, 714, 885 P.2d 628, 635 (1994).

<sup>49</sup> *WHI/Z Sw. Malls*, 2005-NMCA-046, ¶¶ 24-29.



## **§ 7 Defenses of the guarantor; Set-off**

**The defenses that may be available to a guarantor can be grouped into three categories: (1) defenses of the primary obligor; (2) “suretyship defenses”; and (3) other defenses.**

### 7.1 Defenses of the primary obligor

New Mexico has no law dealing with this issue.

### 7.2 “Suretyship” defenses

#### 7.2.1 Change in identity of principal obligor

New Mexico has no law dealing with this issue.

#### 7.2.2 Modification of the underlying obligation

New Mexico’s latest case on point, decided in 1994 before the promulgation of the Restatement, held that a guarantor was completely discharged by a material change in the underlying obligation to which the guarantor had not consented.<sup>53</sup> When presented with the proper case, however, New Mexico courts may adopt the modern rule that such a modification will discharge a guarantor only to the extent that the guarantor would suffer a loss as a result of the modification.<sup>54</sup>

A release of the principal obligor without the guarantor’s consent releases the guarantor to the extent that it impairs the guarantor’s recourse.<sup>55</sup>

#### 7.2.3 Release or impairment of security for the underlying obligation

Under the common law, a guarantor may waive in advance its defense based on the release or impairment of collateral.<sup>56</sup> The obligee may, however, be estopped to take advantage of such a

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<sup>50</sup> Compare NMSA 1978, § 55-1-201 (b)(20) (2005) (defining “good faith” as “honesty in fact and the observance of reasonable commercial standards of fair dealing”) with NMSA 1978, § 55-1-201(19) (1992) (defining “good faith” as “honesty in fact in the conduct or transaction concerned”).

<sup>51</sup> See *supra* n. 4.

<sup>52</sup> See *supra* n. 5.

<sup>53</sup> *FDIC*, 118 N.M. at 81, 879 P. 2d at 82.

<sup>54</sup> *Levenson v. Haynes*, 1997-NMCA-020, ¶18, 123 N.M. 106, 934 P.2d. 300 (citing Restatement (Third) of Suretyship & Guaranty § 41).

<sup>55</sup> *Venaglia*, 1998-NMCA-043, ¶ 37.

<sup>56</sup> *American Bank of Commerce*, 88 N.M at 409-10, 540 P.2d at 1298-99.

waiver, if, for example, the court finds that after the waiver the obligee made an express or implied promise to realize upon the collateral, with reliance by the guarantor upon the promise.<sup>57</sup>

#### 7.2.4 *Release of cosurety*

The release of one surety without the consent of a cosurety releases the cosurety from liability to the extent that the cosurety could have claimed contribution from the released surety.<sup>58</sup> The surety may consent in advance to the release of a cosurety, and New Mexico courts will enforce the consent.<sup>59</sup>

### 7.3 *Other defenses*

#### 7.3.1 *Failure to fulfill a condition precedent*

If a guaranty contains an express condition precedent, which makes it a conditional guaranty, the obligee must perform the condition precedent.<sup>60</sup>

An obligee must also provide notice to the guarantor of the principal's default in the case of a continuing guaranty.<sup>61</sup> This requirement is imposed because in a continuing guaranty the guarantor may terminate its potentially limitless liability by terminating the guaranty as to future debts.<sup>62</sup>

#### 7.3.2 *Modification of the guaranty*

Consideration is required for a modification of a guaranty.<sup>63</sup> Even though the terms of a guaranty instrument may require all changes to be in writing, oral modifications are permitted.<sup>64</sup> An oral modification to a written contract must be proved by clear and convincing evidence.<sup>65</sup>

#### 7.3.3 *Statute of limitations*

The statute of limitations applicable to guaranties is the six-year period provided for actions on written contracts in Section 37-1-3(A) of the New Mexico Statutes Annotated.<sup>66</sup> The statute of

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<sup>57</sup> Cadle Co. v. Wallach Concrete, Inc, 120 N.M. 56, 62-63, 897 P.2d 1104, 1110-12 (1995).

<sup>58</sup> Western Bank v. Aqua Leisure, Ltd., 105 N.M. 756, 758, 737 P.2d 537, 539 (1987).

<sup>59</sup> *Sunwest Bank*, 113 N.M. at 116, 823 P.2d at 916.

<sup>60</sup> *See supra* § 6.2.

