

NEW MEXICO COMMERCIAL LENDING LAW
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I. INTRODUCTION

This guide is an outline of many New Mexico laws that govern commercial lending transactions. It gives greater attention to real estate law because that law is more state specific than personal property law. It assumes a working knowledge of secured commercial finance principles.

The guide is necessarily general in coverage and is meant as an introduction. It is not sufficient to enable an out-of-state lawyer or even a non-specialist New Mexican to handle a typical New Mexico commercial lending transaction. It is also not intended for any litigation, arbitration, mediation, or other dispute resolution purpose.

New Mexico has little well-developed law on many subjects mentioned in this guide. This scarcity occurs for several reasons: New Mexico became a state only recently (1912), has a small population (estimated at less than 2.1 million on July 1, 2014), does not have a large amount of capital or industry, and much of its land is owned by the state or federal government.

In the absence of relevant New Mexico case law, local courts usually look to the restatements for guidance. *E.g.*, *Randles v. Hanson*, 2011-NMCA-059, ¶ 14, 150 N.M. 362, 258 P.3d 1154.² But in rare cases they do not. *E.g.*, *McAlpine v. Zangara Dodge, Inc.*, 2008-NMCA-064, ¶ 19, 144 N.M. 90, 183 P.3d 975.

In addition, the courts make frequent use of Official Comments in interpreting the state's many uniform laws. For a brief discussion of uniform laws and the use of these comments, see Section II. A. of this guide.

II. BASIC LEGAL STRUCTURE

New Mexico was governed first by many sovereign American Indian governments, then by Spain, and later by Mexico. When New Mexico became a part of the United States, it adopted the English common law, NMSA 1978, § 38-1-3,³ which completely supplanted the civil law of Spain and Mexico, except as far as the latter was incorporated into the state statutes. *Field v. Otero*, 1930-NMSC-060, ¶ 10, 35 N.M. 68,

¹ The views in this guide are those of the author alone and not those of his law firm, its other lawyers, or of any organization of which the author is a member. These views are stated as of April 1, 2015, and are subject to change.

² The first part of this case citation is an official, vendor-neutral citation form. The New Mexico Supreme Court requires its use for citations to all precedential New Mexico appellate court opinions. Rule 23-112(B)(1) NMRA (New Mexico Rules Annotated). The citation includes the year the opinion was released, the initials of the Court that issued the opinion, and a three-digit number assigned sequentially as opinions are released for publication each calendar year. *Id.* When a pinpoint citation is used, it consists of only a paragraph symbol and a paragraph number placed after the official citation. Parallel citation to the New Mexico Reports is mandatory, and citation to the Pacific Reporter is discretionary. Rule 23-112(B)(2).

³ Statutory references are to the New Mexico Statutes Annotated, 1978 Compilation.

290 P. 1015. But if a common law doctrine is not applicable to local conditions and circumstances or is obsolete, it will not be given effect. *Abo Petroleum Corp v. Amstutz*, 1979-NMSC-070, 93 N.M. 332, 600 P.2d 278 (declining to adopt the doctrine of destructibility of contingent remainders).

American Indian law has not been incorporated into state law, but remains applicable in “Indian Country.” For a brief discussion of American Indian law and the term “Indian Country,” see Section II. E. 1. of this guide.

A. Constitution and Statutory Law

The general law of New Mexico is contained in its constitution and the New Mexico Statutes Annotated (NMSA 1978). The NMSA 1978 is divided into seventy-seven chapters. Relevant chapters include:

- Chapter 39—Judgments, Costs, Appeals
- Chapter 42—Actions and Proceedings Relating to Property
- Chapter 45—Uniform Probate Code (UPC)
- Chapter 46A—Uniform Trust Code (UTC)
- Chapter 47—Property Law
- Chapter 48—Liens and Mortgages (including Deeds of Trust)
- Chapter 53—Corporations (including Limited Liability Companies)
- Chapter 54—Partnerships
- Chapter 55—Uniform Commercial Code (UCC)
- Chapter 56—Commercial Instruments and Transactions
- Chapter 58—Financial Institutions and Regulations
- Chapter 59A—Insurance Code

Many of New Mexico’s statutes are uniform laws. Most uniform laws are promulgated by the Uniform Law Commission (ULC), formerly known as the National Conference of Commissioners on Uniform State Laws. The sole exception is the UCC, which is produced jointly by the ULC and the American Law Institute. New Mexico has more uniform laws on its books than any other jurisdiction. *See Jurisdictions & Acts Adopted, U.L.A. Directory of Uniform Acts & Codes Tables - Index 58-59 (2014).*

The Official Comments to the uniform laws are especially helpful in New Mexico given its lack of case law and complete absence of legislative history. The uniform laws are generally adopted on a uniform basis so that the comments are as useful as possible.⁴

The annotated NMSA 1978 is not available on any free Web site, but is available on LexisNexis and Westlaw. The unannotated version of the New Mexico statutes is freely available at www.conwaygreene.com/newmexico.htm .

⁴ “When using an Official Comment, the reader should make sure that the section of the statute to which the comment refers has been adopted uniformly or, if it was not, that the non-uniform amendment does not affect the application of the comment to the section.” Jack Burton, *New Uniform Legislation You Should Know About*, 53 NM Bar Bulletin 8 (January 22, 2014).

B. Administrative Law

Most state agencies have promulgated regulations. They are found in the New Mexico Administrative Code (NMAC). The NMAC is available at <http://164.64.110.236/nmac>.

C. Courts

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 deeds of trust, and to appoint receivers. In addition, each county has magistrate courts, except that Bernalillo County, in which Albuquerque, the state's largest city, is located, has a metropolitan court. Appeal from a magistrate court is to the district court where the appeal is usually decided by trial de novo. Many cities and towns other than Albuquerque have municipal courts. Contested probate matters are heard in the district courts. Uncontested matters may be heard either in the district courts or probate courts, which are located in each county. Under the Uniform Probate Code, if a family member does not open a probate proceeding within a certain time period, a creditor may do so in order to foreclose a lien on property formerly owned by a decedent or to collect an unsecured debt from the estate of a decedent.

The New Mexico Court of Appeals is the appellate court of right for most appeals in civil cases. It sits in panels of three in Albuquerque and in Santa Fe, the state capital. The New Mexico Supreme Court hears most of its civil cases on certiorari from the Court of Appeals. The Supreme Court also hears civil matters by certification from the Court of Appeals, from district courts, and by certification under the Uniform Certification of Questions of Law Act (1995) from courts of other states and federal courts. The Supreme Court sits in Santa Fe.

The federal district court in New Mexico is the United States District Court for the District of New Mexico. Some of its judges sit in Albuquerque; some in Santa Fe; and some in Las Cruces, the largest city in the southern part of the state. The United States Bankruptcy Court for the District of New Mexico usually sits in Albuquerque. New Mexico is within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, which usually sits in Denver.

D. Court Rules and Rules of Evidence

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. The New Mexico Supreme Court issues rules of practice and procedure for most of the state's other courts, rules establishing testimonial and evidentiary privileges, and many other types of rules for courts and lawyers. In common with some other states that have enacted the Uniform Probate Code, New Mexico has not adopted rules of procedure for its probate courts. The Supreme Court has recently appointed a committee to rectify this omission.

E. Excluded Laws

1. American Indian Law

New Mexico is home to two American Indian Nations, several tribes, and many pueblos, all of which regard themselves as sovereigns. Coverage of their law is beyond the scope of this guide. Lending to them or their entities requires special care. As does

making loans secured by collateral on an Indian reservation or in other “Indian Country”. “Indian Country” is defined in 18 U.S.C. § 1151 and *Buzzard v. Oklahoma Tax Comm’n*, 992 F.2d 1073 (10th Cir. 1993). Loan documents may require enforcement in American Indian courts under American Indian law, including customary, unwritten law and procedures. Principles of sovereign immunity may bar suit against the American Indian nations, tribes, pueblos, or their constituent entities in any court unless the immunity is effectively waived. And contracts may be void unless they receive certain federal regulatory approvals. *E.g.*, *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056 (E.D. Wisc. 2010), *aff’d in part and rev’d in part*, 658 F.3d 684 (7th Cir. 2011).

2. Other Excluded Law

This guide does not address federal and international law, local law, which is the law of counties, municipalities and other political subdivisions, and state law dealing with consumers and consumer rights, unfair trade practices, torts and similar doctrines, construction law, most water and water rights, most minerals and mineral rights, most environmental matters, most agricultural matters, and most criminal law, including, but not limited to, loan sharking, but the guide does cover usury. Nor does it address legislation which has not yet become effective, except for a few instances, or pending litigation or rule making.

III. AUTHORITY TO DO BUSINESS AND TAXATION

A. Required Qualification to Do Business; Trade Names

Most out-of-state lenders, without in-state offices or employees, are not required to qualify to do business in New Mexico because of one or more statutes. First, NMSA 1978, § 38-1-18 provides:

Any 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 or corporation of the United States government, the foreign corporation, bank, or trust must first appoint the Secretary of State as its agent for service of process arising out of such transactions. The statement of appointment must be signed by the institution’s president, secretary, treasurer, or general manager. *Id.*

Second, several state laws are applicable to different types of business entities. These laws list types of activities that do not constitute doing business in the state for the purpose of registering to do business as a foreign entity. Section 53-17-1, for example, lists these activities for a foreign corporation:

- 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; and
- 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 (LLCs) have a virtually identical list. NMSA 1978, § 53-19-54. So do foreign business trusts. NMSA 1978, § 54-20-3.

There is no provision for registration of foreign general partnerships, except for foreign limited liability partnerships (LLPs), which have an even longer list of activities that do not constitute transacting business in New Mexico. NMSA 1978, § 54-1A-1104.

Foreign limited partnerships (LPs) have the same list as LLPs of activities that do not constitute transacting business. NMSA 1978, § 54-2A-903. During the statutory drafting process, the uniform list of ten excluded activities was expanded to fourteen by the author of this guide to conform to the LLP statute.

