CHAPTER 56
Commercial Instruments and Transactions

ARTICLE 1
Retail Installment Sales

56-1-1. Definitions.

As used in Chapter 56, Article 1 NMSA 1978, unless the context otherwise requires:

A. "goods" means all tangible chattels personal when purchased primarily for personal, family or household use and not for commercial or business use, but not including motor vehicles as defined in this section, money, things in action or intangible personal property other than merchandise certificates or coupons as described in this section. The term includes such chattels which are furnished or used, at the time of sale or subsequently, in the modernization, rehabilitation, repair, alteration, improvement or construction of real property so as to become a part thereof whether or not severable therefrom. The term includes a mobile home, provided such mobile home is not encumbered together with the real estate upon which it is situated. The term also includes merchandise certificates or coupons, issued by a retail seller, not redeemable in cash and to be used in their face amount in lieu of cash, in exchange for goods or services sold by such seller;

B. "services" means work, labor or services of any kind when purchased primarily for personal, family or household use and not for commercial or business use;

C. "motor vehicle" means any automobile, motorcycle, truck, trailer, semi-trailer, truck tractor or bus designed and used primarily to transport persons or property on a public highway or any vehicle designed to run only on rails or tracks or in the air, excepting however, any boat, trailer or any vehicle propelled or drawn exclusively by muscular power;

D. "mobile home" means a structure transportable in one or more sections which is at least eight body feet wide, thirty-two body feet long and which is built on a permanent chassis and designed to be used as a dwelling, with or without a permanent foundation, when connected to the required utilities, and includes the plumbing, heating, air-conditioning and electrical systems contained in the structure;

E. "retail buyer" or "buyer" means a person who buys or agrees to buy goods or obtain services or agrees to have services rendered or furnished from a retail seller;

F. "retail seller" or "seller" means a person regularly and principally engaged in the business of selling goods or services to retail buyers but does not include the services of a professional person licensed by the state;

G. "retail installment transaction" means any transaction in which a retail buyer purchases goods or services from a retail seller pursuant to a retail installment contract or a retail charge agreement, as defined in this section, which provides for a time price differential, as defined in this section, and under which the buyer agrees to pay the unpaid balance in one or more installments;

H. "retail installment contract" means an instrument, other than a retail charge agreement or an instrument reflecting a sale made pursuant thereto, entered into in this state evidencing a retail installment transaction whether secured or unsecured. The term retail installment contract may include a chattel mortgage, a security agreement, a conditional sale contract or a contract in the form of bailment or a lease if the bailee or lessee contracts to pay as compensation for its use a sum substantially equivalent to or in excess of the value of the goods sold and if it is agreed that the bailee or lessee is bound to become or for no other or a merely nominal consideration has the option of becoming the owner of the goods upon full compliance with the provisions of the bailment or lease;

I. "retail charge agreement" means an instrument prescribing the terms of retail installment transactions which may be made thereunder from time to time and under the terms of which a time price differential, as defined in this section, is to be computed in relation to the buyer's unpaid balance from time to time and includes any agreement under which a retail buyer uses a credit card for the purchase of goods and services under any credit card plan, whether credit is extended directly or indirectly to the retail buyer, or the obligation is assigned by the retail seller to a credit card issuer or his agent;

J. "time price differential," however denominated or expressed, means the amount which is paid or payable for the privilege of purchasing goods or services to be paid for by the buyer in installments over a period of time. It does not include the amount, if any, charged for insurance premiums, delinquency charges, attorneys' fees, court costs or official fees;

K. "cash sale price" means the price stated in a retail installment contract or in a sales slip or other memorandum furnished by a retail seller to a retail buyer under or in connection with a retail charge agreement, for which the seller would have sold or furnished to the buyer and the buyer would have bought or obtained from the seller the goods or services which are the subject matter of a retail installment transaction, if the sale had been a sale for cash. The cash sale price may include any taxes and charges for delivery, installation, servicing, repairs, alterations or improvements;

L. "official fees" means the amount of the fees prescribed by law for filing, recording or otherwise perfecting and releasing or satisfying a retained title, lien or other security interest created by a retail installment transaction;

M. "time sale price" means the total of the cash sale price of the goods or services and the amount, if any, included for insurance, if a separate identified charge is made therefor, and the official fees and the time price differential;

N. "principal balance" means the cash sale price of the goods or services which are the subject matter of a retail installment contract plus the amounts, if any, included therein, if a separate identified charge is made therefor and stated in the contract, for insurance and official fees, less the amount of the buyer's down payment in money or goods or both;

O. "holder" means the retail seller of the goods or services under the retail installment contract or retail charge agreement or the assignee if the retail installment contract or the retail charge agreement or outstanding balance under either has been sold or otherwise transferred;

P. "person" means an individual, partnership, joint venture, corporation, association or any other group, however organized; and

Q. words of the masculine gender include the feminine and the neuter and, when the sense so indicates, words of the neuter gender may refer to any gender.

History: 1953 Comp., § 50-16-1, enacted by Laws 1965, ch. 258, § 1; 1973, ch. 77, § 1; 1983, ch. 315, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Sales §§ 6 to 18, 24, 33, 39, 131, 134, 135, 162, 404, 502.

Form of judgment against garnishee respecting obligation payable in installments, 7 A.L.R.2d 680.

Finance or carrying charge on installment sales as includible in amount on which federal excise tax is computed, 33 A.L.R.2d 1450.

Coverage of insurance transactions under state consumer protection statutes, 77 A.L.R.4th 991.

Lease with option to purchase agreement as credit sale or consumer lease under definitions in Truth in Lending Act (15 USCS §§ 1602(g), 1667(1)) and applicable regulations, 58 A.L.R. Fed. 929.

77A C.J.S. Sales § 1 et seq.

56-1-2. Retail installment contracts; consolidation; first bought, first paid.

A. Each retail installment contract shall be in writing, dated, signed by the retail buyer, and completed as to all essential provisions, except as otherwise provided in Subsections G and H of this section.

B. The printed or typed portion of the contract, other than instructions for completion, shall be in a size equal to at least eight point type. The contract shall be designated "retail installment contract" and shall contain substantially the following notice printed or typed in a size equal to at least ten point bold type:

"NOTICE TO THE BUYER. DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE CONTRACT YOU SIGN."

C. The retail seller shall deliver to the retail buyer, or mail to him at his address shown on the retail installment contract, a copy of the contract as accepted by the seller. Until the seller does so, a buyer, who has not received delivery of the goods or been furnished or rendered the services, shall have the right to rescind his contract and to receive a refund of all payments made and return of all goods traded in to the seller on account of or in contemplation of the contract, or if such goods cannot be returned, the value thereof. Any acknowledgment by the buyer of delivery of a copy of the contract shall be in a size equal to at least ten point bold type and, if contained in the contract, shall appear directly above the buyer's signature.

D. The retail installment contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or other address of the buyer as specified by the buyer and a description or identification of the goods sold or to be sold, or services furnished or rendered or to be furnished or rendered.

E. The retail installment contract shall contain the following items:

(1) the cash sale price of the goods or services;

(2) the amount of the buyer's down payment, identifying the amounts paid in money and allowed for goods traded in;

(3) the difference between items (1) and (2);

(4) the aggregate amount, if any, included for insurance, if a separate identified charge is made therefor, specifying the type or types of insurance and the term or terms of coverage;

(5) the aggregate amount of official fees;

(6) the principal balance, which is the sum of items (3), (4) and (5);

(7) the amount or rate of the time price differential;

(8) the amount of the time balance owed by the buyer to the seller, which is the sum of items (6) and the amount set out under item (7);

(9) except as otherwise provided in the next two sentences, the maximum number of installment payments required and the amount of each installment and the due date of each payment necessary to pay the time balance set forth in item (8). If installment payments other than the final payment are stated as a series of equal scheduled amounts and if the amount of the final installment payment does not substantially exceed the scheduled amount of each preceding installment payment, the maximum number of payments and the amount and due date of each payment need not be separately stated and the amount of the scheduled final installment payment may be stated as the remaining unpaid balance. The due date of the first installment payment may be fixed by a day or date or may be fixed by reference to the date of the contract or to the time of delivery or installation;

(10) the time sale price; and

(11) if any installment (except the down payment) is more than double the average of all other installments (except the down payment), the following legend printed in at least ten point bold type or typewritten: **THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS** followed, if there be but one such larger installment, by: **AN INSTALLMENT OF $** . . . . . **WILL BE DUE ON** . . . . . or, if there be more than one such larger installment, by: **LARGER INSTALLMENTS WILL BE DUE AS FOLLOWS:** . . . . . ., in such latter case, inserting the amount of every such larger installment and of its due date.

The above items need not be stated in the sequence or order set forth; additional items may be included to explain the computations made in determining the amount to be paid by the buyer.

F. A retail installment contract need not be contained in a single document. If the contract is contained in more than one document, one such document may be an original document signed by the retail buyer, stated to be applicable to purchases of goods or services to be made by the retail buyer from time to time. In such case, such document, together with the sales slip, account book or other written statement relating to each purchase, shall set forth all of the information required by this section and shall constitute the retail installment contract for each purchase. On each succeeding purchase pursuant to such original document, the sales slip, account book or other written statement may at the option of the seller constitute the memorandum required by Subsection M of this section.

G. Retail installment contracts negotiated and entered into by mail without personal solicitations by salesmen or other representatives of the seller and based upon a catalog of the seller, or other printed solicitation which clearly sets forth the cash sale prices and other terms of sales to be made through such medium, may be made as

provided in this subsection. The provisions of this act [56-1-1 to 56-1-13 NMSA 1978] with respect to retail installment contracts shall be applicable to such sales, except that:

(1) the designation and notice provisions of Subsection B of this section shall not be applicable to such contract; and

(2) the retail installment contract, when completed by the buyer, need not contain the items required by Subsection E of this section.

When the contract is received from the retail buyer, the seller shall prepare a written memorandum containing all of the information required by Subsection E of this section to be included in a retail installment contract. In lieu of delivering a copy of the contract to the retail buyer as provided in Subsection C of this section, the seller shall deliver to the buyer a copy of such memorandum prior to the due date of the first installment payable under the contract.

H. A retail installment contract shall not be signed by any party thereto when it contains blank spaces of items which are essential provisions of the transaction; provided, however, if delivery of the goods is not made at the time of the execution of the contract, the identifying numbers of marks of the goods or similar information and the due date of the first installment may be inserted by the seller in the seller's counterpart of the contract after it has been signed by the buyer. The buyer's acknowledgment, conforming to the requirements of this section, of delivery of a copy of the contract shall be presumptive proof, or, in the case of a holder of the contract without knowledge to the contrary when he purchases it, conclusive proof of such delivery and of compliance with this subsection and any other requirement relating to completion of the contract prior to execution thereof by the buyer, in any action or proceeding.

I. Notwithstanding the provisions of any other law, a retail installment contract may provide for, and the seller or holder may then charge, collect and receive a time price differential.

The time price differential on a retail installment contract shall be computed on the principal balance of each transaction, as determined under Subsection E on contracts payable in successive monthly payments substantially equal in amount from the date of the contract to the maturity of the final payment, notwithstanding that the total time balance thereof is required to be paid in one or more deferred payments. When a retail installment contract provides for payment other than in substantially equal successive monthly payments, the time price differential shall not exceed the amount which will provide the same return as is permitted on substantially equal successive monthly payment contracts, having due regard for the schedule of payments. The time price differential may be computed on the basis of a full month for any fractional portion of a month in excess of ten days.

J. Notwithstanding the provisions of any retail installment contract to the contrary, any buyer may prepay in full the unpaid time balance thereof at any time before its final due date and, if he does so, shall receive a refund credit thereon for such prepayment. The amount of such refund credit shall represent at least as great a proportion of the original time price differential, after deducting therefrom a maximum of ten dollars ($10.00) as:

(1) the sum of the monthly balances under the schedule of payments in the contract beginning as of the date after such prepayment which is the next succeeding monthly anniversary date of the due date of the first installment under the contract, or, if the prepayment is prior to the due date of the first installment under the contract, then as of the date after such prepayment which is the next succeeding monthly anniversary date of the date of the contract, bears to;

(2) the sum of all the monthly balances under the schedule of installment payments in the contract. Where the amount of refund credit is less than one dollar ($1.00), no refund credit need be made.

K. The holder of any retail installment contract, if it so provides, may collect a delinquency and collection charge on each installment in default for a period of more than ten days in the amount not to exceed five percent of each installment or five dollars ($5.00), whichever is less, or in lieu thereof, interest after maturity of each such installment not to exceed the highest lawful contract rate. In addition, such contract may provide for the payment of an attorney's reasonable fee where it is referred for collection to an attorney not a salaried employee of the holder of the contract, and for court costs and disbursements.

L. Upon written request of the buyer, the holder of a retail installment contract shall give or forward to the buyer a written statement of the dates and amounts of payments and the total amount unpaid under the contract. A buyer shall be given a written receipt for any payment when made in cash. Such a statement or receipt shall be given the buyer once without charge; if any additional statement is requested by the buyer, it shall be supplied by the holder at a charge not in excess of one dollar ($1.00) for each additional statement or receipt so supplied.

M. (1) If, in a retail installment transaction, a retail buyer makes any subsequent purchases of goods or services from a retail seller from whom he has previously purchased goods or services under one or more retail installment contracts, and the amounts under such previous contract or contracts have not been fully paid, the subsequent purchases may, at the seller's option, be included in and consolidated with one or more of the previous contract or contracts. Each subsequent purchase shall be a separate retail installment contract under this act [56-1-1 to 56-1-13 NMSA 1978], notwithstanding that the same may be included in and consolidated with one or more of such previous contract or contracts. All the provisions of this act with respect to retail installment contracts shall be applicable to such subsequent purchases except as hereinafter stated in this subsection.

(2) In the event of such consolidation, in lieu of the buyer's executing a retail installment contract respecting each subsequent purchase, as provided in this section, it shall be sufficient if the seller shall prepare a written memorandum of each subsequent purchase, in which case the provisions of Subsections A, B, C and E of this section shall not be applicable. Unless previously furnished in writing to the buyer by the seller, by sales slip, memorandum or otherwise, such memorandum shall contain with respect to each subsequent purchase items (1) through (8) of Subsection E of this section and, in addition, the outstanding balance of the previous contract or contracts, the consolidated time balance, and the revised installments applicable to the consolidated time balance, if any.

The seller shall deliver to the buyer a copy of such memorandum prior to the due date of the first installment of such consolidated contract.

(3) When such subsequent purchases are made, if the seller has retained title or taken a lien or other security interest in any of the goods purchased under any one of the contracts included in the consolidation, the entire amount of all payments made prior to such subsequent purchases shall be deemed to have been applied on the previous purchases; and each payment after such subsequent purchase made on the consolidated contract shall be deemed to have been allocated to the purchases earliest in time. The payments shall be credited first to the current carrying charges and then in reduction of the purchase price of merchandise in the order in which it was purchased. Articles of merchandise for which the sales price and carrying charges have been paid for under this section shall not thereafter be repossessed or considered security for payment of any charge arising out of any subsequent purchases made by the buyer. However, the amount of any down payment on the subsequent purchase shall be allocated in its entirety to such subsequent purchase. The provisions of this paragraph shall not apply to cases where such previous and subsequent purchases involve equipment, parts, or other goods attached or affixed to goods previously purchased and not fully paid, or to services in connection therewith rendered by the seller at the buyer's request.

History: 1953 Comp., § 50-16-2, enacted by Laws 1965, ch. 258, § 2; 1971, ch. 110, § 1; 1981, ch. 186, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Sales §§ 8, 41, 65 to 67, 103 to 106, 155 to 157, 205 to 207, 416 to 424.

Validity and construction of provision imposing "late charge" or similar exaction for delay in making periodic payments on note, mortgage, or installment sale contract, 63 A.L.R.3d 50.

77A C.J.S. Sales § 9 et seq.

56-1-2.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 263, § 4, repealed 56-1-2.1 NMSA 1978, as enacted by Laws 1981, ch. 186, § 2, relating to the maximum time price differential in retail installment contracts, effective July 1, 1981. For present provisions, *see* 56-1-2 NMSA 1978.

Compiler's notes. — Laws 1981, ch. 263, § 6, revived 56-1-2.1 NMSA 1978, effective July 1, 1983. However, Laws 1983, ch. 44, § 1, repealed Laws 1981, ch. 263, § 6, effective June 30, 1983.

56-1-3. Retail charge agreements.

A. Each retail charge agreement shall be in writing and signed by the buyer. A copy of any such agreement executed on or after the effective date of this act shall be delivered or mailed to the buyer prior to the date on which the first payment is due thereunder. Any acknowledgment by the buyer of delivery of a copy of the agreement contained in the body thereof shall be in a size equal to at least ten point bold type and shall appear directly above the buyer's signature. No agreement executed on or after the effective date of this act shall be signed by the buyer when it contains blank spaces to be filled in after it has been signed. The buyer's acknowledgment, conforming to the requirements of this subsection, of delivery of a copy of an agreement, shall be presumptive proof, in any action or proceeding, of such delivery and that the agreement, when signed, did not contain any blank spaces as herein provided. All retail charge agreements executed on or after the effective date of this act shall state the maximum amount and rate of the time price differential to be charged and paid pursuant thereto. Any such agreement shall contain substantially the following notice printed or typed in a size equal to at least ten point bold type:

"NOTICE TO THE BUYER - DO NOT SIGN THIS AGREEMENT BEFORE YOU READ IT OR IF IT CONTAINS BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE AGREEMENT YOU SIGN."

B. The buyer under the retail charge agreement shall promptly be supplied with a statement as of the end of each monthly period, which need not be a calendar month, or other regular period agreed upon in writing, at the end of which there is any unpaid balance thereunder, which statement shall recite the following:

(1) the unpaid balance under the retail charge agreement at the beginning and at the end of the period;

(2) the dollar amount of each purchase by the buyer during the period and (unless a sales slip or a memorandum of each purchase has previously been furnished

the buyer or is attached to the statement) the purchase or posting date, a brief description or identification and the cash price of each purchase;

(3) the payments made by the buyer and any other credits to the buyer during the period;

(4) the amount, if any, of any time price differential for such period; and

(5) a legend to the effect that the buyer may at any time pay his total unpaid balance or any part thereof.

C. Notwithstanding the provisions of any other law, a retail charge agreement may provide for, and the seller or holder may then charge, collect and receive, a time price differential for the privilege of paying in installments thereunder.

The time price differential on a retail charge agreement shall be computed from month to month (which need not be a calendar month) or other regular period, on all amounts unpaid under the agreement at the beginning of each such period. The time price differential under this subsection may be computed for all unpaid balances within a range of not in excess of ten dollars [($10.00)] on the basis of the median amount within such range, if as so computed such time price differential is applied to all unpaid balances within such range.

A retail charge agreement may also provide for the payment of an attorney's reasonable fee where it is referred for collection to an attorney not a salaried employee of the holder of the retail charge agreement or any unpaid balance thereunder, and for court costs and disbursements.

History: 1953 Comp., § 50-16-3, enacted by Laws 1965, ch. 258, § 3; 1980, ch. 72, § 1; 1981, ch. 186, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Sales §§ 8, 10, 141, 311 to 313, 526 to 535.

Validity and construction of provision imposing "late charge" or similar exaction for delay in making periodic payments on note, mortgage, or installment sale contract, 63 A.L.R.3d 50.

77A C.J.S. Sales § 9 et seq.

56-1-3.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 263, § 4, repealed 56-1-3.1 NMSA 1978, as enacted by Laws 1981, ch. 186, § 4, relating to the maximum time price differential in retail charge agreements, effective July 1, 1981. For present provisions, *see* 56-1-3 NMSA 1978.

Compiler's notes. — Laws 1981, ch. 263, § 6, revived 56-1-3.1 NMSA 1978, effective July 1, 1983. However, Laws 1983, ch. 44, § 1, repealed Laws 1981, ch. 263, § 6, effective June 30, 1983.

56-1-4. Insurance.

If the cost of insurance is included in the retail installment contract or the retail charge agreement and a separate charge is made to the buyer for the insurance:

A. the contract or agreement must state the nature, purpose and amount of the insurance;

B. the contract or agreement must state whether the insurance is to be procured by the buyer or the seller;

C. the amount included for the insurance may not exceed the premiums chargeable in accordance with the rate fixed for the insurance by the insurer except where the amount is less than one dollar [($1.00)]; and if the insurance is cancelled or terminated for any reason, the refund for unearned insurance premiums received by the seller or the holder, shall be credited to the final maturing installments of the retail installment contract or retail charge agreement, and the remaining balance of the unearned insurance premiums shall be refunded to the buyer; provided, however, that no cash refund shall be required if the amount thereof is less than one dollar [($1.00)], and

D. if the insurance is to be procured by the seller or holder, he shall, within 45 days after delivery of the goods or furnishing of the services under the contract or agreement deliver, mail or cause to be mailed to the buyer at his address as specified in the contract or agreement, a notice that the insurance is procured, a copy of the policy or policies of insurance or a certificate of the insurance so procured.

History: 1953 Comp., § 50-16-4, enacted by Laws 1965, ch. 258, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Sales §§ 229, 248, 339.

77A C.J.S. Sales § 18 et seq.

56-1-5. Prohibited provisions.

No retail installment contract or retail charge agreement shall contain any provision by which:

A. in the absence of the buyer's default in the performance of any of his obligations, the holder may accelerate the maturity of any part or all of the amount owing thereunder;

B. a power of attorney is given to confess judgment in this state, or an assignment of wages is given;

C. the seller or holder or other person acting on his behalf is given authority to enter upon the buyer's premises unlawfully or to commit any breach of the peace in the repossession of goods;

D. the buyer waives any right of action against the seller or holder or other person acting on his behalf, for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of goods;

E. the buyer executes a power of attorney appointing the seller or holder or other person acting on his behalf, as the buyer's agent in collection of payments under the contract or agreement or in the repossession of goods; or

F. the buyer agrees not to assert against the seller or against an assignee a claim or defense arising out of the sale.

History: 1953 Comp., § 50-16-5, enacted by Laws 1965, ch. 258, § 5.

ANNOTATIONS

Cross references. — For definition of cognovit notes, *see* 39-1-18 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Sales § 629.

77A C.J.S. Sales § 1 et seq.

56-1-6. Assignment.

Notwithstanding the provisions of any other law:

A. an assignee may purchase or acquire or agree to purchase or acquire any retail installment contract or retail charge agreement or any outstanding balance under either from a seller on such terms and conditions and for such price as may be mutually agreed upon;

B. filing of the assignment, notice to the buyer of the assignment and any requirement that the seller be deprived of dominion over payments upon a retail installment contract or retail charge agreement, or over the goods if returned to or repossessed by the seller, shall not be necessary to the validity of a written assignment of the retail installment contract or retail charge agreement or any outstanding balance under either as against creditors, subsequent purchasers, pledgees, mortgagees and lien claimants of the seller; and

C. unless the buyer has notice of the assignment of his retail installment contract, retail charge agreement or any outstanding balance under either, payment therefor made by the buyer to the holder last known to him shall be binding upon all subsequent holders.

History: 1953 Comp., § 50-16-6, enacted by Laws 1965, ch. 258, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Sales §§ 27, 222 to 226.

Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 A.L.R.2d 447.

77A C.J.S. Sales § 109 et seq.

56-1-7. [Waiver.]

No act or agreement of the retail buyer before or at the time of the making of a retail installment contract, retail charge agreement or purchase thereunder shall constitute a valid waiver of any of the provisions of this act [56-1-1 to 56-1-13 NMSA 1978] or of any remedies granted to the buyer by law.

History: 1953 Comp., § 50-16-7, enacted by Laws 1965, ch. 258, § 7.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Sales §§ 19, 210 to 221, 417, 422 to 424.

77A C.J.S. Sales § 1 et seq.

56-1-8. Penalty for violation of act.

Any person who wilfully [willfully] and intentionally violates any provision of this act [56-1-1 to 56-1-13 NMSA 1978] shall be guilty of a misdemeanor. Violation of any order or injunction issued pursuant to this act shall constitute prima facie proof of a violation of this section.

History: 1953 Comp., § 50-16-8, enacted by Laws 1965, ch. 258, § 8.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For penalties for misdemeanors, *see* 31-19-1 NMSA 1978.

56-1-9. Violation; bar to recovery.

Any seller who enters into any contract or agreement which does not comply with the provisions of this act [56-1-1 to 56-1-13 NMSA 1978] or who violates any provision of this act except as a result of an accidental or bona fide error shall be barred from the recovery of any time price differential, official fees, or any delinquency or collection charge under or in connection with the related retail installment contract or purchases under a retail charge agreement; but the seller may nevertheless recover from the buyer an amount equal to the cash price of the goods or services and the cost to the seller of any insurance included in the transaction.

History: 1953 Comp., § 50-16-9, enacted by Laws 1965, ch. 258, § 9.

56-1-10. Injunction to prevent violation.

The attorney general of the state of New Mexico or the district attorney of the district in which the violation occurs may bring an action in the name of the state against any person to restrain and prevent any violation of this act [56-1-1 to 56-1-13 NMSA 1978].

History: 1953 Comp., § 50-16-10, enacted by Laws 1965, ch. 258, § 10.

ANNOTATIONS

Cross references. — For the attorney general, *see* N.M. Const., art. V, § 1 and Chapter 8, Article 5 NMSA 1978.

For district attorneys, *see* N.M. Const., art. VI, § 24 and Chapter 36, Article 1 NMSA 1978.

56-1-11. Consent to discontinuance.

In the enforcement of this act [56-1-1 to 56-1-13 NMSA 1978], the attorney general of the state of New Mexico or with his consent a district attorney may accept an assurance of discontinuance of any act or practice deemed in violation of this act, from any person engaging in, or who has engaged in, such act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of the district court of the county in which the alleged violator resides or has his principal place of business. Failure to perform the terms of any such assurance shall constitute prima facie proof of a violation of this act for the purpose of securing any injunction as provided in Section 10 [56-1-10 NMSA 1978] of this act and for the purpose of Section 9 [56-1-9 NMSA 1978] hereof. After commencement of any action by a district attorney, the attorney general may not accept an assurance of discontinuance without the consent of the district attorney.

History: 1953 Comp., § 50-16-11, enacted by Laws 1965, ch. 258, § 11.

ANNOTATIONS

Cross references. — For the attorney general, *see* N.M. Const., art. V, § 1 and Chapter 8, Article 5 NMSA 1978.

For district attorneys, *see* N.M. Const., art. VI, § 24 and Chapter 36, Article 1 NMSA 1978.

56-1-12. Violation of injunction; penalty.

Any person who violates any order or injunction issued pursuant to this act [56-1-1 to 56-1-13 NMSA 1978] shall forfeit and pay a civil penalty of not more than $1,000. For the purpose of this section, the court issuing any injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for the recovery of civil penalties.

History: 1953 Comp., § 50-16-12, enacted by Laws 1965, ch. 258, § 12.

ANNOTATIONS

Cross references. — For the attorney general, *see* N.M. Const., art. V, § 1 and Chapter 8, Article 5 NMSA 1978.

56-1-13. Contracts executed prior to act.

The provisions of this act [56-1-1 to 56-1-13 NMSA 1978] shall not invalidate or make unlawful retail installment contracts or retail charge agreements executed prior to the effective date hereof.

History: 1953 Comp., § 50-16-13, enacted by Laws 1965, ch. 258, § 13.

ANNOTATIONS

Compiler's notes. — The phrase "effective date hereof" at the end of the section refers to the effective date of Laws 1965, ch. 258, which was May 19, 1965.

Severability. — Laws 1965, ch. 258, § 14, provided for the severability of the act if any part or application thereof is held invalid.

56-1-14. Open-end retail charge agreements; application of payments; prohibition against repossession of merchandise under agreement when paid for.

A. Payments made on retail charges agreements, open-end contracts or similar types of add-on retail sales agreements shall be first applied to the purchases earliest in time. The payments shall be credited first to the current interest or carrying charges and then in reduction of the purchase price of merchandise in the order in which it was purchased.

B. When, subsequent to the date of purchase, payments have been made and credited in an amount to pay the sales price and carrying charges of any merchandise, then that article of merchandise shall be considered paid for in full, provided that all balances incurred prior to that purchase have been paid.

C. The articles of merchandise which have been paid for under this section shall not thereafter be repossessed or considered security for the payment of any charges arising out of subsequent purchases under the same account.

History: 1953 Comp., § 50-16-14, enacted by Laws 1967, ch. 179, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Sales §§ 413, 421.

77A C.J.S. Sales § 1 et seq.

56-1-15. Creditor compliance with federal regulations deemed compliance with this act.

Any creditor engaging in transactions subject to the provisions of this act, who complies with 15 United States Code, [§§] 1601 through 1665, and the regulations promulgated pursuant thereto, shall be deemed to have complied with applicable provisions of this act.

History: 1953 Comp., § 50-16-15, enacted by Laws 1969, ch. 110, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "this act," in the catchline and text of this section apparently refer to Laws 1965, ch. 258, as amended, compiled as 56-1-1 to 56-1-13 NMSA 1978 and may also include Laws 1967, ch. 179, § 1, compiled as 56-1-14 NMSA 1978.

56-1-16. Variable rates.

A retail installment contract for the purchase of a mobile home may provide that the rate of time price differential may be adjusted at stated intervals, in which case the retail installment contract shall be subject to the following provisions:

A. adjustments in the rate charged shall be based on changes in a specific index, as set forth in the retail installment contract, with the index base being fixed by the index value in effect on the first day of the month in which the retail installment contract is dated. The index may be only an index approved by the federal home loan bank board or by the office of the comptroller of the currency of the department of the treasury for adjustable or variable interest rates on residential mortgage loans;

B. subject to the limitations prescribed by this section, the adjustments to the rate of time price differential on each rate adjustment date, either up or down, shall be equal to the difference between the index value in effect on the first day of the second calendar month preceding the month in which the rate adjustment falls and the index value in effect on the first day of the month in which the retail installment contract is executed; or, for adjustments after the initial adjustment, the adjustment shall be equal to the difference between the index value in effect on the first day of the second calendar month preceding the adjustment date and the index value in effect on the first day of the second calendar month preceding the date of the immediately preceding rate adjustment;

C. for any six-month period, no rate adjustment may result in a rate of time price differential which is more than one percentage point greater or less than the rate of time price differential in effect in the preceding six-month period. At no point in time shall the rate of time price differential after adjustment be more than ten percentage points more or less than the rate of time price differential in effect when the retail installment contract was dated;

D. any increase in the rate permitted by this section may be waived at the option of the seller. Any decrease in the rate warranted by decreases in the index is mandatory, subject to the limitations prescribed by this section and by the provisions of Subsection E of this section. If the seller agrees to impose a periodic or aggregate limitation on rate

adjustments that is smaller or more restrictive than the limitations prescribed by this section, such limitation shall apply both to increases and decreases;

E. any changes in the index not reflected in adjustments to the rate of time price differential shall be carried over to succeeding rate adjustment periods and be implemented to the extent they are not offset by opposite movements in the index; and

F. adjustments to the rate of time price differential may result in changes in the amount of any installment payment due under the retail installment contract or in changes in the term of the retail installment contract or in a combination of such changes in amount and term. Adjustments to the amount of installment payments may be made less frequently than adjustments to the rate of time price differential.