<sup>61</sup> *WXI/Z Sw. Malls*, 2005-NMCA-046, ¶ 16.

<sup>62</sup> *Id.*

<sup>63</sup> *Valley Bank of Commerce*, 2005-NMCA-004, ¶ 24.

<sup>64</sup> *Id.* ¶ 23.

<sup>65</sup> *Id.* ¶ 25.

<sup>66</sup> *Western Bank v. Franklin Dev. Corp.*, 111 N.M. 259, 260, 804 P.2d 1078, 1079 (1991).

limitations begins to run when a right of action upon the guaranty accrues.<sup>67</sup> On a demand guaranty the statute of limitations does not begin to run against the guarantor until demand is made upon the guarantor.<sup>68</sup> This rule is the opposite of the rule applicable to promissory notes, where the statute of limitations begins to run against the maker of the note when the note is made.<sup>69</sup>

#### 7.3.4 *Statute of frauds*

The English statute of frauds has been adopted as part of the common law of New Mexico.<sup>70</sup> A guaranty is covered by the statute of frauds because it is a promise to answer for the debt of another.<sup>71</sup> Nevertheless, an oral modification of a guaranty is permissible if one of the parties materially changes its position in reliance on that modification.<sup>72</sup>

#### 7.3.5 *Defenses particular to guarantors that are natural persons and their spouses*

New Mexico has no law dealing with these issues.

#### 7.4 *Right of set-off*

New Mexico has no law on these issues.

### **§ 8 *Waiver of defenses by the guarantor***

#### 8.1 *Defenses that cannot be waived*

An obligee's duty of good faith cannot be waived by the guarantor, but the parties can determine the standards by which the performance of their good faith obligations is measured, so long as the standards are not unreasonable.<sup>73</sup>

New Mexico has no cases addressing the prohibitions in UCC Article 9 (as amended in 2001) against predefault waivers by guarantors of rights under Article 9 of the UCC.<sup>74</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Bassett v. Bassett*, 110 N.M. 559, 562, 798 P.2d 160, 163 (1990).

<sup>71</sup> *See Valley Bank of Commerce*, 2005-NMCA-004, ¶ 23.

<sup>72</sup> *Id.*

<sup>73</sup> *American Bank of Commerce*, 88 N.M. at 408, n. 6, 540 P.2d at 1297, n.6.

<sup>74</sup> NMSA 1978, §§ 55-9-602, -610, -611, -623, -624 (2001). New Mexico will consider the even newer uniform amendments to UCC Article 9 during the 2013 session of its legislature.

## 8.2 “Catch-all” waivers

New Mexico has no well-developed body of law providing reliable guidance on general, catch-all waiver language in guaranties.

## 8.3 Use of specific waivers

New Mexico courts routinely enforce specific waivers of rights and defenses by guarantors.<sup>75</sup> The state Supreme Court has enforced the waiver of the homestead exemption<sup>76</sup> and the waiver of the right to a commercially reasonable sale of collateral in cases not involving Article 9.<sup>77</sup>

## **§ 9 *Third-party pledgors—defenses and waiver thereof***

**Because a pledgor arguably stands in the relation of a guarantor to the principal obligor to the extent of the pledge, the pledgor may most likely avail itself of the defenses of a guarantor. It may also waive such defenses.**

We have found no evidence that the law as applied to sureties would not apply to a third-party pledge. In contrast, the law appears to be that the pledge of collateral results in a surety relationship. It would seem logical, given this state of the law, that the pledgor generally has the same defenses available to it as are available to a surety.

## **§ 10 *Jointly and severally liable guarantors—contribution and reduction of obligations upon payment by a co-obligor***

New Mexico has no law dealing with these issues.

## **§ 11 *Reliance***

**Reliance is probably not required to claim under a guaranty.**

Under New Mexico law, a guaranty is governed by the rules generally applicable to contracts.<sup>78</sup> Presumably, then, reliance is not requisite to enforce a guaranty.

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<sup>75</sup> See, e.g., *American Bank of Commerce; WXI/Z Sw. Malls*.

<sup>76</sup> *Munzio*, 100 N.M. at 99, 666 P. 2d at 778.

<sup>77</sup> See e.g., *Sunwest Bank*, 113 N.M. at 117, 823 P.2d at 917.

<sup>78</sup> *WXI/Z Sw. Malls*, 2005-NMCA-046, ¶ 10.