The fact that a lender is not required to register as a foreign entity doing business in the state does not mean that the lender is exempt from taxation or that its activities will not give rise to service of process. *e.g.*, NMSA 1978 § 54-2A-903(C). Entirely different considerations apply to those determinations.

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

Transacting business without registering does not impair the validity of an entity's contracts or prohibit the entity from defending an action or proceeding in the state, *e.g.*, NMSA 1978, § 54-2A-907, nor does it create liability for the entity's partners or members solely by reason of being a member or partner of the entity, *i.d.*, but the entity is prohibited from maintaining any action or proceeding in New Mexico, *i.d.*, 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 all foreign entities is the now the office of the Secretary of State. The duties of the Public Regulation Commission (PRC) that formerly pertained to corporations and LLCs have been transferred to the Secretary of State.

New Mexico has no fictitious or trade name regulation. It does, however, have a trade name statute, the New Mexico Trademark Act. NMSA 1978, §§ 57-3B-1 to -17. This statute preserves common law rights to trade names. Among those common law rights is the right to appropriate a trade name to one's use without registration of the name. Registration with the state of a trade name as a trade mark does not provide constructive notice of one's trade name, so another person can properly use a registered trade name in a different market from that in which it is being used by the registrant, if the use is in good faith. *S & S Invs., Inc. v. Hooper Enters., Ltd.*, 1993-NMCA-122, ¶¶ 5, 6, 116 N.M. 393, 862 P.2d 1252. (The federal Lanham Act is to the contrary. *Id.*)

B. Licensing Requirements and Regulation of Financing

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

- Some mortgage loan companies and loan brokers must register with the Director of the Financial Institutions Division of the Regulation and Licensing Department. NMSA 1978, § 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 1978, § 58-21-6.
- Some residential mortgage loan originators must register with and be licensed by the Director of the Financial Institutions Division of the Regulation and Licensing Department. NMSA 1978, § 58-21B-4. Certain employees of depository institutions are exempt from these requirements. *Id.*
- Persons 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 1978, § 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.*

C. Taxation

The New Mexico income tax rate on corporations, business trusts, and banks will drop in increments over a period of several years. It now ranges from 4.8% to 6.9%, depending on the amount of income. NMSA 1978, § 7-2A-5. For tax years beginning on or after 2018, it will range from 4.8% to 5.9% depending on the amount of the income. *Id.* Income of taxpayers operating both 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 1978, §§ 7-4-1 to -21.

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 located in New Mexico. NMSA 1978, § 7-4-8.

The bad news is 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 1978, § 7-4-10, which requires consideration of the property, payroll, and sales of the taxpayer in New Mexico compared with those factors elsewhere.

New Mexico imposes a tax on the gross receipts received by almost anyone from selling almost anything, including services. *See* Gross Receipts and Compensating Tax Act, NMSA 1978, §§ 7-9-1 to -114. The rate of tax imposed by the state is five and one-eighth percent. NMSA 1978, § 7-9-4. By law, counties, 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 between eight and eight and one-half percent.

Fortunately for lenders, interest on money loaned is exempt from the gross receipts tax. NMSA 1978, § 7-9-25. But some miscellaneous receipts of lenders may be taxable.

New Mexico has no intangibles tax, recording tax, stamp tax, or similar tax on mortgages, loans, or the like.

IV. INTEREST AND USURY; PROMISSORY NOTES

A. Compound Interest

The recovery of interest on interest prior to judgment is not permitted absent a contract or statute authorizing it. *S. Union Expl. Co. v. Wynn Expl. Co., Inc.*, 1981-NMCA-006, ¶ 37, 95 N.M. 594, 624 P.2d. 536; *Consolidated Oil & Gas, Inc. v. S. Union Expl. Co.*, 1987-NMSC-055, ¶ 38, 106 N.M. 719, 749 P.2d 1098.

B. Usury

Usury is generally not a concern for most commercial lenders. The general usury statute, former NMSA 1978, § 56-8-11.1, was repealed in 1991. The result is that, with 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 fifteen percent." NMSA 1978, § 56-8-3.

Several vestiges of New Mexico's usury statutes remain. First, the rate of commission chargeable for "negotiating or securing" any loan is limited to six percent for any loan of more than \$50,000 and lesser rates for smaller amounts. NMSA 1978, § 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 1978, § 56-8-8.

Second, lenders may charge a premium or points of not more than three percent of the face amount of an interim construction loan. NMSA 1978, § 56-8-9(D). The principal is liable for the acts of its agent. NMSA 1978, § 56-8-12. The penalty for violating Section 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 1978, § 56-8-13. Violation is a misdemeanor, punishable by a fine.

Third, corporations, partnerships, and their limited and general partners are forbidden to assert a claim or defense of usury. NMSA 1978, § 56-8-21. This statute does not mention limited liability companies because it was enacted in 1975, long before those entities appeared in New Mexico. New Mexico's Limited Liability Company Act was not enacted until 1993. NMSA 1978, Ch. 53, art. 19, enacted by 1993 N.M. Laws, Ch. 280.

Fourth, the right to agree on an interest rate is not a license to overreach. Under the common law and the Uniform Commercial Code, NMSA 1978, § 55-2-302, the terms of a contract may not be unconscionable. *State ex rel. State Hwy. & Transp. Dep't v. Garley*, 1991-NMSC-008, ¶¶ 31, 32, 111 N.M. 383, 806 P.2d 32. UCC Section 2-302(1) "is virtually identical" to Restatement (Second) of Contracts § 208 (1971). *Id.* ¶ 31. UCC Section 2-302 "sets out what should be the rule under the common law doctrine of unconscionability as applied to all contracts," including those affecting real property. *Id.* ¶ 32. An interest rate in excess of 1,100% is unconscionable as a matter of law. *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 49, 329 P.3d 658.

C. Acceleration

Exercise of any rights to accelerate all sums due under a note upon a default (1) may be ineffective, absent notice to the borrower of such acceleration, even where the borrower has waived notice of acceleration, *Comer v. Hargrave*, 1979-NMSC-059, 93 N.M. 170, 598 P.2d 213, and (2) is subject to NMSA 1978, § 55 1-309, which provides that "[a] term providing that one party . . . may accelerate payment or performance or require collateral or additional collateral 'at will' or when the party 'deems itself insecure,' or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired." A lender can be held liable for wrongful acceleration where it accelerates, without prior notice or opportunity to cure, even though permitted by the language of the parties' agreement, in certain circumstances. *J.R. Hale Contracting Co. v. United N. M. Bank*, 1990-NMSC-089, 110 N.M. 712, 799 P.2d 581.

D. Demand Notes

The statute of limitations on a non-negotiable demand note begins to run upon the date that it is executed. *W. Bank v. Franklin Dev. Corp.*, 1991-NMSC-009, ¶ 6, 111 N.M. 259, 804 P.2d 1078. The rule is different under the UCC for a negotiable demand note. If a demand for payment is made, the statute of limitations begins to run upon the date of the demand. NMSA 1978, § 55-3-118(b). If no demand is made, the claim is barred if neither principal nor interest has been paid on the note for a continuous period of ten years. *Id.*

E. Place of Payment

Except for Section 3-111 of the UCC, codified in New Mexico at NMSA 1978, § 55-3-111, New Mexico has no well-established body of law dealing with this subject.

F. Application of Payments

New Mexico has no well-established body of law dealing with this subject.

G. Prepayment

In commercial transactions, New Mexico appellate courts have not given substantive attention to the common law rule that prohibits prepayment of a note absent a provision authorizing prepayment or the other consent of the holder. *See Naumburg v. Pattison*, 1985-NMSC-120, ¶ 24, 103 N.M. 649, 711 P.2d 1387 (Stowers, J. dissenting).

The rule is different for notes secured by residential real estate. Prepayment is permitted without penalty or premium. NMSA 1978, § 56-8-30. The statute also forbids a complete prohibition on prepayment. *Naumburg*, 1985-NMSC-120, ¶ 14. This statute is, however, preempted by federal law for national banks. *Stoneking v. Bank of Am., N.A.*, 2002-NMCA-042, ¶ 10, 132 N.M. 79, 43 P.3d 1089. New Mexico state banks are granted the same power and authority as national banks, federal credit unions, and federal savings associations. 12.16.76.8 NMAC, 12.16.76.9 NMAC; NMSA 1978, §§ 58-1-34(A)(2)(b), 58-1-54. This means that the statute is also preempted for New Mexico state banks.

V. TYPES OF BORROWERS

A. Corporations

New Mexico business corporations are governed by the Business Corporation Act. NMSA 1978, Ch. 53, arts. 11-18. Nonprofit corporations are governed by article 8 and professional corporations by article 6. The Business Corporation Act is derived from the American Bar Association's Model Business Corporation Act, but many amendments have been made to the New Mexico act and many 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 Secretary of State 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 Secretary of State.

A corporate seal is 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 1978, § 53-11-4(C).

B. Partnerships

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

New Mexico's current partnership law permits the formation of three types of partnerships: (1) general partnerships, (2) LLPs, which are formed under the general partnership act but afford limited liability to its partners, and (3) limited liability

limited partnerships (LLPs), which are formed under the Revised Uniform Limited Partnership Act.

The Uniform Partnership Act is codified at NMSA 1978, Chapter 54, article 1A. It was promulgated by the Uniform Law Commission in 1994. It governs New Mexico general partnerships and LLPs 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 1978, § 54-1A-307. This was one of the major changes in the 1994 revision of the Uniform Partnership Act by the Uniform Law Commission.

General partnerships are not required to file anything with the Secretary of State. An LLP must file simple documents with the Secretary of State. A partner in a LLP is no more liable for the obligations of the LLP 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 Revised Uniform Limited Partnership Act is codified at NMSA 1978, Chapter 54, article 2A. It was promulgated by the Uniform Law Commission in 2001. It applies to LPs 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 LPs. Those LPPs are automatically LLPs. The LP agreement is not filed with the Secretary of State.