History: 1978 Comp., § 56-1-16, enacted by Laws 1983, ch. 315, § 2.

ANNOTATIONS

Compiler's notes. — Laws 1983, ch. 315, § 4 repealed 56-1-16 NMSA 1978, effective June 30, 1985. However, Laws 1985, ch. 69, § 1 repealed Laws 1983, ch. 315, § 4, effective June 14, 1985.

ARTICLE 2
Debt Adjusters

56-2-1. Definitions.

As used in this act [56-2-1 to 56-2-4 NMSA 1978]:

A. "person" means an individual, partnership, corporation and association;

B. "debt adjuster" means a person who acts or offers to act for a consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding or in anywise altering the terms of payment of any debts of the debtor; and, to that end, receives money or other property from the debtor, or on behalf of the debtor, for payment to, or distribution among the creditors of the debtor;

C. "debtor" means an individual, and includes two (2) or more individuals who are jointly and severally, or jointly or severally indebted.

History: 1953 Comp., § 50-17-1, enacted by Laws 1965, ch. 80, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Collection and Credit Agencies §§ 1, 17, 18.

Survival of liability on joint obligation, 67 A.L.R. 608.

Legislation regulating, taxing or forbidding debt adjusting, 95 A.L.R.2d 1354.

What constitutes false, deceptive, or misleading representation or means in connection with collection of debt proscribed by provisions of Fair Debt Collection Practices Act (15 USCS § 1692e), 67 A.L.R. Fed. 974.

56-2-2. Prohibition; penalty.

Any person who shall hereafter act or offer to act as a debt adjuster in this state shall be guilty of a misdemeanor.

History: 1953 Comp., § 50-17-2, enacted by Laws 1965, ch. 80, § 2.

ANNOTATIONS

Cross references. — For penalties for misdemeanors, *see* 31-19-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Collection and Credit Agencies § 18.

56-2-3. Injunction.

Courts of record shall have power, in an action brought in the name of the state by the attorney general, to enjoin any person from acting or offering to act as a debt adjuster; and, in such action, may appoint a receiver for the property and money employed in the transaction of business by such person as a debt adjuster, to insure, so far as may be possible, the return to debtors of so much of their money and property as has been received by the debt adjuster, and has not been paid to the creditors of the debtors.

History: 1953 Comp., § 50-17-3, enacted by Laws 1965, ch. 80, § 3.

56-2-4. Exemptions.

The following persons shall not be deemed debt adjusters for the purposes of this act [56-2-1 to 56-2-4 NMSA 1978]: any attorney-at-law admitted to practice in this state; any person who is a regular, full-time employee of a debtor, and who acts as an adjuster of his employer's debts; any person acting pursuant to any order or judgment of court, or pursuant to authority conferred by any law of this state or of the United States; any person who is a creditor of the debtor, or an agent of one (1) or more creditors of the debtor, and whose service in adjusting the debtor's debts are rendered without cost to the debtor; and any person who, at the request of a debtor, arranges for or makes a loan to the debtor, and who, at the authorization of the debtor, acts as an adjuster of the debtor's debts in the disbursement of the proceeds of the loan, without compensation

for the services rendered in adjusting such debts; nonprofit corporations organized as a community effort to assist debtors.

History: 1953 Comp., § 50-17-4, enacted by Laws 1965, ch. 80, § 4.

ARTICLE 3
Credit Bureaus

56-3-1. Definitions.

As used in this act [56-3-1 to 56-3-6 NMSA 1978]:

A. "credit bureau" means any business engaged in furnishing credit information about consumers; and

B. "consumer" means any natural person in the general consuming public who seeks or is seeking credit for personal, family or household purposes.

History: 1953 Comp., § 50-18-1, enacted by Laws 1969, ch. 259, § 1; 1971, ch. 278, § 4.

ANNOTATIONS

Law reviews. — For comment, "Credit Bureaus and Consumers - Regulation and Remedy in New Mexico," *see* 10 Nat. Resources J. 171 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Collection and Credit Agencies §§ 1 to 27.

Rights and remedies of financial institution customer in relation to subpoena duces tecum exception to general prohibitions of state right to financial privacy statute, 43 A.L.R.4th 1157.

Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

56-3-2. Availability of information to the public; liability.

A. Any credit bureau conducting business in the state shall provide trained personnel to interview and counsel with a consumer, during normal business hours, concerning any information about that consumer contained in the credit bureau's files.

B. A credit bureau, upon request, shall disclose the content of all information about that particular consumer which is included in his credit report or rating, if the consumer making the request presents adequate identification.

C. For any consumer to whom credit has been refused because of a credit bureau's report, the credit bureau which compiled the report shall make any necessary reinvestigation and perform any necessary updating or correction of records at no cost to the consumer. A credit bureau may charge a fee of not to exceed five dollars ($5.00) for any reinvestigation requested by any consumer, if that consumer has not been refused credit on the basis of a credit bureau report.

D. After a credit bureau has been given written notice of any error in its credit report or record by a consumer, the credit bureau is liable for any subsequent report which fails to correct the error. However, prior to receiving written notice of such error, a credit bureau or its source of information is not liable for any damages caused by any reports or dispersal of information which is the result of an unintentional error of either the credit bureau or its source of information.

E. A credit bureau shall give to any consumer examining his credit record forms upon which to designate any errors which the consumer discovers in his credit record or report.

History: 1953 Comp., § 50-18-2, enacted by Laws 1969, ch. 259, § 2; 1971, ch. 278, § 1.

ANNOTATIONS

Law reviews. — For comment, "Credit Bureaus and Consumers - Regulation and Remedy in New Mexico," *see* 10 Nat. Resources J. 171 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Collection and Credit Agencies §§ 17 to 29.

Sufficiency of showing of malice or lack of reasonable care to support credit agency's liability for circulating inaccurate credit report, 40 A.L.R.3d 1049.

Imputation of insolvency as defamatory, 49 A.L.R.3d 163.

Validity and construction of state fair credit reporting acts, 12 A.L.R.4th 294.

56-3-3. Information to non credit-granting governmental agencies.

A. A credit bureau may supply identifying information such as names, addresses, former addresses, places of employment and former employment to non credit-granting governmental agencies.

B. No other information may be supplied to such governmental agencies, other than as provided in Subsection A of this section, by a credit bureau except in response to legal process unless the investigation is for security purposes.

C. The limitations contained in Subsections A and B of this section shall not apply to the child support enforcement division of the human services department [health care authority department] which shall, unless otherwise prohibited by law, have the right to full access to credit bureau reports for the purpose of assisting it in carrying out its duties to locate child support obligors and enforce child support obligations pursuant to the department's child support program responsibilities set forth in Section 27-2-27 NMSA 1978. The child support enforcement division shall limit its use of consumer credit reports to those purposes permissible under the federal Fair Credit Reporting Act, 15 U.S.C. 1681. The division shall furnish to the credit bureau the judgment or case number for the child support obligation for which a report is requested, and the credit bureau furnishing reports to the division shall audit the division's requests on a monthly basis to assure the division's compliance with this subsection. Any employee of the division having access to credit bureau reports shall limit strictly the use of information contained in the reports to purposes connected with the employee's responsibilities for enforcing child support obligations pursuant to the state's child support enforcement program.

History: 1953 Comp., § 50-18-3, enacted by Laws 1969, ch. 259, § 3; 1989, ch. 165, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 1989 amendment, effective June 16, 1989, inserted "of this section" in Subsection B, and added Subsection C.

Law reviews. — For comment, "Credit Bureaus and Consumers - Regulation and Remedy in New Mexico," *see* 10 Nat. Resources J. 171 (1970).

56-3-4. Information to businesses, professions and individuals.

A. In dealing with businesses, professions and individuals, a credit bureau shall require service contracts to be executed in which the regular subscriber or the occasional user certifies that inquiries shall be made only for the purposes of the granting of credit or other bona fide business transaction, such as evaluation of present or prospective credit risks or evaluation of the qualifications of present or prospective employees.

B. The credit bureau shall refuse service to any prospective subscriber or user who will not so certify, and shall discontinue service to any who fails to honor the above contract provisions.

History: 1953 Comp., § 50-18-4, enacted by Laws 1969, ch. 259, § 4.

ANNOTATIONS

Law reviews. — For comment, "Credit Bureaus and Consumers - Regulation and Remedy in New Mexico," *see* 10 Nat. Resources J. 171 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Collection and Credit Agencies § 18.

56-3-5. Personnel reporting; safeguards.

A credit bureau which furnishes personnel-reporting service shall adopt rigid safeguards in order that the specialized information developed in the course of such investigations other than credit information shall be maintained separately, and shall not be incorporated in credit reports or made available to subsequent inquirers except in connection with a subsequent personnel investigation.

History: 1953 Comp., § 50-18-5, enacted by Laws 1969, ch. 259, § 5.

ANNOTATIONS

Law reviews. — For comment, "Credit Bureaus and Consumers - Regulation and Remedy in New Mexico," *see* 10 Nat. Resources J. 171 (1970).

56-3-6. Report information; limitations.

A. A credit bureau may report the following matters for no longer than the specified periods:

(1) bankruptcies of all types for not longer than fourteen years from the date of adjudication of the most recent bankruptcy;

(2) accounts placed for collection and accounts charged to profit and loss for not longer than seven years, or until the governing statute of limitations has expired, whichever is the longer period;

(3) suits and judgments for not longer than seven years from date of entry, or until the governing statute of limitations has expired, whichever is the longer period;

(4) paid tax liens for not longer than seven years and unpaid tax liens for any length of time;

(5) arrests and indictments pending trial, or convictions of crimes, for not longer than seven years from date of release or parole. Such items shall no longer be

reported if at any time it is learned that after a conviction a full pardon has been granted, or after an arrest or indictment a conviction did not result; and

(6) any other data not otherwise specified in this section, for not longer than seven years.

B. A credit bureau shall delete as soon as practical any item of derogatory information whenever it is ascertained that the source of information can no longer verify the item in question from its records of original entry.

History: 1953 Comp., § 50-18-6, enacted by Laws 1969, ch. 259, § 6.

ANNOTATIONS

Law reviews. — For comment, "Credit Bureaus and Consumers - Regulation and Remedy in New Mexico," *see* 10 Nat. Resources J. 171 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of state fair credit reporting acts, 12 A.L.R.4th 294.

56-3-7. Civil liability for noncompliance.

A. Any credit bureau or user of information that willfully fails to comply with any requirement of Sections 56-3-1 through 56-3-6 NMSA 1978 with respect to any consumer is liable to that consumer in an amount equal to:

(1) any actual damages sustained by the consumer as a result of the failure;

(2) punitive damages as the court may allow; and

(3) in the case of any successful action under this section, costs of the action and reasonable attorney's fees as determined by the court.

B. Any credit bureau or user of information that is negligent in failing to comply with any requirement of Sections 56-3-1 through 56-3-6 NMSA 1978 with respect to any consumer is liable to that consumer in an amount equal to:

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action under this section, costs of the action and reasonable attorney's fees as determined by the court.

History: 1953 Comp., § 50-18-7, enacted by Laws 1971, ch. 278, § 2.

ANNOTATIONS

Analogous to federal law. — The New Mexico's Credit Bureaus Act operates as a state consumer-protection statute analogous to the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq., not merely a statutory codification of the common-law torts of defamation, invasion of privacy, or negligence. *Apodaca v. Discover Fin. Servs.*, 417 F.Supp.2d 1220 (D.N.M. 2006).

Law reviews. — For comment, "Credit Bureaus and Consumers - Regulation and Remedy in New Mexico," *see* 10 Nat. Resources J. 171 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Collection and Credit Agencies §§ 22 to 29.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts, 35 A.L.R.4th 12.

56-3-8. Penalty.

It is a fourth-degree felony for:

A. any person to knowingly and willfully obtain information on a consumer from a credit bureau under false pretenses; or

B. any officer or employee of a credit bureau to knowingly and willfully provide information concerning a consumer from the credit bureau's files to a person or firm not authorized to receive that information.

History: 1953 Comp., § 50-18-8, enacted by Laws 1971, ch. 278, § 3.

ANNOTATIONS

Cross references. — For penalties for felonies, *see* 31-18-15 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Collection and Credit Agencies §§ 30, 31.

ARTICLE 3A
Credit Report Security Act

56-3A-1. Short title.

Chapter 56, Article 3A NMSA 1978 may be cited as the "Fair Credit Reporting and Identity Security Act".

History: Laws 2007, ch. 106, § 1; 2010, ch. 54, § 1.

ANNOTATIONS

The 2010 amendment, effective May 19, 2010, deleted "This act" and added "Chapter 56, Article 3A NMSA 1978" and after "cited as the", deleted "Credit Report" and added "Fair Credit Reporting and Identity".

56-3A-2. Definitions.

As used in the Fair Credit Reporting and Identity Security Act:

A. "consumer" means an individual who is a resident of New Mexico;

B. "consumer reporting agency" means any person that, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing credit reports to third parties;

C. "credit report" means a written, oral or other communication of information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected for the purpose of serving as a factor in establishing the consumer's eligibility for credit, insurance, investment, benefit, employment or other purpose as authorized by the federal Fair Credit Reporting Act, 15 U.S.C. Section 1681a;

D. "declaration of removal" means an identity theft report with a sworn affidavit that is delivered by regular or certified mail or facsimile or delivered electronically to a consumer reporting agency that operates within New Mexico and which affidavit states:

(1) that the consumer is entitled to removal of information in the consumer reporting agency's files on grounds that the consumer is the victim of identity theft; and

(2) the address at which the consumer is available for service of process by the consumer reporting agency and proper identifying information by which the consumer can be identified by the consumer reporting agency;

E. "person" means an individual, corporation, firm, association, organization, trust, estate, cooperative, business, partnership, limited liability company, joint venture, governmental agency or subdivision or any legal or commercial entity;

F. "security freeze" means a notice placed in a consumer's credit report, at the request of the consumer and subject to certain exceptions, that prohibits a consumer reporting agency from releasing the consumer's credit report or score relating to the extension of credit or the opening of new accounts without the express authorization of the consumer; and

G. "operates within New Mexico" means accepting or maintaining a credit report on a person that resides within New Mexico.

History: Laws 2007, ch. 106, § 2; 2010, ch. 54, § 2.

ANNOTATIONS

The 2010 amendment, effective May 19, 2010, in the introductory sentence, deleted "Credit Report" and added "Fair Credit Reporting and Identity"; added Subsections D and G.

56-3A-3. Security freeze.

A. A consumer may elect to place a security freeze on the consumer's credit report by making a request to a consumer reporting agency by means of certified or regular mail sent to an address designated by the consumer reporting agency, or by means of a telephone or a secure electronic method if such means are provided by the agency. A consumer shall provide any personal identification required by the consumer reporting agency and pay a fee, if applicable.

B. A consumer reporting agency shall place a security freeze on a consumer's credit report no later than three business days after receiving a request from the consumer.

C. Within five business days of placing a security freeze on a consumer's credit report, a consumer reporting agency shall:

(1) send a written confirmation of the security freeze to the consumer; and

(2) provide the consumer with a unique personal identification number, password or similar device to be used by the consumer when providing authorization for the release of the consumer's credit report to a specific person or for a specific period of time or for permanent removal of the freeze.

D. While a security freeze is in effect, a consumer may authorize a consumer reporting agency to release the consumer's credit report to a specific person or to release the credit report for a specific period of time by contacting the consumer reporting agency by regular or certified mail or by telephone, and as of September 1, 2008, by contacting the consumer reporting agency by mail, by telephone or by a secure electronic method, and providing:

(1) proper identification;

(2) the unique personal identification number, password or similar device;

(3) information regarding the party that is to have access to the credit report or the time period during which the credit report can be released; and

(4) payment of a fee, if applicable.

E. A consumer reporting agency that receives a request pursuant to Subsection D of this section shall release a consumer's credit report as requested by the consumer within three business days after the business day on which the consumer's request by regular or certified mail or by telephone is received by the consumer reporting agency. As of September 1, 2008, a consumer reporting agency that receives a request pursuant to Subsection D of this section shall release a consumer's credit report as requested by the consumer within fifteen minutes after the consumer's request is received by the consumer reporting agency through the use of a telephone or a secure electronic method provided by the agency, which may include the use of the internet, facsimile or other electronic means; provided that the consumer reporting agency is not required to release the credit report within fifteen minutes unless the consumer's request is received by the consumer reporting agency between the hours of 6:00 a.m. and 9:30 p.m. mountain standard or mountain daylight time, as applicable, Sunday through Saturday.

F. A consumer reporting agency need not release a credit report within the time periods set forth in Subsection E of this section if:

(1) the consumer fails to meet the requirements of Subsection D of this section; or

(2) the consumer reporting agency's ability to remove the security freeze within fifteen minutes is prevented by:

(a) an act of God, including fire, earthquake, hurricane, storm or similar natural disaster or phenomenon;

(b) unauthorized or illegal acts by a third party, including terrorism, sabotage, riots, vandalism, labor strikes or disputes disrupting operations or similar occurrences;

(c) operational interruption, including electrical failure, unanticipated delay in equipment or replacement part delivery, computer hardware or software failure inhibiting response time or similar disruption;

(d) governmental action, including emergency orders or regulations, judicial or law enforcement actions or similar directives;

(e) regularly scheduled maintenance of, or updates to, the consumer reporting agency's systems during other than normal business hours; or

(f) commercially reasonable maintenance of, or repair to, the consumer reporting agency's systems that is unexpected or unscheduled.

G. If a consumer reporting agency erroneously releases information on a credit report while a security freeze is in effect and without a consumer's authorization, it shall notify the consumer of the release of information within five business days of the agency's discovery of the erroneous release of information and inform the consumer of the specific information released and the third party to whom it has been released.

H. A security freeze shall remain in place until a consumer requests its removal. A consumer reporting agency shall remove the security freeze within three business days after receiving a request from a consumer who provides the unique personal identification number, password or similar device and proper identification.

I. A consumer reporting agency may charge a consumer a fee of no more than ten dollars ($10.00) for the placement of a security freeze or for processing a declaration of removal. A consumer reporting agency may charge a fee of no more than five dollars ($5.00) for the release of a credit report, upon which a security freeze has been placed, to a specific person or for a specific period of time. A consumer reporting agency may charge a fee of no more than five dollars ($5.00) for the removal of a security freeze or to change a declaration of removal. A fee shall not be charged to a consumer who is sixty-five years of age or older or to a victim of identity theft who provides a valid police or investigative report filed with a law enforcement agency alleging the crime of identity theft. A consumer reporting agency shall accept payment by check sent via regular or certified mail and by debit or credit card via a secure electronic method and telephone and shall accept automatic clearinghouse and electronic fund transfer payments.

J. If a consumer's credit report was frozen due to a material misrepresentation of fact by the consumer and a consumer reporting agency intends to remove the freeze, the consumer reporting agency shall notify the consumer in writing five business days prior to removing the security freeze on the consumer's credit report.

K. A consumer reporting agency may advise a third party that a security freeze is in effect with respect to a consumer's credit report. A consumer reporting agency shall not suggest or otherwise state or imply to a third party that the security freeze reflects a negative credit score, history, report or rating.

L. The provisions of this section do not prevent a consumer reporting agency from releasing a consumer's credit report:

(1) to a person or the person's subsidiary, affiliate, agent or assignee with which the consumer has or, prior to assignment, had an account, contract or debtor-creditor relationship for the purpose of reviewing the account or collecting the financial obligation owing for the account, contract or debt, or to a prospective assignee of a financial obligation owing by the consumer in conjunction with the proposed purchase of the financial obligation. As used in this paragraph, "reviewing the account" includes activities related to account maintenance, monitoring, credit line increases and account upgrades and enhancements;

(2) to a subsidiary, affiliate, agent, assignee or prospective assignee of a person to whom access has been granted by the consumer pursuant to Subsection D of this section for the purpose of facilitating the extension of credit or other permissible use;

(3) to a person or entity administering a credit file monitoring subscription service to which the consumer has subscribed;

(4) to a person or entity for the purpose of providing a consumer with a copy of the consumer's credit report upon the consumer's request;

(5) to a person acting pursuant to a court order, warrant or subpoena;

(6) to the child support enforcement division of the human services department [health care authority department] for the purpose of carrying out its statutory duties of establishing and collecting child support obligations;

(7) to a governmental agency acting to investigate fraud, to investigate or collect delinquent taxes or unpaid court orders or to fulfill any of its other statutory duties;

(8) to a person for the purposes of prescreening as defined by the federal Fair Credit Reporting Act;

(9) from a consumer reporting agency's database or file that consists only of and is used solely for one or more of the following:

(a) criminal record information;

(b) tenant screening;

(c) employment screening; or

(d) fraud prevention or detection; or

(10) to a person or entity for use in setting or adjusting an insurance rate, adjusting an insurance claim or underwriting for insurance purposes.

M. The following entities are not required to place a security freeze on a credit report:

(1) a consumer reporting agency that acts only as a reseller of credit information by assembling and merging information contained in the database of another consumer reporting agency or multiple consumer credit reporting agencies and does not maintain a permanent database of credit information from which new consumer credit reports are produced. However, a consumer reporting agency acting as

a reseller shall honor any security freeze placed on a consumer credit report by another consumer reporting agency;

(2) a check services or fraud prevention services company that issues reports on incidents of fraud or authorizations for the purpose of approving or processing negotiable instruments, electronic funds transfers or similar methods of payment; or

(3) a deposit account information service company that issues reports regarding account closures due to fraud, substantial overdrafts, automatic teller machine abuse or similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a deposit account at the inquiring bank or financial institution.

History: Laws 2007, ch. 106, § 3; 2010, ch. 54, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Cross references. — For the federal Fair Credit Reporting Act, *see* 15 U.S.C. § 1681 et seq.

The 2010 amendment, effective May 19, 2010, in Subsection I, in the first sentence, added "or for processing a declaration of removal"; in the third sentence, added "or to change a declaration of removal"; and added the last sentence.

56-3A-3.1. Declaration of removal; procedures.

A. A consumer may file a declaration of removal with a consumer reporting agency operating within New Mexico declaring that the consumer:

(1) is the victim of identity theft;

(2) is eligible for removal of information reported to or by the consumer reporting agency on the basis of identity theft;

(3) is available for service of process at a conclusively valid designated address for at least thirty days; and

(4) discloses proper identifying information by which the consumer may be identified by the consumer reporting agency.

B. The attorney general may publish a sample declaration of removal in compliance with the applicable requirements of Subsection A of this section. The declaration of removal published by the attorney general is not required to be used. A consumer may use other forms that serve the same purpose and that are in compliance with the applicable requirements of Subsection A of this section.

C. A consumer reporting agency shall make available on a web site and on all credit reports of the consumer reporting agency the means for contacting the consumer reporting agency through a physical mailing address, by telephone and facsimile, and through use of a web site and an internet electronic mailing address. A consumer reporting agency shall state on a web site and on all credit reports of the consumer the methods for submitting a declaration of removal.

D. Within five days of receiving a declaration of removal and, if applicable, receipt of a fee as authorized in Subsection I of Section 56-3A-3 NMSA 1978, a consumer reporting agency shall remove from its files and credit reports of the affected consumer the information that is the subject of the declaration of removal and notify the consumer once the removal is complete. A consumer reporting agency shall not state on a credit report that information was removed at the request of a declaration of removal and shall not use that information to suggest or otherwise state or imply to a third party that the affected consumer has a negative credit score, history, report or rating.

E. A consumer reporting agency may restore the information that was the subject of a declaration of removal upon:

(1) request of the affected consumer; or

(2) a court order after the adjudication of the alleged debt in the judicial district in which the consumer resides.

History: Laws 2010, ch. 54, § 3.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 54 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Cross references. — For the federal Fair Credit Reporting Act, *see* 15 U.S.C. § 1681 et seq.

56-3A-4. Notice of rights.

At any time that a consumer reporting agency is required to provide the consumer with a summary of rights pursuant to Section 609 of the federal Fair Credit Reporting Act, the following notice shall be included:

"New Mexico Consumers Have the
Right to Obtain a Security Freeze or
Submit a Declaration of Removal

You may obtain a security freeze on your credit report to protect your privacy and ensure that credit is not granted in your name without your knowledge. You may submit a declaration of removal to remove information placed in your credit report as a result of being a victim of identity theft. You have a right to place a security freeze on your credit report or submit a declaration of removal pursuant to the Fair Credit Reporting and Identity Security Act.

The security freeze will prohibit a consumer reporting agency from releasing any information in your credit report without your express authorization or approval.

The security freeze is designed to prevent credit, loans and services from being approved in your name without your consent. When you place a security freeze on your credit report, you will be provided with a personal identification number, password or similar device to use if you choose to remove the freeze on your credit report or to temporarily authorize the release of your credit report to a specific party or parties or for a specific period of time after the freeze is in place. To remove the freeze or to provide authorization for the temporary release of your credit report, you must contact the consumer reporting agency and provide all of the following:

(1) the unique personal identification number, password or similar device provided by the consumer reporting agency;

(2) proper identification to verify your identity;

(3) information regarding the third party or parties who are to receive the credit report or the period of time for which the credit report may be released to users of the credit report; and

(4) payment of a fee, if applicable.

A consumer reporting agency that receives a request from a consumer to lift temporarily a freeze on a credit report shall comply with the request no later than three business days after receiving the request. As of September 1, 2008, a consumer reporting agency shall comply with the request within fifteen minutes of receiving the request by a secure electronic method or by telephone.

A security freeze does not apply in all circumstances, such as where you have an existing account relationship and a copy of your credit report is requested by your existing creditor or its agents for certain types of account review, collection, fraud control or similar activities; for use in setting or adjusting an insurance rate or claim or insurance underwriting; for certain governmental purposes; and for purposes of prescreening as defined in the federal Fair Credit Reporting Act.

If you are actively seeking a new credit, loan, utility, telephone or insurance account, you should understand that the procedures involved in lifting a security freeze may slow your own applications for credit. You should plan ahead and lift a freeze, either completely if you are shopping around or specifically for a certain creditor, with enough advance notice before you apply for new credit for the lifting to take effect. You should contact a consumer reporting agency and request it to lift the freeze at least three business days before applying. As of September 1, 2008, if you contact a consumer reporting agency by a secure electronic method or by telephone, the consumer reporting agency should lift the freeze within fifteen minutes. You have a right to bring a civil action against a consumer reporting agency that violates your rights under the Fair Credit Reporting and Identity Security Act.".

History: Laws 2007, ch. 106, § 4; 2010, ch. 54, § 5.

ANNOTATIONS

Cross references. — For the federal Fair Credit Reporting Act, *see* 15 U.S.C. § 1681 et seq.

The 2010 amendment, effective May 19, 2010, in the form, added "or Submit a Declaration of Removal" at the end of the title; in the first paragraph, added the second sentence; and in the third sentence, after "security freeze on your credit report", added "or submit a declaration of removal"; after "pursuant to the", added "Fair"; and after "Fair Credit", changed "Report" to "Reporting and Identity"; and in the sixth paragraph, in the last sentence, after "your rights under the", added "Fair" and after "Fair Credit", deleted "Report" and added "Reporting and Identity".

56-3A-5. Violations; civil liability.

If a consumer reporting agency violates the provisions of the Fair Credit Reporting and Identity Security Act, the affected consumer or the attorney general may bring a civil action against the consumer reporting agency for:

A. injunctive relief to prevent further violation of the Fair Credit Reporting and Identity Security Act;

B. any actual damages sustained by the consumer as a result of a violation of the Fair Credit Reporting and Identity Security Act;

C. a civil penalty in an amount not to exceed two thousand dollars ($2,000) for each violation of the security freeze or each violation of the provisions of Subsection D of Section 3 [56-3A-3 NMSA 1978] of this 2010 act; and

D. costs of the action and reasonable attorney fees.

History: Laws 2007, ch. 106, § 5; 2010, ch. 54, § 6.

ANNOTATIONS

The 2010 amendment, effective May 19, 2010, in the catchline, deleted "violation of security freeze" and added "Violations; civil liability"; in the introductory sentence, after "consumer reporting agency", deleted "releases information placed under a security freeze in violation of" and added "violates"; after "the provisions of", deleted "Section 3 of the Credit Report Security Act" and added "the Fair Credit Reporting and Identity Security Act"; and after "the affected consumer", added "or the attorney general"; in Subsection A, after "further violation of the", deleted "security freeze" and added "Fair Credit Reporting and Identity Security Act"; and in Subsection B, after "a violation of", added "the Fair Credit Reporting and Identity Security Act"; and in Subsection C, after "violation of the security freeze", added "or each violation of the provisions of Subsection D of Section 3 of this 2010 act".

56-3A-6. Severability.

If any part or application of the Fair Credit Reporting and Identity Security Act is held invalid, the remainder or its application to other persons or situations shall not be affected.

History: Laws 2007, ch. 106, § 6; 2010, ch. 54, § 7.

ANNOTATIONS

The 2010 amendment, effective May 19, 2010, after "application of the", added "Fair" and after "Fair Credit", deleted "Report" and added "Reporting and Identity".

ARTICLE 4
Credit Cards

56-4-1. Short title.

This act [56-4-1 to 56-4-4 NMSA 1978] may be cited as the "Credit Card Act".

History: 1953 Comp., § 50-19-1, enacted by Laws 1971, ch. 154, § 1.

ANNOTATIONS

Cross references. — For criminal provisions, *see* 30-16-25 to 30-16-38 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

56-4-2. Definitions.