## § 12 *Subrogation*

The secondary obligor is subrogated to the rights of the obligee if the secondary obligor satisfies the underlying obligation.<sup>79</sup>

## § 13 *Triangular set-off in bankruptcy*

New Mexico has no law dealing with this issue.

## § 14 *Indemnification—Whether the primary obligor has a duty*

New Mexico has no law dealing with these issues.

## § 15 *Enforcement of guaranties*

### 15.1 *Limitations on recovery—fraudulent transfer*

New Mexico has no law dealing with these issues.

### 15.2 *Enforcement of guaranties of payment versus guaranties of performance*

New Mexico has no law dealing with these issues.

### 15.3 *Exercising rights under a guaranty where the underlying obligation is also secured*

Absent an agreement to the contrary, New Mexico has no law requiring an obligee to proceed first against the collateral for an obligation before proceeding against a guarantor.

### 15.4 *Litigating guaranty claims: Procedural considerations*

A party is entitled to a jury trial on issues pertaining to a guaranty, even in a case presenting only other equitable issues, such as in a mortgage foreclosure case.<sup>80</sup>

### 15.5 *One-action laws and rules*

New Mexico has no one-action rule. Like other states, it does have rules against splitting causes of action and it recognizes principles of res judicata and collateral estoppel, so that if an obligee

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<sup>79</sup> *FDIC*, 118 N.M. at 82, 878 P.2d at 83.

<sup>80</sup> *State ex rel. McAdams v. District Court*, 105 N.M. 95, 96-97, 728 P. 2d 1364, 1365-66 (1986), *overruled in part on other grounds* by *Blea v. Fields*, 2005-NMSC-029, 138 N.M. 348, 120 P3d. 430.

does commence an enforcement action against a guarantor, it should consider asserting all of its claims against the guarantor in the action.<sup>81</sup>

## 15.6 Antideficiency laws

Normally, absent an agreement to the contrary, deficiency judgments are obtainable in cases involving commercial loans. This has long been established by case law for judicial foreclosures<sup>82</sup> and is now provided by statute for nonjudicial foreclosures under the Deed of Trust Act.<sup>83</sup>

## § 16 *Revival and reinstatement of guaranties*

New Mexico has no law dealing with these issues.

## § 17 *Choice of law rules*

New Mexico has no cases that construe choice-of-law clauses in guaranties, so its courts will apply principles applicable to contracts in order to construe these clauses.<sup>84</sup>

If a contract contains an effective choice-of-law clause and the contract is governed by the UCC, New Mexico courts will enforce the choice-of-law clause if transaction bears a reasonable relationship to the state or country designated, unless the application of the chosen law would offend New Mexico public policy or otherwise would violate some “fundamental principle of justice.”<sup>85</sup> Some believe that New Mexico would follow the same rule for a contract which contains a choice-of-law clause but which is outside of the UCC, if the issue were squarely presented.<sup>86</sup>

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<sup>81</sup> See, e.g., *Munzio*, 100 N.M. at 101, 666 P.2d at 1000 (“A party cannot by negligence or design withhold issues and litigate them in consecutive actions. He may not split his demands or defenses.”) (internal quotation marks & citations omitted) (emphasis omitted).

<sup>82</sup> See, e.g., *Armijo v. Pettit*, 34 N.M. 559, 561, 286 P. 827, 828 (1930).

<sup>83</sup> NMSA 1978, § 48-10-17 (2007).

<sup>84</sup> See *supra* § 6.1.

<sup>85</sup> NMSA 1978, § 55-1-301(A) (2005); see, e.g., *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 7, 144 N.M. 464, 188 P.3d. 1215. *Fiser* relied only upon the choice-of-law rules in the UCC; it did not rely upon any precedents, statutory or common law, outside of the UCC.

<sup>86</sup> See, e.g., *Burge v. Mid-Continent Cas. Co.*, 1997-NMSC-009, ¶ 11, 123 N.M. 1, 933 P.2d 210 (filed 1996) (“New Mexico law recognizes the validity of choice of law provisions contained in contracts.”) Dictum; parties stipulated to the choice of foreign state’s law. *Burge* relied upon only two cases for this statement. One case was dictum; the other was decided under the UCC. *Burge* did not overrule prior precedent to the contrary. *Stevenson v. Louis Dreyfus Corp.*, 112 N.M. 97, 98, 811 P.2d 1308, 1309 (1991) (“[P]arties are free to choose by contract a law to govern the performance and enforcement of contractual arrangements between them.”) Dictum; contract was not executed by both parties. *Stevenson* relied upon only one case for this statement. That case was decided under the UCC. *Stevenson* did not overrule prior precedent to the contrary. *Reagan v. McGee Drilling Corp.*, 1997-NMCA-014, ¶ 7, 123 N.M. 68, 933 P.2d. 867 (Pickard, J.) *Reagan* was decided before the *Burge* opinion was released for