General partners of a LLP 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.

C. Limited Liability Companies

New Mexico LLCs are governed by its nonuniform Limited Liability Company Act. NMSA 1978, Ch. 53, art. 19. New Mexico LLCs 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 1978, § 53-19-13.

Lenders dealing with a New Mexico LLC customarily obtain from the Secretary of State 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 Secretary of State.

Although future legislation is generally outside the scope of this guide, legislation is under consideration by a bar association committee that may result in the enactment of the Uniform Limited Liability Company Act (2006, last revised 2013). This uniform law, if enacted, would not materially change the statements made above about New Mexico limited liability companies.

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 in the last paragraph of Section III. A of this guide, 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. Marital Property Laws; Community Property

New Mexico is a community property state. Its community property statutes are modeled on the civil law of Spain and Mexico. *McDonald v. Senn*, 1949-NMSC-020, ¶ 9, 53 N.M. 198, 204 P.2d 990. Lenders should 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 1978, §§ 40-3-6 to -17.

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 1978, §§ 40-3-8(F), 47-1-36.

Dower and curtesy have been abolished. NMSA 1978, § 45-2-112. As have tenancies by the entirety. *Swink v. Fingado*, 1993-NMSC-013, ¶ 16 n. 9, 115 N.M. 275, 850 P.2d 978.

New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights, protections, and responsibilities that derive from civil marriage under New Mexico law. *Griego v. Oliver*, 2014-NMSC-003, ¶ 6, 316 P.3d 865. A valid common law marriage may not be consummated in New Mexico. *Gabalton v. Gabalton (In re Gabalton’s Estate)*, 1934-NMSC-053, 38 N.M. 392, 34 P.2d 672. But if it is valid where consummated, it will be recognized in New Mexico. NMSA 1978, § 40-1-4.

Separate property is (1) property acquired before marriage or after the entry of a decree of dissolution of marriage, (2) property acquired after permanent separation and the entry of a decree of division of property unless the decree provides otherwise, (3) property designated as separate property by a court judgment, (4) property acquired during marriage by gift or inheritance, and (5) property designated as separate property in an agreement between the spouses. NMSA 1978, § 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 1978, § 40-3-12. Finally, on 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).

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 1978, § 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 1978, § 40-3-13.

The doctrine of after-acquired title cannot be used to cure defects in mortgages or other documents that were void at the time of execution because of the failure of both spouses to join. *C & L Lumber & Supply, Inc., v. Tex. Am Bank/Galleria*, 1990-NMSC-056, ¶ 35, 110 N.M. 291, 795 P.2d 502.

The rules are different for personal property. 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 (1) named in a document evidencing ownership of community personal property or (2) named in a written agreement between that spouse and another person and a third party as having authority to manage, control, dispose of, or encumber the community personal property that is described in the agreement. NMSA 1978, § 40-3-14. Again, there is no rule that the document or agreement must be recorded or otherwise be made a public record.

A spouse need not join with the other spouse when the other gives a power of attorney. NMSA 1978, § 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 1978, § 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, 1691f, and Regulation B promulgated thereunder, 12 C.F.R. §§ 202.1-16.

Because of the uncertainties created by New Mexico’s community property laws, some 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, 1691f, and Regulation B promulgated thereunder, 12 C.F.R. §§ 202.1-16.

2. Property Held in Joint Tenancy With Right of Survivorship

A mortgage by only one joint tenant does not encumber the interest of the other joint tenant, nor does it sever the tenancy. *Tex. Am. Bank/Levelland v. Morgan*, 1987-

NMSC-014, ¶¶ 8, 9, 105 N.M. 416, 733 P.2d 864. But if the joint tenants are married persons and own the joint tenancy property as community property, New Mexico's community property laws require that both tenants join in the conveyance of even one tenant's interest. For a discussion of these community property laws, see Section V. D. 1. of this guide.

To create a joint tenancy it is necessary only to convey property to two or more persons and to describe them in the conveyance as joint tenants. NMSA 1978, § 47-1-35. Spouses may own real property as joint tenants in addition to having community property rights. NMSA 1978, § 47-1-36. On the other hand, if the conveyance is to two or more persons, not executors or trustees, and not married to each other, then the persons take as tenants in common, unless the conveyance clearly states otherwise. NMSA 1978, § 47-1-15.

3. 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 \$60,000 for each person owning a homestead. NMSA 1978, § 42-10-9. If a person does not own a homestead, an additional \$5,000 exemption for real or personal property is allowed. NMSA 1978, § 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; tools of trade valued at up to \$1,500; jewelry valued at up to \$2,500; the following with an unlimited value: clothing; furniture; books; medical-health equipment for personal use; and an interest in and proceeds from a pension or retirement fund, NMSA 1978, §§ 42-10-1, 42-10-2; and benevolent association benefits of up to \$5,000 payable to a member's family, NMSA 1978, § 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 1978, §§ 42-10-6, 42-10-7, 42-10-10. A consensual lien is a waiver of the homestead exemption. *Tomson v. Lerner*, 1933-NMSC-078, ¶ 16, 37 N.M. 546, 25 P.2d 209. A guarantor may waive in advance a homestead exemption. *First State Bank v. Muzio*, 1983-NMSC-057, ¶ 5, 100 N.M. 98, 666 P.2d 777, *overruled on other grounds*, *Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, ¶ 32, 116 N.M. 254, 861 P.2d 935.

4. Age of Majority

The age of majority in New Mexico for most purposes is 18. NMSA 1978, § 28-6-1.

E. Trusts and Estates

New Mexico has enacted the Uniform Trust Code (UTC) with several nonuniform provisions and omissions. NMSA 1978, Ch. 46A.

The UTC 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 1978, § 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 1978, § 46A-

10-1011(A). In addition, the third party may rely on 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 1978, § 46A-10-1012.

New Mexico has enacted the Uniform Probate Code (UPC) with a number of nonuniform provisions. NMSA 1978, Ch. 45.

Most claims against a decedent's estate that arose before the decedent's death must be presented within the shorter of (a) one year after the decedent's death, or (b) the time provided for any creditor who is given an optional notice. NMSA 1978, § 45-3-803. That time is the later of (i) 60 days after notification to creditors by delivery or mail, or (ii) four months after the last of three weekly publication in a newspaper. NMSA 1978, § 45-3-801. 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 1978, § 45-3-804.

The UPC does not require court approval for the sale of real estate by the personal representative. Title insurance companies routinely insure title to this real property as soon as the estate has been opened, and the personal representative has been appointed, has qualified, and has signed and acknowledged a deed in proper form.

VI. REAL ESTATE LENDING

A. Property Rights

Most of New Mexico's real property law is contained in its common law and its customs and practices. The few relevant statutes are codified primarily at NMSA 1978, Chapter 14, article 9 (Records Affecting Real Property); Chapter 39, article 5 (Sales under Execution and Foreclosure); Chapter 47 (Property Law); and Chapter 48 articles 7 (Mortgages) and 10 (Deeds of Trust). For a brief discussion of minerals, water, and agriculture, which are excluded from coverage in this guide, see Sections XII. D. E. and F. of this guide.

B. Leases

Real property conveyancing statutes apply to leaseholds. NMSA 1978, § 47-1-1; *RTC v. Binford*, 1992-NMSC-068, ¶ 20, 114 N.M. 560, 844 P.2d 810. This means that leaseholds are not foreclosed under UCC Article 9 but under real estate mortgage law. *Id.* ¶¶ 21, 23, 24, 25. Even though leases are conveyed under real property rules, they still remain personal property. *Id.* ¶ 28.

C. Condominiums

New Mexico has its own Condominium Act. NMSA 1978, §§ 47-7A-1 to -7D-20. It is based on the Uniform Condominium Act. *Id.* One of the many local variations subordinates mortgages or deeds of trust on a condominium unit to the lien of the condominium association for its assessments and fines unless otherwise provided in the condominium declaration. NMSA 1978, § 47-7C-16(H).

D. Types of Real Property Security Instruments

1. Deeds of Trust

The Deed of Trust Act, NMSA 1978, §§ 48-10-1 to -21, was amended in 2007 to remove many obstacles to its use. The act still has failed to attract any use in contested commercial cases because some obstacles remain: Some types of property cannot be used as trust real estate, some types of entities and individuals are ineligible to serve as trustee, there is a long waiting period after the notice of sale and before the date of the sale, and there is the same redemption period after the sale as with a mortgage, among others. Regional lenders report that commercial foreclosure practices and procedures under New Mexico's Deed of Trust Act are more cumbersome and uncertain than those under deed-of-trust laws in adjoining states.

Some lenders nevertheless use their out-of-state deed-of-trust forms in New Mexico but provide that the deed of trust may be foreclosed in the same manner as a mortgage. They also make other changes necessary to conform the document to New Mexico law. Many New Mexico lawyers are not sure why they go to this effort, as legislative changes to the New Mexico Deed of Trust Act in the past have had only prospective effect.

2. Mortgages

The mortgage is still the security instrument most often used to encumber real estate. Mortgages are governed primarily by the common law in New Mexico.

3. Real Estate Contracts

Real estate contracts, called contracts for deed in some states, are still used in New Mexico, primarily by persons who do not or cannot make large down payments required by conventional loans. Printed forms of the real estate contract are commonly used that provide for the escrow of a deed from the seller to the buyer to be delivered upon timely payment of the installments of the purchase price, together with the escrow of a special warranty deed back from the purchaser to be used in the case of a default. The payments are made through the escrow agent. The real estate contract is recorded. The legal title remains in the seller, while the equitable title is transferred immediately to the purchaser upon recordation of the real estate contract. Title insurance is optional, and if used, is often furnished at the time the real estate contract is recorded.