As used in the Credit Card Act:

A. "adequate notice" means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning; notice may be given to a cardholder by printing it on his credit card or on each periodic statement of account issued to him or by any other means which reasonably assures receipt of the notice by the cardholder;

B. "credit card" means any card, plate, coupon book or other credit device existing for the purposes of obtaining money, property, labor or services on credit;

C. "accepted credit card" means any credit card which the cardholder has requested and received, or has signed, or has used or authorized another to use;

D. "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person;

E. "card issuer" means any person who issues a credit card or his agent with respect to the credit card; and

F. "unauthorized use" means any use of a credit card by a person other than the cardholder who does not have actual, implied or apparent authority for such use and from which use the cardholder received no benefit.

History: 1953 Comp., § 50-19-2, enacted by Laws 1971, ch. 154, § 2.

56-4-3. Issuance of credit cards.

No credit card shall be issued except in response to a request or application for it. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.

History: 1953 Comp., § 50-19-3, enacted by Laws 1971, ch. 154, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Letters of Credit and Credit Cards § 8 et seq.; 74 Am. Jur. 2d Torts § 15.

72 C.J.S. Supp. Products Liability § 68.

56-4-3.1. Prohibited disclosure of credit card number.

A person who accepts a credit card from a cardholder shall not issue a receipt that lists more than five numbers from the cardholder's credit card account number.

History: Laws 2003, ch. 169, § 4.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 169, § 5 made Laws 2003, ch. 169, § 4 effective January 1, 2004.

56-4-4. Liability of cardholder.

A. A cardholder is liable for the unauthorized use of a credit card only if:

(1) the card is an accepted credit card;

(2) the liability is not in excess of fifty dollars ($50.00);

(3) the card issuer has provided the cardholder with a toll-free number or other convenient, no-cost method of notifying the card issuer in the event of loss or theft of the credit card; and

(4) the unauthorized use occurs before the cardholder has notified the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft or otherwise.

B. No cardholder is liable for the unauthorized use of any credit card that was issued on or after the effective date of the Credit Card Act, and, after the expiration of twelve months following that effective date, no cardholder is liable for the unauthorized use of any credit card regardless of its date of issuance unless:

(1) the conditions of liability specified in Subsection A of this section are met; and

(2) the card issuer has provided a method whereby the user of the credit card can be identified as the person authorized to use it.

C. For the purposes of this section, a cardholder notifies a card issuer by taking such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information whether or not any particular officer, employee or agent of the card issuer does in fact receive such information.

D. In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the

conditions of liability for the unauthorized use of a credit card, as set forth in Subsection A of this section, have been met.

E. Nothing in this section imposes liability upon a cardholder for the unauthorized use of a credit card in excess of his liability for such use under other applicable law or under any agreement with the card issuer.

F. Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

History: 1953 Comp., § 50-19-4, enacted by Laws 1971, ch. 154, § 4; 1995, ch. 190, § 6.

ANNOTATIONS

Compiler's notes. — The phrase "effective date of the Credit Card Act" refers to the effective date of Laws 1971, ch. 154, which was May 19, 1971.

The 1995 amendment, effective June 16, 1995, substituted "toll-free number or other convenient, no-cost method of notifying the card issuer" for "self-addressed, pre-stamped notification to be mailed by the cardholder" in Paragraph (3) of Subsection A, and made minor stylistic changes in Subsections B and D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 66 Am. Jur. 2d Receiving Stolen Property § 40.

Liability of a holder of credit card or plate for purchases made by another person, 15 A.L.R.3d 1086.

Criminal liability for the unauthorized use of credit cards, 24 A.L.R.3d 986.

17A C.J.S. Contracts § 402; 35 C.J.S. False Pretenses §§ 20, 52.

ARTICLE 5
Miscellaneous Provisions Relating to Commercial Instruments

56-5-1. Assignability; rights of assignee.

Except as provided in the Uniform Commercial Code [Chapter 55 NMSA 1978], notes, bonds, due bills and all instruments in writing, by which the maker promises to pay to another, or order or bearer, a sum of money, or by which the maker promises to pay in property or labor, or to pay or deliver any property or labor, or acknowledges any money or labor or property to be due, are assignable by indorsement or by other writing, and the assignee has a right of action in his own name, subject to any defense or setoff,

legal or equitable, which the maker or debtor had against any assignor before notice of his assignment.

History: Laws 1851-1852, p. 283; C.L. 1865, ch. 14, § 1; C.L. 1884, § 1725; C.L. 1897, § 2540; Code 1915, § 589; C.S. 1929, § 27-101; 1941 Comp., § 53-701; 1953 Comp., § 50-7-1; Laws 1961, ch. 96, § 11-106.

ANNOTATIONS

This section has no application to liability insurance policy because it is not a promissory note, bill of exchange or other negotiable instrument, but is rather an executory contract of indemnification which can be assigned within limitations imposed by law. *Houtz v. General Bonding & Ins. Co.*, 235 F.2d 591 (10th Cir. 1956).

Section inapplicable to assignment as matter of law. — This section applies in terms to the assignment of the evidence of the debt. The section has no application where the assignment occurs pursuant to an equitable doctrine, which arises as a matter of law rather than by the act of the parties. *Barnett v. Wedgewood*, 1922-NMSC-068, 28 N.M. 312, 211 P. 601.

Assignee may sue on nonnegotiable note in own name. — A note transferred after maturity is subject to defenses existing between the payee and payors, and the question as to whether the note is negotiable or nonnegotiable is immaterial. Endorsement and delivery of a note operates as an assignment, even when the note be treated as nonnegotiable, and under our statute the assignee may sue in his own name. *Southard v. Latham*, 1914-NMSC-007, 18 N.M. 503, 138 P. 205.

Law reviews. — For comment, "Assignments - Maker's Defenses Cut Off - Uniform Commercial Code § 9-206," *see* 5 Nat. Resources J. 408 (1965).

For article, "Attachment in New Mexico - Part II," *see* 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments §§ 119, 120, 123, 124; 11 Am. Jur. 2d Bills and Notes §§ 301, 930.

Priority as between different assignees of same chose in action as affected by notice to debtor, 31 A.L.R. 876, 110 A.L.R. 774.

Payment of judgment by debtor without notice of its assignment, 32 A.L.R. 1021.

Assignment of judgment, or an interest therein, to attorney for his services in procuring it, as subject to setoff of judgment against the assignor, 51 A.L.R. 1278.

Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 A.L.R. 109.

Stockholders' statutory liability as assignable for subject of sale, 159 A.L.R. 1114.

Assignability of right to rescission or right to return of money or other property as incident of, 162 A.L.R. 743.

Priority between assignee and surety of contractor who completes contract as to money earned by contractor but unpaid before default, 164 A.L.R. 614.

Building and construction contractor, validity of assignment to one making loans or advances to, of labor or material claims, 164 A.L.R. 788.

Oil or gas "royalty" within language of assignment, 4 A.L.R.2d 492.

Assignment of statutory right of action for recovery of money lost at gambling, 18 A.L.R.2d 999.

Validity of anti-assignment clause in contract, 37 A.L.R.2d 1251.

6 C.J.S. Assignments § 6.

56-5-2. Assignment without recourse.

Except as provided in the Uniform Commercial Code [Chapter 55, NMSA 1978], the assignor may discharge himself from liability to the assignee by specifying in the assignment that it is made without recourse.

History: Laws 1851-1852, p. 283; C.L. 1865, ch. 14, § 2; C.L. 1884, § 1726; C.L. 1897, § 2541; Code 1915, § 590; C.S. 1929, § 27-102; 1941 Comp., § 53-702; 1953 Comp., § 50-7-2; Laws 1961, ch. 96, § 11-107.

56-5-3. Contracts not specifying time of performance; demand necessary.

Except as provided in the Uniform Commercial Code [Chapter 55, NMSA 1978], no contract for labor, or for the payment or delivery of property in which the time of performance is not fixed, can be converted into a money demand until a demand of performance has been made and the maker refuses or a reasonable time is allowed for performance.

History: Laws 1851-1852, p. 283; C.L. 1865, ch. 14, § 3; C.L. 1884, § 1727; C.L. 1897, § 2542; Code 1915, § 591; C.S. 1929, § 27-103; 1941 Comp., § 53-703; 1953 Comp., § 50-7-3; Laws 1961, ch. 96, § 11-108.

ANNOTATIONS

Purpose is to allow party last chance to perform. — The manifest purpose of this section is to give a party one last chance to perform his contract obligations prior to suit. *Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. 1967).

This section has no application where the time for performance is fixed in the contract. *Barnett v. Wedgewood*, 1922-NMSC-068, 28 N.M. 312, 211 P. 601.

Generally, no demand for performance is necessary when agreement is absolute and unconditional. *Data Gen. Corp. v. Commc'ns Diversified, Inc.*, 1986-NMSC-088, 105 N.M. 59, 728 P.2d 469.

Demand not required in action against realtor for fraud. — In bringing suit against a realtor for damages on account of claimed fraud in failing to buy real estate for the plaintiff, the demand required under this section was not a condition precedent to bringing the suit. *Mitchell v. Allison*, 1949-NMSC-070, 54 N.M. 56, 213 P.2d 231.

Law reviews. — For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," *see* 8 Nat. Resources J. 176 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17A Am. Jur. 2d Contracts §§ 201, 478.

Time for performance of contract for sale or exchange of land where time fixed by contract has been waived, 4 A.L.R. 815.

Rights of parties to a timber contract upon failure of purchaser to remove timber within a reasonable time, 15 A.L.R. 41, 31 A.L.R. 944, 42 A.L.R. 641, 71 A.L.R. 143, 164 A.L.R. 423.

Duration of real estate broker's contract which specifies no time, 24 A.L.R. 1537, 28 A.L.R. 893.

Delay in acceptance of work as coming within "no damage" clause with respect to the delay in construction contract, 74 A.L.R.3d 187.

17A C.J.S. Contracts § 478; 86 C.J.S. Time § 4.

56-5-4. [False certificate as to protest by notary public; penalty.]

Any notary public, who shall willfully issue a false certificate in relation to any note or order protested by him, shall be punished by a fine of not less than twenty dollars [($20.00)] nor more than five hundred dollars [($500)], and shall also be liable for damages to any party injured by such false certificate.

History: Laws 1876, ch. 30, § 3; C.L. 1884, § 1731; C.L. 1897, § 2547; Code 1915, § 594; C.S. 1929, § 27-106; 1941 Comp., § 53-704; 1953 Comp., § 50-7-4; Laws 1961, ch. 96, § 11-109.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Notaries Public §§ 58 to 76.

Necessity and sufficiency of officer's jurat or certificate as to oath, 1 A.L.R. 1568, 116 A.L.R. 587.

What amounts to notary's seal, 7 A.L.R. 1663.

Notary's right to change or contradict certificate of protest, 28 A.L.R. 543.

Parol evidence to show contents of certificate of protest, 75 A.L.R. 134.

Measure of damages for false or incomplete certificate by notary public, 13 A.L.R.3d 1039.

66 C.J.S. Notaries § 6.

56-5-5. [Bills of exchange; nonacceptance or nonpayment; damages and interest recoverable.]

The rate of damage to be allowed and paid upon the nonacceptance or nonpayment of bills of exchange drawn or indorsed in this state, when damage is recoverable, shall be as follows: if the bill be drawn upon a person at a place out of the United States, twelve percent upon the principal specified in the bill, with interest on the same from the time of the protest; if drawn upon a person at a place in any of the United States or the territories thereof, six percent with interest.

History: Laws 1851-1852, p. 283; C.L. 1865, ch. 14, § 4; C.L. 1884, § 1728; C.L. 1897, § 2543; Code 1915, § 592; C.S. 1929, § 27-104; 1941 Comp., § 53-705; 1953 Comp., § 50-7-5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

ARTICLE 6
Warehousing of Agricultural Products

56-6-1. Definitions.

As used in Sections 56-6-1 through 56-6-11 New Mexico Statutes Annotated, 1978 Compilation:

A. words shall have the same meanings as set forth in the Uniform Commercial Code, Article 7 [55-7-101 to 55-7-807 NMSA 1978];

B. "warehouse" means any building, structure or other protected enclosure in which any agricultural product is, or may be, stored; and

C. "agricultural products" includes only those which are produced from the ground.

History: Laws 1941, ch. 145, § 1; 1941 Comp., § 53-901; 1953 Comp., § 50-9-1; Laws 1961, ch. 96, § 11-110.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses §§ 11, 18.

Liability of warehousemen for damage to, or destruction of, property by fire, 16 A.L.R. 280.

Deposit of grain without obligation to return identical grain as bailment or a sale, 54 A.L.R. 1166.

Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman, 108 A.L.R. 928.

Storage contract as a bailment of chattels or lease of place where chattels are stored, 138 A.L.R. 1137.

Liability of warehouseman for deterioration of goods due to improper temperature, 92 A.L.R.2d 1298.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 A.L.R.4th 883.

93 C.J.S. Warehousemen and Safe Depositaries § 15.

56-6-2. [License to store agricultural products; issuance upon application; contents; fee.]

No warehouseman shall issue negotiable warehouse receipts for agricultural products as in this act [56-6-1 to 56-6-11 NMSA 1978] defined, unless he shall have obtained from the county clerk of the county in which his warehouse is located a license authorizing him to store such agricultural products. Such license shall be issued by said county clerk upon the written application, under oath, of the warehouseman, setting forth his name and the location of his warehouse or warehouses. At the time of filing such application with the county clerk, the applicant shall be required to pay to the county clerk a filing fee of $2.50. If the applicant is a partnership, the names of the partners shall be set forth, and if a corporation, then the names of the president, secretary and treasurer thereof shall be set forth. In the case of a corporate applicant, the application shall be signed and sworn to by its president or secretary. Such application shall be filed and preserved in the county clerk's office.

History: Laws 1941, ch. 145, § 2; 1941 Comp., § 53-902; 1953 Comp., § 50-9-2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For county clerks, *see* N.M. Const., art. VI, § 22 and Chapter 4, Article 40 NMSA 1978.

Individual requires one bond, license. — When a person is acting in his individual capacity, he need obtain only one bond and one license, even where he owns more than one warehouse. 1943 Op. Att'y Gen. No. 43-4390.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses §§ 19 to 23, 42.

53 C.J.S. Licenses § 34; 93 C.J.S. Warehousemen and Safe Depositaries § 5.

56-6-3. [Bond; filing; approval; conditions; effect of termination.]

No warehouseman shall issue negotiable warehouse receipts until he has filed, with the county clerk, a surety company bond in the sum of five thousand dollars ($5,000), payable to the state, and approved by the district attorney of the judicial district within which is located the office of the county clerk, to secure the faithful performance of the warehouseman's obligation under the provisions of Sections 56-6-1 through 56-6-11 New Mexico Statutes Annotated, 1978 Compilation, and under the Uniform Commercial Code, Article 7 [55-7-101 to 55-7-807 NMSA 1978], and of such additional obligations, as a warehouseman, assumed by him under contracts with the depositors of agricultural products in the warehouse. The license shall terminate upon the expiration of the surety bond unless a new bond is filed with the county clerk not less than ten days prior to the expiration date.

History: Laws 1941, ch. 145, § 3; 1941 Comp., § 53-903; 1953 Comp., § 50-9-3; Laws 1961, ch. 96, § 11-111.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For county clerks, *see* N.M. Const., art. VI, § 22 and Chapter 4, Article 40 NMSA 1978.

For district attorneys, *see* N.M. Const., art. VI, § 24 and Chapter 36, Article 1 NMSA 1978.

For surety companies, *see* Chapter 46, Article 6 NMSA 1978.

Bond required for each county with warehouse. — A bond must be filed by warehouse companies which issue negotiable warehouse receipts in each county in which warehouses are located. 1941 Op. Att'y Gen. No. 41-3897.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses §§ 127 to 137.

93 C.J.S. Warehousemen and Safe Depositaries §§ 15 to 28.

56-6-4. [Numbering of licenses; display.]

The county clerk shall number the licenses, issued under this act [56-6-1 to 56-6-11 NMSA 1978], with consecutive numbers following the name of his county, as follows: ". . . . . County, Number . . . ." Each warehouseman shall display the number of his license on his warehouse, together with the words "New Mexico Bonded Warehouse, License No. . . . . ., ... County."

History: Laws 1941, ch. 145, § 4; 1941 Comp., § 53-904; 1953 Comp., § 50-9-4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For county clerks, *see* N.M. Const., art. VI, § 22 and Chapter 4, Article 40 NMSA 1978.

56-6-5. [Insurance required.]

Each warehouseman shall be required to carry one hundred percent fire, combustion and lightning insurance and fifty percent tornado insurance on the value of the products in storage, under policies issued by insurance companies authorized to do business in New Mexico, payable to the warehouseman and his bondsman as their interests may appear.

History: Laws 1941, ch. 145, § 5; 1941 Comp., § 53-905; 1953 Comp., § 50-9-5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses §§ 157 to 167, 184 to 200.

Liability of warehouseman for damage to, or destruction of, property by fire, 16 A.L.R. 280.

Right in proceeds of insurance taken out by warehouseman on goods stored, 53 A.L.R. 1409.

Right of owner to sue on fire policy taken out by warehouseman, 61 A.L.R. 720.

Right of owner to enforce insurance policy taken out by warehouseman, 81 A.L.R. 1271, 148 A.L.R. 359.

Farmowners' liability insurance risks and coverage, 93 A.L.R.3d 472, 31 A.L.R.4th 957, 33 A.L.R.4th 983, 34 A.L.R.4th 761, 35 A.L.R.4th 1063.

93 C.J.S. Warehousemen and Safe Depositaries §§ 34, 40, 41, 61.

56-6-6. [Action for breach of obligation secured by bond.]

Any person injured by the breach of any obligation to secure which a bond is given, under the provisions of Sections 56-6-1 through 56-6-11 New Mexico Statutes Annotated, 1978 Compilation or the Uniform Commercial Code, Article 7 [55-7-101 to 55-7-807 NMSA 1978] shall be entitled to sue on the bond in his own name in any court of competent jurisdiction to recover the damages he may have sustained by such breach.

History: Laws 1941, ch. 145, § 6; 1941 Comp., § 53-906; 1953 Comp., § 50-9-6; Laws 1961, ch. 96, § 11-112.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses §§ 245, 248, 267.

93 C.J.S. Warehousemen and Safe Depositaries § 75.

56-6-7. [Revocation of license; procedure.]

The license gives the applicant authority to conduct the business of a warehouseman and is revocable only by the district court of the county in which the warehouse is located, upon the written petition of any person setting forth the particular violation of Sections 56-6-1 through 56-6-11 New Mexico Statutes Annotated, 1978 Compilation or of Sections 50-8-50 through 50-8-55 New Mexico Statutes Annotated, 1953 Compilation, or both, and upon proper procedure and proof, as in other civil cases.

History: Laws 1941, ch. 145, § 7; 1941 Comp., § 53-907; 1953 Comp., § 50-9-7; Laws 1961, ch. 96, § 11-113.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Sections 50-8-50 through 50-8-55 New Mexico Statutes Annotated, 1953 Compilation, referenced in this section, were repealed by Laws 1961, ch. 96, § 10-102.

Cross references. — For special penalty provisions pertaining to warehouse receipts, *see* 55-7-301 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses § 11.

93 C.J.S. Warehousemen and Safe Depositaries § 5.

56-6-8. [Negotiable receipts to bear endorsement regarding insurance.]

The negotiable receipts issued by any warehouseman under Sections 56-6-1 through 56-6-11 New Mexico Statutes Annotated, 1978 Compilation, among other requirements provided for in the Uniform Commercial Code, Article 7 [55-7-101 to 55-7-807 NMSA 1978] shall plainly state on the face that the agricultural products for which the receipt is issued are kept fully insured by the warehouseman against loss by fire at the current market value.

History: Laws 1941, ch. 145, § 8; 1941 Comp., § 53-908; 1953 Comp., § 50-9-8; Laws 1961, ch. 96, § 11-114.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses §§ 40 to 50.

Rights of purchaser of warehouse receipt against warehouseman, 38 A.L.R. 1205.

"Warehouse purchase receipt" as bailment or contract of sale, 91 A.L.R. 907.

93 C.J.S. Warehousemen and Safe Depositaries § 3.

56-6-9. [Issuance of receipts without complying with act; penalty.]

Any warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a receipt for such agricultural products without complying with the provisions of this act [56-6-1 to 56-6-11 NMSA 1978] shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment not exceeding three years or by a fine not exceeding five thousand dollars [($5,000)], or both.

History: Laws 1941, ch. 145, § 9; 1941 Comp., § 53-909; 1953 Comp., § 50-9-9.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses §§ 42, 60, 288, 305.

93 C.J.S. Warehousemen and Safe Depositaries §§ 18, 86.

56-6-10. [Exemption of farmer's marketing associations.]

The provisions of this act [56-6-1 to 56-6-11 NMSA 1978] shall not apply to any farmer's marketing association whose principal business is that of storing and marketing perishable agricultural products.

History: Laws 1941, ch. 145, § 10; 1941 Comp., § 53-910; 1953 Comp., § 50-9-10.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses § 9.

93 C.J.S. Warehousemen and Safe Depositaries § 5.

56-6-11. [Exemption of warehouseman operating under federal act, or under $5,000 bond; exception.]

No provision of this act [56-6-1 to 56-6-11 NMSA 1978] shall apply to any warehouseman operating under the provisions of the United States Warehouse Act nor to any warehouseman within the state of New Mexico who is under like bond in the amount of $5,000.00 or more to any agency of the United States or the state of New Mexico providing that if the warehouseman shall cease to operate under the bond referred to in this section, he shall be governed by the provisions of this act.

History: Laws 1941, ch. 145, § 11; 1941 Comp., § 53-911; 1953 Comp., § 50-9-11.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For the United States Warehouse Act, *see* 7 U.S.C. § 241 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Warehouses §§ 11, 12.

93 C.J.S. Warehousemen and Safe Depositaries §§ 3, 15.

ARTICLE 7
Indemnity Agreements

56-7-1. Real property; indemnity agreements; agreements void.

A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

B. A construction contract may contain a provision that, or shall be enforced only to the extent that, it:

(1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents; or

(2) requires a party to the contract to purchase a project-specific insurance policy, including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance.

C. This section does not apply to indemnity of a surety by a principal on any surety bond or to an insurer's obligation to its insureds.

D. The state, a state agency or a political subdivision of the state may enter into a contract for the construction, operation or maintenance of a public transportation system, including a railroad and related facilities, that includes a continuous obligation to procure an insurance policy, including an owner's, operator's or contractor's protective or liability insurance, project management protective liability insurance, builder's risk insurance, railroad protective insurance or other policy of insurance against the negligence of another party to the contract. If the state, a state agency or a political subdivision of the state insured by the risk management division of the general services department enters into a contract to procure insurance as permitted by this section, the cost of any insurance shall be paid by the risk management division of the general services department and shall not be a general obligation of the state, the state agency or the political subdivision of the state.

E. As used in this section, "construction contract" means a public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or maintenance of any real property in New Mexico and includes agreements for architectural services, demolition, design services, development, engineering services, excavation or other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property.

F. As used in this section, "indemnify" or "hold harmless" includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section.

History: 1953 Comp., § 28-2-1, enacted by Laws 1971, ch. 107, § 1; 2003, ch. 309, § 1; 2003, ch. 421, § 1; 2005, ch. 148, § 1.

ANNOTATIONS

Cross references. — For contribution among joint tort-feasors, *see* 41-3-1 to 41-3-8 NMSA 1978.

The 2005 amendment, effective June 17, 2005, added Subsection D to permit the state, its agencies and political subdivisions to enter into contracts for public transportation systems that include a continuous obligation to procure an insurance policy against the negligence of another party to the contract and to provide for payment of the insurance premium by the risk management division of the general services department.

The 2003 amendment, effective July 1, 2003, rewrote the section.

Anti-indemnity provisions in statute. — As a matter of law and policy, the anti-indemnity provisions of the 1971 version of 56-7-1 NMSA 1978 and the amended version both ensure that an indemnitor only has to indemnify for causes of action that arise from the indemnitor's own negligent conduct. In addition, both versions of the statute are based on public policy promoting safety in construction projects by holding each party to the contract accountable for injuries caused by its own negligence. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2016-NMSC-009, *rev'g* 2013-NMCA-021, 297 P.3d 347.

In an appeal arising out of a cross-claim for contractual and traditional indemnification, where contractor negligently installed a diaper changing table in a grocery store belonging to petitioner, and the changing table collapsed causing injuries to plaintiffs, petitioner sought defense, indemnification, contribution, and damages pursuant to an agreement between contractor and petitioner which provided that contractor would indemnify and defend petitioner for any damages in connection with any cause of action arising from any negligence of contractor. The indemnification provision was held to be statutorily void and unenforceable because it required contractor to indemnify petitioner for petitioner's own negligence. Similarly, as a matter of both law and policy, contractor was not required to pay for petitioner's legal defense caused by petitioner's own fault. Section 56-7-1 NMSA 1978 voids in its entirety an agreement containing provisions regarding both indemnification and duties to defend. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2016-NMSC-009, *rev'g* 2013-NMCA-021, 297 P.3d 347.

Statute in effect when indemnity agreement is signed applies. — The version of the indemnity statute that is in effect when the parties sign an indemnity agreement governs, irrespective of the statute's subsequent amendment. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2013-NMCA-021, 297 P.3d 347, cert. granted, 2013-NMCERT-001.

Statute in effect when indemnity agreement is signed governs. — Where, prior to 2003, a grocery store owner and a contractor signed a service agreement that contained an indemnity clause in which the contractor agreed to indemnify the grocery store owner from claims arising out of the contractor's performance of the agreement; in 2005, pursuant to the agreement, the contractor installed a diaper changing table in the owner's grocery store; in 2006, the changing table dislodged and fell from the wall, injuring plaintiff and plaintiff's child; and the 1971 version of 56-7-1 NMSA 1978 was amended in 2003, the contractor did not have a contractual duty to indemnify the

grocery store owner under the agreement because the 1971 version of 56-7-1 NMSA 1978, which was in effect when the parties signed the agreement, applied and prohibited all indemnity agreements. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2013-NMCA-021, 297 P.3d 347, cert. granted, 2013-NMCERT-001.

Indemnitee's negligence. — Section 56-7-1 NMSA 1978 does not prohibit a limitation of liability based on one's own negligence but prohibits the avoidance of all liability for one's own negligence. Fort Knox Self Storage, Inc. v. W. Techs., Inc., 2006-NMCA-096, 140 N.M. 233, 142 P.3d 1.

Agreement to defend extends to the conclusion of litigation. — Absent contractual language to the contrary, an agreement to defend and indemnify extends to the conclusion of litigation. Guest v. Allstate Ins. Co., 2010-NMSC-047, 149 N.M. 74, 244 P.3d 342, *aff'g in part, rev'g in part*, 2009-NMCA-037, 145 N.M. 797, 205 P.3d 844.

Where defendant's insured sued defendant and plaintiff; defendant agreed to provide plaintiff a defense and indemnification without any further elaboration or condition; plaintiff refused to accept the settlement agreement negotiated between defendant and the insured; and defendant refused to further fund plaintiff's defense or to pay any potential judgment against plaintiff, defendant's obligation to defend plaintiff extended through the end of litigation, whether as a result of a final judgment or a settlement that was acceptable to plaintiff. Guest v. Allstate Ins. Co., 2010-NMSC-047, 149 N.M. 74, 244 P.3d 342, *aff'g in part, rev'g in part*, 2009-NMCA-037, 145 N.M. 797, 205 P.3d 844.

Determination of type of work to be performed. — Where a contract is so generic in nature that it is not possible to determine the type of work to be performed from the contract itself, the court will look past the contract to the nature of the work being performed at the time of an accident in order to resolve whether the circumstances of a given case are within the scope of the anti-indemnity statutes. Holguin v. Fulco Oil Servs., LLC, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

Meaning of "maintenance". — Work on an improvement to real property that is required to keep that improvement in a good state of repair and operating properly is "maintenance" and is within the scope of the construction anti-indemnity statute. Holguin v. Fulco Oil Servs., LLC, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

Construction anti-indemnity statute applies to natural gas processing facility. — Where a natural gas company hired contractors to perform work at a natural gas processing facility; the service contract provided that the contractors agreed to indemnify the gas company against all claims even if the claim was based in part on the negligence of the gas company; and an employee of one of the contractors sued the gas company for injuries incurred during the cleaning of a "slug catcher", which is a system that removes condensate and other particles from the natural gas, the maintenance of the slug catcher was within the scope of the construction anti-indemnity

statute. Holguin v. Fulco Oil Servs., LLC, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

Void provision of an indemnity clause does not void the entire clause. — Subsection A of 56-7-1 NMSA 1978, which declares a provision that requires indemnification for the indemnitee's own negligence to be void and unenforceable, refers only to that particular provision within an indemnity clause not to the entire indemnity clause and remaining provisions in an indemnity clause that provide for indemnification against the indemnitor's negligence are enforceable under Subsection B of 56-7-1 NMSA 1978. Holguin v. Fulco Oil Servs., LLC, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

Indemnity clause was partially void. — Where a natural gas company hired contractors to perform work at a natural gas processing facility and the service contract provided that the contractors agreed to indemnify the gas company against all claims, including the negligence of the contractor, even if the claim was based in part on the negligence of the gas company, the provision of the indemnity clause that required the contractors to indemnify the gas company for the gas company's own negligence was void and unenforceable and the remainder of the indemnity clause that required the contractors to indemnify the gas company for claims based on the contractor's negligence was enforceable. Holguin v. Fulco Oil Servs., LLC, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

Rental equipment contract. — A contract for rental of equipment to be used in a construction project is a contract or agreement relating to construction, and an indemnity clause in such a contract or agreement is prohibited by 56-7-1 NMSA 1978. United Rentals Nw., Inc. v. Yearout Mech., Inc., 2010-NMSC-030, 148 N.M. 426, 237 P.3d 728.

General rule giving rise to the duty to defend. — If the allegations of an injured third party’s complaint show that an accident or occurrence comes within the coverage of a liability policy, the insurer is obligated to defend, regardless of the ultimate liability of the insured. The question presented to the insurer in each case is whether the injured party’s complaint states facts which bring the case within the coverage of the policy, not whether the third party can prove an action against the insured for damages. The insurer must also fulfill its promise to defend even though the complaint fails to state facts with sufficient clarity so that it may be determined from its face whether or not the action is within the coverage of the policy, provided the alleged facts tend to show an occurrence within the coverage. Windham v. L.C.I.2, Inc., 2012-NMCA-001, 268 P.3d 528.