If a contract does not contain an effective choice-of-law clause, the rules in New Mexico are different for contracts governed by the UCC and for those governed by the common law. If a contract does not contain an effective choice-of-law clause and is governed by the UCC, the New Mexico UCC applies to a transaction “bearing an appropriate relation to [New Mexico].”<sup>87</sup>

If a contract does not contain an effective choice-of-law clause and is not governed by the UCC, then absent a statute to the contrary, the general rule in New Mexico is that contracts 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).<sup>88</sup> This is the Restatement (First) of Conflict of Laws rule, which is otherwise followed in New Mexico.<sup>89</sup> Most, if not all, of the many<sup>90</sup> uniform laws enacted by statute in New Mexico that contain a choice-of-law provision are to the contrary.<sup>91</sup> They follow the Restatement (Second) of Conflict of Law rule.<sup>92</sup> That rule generally looks to the jurisdiction with the most significant relationship to an agreement.<sup>93</sup> There is no reason why the New Mexico Supreme Court could not use the legislature’s many enactments of the Second Restatement as additional support for the court’s own adoption of the Second Restatement as the common law of the state<sup>94</sup> when the issue is squarely presented.<sup>95</sup>

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publication; the release date was delayed because of pending motions for rehearing. *Reagan* noted that “our courts have strongly endorsed the view that the rights of parties to a contract are primarily determined by the terms of the contract. This strong endorsement may counsel that, if the issue were squarely presented, New Mexico would likely adopt the Restatement (Second) approach to choice of law under circumstances in which the parties had expressly chosen the law.” (Citations omitted), *limited on other grounds by Piña v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, ¶ 20. *Reagan* found it unnecessary to decide which Restatement should be applied because the result would be the same under both Restatements. *Reagan* contains an excellent overview of the differences between the First and Second Restatements. *Id.* ¶ 6.

<sup>87</sup> NMSA 1978, §§ 55-1-301(B) (2005).

<sup>88</sup> *See, e.g.*, *State Farm Mut. Ins. Co. v. Conyers*, 109 N.M. 243, 246-48, 784 P.2d 986, 989-91 (1989).

<sup>89</sup> *Id.*

<sup>90</sup> New Mexico has more uniform laws on its books than any other state. *See* Jurisdictions & Acts Adopted, U.L.A. Directory of Uniform Acts & Codes Tables - Index at 57-58 (2012).

<sup>91</sup> *See, e.g.*, NMSA 1978 § 46A-1-107(B) (2011) (part of the Uniform Trust Code; absent a controlling designation in the terms of a trust, the meaning and effect of the trust are determined by the law of the jurisdiction having the “most significant relationship to the matter at issue”).

<sup>92</sup> “Such provisions [as those in the Uniform Trust Code] deferring to the jurisdiction with the most significant relationship to an agreement are a hallmark of uniform laws, which generally follow the Second Restatement approach to conflict of laws. These provisions also stand in stark contrast to the New Mexico rules, which generally follow the First Restatement approach of looking to the place of the last act necessary for the formation of an agreement.” Jack Burton & Fletcher Catron, *Uniform Probate Code Amendments Take Effect Jan. 1, 2012*, 50 New Mexico Bar Bulletin 9, 11 (December 21, 2011).

<sup>93</sup> *Id.*

<sup>94</sup> *See* *U.S. Bank Nat’l Assoc. v. Martinez*, 2003-NMCA-151 ¶ 5, 134 N.M. 665, 812 N.M. 665, 81 P.3d 608 (using provision of Uniform Statute and Rule Construction Act, NMSA 1978, §§ 12-2A-1 to - 20 (1997), that was inapplicable to issue squarely presented in order to develop common law rule).

<sup>95</sup> *See supra* n. 86.

If a contract does not contain an effective choice-of-law provision, then no matter which type of law governs the contract – that is, whether the contract is governed by the UCC, another statute, or the common law – a court may always refuse to apply an out-of-state law if the out of state law “would offend New Mexico public policy.”<sup>96</sup>

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<sup>96</sup> *Reagan*, 1997-NMCA-014, ¶ 8; *see supra* § 2.6.2.