E. Formalities of Deeds of Trust and Mortgages

There are no special formalities that must be observed in connection with the execution of a deed of trust or mortgage in New Mexico. The mortgagor or trustor need only sign the document to make it enforceable against the mortgagor or trustor. NMSA 1978, § 47-1-5. An acknowledgment is unnecessary to make the instrument enforceable between the parties, but is necessary to allow it to be recorded. *Garrett Bldg. Ctrs., Inc. v. Hale*, 1981-NMSC-009, ¶¶ 8, 9, 95 N.M. 450, 623 P.2d 570. Seals or scrolls are unnecessary. NMSA 1978, § 47-1-6. But if the mortgagor or trustor is married, it is necessary for the spouse to join in signing most mortgages and deeds of trust. See the discussion of community property in Section V. D. 1. of this guide. There are no special formalities for any such joinder, except that it is customary to recite that they are signing as married persons. In the past it has also been customary for the notary to include the marital relationship in the notarization.

F. Assignments of Leases and Rents

New Mexico has enacted the Uniform Assignment of Rents Act. NMSA 1978, §§ 56-15-1 to -19. An assignment of rents constitutes a presently effective security interest in "rents" as defined in the act. The assignment of rents may be contained in the

mortgage or deed of trust itself. The assignment is perfected automatically upon recordation. With several exceptions, the act applies to an assignment of rents made before the act's effective date, January 1, 2012. NMSA 1978, § 56-15-19. New Mexico has no well-developed body of law dealing with "rents" outside the definition of that term in the uniform act.

G. Recordation and Acknowledgments

1. Recordation

The proper place to record an instrument affecting real estates is in the records of the county clerk of each county where any affected real estate is located. NMSA 1978, §14-9-1.

All deeds, mortgages, leases of an initial term plus option terms in excess of five years, or memoranda of the material terms of such leases, assignments or amendments to such leases, and other writings affecting the title to real estate shall be recorded. *Id.* There is no requirement that the instrument be recorded within any particular time. *Angle v. Slayton*, 1985-NMSC-032, ¶ 10, 102 N.M. 521, 697 P.2d. 940.

The statute is a "notice" statute. *Id.* ¶ 8. It requires only that the instrument be recorded before a subsequent purchaser acquires an interest in the property. *Id.* ¶¶ 9, 10.

NMSA 1978, Section 14-9-2 provides that recordation constitutes notice to "all the world." The broad application of this statute has been limited by judicial interpretation to those who are bound to search the record. *Angle*, 1985-NMSC-032, ¶ 7.

Former NMSA 1978, Section 48-7-2, which required the recordation of assignments of mortgages, was repealed in 2009. 2009 N.M. Laws, Ch. 234, § 18.

An unrecorded instrument does not provide constructive notice to a subsequent purchaser, encumbrancer in good faith or judgment lien creditor without knowledge of the unrecorded instrument. NMSA 1978, § 14-9-3.

Failure to properly acknowledge a document relating to real property renders its recording ineffective. NMSA 1978, § 14-8-4; *F & S Co. v. Gentry*, 1985-NMSC-065, ¶ 9, 103 N.M. 54, 702 P.2d. 999; *AG New Mexico, FCS, ACA v. Borges (In re Borges)*, 485 B.R. 743 (Bankr. D.N.M. 2012) (collecting cases), *aff'd*, 510 B.R. 306 (B.A.P. 10th Cir. 2014) (also collecting cases).

Powers of attorney containing authority to convey real estate, or by which real estate may be affected, must be acknowledged, certified to, and recorded. NMSA 1978, § 47-1-7; *Miera v. Miera*, 1919-NMSC-016, 25 N.M. 299, 181 P. 583. The power of attorney is not revoked until an instrument of revocation is also acknowledged, certified to, and recorded in the same records. NMSA 1978, § 47-1-7.

New Mexico has enacted the Uniform Power of Attorney Act. NMSA 1978, §§ 45-5B-101 to -403.

New Mexico has also enacted the Uniform Real Property Electronic Recording Act. NMSA 1978, §§ 14-9A-1 to -7.

2. No Official Torrens System

New Mexico does not maintain a Torrens System of filing or recording. But many title insurance companies, or their local agents, maintain these filing systems for their own internal use. *F & S Co.*, 1985-NMSC-065, ¶ 9. A person is not required to search these private tract records in order to achieve the status of a bona fide purchaser without notice. *Id.*

3. Notary Acknowledgments

A document must be acknowledged to be recorded, with few exceptions. NMSA 1978, § 14-8-4. New Mexico has adopted the 1982 version of the Uniform Law on Notarial Acts. NMSA 1978, §§ 14-14-1 to -10. Short, statutory forms of acknowledgments are found at NMSA 1978, § 14-4-8. A form of acknowledgment used in the foreign state where the acknowledgment is taken is also sufficient. NMSA 1978, § 14-14-7(B)(3).

4. Recording Fees

Fees for recording mortgages and other documents are not high and vary according to the number of documents recorded, number of pages in each document, number of names indexed, and the like.

H. Priority Issues

1. Future Advances

Future advances may be secured by the lien of mortgages and deeds of trust. The lien of the security instrument has priority over intervening liens as to all advances, obligatory or discretionary, up to the maximum amount stated in the recorded lien instrument. NMSA 1978, § 48-7-9. The amount of a loan or advance in excess of the maximum amount stated is unsecured. *Pioneer Sav. & Trust, F. A. v. Rue*, 1989-NMSC-079, ¶ 6, 109 N.M. 228,784 P2d 415.

2. Modification of Deeds of Trust and Mortgages

New Mexico has no well-developed body of law dealing with this subject.

3. Purchase Money Priority

New Mexico has no well-developed body of law dealing with this subject.

4. Priority of Options to Purchase

New Mexico has no well-developed body of law dealing with this subject.

5. Priority of Rights of Reverter

New Mexico has no well-developed body of law dealing with this subject. But see NMSA 1978, § 45-2-912 for time limits on certain possibilities of reverter and § 45-2-913 for exclusions from that section.

6. Equitable Subrogation

New Mexico recognizes the doctrine of equitable subrogation. *FDIC v. Moore*, 1994-NMSC-072, ¶ 13, 118 N.M. 77, 879 P.2d 78. Subrogation is an equitable remedy “of civil law origin whereby through a supposed succession to the legal rights of another, a loss is put ultimately on that one who in equity and good conscience should pay it. It is

a remedy for the benefit of one secondarily liable, who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor.” *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 23, 124 N.M. 624, 954 P.2d 56 (internal quotation marks & citation omitted) (alteration omitted). Courts will analyze complicated lending situations to determine which party is actually the primary obligor and which is secondarily liable. *Montoya v. HRW of Las Cruces, Inc., (In Re Wiley)*, 438 B.R. 331 (Bankr. D.N.M. 2010).

7. Subordination Agreements

New Mexico has no well-developed body of law dealing with this subject.

I. 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. New Mexico has promulgated its own forms based on the 2006 American Land Title Association (ALTA) policy forms and many ALTA endorsements. *See generally* NMSA 1978, Ch. 59A, art. 30 – Title Insurance; NMAC -- Title Insurance, Title 13, Ch. 14.

J. Prepayment

New Mexico appellate courts have not given substantive attention in commercial transactions to the common law rule that prohibits prepayment of a note absent either a provision in the loan documents authorizing prepayment or another form of consent of the holder. *See Naumburg v. Pattison*, 1985-NMSC-120, ¶24, 103 N.M. 649, 711 P.2d 1387 (Stowers, J. dissenting). No state statute addresses this issue for commercial loans.

The rule is different for notes secured by residential real estate. Prepayment is permitted without penalty or premium. NMSA 1978, § 56-8-30. The statute also forbids a complete prohibition on prepayment. *Naumburg*, 1985-NMSC-120, ¶ 14. But this statute is preempted by federal law for national banks. *Stoneking v. Bank of Am., N.A.*, 2002-NMCA-042, ¶ 10, 132 N.M. 79, 43 P.3d 1089. New Mexico state banks are granted the same power and authority as national banks, federal credit unions, and federal savings associations. 12.16.76.8 NMAC; 12.16.76.9 NMAC; NMSA 1978, §§ 58-1-34(A)(2)(b), 58-1-54. This means that the statute is also preempted for New Mexico state banks.

K. Due on Sale or Encumbrance Clauses

New Mexico has two statutes relevant to the enforceability of a due-on-sale clause authorizing a lender either (a) to accelerate an indebtedness if the real property collateral is transferred contrary to a prohibition in the loan documents or (b) to demand an increase in the interest rate as a condition of approving an assumption of the loan. They are NMSA 1978, §§ 48-7-20 and -21. Section 48-7-20 prohibits a lender from exercising any option in a “due-on-sale” clause upon occurrence of any of the events there set forth. Section 48-7-21 requires a lender to prove that its security

interest in the property would be substantially impaired by a transfer as a condition of its foreclosing.

Section 341 of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 1701j-3, may preempt the application of Sections 48-7-20 and -21 to any due-on-sale clause authorizing acceleration if the real property collateral is transferred. The preemption argument does not appear to be readily applicable to a provision authorizing a lender to demand an increase in the interest rate or a fee as a condition of approving an assumption of the indebtedness or a transfer of the collateral.

L. Transfer of the Mortgaged Property; Assumption Agreements

Anyone who owns property in New Mexico may convey it unless restricted by the loan documents, other agreement, or law. NMSA 1978, § 47-1-4 (stating that anyone who owns property may convey it).

New Mexico has not altered the common-law rule against restraints on alienation. This fact prevented at least some borrowers' counsel from issuing opinions about the enforceability of provisions which prohibited the partition of properties owned by large tenancies in common when such tenancies were common borrowers.

New Mexico has no well-developed body of law on the subject of assumption agreements.

M. Transfer of Deeds of Trust and Mortgages

1. Recording Statutes

New Mexico law does not require that an assignment or other transfer of a deed of trust or mortgage be recorded. The statute that formerly required the recordation of assignments of mortgages, NMSA 1978, § 48-7-2, has been repealed. 2009 N.M. Laws, Ch. 236, § 18. However, an unrecorded assignment does not provide constructive notice of the transfer. NMSA 1978, § 14-9-3.