Where defendant was hired as a general contractor to construct a structure; defendant hired a subcontractor to install a roof on the structure; plaintiff was injured within the scope of plaintiff’s employment with the subcontractor while installing the roof; defendant was named as an additional insured under the subcontractor’s liability insurance policy with respect to liability arising out of the subcontractor’s work for

defendant; plaintiff sued defendant for negligence for failing to take measures that would have prevented plaintiff's accident; and plaintiff made no claim against the subcontractor, plaintiff's allegations arose out of the subcontractor's work for defendant and the insured who issued the liability policy to the subcontractor had a duty to defend defendant regardless of defendant's ultimate liability to plaintiff. Windham v. L.C.I.2, Inc., 2012-NMCA-001, 268 P.3d 528.

When duty to defend is triggered. — The duty to defend in an indemnity contract arises when the allegations in a complaint state a claim that falls within the terms of the indemnity contract. City of Albuquerque v. BPLW Architects & Eng'rs, Inc., 2009-NMCA-081, 146 N.M. 717, 213 P.3d 1146.

Duty to defend for indemnitee's alleged negligence. — Where plaintiff and defendant entered into a contract in which defendant agreed to design and supervise the construction of a facility for plaintiff; plaintiff provided design specifications and approved the designs for the facility; shortly after the construction of the facility was completed, a pedestrian fell off a curb while exiting the facility and was injured; the pedestrian sued plaintiff alleging that plaintiff negligently constructed the curb; the indemnity clause of the contract between plaintiff and defendant provided that defendant agreed to defend, indemnify and hold harmless plaintiff against all suits brought against plaintiff because of any injury or damage to any person resulting from any negligent act, error or omission of defendant arising out of the performance of the contract; and the indemnity clause also provided that defendant was not required to defend plaintiff for plaintiff's own negligence, defendant had a duty to defend plaintiff, even for plaintiff's own alleged negligence, because plaintiff's alleged negligence arose out of defendant's performance of the contract. City of Albuquerque v. BPLW Architects & Engr's, Inc., 2009-NMCA-081, 146 N.M. 717, 213 P.3d 1146.

Circuity doctrine did not apply. — Where plaintiff hired defendant to build a dairy, defendant subcontracted the electrical work; plaintiff sued defendant and the subcontractor for damages caused by the defective wiring of the dairy; plaintiff's action against defendant was for negligent design, misrepresentation, hiring and supervision of the construction of the dairy; defendant demanded that the subcontractor indemnify defendant for liability imposed on defendant for the negligent wiring of the dairy; plaintiff settled with the subcontractor and agreed to indemnify the subcontractor against liability to defendant and to reduce any judgment obtained against defendant to extinguish the claim defendant had against the subcontractor; and defendant claimed that plaintiff's indemnity agreement with the subcontractor created a circular chain of indemnification because of the subcontractor's obligation to indemnify defendant, which barred plaintiff's claim against defendant, the doctrine of circuity did not apply because plaintiff's action against defendant was based on defendant's direct negligence and defendant could not seek indemnification from the subcontractor on plaintiff's claims because they had nothing to do with the subcontractor's negligence. Loper v. JMAR, 2013-NMCA-098, cert. denied, 2013-NMCERT-008.

Evidence of indemnity contract. — Where an insured sued the insured's insurer and the insurer's attorney for claims that arose out of the handling of the insured's uninsured motorist claim; the attorney told the insurer that if the insurer did not defend and indemnify the attorney, the attorney could not continue to handle the insurer's cases due to a conflict; the insurer asked the attorney to continue working on the insurer's cases and told the attorney that the insurer would defend the attorney; and the attorney continued to work on the insurer's cases, the evidence was sufficient to support the jury determination that an indemnity contract existed between the attorney and the insurer. Guest v. Allstate Ins. Co., 2009-NMCA-037, 145 N.M. 797, 205 P.3d 844, *aff'd in part, rev'd in part*, 2010-NMSC-047, 149 N.M. 74, 244 P.3d 342.

Breach of indemnity contract. — Where an insured sued the insured's insurer and the insurer's attorney for claims that arose out of the handling of the insured's uninsured motorist claim; the insurer agreed to defend and indemnify the attorney in the insured's suit; and the insurer negotiated a settlement of the insured's claims, which included a release of all claims that the attorney might have against the insureds and their attorneys; the attorney refused to accept the settlement; and the insurer discontinued the defense of the attorney, the insurer breached a material provision of the contract to defend and indemnify the attorney. Guest v. Allstate Ins. Co., 2009-NMCA-037, 145 N.M. 797, 205 P.3d 844, *aff'd in part, rev'd in part*, 2010-NMSC-047, 149 N.M. 74, 244 P.3d 342.

A contract indemnification clause is not invalid against public policy, because it fails to expressly exclude indemnification prohibited under this section. J.R. Hale Contracting Co., Inc. v. Union Pac. R.R., 2008-NMCA-037, 143 N.M. 574, 179 P.3d 579.

Agreements absolutely void. — This section does not allow, explicitly or implicitly, indemnification for an indemnitor's negligence. Indemnity agreements, as defined in this section, are absolutely void, whether they indemnify against the indemnitee's or the indemnitor's negligence. Sierra v. Garcia, 1987-NMSC-116, 106 N.M. 573, 746 P.2d 1105, superseded by statute, Holguin v. Fulco Oil Servs., L.L.C., 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

Project-specific insurance policy exception. — Where subcontractor's insurer brought an action against the general contractor and the general contractor's insurer seeking a declaratory judgment that it had no obligation to indemnify the general contractor following a wrongful death lawsuit by an employee of the subcontractor, and where the district court held that although this section voids the subcontract agreement's provisions requiring the subcontractor to indemnify the general contractor for the general contractor's own negligent acts and omissions, other provisions in the subcontract agreement were not contrary to this section and were therefore enforceable, including the provision requiring the subcontractor to add the general contractor as an additional insured on the insurance policy; the district court did not err in granting the general contractor's motion for summary judgment because the subcontract agreement's provisions, requiring the purchase of a project-specific insurance policy and requiring the subcontractor to add the general contractor as an

additional insured, fall under the exception identified in 56-7-1(B)(2) NMSA 1978, and thus the subcontract agreement does not violate 56-7-1(A) NMSA 1978 and 56-7-1(F) NMSA 1978. *First Mercury Ins. Co. v. Cincinnati Ins. Co*., 882 F.3d 1289 (10th Cir. 2018).

California provisions unenforceable. — Under New Mexico choice of law rules, the indemnity provisions of a contract made in California but performed in New Mexico were not enforceable because they were contrary to fundamental policies of the forum. Tucker v. R.A. Hanson Co., 956 F.2d 215 (10th Cir. 1992).

Properly-pled indemnification claims. — A property-pled indemnification claim must allege that the indemnitee caused some harm and is liable for claims made against the indemnitor. Frederick v. Sun 1031, LLC, 2012-NMCA-118, 293 P.3d 934.

Improperly-pled indemnification claims. — Where defendants offered investment packages to the public that consisted of interests in real property; plaintiff invested in three properties; defendants created the third parties to act as the seller of the real property; plaintiff sued defendants for violations of the New Mexico Securities Act of 1986, 58-13B-1 NMSA 1978 et seq. [repealed]; and defendants filed complaints against the third parties for indemnity on the ground that the third parties sold the real property interests that comprised the alleged securities that plaintiff bought; the third party complaint did not state an adequate claim for proportional or traditional indemnification because it did not allege that the third parties were wholly or partially liable to plaintiff for the violations of the Securities Act that plaintiff alleged in the complaint. Frederick v. Sun 1031, LLC, 2012-NMCA-118, 293 P.3d 934.

Traditional indemnification and proportional indemnification. — The right to traditional indemnification, or common law indemnification, involves whether the conduct of the party seeking indemnification was passive and not active. Active conduct is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had a duty to perform. Passive conduct occurs when the party seeking indemnification fails to discover and remedy a dangerous situation created by the negligence or wrongdoing of another. Traditional indemnification is a judicially created common-law right that grants to one who is held liable an all-or-nothing right of recovery from a third party. Proportional indemnification applies when the one seeking indemnification has been adjudged liable for full damages on a third-party claim that is not susceptible under law to proration of fault among joint tortfeasors. Proportional indemnification applies only when contribution or some other form of proration of fault among tortfeasors is not available. New Mexico recognizes proportional indemnification, which allows defendants to recover from a third-party for the portion of a plaintiff's loss which the third-party's conduct caused, even when the law does not apportion fault amongst tortfeasors under a theory of comparative fault. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2016-NMSC-009, *rev'g* 2013-NMCA-021, 297 P.3d 347.

Traditional indemnification does not apply when the jury finds a tortfeasor actively at fault. — Traditional indemnification would allow a party who has been found liable without active fault to seek restitution from someone who was actively at fault. One held vicariously liable has an action for traditional indemnification against the person whose act or omission gave rise to the vicarious liability. The legislature left traditional indemnification as the only scheme for a passive joint tortfeasor to recover from the active joint tortfeasor under four categories of vicarious and derivative liability listed in 41-3A-1(C) NMSA 1978. The application of traditional indemnification is limited to cases truly premised on vicarious or derivative liability. Traditional indemnity does not apply when the jury finds a tortfeasor actively at fault and apportions liability using comparative fault principles. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2016-NMSC-009, *rev'g* 2013-NMCA-021, 297 P.3d 347.

In an appeal arising out of a cross-claim for contractual and traditional indemnification, where contractor negligently installed a diaper changing table in a grocery store belonging to petitioner, and the changing table collapsed causing injuries to plaintiffs, and where, at trial, the jury returned a comparative fault special verdict form, finding petitioner 40% at fault for either failing to exercise ordinary care to provide proper hardware to contractor, failing to supervise the installation of the diaper changing table, or failing to conduct reasonable inspections of the table between the time of installation and the time of plaintiffs' injuries, petitioner sought defense, indemnification, contribution, and damages pursuant to New Mexico common law and an agreement between contractor and petitioner which provided that contractor would indemnify and defend petitioner for any damages in connection with any cause of action arising from any negligence of contractor. Traditional indemnification was not applicable because plaintiffs clearly advanced, and the jury found, theories of liability that alleged petitioner to be an active tortfeasor, and this was not a true vicarious liability case that would entitle petitioner to traditional indemnity because the jury found petitioner actively at fault. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2016-NMSC-009, *rev'g* 2013-NMCA-021, 297 P.3d 347.

Common law right to indemnification. — Common law indemnification allows a passive tortfeasor who is not at fault to recover in full from an active tortfeasor who is at fault. The court of a jury must determine whether a tortfeasor was an active or passive tortfeasor. The fact that a court or a jury apportions fault to a tortfeasor does not establish whether the tortfeasor was a passive tortfeasor and entitled to indemnification. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2013-NMCA-021, 297 P.3d 347, cert. granted, 2013-NMCERT-001.

Common law right to indemnification not barred by statute. — Common law indemnification is not precluded by 56-7-1 NMSA 1978 because the statute applies only to agreements to indemnify, not to common law indemnification. The fact that an indemnity agreement is unenforceable under 56-7-1 NMSA 1978 has no effect upon a party's common law right to indemnification. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2013-NMCA-021, 297 P.3d 347, cert. granted, 2013-NMCERT-001.

Common law indemnification requires a determination of whether an indemnitee was a passive or an active tortfeasor. — Where, pursuant to a service agreement between a grocery store owner and a contractor, the contractor installed a diaper changing table in the owner's grocery store; the changing table dislodged and fell from the wall, injuring plaintiff and plaintiff's child; plaintiff sued the grocery store owner under the non-delegable duty doctrine based on the grocery store owner's failure to maintain safe premises; the jury apportioned fault between the grocery store owner and the contractor, but did not determine whether the grocery store owner was an active or a passive tortfeasor; and the grocery store owner sued the contractor for common law indemnification, the district court erred in granting summary judgment for the contractor because issues of material fact existed as to whether the grocery store owner was a passive or an active tortfeasor which would determine whether the grocery store owner was entitled to common law indemnification. Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2013-NMCA-021, 297 P.3d 347, cert. granted, 2013-NMCERT-001.

Law reviews. — For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," *see* 18 N.M.L. Rev. 483 (1988).

For note, "Contract law: New Mexico interprets the insurance clause in the oil and gas anti-indemnity statute: *Amoco Production Co. v. Action Well Service, Inc.,*", *see* 20 N.M.L. Rev. 179 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Indemnity §§ 9 to 12, 19 to 27.

What law governs right to indemnity between tort-feasors, 95 A.L.R.2d 1096.

Tenant's agreement to indemnify landlord against all claims as including losses resulting from landlord's negligence, 4 A.L.R.4th 798.

17 C.J.S. Contracts § 221; 42 C.J.S. Indemnity § 1.

56-7-2. Oil, gas or water wells and mineral mines; agreements, covenants and promises to indemnify void.

A. An agreement, covenant or promise, foreign or domestic, contained in, collateral to or affecting an agreement pertaining to a well for oil, gas or water, or mine for a mineral, within New Mexico, that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified in Paragraph (1), (2) or (3) of this subsection is against public policy and is void:

(1) the sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee;

(2) the sole or concurrent negligence of an independent contractor who is directly responsible to the indemnitee; or

(3) an accident that occurs in operations carried on at the direction or under the supervision of the indemnitee, an employee or representative of the indemnitee or in accordance with methods and means specified by the indemnitee or employees or representatives of the indemnitee.

B. As used in this section, "agreement pertaining to a well for oil, gas or water, or mine for a mineral" means an agreement:

(1) concerning any operations related to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging or otherwise rendering services in connection with a well drilled for the purpose of producing or disposing of oil, gas or other minerals or water;

(2) for rendering services in connection with a mine shaft, drift or other structure intended for use in the exploration for or production of a mineral; or

(3) to perform a portion of the work or services described in Paragraph (1) or (2) of this subsection or an act collateral thereto.

C. A provision in an insurance contract indemnity agreement naming a person as an additional insured or a provision in an insurance contract or any other contract requiring a waiver of rights of subrogation or otherwise having the effect of imposing a duty of indemnification on the primary insured party that would, if it were a direct or collateral agreement described in Subsections A and B of this section, be void, is against public policy and void.

D. Nothing in this section:

(1) deprives an owner of the surface estate of the right to secure indemnity from a lessee, operator, contractor or other person conducting operations for the exploration of minerals on the owner's land; or

(2) affects the validity of a benefit conferred by the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978].

History: 1953 Comp., § 28-2-2, enacted by Laws 1971, ch. 205, § 1; 1999, ch. 162, § 1; 2003, ch. 309, § 2; 2003, ch. 421, § 2.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, in Subsection A, inserted "foreign or domestic" following "covenant or promise", inserted "within New Mexico" following "for a mineral"; and substituted "Paragraph" for "Paragraphs" preceding "(1) or (2)" in Subsection A and Paragraph B(3).

Laws 2003, ch. 309, § 2 and Laws 2003, ch. 421, § 2, both effective July 1, 2003, enacted identical amendments to this section. The section was set out as amended by Laws 2003, ch. 421, § 2. *See* 12-1-8 NMSA 1978.

The 1999 amendment, effective June 18, 1999, rewrote the section, including adding a new Subsection C to expand coverage of prohibited indemnification arrangements.

Determination of type of work to be performed. — Where a contract is so generic in nature that it is not possible to determine the type of work to be performed from the contract itself, the court will look past the contract to the nature of the work being performed at the time of an accident in order to resolve whether the circumstances of a given case are within the scope of the anti-indemnity statutes. *Holguin v. Fulco Oil Servs., LLC*, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

The anti-indemnity statute does not include any activities related to the distribution, processing, or transportation of oil and gas. *Holguin v. Fulco Oil Servs., LLC*, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

Oilfield anti-indemnity statute did not apply to natural gas processing facility. — Where a natural gas company hired contractors to perform work at a natural gas processing facility; the service contract provided that the contractors agreed to indemnify the gas company against all claims even if the claim was based in part on the negligence of the gas company; an employee of one of the contractors sued the gas company for injuries incurred during the cleaning of a "slug catcher", which is a system that removes condensate and other particles from the natural gas; and the slug catcher was not located at a well site and was not part of the production activities associated with a well head, the maintenance of the slug catcher was not within the scope of the oilfield anti-indemnity statute. *Holguin v. Fulco Oil Servs., LLC*, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42, cert. dismissed, 2011-NMCERT-010.

Indemnitee cannot contract away liability for own negligence. — The language in Subsection A(4), which makes void and unenforceable any agreement which purports to indemnify an indemnitee for injuries or death "arising from the . . . concurrent negligence of the indemnitee", means only that the indemnitee cannot contract away liability for his own percentage of negligence. *Guitard v. Gulf Oil Co.*, 1983-NMCA-103, 100 N.M. 358, 670 P.2d 969; *Brashar v. Mobil Oil Corp.*, 626 F. Supp. 434 (D.N.M. 1984); *Tipton v. Texaco, Inc.*, 1985-NMSC-108, 103 N.M. 689, 712 P.2d 1351 (decided under prior law).

Indemnity provision that holds an indemnitee harmless against its own negligence is void. — In a subrogation action, where an insurer brought an action as the subrogee of an insured pipeline operator against the surface estate owner and construction company to recover cleanup costs incurred after the release of waste saltwater on the surface of the property from the operator's pipeline, and where the estate owner alleged that the pipeline operator breached the parties saltwater disposal

agreement by pursuing claims against the estate owner through a subrogee because the estate owner and the pipeline operator had an agreement whereby the pipeline operator would hold the estate owner harmless from any losses, damages, liabilities, or claims of any kind in connection with the operation, the estate owner was precluded from enforcing the indemnity provision, which required the pipeline operator to indemnify the estate owner for the owner's own negligence. New Mexico law voids indemnity clauses where one party agrees to hold an indemnitee harmless against its own negligence, and the indemnity provision in the saltwater disposal agreement had the effect of relieving the estate owner from liability for its own negligence. *St. Paul Fire and Marine Ins. Co. v. Sedona Contracting, Inc.*, 474 F. Supp. 3d 1211 (D. N.M. 2020)

Indemnity provision holding each party responsible for its own negligence does not violate this section. — Where oil and gas well operator (operator) brought action against contractor and commercial general liability insurer (insurer), alleging that contractor breached its contractual duties to defend operator against claims asserted in underlying personal injury lawsuits arising from an accident at a well, and that insurer breached its defense and reimbursement obligations to operator, insurer's motion for summary judgment was denied because this section prohibits only those contracts that provide indemnity for one's own negligence, and the master contract in this case does not purport to relieve operator of its own negligence but seeks to indemnify operator for contractor's negligence, for which operator may be held liable. New Mexico courts have allowed indemnity agreements that seek to hold each party responsible for its own negligence. *XTO Energy, Inc. v. ATD, LLC*, 189 F.Supp.3d 1174 (D.N.M. 2016).

Validity of insurance contract. — Under Subsection A(4), the validity of any insurance contract is not affected where the insurance is purchased by the indemnitor to protect its interests, and not the interest of the indemnitee. *Amoco Prod. Co. v. Action Well Serv., Inc.*, 1988-NMSC-040, 107 N.M. 208, 755 P.2d 52 (decided under prior law).

Enforcement of out-of-state indemnity. — Indemnity provisions requiring an operator to indemnify a driller for the driller's own negligence were valid under Texas law, whose public policy is consistent with New Mexico's, and were enforceable in New Mexico. *Reagan v. McGee Drilling Corp.*, 1997-NMCA-014, 123 N.M. 68, 933 P.2d 867 (decided under prior law).

Fundamental principle of justice. — Section 56-7-2 NMSA 1978, as amended in 1999, is intended to insure the safety of persons and property at well sites within New Mexico and a choice of law provision applying Texas law, by which an indemnitee may be indemnified against its own negligence, is void as violative of the public policy of New Mexico. *Piña v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, 139 N.M. 619, 136 P.3d 1029.

Choice of law provision void. — Indemnification agreements that undermine the indemnitee's incentive to promote safety at New Mexico well sites violate a fundamental public policy of New Mexico and are void and unenforceable and agreements that purport to escape the effect of 56-7-2 NMSA 1978, as amended in 1999, by invoking

foreign law are against public policy and are void and unenforceable in New Mexico courts. *Piña v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, 139 N.M. 619, 136 P.3d 1029.

Law reviews. — For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," *see* 18 N.M.L. Rev. 483 (1988).

For note, "Contract law: New Mexico interprets the insurance clause in the oil and gas anti-indemnity statute: *Amoco Production Co. v. Action Well Service, Inc.,*", *see* 20 N.M.L. Rev. 179 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Tenant's agreement to indemnify landlord against all claims as including losses resulting from landlord's negligence, 4 A.L.R.4th 798.

56-7-3. Commercial instruments and transaction.

A. A provision of a lease or rental contract for equipment that requires a party to the agreement to indemnify, hold harmless, insure or defend the other party to the agreement, including the other party's officers, employees or agents against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to a person or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of this state.

B. A lease or rental contract for equipment may contain a provision that requires one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or expenses are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents.

C. A lease or rental contract for equipment that does not contain a provision covered by this section shall be presumed to conform to Subsections A and B of this section.

D. As used in this section, "lease or rental contract for equipment" means any public, private, foreign or domestic contract or agreement relating to the temporary use of equipment without transfer of ownership of the equipment from one party to the other.

E. As used in this section, "indemnify" or "hold harmless" includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section. The provisions of this subsection shall not restrict the right of any remedy available to a claimant or plaintiff.

F. Nothing in this section shall apply to a lease or rental contract for a motor vehicle, as "motor vehicle" is defined in Section 66-1-4.11 NMSA 1978 and that is designed and used primarily to transport persons or property on a public highway.

G. Nothing in this section shall apply to a security agreement as defined in Section 55-9-102 NMSA 1978 or to a finance lease as defined in Section 55-2A-103 NMSA 1978 or to a lease by a repossessing lessor for equipment repossessed upon default under such a finance lease.

H. Nothing in this section shall apply to a lease or rental contract for equipment for use in the production of motion pictures or television.

History: Laws 2007, ch. 252, § 2.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 252 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

ARTICLE 8
Money, Interest and Usury

56-8-1. [Lawful money; definition; application.]

The money of account of this state shall be the dollar, cent and mill; and all public accounts, and the proceedings of all courts in relation to money shall be kept and expressed in money of the above denomination.

History: Laws 1851-1852, p. 254; C.L. 1865, ch. 79, § 1; C.L. 1884, § 1732; C.L. 1897, § 2548; Code 1915, § 3523; C.S. 1929, § 89-101; 1941 Comp., § 53-601; 1953 Comp., § 50-6-1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 4 to 17.

Retrospective application and effect of statutory provision for change of rate of interest, 4 A.L.R.2d 932, 40 A.L.R.4th 147, 41 A.L.R.4th 694.

91 C.J.S. Usury § 8.

56-8-2. [Denominations to be reduced to lawful basis in actions.]

The above section [56-8-1 NMSA 1978] shall not in any manner affect any demand in money of another denomination, but such demand in any suit or proceeding affecting the same shall be reduced to the above denomination.

History: Laws 1851-1852, p. 254; C.L. 1865, ch. 79, § 2; C.L. 1884, § 1733; C.L. 1897, § 2549; Code 1915, § 3524; C.S. 1929, § 89-102; 1941 Comp., § 53-602; 1953 Comp., § 50-6-2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross reference. — For the meaning of the words "above denomination" as referring to the dollar, cent and mill, *see* 56-8-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 C.J.S. Mines § 141.

56-8-3. Interest rate; no written contract.

The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in the following cases:

A. on money due by contract;

B. on money received to the use of another and retained without the owner's consent expressed or implied; and

C. on money due upon the settlement of matured accounts from the day the balance is ascertained.

History: 1978 Comp., § 56-8-3, enacted by Laws 1983, ch. 254, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1983, Chapter 254, § 1 repealed and reenacted 56-8-3 NMSA 1978. For prior history, *see* Laws 1851-1852, p. 254; C.L. 1865, ch. 79, § 4; C.L. 1884, § 1734; C.L. 1897, § 2550; Code 1915, § 3525; C.S. 1929, § 89-103; 1941 Comp., § 53-603; 1953 Comp., § 50-6-3; Laws 1980, ch. 68, § 1.

Cross references. — For interest rate on open accounts in commercial houses, *see* 56-8-5 NMSA 1978.

For exemption from limits of interest rate on National Housing Act loans, *see* 58-8-2 NMSA 1978.

Compiler's notes. — Annotations to decisions under prior versions of Section 56-8-3 NMSA 1978 and their predecessors (which contained various legal rates of interest) appear in the annotations to decisions under this section.

I. GENERAL CONSIDERATION.

Application to prejudgment interest. — This section, by its own terms, applies only in those actions on a contract where the contract is silent as to prejudgment interest. *D.J. Simmons, Inc. v. Broaddus*, 116 Fed. Appx. 964.

Applicability. — This statute applies to all judgments and decrees. The references to contracts in the statute simply clarifies that a contract could always set a different rate of interest, which a judgment was to follow. *Folz v. State*, 1993-NMCA-066, 115 N.M. 639, 857 P.2d 39, cert. denied, 115 N.M. 602, 856 P.2d 250.

This section does not use the term "damages". Instead it refers to "money due by contract". *Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc.*, 2004-NMCA-063, 135 N.M. 607, 92 P.3d 53, cert. denied, 2004-NMCERT-005, 135 N.M. 565, 92 P.3d 10.

Section inapplicable when neither contract nor judgment involved. — This section is inapplicable where the trial court, sitting in equity, is not awarding money due on a contract and there is no money due "on a judgment." *El Paso Natural Gas Co. v. W. Bldg. Assocs.*, 675 F.2d 1135 (10th Cir. 1982).

1980 amendment inapplicable to complaint filed prior thereto. — The increase in the interest rate from 6 percent to 10 percent enacted in 1980 does not apply to a complaint filed prior to 1980. *Strickland v. Roosevelt County Rural Elec. Coop.*, 1982-NMCA-184, 99 N.M. 335, 657 P.2d 1184, cert. denied, 99 N.M. 358, 658 P.2d 433 (1983), and cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Inapplicable when written contract fixes different rate. — Where a written contract fixing a different rate existed between the parties, there is no applicability of this section. *Skarda v. Davis*, 1973-NMSC-011, 84 N.M. 544, 505 P.2d 1220.

Inapplicable when written contract provides "no interest". — Where express provision of contract stipulated that part of obligation payable in annual installments was to bear no interest, there is no place for the operation of any implied contract to pay interest, regardless of how the statutory term "due" used in this section might be interpreted. *City of Clovis v. Sw. Pub. Serv. Co.*, 1945-NMSC-030, 49 N.M. 270, 161 P.2d 878.

Inapplicable when contract performed out-of-state. — Where drainage district bonds and coupons issued by Roswell drainage district of New Mexico are made payable to

bearer at bank in Illinois, interest rate after maturity of coupons is governed by law of state where contract was to be performed and not by this section. *Roswell Drainage Dist. v. Parker*, 53 F.2d 793 (10th Cir. 1931).

Applicable when contract uses mathematical formula. — When the amount owed is ascertainable by a mathematical calculation from a standard fixed in the contract or from established market prices, this section is applicable. *Grynberg v. Roberts*, 1985-NMSC-040, 102 N.M. 560, 698 P.2d 430.

An injured party is entitled to prejudgment interest as a matter of right when the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices. The trial court has discretion to award prejudgment interest, if justice requires, when the contract amount is not ascertainable by the above means. *Kueffer v. Kueffer*, 1990-NMSC-045, 110 N.M. 10, 791 P.2d 461.

Prejudgment interest is permissible as a matter of right when the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices. Furthermore, so long as the amount of money obligation is ascertainable, interest is recoverable even where the creditor has not actually realized any loss as a result of nonpayment. *Martinez v. Albuquerque Collection Servs., Inc.*, 867 F. Supp. 1495 (D.N.M. 1994).

Applicability in divorce cases. — Award of prejudgment interest in a divorce case is a question within the sound discretion of the trial court, as it is in other cases. *Jurado v. Jurado*, 1995-NMCA-014, 119 N.M. 522, 892 P.2d 969.

Fact that defendant offered to pay contested amount before trial is not persuasive that it was inequitable for the trial court to award plaintiff prejudgment interest on the amount. *Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc.*, 2004-NMCA-063, 135 N.M. 607, 92 P.3d 53, cert. denied, 2004-NMCERT-005, 135 N.M. 565, 92 P.3d 10.

Subsection A requires that contract be breached before an award of prejudgment interest can be considered. *State Farm Mut. Auto. Ins. Co. v. Barker*, 2004-NMCA-105, 136 N.M. 211, 96 P.3d 336.

Purpose of prejudgment interest. — This section allows prejudgment interest in cases proving money due by contract; the obligation to pay prejudgment interest arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor between the time the claimant's claim accrues and the time of judgement (the loss of use and earning power of the claimant's fund). *State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co. of Am.*, 1994-NMSC-106, 118 N.M. 558, 883 P.2d 144.

Certainty of damages does not provide the basis for an award of prejudgment interest under this section. *State Farm Mut. Auto. Ins. Co. v. Barker*, 2004-NMCA-105, 136 N.M. 211, 96 P.3d 336.

Prejudgment interest as damages. — The fact that Subsection A fixes a statutory maximum rate of 15 percent for interest "on money due by contract" does not preclude use of that rate in computing prejudgment interest as damages; the same rate is fixed in Subsection B for interest "on money received to the use of another and retained without the owner's consent expressed or implied". Interest as damages is computed at the statutory rate, and finding an implied contract to pay interest is not necessary in order to apply Subsection B. *Economy Rentals, Inc. v. Garcia*, 1991-NMSC-092, 112 N.M. 748, 819 P.2d 1306.

Construction with Section 56-8-4 NMSA 1978. — Prejudgment interest assessed from the date the claim accrued was consistent with an award under this section, not 56-8-4B NMSA 1978; as a result, the appeals court should not review the award as a matter of discretion, but as an award as of right pursuant to this section. *Gilmore v. Duderstadt*, 1998-NMCA-086, 125 N.M. 330, 961 P.2d 175.