2. Uniform Commercial Code

A deed of trust or mortgage cannot be transferred separately from the note that it secures. If the note is transferred, the deed of trust or mortgage automatically follows the note without the need of an assignment of the deed of trust or mortgage. *Citizens' Bank v. Brown*, 1934-NMSC-037, ¶¶ 10, 20, 38 N.M. 310, 32 P.2d 755; Restatement (Third) Property: Mortgages § 5.4(a) (1997); NMSA 1978, § 55-9-203(g) cmt.9 ("Collateral Follows Right to Payment or Performance. Subsection (g) codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.").

N. Cancellation 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 1978, § 48-7-4. There is a penalty for failure to do so; in addition, the lender is liable for the borrower's attorney fees. NMSA 1978, § 48-7-5.

0. Default and Foreclosure Remedies

1. Foreclosure of Mortgages and Deeds of Trust

Judicial foreclosure is required for mortgages. Nonjudicial foreclosure is permitted by statute for commercial deeds of trust that comply with the Deed of Trust Act. NMSA 1978, §§ 48-10-1 to -10. But as discussed in Section VI. D. 1. of this guide, nonjudicial foreclosure has not yet been used in a contested foreclosure case in New Mexico. Deeds of trust also commonly provide that they may be foreclosed judicially in the manner of a mortgage at the lender's option.

The property may be redeemed before the sale by paying the full amount owed including the full accelerated amount. NMSA 1978, § 39-5-17. State law grants no right to cure and reinstate.

State statutes grant a redemption right after a judicial foreclosure sale, NMSA 1978, § 39-5-18, and after a trustee's foreclosure sale, NMSA 1978, § 48-10-16. The redemption period is nine months after either a judicial sale, NMSA 1978, § 39-5-18, or a trustee's sale, NMSA 1978, § 48-10-16. A mortgagor or trustor may not waive this post-sale statutory redemption period; however, the mortgagor or trustor may agree in the mortgage or the deed of trust to shorten the nine-month statutory redemption period to not less than one month. NMSA 1978, §§ 39-5-19 (judicial sales), § 48-10-16 (trustees' sales).

Even if the statutory redemption period is shortened by agreement a court may increase it only for judicial sales to not more than nine months upon a sufficient showing that redemption will be made. NMSA 1978, § 39-5-19. And the court has equitable power to extend the statutory redemption period even further either because of clerical or judicial error or because of fraud or other misconduct by the purchaser at the foreclosure sale. *Brown v. Trujillo*, 2004-NMCA-040, ¶¶ 21, 22, 135 N.M. 365, 88 P.3d 881; *Chapel v. Nevitt*, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889.

The redemption period after a judicial foreclosure sale runs from the date of the order confirming the sale. *Morgan v. Tex. Am. Bank/Levelland*, 1990-NMSC-058, ¶ 13, 110 N.M. 184, 793P.2d 1337. The redemption period after a trustee's sale runs from the date of the sale. NMSA 1978, § 48-10-6(A).

The purchaser at a foreclosure sale of commercial property is entitled to possession at the time of the sale, even though there is a right of redemption. *Speckner v. Riebold*, 1974-NMSC-029 ¶ 7, 86 N.M. 275, 523 P.2d 10.

The purchaser at the foreclosure sale is entitled to the rents and profits of commercial property during the redemption period, *Ulivarri v. Lovelace*, 1934-NMSC-087, ¶ 5, 39 N.M. 36, 38 P.2d 1114, and may retain the rents and profits even if the property is later redeemed, *W. Bank v. Malooly*, 1995-NMCA-044, ¶ 5, 119 N.M. 743, 895 P.2d 265; NMSA 1978, § 39-5-22. But if the purchaser makes improvements to the property during the redemption period, it does so at its own risk. If the property is redeemed, the purchaser may not recover the cost of improvements from the redemptioner. *Chase Manhattan Bank v. Candelaria*, 2004-NMSC-017, ¶ 12, 135 N.M. 527, 90 P.3d 985.

New Mexico has no one-action rule. At common law, the claims on a promissory note and a mortgage securing the note were separate causes of action that could be pursued either consecutively or concurrently. New Mexico has one case that adopted this rule. *Kepler v. Slade*, 1995-NMSC-035, ¶ 14, 119 N.M. 802, 896 P.2d 482. But for technical reasons, the court did not consider several defenses to the application of this common law rule. So it remains to be seen whether a lender would be safe in deliberately withholding any of its claims against a debtor. It would come as no great surprise if the court were to abandon this common law rule on the ground that it is outmoded and hold that the creditor's second lawsuit is barred, particularly if a debtor could show prejudice or that the lender were guilty of inequitable conduct. See *Hicks v. State*, 1975-NMSC-056, ¶ 15, 88 N.M. 588, 544 P.2d 1153 (abrogating sovereign immunity).

Normally, absent an agreement to the contrary, deficiency judgments are obtainable in commercial real estate loans. This has long been established by the common law for judicial foreclosures, e.g., *Springer Group, Inc. v. Wittelsohn*, 1999-NMCA-120, ¶ 19, 128 N.M. 36, 988 P.2d. 1260 (error to refuse to award deficiency judgment), and is now provided by statute for nonjudicial foreclosures under the Deed of Trust Act. NMSA 1978, § 48-10-17.

There is no body of experience with nonjudicial sales under deeds of trust.

The appropriate judicial foreclosure procedure is the following:

- The lender demands all past due payments and gives the borrower the opportunity to cure, if required by the loan documents.
- If the borrower fails to cure, the lender then accelerates payment of the promissory note including principal, interest, late fees, costs, and expenses.
- The lender files suit against the borrower and joins all other parties claiming an interest in or lien upon the real estate, including all junior lienholders. Much of New Mexico's law is customary and finds its way into the case law only when a problem arises or there is deviation from the norm. E.g., *Speckner v. Riebold*, 1974-NMSC-029 ¶ 4, 86 N.M. 275,523 P.2d 10. Foreclosure suits are equitable in nature and New Mexico courts have not recognized a right to a jury trial on issues that are necessarily decided in the course of a foreclosure suit such as the existence and the amount of the debt. *Las Companas Ltd. P'shp v. Pribble*, 1997-NMCA-055, ¶ 9, 123 N.M. 520, 943 P.2d 554.
- A notice of lis pendens is recorded in the real estate records of each county where the affected real estate is located. NMSA 1878, § 38-1-14. Subsequent purchasers and encumbrancers are bound by the foreclosure lawsuit as if they had been made parties to it. *Id.*
- All parties to the lawsuit have thirty days after they are served to file an answer to the complaint, with few exceptions. Rule 1-012(A) NMRA. If no one answers or if everyone answers admitting the indebtedness and the priority of the lien of the mortgage, a foreclosure 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. Receivers are commonly appointed in foreclosures against commercial property.

- After the entry of the foreclosure judgment, notice of the sale must be published in a newspaper of general circulation in the county where the real estate is located for four consecutive weeks. NMSA 1978, § 39-5-1; *Prod. Credit Ass'n v. Williamson*, 1988-NMSC-041, ¶¶ 2, 5, 107 N.M. 212, 755 P.2d. 56.
- The sale must take place at least three days after the last publication of notice of sale and thirty days after entry of the foreclosure judgment. NMSA 1978, § 39-5-17. A special master, appointed in the foreclosure judgment, conducts the sale and, upon approval and confirmation of the sale by the court, executes a deed to the purchaser, which is subject to defeasance if the property is redeemed. *Speckner*, 1974-NMSC-029, ¶4. The portion of the foreclosure judgment that directs the manner and terms of the sale of the mortgaged property becomes final upon judicial confirmation of the sale. *Id.* ¶9.
- 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 four months after the filing of the complaint, but the average time to complete a foreclosure ranges from four months to twenty-four months.
- The author of this guide and the other members of the author's law firm are not aware that any property has been sold at a trustee's sale in a contested case anywhere in New Mexico, so it is not possible to provide any standard procedures and timetable for doing so.

2. Forfeiture of Real Estate Contracts

Usually real estate contracts provide that they may be forfeited if a default is not cured within a specified time period after notice is given. Printed forms of real estate contracts are customarily used providing for the escrow of a warranty deed from the seller to the purchaser to be delivered upon payment of the purchase price and a special warranty deed from the purchaser to the seller to be delivered to the seller upon default. Payments in such a case are made through an escrow agent. Courts have not yet shown an inclination to treat real estate contracts as if they were mortgages, for example by providing the debtor with rights accorded by law to a mortgagor or a trustor, such as redemption rights.

3 Deeds in Lieu of Foreclosure

New Mexico has no well-developed body of law dealing with deeds in lieu of foreclosure. They are not commonly used because of junior liens.

P. Environmental Indemnities

New Mexico has no well-developed body of law on this subject.

Q. Mechanics and Material Suppliers Liens

Liens of construction workers and material suppliers are provided in NMSA 1978, Chapter 48, article 2. They are superior to the lien of the mortgage only if the mortgage is unrecorded at the time of commencement of the construction. NMSA 1978, § 48-2-5; *House of Carpets, Inc. v. Mortg. Inv. Co.*, 1973-NMSC-095, 85 N.M. 560, 514 P.2d 611.

The work must have been commenced on, or the materials must have been delivered to, the construction site before the mortgage is recorded in order for the construction workers' and material suppliers' liens to prime the mortgage lien. *Pioneer Sav. & Trust, F.A. v. Rue*, 1989-NMSC-079, ¶ 10, 109 N.M. 228, 784 P.2d 415. Work done off-site does not suffice. *Sec. Fed. Sav. & Loan Ass'n v. Commercial Invs., Ltd. (In re Commercial Invs., Ltd.)*, 92 B.R. 488 (Bankr. D.N.M. 1988) (architect's work done in office). And work done by surveyors does not constitute the commencement of construction. NMSA 1978, § 45-2-5(B).

But if the mortgage is primed by the lien of even one worker or material supplier, then the mortgage is also primed by the liens of all workers and material suppliers, even if they begin work after the mortgage is recorded. NMSA 1978, § 45-2-5(A); *Valley Fed. Sav. & Loan Ass'n v. T-Bird Home Ctrs., Inc.*, 1987-NMSC-067, 106 N.M. 223, 741 P.2d 826.

The liens of these workers and material suppliers are not required to be recorded before the mortgage is recorded. An original contractor (one that contracts directly with the property owner) must record its lien within 120 days after completion of its contract. NMSA 1978, § 48-2-6. Everyone else must record within 90 days after completion of any building improvement, alteration, or repair. *Id.*

There is no stop-notice law applicable to commercial property.

R. Collection of Property Tax and Insurance Impounds by Lenders

NMSA 1978, Section 48-7-8 limits the balance in an escrow fund held by a lender for payment of taxes, insurance premiums and other charges to two months' total escrow charges for such items plus the pro rata accrual for the taxes, insurance premiums and other charges. Any excess must, upon demand of the borrower, be credited to the principal amount of the loan, or as provided by the agreement, within 60 days of the demand. A penalty accrues for failure to do so. NMSA 1978, § 48-7-8(C).

VII. PERSONAL PROPERTY LENDING AND EQUIPMENT LEASING

A. UCC Article 9 (State Variations and Case Law)

New Mexico has adopted UCC Article 9 uniformly, without material variation, and has no well-developed body of case law interpreting it.

B. Priority Versus Secret Liens (Statutory and Common Law)

New Mexico courts hold that the priority goes to the lien that attached first. *Nat'l Inv. Trust v. First Nat'l Bank*, 1975-NMSC-065, ¶ 6, 88 N.M. 514, 543 P.2d 482. If the liens attach at the same time, the priority goes to the lienholder who first gave actual or constructive notice to the other. *Id.*

C. Equipment Leasing

New Mexico has adopted Article 2A of the UCC. NMSA 1978, Ch. 55, art. 2A. The New Mexico variations from the uniform text of Article 2A and other articles have been corrected to bring New Mexico's UCC into conformity with the uniform version.

VIII. GUARANTIES AND SURETYSHIP

A. Waivers of Suretyship Defenses

Waivers of suretyship defenses are generally enforced in New Mexico. *E.g.*, *Am. Bank of Commerce v. Covolo*, 1975-NMSC-053, 88 N.M. 405, 540 P.2d 1294.

B. Guaranties

The Restatement (Third) of Suretyship & Guaranty (1996) provides “authoritative guidance on the common law” of guaranties. *Venaglia v. Kropinak*, 1998-NMCA-043, ¶ 12, 125 N.M. 25, 956 P.2d 824.⁵ Articles 3⁶ and 9⁷ of the UCC 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.⁸

C. Other Suretyship Situations

While not the focus of this discussion, a suretyship relationship may also arise because of a pledge of collateral. *See* Restatement (Third) of Suretyship and Guaranty § 1(1)(a) (1996) (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)). 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. *Compare* NMSA 1978, § 55-9-102(a)(28)(A) (“debtor” under Article 9 includes one that has “an interest other than a security interest or other lien in the collateral, whether or not the person is an obligor”) *with* NMSA 1978, 55-9-102(a)(59)(A) (“obligor” under Article 9 includes one who “owes payment or other performance of the obligation”).

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. NMSA 1978, §§ 56-7-1 (construction); 56-7-2 (mining; drilling oil, gas, and water wells); 56-7-3 (equipment leases and rentals). These matters are beyond the scope of this discussion.

⁵ *Venaglia* was the first New Mexico case to provide modern law about guaranties.

⁶ *Id.* ¶ 11. The guarantors in *Venaglia* signed the note as accommodation parties, bringing Article 3 of the UCC into play. Judge Hartz analyzed the differences between the Restatement and Article 3 as it then existed. Article 3 has since been amended. One of the purposes of the amendments was to conform it to the Restatement. *See* 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.

⁷ 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 revised Article 9. NMSA 1978, §§ 55-9-101 to -709 (2001), as amended. For further discussion of Article 9 and suretyship, see Section VIII. C. of this guide.

⁸ NMSA 1978, § 55-1-102 (“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.”).

Another New Mexico statute, NMSA 1978, § 40-3-4, provides that unless a “contract of indemnity” is signed by both spouses, it does not “obligate” the community property of either spouse. In 1987 the Supreme Court held that this statute does not apply to a promissory note given as collateral for corporate indebtedness. *Lubbock Steel & Supply, Inc. v. Gomez*, 1987-NMSC-025, ¶ 5, 105 N.M. 516, 734 P.2d 756.

The court stated in what may be dictum that this statute applies only to “contracts of indemnity with surety companies.” *Id.* ¶ 6. New Mexico has no other case construing this statute.

The New Mexico Form of Sample Opinion of the Opinion Task Force of the Real Property, Probate and Trust Law Section of the State Bar of New Mexico contains an 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” New Mexico Form of Opinion ¶ 18, available at <http://nmbar.org/NmbarDocs/AboutUs/sections/RealPropProbateTrust/OpinionLetterbec73103clean..pdf>.

This exclusion is stated in connection with a sample loan transaction involving a guaranty but not a surety company. The exclusion may serve as an indication of the concern that some New Mexico practitioners have about the importance of the statute; the consequences of a violation, even an inadvertent one; and some uncertainty about its interpretation. Or it may simply indicate an overabundance of caution.

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 the statute does reflect the public policy of New Mexico, then it is also not entirely beyond the realm of possibility that the court might also apply the statute to a guaranty that chooses the law of another state. *See Piña v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, ¶ 1, 139 NM 619, 136 P.3d 1029 (construing NMSA 1978, § 56-7-2, 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).

D. Reimbursement, Subrogation and Contribution Rights

New Mexico recognizes these rights. A contributing cosurety can seek recovery against a principal obligor under three theories: (1) reimbursement, (2) restitution, and (3) subrogation. *Randles v. Hanson*, 2011-NMCA-059, ¶ 19, 150 N.M. 362, 258 P.3d 1154 (citing Restatement (Third) of Suretyship and Guaranty § 58 (1996)).

IX. INSOLVENCY LAWS

A. Receivership

Receivership is frequently used in the case of defaults on commercial loans, especially during foreclosure proceedings. A separate action is rarely maintained. Instead, the request for appointment of a receiver is usually brought before the court by motion in the main action. New Mexico’s Receivership Act is codified at NMSA 1978, Sections 44-8-1 to -10. The Receivership Act permits a receiver to sell receivership property. *See* NMSA 1978, § 44-8-7(H).

B. Assignment for Benefit of Creditors

New Mexico has no well-established body of law on this subject.

C. Fraudulent Transfer and Voidable Transactions Law

New Mexico has enacted the Uniform Voidable Transactions Act, replacing the Uniform Fraudulent Transfer Act. NMSA 1978, §§ 56-10-14 to -29. That act applies to transfers made and obligations incurred on or after January 1, 2016.

X. MISCELLANEOUS LENDING TOPICS

A. Loan Commitments

New Mexico has no well-developed body of law dealing with this subject.

B. Statute of Frauds

The English statute of frauds was adopted as part of the common law of New Mexico. *Childers v. Talbott*, 1888-NMSC-003, ¶ 3, 4 N.M. 336, 16 P. 275; *Bassett v. Bassett*, 1990-NMSC-070, ¶ 7, 110 N.M. 559, 798 P.2d 160. There are special statutes of frauds in the UCC applicable to the sale and leasing of goods. NMSA 1978, §§ 55-2-201, 55-2A-201.

There is also 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 primarily for personal, family, or household purposes. Within these 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. NMSA 1978, § 58-6-5.

C. Acceptance of Late or Partial Payment; Accord and Satisfaction

When a contract payee accepts late payments without objection about their timeliness, the payee impliedly leads the payor to believe that late payments are acceptable. *Cowan v. Chalamidas*, 1982-NMSC-053, ¶ 7, 98 N.M. 14, 644 P.2d 528.

Accord and satisfaction is an affirmative defense, Rule 1-008(c) NMRA, that must be pleaded and proved. *Gallup Gamarco Coal Co. v. Irwin*, 1973-NMSC-110, ¶ 11, 85 N.M. 673, 515 P.2d 1277. If it is not properly raised, it is waived. *Id.*

An "accord" -- i.e., an executory agreement to settle a claim, Restatement (Second) of Contracts § 281 (1979) -- operates as a defense to the claim even though there has not yet been "satisfaction" -- i.e., the agreement has not yet been performed -- in two situations. First, when the debt is unliquidated, and, second, when the claim is liquidated, if there is new and independent consideration to support the creditor's agreement that the claim will be released. *Clark Leasing Corp. v. White Sands Forest Prods., Inc.*, 1975-NMSC-022, ¶ 4, 87 N.M. 451, 535 P.2d 1077. A lender's agreement to accept mere possession of the collateral is not sufficient to constitute this new consideration, because the lender is receiving no more than it already has a right to receive and the borrower is doing no more than it is already obligated to do. *Id.* ¶ 5.

On the other hand, a lender's agreement to accept full ownership, as opposed to mere possession, of the collateral in full satisfaction of an undisputed and liquidated amount claimed can constitute this new consideration and thus can constitute an accord and satisfaction. *W. Bank v. Biava*, 1990-NMSC-023, 109 N.M. 550, 787 P.2d 830. .

D. Setoff and Recoupment

New Mexico has no well-developed body of law on this subject.

E. No State Assignment of Claims Statute

New Mexico has no state anti-assignment of claims statute.

XI. LITIGATION AND ARBITRATION

A. Lender Liability

1. Duty of Good Faith

In every New Mexico contract there is an implied “duty of good faith and fair dealing upon the parties in the performance and enforcement of the contract.” *Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶ 31, 118 N.M. 203, 880 P.2d 300 (internal quotation marks & citation omitted), *limited on other grounds*, *Sloan v. State Farm Mut. Auto Ins. Co. (In re Sloan)*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230. “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.” *Id.* (internal quotation marks & citation omitted).