Prejudgment interest not considered insurance "claim". — Prejudgment interest is not included within the definition of "covered claims" in 59A-43-4C NMSA 1978 so as to be limited or excluded by the Property and Casualty Insurance Guaranty Law liability cap of $100,000 per occurrence on individual "covered claims." Also, no specific authority within the Guaranty Law is necessary to award prejudgment interest. The trial court has that authority under either this section or 56-8-4B NMSA 1978. *Aztec Well Servicing Co. v. Prop. & Cas. Ins. Guar. Ass'n*, 1993-NMSC-023, 115 N.M. 475, 853 P.2d 726.

Prejudgment interest rate to be applied is the one in effect when the dispute becomes a pending case. *Taylor v. Allegretto*, 1994-NMSC-081, 118 N.M. 85, 879 P.2d 86.

Countervailing equities regarding prejudgment interest. — When prejudgment interest is awarded either as a matter of right or in the trial court's discretion, the court will examine any countervailing equities to determine whether the award was properly made. *State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co. of Am.*, 1994-NMSC-106, 118 N.M. 558, 883 P.2d 144.

Debtor may elect to pay more than legal interest. — Although the legal rate of interest is 6%, that does not prevent a debtor from paying more if he elects, and a debtor who knows that an account stated contains items of interest on average monthly balances agrees to pay interest on the monthly balances. *Brown & Manzanares Co. v. Gise*, 1907-NMSC-030, 14 N.M. 282, 91 P. 716.

A mere difference of opinion as to the amount owed will not relieve the breaching party for liability for prejudgment interest. *Kueffer v. Kueffer*, 1990-NMSC-045, 110 N.M. 10, 791 P.2d 461.

Interest on judgment against political subdivision. — Because of the separate policies furthered by the two sections, it cannot be said that the language of 56-8-4D NMSA 1978 exempts a city from prejudgment interest under this section, which is silent as to the assessment of interest against political subdivisions. *City of Carlsbad v. Grace*, 1998-NMCA-144, 126 N.M. 95, 966 P.2d 1178.

Legal interest rate if contract silent. — This section empowers private lenders to charge interest on money debts at the legal rate if the contract is silent on the issue. *Martinez v. Albuquerque Collection Servs., Inc.*, 867 F. Supp. 1495 (D.N.M. 1994).

Source of award not determinative. — In determining interest, whether an award is made by arbitrators or by a court is not the determining factor. *State Farm Mut. Auto. Ins. Co. v. Barker*, 2004-NMCA-105, 136 N.M. 211, 96 P.3d 336.

II. MONEY DUE BY CONTRACT.

A. IN GENERAL.

Since check takes on characteristics of demand note, section covering interest on money due on contract applies. *Coseboom v. Marshall Trust*, 1960-NMSC-113, 67 N.M. 405, 356 P.2d 117.

Check on which payment has been stopped comes within classification of "money due by contract." *Coseboom v. Marshall Trust*, 1960-NMSC-113, 67 N.M. 405, 356 P.2d 117.

Money due on settlement from insurance policy is "due by contract" and is therefore subject to interest at the statutory rate. *O'Meara v. Commercial Ins. Co.*, 1962-NMSC-160, 71 N.M. 145, 376 P.2d 486.

Money due on settlement from insurance policy. — Trial court's application of Subsection A and award of prejudgment interest for money due by contract was proper based on a judgment allowing the stacking of insurance coverage because the insured had a reasonable expectation of coverage under the policy. *Ponder v. State Farm Mut. Ins. Co.*, 2000-NMSC-033, 129 N.M. 698, 12 P.3d 960.

Oral contract. — Where plaintiff was the assignee of an account receivable due under an oral contract to care for and feed cattle; and defendant testified that the parties to the oral contract orally agreed to waive interest charges, it was within the discretion of the trial court to disbelieve evidence of the alleged oral waiver and award fifteen percent interest on the amount due. *Production Credit Ass'n of Sw. N.M. v. Alamo Ranch Co.*, 989 F.2d 413 (10th Cir. 1993).

B. DATE OF ACCRUAL.

Interest accrues upon maturity of indebtedness. — In a situation where no additional demand is required to mature the indebtedness, reason and logic support the accrual of interest from the date of refusal of payment. *Coseboom v. Marshall Trust*, 1960-NMSC-113, 67 N.M. 405, 356 P.2d 117.

On demand notes interest is recoverable from time of demand. *Coseboom v. Marshall Trust*, 1960-NMSC-113, 67 N.M. 405, 356 P.2d 117.

Interest on bill of exchange dates from judgment. — Principal's liability on a bill of exchange drawn against it by an agent and paid by the plaintiff bank does not include interest on the principal amount before the date judgment was entered. *Roswell State Bank v. Lawrence Walker Cotton Co.*, 1952-NMSC-020, 56 N.M. 107, 240 P.2d 1143.

Contract does not expressly forbid accrual of interest. — Where the parties entered into a long-term contract for the sale of natural gas, plaintiff recovered judgment against defendant for overcharges together with prejudgment interest; the contract provided that if plaintiff paid an overcharge, then within 30 days after final determination, defendant would refund the amount of the overcharge; and there was no indication that the parties intended to delay the due date for payment of overcharges until final judicial determination, no prohibition of prejudgment interest on overcharges could be implied from the contract and the award of prejudgment interest was within the discretion of the trial court. *City of Farmington v. Amoco Gas Co.*, 777 F.2d 554 (10th Cir. 1985).

Oral contract. — Where the parties entered into an oral contract to care for and feed cattle, prejudgment interest should be awarded on the amount due for cattle feed from the date the last of the cattle were sold, which was the date when the amount due under the oral contract could be ascertained with reasonable certainty. *Production Credit Ass'n of Sw. N.M. v. Alamo Ranch Co.*, 989 F.2d 413 (10th Cir. 1993).

III. MONEY RETAINED WITHOUT CONSENT.

Cotenant liable for interest on rents and profits withheld from cotenant. — Where a cotenant entered under a deed which purported to convey the whole estate, and claimed the land adversely, he is liable for interest on his cotenant's share of the rents and profits received, although his cotenant failed to demand them, as there was no consent to their retention. *Armijo v. Neher*, 1903-NMSC-005, 11 N.M. 645, 72 P. 12.

Express contract stipulating no interest. — Subsection B does not create a liability for interest if the retention of a payable obligation is proper. When an express provision of a contract stipulates that a payable obligation is to bear no interest, there can be no implied contract to pay interest under the statute. *Murdock v. Pure-Lively Energy 1981-A, Ltd.*, 1989-NMSC-048, 108 N.M. 575, 775 P.2d 1292.

Prejudgment interest may be awarded in connection with judgment based on quantum meruit. — When a person is found to be liable in quantum meruit, the factfinder has made, in essence, a determination that the person has retained the money due (i.e., the value of the services or materials) and has deprived the claimant of the opportunity to use the money. The trial court may compensate the claimant for the lost opportunity by awarding prejudgment interest. *Taylor v. Allegretto*, 1994-NMSC-081, 118 N.M. 85, 879 P.2d 86.

Beneficiary mistakenly paid money owes prejudgment interest. — When a p.o.d. (paid on death) beneficiary of a joint account was mistakenly paid the money in the account upon the death of one of the two joint tenants and was, thus, unjustly enriched at the bank's expense, the bank was entitled as a matter of right (absent countervailing equities) to an award of prejudgment interest at a rate of not more than 15%. *Sunwest Bank v. Colucci*, 1994-NMSC-027, 117 N.M. 373, 872 P.2d 346.

Award of prejudgment interest is a question of law. — The award of prejudgment interest is a question of law solely within the sound discretion of the court and where defendant wrongfully deducted the amount due on a delinquent promissory note from a non-renewal certificate of deposit with a fixed term of six months and a fixed rate of six percent, the court did not err in awarding prejudgment interest in the statutory amount on the ground that because there was no contract in force, 56-8-3 NMSA 1978 applied. *Navajo Tribe v. Bank of N.M.*, 700 F.2d 1285 (10th Cir., 1983).

IV. MONEY DUE ON MATURED ACCOUNTS.

Interest collectable after maturity of general obligation bond. — Because of 73-21-18 and 73-21-19 NMSA 1978 allowing a governing body to levy and collect taxes for payment of general obligations at any time they should become necessary, as opposed to special obligation bonds which can draw only upon specific funds as designated by statute and city ordinance, interest may be collected after the date of maturity of a general obligation bond in accordance with the general rule that interest coupons or notes executed by the maker of a note or bond to evidence installments of interest do bear interest after maturity, although there is no provision for interest. *Dexter v. Lakeshore City Sanitation Dist.*, 1971-NMSC-057, 82 N.M. 556, 484 P.2d 1266.

Section inapplicable to special revenue bonds. — This section is inapplicable when a specific rule applies to the state or its subdivisions, particularly in the case of special revenue bonds. The statutory method of repaying such bonds is exclusive. Thus, bondholders do not receive interest upon interest after maturity of passing bonds. *Munro v. City of Albuquerque*, 1939-NMSC-043, 43 N.M. 334, 93 P.2d 993.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 10 to 12, 26, 41, 63 to 75, 87, 88.

Retrospective application and effect of statutory provision for interest or changed rate of interest, 4 A.L.R.2d 932, 40 A.L.R.4th 147, 41 A.L.R.4th 694.

Recovery of interest in action on real estate broker's statutory bond, 17 A.L.R.2d 1035.

Personal liability of executor or administrator for interests on legacies or distributive shares where payment is delayed, 18 A.L.R.2d 1384.

Recovery of interest on claim against a governmental unit in absence of provision in contract or express statutory provision, 24 A.L.R.2d 928.

Rights as between vendor and vendee under land contract in respect of interest, 25 A.L.R.2d 951.

Claim in bankruptcy as bearing interest after filing of petition where there is a surplus, 27 A.L.R.2d 586.

Rights by one entitled to contribution to recover interest, 27 A.L.R.2d 1268.

Right to interest on unpaid alimony, 33 A.L.R.2d 1455.

Time from which interest is recoverable on demand note or like demand instrument containing no provision as to interest, 45 A.L.R.2d 1202.

Cotenant accountable for rents and profits or use and occupation as chargeable with interest and as entitled to interest on expenditures by him, 51 A.L.R.2d 388.

Rights in profits earned by partnership or joint adventure after death or dissolution, 55 A.L.R.2d 1391.

Taking or charging interest in advance as usury, 57 A.L.R.2d 630.

Interest upon arrearages or unpaid accumulations of annuities, 66 A.L.R.2d 857.

Auctioneer's liability for interest on deposit money, 80 A.L.R.2d 1237.

Right to interest on refund or credit in absence of specific controlling statute, 88 A.L.R.2d 823.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694.

47 C.J.S. Interest and Usury; Consumer Credit §§ 32, 34; 91 C.J.S. Usury §§ 5 to 10, 56, 61, 118, 135, 141, 144, 153.

56-8-4. Judgments and decrees; basis of computing interest.

A. Interest shall be allowed on judgments and decrees for the payment of money from entry and shall be calculated at the rate of eight and three-fourths percent per year, unless:

(1) the judgment is rendered on a written instrument having a different rate of interest, in which case interest shall be computed at a rate no higher than specified in the instrument; or

(2) the judgment is based on tortious conduct, bad faith or intentional or willful acts, in which case interest shall be computed at the rate of fifteen percent.

B. Unless the judgment is based on unpaid child support, the court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering, among other things:

(1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims; and

(2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.

C. Nothing contained in this section shall affect the award of interest or the time from which interest is computed as otherwise permitted by statute or common law.

D. The state and its political subdivisions are exempt from the provisions of this section except as otherwise provided by statute or common law.

History: Laws 1851-1852, p. 255; C.L. 1865, ch. 79, § 5; C.L. 1884, § 1735; C.L. 1897, § 2551; Code 1915, § 3526; C.S. 1929, § 89-104; 1941 Comp., § 53-604; 1953 Comp., § 50-6-4; Laws 1977, ch. 293, § 1; 1980, ch. 68, § 2; 1983, ch. 254, § 2; 1993, ch. 112, § 1; 2004, ch. 41, § 7.

ANNOTATIONS

The 2004 amendment, effective May 19, 2004, inserted at the beginning of Subsection B "Unless the judgment is based on unpaid child support".

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "eight and three-fourths percent" for "fifteen percent"; and in Subsection A(1), substituted "no higher than specified" for "specified in the instrument".

Compiler's notes. — Annotations to decisions under former 56-8-3 NMSA 1978 and its predecessors, which contained provisions concerning interest on judgment and decrees, appear in the annotations to decisions under this section.

I. GENERAL CONSIDERATION.

Discretion of court. — An interest award under 56-8-4 NMSA 1978 is not an absolute right, but rather is a matter to be left to the discretion of the trial court. *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, 129 N.M. 586, 11 P.3d 550.

Section 52-1-9.1 NMSA 1978 prevails. — The legislative design demonstrates that the specific provisions of 52-1-9.1(G) NMSA 1978 must prevail over the more general application of 56-8-4(B) NMSA 1978. *Pipkin v. Daniel*, 2009-NMCA-006, 145 N.M. 398, 199 P.3d 301.

Federal claims filed in state court. — The state and its political subdivisions are not exempt from post-judgment interest because the legislature plainly intended interest to be awarded "as otherwise provided by statute", 56-8-4D NMSA 1978, and a federal statute, 28 U.S.C. § 1961, provide for post-judgment interest in 42 U.S.C. § 1983 actions. The legislature intended the interest rate set forth in 28 U.S.C. § 1961 to apply to 42 U.S.C. § 1983 actions filed in state court. *Albuquerque Commons P'ship v. City Council*, 2011-NMSC-002, 149 N.M. 308, 248 P.3d 856.

Tortious conduct includes negligence and the post-judgment interest rate of 15% applies to judgments awarding damages for negligent conduct. *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, 146 N.M. 853, 215 P.3d 791.

Section 1983 claim. — Post-judgment interest is not recoverable in a Section 1983 case filed in state court. *Albuquerque Commons P'ship v. City Council*, 2009-NMCA-065, 146 N.M. 568, 212 P.3d 1122, cert. granted, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358, *rev'd*, 2011-NMSC-002, 149 N.M. 308, 248 P.3d 856.

Insurance companies are not liable for fifteen percent interest based on the tortious conduct of an uninsured motorist. *Bird v. State Farm Mutual Auto. Ins. Co.*, 2007-NMCA-088, 142 N.M. 346, 165 P.3d 343, cert. denied, 2007-NMCERT-007, 142 N.M. 329, 165 P.3d 326.

1983 amendment applies prospectively. *North v. Public Serv. Co.*, 1983-NMCA-124, 101 N.M. 222, 680 P.2d 603, cert. quashed, 101 N.M. 11, 677 P.2d 624 (1984).

Six percent interest rate in pre-1980, noncontract cases. — The amount of interest that may be awarded on judgments in cases filed prior to the 1980 amendment of former 56-8-3 NMSA 1978 is six percent per annum. *Navajo Tribe v. Bank of N.M.*, 700 F.2d 1285 (10th Cir. 1983).

Subsection A relates to postjudgment interest, not prejudgment interest. *State Farm Mut. Auto. Ins. Co. v. Barker*, 2004-NMCA-105, 136 N.M. 211, 96 P.3d 336.

Postjudgment interest mandatory. — Following the 1983 amendment to this section, postjudgment interest on an award of punitive damages is mandatory. *Weststar Mortg. Corp. v. Jackson*, 2002-NMCA-009, 131 N.M. 493, 39 P.3d 710, *rev'd on other grounds*, 2003-NMSC-002, 133 N.M. 114, 61 P.3d 823.

Post-judgment interest on reconsideration of punitive damage award should run from the date of the new judgment. — Where plaintiffs brought claims against defendants for breach of a mortgage contract, wrongful foreclosure, breach of the covenant of good faith and fair dealing, violations of the Unfair Practices Act, violations of the Home Loan Protection Act (HLPA), and for attorney fees and punitive damages, in connection with a mortgage accidental death insurance policy and defendants' related misapplication of payments and foreclosure on the insured mortgage, and where, following a bench trial, the district court found in favor of plaintiffs on all claims except the HLPA claim, and awarded actual damages and costs as well as punitive damages, and where the New Mexico court of appeals found that the procedures used to reach the punitive damages award were lacking, set aside the punitive damages award and remanded to the district court for reconsideration of its award, and where, on remand, the district court awarded plaintiffs $2,500,000 in punitive damages and post-judgment interest of 15% to run from the date of the original judgment, the court of appeals held that post-judgment interest should not accrue from the date of the original judgment, but as a matter of law, should run from the date of the second judgment. If an appellate determination only requires modification of a former judgment, interest accrues at the date of the original judgment, but if a remand requires new findings and new computation of an award, then interest accrues from the date of the new judgment. *Dollens v. Wells Fargo Bank*, 2021-NMCA-039.

Rate of post-judgment interest. — Where the open account credit agreement between the supplier of materials and a subcontractor on a municipal construction project provided for interest at 18% per year, post-judgment interest was awardable as a sum justly due under 13-4-19 NMSA 1978 at the rate of 18% per year against the surety on the payment bond for the project. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Award was not based on culpable conduct. — Where plaintiff, who purchased a commercial greenhouse operation to hydrophonically grow tomatoes, contracted with defendant for electrical power; the greenhouse was destroyed in a fire; before the fire and without notifying plaintiff, defendant disconnected electrical power to the greenhouse for nonpayment of bills which prevented plaintiff from pumping water from its wells to quench the fire; plaintiff sued defendant for breach of contract; the district court found that defendant did not act maliciously, willfully, wantonly, fraudulently or in bad faith toward plaintiff prior to the fire; and the district court did not find any pre-fire breach of contract that caused plaintiff damages other than the failure to provide advance notice of the disconnect of electrical power; and the district court did not find that defendant’s alleged threat that the fire chief would be liable if defendant reconnected electrical power during the fire was a breach of any particular contract provision or that if the conduct was a breach of contract that the conduct caused any damages to defendant, the district court did not abuse its discretion in denying plaintiff’s request for a fifteen percent interest award. *Sunnyland Farms, Inc. v. Central N.M. Elec. Coop., Inc.*, 2011-NMCA-049, 149 N.M. 746, 255 P.3d 324, cert. granted, 2011-NMCERT-005, 150 N.M. 667, 265 P.3d 718.

Action against state. — Plaintiff in wrongful death action was not entitled to postjudgment interest on a prior judgment obtained against the New Mexico State Highway Department (State). *Fought v. State*, 1988-NMCA-088, 107 N.M. 715, 764 P.2d 142, *overruled in part on other grounds by Folz v. State*, 1993-NMCA-066, 115 N.M. 639, 857 P.2d 39, cert. denied, 115 N.M. 602, 856 P.2d 250.

Plaintiff was not entitled to postjudgment interest following an award of damages for wrongful termination against a school district. *Franco v. Carlsbad Mun. Schs.*, 2001-NMCA-042, 130 N.M. 543, 28 P.3d 531.

Applicability. — Subsection B of this section applies to all actions and is not limited to certain or specific actions, such as those based on contract or in which damages are ascertainable before trial. *Southard v. Fox*, 1992-NMCA-045, 113 N.M. 774, 833 P.2d 251.

Applicability to workers' compensation awards. — Where worker was awarded damages under the Workers' Compensation Act because the employer intentionally retaliated against worker for filing a workers' compensation claim, the actions of the employer constituted bad faith, and the employer's actions amounted to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of the worker, the employer was required to award the worker post-judgment interest at the highest rate of fifteen percent. *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103, 150 N.M. 629, 264 P.3d 725, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Date interest accrues on worker's compensation awards. — Post judgment interest begins to accrue on the date that an order is filed awarding a partial lump-sum payment. *Massengill v. Fisher Sand & Gravel Co.*, 2013-NMCA-103, cert. denied, 2013-NMCERT-010.

Where worker had reached maximum medical improvement and was receiving permanent partial disability, but a final determination of worker's permanent partial disability benefits had not been made; the worker's compensation judge entered an order granting worker a partial lump-sum payment and mailed the order to the parties; and employer claimed that pursuant to 52-5-7(C) NMSA 1978, the order was not operative until thirty days after it was mailed to the parties and that because worker's permanent partial disability benefits had not been determined, the order awarding a partial lump-sum payment was not a final order, post-judgment interest on the compensation award began to run on the date the order was filed, 52-5-7(C) NMSA 1978 does not provide a thirty day grace period to pay a compensation award, and the pending decision on the worker's unresolved permanent partial disability benefits did not render the partial lump-sum award a non-final decision. *Massengill v. Fisher Sand & Gravel Co.*, 2013-NMCA-103, cert. denied, 2013-NMCERT-010.

There is a legislative intent to apply this section to final compensation orders in workers' compensation cases. *Sanchez v. Siemens Transmission Sys.*, 1991-NMCA-028, 112

N.M. 236, 814 P.2d 104, *rev'd on other grounds*, 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

Postjudgment interest under subsequent injury act. — The court in its discretion may allow postjudgment interest on compensation benefits payable by the subsequent injury fund and awarded to an injured or disabled workman. Allowance of interest, however, is limited to that portion of a judgment against the fund in favor of an injured worker, and the fund is not liable for the payment of interest on that portion of reimbursement payable by the fund to an employer or its carrier. Additionally, any award of postjudgment interest does not commence to run upon compensation benefits until the time fixed for their payment. *Mares v. Valencia Cnty. Sheriff's Dep't*, 1988-NMCA-003, 106 N.M. 744, 749 P.2d 1123.

Interest is element of damages to be considered by trial court. — As such, it is left to the discretion of the trial court. *Kennedy v. Moutray*, 1977-NMSC-109, 91 N.M. 205, 572 P.2d 933; *Trujillo v. Beaty Elec. Co.*, 1978-NMCA-021, 91 N.M. 533, 577 P.2d 431, *see Weststar Mortgage Corp. v. Jackson*, 2002-NMCA-009, 131 N.M. 493, 39 P.3d 710, *rev'd on other grounds*, 2003-NMSC-002, 133 N.M. 114, 61 P.3d 823 (concerning the distinction between pre and postjudgment interest after the 1983 amendment to this section).

Interest generally not allowed on a judgment awarding costs. — The general rule regarding interest on costs is that in the absence of statutory authorization, interest may not be allowed on a judgment awarding costs. *Aquifer Science, LLC v. Verhines*, 2023-NMCA-020, cert. denied.

This section authorizes post-judgment interest on an award of costs. — Where applicant, a limited liability company formed to obtain water for the Campbell ranch master plan project, a multiple use development consisting of four villages with residential, commercial, and resort elements spread among Bernalillo county, Sandoval county, and Santa Fe county, sought a permit to appropriate groundwater from the Sandia underground water basin, and where the district court denied plaintiff's application because the magnitude of likely impairment to existing water rights was significant and the application was contrary to conservation of water, and where the district court granted the costs requested by the prevailing party opposing the application for groundwater, and where applicant argued that an award of costs is neither a judgment nor a decree, and, as such, the prevailing party was not entitled to post-judgment interest on their award of costs, the district judge did not err in awarding interest on costs in this case, because an award of costs is a judgment for the payment of money as authorized by 56-8-4(A) NMSA 1978. *Aquifer Science, LLC v. Verhines*, 2023-NMCA-020, cert. denied.

Trial judge has discretion to allow or withhold interest under this section. *Moorhead v. Stearns-Roger Mfg. Co.*, 320 F.2d 26 (10th Cir. 1963).

Determination of intention or willfulness. — If a plaintiff wants to insure that a judgment is assessed the higher 15 percent interest rate in a case not based in tort or bad faith, the plaintiff must specifically request that the factfinder make a finding of intention or willfulness; however, if such a finding is not made, and the evidence indicates that the defendant acted with a culpable mental state approximating intention or willfulness, the award of the higher interest rate will be left to the sound discretion of the trial court. *Public Serv. Co. v. Diamond D Constr. Co.*, 2001-NMCA-082, 131 N.M. 100, 33 P.3d 651.

Rate at time of filing is determinative. — The statutory rate of interest in effect at the time a breach of contract suit is filed, not that in effect at the time the contract is executed, is applicable to determine prejudgment and postjudgment interest. *City of Farmington v. Amoco Gas Co.*, 777 F.2d 554 (10th Cir. 1985).

A change in interest affects the rights or remedies of the parties, even if these rights or remedies are purely statutory, and therefore the statutory rate of interest in effect when a claim became a pending case is applicable to that case even if the rate of interest is changed prior to judgment. *Hillelson v. Republic Ins. Co.*, 1981-NMSC-048, 96 N.M. 36, 627 P.2d 878; *Archuleta v. Jacquez*, 1985-NMCA-077, 103 N.M. 254, 704 P.2d 1130.

Postjudgment interest at the rate of 15% was inappropriate where at the time of the filing of the lawsuit the applicable interest rate was 10%. *Lopez v. Smith's Mgt. Corp.*, 1986-NMCA-054, 106 N.M. 416, 744 P.2d 544), cert. quashed, 106 N.M. 405, 744 P.2d 180 (1987).

Interest recoverable from time of actual taking. — United States instituted condemnation proceedings to appropriate for reclamation purposes land already actually taken. In making awards, interest was properly included at 6% from time of actual taking to time of deposit of awards in court in payment of same. *United States v. Rogers*, 255 U.S. 163, 41 S. Ct. 281, 65 L. Ed. 566 (1921).

Interest as element of damage considered upon breach. — The date on which the contract of insurance is breached - the date when insurance company denies liability - is the date when interest, as an element of damage, might be considered. *O'Meara v. Commercial Ins. Co.*, 1962-NMSC-160, 71 N.M. 145, 376 P.2d 486.

Allowance from breach not matter of right. — The allowance of interest as an element of the total damage is a matter of discretion in the trier of the facts, and not a matter of right under the statute. *O'Meara v. Commercial Ins. Co.*, 1962-NMSC-160, 71 N.M. 145, 376 P.2d 486.

No prejudgment interest without request. — In a suit in quantum meruit for services rendered by a litigant who does not include a request for interest in the complaint, the court cannot add interest from the date of complete rendition of services to the date of entry of the judgment. *United States Potash Co. v. McNutt*, 70 F.2d 1003 (10th Cir. 1934).

Interest must be claimed in lower court. — An appellate court will not grant interest unless the subject of interest has been under consideration in the court below. *United States Potash Co. v. McNutt*, 70 F.2d 1003 (10th Cir. 1934).

Interest awarded not to exceed legal rate. — Where interest is awarded as damages at law, it cannot be granted in excess of the legal rate. *Shaeffer v. Kelton*, 1980-NMSC-117, 95 N.M. 182, 619 P.2d 1226.

Defendants not entitled to fifteen percent rate of postjudgment interest. — Where plaintiff filed a complaint alleging that when defendants signed a petition and actively supported plaintiff's recall from the Taos school board, such acts constituted malicious abuse of process, civil conspiracy, and prima facie tort, and where defendants filed special motions to dismiss pursuant to § 38-2-9.1 NMSA 1978, alleging that plaintiff's complaint infringed on defendants' first amendment rights, and where the district court granted defendants' special motions to dismiss, granted defendants' request for attorney fees, and awarded postjudgment interest at a rate of 8.75 percent, finding that defendants' support of plaintiff's recall from the Taos school board invoked the substantive protection of the first amendment and the procedural and remedial provisions of the anti-SLAPP statute, the district court did not err in denying defendants' request for postjudgment interest at the rate of fifteen percent because defendants failed to demonstrate that the filing of plaintiff's complaint constituted conduct that was tortious, intentional, or in bad faith as required by § 56-8-4(A)(2) NMSA 1978. *Cordova v. Cline*, 2021-NMCA-022.

Apportionment of postjudgment interest. — In awarding postjudgment interest, the portion of the judgment that awarded damages for bad faith should bear interest at the rate of 15%, however, that portion of damages awarded as measured by standard contract law should bear interest at eight and three quarters percent. *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, 127 N.M. 603, 985 P.2d 1183, cert. denied, 127 N.M. 391, 981 P.2d 1209, *overruled in part on other grounds by Sloan v. State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220 (10th Cir. N.M. 2004).

Error to award variable rate of interest. — When a p.o.d. (paid on death) beneficiary of a joint account was mistakenly paid the money in the account upon the death of one of the two joint tenants and was, thus, unjustly enriched at the bank's expense, the court erred by awarding the bank postjudgment interest calculated at a variable rate equal to the rate paid by the bank to the federal reserve bank for funds borrowed. Postjudgment interest on judgments and decrees for payment of money is mandatory and accrues at the statutory rate from the date of entry of judgment, unless the judgment is based on a written instrument bearing a different rate. The judgment in this case was not rendered on a written contract, and therefore postjudgment interest should have been calculated at the statutory rate of fifteen percent in effect at the time the complaint was filed. *Sunwest Bank v. Colucci*, 1994-NMSC-027, 117 N.M. 373, 872 P.2d 346 (decided prior to 1993 amendment).

Allowance of excess interest reversible error. — It is error to allow a greater rate than that legally allowed, for which a reversal will be granted unless defendant remits the excess of interest. *Romero v. Desmarais*, 1889-NMSC-011, 5 N.M. 142, 20 P. 787.

Affirmance conditioned on remission of excess allowable. — Where judgment, otherwise correct, has awarded 10% interest, it will be affirmed on condition of the remission of the excess interest. *Romero v. Desmarais*, 1889-NMSC-011, 5 N.M. 142, 20 P. 787; *Hopkins v. Orr*, 124 U.S. 510, 8 S. Ct. 590, 31 L. Ed. 523 (1888).

Allowance of excess modifiable. — In view of this section, the court is not authorized to allow 8% interest on the award of a commission sued for, and such allowance will be modified by the supreme court. *Taylor v. Sarracino*, 1940-NMSC-053, 44 N.M. 469, 104 P.2d 742.

Upon remand on damages, interest accrues from new judgment. — Where reviewing court's opinion only requires a modification of the former judgment (such as remittitur or additur), interest accrues at the date of the original judgment; but if that court has reversed the former judgment, insofar as damages are concerned, and remanded for new findings and computation of the award, such as here, then interest accrues from the date of the new judgment. *Varney v. Taylor*, 1969-NMSC-175, 81 N.M. 87, 463 P.2d 511.

Absent abuse district court award stands. — The district court exercises discretion in awarding prejudgment interest, and absent abuse, the court's decision should be allowed to stand. For a finding of abuse of discretion, an appellant bears the burden of proving the district court's decision is contrary to all logic and reason. *Delisle v. Avallone*, 1994-NMCA-012, 117 N.M. 602, 874 P.2d 1266, cert. denied, 117 N.M. 773, 877 P.2d 579.