“[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.” *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, ¶ 28, 118 N.M. 707, 885 P.2d 628, 635 (internal quotation marks & citation omitted).

New Mexico has no reported cases construing the modern definition of “good faith” in Article 1 of the UCC. *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(b)(19) (1992) (defining “good faith” as “honesty in fact in the conduct or transaction concerned”).

2. Fiduciary Duty

New Mexico courts have never subscribed to the view that a fiduciary duty runs from a commercial lender to its borrower or guarantor or vice versa. *See Branch v. Chamisa Dev. Corp. Ltd.*, 2009-NMCA-131, ¶ 41, 147 N.M. 397, 223 P.3d 942. “It seems self-evident that a fiduciary duty is inconsistent with standards of conduct typically at play in arm’s-length commercial or business transactions.” *Id.* (internal quotation marks & citation omitted) (alteration omitted). *See also R.A. Peck, Inc. v. Liberty Fed. Sav. Bank.*, 1988-NMCA-111, ¶ 34, 108 N.M. 84, 766 P.2d 928. (Generally, a bank-depositor relationship, which is treated as a debtor-creditor relationship, does not ordinarily impose a duty of disclosure upon a bank.) (internal quotation marks and citation omitted).

3. Consumer Protection Act as Applicable to Commercial Loans

Borrowers’ counsel can be expected to attempt to assert a claim against the lender under the New Mexico Unfair Practices Act. NMSA 1978, §§ 57-12-1 to -26. If counsel succeeds, attorney fees can be recovered in addition to economic damages and even damages for personal injury. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 18, 132 N.M. 459, 50 P.3d 554.

B. Recovery of Attorneys' Fees

New Mexico has not abandoned the American Rule; that ordinarily, absent a contract, statute or court rule that provides otherwise, each party pays its own attorney fees. *In re Oppenheim*, 2007-NMSC-022, ¶ 46, 141 N.M. 596, 159 P.2d. 245. There are a few miscellaneous exceptions to this rule that are not ordinarily applicable to commercial lending cases. *See, e.g., Gregg v. Gardner*, 1963-NMSC-223, ¶ 34, 73 N.M. 347, 388 P.3d 68.

Because no statute authorizes the award of attorney fees in a foreclosure case, an agreement to pay them must be pleaded and proved if they are to be recovered. *Goode v. Colo. Inv. Loan Co.*, 1911-NMSC-047, ¶ 5, 16 N.M. 461, 117 P. 856. If the agreement is for a stipulated amount of attorney fees or a percentage, the court should allow only such sums as may be reasonable and if the amount of reasonable attorney fees is disputed, the court must take evidence. *Budagher v. Sunnyland Enters., Inc.*, 1977-NMSC-035, ¶¶ 5, 7, 8, 90 N.M. 365, 563 P.2d 1158.

C. Statutes of Limitations

1. Applicable Periods of Limitations

The general statute of limitations applicable to promissory notes and other written contracts such as mortgages and deeds of trust is six years. NMSA 1978, § 37-1-3. There is also a special statute of limitations in Article 3 of the UCC applicable to negotiable notes. It will be discussed below. The statute of limitations on oral contracts, fraud, accounts, and injury to or conversion of property is four years. NMSA 1978, § 37-1-4.

The application of the statutes of limitation differs depending on whether the notes or guaranties are demand instruments or are payable at a specific time. The next paragraph covers demand instruments. The paragraph after that one covers instruments payable at a specific time, including those that may be accelerated.

If a negotiable note is payable on demand, the statute of limitations is six years from the time demand is made. If no demand is made, then an action to enforce the note is barred if neither principal nor interest has been paid for a continuous period of ten years. NMSA 1978, § 55-3-118(b). The limitations period begins to run on a non-negotiable demand note when it is executed; the limitations period on a guaranty payable on demand, when demand is made. *W. Bank v. Franklin Dev. Corp.*, 1991-NMSC-009, ¶ 5, 111 N.M. 259, 804 P.2d 1078.

The statute of limitations on a written contract or instrument payable at a definite time, whether negotiable or non-negotiable, is six years and begins to run upon its due date or dates or, if accelerated, upon its accelerated due date. NMSA 1978, §§ 55-3-118(a) (negotiable instruments); NMSA 1978, § 37-1-3, *Welty v. W. Bank*, 1987-NMSC-066, ¶ 9, 106 N.M. 126, 740 P.2d 120 (non-negotiable instruments and other contracts).

The statute of limitations on fraud, or injuries to or conversion of property begins to run upon discovery. NMSA 1978, § 37-1-7.

The statute of limitations for personal injuries is three years. NMSA 1978, § 37-1-8. Lenders are rarely found liable for personal injury, but it does happen. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 18, 132 N.M. 459, 50 P.3d 554.

UCC Articles 2 (Sales), 2A (Leases), 3 (Negotiable Instruments), 4 (Bank Deposits and Collections), and 5 (Letters of Credit) have their own statutes of limitations. NMSA 1978, §§ 55-2-725, 55-2A-506, 55-3-118, 55-4-111, 55-5-115.

The statute of limitations for liens of workers and material suppliers is two years from when the lien is recorded. NMSA 1978, 48-2-10.

2. Extension by Voluntary Payment

A voluntary payment, or even an admission that the debt is unpaid, will revive an expired statute of limitations on the debt. NMSA 1978, § 37-1-16. But it will not revive a mortgage that secured the debt unless the promise to pay or admission is written, acknowledged, and recorded. *Id.*

3. Use of Time-Barred Claim as Defense

A time-barred claim may be used as a set off or as a counterclaim or in recoupment up to the amount of the claim against the party asserting it. NMSA 1978, § 37-1-15.

4. Effect on Collateral for Time-Barred Claim

A creditor may not sell collateral when an action on the debt secured by the collateral is barred. NMSA 1978, § 37-1-20.

5. Agreements to Extend or Shorten Limitations Period

Agreements to extend or shorten the limitations period are permissible if they are reasonable. *Willey v. United Mercantile Life Ins. Co.*, 1999-NMCA-137, 128 N.M. 98, 990 P.2d 211.

E. Choice of Law Provisions/Conflict of Laws

New Mexico's choice of law analysis depends on whether the contract is governed by the UCC, which has its own statutory governing law rules, or is outside of the UCC, in which case the state's common law rules apply. The common law rules are based on the Restatement (First) of Conflict of Laws (1934), but are evolving to meet the needs of a modern world. This situation makes the analysis complex.

Ordinarily, New Mexico courts will enforce choice-of law provisions in contracts governed by the UCC if the transaction bears a reasonable relation to the chosen state or nation, unless the application of the chosen law would offend New Mexico public policy. NMSA 1978, § 55-1-301(A); *United Wholesale Liquor Co. v. Brown-Foreman Distillers Corp.*, 1989-NMSC-030, 108 N.M. 467, 775 P.2d 233. Absent an effective choice-of-law provision, a contract governed by the UCC will be usually be governed by the law of the forum state, NMSA 1978, § 55-1-301(B), unless the special rules found in the sections listed in Subsection C of UCC Section 55-1-301 apply.

The New Mexico Supreme Court has begun to enforce choice-of-law provisions in contracts outside of the UCC. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 26, 304 P.3d 409. "New Mexico respects party autonomy; the law to be applied to a particular dispute may be chosen by the parties through a contractual choice-of-law provision." *Id.* (internal quotation marks & citation omitted). But there are limits to party autonomy. A court will not apply the law chosen by the parties if that law would violate a fundamental public policy of New Mexico. *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 6, 144 N.M. 464, 188 P3d 1215.

The New Mexico Supreme Court has not been asked to decide which other limitations should be imposed upon party autonomy for contracts outside the UCC. *Compare* NMSA 1978, 55-1-301(a) (“[W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.”) *with* Restatement (Second) Conflict of Laws § 187(2) (1971) (“The law of the state chosen by the parties . . . will be applied, . . . unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”).

The Supreme Court has thus embraced party autonomy even though it still adheres to the Restatement of Conflict of Laws (1934) for contracts outside of the UCC, which does not allow party autonomy. *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶ 53, 144 N.M. 405, 188 P.3d 1156.

Absent an effective choice-of-law provision, most contracts outside of the UCC 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*, 1989-NMSC-071, ¶ 15, 109 N.M. 243, 784 P.2d 986. “A contract is made at the place where the last signature is affixed.” *Id.* This is the Restatement of Conflict of Laws (1934) rule.

By 2008 New Mexico was one of only eleven states that still adhered to the Restatement of Conflict of Laws rule for contracts not governed by the UCC. *Id.*

The Supreme Court has, however, recently decided a class certification case that applied the Restatement (Second) Conflict of Laws to conveyances of interests in real property. *Ideal v. Burlington Res. Oil & Gas Co., LP*, 2010-NMSC-022, ¶¶ 21, 22, 23, 148 N.M. 228, 233 P.3d 362 (mineral leases). Language in this case may indicate that the court would be open to applying the Restatement (Second) to mortgages.

F. Forum and Venue Selection Provisions

A contractual forum selection clause is prima facie valid. *Mueller v. Sample*, 2004-NMCA-075, ¶ 8, 135 N.M. 748, 93 P.3d 769. “Forum selection clauses are often classified as either mandatory or permissive with mandatory clauses containing clear language showing that jurisdiction is appropriate only in the designated forum and permissive forum selection clauses authorizing jurisdiction in a designated forum, but not prohibiting litigation elsewhere. The controlling factor in governing enforcement of a venue provision in any agreement by confining venue to a specific court is whether the parties intended to commit the actions to that court to the exclusion of all others.” *Id.* ¶9 (internal quotation marks and citation omitted).

Forum-selection provisions are decided as venue motions under the state analog of Rule 12(b)(3) of the Federal Rules of Civil Procedure instead of the state analog of Rule 12(b)(6). *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶¶ 62, 64, 144 N.M. 405, 188 P.3d 1156. The import of the distinction is that venue motions are waived if they are not asserted very early in a case, while Rule 12(b)(6) motions to dismiss for failure to state a claim for which relief can be granted may be raised at any time, even on appeal, and even *sua sponte* by the Court.

G. Jury Trial Waivers

New Mexico has no well-developed body of law on this subject in civil cases.

H. Arbitration Agreements

Arbitration agreements are generally enforceable by state courts as long as they are not one-sided, as by having the consumer waive rights such as class actions, and are otherwise not what the court views as unconscionable or illusory. *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 7, 144 N.M. 464, 188 P.3d. 1215.

I. Pre-Judgment Remedies

Most lenders find it unnecessary or unwise to seek prejudgment remedies, except for the appointment of a receiver.

J. Judgments

1. Confession of Judgments

It is a misdemeanor to take a “cognovit” note or to attempt to recover on one. NMSA 1978, § 39-1-18. Likewise, a consent to judgment in a contract or note is void. NMSA 1978, § 39-1-16.

2. Interest on Judgments

Absent a contract fixing a different rate, NMSA 1978, § 56-8-3 provides a prejudgment rate of interest of not more than 15%. The actual interest rate is left to the discretion of the trial court. *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 1994-NMSC-027, ¶ 24, 117 N.M. 373, 872 P.2d. 346. “In many -- perhaps most -- cases, the claimant will be entitled to prejudgment interest at the fifteen-percent rate; and many of our cases have held that prejudgment interest, in the particular cases, was to be awarded at the statutory rate.” *Id.* (internal quotation marks and quotation omitted).

Postjudgment interest is fixed at 8¾ %, unless the contract rate is different, in which case the judgment rate shall be no higher than the contract rate, or, if the judgment is based on tortious conduct, bad faith, or intentional or willful acts, then the interest rate shall be 15%. NMSA 1978, § 56-8-4(A).

If the judgment is in favor of the defendant and if the plaintiff was the cause of unreasonable delay and if the defendant made a reasonable and timely offer of settlement to the plaintiff, then the court may award 10% prejudgment interest to the defendant on the entire judgment. NMSA 1978, § 56-8-4(B).

3. Survival of Judgments

The statute of limitations on the enforcement of New Mexico judgments is fourteen years from the date of the judgment. NMSA 1978, § 37-1-2. The statute of limitations on an action to collect a deficiency judgment after a nonjudicial trustee’s sale under a deed of trust is six years from the date of the trustee’s sale. NMSA 1978, § 48-10-17(A).

4. Judgment Liens and Post-Judgment Remedies

A judgment is docketed by the court clerk and a transcript of the judgment is issued by the clerk of the court upon the request of the parties. NMSA 1978, § 39-1-6. The judgment is a lien on the real estate of the judgment debtor from the date of filing of

the transcript of judgment in the office of the county clerk of the county in which the real estate is located. *Id.*

A judgment lien is foreclosed by a foreclosure suit similar to a suit to foreclose a mortgage and is subject to the same nine-month redemption period following the sale. NMSA 1978, § 39-4-13.

Similarly, the creditor may use a writ of execution to reach personal property belonging to the debtor that is in the hands of the debtor, Rule 1-065.1 NMRA, or a writ of garnishment to reach personal property owing the debtor that is believed to be in the hands of a third party, Rule 1-065.2 NMRA.

5. Assignment of Judgments

New Mexico has no well-developed body of law on this subject.

6. Enforcement of Foreign Judgments

New Mexico has enacted three uniform laws to facilitate the enforcement of foreign judgments. The Foreign Judgments Act, based on the Uniform Enforcement of Foreign Judgments Act, is used to enforce a judgment of a sister state that is entitled to full faith and credit. NMSA 1978, §§ 39-4A-1 to -6. The Foreign Judgments Act is also used to domesticate a judgment from a federal court. *Walter E. Heller West, Inc. v. Ditto*, 1998-NMCA-068, ¶ 5, 125 N.M. 226, 959 P.2d 560 (judgment from United States Bankruptcy Court for the District of New Mexico).

The Uniform Foreign-Country Money Judgments Recognition Act is used to enforce a judgment of a foreign country. NMSA 1978, §§ 39-4D-1 to -11. The Uniform Foreign-Money Claims Act provides a method for a state court judge to calculate the amount of damages to be expressed in the currency of a foreign country. NMSA 1978, §§ 39-4C-1 to -16.

A New Mexico statute makes it a misdemeanor to enforce within New Mexico a judgment obtained elsewhere based on a cognovit note or contract. NMSA 1978, § 39-1-18. But this statute violates the full faith and credit clause of the United States Constitution if the judgment was properly obtained in another state. *Mountain States Fixture Co. v. Daskalos*, 1956-NMSC-109, ¶¶ 14, 15, 61 N.M. 491, 303 P.2d 698. These notes and contracts are also illegal if procured in New Mexico. *Id.* For a discussion of cognovit notes in New Mexico, see Section XI. J. 1. of this guide.

XII. OTHER LAWS OF INTEREST

A. Environmental Laws and Regulations

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.

B. Bulk Sales

Article 6 - Bulk Sales - of the UCC was repealed in 1992.

C. Punitive Damages

Punitive damages may be recovered for breach of contract in New Mexico if the breach is sufficiently culpable. The standard of culpability is still evolving. *E.g.*, *Romero v. Mervyn's*, 1989-NMSC-081, 109 N.M. 249, 784 P.2d 992.

Punitive damages may be awarded in an arbitration proceeding. NMSA 1978, § 44-7A-22 (a).

D. Mineral Rights

In New Mexico, many types of minerals have been obtained through exploration and development, including copper, uranium, coal, potash, oil, and gas. Separate ownership of the surface and mineral estates is permitted. Each estate conveys distinct private property rights to its owner, and it is not uncommon for different parties to own the surface and mineral estates. A mineral estate may be severed from the surface estate by reservation or 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 the owner of each estate must be exercised with due regard for the rights of the owner of the other estate. The owner of the mineral estate has the right to appropriate the mineral estate and may drill or 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 as 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 that 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.

Title Insurance is not available to insure mineral estates in New Mexico. An abstract of title and sometimes a title opinion are used in lieu of title insurance on title to mineral interests.

The situation is different when the lender is encumbering the land or land and improvements on the surface estate and inquires about the availability of title insurance to protect against the exercise of rights by the mineral owner. Title insurance is available, but only if there is a waiver of the right of entry or of surface usage by the mineral owner and the satisfaction of other conditions. 13.14.8.16 NMAC.

Under the authority of the Oil and Gas Act, NMSA 1978, §§ 70-2-1 to -38, the Oil Conservation Division of the Energy, Minerals, and Natural Resources Department regulates oil and gas and geothermal activity in New Mexico. NMSA 1978, Chapter 69 governs mining operations. As noted, the coverage of minerals and mineral rights is beyond the scope of this guide.

E. Water Rights

In rural New Mexico, water rights are often as valuable, or even more valuable, than the unimproved land that they benefit, if water is actually available to make use of those rights.

New Mexico follows the doctrine of prior appropriation. That is, whoever first appropriated the water to beneficial use and has maintained that use has first priority for its use up to the amount of that usage in case of any shortage. NMSA 1978, § 72-1-2.

When the first Europeans arrived in New Mexico in 1540, Pueblo Indians were irrigating their land. *State ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993 (D.N.M. 1985). Some were using water from the Rio Grande tributaries north of Santa Fe. *Id.* Their rights to this water are still paramount almost 500 years later. *Id.*

Title insurance is not available for water rights. Title searches are used instead. Sometimes title opinions are obtained.

New Mexico's water and water rights are under the jurisdiction of the State Engineer. The State Engineer has broad powers over water and water rights. *E.g.*, *State ex rel. Reynolds v. Aamodt*, 1990-NMSC-099, ¶ 7, 111 N.M. 4, 800 P.2d 1061.

The State Engineer's office keeps the records of ownership and of the transfer of water rights. NMSA 1978, § 72-1-2.1. Ownership and transfers are also recorded in the office of the county clerk of the county where the property which the water rights benefit is located. *Id.* As noted, the coverage of water and water rights is beyond the scope of this guide.

F. Agricultural Operations

Much of New Mexico's land is owned by the state or federal government. Some of it is leased by governmental agencies to private individuals and entities for agricultural purposes. It is not uncommon for a rancher to have more acreage under lease than land owned in fee. Ranching and other agricultural operations of a similar or dissimilar nature are beyond the scope of this guide. Similarly, federal and state lands are leased for oil and gas exploration and development and other mineral operations mentioned above.

G. Insurance Anti-Coercion Law

A lender may require that encumbered property be insured, but may not require that the insurance be provided by any particular company or through any particular agent or broker. NMSA 1978, § 59A-16-14. A lender loaning money secured by real or personal property in New Mexico must inform the borrower of these facts, using a state-prescribed form. 13.7.2.8 NMAC.

H. Abolition of Distinction Between Sealed and Unsealed Instruments

Seals are ineffective. NMSA 1978, § 47-1-6. This statute abolished the distinction between sealed and unsealed instruments in New Mexico. *Griffith v. Humble*, 1942-NMSC-006, ¶ 11, 46 N.M. 113, 122 P.2d 134.

XIII. CONCLUSION

The features of New Mexico law that strike lenders and borrowers the most are the duty of good faith and fair dealing that is implied in both the interpretation and enforcement of every contract, the requirement that both mortgages and deeds of trust be foreclosed judicially, and the relative lack of case and statutory law.

On the other hand, borrowers and lenders find that New Mexico laws generally permit freedom of contract, which in turn permits the parties to choose another state's law to govern those contracts.

They also find that most New Mexico judges are fair and impartial, are appointed and retained through a merit system, enforce reasonably drafted and reasonably enforced commercial loan documents, appoint receivers to manage commercial real estate during the pendency of foreclosure cases, move cases along on their dockets as fast as is reasonably possible, apply the restatements as fair, predictable, and up-to-date guides to the common law, and use the Official Comments as persuasive guides to the interpretation of the state's many modern uniform laws.