Interest on child support arrearages award. — Because each unpaid installment was a final judgment, mother's claim was to post-judgment, not pre-judgment, interest, and payment is mandatory. *Bustos v. Bustos*, 2000-NMCA-040, 128 N.M. 842, 999 P.2d 1074.

Workers' compensation cases. — There is nothing which indicates that Subsection A should not apply in workers' compensation cases. *Candelaria v. General Elec. Co.*, 1986-NMCA-016, 105 N.M. 167, 730 P.2d 470, cert. quashed, 105 N.M. 111, 729 P.2d 1365.

Interest against state. — Subsection D does not bar appellants from recovering interest against the state under the circumstances of this case because the present causes of action were pending prior to the effective date of Subsection D in 1983. *Folz v. State*, 1993-NMCA-066, 115 N.M. 639, 857 P.2d 39, cert. denied, 115 N.M. 602, 856 P.2d 250.

Section 41-4-19 NMSA 1978, when read in pari materia with Subsection D of this section, prohibits the awarding of post-judgment interest on tort judgments against the state and its subdivisions. *Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

Legislature waived immunity for post-judgment interest in the Whistleblower Protection Act. — Where plaintiff sued defendant Northern New Mexico College (NNMC) pursuant to the New Mexico Whistleblower Protection Act (WPA), NMSA 1978, §§ 10-16C-1 to -6, and where plaintiff offered evidence at trial that NNMC removed her from her position as director of NNMC's campus in El Rito, New Mexico, transferred her to another position, and then terminated her employment in retaliation for her communications to NNMC's administrators about NNMC's failure to approve expenditures necessary for the successful implementation of a plan to revitalize the El Rito campus, and where the jury concluded that NNMC violated the WPA and found by special verdict form that plaintiff had communicated to defendant about the occurrence of an improper act, that there was a reasonable basis in fact for the improper act, and that defendant retaliated against plaintiff because of a communication about that improper act, and where the jury awarded plaintiff $239,000 in backpay and $180,000 to compensate her for emotional distress, the trial court erred in denying plaintiff's motion for post-judgment interest, because by explicitly making public employers liable for interest on back pay in NMSA 1978, § 10-16C-4, the legislature waived sovereign immunity for post-judgment interest pursuant to Subsection D of this section. *Velasquez v. Regents of Northern N.M. Coll.*, 2021-NMCA-007, cert. denied.

II. PREJUDGMENT INTEREST.

Construction with Section 56-8-3 NMSA 1978. — Prejudgment interest assessed from the date the claim accrued was consistent with an award under 56-8-3 NMSA 1978, not this section; as a result, the appeals court should not review the award as a matter of discretion, but as an award as of right pursuant to 56-8-3 NMSA 1978. *Gilmore v. Duderstadt*, 1998-NMCA-086, 125 N.M. 330, 961 P.2d 175.

Because of the separate policies furthered by the two sections, it cannot be said that the language of Subsection D exempts a city from prejudgment interest under 56-8-3 NMSA 1978, which is silent as to the assessment of interest against political subdivisions. *City of Carlsbad v. Grace*, 1998-NMCA-144, 126 N.M. 95, 966 P.2d 1178.

Valid judgment required. — Subsection B of this section presupposes a valid judgment; therefore, a judgment that has been set aside for want of jurisdiction cannot be the basis for an award of prejudgment interest. *Martinez v. Friede*, 2003-NMCA-081, 133 N.M. 834, 70 P.3d 1273, *rev'd on other grounds*, 2004-NMSC-006, 135 N.M. 171, 86 P.3d 596.

Purpose of prejudgment interest. — Prejudgment interest serves two purposes, promoting early settlements and compensating persons. Interest is awarded to make the tort victim whole, and has no bearing on the question of punishing the tortfeasor.

Morga v. FedEx Ground Package Sys., 2018-NMCA-039*, aff'd on other grounds by* 2022-NMSC-013*.*

The district court did not abuse its discretion in awarding prejudgment interest.- In a wrongful death, personal injury, and loss of consortium case, where plaintiff's claims arose from a catastrophic automobile accident which caused the death of his wife and daughter and seriously injured his son, and where the jury returned a verdict for more than $165 million in compensatory damages, the district court did not abuse its discretion in awarding prejudgment interest where the district court concluded that defendants' sole settlement offer was unreasonable and that defendants lacked an appreciation or concern about the potential results of a trial. *Morga v. FedEx Ground Package Sys.,* 2018-NMCA-039, *aff'd on other grounds by* 2022-NMSC-013.

Damages need not be fixed or ascertainable. — Subsection B is not limited by whether damages are fixed or ascertainable. Because the language in Subsection B is general, the legislature must have intended that, to foster timely settlements, a discretionary award of prejudgment interest is allowed in all cases. *Lucero v. Aladdin Beauty Colls., Inc.*, 1994-NMSC-022, 117 N.M. 269, 871 P.2d 365.

Higher interest rate allowable when debtor notified by written instrument. — Allowance of 18% on a judgment until the debt is paid is proper only where there is "a written instrument," of which the debtor possesses a copy, having a different rate of interest than the 15% permitted by this section. *N.M. Tire & Battery Co. v. Ole Tires, Inc.*, 1984-NMSC-063, 101 N.M. 357, 683 P.2d 39.

Higher rate by agreement of parties. — Where the open account credit agreement between the supplier of materials and a subcontractor on a municipal construction project provided for interest at 18% per year, prejudgment interest was awardable as a sum justly due under 13-4-19 NMSA 1978 at the rate of 18% per year against the surety on the payment bond for the project. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Award of prejudgment interest within court's discretion. — The award of prejudgment interest is a question of law solely within the sound discretion of the court. *Navajo Tribe v. Bank of N.M.*, 700 F.2d 1285 (10th Cir. 1983).

This section provides authority for an award of prejudgment interest at the discretion of the trial court. *State Farm Mut. Auto. Ins. Co. v. Barker*, 2004-NMCA-105, 136 N.M. 211, 96 P.3d 336.

The trial court has discretion as to prejudgment interest under this section; thus, where the district court necessarily exercised such discretion in making its award, the appellate court would not disturb the award absent a showing of abuse of discretion. *Kennedy v. Dexter Consol. Schs.*, 1998-NMCA-051, 124 N.M. 764, 955 P.2d 693, *rev'd on other grounds*, 2000-NMSC-025, 129 N.M. 436, 10 P.3d 115.

Prejudgment interest awarded under 56-8-4 B NMSA 1978 is not damages that must be determined by the jury and the legislature could properly entrust such determinations to the trial court. *Southard v. Fox*, 1992-NMCA-045, 113 N.M. 774, 833 P.2d 251.

Review of award. — An award of prejudgment interest is reviewed under an abuse of discretion standard. *State Farm Fire & Cas. Co. v. Farmers Alliance Mut. Ins. Co.*, 2004-NMCA-101, 136 N.M. 259, 96 P.3d 1179.

Denial of prejudgment interest was not an abuse of discretion. — Where a fire destroyed plaintiff's hydroponic tomato facility; the day before the fire, defendant shut off electricity to the facility for nonpayment; defendant failed to give plaintiff the customary fifteen-day notice to pay the overdue bill before defendant suspended service; plaintiff's pumps were powered by electricity and without power, firefighters could not access well water to suppress the fire; plaintiff recovered contract and tort damages against defendant; the district court refused to award prejudgment interest; and the case involved difficult, complex legal issues concerning causation, comparative fault and estimation of lost profits; and the parties had genuine differences of opinion on the strength of plaintiff's case and failed to settle, the district court did not abuse its discretion in denying prejudgment interest. *Sunnyland Farms, Inc. v. Central N.M. Elec. Coop., Inc.*, 2013-NMSC-017, 301 P.3d 387, *aff'g* 2011-NMCA-049, 149 N.M. 746, 255 P.3d 324.

Findings for denial of interest not required. — When an award of prejudgment interest is in the trial court's discretion and not a matter of right under 56-8-3 NMSA 1978, the court does not need to make specific factual findings; the reasons for denying interest need only be ascertainable from the record and not contrary to logic; in addition, the two factors listed in this section are not exclusive and the court should take into account all relevant equitable considerations. *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

No interest for seller causing contract's nonperformance. — A seller is not entitled to interest on the unpaid portion of the purchase price when the seller causes nonperformance of a contract. *Smith v. McKee*, 1993-NMSC-046, 116 N.M. 34, 859 P.2d 1061.

Interest on interest not authorized. — Absent either a contract or statutory provision authorizing interest on interest prior to judgment, such may not be recovered. *Southern Union Exploration Co. v. Wynn Exploration Co.*, 1981-NMCA-006, 95 N.M. 594, 624 P.2d 536, cert. denied, 95 N.M. 593, 624 P.2d 535, and cert. denied, 455 U.S. 920, 102 S. Ct. 1276, 71 L. Ed. 2d 461 (1982).

Monthly compounding incorrect. — The trial court incorrectly computed a prejudgment interest award from a calculation incorporating monthly compounding. The result was an award of interest in excess of the statutory rate. *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, 1987-NMSC-055, 106 N.M. 719, 749 P.2d 1098, cert. denied, 484 U.S. 1063, 108 S. Ct. 1021, 98 L. Ed. 2d 986 (1988).

Prejudgment interest rate set when action becomes pending. — The rate of prejudgment interest to be granted is that rate in effect when an action becomes pending. *Grynberg v. Roberts*, 1985-NMSC-040, 102 N.M. 560, 698 P.2d 430.

When contract silent on interest, prejudgment interest allowable. — Where a contract does not specifically preclude interest, an award of prejudgment interest under this section is within the sound discretion of the trial court. *City of Farmington v. Amoco Gas Co.*, 777 F.2d 554 (10th Cir. 1985).

Not legally required in negligent misrepresentation action. — The court was not required as a matter of law to award prejudgment interest in an action for negligent misrepresentation, even though the damages were allegedly readily ascertainable. Prejudgment interest should be awarded as a matter of right only when the defendant has breached a contract to pay a definite sum of money. *Charter Servs., Inc. v. Principal Mut. Life Ins. Co.*, 1994-NMCA-007, 117 N.M. 82, 868 P.2d 1307.

Prejudgment interest upheld where discretion not abused. — Since it is within the discretion of a court to award prejudgment interest when the amount of damages in question is ascertainable, if no abuse of that discretion is shown, an award of prejudgment interest will be upheld. *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 1985-NMSC-090, 103 N.M. 480, 709 P.2d 649.

Denial of prejudgment interest. — Where a fire, that was negligently caused by defendant, destroyed plaintiff's household goods and personal effects in a mobile home that plaintiff rented from defendant; both sides aggressively litigated the case and engaged in extensive motions practice; defendant did not offer to settle until nine months after plaintiff filed suit; defendant contested liability for two and one half years before changing its position and stipulating to liability; and defendant made a number of offers, each of which met or exceeded the jury award, the district court did not abuse its discretion in denying plaintiff's request for pre-judgment interest. *Behrens v. Gateway Court, L.L.C.*, 2013-NMCA-097, cert. granted, 2013-NMCERT-009.

Where worker was awarded damages for bad faith and wrongful termination under the Workers' Compensation Act and the employer did not cause any unreasonable delay in the workers' compensation proceedings or make any unreasonable settlement offers prior to trial, the trial court did not abuse its discretion in denying the worker's request for prejudgment interest. *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103, 150 N.M. 629, 264 P.3d 725, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Since the plaintiffs did not request prejudgment interest until after entry of the final judgment, and, in addition, the defendant was not responsible for a delay between the jury verdict and entry of judgment and had made settlement offers which were not unreasonable as a matter of law, the trial court did not abuse its discretion in denying the plaintiffs' motion for prejudgment interest. *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

When initiation of action delayed, no interest. — The court's decision denying the plaintiff's prejudgment interest did not constitute an abuse of discretion, given the "great lapse of time" since the initiation of the action. *Charter Servs., Inc. v. Principal Mut. Life Ins. Co.*, 1994-NMCA-007, 117 N.M. 82, 868 P.2d 1307.

Prejudgment interest not considered insurance "claim". — Prejudgment interest is not included within the definition of "covered claims" in 59A-43-4C NMSA 1978 so as to be limited or excluded by the Property and Casualty Insurance Guaranty Law liability cap of $100,000 per occurrence on individual "covered claims." Also, no specific authority within the Guaranty Law is necessary to award prejudgment interest. The trial court has that authority under either 56-8-3 or 56-8-4B NMSA 1978. *Aztec Well Servicing Co. v. Property & Cas. Ins. Guar. Ass'n*, 1993-NMSC-023, 115 N.M. 475, 853 P.2d 726.

Award of prejudgment interest was inappropriate in workmen's (workers') compensation case where, at the time the complaint was filed, neither this section nor the Workmen's (Workers') Compensation Act, Chapter 52, Article 1 NMSA 1978, allowed for such an award. *Lopez v. Smith's Mgmt. Corp.*, 1986-NMCA-054, 106 N.M. 416, 744 P.2d 544, cert. quashed, 106 N.M. 405, 744 P.2d 180 (1987).

Interest appropriate where proceedings delayed. — Trial court was within its discretion to assess prejudgment interest against husband, where he rejected wife's offers of settlement, and delayed proceedings on the grounds that he was going to call numerous witnesses whom he did not call. *Trego v. Scott*, 1998-NMCA-080, 125 N.M. 323, 961 P.2d 168, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

Defendant entitled to prejudgment interest. — In a negligence action, where it was determined that defendant had not been the source of unreasonable delay and there were difficult legal issues to be decided which would probably preclude settlement and which were worthy of full briefing and argument, it was not an abuse of discretion to refuse to award prejudgment interest. *Abeita v. Northern Rio Arriba Elec. Coop.*, 1997-NMCA-097, 124 N.M. 97, 946 P.2d 1108.

Exemption for state in workers' compensation action. — Subsection D contains an express exemption for the state from awards of prejudgment interest in favor of an injured worker in a workers' compensation action. *Montney v. State ex rel. State Hwy. Dep't*, 1989-NMCA-002, 108 N.M. 326, 772 P.2d 360, cert. denied, 108 N.M. 197, 769 P.2d 731.

Award allowed under Occupational Disease Disability Law. — Subsection B does not apply to decisions made pursuant to the Occupational Disease Disability Law. However, such interest is allowed under Workers' Compensation Division Rules, WCD 89-4(V)(A)(3) (now 11.4.4.13D(3)), promulgated under 52-5-4A NMSA 1978 (authority of director to adopt rules and regulations). *Bryant v. Lear Siegler Mgmt. Servs. Corp.*, 1993-NMCA-052, 115 N.M. 502, 853 P.2d 753.

Nonpecuniary losses. — This section permits the trial court to award prejudgment interest on judgments for tort actions, including those amounts for nonpecuniary and unliquidated losses. *Southard v. Fox*, 1992-NMCA-045, 113 N.M. 774, 833 P.2d 251.

Punitive damage award was not subject to prejudgment interest. *Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 59 to 62, 73, 74, 87 to 110.

Correction of clerical error as to interest in judgment, 10 A.L.R. 526, 67 A.L.R. 828, 126 A.L.R. 956, 14 A.L.R.2d 224.

Court's power to add interest to verdict returned by jury, 72 A.L.R. 1150.

Law of the forum as governing right to and rate of interest on judgments, 78 A.L.R. 1063.

Interest on damages for period before judgment for detention of property, 96 A.L.R. 18, 36 A.L.R.2d 337.

Interest as element of damages recoverable for destruction of, or injury to, trees or shrubbery, 161 A.L.R. 549, 69 A.L.R.2d 1335.

Commercial vehicle, interest as element of damages in action for destruction of or injury to, 169 A.L.R. 1080.

Interest on recovery for period before judgment in action for money loss caused by duress, 171 A.L.R. 816.

Interest on amount recovered by owner from holder of invalid tax title on account of rents and profits for use and occupation, 173 A.L.R. 1179.

Retrospective application and effect of statutory provision for interest or changed rate of interest, 4 A.L.R.2d 932, 40 A.L.R.4th 147, 41 A.L.R.4th 694.

Interest as element of damages recoverable in action for breach of contract for sale of commodity, 4 A.L.R.2d 1388.

Rate of interest after maturity on obligation which fixes rate of interest expressly until maturity, 16 A.L.R.2d 902.

Rights of one entitled to contribution to recover interest, 27 A.L.R.2d 1268.

Right to interest on unpaid alimony, 33 A.L.R.2d 1455.

Rate of interest for damages for period before judgment for injury to, or detention, loss or destruction of, property, 36 A.L.R.2d 337.

Treatment of interest on judgment or award in determining attorney's contingent fee, 82 A.L.R.2d 953.

Prejudgment interest on wrongful death damages, 96 A.L.R.2d 1104.

Right to interest, pending appeal, of judgment creditor appealing unsuccessfully on grounds of inadequacy, 15 A.L.R.3d 411, 11 A.L.R.4th 1099.

Allowance of prejudgment interest on builder's recovery in action for breach of construction contract, 60 A.L.R.3d 487.

Insured's right to recover from insurer prejudgment interest on amount of fire loss, 5 A.L.R.4th 126.

Running of interest on judgment where both parties appeal, 11 A.L.R.4th 1099.

Validity and construction of state statute or rule allowing or changing rate of prejudgment interest in tort actions, 40 A.L.R.4th 147.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694.

Prejudgment interest awards in divorce cases, 62 A.L.R.4th 156.

Right to prejudgment interest on punitive or multiple damages awards, 9 A.L.R.5th 63.

Liability of insurer for prejudgment interest in excess of policy limits for covered loss, 23 A.L.R.5th 75.

47 C.J.S. Interest and Usury; Consumer Credit §§ 4, 21, 41 to 69.

56-8-5. Interest; open accounts.

In current or open accounts there shall not be collected more than fifteen percent interest annually thereon, thirty days after the delivery of the last article or service; provided that the parties may set a higher rate by agreement.

History: Laws 1882, ch. 25, § 2; C.L. 1884, § 1736; C.L. 1897, § 2552; Code 1915, § 3527; C.S. 1929, § 89-105; 1941 Comp., § 53-605; 1953 Comp., § 50-6-5; Laws 1977, ch. 293, § 2; 1980, ch. 68, § 3; 1981, ch. 194, § 1; 1983, ch. 254, § 3.

ANNOTATIONS

Cross references. — For interest when no written contract, *see* 56-8-3 NMSA 1978.

Compiler's notes. — Annotations to decisions under former 56-8-3 NMSA 1978 and its predecessors, which contained provisions concerning interest on open accounts, appear in the annotations to decisions under this section.

Interest runs on an open account against the estate of a deceased person, beginning six months after the date of the last item. *Radcliffe v. Chaves*, 1910-NMSC-004, 15 N.M. 258, 110 P. 699.

Usurious agreements not totally void. — The usury statute of 1866, which completely voided usurious agreements, repealed by Laws 1872, ch. 19, which abolished the plea of usury and permitted any rate of interest, was not revived when the latter act was repealed by Laws 1882, ch. 25, § 1. *Milligan v. Cromwell*, 1886-NMSC-009, 3 N.M. (Gild.) 557, 9 P. 359.

Void only as to excess. — Contract of loan providing for usurious interest cannot be held void, except as to interest in excess of what the statute allows to be charged, collected, or received. *McBroom v. Scottish Mortg. & Land Inv. Co.*, 153 U.S. 318, 14 S. Ct. 852, 38 L. Ed. 729 (1894).

Enforceable as to principal and legal maximum. — Where a written contract provides for the payment of money at a rate of interest exceeding 12%, recovery may be had of the principal and interest thereon at the rate of 12%. *Milligan v. Cromwell*, 1886-NMSC-009, 3 N.M. (Gild.) 557, 9 P. 359.

Section inapplicable when account stated. — This section pertains to interest on money due on open account; when there is an account stated, not an open account, an interest award on the basis of an open account is inappropriate. *Tabet Lumber Co. v. Chalamidas*, 1971-NMCA-140, 83 N.M. 172, 489 P.2d 885.

Section inapplicable when contract governed by law of foreign state. — Where a contract was executed in the territory between a resident and a foreign corporation, stipulated that it was to be governed by the statutes of the foreign state, the fact that the interest required exceeded that allowed by this section did not invalidate the contract. *Goode v. Colorado Inv. Loan Co.*, 1911-NMSC-047, 16 N.M. 461, 117 P. 856.

Higher rate by agreement of parties. — Where the open account credit agreement between the supplier of materials and a subcontractor on a municipal construction project provided for interest at 18% per year, prejudgment interest was awardable as a sum justly due under 13-4-19 NMSA 1978 at the rate of 18% per year against the surety on the payment bond for the project. *State ex rel. Solsbury Hill, LLC v. Liberty Mut. Ins. Co.*, 2012-NMCA-032, 273 P.3d 1, cert. granted, 2012-NMCERT-003.

Evidence supported finding that interest rate charged against open account, which was above the statutory amount, was agreed to by the parties, where invoices stated: "Past

due accounts are charged 2% per month on the unpaid balance. This is an annual interest rate of 24%." *Superior Concrete Pumping, Inc. v. David Montoya Constr., Inc.*, 1989-NMSC-023, 108 N.M. 401, 773 P.2d 346.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 247 to 249.

Rights as between vendor and vendee under land contract in respect of interest, 25 A.L.R.2d 951.

Payments under ostensibly independent contract as usury, 81 A.L.R.2d 1280.

Provision for interest after maturity as a rate in excess of legal rate as usurious or otherwise illegal, 28 A.L.R.3d 449.

Reformation of usurious contract, 74 A.L.R.3d 1239.

47 C.J.S. Interest and Usury; Consumer Credit §§ 6, 22; 91 C.J.S. Usury §§ 11, 56.

56-8-6. Grain purchase contracts; disclosure regarding act of God clause.

If a written contract for the purchase of grain does not include an act of God clause that relieves the seller of the grain from any obligation to fulfill the contract due to acts of God or other unavoidable accidents which prevent the performance of the contract, the purchaser of the grain shall clearly and conspicuously disclose the absence of that act of God clause on the front page of the written contract. The notice required by this section shall be separately and clearly stated in at least ten-point bold-face type.

History: Laws 1991, ch. 246, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1991, ch. 246, § 2 repealed 56-8-6 NMSA 1978, as enacted by Laws 1865-1866, ch. 14, § 1, effective April 4, 1991. Laws 1991, ch. 246, § 1 enacted a new 56-8-6 NMSA 1978.

56-8-7. Procuring loans; rate of commission; exceptions.

For negotiating or securing any loan, no person, association of persons or corporation shall charge, collect or receive in excess of the following amounts:

A. upon any loan not exceeding five hundred dollars ($500), four percent;

B. upon any loan exceeding five hundred dollars ($500) and not exceeding two thousand dollars ($2,000), four percent upon the first five hundred dollars ($500) and three percent upon the remainder; and

C. upon any loan exceeding two thousand dollars ($2,000), four percent upon the first one thousand dollars ($1,000) and two percent upon the remainder; provided that this section shall not apply to any loan in excess of fifty thousand dollars ($50,000) when such loan is made for business, commercial or agricultural purposes, nor to any loan negotiated or secured by a registrant under the Mortgage Loan Company and Loan Broker Act [Mortgage Loan Company Act] [Chapter 58, Article 21 NMSA 1978]. In such instances, broker's fees shall be negotiable, but shall not exceed six percent of the principal amount of the loan.

History: Laws 1912, ch. 31, § 1; Code 1915, § 1806; C.S. 1929, § 35-4616; 1941 Comp., § 53-613; 1953 Comp., § 50-6-13; Laws 1977, ch. 293, § 3; 1984, ch. 15, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

A note given for interest and not commissions is not unlawful. *Tompkins v. Rain*, 1921-NMSC-015, 26 N.M. 631, 195 P. 800.

Commission rates limited. — This section places a maximum limit on the rate of commission for negotiating or securing a loan for more than two thousand dollars ($2,000) at 4% on the first $1,000 and 2% on the remainder. *Forrest Currell Lumber Co. v. Thomas*, 1970-NMSC-018, 81 N.M. 161, 464 P.2d 891.

Inapplicable absent broker-principal relation. — This section limits the charge which may be made by a broker against his principal for services rendered by the broker in procuring a loan of money for the principal. The section has no application where there is no broker-principal relation. *Home Sav. & Loan Ass'n v. Bates*, 1966-NMSC-167, 76 N.M. 660, 417 P.2d 798.

Violation of section as cause of action by corporation. — A corporation can rely on a violation of this section as a basis for a cause of action for damages pursuant to 56-8-8 NMSA 1978. *Diane, Inc. v. Kapnison*, 1983-NMSC-056, 100 N.M. 143, 667 P.2d 450.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury § 235.

Expenses or charges in form of commissions to agents, brokers, or like intermediaries incident to loan of money, 52 A.L.R.2d 703.

91 C.J.S. Usury §§ 6, 114.

56-8-8. [Excessive commission for procuring loan; penalty.]

That any person, association of persons or corporation violating the preceding section [56-8-7 NMSA 1978] shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars [($100)] nor more than five hundred dollars [($500)], or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment; and shall also be liable in damages to the party injured in double the whole amount so charged for negotiating or securing any such loan.

History: Laws 1912, ch. 31, § 2; Code 1915, § 1807; C.S. 1929, § 35-4617; 1941 Comp., § 53-614; 1953 Comp., § 50-6-14.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Corporation may bring action. — A corporation can rely on a violation of 56-8-7 NMSA 1978, which limits commission rates on procuring loans, as a basis for a cause of action for damages pursuant to this section. *Diane, Inc. v. Kapnison*, 1983-NMSC-056, 100 N.M. 143, 667 P.2d 450.

Penalties for charging excess commission. — This section makes a violation of 56-8-7 NMSA 1978 a misdemeanor and, in addition to a fine and imprisonment, makes the person or corporation liable in damages in double the whole amount charged for negotiating or securing the loan. *Forrest Currell Lumber Co. v. Thomas*, 1970-NMSC-018, 81 N.M. 161, 464 P.2d 891.

Attorney's duty to advise client of potential penalty. — An attorney who advised his client that a loan brokerage fee which the client charged a corporation was not excessive, had a duty to advise his client on the potential exposure to penalty, should his interpretation be deemed incorrect. *First Nat'l Bank v. Diane, Inc.*, 1985-NMCA-025, 102 N.M. 548, 698 P.2d 5.

Law reviews. — For note, "Legal Malpractice - Liability for Failure to Warn: *First National Bank of Clovis v. Diane, Inc.*," *see* 16 N.M.L. Rev. 395 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 218 to 222.

Usury as affected by mistake in amount or calculation of interest or service charges for loan, 11 A.L.R.3d 1498.

Enforceability of provision in loan commitment agreement authorizing lender to charge standby fee, commitment fee or similar deposit, 93 A.L.R.3d 1156.

91 C.J.S. Usury §§ 6, 114, 116.

56-8-9. Excessive charges prohibited; applicability of maximum rates; definition.

A. Unless otherwise provided by law, no person, corporation or association, directly or indirectly, shall take, reserve, receive or charge any interest, discount or other advantage for the loan of money or credit or the forbearance or postponement of the right to receive money or credit except at the rates permitted in Sections 56-8-1 through 56-8-21 NMSA 1978.

B. No provision of law prescribing maximum rates of interest that may be charged in any transaction shall apply to a transaction in which a corporation, limited liability corporation or other business entity is a debtor, regardless of the purpose for which the corporation was formed and regardless of the fact that an individual is codebtor, endorser, guarantor, surety or accommodation party. No corporation or its codebtor, endorser, guarantor, surety or accommodation party shall have a cause of action or affirmatively plead, counterclaim, set off or set up the defense of usury in any action to recover damages or enforce a remedy on any obligation executed by the corporation, and no civil or criminal penalty that would otherwise be applicable except as provided in Sections 30-43-1 through 30-43-5 NMSA 1978 shall apply on any obligation executed by the corporation.

C. A lender may, in the case of business or commercial loans for business or commercial purposes in the amount of five hundred thousand dollars ($500,000) or more, take, receive, reserve or charge on any loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at a rate agreed to by the parties.

D. In addition to the maximum interest or discount that a lender is permitted to charge by law, the lender may charge, take, reserve or receive a premium or points in an amount up to but not exceeding three percent of the face amount of the loan on interim construction loans. The lender may charge and require the borrower to pay the premium upon execution of the loan agreement, whether the proceeds are delivered to the borrower immediately or whether there are to be obligatory or permissive future advances. The lender shall not be required to refund this charge in the event of prepayment of the obligation. For the purposes of this section, "interim construction loan" means a loan secured by a first mortgage and used by the borrower primarily for financing the construction of buildings, structures or improvements on or to the real property on which the first mortgage has been taken.

E. A lender may charge, take, reserve or receive points or a premium on any loan secured by real property; provided the points or premium together with the interest or discount charged, taken, reserved or received do not exceed the maximum interest or discount permitted by law. The lender shall not be required to refund this charge in the event of prepayment even if the prepayment would result in a higher charge to the borrower than permitted by law.

F. A loan in an amount equal to five thousand dollars ($5,000) or less shall be made only pursuant to the New Mexico Bank Installment Loan Act of 1959 [58-7-1 to 58-7-3, 58-7-5 to 58-7-9 NMSA 1978] or the New Mexico Small Loan Act of 1955 [Chapter 58, Article 15 NMSA 1978].

History: 1953 Comp., § 50-6-15, enacted by Laws 1957, ch. 209, § 1; 1977, ch. 293, § 4; 1980, ch. 39, § 6; 2017, ch. 110, § 1.

ANNOTATIONS

Cross references. — For rates and charges on bank installment loans, *see* 58-7-1 to 58-7-9 NMSA 1978.

The 2017 amendment, effective January 1, 2018, provided that no provision of law prescribing maximum rates of interest that may be charged in any transaction shall apply to transactions in which a limited liability corporation or other business entity is a debtor, removed a reference to a repealed provision of law, and provided that loans in the amount of five thousand dollars ($5,000) or less shall be made only pursuant to the New Mexico Bank Installment Loan Act of 1959 or the New Mexico Small Loan Act of 1955; in Subsection B, after "corporation", added "limited liability corporation or other business entity"; in Subsection C, after "agreed to by the parties", deleted "even if the rate exceeds the rate set forth in Section 56-8-11 NMSA 1978"; and added Subsection F.

Applicability. — Laws 2017, ch. 110, § 26 provided that the provisions of Laws 2017, ch. 110 shall apply to loans subject to the New Mexico Small Loan Act of 1955 and the New Mexico Bank Installment Loan Act of 1959 executed on or after January 1, 2018.

What constitutes forbearance. — All the terms of Subsection A denote consensual agreements between the parties, indicating that a withholding or detention by the borrower not consented to by the lender is not within the article's purview. The mere fact that the parties have agreed to the rate to be paid after the debt is due does not make an arrangement a forbearance. *Smith Mach. Co. v. Jenkins*, 654 F.2d 693 (10th Cir. 1981).

Applicability of prohibition in Subsection B. — Subsection B, prohibiting a corporation from bringing a usury action, has no applicability to an action involving a violation of 56-8-7 NMSA 1978, limiting commission rates on procuring loans. *Diane, Inc. v. Kapnison*, 1983-NMSC-056, 100 N.M. 143, 667 P.2d 450.

Obligations assumed in addition to maximum interest not usurious. — Transaction requiring borrower to assume additional obligations of third party in order to get an extension on his loan is not usurious where there is a close business relationship between borrower and third party, and reason for the borrower to assume the obligations, as well as an absence of intent to exact a usurious return. *McCullough v. Snow*, 1967-NMSC-247, 78 N.M. 455, 432 P.2d 811.

Party asserting usury has burden of proof absent indication thereof on face. — When the notes sued upon show no indication of usury on their face, the burden of proving usury is on the party asserting it. *McCullough v. Snow*, 1967-NMSC-247, 78 N.M. 455, 432 P.2d 811.

Applies to insurance premium financing arrangements. — There is a limitation on the finance charge which is imposed for financing insurance premiums when the insurance is not written in connection with loans or financing. The premiums financing arrangement is a loan, as such it is subject to usury laws. 1971 Op. Att'y Gen. No. 71-52.

Lender may charge up to three points for interim construction. — A lender, making a home loan for purposes of interim construction financing under the Residential Home Loan Act (56-8-22 to 56-8-30 NMSA 1978), may charge "points" not to exceed three percent of the face amount of the loan in addition to any amounts allowed as interest under 56-8-25 and 56-8-26 NMSA 1978 (since repealed). 1980 Op. Att'y Gen. No. 80-14 (rendered under prior law).

Service charge in addition to legal interest allowed. — A person or corporation may charge a reasonable service charge for servicing a loan of money under this section in addition to the specified interest rates contained in former 56-8-11 NMSA 1978 as long as such is a bona fide cost incident to processing such loans and is not a subterfuge to exact a higher interest rate than permitted by law. 1965 Op. Att'y Gen. No. 65-09.

The vast weight of authority refuses to apply usury laws to time-sale transactions. — The owner may sell property at whatever price and on whatever terms he may determine. Accordingly, he may sell it at a stated "cash price," or at stated "time price," and the fact that the difference exceeds the rate of interest permitted by the usury laws is immaterial. Obviously, the time price differential must take account of factors not present in making a loan to a prime rate borrower - heavier handling charges, heavier collection charges and so forth. 1958 Op. Att'y Gen. No. 58-184.

This section is equally inapplicable to revolving credit plans. 1958 Op. Att'y Gen. No. 58-184.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 166 to 237.

Taking or charging interest in advance as usury, 57 A.L.R.2d 630.

Usury as affected by repayment of, or borrower's option to repay, loan before maturity, 75 A.L.R.2d 1265.

What is "compound interest" within meaning of statutes prohibiting the charging of such interest, 10 A.L.R.3d 421.

Contingency as to borrower's receipt of money or other property from which loan is to be repaid as rendering loan usurious, 92 A.L.R.3d 623.

Leaving part of loan on deposit with lender as usury, 92 A.L.R.3d 769.

Enforceability of provision in loan commitment agreement authorizing lender to charge standby fee, commitment fee or similar deposit, 93 A.L.R.3d 1156.

Application of usury laws to transactions characterized as "leases," 94 A.L.R.3d 640.

Validity and construction of provision of mortgage or other real-estate financing contract prohibiting prepayment for a fixed period of time, 81 A.L.R.4th 423.

Construction and application of Consumer Credit Protection Act provisions (18 USCS §§ 891-894) prohibiting extortionate credit transactions, 106 A.L.R. Fed. 33.

91 C.J.S. Usury § 1.

56-8-10. Farm, ranch and agriculture loans.

The provisions of Subsections C, D and E of Section 56-8-9 NMSA 1978 are not applicable to loans secured by a first mortgage on farm, ranch or agricultural real estate where the purpose of the loan is primarily for farming, ranching or agricultural purposes.

History: 1953 Comp., § 50-6-15.1, enacted by Laws 1977, ch. 293, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of provision (escalator clause) in land contract or mortgage that rate of interest payable shall increase if legal rate is raised, 60 A.L.R.3d 473.

56-8-11. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 263, § 4, repealed 56-8-11 NMSA 1978, as enacted by Laws 1967, ch. 41, § 2, relating to the rates of interest allowed, effective July 1, 1981.

Compiler's notes. — Laws 1981, ch. 263, § 6, revived 56-8-11 NMSA 1978, effective July 1, 1983. However, Laws 1983, ch. 44, § 1, repealed Laws 1981, ch. 263, § 6, effective June 30, 1983.

56-8-11.1. Repealed.

History: Laws 1981, ch. 263, § 1; repealed by Laws 1991, ch. 120, § 10.

ANNOTATIONS

Repeals. — Laws 1991, ch. 120, § 10 repealed 56-8-11.1 NMSA 1978, as enacted by Laws 1981, ch. 263, § 1, relating to maximum rate of interest, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*.

56-8-11.2. Repealed.

History: Laws 1981, ch. 263, § 2; 1990, ch. 69, § 1; repealed by Laws 1991, ch. 120, § 10.

ANNOTATIONS

Repeals. — Laws 1991, ch. 120, § 10 repealed 56-8-11.2 NMSA 1978, as enacted by Laws 1981, ch. 263, § 2, relating to disclosure, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*.

56-8-11.3. Repealed.

History: Laws 1981, ch. 263, § 3; repealed by Laws 1991, ch. 120, § 10.

ANNOTATIONS

Repeals. — Laws 1991, ch. 120, § 10 repealed 56-8-11.3 NMSA 1978, as enacted by Laws 1981, ch. 263, § 3, relating to penalties, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*.

56-8-11.4. Repealed.

ANNOTATIONS

Repeals. — Laws 1983, ch. 44, § 1, repealed 56-8-11.4 NMSA 1978, which, on July 1, 1983, repealed 56-8-11.1 to 56-8-11.3 NMSA 1978, effective June 30, 1983. Former 56-8-11.4 NMSA 1978 also, on July 1, 1983, revived 56-1-2.1, 56-1-3.1, 56-8-11, 56-8-25 to 56-8-28, 58-7-4, 58-11-17, 58-13-47, 58-15-14, 58-19-8 and 59-8-7.1 NMSA 1978, which were previously repealed by Laws 1981, ch. 263, § 4.

56-8-12. Loans by agent; liability of principal.

The acts and dealings of an agent in loaning money shall bind the principal, and in all cases where there is illegal interest contracted for by the transaction of any agent, the principal shall be held thereby to the same effect as though he had acted in person, and when the same person acts as agent for the borrower and lender, he shall be deemed the agent of the lender for the purpose of this act [56-8-9, 56-8-12 to 56-8-14 NMSA 1978].

History: 1953 Comp., § 50-6-17, enacted by Laws 1957, ch. 209, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 223 to 234, 326, 357.

Guardian's liability for interest on ward's funds, 72 A.L.R.2d 757.

91 C.J.S. Usury §§ 43 to 45, 64, 166.

56-8-13. Penalties and forfeitures.

The taking, receiving, reserving or charging of a rate of interest greater than allowed by this act [56-8-9, 56-8-12 to 56-8-14 NMSA 1978], when knowingly done, shall be deemed a forfeiture of the entire amount of such interest which the note, bill or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back by civil action twice the amount of the interest thus paid from the person, corporation or association taking or receiving the same; provided that such action is commenced within two (2) years from the time the usurious transaction occurred.

History: 1953 Comp., § 50-6-18, enacted by Laws 1957, ch. 209, § 4.

ANNOTATIONS

Excess knowingly charged deemed usury. — Where an agreement provides security for the loan at a rate of interest in excess of that allowed for secured indebtedness under this statute, it was therefore usurious since the taking, receiving, reserving or charging of that rate was knowingly done. *Hays v. Hudson*, 1973-NMSC-086, 85 N.M. 512, 514 P.2d 31, *overruled on other grounds by Maulsby v. Magnuson*, 1988-NMSC-046, 107 N.M. 223, 755 P.2d 67.

Any excess profit for use of money deemed usury. — Profit greater than the lawful rate of interest intentionally charged for the loan or forbearance of money is a violation of the usury law, though in the form of a bonus or commission. *Anderson v. Beadle*, 1931-NMSC-040, 35 N.M. 654, 5 P.2d 528, *overruled on other grounds by Hays v. Hudson*, 1973-NMSC-086, 85 N.M. 512, 514 P.2d 31; *Scottish Mortg. & Land Inv. Co. v. McBroom*, 1892-NMSC-021, 6 N.M. 573, 30 P. 859, *aff'd*, 153 U.S. 318, 14 S. Ct. 852, 38 L. Ed. 729 (1894) (decided under former law).

Reduced price sale of stock in addition to maximum interest deemed usurious. — Usury must exist at the inception of an agreement; and where a sale of stock at a reduced price was a condition of the loan and according to the uncontradicted testimony of one of the borrowers, the reduced price was to constitute additional interest of some

7% over and above the approximately 10% provided for in the note, it was held that usury was present in the transactions from the outset. *First Nat'l Bank v. Danek*, 1976-NMSC-077, 89 N.M. 623, 556 P.2d 31.

Specific intent required. — Knowingly charging an illegal interest rate requires a showing of some usurious intent to exploit. *Maulsby v. Magnuson*, 1988-NMSC-046, 107 N.M. 223, 755 P.2d 67.

Borrower's obligation complete upon payment of principal. — Where plaintiff-lender was shown to have knowingly charged an illegal rate of interest on certain loans, it was held that the obligation of defendant-borrowers, who had received the benefit of $56,024 from the various transactions, and had made payments of $57,547.22, was completed. *First Nat'l Bank v. Danek*, 1976-NMSC-077, 89 N.M. 623, 556 P.2d 31.

Applies where application of foreign law shocks court. — Where interest contracted for is greatly in excess of that allowable under New Mexico law, New Mexico courts are relieved of any obligation to consider whether foreign law is applicable as the law of the contract, and/or whether such law would allow interest rates such as those charged. *Trinidad Indus. Bank v. Romero*, 1970-NMSC-038, 81 N.M. 291, 466 P.2d 568.

Attorney's fees to collect permissible debt allowed. — When the effect thereof is not to render the contract void, but merely to forfeit the interest, usury in a loan will not prevent the recovery of reasonable attorney's fees provided for, where suit is necessary to enforce the obligation to the extent permitted by law. Attorney's fees will not be allowed, however, for attempts to collect the usurious portion of the interest. *Hays v. Hudson*, 1973-NMSC-086, 85 N.M. 512, 514 P.2d 31, *overruled on other grounds by Maulsby v. Magnuson*, 1988-NMSC-046, 107 N.M. 223, 755 P.2d 67.

Attorney's fees not allowed for collection of usurious interest. — Where at the time suit was commenced, the lender had no legal cause of action against the defendants since the note was usurious and payment on the net principal had been made, the lender's attorneys were not entitled to attorney's fees, and the order of the trial court allowing attorney's fees was reversed. *First Nat'l Bank v. Danek*, 1976-NMSC-077, 89 N.M. 623, 556 P.2d 31.

Borrower's performance prerequisite to affirmative recovery. — Absent performance by the borrower, this section serves borrower only as a shield by way of recoupment, so that the affirmative right of borrower to recover over against the lender or in an independent suit accrued only in the event of performance by the borrower. *Stiff v. Fogerson*, 1954-NMSC-031, 58 N.M. 193, 269 P.2d 743 (decided under former law).

Cause accrues upon payment of amount greater than principal and legal interest. — The limitation of three years, within which borrower may sue for double the amount of usurious interest collected and received from him, does not commence to run, and, therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt with legal interest. *McBroom v. Scottish Mortg. &*

Land Inv. Co., 153 U.S. 318, 14 S. Ct. 852, 38 L. Ed. 729 (1894) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 307 to 338.

Accommodation party's rights as against accommodated after payment, as affected by usury, 36 A.L.R. 559, 77 A.L.R. 668.

Compound interest, agreement to pay as usurious, 37 A.L.R. 325, 76 A.L.R. 1484.

Property within contemplation of statute making it criminal offense to loan at usurious rate on security of specified kinds of property, 64 A.L.R. 1071.

Affirmative liability for usurious penalty or excess interest paid under usurious contract in event of assignment or transfer, 78 A.L.R. 408.

Survival of claim for usury against estate of usurer, 78 A.L.R. 451.

Loan or forbearance within usury law, obligations covering deferred payments of purchase money or extension thereof, 91 A.L.R. 1105.

Usury as predicable on agreement by which lender is to receive something other than money for his loan, 95 A.L.R. 1231.

Usury in underwriting an issue of securities at less than par, 165 A.L.R. 626.

Usury as predicable on bonuses in the sale of commercial paper or other choses in action, 165 A.L.R. 677.

Expenses or charges in form of commissions to agents, brokers, or like intermediaries incident to loan of money, 52 A.L.R.2d 703.

Advance in price on credit sale as compared with cash sale, as usury, 14 A.L.R.3d 1065.

Earnings of or income from property, agreement for share in, in lieu of, or in addition to, interest as usurious, 16 A.L.R.3d 475.

Fraud of borrower contributing to execution of usurious contract as affecting right or remedies of parties, 16 A.L.R.3d 510.

Provision for interest after maturity at a rate in excess of legal rate as usurious, 28 A.L.R.3d 449.

Assumption by borrower of responsibility in respect of other debt, usury as affected by, 31 A.L.R.3d 763.

Usury as affected by acceleration clause, 66 A.L.R.3d 650.

91 C.J.S. Usury §§ 142 to 159.

56-8-14. Criminal penalty.

Any person, corporation or association who shall violate the provisions of this act [56-8-9, 56-8-12 to 56-8-14 NMSA 1978] shall be guilty of a misdemeanor, and upon conviction thereof before the district court or a justice of the peace shall be fined the sum of not less than twenty-five ($25.00) dollars, nor more than one hundred ($100.00) dollars.

History: 1953 Comp., § 50-6-19, enacted by Laws 1957, ch. 209, § 5.

ANNOTATIONS

Saving clauses. — Laws 1957, ch. 209, § 6 provided that none of the provisions of the New Mexico Small Loan Act of 1955, Laws 1955, ch. 128, is amended or repealed by this act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 307, 357 to 360.

Construction and application of Consumer Credit Protection Act provisions (18 USCS §§ 891-894) prohibiting extortionate credit transactions, 106 A.L.R. Fed. 33.

91 C.J.S. Usury § 160.

56-8-15 to 56-8-20. Repealed.

ANNOTATIONS

Repeals. — Laws 1985, ch. 228, § 17 repealed 56-8-15 to 56-8-20 NMSA 1978, as enacted by Laws 1965, ch. 253, §§ 1 to 6 and as amended by Laws 1971, ch. 82, §§ 1 and 2, relating to pledging personalty as security for loans and penalties for violation of provisions, effective June 14, 1985. For present comparable provisions, *see* Chapter 56, Article 12 NMSA 1978.

56-8-21. Usury; corporations and limited partnerships.

A. No corporation shall plead, enforce a remedy, counterclaim, set off or set up the defense of usury to any action brought against it to recover damages or shall enforce a remedy for usury on any obligation executed by the corporation.

B. No limited partnership, limited partner or general partner of a limited partnership, shall plead or set up the defense of usury in any action brought against it or him on a limited partnership obligation. No limited partnership, limited partner or general partner of a limited partnership shall enforce a remedy for usury on any limited partnership obligation.

C. This section shall apply to a transaction in which a corporation or a limited partnership is debtor regardless of the purpose for which the corporation or limited partnership was formed.

History: 1953 Comp., § 50-6-26, enacted by Laws 1975, ch. 171, § 1.

ANNOTATIONS

Section has no applicability to action involving violation of 56-8-7 NMSA 1978, limiting commission rates on procuring loans. *Diane, Inc. v. Kapnison*, 1983-NMSC-056, 100 N.M. 143, 667 P.2d 450.

Individual's usury defense allowed when corporation guarantor. — When a corporation is not a primary maker on a note but is a guarantor, the individuals who signed as makers are entitled to assert the defense of usury. *First Nat'l Bank v. Danek*, 1976-NMSC-077, 89 N.M. 623, 556 P.2d 31.

Usury defense unavailable where corporation actually maker. — Evidence which tended to show that the money represented by a promissory note was primarily to be used to establish and operate a corporation and that the corporation was actually the maker and the individuals, the guarantors, would have nullified the defense of usury. *First Nat'l Bank v. Danek*, 1976-NMSC-077, 89 N.M. 623, 556 P.2d 31.

Exemptions applicable to Residential Home Loan Act. — The exemptions from interest limitations and other provisions of law established by 56-8-9 and 58-8-1 to 58-8-3 NMSA 1978 and this section should be applicable to any home loan made pursuant to the Residential Home Loan Act. 1980 Op. Att'y Gen. No. 80-14.

Law reviews. — For article, "The Use (or Abuse) of the Limited Partnership in Financing Real Estate Ventures in New Mexico," *see* 3 N.M. L. Rev. 251 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Interest and Usury §§ 285 to 290.

Quantum, degree, or weight of evidence to sustain usury charge, 51 A.L.R.2d 1087.

Statute denying defense of usury to corporation, 63 A.L.R.2d 924.

Admissibility, in civil case involving usury issue, of evidence of other assertedly usurious transactions, 67 A.L.R.2d 232.

Usury as affected by acceleration clause, 66 A.L.R.3d 650.

91 C.J.S. Usury §§ 26, 92, 135, 160.

56-8-22. Short title.

Sections 1 through 9 [56-8-22 to 56-8-30 NMSA 1978] of this act may be cited as the "Residential Home Loan Act."

History: Laws 1980, ch. 64, § 1.

ANNOTATIONS

Compiler's notes. — Sections 56-8-25 to 56-8-28 NMSA 1978 were repealed by Laws 1981, ch. 263, § 4, effective July 1, 1981.

Applicability of act. — There is no indication, either express or implied, that 56-8-22 to 56-8-30 NMSA 1978 apply only to unsophisticated and naive purchasers. *Naumburg v. Pattison*, 1985-NMSC-120, 103 N.M. 649, 711 P.2d 1387.

56-8-23. Purpose of act.

The purpose of the Residential Home Loan Act is to make funds for residential home financing available to New Mexicans at national market rates and to secure certain rights and protections for borrowers.

History: Laws 1980, ch. 64, § 2.

ANNOTATIONS

56-8-24. Definitions.

As used in the Residential Home Loan Act:

A. "residence" means a dwelling and the underlying real property designed for occupancy by one to four families, and includes mobile homes and condominiums;

B. "home loan" means:

(1) a loan made to a person, all or a substantial portion of the proceeds of which will be used to purchase, construct, improve, rehabilitate, sell a residence or refinance a loan on a residence and which loan will be secured in whole or in part by a security interest in the residence evidenced by a real estate mortgage;

(2) the principal amount secured by a real estate mortgage on a residence when that real estate mortgage was executed by the mortgagor in connection with his

purchase of the property, and the obligation secured represents a part of the deferred purchase price; or

(3) the deferred balance due under a real estate contract made for the purchase or sale of a residence;

C. "director" means the director of the financial institutions division of the commerce and industry department [regulation and licensing department];

D. "person" means any individual or other legal entity;

E. "real estate contract" means a contractual document creating rights and obligations between a seller and buyer of a residence under which the seller agrees to transfer legal title to the residence to the buyer after payment over time of all or part of the purchase price of the residence;

F. "real estate mortgage" means any document creating a security interest in a residence owned by a person to secure the payment of a home loan as defined in Paragraphs (1) and (2) of Subsection B of this section and includes mortgages and deeds of trust;

G. "rate of interest" means the annual interest rate computed on any home loan determined by and calculated over the full contracted term of the home loan and includes in the calculation both the interest on the principal amount of the loan and discount points, premiums, commitment fees and other interest charges made pursuant to a home loan; and

H. "federal national mortgage association auction" means a biweekly auction of the federal national mortgage association for commitments to purchase eligible conventional home loans (free market system auction).

History: Laws 1980, ch. 64, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The commerce and industry department, referred to in the first sentence in Subsection C, was abolished by Laws 1983, ch. 297, § 33. Laws 1983, ch. 297, § 20, created the regulation and licensing department, composed of several divisions, including the financial institutions division. Laws 1983, ch. 297, § 31, provided that all references in law to the financial institutions division of the commerce and industry department shall be construed to be references to the same division within the regulation and licensing department. *See* 9-16-4 NMSA 1978 and notes thereto.

"Residence". — Subsection A contains no requirement that the dwelling be the primary family residence. *Naumburg v. Pattison*, 1985-NMSC-120, 103 N.M. 649, 711 P.2d 1387.

A log cabin designed for single-family use was a "residence" within the meaning of Subsection A, notwithstanding its location in a commercial area, where its owners intended to use, and did in fact use, the property for recreational and not commercial purposes. *Naumburg v. Pattison*, 1985-NMSC-120, 103 N.M. 649, 711 P.2d 1387.

56-8-25 to 56-8-28. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 263, § 4, repealed 56-8-25 to 56-8-28 NMSA 1978, as enacted by Laws 1980, ch. 64, §§ 4 to 7, relating to the rates of interest on home loans, effective July 1, 1981.

Compiler's notes. — Laws 1981, ch. 263, § 6, revived 56-8-25 to 56-8-28 NMSA 1978, effective July 1, 1983. However, Laws 1983, ch. 44, § 1, repealed Laws 1981, ch. 263, § 6, effective June 30, 1983.

56-8-29. Civil penalty for violation of act.

Any person that knowingly receives or charges a rate of interest greater than that allowed under the Residential Home Loan Act shall forfeit the entire amount of interest that the evidence of indebtedness specifies. If any interest has been paid by the debtor to a person that knowingly received or charged a rate that was in excess of the rate of interest allowed under the Residential Home Loan Act, then the debtor may recover by civil action twice the amount of the interest paid plus his costs of suit and attorney's fees. If any person, other than an institutional lender as defined in Section 4 [repealed] of the Residential Home Loan Act, receives or charges a rate of interest greater than that allowed under the Residential Home Loan Act, but such charging or receipt was under mistake or otherwise without knowledge of the violation, then the evidence of indebtedness is enforceable except that the lender cannot charge or receive more than the maximum rate of interest permitted under the Residential Home Loan Act, and the debtor may recover by civil action only the excess interest plus his costs of suit and attorney's fees. Any action brought under this section must be commenced within two years of the date the evidence of indebtedness was signed by the debtor.

History: Laws 1980, ch. 64, § 8.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Section 4 of the Residential Home Loan Act, referred to in the next-to-last sentence in this section, refers to Laws 1980, ch. 64, § 4, which was compiled as 56-8-25 NMSA 1978. That section and 56-8-26 to 56-8-28 NMSA 1978 were repealed by Laws 1981, ch. 263, § 4, effective July 1, 1981.

Statutory limitation on interest rates. — With the repeal of Sections 56-8-25 to 56-8-28 NMSA 1978, there are no longer any interest rate limitations in the Residential Home Loan Act (Sections 56-8-22 to 56-8-30 NMSA 1978). 1985 Op. Att'y Gen. No. 85-01.

56-8-30. No prepayment penalty on home loans.

No provision in a home loan or a loan for a mobile home, the evidence of indebtedness of a home loan, a real estate contract or an obligation secured by a real estate mortgage or other purchase contract requiring a penalty or premium for prepayment of an installment payment or prepayment of the balance of the indebtedness is enforceable.

History: Laws 1980, ch. 64, § 9; 2009, ch. 151, § 1.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, after "home loan", added "or a loan for a mobile home"; after "real estate mortgage", added "or other purchase contract"; and after "prepayment of", added "an installment payment or prepayment of".

Federal preemption. — When applied to federally-chartered thrift institutions and banks federal law preempts 56-8-30 NMSA 1978, which prohibits banks from collecting prepayment penalties on home mortgages. *Stoneking v. Bank of Am., N.A.*, 2002-NMCA-042, 132 N.M. 79, 43 P.3d 1089

A complete prohibition against prepayment is a penalty forbidden by this section. *Naumburg v. Pattison*, 1985-NMSC-120, 103 N.M. 649, 711 P.2d 1387.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of provision of mortgage or other real-estate financing contract prohibiting prepayment for a fixed period of time, 81 A.L.R.4th 423.

ARTICLE 9
Transfers to Prefer Creditors - Voluntary Assignments

56-9-1. [Transfers to prefer creditors; effect; exception of mortgage in good faith.]

Every sale, mortgage or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation

of insolvency and with the design to prefer one or more creditors to the exclusion in whole or in part of others, shall operate as an assignment and transfer of all the property and effects of such debtor and shall inure to the benefit of all his creditors, except as hereinafter provided in this chapter, in proportion to the amount of their respective demands, including those which are future and contingent, but nothing in this chapter shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record forthwith in the office of the county clerk where the property described therein shall be situated.

History: Laws 1889, ch. 67, § 1; C.L. 1897, § 2818; Code 1915, § 274; C.S. 1929, § 7-101; 1941 Comp., § 23-101; 1953 Comp., § 27-1-1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The compilers of the 1915 Code substituted the words "county clerk" for the words "county recorder."

The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Cross references. — For county clerks, *see* N.M. Const., art. VI, § 22 and Chapter 4, Article 40 NMSA 1978.

For assignments by insolvent banks, *see* 58-1-73 NMSA 1978.

Designed to prevent fraudulent transfer. — Intent and purpose of this section is to prevent an insolvent and failing debtor from making fraudulent transfer of his property and from giving a preference to one creditor, and to give an equal distribution of all such property between all creditors by creating a trust in their behalf. *Early Times Distillery Co. v. Zeiger*, 1897-NMSC-008, 9 N.M. 31, 49 P. 723.

Specifies procedure for assignment to creditors. — Acts regulating both voluntary and involuntary assignments, passed in 1889, were designed to form a complete code of procedure for parties wishing to abandon their estates to their creditors, and requiring sales of assigned property to be in accordance with statute. *In re Zeiger*, 1909-NMSC-017, 15 N.M. 150, 106 P. 345.

No release of debtor from debts. — This statute is not in the nature of an act of bankruptcy, and does not release any debtor or his after-acquired property from his

debts, but only seeks to prevent preferences to creditors. It was not suspended by the National Bankruptcy Act as to any proceeding to set aside fraudulent conveyances made prior thereto. *Grunsfeld Bros. v. Brownell*, 1904-NMSC-014, 12 N.M. 192, 76 P. 310.

Applies to assignments only. — This section does not apply to fraudulent conveyances other than assignments. *Douglas Fir Lumber Co. v. Star Lumber Co.*, 1921-NMSC-077, 27 N.M. 403, 201 P. 867.

Intent to hinder creditor necessary. — Even though a transferee is in fact insolvent, in case a transfer is made voluntarily without any intent or purpose of hindering, delaying or defrauding any creditor in so doing, the mere fact that such transfer amounts to the preference of one creditor over another does not make the transfer illegal, except where bankruptcy or insolvency laws are involved. *Marchbanks v. McCullough*, 1942-NMSC-066, 47 N.M. 13, 132 P.2d 426.

No equitable mortgage of community property without spouse's promise. — A promise by a husband to give a mortgage on community real estate, in which wife does not join, furnishes no basis upon which an equitable mortgage can be declared. *El Paso Cattle Loan Co. v. Stephens & Gardner*, 1924-NMSC-067, 30 N.M. 154, 228 P. 1076.

Law reviews. — For article, "Attachment in New Mexico - Part I," *see* 1 Nat. Resources J. 303 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 2, 37, 45 to 48, 69; 42 Am. Jur. 2d Insolvency § 108.

Creditor's receipt of proceeds of conveyance or transfer by debtor as estopping him to claim that conveyance or transfer was fraudulent, 9 A.L.R. 358.

Validity and effect of provisions in assignments for creditors authorizing continuance of assignor's business, 23 A.L.R. 199.

Preference in event of debtor's insolvency in respect of funds designated or set apart by him for payment of specified obligation, 32 A.L.R. 950.

State's prerogative right of preference at common law, 51 A.L.R. 1366, 65 A.L.R. 1331, 90 A.L.R. 184, 167 A.L.R. 640.

Admissions of insolvent as evidence against assignee in case of fraud or collusion between assignor and assignee, 53 A.L.R. 655.

Corporate dividends improperly paid, right of corporation's assignee for creditors to recover, 55 A.L.R. 108, 76 A.L.R. 885, 109 A.L.R. 1381.

Declarations of assignor, made subsequent to assignment, on issue whether sale constituted fraud on creditors, 64 A.L.R. 825.

Chattel mortgage giving mortgagor right to sell, validity of, as against assignee for creditors, 73 A.L.R. 258.

Prerogative right of county or other political subdivision to preference, 90 A.L.R. 208.

Verdict in tort action, 156 A.L.R. 1431.

Validity of anti-assignment clause in contract, 37 A.L.R.2d 1251.

Validity of provision in deed or transfer to assignee for benefit of creditors for payment of attorneys' fees, 79 A.L.R.2d 513.

6A C.J.S. Assignments for Benefit of Creditors §§ 26, 54, 55, 57.

56-9-2. [Interested persons may file suit.]

All such transfers as are herein declared to inure to the benefit of the creditors generally shall be subject to the control of courts of equity upon the bill [complaint] of any person interested, filed within six months after the mortgage or transfer is legally lodged for record or the delivery of the property or effects transferred.

History: Laws 1889, ch. 67, § 2; C.L. 1897, § 2819; Code 1915, § 275; C.S. 1929, § 7-102; 1941 Comp., § 23-102; 1953 Comp., § 27-1-2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The word "complaint" was inserted in compliance with Rule 1-007A NMRA, which prescribes allowed pleadings.

Compiler's notes. — The rules of civil procedure govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity, with exceptions, and provide that there shall be one form of action which shall be known as a "civil action." *See* Rules 1-001 and 1-002 NMRA.

Time runs from delivery for six months. — On assignments of contracts for the sale of land made by a debtor in contemplation of insolvency and with a design to prefer one or more creditors, which operate as assignments and transfers of all the property and effects of such debtor and inure to the benefit of all his creditors, subject to the control of courts of equity action upon the complaint of any interested person, must be filed within six months after such assignments or transfers are legally lodged for record or

the delivery of the property. *Early Times Distillery Co. v. Zeiger*, 1902-NMSC-001, 11 N.M. 221, 67 P. 734.

Time when suit barred. — Right to sue under this section was lost where seven months and a half had elapsed between the delivery of the property or effects transferred, and the time of filing bill. *Early Times Distillery Co. v. Zeiger*, 1902-NMSC-001, 11 N.M. 221, 67 P. 734; *Early Times Distillery Co. v. Zeiger*, 1897-NMSC-008, 9 N.M. 31, 49 P. 723.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors § 135.

6A C.J.S. Assignments for Benefit of Creditors § 135.

56-9-3. [Parties; order for creditors to appear; publication of notice.]

Any number of persons interested may unite as complainants in the bill of complaint; but it shall not be necessary to make any persons defendants, except the debtor and transferee; such bill of complaint shall state the amount of the debts of the defendant debtor, so far as known to the complainant, and in such action the court shall make an order for such of the creditors of the defendant debtor as are not joined as defendants in the bill of complaint, to appear before a master to be appointed by the court and prove their claims before a certain day to be named in the order, notice of which shall be given by advertisement in a newspaper; or if none be published in the county, then by such other mode as the court may judge best calculated to give such creditors actual notice of the order; and in addition to the advertisement in a newspaper, the court may direct publication in other modes. A creditor appearing before the master and presenting his claim shall thereby become a party to the action and be concluded by the final judgment of the court allowing or rejecting his claim. Any creditor who shall fail to appear and prove his claim agreeable to such order shall be precluded from participation in the distribution of the assets of the debtor hereinafter provided for.

History: Laws 1889, ch. 67, § 3; C.L. 1897, § 2820; Code 1915, § 276; C.S. 1929, § 7-103; 1941 Comp., § 23-103; 1953 Comp., § 27-1-3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Rule 1-007A NMRA designates the allowed pleadings and speaks of a "complaint," not a "bill of complaint." Rule 1-003 NMRA provides that a complaint commences a civil action.

Cross references. — For publication of notice, *see* Chapter 14, Article 11 NMSA 1978.

For joinder of parties, *see* Rule 1-020A NMRA.

For class actions, *see* Rule 1-023 NMRA.

A creditor does not have to secure judgment before he can go into court to set aside a fraudulent conveyance; it is not the existence or non-existence of the debt which gives the court jurisdiction, but the fraudulent conveyance. *Grunsfeld Bros. v. Brownell*, 1904-NMSC-014, 12 N.M. 192, 76 P. 310; *Early Times Distillery Co. v. Zeiger*, 1897-NMSC-009, 9 N.M. 45, 49 P. 1118; *Early Times Distillery Co. v. Zeiger*, 1897-NMSC-008, 9 N.M. 31, 49 P. 723.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignment for Benefit of Creditors §§ 7, 23, 33, 81, 97, 122, 125, 130, 138.

6A C.J.S. Assignments for Benefit of Creditors §§ 59, 134.

56-9-4. [Surrender of property to receiver.]

The court or judge may at any time, pending the action, and upon such terms as it shall be deemed proper, compel the transferee to surrender to a receiver of the court, all property and effects in his possession, or under his control; and it may make such orders respecting the property as courts of law are now allowed to make concerning attached property. And when it is decided that a sale, mortgage or assignment was made in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion in whole or in part, of others, the court shall compel the debtor to surrender to such receiver all property and effects in his possession or under his control, except such property as is exempt from executions, to disclose the amount of his debts, the names and residence of his creditors, all offsets and defenses to any claims against him, or any other matter which shall be deemed proper; and the court shall also compel every person who shall acquire by purchase, assignment or otherwise, any property or effects from such debtor, after the suit contemplated by this chapter shall have been instituted, to surrender the same to such receiver.

History: Laws 1889, ch. 67, § 4; C.L. 1897, § 2821; Code 1915, § 277; C.S. 1929, § 7-104; 1941 Comp., § 23-104; 1953 Comp., § 27-1-4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — For the meaning of "courts of law," *see* Rules 1-001 and 1-002 NMRA which provide that the rules govern procedure in the New Mexico district courts in all suits of a civil nature, with exceptions, and provide that there is one form of action, known as a civil action. There is no provision for a "court of law."

The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Cross references. — For exemptions from execution, *see* 42-10-1 to 42-10-13 NMSA 1978.

For appointment of receivers, *see* Rule 1-066 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 78, 121, 134.

6A C.J.S. Assignments for Benefit of Creditors §§ 4, 10.

56-9-5. [Distribution of assets; final judgment; appeal.]

The court may make distribution of the assets on hand from time to time, and the decision of the court at the time of any distribution, allowing or disallowing any claim, shall be held final judgment, and may be appealed from as other final judgment.

History: Laws 1889, ch. 67, § 5; C.L. 1897, § 2822; Code 1915, § 278; C.S. 1929, § 7-105; 1941 Comp., § 23-105; 1953 Comp., § 27-1-5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 138, 140, 211 to 213.

6A C.J.S. Assignments for Benefit of Creditors §§ 85 to 111.

56-9-6. [Writ of ne exeat or attachment.]

The court or judge may grant against such debtor a writ of ne exeat or attachment in chancery, as for contempt, when it shall be made to appear, by affidavit, that such writ or attachment is necessary to secure the surrender or disclosures provided for herein.

History: Laws 1889, ch. 67, § 6; C.L. 1897, § 2823; Code 1915, § 279; C.S. 1929, § 7-106; 1941 Comp., § 23-106; 1953 Comp., § 27-1-6.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6A C.J.S. Assignments for Benefit of Creditors §§ 4, 9, 76.

56-9-7. [Claims of creditors; verification.]

The claims of creditors shall be verified by the oath of the creditor, his agent or attorney, before any portion of the assets shall be received thereon.

History: Laws 1889, ch. 67, § 7; C.L. 1897, § 2824; Code 1915, § 280; C.S. 1929, § 7-107; 1941 Comp., § 23-107; 1953 Comp., § 27-1-7.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 125, 126.

6A C.J.S. Assignments for Benefit of Creditors §§ 133 to 136, 142.

56-9-8. [Voluntary assignment; assignment not operative until execution of bond; action on bond.]

In case of any voluntary assignment for the benefit of creditors, such assignment shall not become operative and the assignee shall not enter into the possession of the property assigned until he shall have executed a good and sufficient bond to the state of New Mexico in a sum to be fixed by the judge of the district court of the county of the assignor's residence, which sum shall not be less than double the value of the property assigned; which value shall be ascertained by proof satisfactory to such district judge before the approval of the bond, conditioned for the faithful performance of all his duties as such assignee, and for the payment to the parties entitled thereto, promptly and without delay, of all sums of money which may come into his hands as such assignee. And any person aggrieved may maintain an action upon the said bond in his own name, or in the name of the state, on his relation, in any district court of this state having jurisdiction.

History: Laws 1889, ch. 67, § 8; C.L. 1897, § 2825; Code 1915, § 281; C.S. 1929, § 7-108; 1941 Comp., § 23-108; 1953 Comp., § 27-1-8.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — This section and 56-9-9 NMSA 1978, relating to voluntary assignments, may be affected by Laws 1889, ch. 71, §§ 1 to 44, compiled presently as 56-9-10 to 56-9-53 NMSA 1978, relating to the same subject. Laws 1889, ch. 67, became effective on February 19, 1889, while Laws 1889, ch. 71, became effective on February 20, 1889. Provisions concerning assignee's bond in the later act are in 56-9-18 NMSA 1978.

Liberally construed. — The law providing for a general assignment for the benefit of all the insolvent's creditors should receive a liberal construction. *Schofield v. Folsom*, 1894-NMSC-015, 7 N.M. 601, 38 P. 251.

Section covers voluntary assignments only. — Notwithstanding that the general purpose of the act is to prevent preference among creditors, and to create out of any such preference an involuntary assignment, this section was evidently incorporated into it as a piece of legislation designed for a wholly different purpose, and relates, by its terms, to voluntary, rather than involuntary, assignments. *Schofield v. Folsom*, 1894-NMSC-015, 7 N.M. 601, 38 P. 251.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur.2d Assignments for Benefit of Creditors §§ 3, 136 to 138.

6A C.J.S. Assignments for Benefit of Creditors §§ 2, 48.

56-9-9. [Failure of assignee to settle estate; suit to compel settlement.]

In case of any voluntary assignment, referred to in Section 56-9-8 NMSA 1978, if the assignee shall fail within twelve months to settle up the estate of his assignor and distribute the proceeds thereof among the creditors entitled thereto, any creditor aggrieved may file a bill of complaint in any district court having jurisdiction of the subject matter and the parties to compel such settlement and distribution and thereupon such suit shall proceed in the manner prescribed by this chapter for the proving of claims and the distribution of assets in cases of involuntary assignment.

History: Laws 1889, ch. 67, § 9; C.L. 1897, § 2826; Code 1915, § 282; C.S. 1929, § 7-109; 1941 Comp., § 23-109; 1953 Comp., § 27-1-9.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Rule 1-007A NMRA designates the allowed pleadings and speaks of a "complaint," not a "bill of complaint." Rule 1-003 NMRA provides that a complaint commences a civil action.

The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Cross references. — For voluntary assignments, *see* 56-9-1 to 56-9-7 NMSA 1978.

For provisions concerning voluntary assignments, *see* compiler's note to 56-9-8 NMSA 1978.

For provisions dealing with assignee's failure to settle, *see* 56-9-25 NMSA 1978.

For provisions dealing with the time for payment of claims, *see* 56-9-41 NMSA 1978.

56-9-10. [Voluntary assignments; acknowledgment and recording.]

That every voluntary assignment of lands, tenements, goods, chattels, effects and credits, made by any debtor to any person in trust for the benefit of his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims, except as hereinafter provided in this chapter; and every such assignment shall be proved or acknowledged and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed.

History: Laws 1889, ch. 71, § 1; C.L. 1897, § 2827; Code 1915, § 283; C.S. 1929, § 7-110; 1941 Comp., § 23-110; 1953 Comp., § 27-1-10.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Cross references. — For recordation of real property, *see* 14-9-1 to 14-9-9 NMSA 1978.

For assignments by banks, *see* 58-1-73 NMSA 1978.

Property assigned under section not attachable. — The only thing required of the assignor is that he execute an assignment under the formalities required for the conveyance of real estate. The assignment having been "proved, or acknowledged, and certified and recorded," the legal title passes out of the assignor, and the property assigned is no longer subject to seizure under attachment proceedings. *Schofield v. Folsom*, 1894-NMSC-015, 7 N.M. 601, 38 P. 251.

Procedure mandatory on assignees. — This act was designed to form a complete code of procedure for parties wishing to abandon their estates to their creditors, and assignees must follow this procedure. *In re Zeiger*, 1909-NMSC-017, 15 N.M. 150, 106 P. 345.

Assignment must benefit all creditors proportionally. — Where a deed of assignment directs the assignee to pay, out of firm assets, an individual partner's creditor in preference to firm creditors, and to pay taxes of individual partners as well as of the firm, it is fraudulent as to creditors. Under such a deed, where the assignee carries on the business under the firm name and replenishes stock, and the assignor is employed to aid in the management, and the assignor has previously secured credit by misrepresentation and conducts himself with the apparent purpose of hindering creditors, the assignment is fraudulent to those extending credit through false claims. *Marshall Field & Co. v. M. Romero & Co.*, 1895-NMSC-002, 7 N.M. 630, 41 P. 517, (case arose before section enacted).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 3, 8, 27, 29, 55, 94, 100, 136 to 139.

6A C.J.S. Assignments for Benefit of Creditors §§ 48, 62, 64, 66.

56-9-11. [Inventory by assignee.]

It shall be the duty of the assignee, within ten days after the execution and delivery of the deed of assignment, to file in the office of the clerk of the district court of the county in which the assignor, or if there be more than one, in which any of them shall reside, unless longer time be allowed by the judge of the court for good cause shown, an inventory of the property, effects and things assigned.

History: Laws 1889, ch. 71, § 2; C.L. 1897, § 2828; Code 1915, § 284; C.S. 1929, § 7-111; 1941 Comp., § 23-111; 1953 Comp., § 27-1-11.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 30, 31, 67, 100, 138.

Trademark or trade name as asset in case of assignment for creditors, 44 A.L.R. 706.

6A C.J.S. Assignments for Benefit of Creditors §§ 48, 61, 66, 116.

56-9-12. [Inventory to be accompanied by affidavit.]

The inventory shall be accompanied with an affidavit by the assignee that the same is a full and complete inventory of all such property, effects and things as far as the same has come to his knowledge.

History: Laws 1889, ch. 71, § 3; C.L. 1897, § 2829; Code 1915, § 285; C.S. 1929, § 7-112; 1941 Comp., § 23-112; 1953 Comp., § 27-1-12.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-13. [Appraisement.]

It shall be the duty of the district court, or the judge thereof in vacation, in whose clerk's office such inventory may be filed, to appoint two or more disinterested and competent persons to appraise the property, effects and things so inventoried.

History: Laws 1889, ch. 71, § 4; C.L. 1897, § 2830; Code 1915, § 286; C.S. 1929, § 7-113; 1941 Comp., § 23-113; 1953 Comp., § 27-1-13.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors § 100.

56-9-14. [Oath of appraisers.]

The appraisers, having first taken an oath or affirmation before some person having authority to administer oaths, to discharge their duties with fidelity, shall forthwith proceed to make such appraisement.

History: Laws 1889, ch. 71, § 5; C.L. 1897, § 2831; Code 1915, § 287; C.S. 1929, § 7-114; 1941 Comp., § 23-114; 1953 Comp., § 27-1-14.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For persons authorized to administer oaths, *see* 14-13-3 NMSA 1978.

56-9-15. [Filing of appraisement and oath.]

The appraisers shall file the appraisement and their oath of office in the office of the clerk of the district court, within five days after they shall have completed the same.

History: Laws 1889, ch. 71, § 6; C.L. 1897, § 2832; Code 1915, § 288; C.S. 1929, § 7-115; 1941 Comp., § 23-115; 1953 Comp., § 27-1-15.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-16. [Compensation of appraisers.]

The appraisers shall receive four dollars [($4.00)] per day for their necessary attendance and services.

History: Laws 1889, ch. 71, § 7; C.L. 1897, § 2833; Code 1915, § 289; C.S. 1929, § 7-116; 1941 Comp., § 23-116; 1953 Comp., § 27-1-16.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-17. [Additional property; appraisement.]

If, after making the first inventory, any other property, effects or things conveyed by the deed of assignment, shall come to the possession or knowledge of the assignee, his duty in relation thereto, and the duty of the court or judge and the appraisers shall be the same as required of them by the preceding section [sections].

History: Laws 1889, ch. 71, § 8; C.L. 1897, § 2834; Code 1915, § 290; C.S. 1929, § 7-117; 1941 Comp., § 23-117; 1953 Comp., § 27-1-17.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The word "sections" was inserted to indicate the probable meaning. A reference to the preceding section only would be meaningless. As enacted, this section contained the additional words "of this act" which would limit the reference to 56-9-1 to 56-9-16 NMSA 1978.

56-9-18. [Statement of assignee; bond.]

The assignee, his agent or attorney, at the time of the execution and delivery of the deed of assignment, shall make a statement in writing, verified by affidavit, setting forth the general nature and full value of the estate and effects assigned, which statement shall be filed with the deed of assignment for record, and the assignee shall, within five days after the filing of such statement, give bond with at least two good and sufficient securities to be approved by the court, or judge or clerk thereof in vacation, in double the amount of the estate and effects assigned, and if the appraised value of such estate and effects, when appraised, shall be greater than the value given in such statement, or if the securities in such should in any way become impaired or insufficient, the assignee shall, at the time of filing the appraisement, give another bond with at least two good and sufficient securities to be approved in like manner, in double the value of the estate and effects assigned.

History: Laws 1889, ch. 71, § 9; C.L. 1897, § 2835; Code 1915, § 291; C.S. 1929, § 7-118; 1941 Comp., § 23-118; 1953 Comp., § 27-1-18.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Laws 1889, ch. 67, § 8, presently compiled as 56-9-8 NMSA 1978 also provides for assignee's bond. *See* the compiler's notes to 56-9-8 NMSA 1978.

Cross references. — For assignee's removal for failure to file inventory or bond, *see* 56-9-35, 56-9-36 NMSA 1978.

For the bond requirement for sale of realty, *see* 56-9-40 NMSA 1978.

For surety bonds generally, *see* Chapter 46, Article 6 NMSA 1978.

Assignee may amend bond to reflect appraisal lower than initial statement. — Where the assignee, after having declared in his preliminary statement a higher value of the property than the appraisal showed, he was properly permitted to correct the statement to accord with the value and to file bond for double the latter amount. *Lyndonville Nat'l Bank v. Folsom*, 1894-NMSC-016, 7 N.M. 611, 38 P. 253.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 105, 106; 12 Am. Jur. 2d Bonds § 57.

Right of assignee for creditors under indemnity insurance policy, 6 A.L.R. 1240.

Taking possession of goods by assignee of creditors of vendee as terminating right of stoppage in transitu, 7 A.L.R. 1411.

Assignee's right to possession and administration of collateral validly pledged by his insolvent, 28 A.L.R. 413.

6A C.J.S. Assignments for Benefit of Creditors § 79.

56-9-19. [Conditions of bond.]

The bond shall be taken in the name of the state of New Mexico, and the conditions shall be as follows: The conditions of this obligation are such that if the above bound assignee of . . . . . shall, in all things, discharge his duty as assignee of . . . . . aforesaid, and faithfully execute the trust confided to him, then the above obligation to be void, otherwise to remain in full force.

History: Laws 1889, ch. 71, § 10; C.L. 1897, § 2836; Code 1915, § 292; C.S. 1929, § 7-119; 1941 Comp., § 23-119; 1953 Comp., § 27-1-19.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 105, 106.

56-9-20. [Recording of bond; filing copies of bond and other papers with county clerk.]

The bond shall be filed in the office of the clerk of the court in which the inventory is filed and shall be by the clerk recorded in a book kept by him for such purpose, and labeled, "Assignments," and presented, if taken by him in vacation, to the district court at its next regular term. A certified copy of such bond, deed of assignment, statement and inventory shall also be filed for record in the office of the county clerk of the same county, as soon as such certified copies can be obtained from the clerk of the district court.

History: Laws 1889, ch. 71, § 11; C.L. 1897, § 2837; Code 1915, § 293; C.S. 1929, § 7-120; 1941 Comp., § 23-120; 1953 Comp., § 27-1-20.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-21. [Approval or rejection of bonds taken in vacation.]

The district court or judge shall approve or reject the bonds taken by the clerk in vacation, and the clerk of the district court shall enter the approval or rejection on the record.

History: Laws 1889, ch. 71, § 12; C.L. 1897, § 2838; Code 1915, § 294; C.S. 1929, § 7-121; 1941 Comp., § 23-121; 1953 Comp., § 27-1-21.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-22. [Failure to give additional bond; revocation of authority.]

If the bond be rejected the district court or judge thereof shall order the assignee to give another bond, with sufficient security to be approved by the court, and if he fail to give such bond within such time as the court or judge thereof shall direct, not exceeding twenty days, his authority further to act as assignee shall be deemed revoked.

History: Laws 1889, ch. 71, § 13; C.L. 1897, § 2839; Code 1915, § 295; C.S. 1929, § 7-122; 1941 Comp., § 23-122; 1953 Comp., § 27-1-22.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-23. [Old bond is valid until new bond approved.]

Such bond shall be valid until such new bond be given and approved, notwithstanding its rejection by the court, and such new bond, when approved, shall relate back and operate from the date of assignment.

History: Laws 1889, ch. 71, § 14; C.L. 1897, § 2840; Code 1915, § 296; C.S. 1929, § 7-123; 1941 Comp., § 23-123; 1953 Comp., § 27-1-23.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-24. [Suit on bond.]

Any person, injured by a breach of the condition of the bond, may sue thereon in the name of the state for his use, and the damages shall be assessed as on bonds with collateral conditions.

History: Laws 1889, ch. 71, § 15; C.L. 1897, § 2841; Code 1915, § 297; C.S. 1929, § 7-124; 1941 Comp., § 23-124; 1953 Comp., § 27-1-24.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Official, as distinguished from individual acts for which sureties on bond of assignee for creditors are liable, 50 A.L.R. 314.

6A C.J.S. Assignments for Benefit of Creditors §§ 79, 175.

56-9-25. [Statement of accounts; time of making; dismissal for failure to make.]

Every assignee shall exhibit on oath a statement of the accounts of the trust, with proper vouchers, to the district court at the first regular term after the execution of the assignment unless for good cause postponed, and shall file a like statement at least every three months thereafter for the inspection of the judge, and if by the judge found correct and proper, to be by him approved; such statements to be so made until assigned estate is fully settled. And if such assignee shall fail to make such settlement as herein provided for within the time mentioned, then on the application of any person interested, the court or judge thereof shall order a citation to issue to such assignee requiring him to appear before him at his chambers within a time named therein and exhibit on oath a statement of his accounts, and if said assignee shall neglect and fail to exhibit such accounts within the time named in such citation, the judge shall, on motion, unless for good cause shown, dismiss said assignee from his trust and enter an order that he pay all costs of the proceedings.

History: Laws 1889, ch. 71, § 16; C.L. 1897, § 2842; Code 1915, § 298; C.S. 1929, § 7-125; 1941 Comp., § 23-125; 1953 Comp., § 27-1-25.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Laws 1889, ch. 67, § 9, compiled as 56-9-9 NMSA 1978, also provides for procedures upon an assignee's failure to settle the estate. *See* the compiler's notes to 56-9-8 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 18, 130.

6A C.J.S. Assignments for Benefit of Creditors § 112.

56-9-26. [Notice of filing accounts.]

The court or judge thereof shall, by such order as the circumstances of the case may require, direct the clerk to give notice of the exhibition and filing of such accounts, for such time and in some newspaper of general circulation within the county wherein such assignment is made and recorded, and that such accounts will be allowed by the court or judge thereof in vacation, at a certain time, to be stated in such notice, unless good cause to the contrary is shown.

History: Laws 1889, ch. 71, § 17; C.L. 1897, § 2843; Code 1915, § 299; C.S. 1929, § 7-126; 1941 Comp., § 23-126; 1953 Comp., § 27-1-26.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For publication of legal notices, *see* 14-11-10 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6A C.J.S. Assignments for Benefit of Creditors § 81.

56-9-27. [Advertising paid by assignee; credit.]

The expense of advertising shall be paid by the assignee at the time of exhibiting his account, and shall be passed to his credit in such account.

History: Laws 1889, ch. 71, § 18; C.L. 1897, § 2844; Code 1915, § 300; C.S. 1929, § 7-127; 1941 Comp., § 23-127; 1953 Comp., § 27-1-27.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-28. [Adjustment and allowance of demands.]

The assignee shall appoint a day, within three months after the date of the assignment, and a place, which shall be the county seat of the county where the inventory is filed, or such other place in said county most convenient to all the parties in interest where any court of record may be lawfully held, when and where he will proceed publicly to adjust and allow demands against the estate and effects of the assignor.

History: Laws 1889, ch. 71, § 19; C.L. 1897, § 2845; Code 1915, § 301; C.S. 1929, § 7-128; 1941 Comp., § 23-128; 1953 Comp., § 27-1-28.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of lessor to compensation out of estate for use of premises by receiver or assignee for creditors without adopting lease, 43 A.L.R. 734.

Reformation of instrument as against assignee for creditors or creditors secured by assignment, 44 A.L.R. 115, 79 A.L.R.2d 1180.

Rights of holder of trust receipt as against assignee for creditors of receiptor, 49 A.L.R. 291, 87 A.L.R. 302, 101 A.L.R. 453, 168 A.L.R. 359.

Freight charges, liability for, of assignee for creditors of consignee, 61 A.L.R. 432.

Rights in respect of legacy charged upon devisee's land, as against assignee for creditors of devisee. 116 A.L.R. 35, 134 A.L.R. 361.

6A C.J.S. Assignments for Benefit of Creditors §§ 53, 70, 71, 134.

56-9-29. [Notice of adjusting and allowing demands; publication; procedure; claims not presented.]

The assignee shall give notice of the time and place of adjusting and allowing demands against the estate of his assignor, by advertisement published in some newspaper printed in the county, or if there be none, in the one nearest the place where the inventory is filed, for four weeks successively, the last insertion to be at least one week before the appointed day, and also, whenever the residence of any of the creditors is known to him, by letters addressed to such creditors at their known or usual place of abode, at least four weeks before the appointed day. The assignee shall attend at the place designated in said notice, in person, on said day, and shall remain in attendance at said place on said day, and during two consecutive days thereafter, and shall commence the adjustment and allowance of demands against the trust fund at nine o'clock a.m. and continue the same until five o'clock p.m. of each of the said three

days; and all creditors who, after being notified as aforesaid, shall not attend at the place designated during the said term, and lay before the assignee the nature and amount of their demands, shall be precluded of any benefit of said estate, but the hearing on any demand presented at the time may be continued, for good cause shown, to such time as is deemed right: provided, that any creditor who shall fail to lay his claim before said assignee during the said term on account of sickness, absence from the state, or any other good cause, may, at any time before the declaration of the final dividend, file and prove up his claim, and the same may be allowed, and the remaining dividends paid thereon as in the case of other allowed claims.

History: Laws 1889, ch. 71, § 20; C.L. 1897, § 2846; Code 1915, § 302; C.S. 1929, § 7-129; 1941 Comp., § 23-129; 1953 Comp., § 27-1-29.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For legal newspapers, *see* 14-11-12 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 125, 126.

Waiver of or estoppel to assert lien by filing claim with or receiving dividend from assignee for creditors, 55 A.L.R. 993.

Mechanic's lien as waived by filing claim with assignee for creditors, 65 A.L.R. 315.

6A C.J.S. Assignments for Benefit of Creditors § 134.

56-9-30. [Assignee may administer oaths to witnesses.]

The assignee shall have power to administer all necessary oaths to debtors, creditors and witnesses, and may examine them on oath, touching any claim exhibited to him for allowance.

History: Laws 1889, ch. 71, § 21; C.L. 1897, § 2847; Code 1915, § 303; C.S. 1929, § 7-130; 1941 Comp., § 23-130; 1953 Comp., § 27-1-30.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-31. [Rejection of claims.]

Should the assignee reject any claim or demand against the estate, he shall indorse on the back of said claim or demand the word, "Rejected," giving the date of said rejection and sign his name as such assignee thereto.

History: Laws 1889, ch. 71, § 22; C.L. 1897, § 2848; Code 1915, § 304; C.S. 1929, § 7-131; 1941 Comp., § 23-131; 1953 Comp., § 27-1-31.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6A C.J.S. Assignments for Benefit of Creditors § 136.

56-9-32. [Rejected claim; right to bring action; limitation.]

If, within thirty days after the same is rejected, the party owning said claim does not prosecute his action against the assignee in a court of competent jurisdiction, a recovery upon said claim or demand shall be forever barred. If the plaintiff's cause of action be dismissed at the instance of the defendant other than on its merits, the plaintiff shall have thirty days from the date of such dismissal to bring a new suit.

History: Laws 1889, ch. 71, § 23; C.L. 1897, § 2849; Code 1915, § 305; C.S. 1929, § 7-132; 1941 Comp., § 23-132; 1953 Comp., § 27-1-32.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 52, 72.

56-9-33. [Judgments in favor of claimant certified to assignee.]

All judgments rendered in favor of any claimant in the district court, by virtue of the provisions of this chapter, shall be certified by the clerk thereof to the assignee, who shall allow the same and class it as a valid claim against the estate.

History: Laws 1889, ch. 71, § 24; C.L. 1897, § 2850; Code 1915, § 306; C.S. 1929, § 7-133; 1941 Comp., § 23-133; 1953 Comp., § 27-1-33.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 112, 134; 47 Am. Jur. 2d Judgments § 759.

6A C.J.S. Assignments for Benefit of Creditors § 157.

56-9-34. [Claims of assignee; presentation to court; temporary assignee; allowance or rejection of claim.]

If the assignee shall have a demand against the assignor which he desires to have allowed, he may present a petition to the district court or to the judge thereof in vacation, stating the particulars of his demand and the amount thereof, verified by affidavit, and thereupon such court, or the judge thereof in vacation, shall appoint some suitable person to act temporarily as the assignee of such estate for the purpose of hearing and passing upon such demand. The assignee appointed shall take an oath that he will faithfully discharge the trust confided to him, and shall proceed to examine the claim, and if same be found to be correct in whole or in part, he shall allow the amount found to be due, and report his action in the premises to the proper court at the next term thereof, or to the judge of said court in vacation; and the court or judge, as the case may be, shall make an order directing the sum allowed to be paid to the claimant as other allowances are paid; and in case such demand or demands shall have been rejected by the temporary assignee, such proceedings may be had as designated in Sections 56-9-31 to 56-9-33 NMSA 1978.

History: Laws 1889, ch. 71, § 25; C.L. 1897, § 2851; Code 1915, § 307; C.S. 1929, § 7-134; 1941 Comp., § 23-134; 1953 Comp., § 27-1-34.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors § 104.

56-9-35. [Failure of assignee to file inventory or give bond; citation to show cause.]

Whenever it shall be made to appear to the court having jurisdiction, or the judge of the proper district court in vacation, that any assignee has neglected and refused, when required by law, to file a full and true inventory or to give a bond as required by this chapter, the court, or judge thereof in vacation, shall issue a citation to said assignee to appear before said judge at a time and place within his judicial district therein specified, to show cause why he should not be dismissed from his trust.

History: Laws 1889, ch. 71, § 26; C.L. 1897, § 2852; Code 1915, § 308; C.S. 1929, § 7-135; 1941 Comp., § 23-135; 1953 Comp., § 27-1-35.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — For meaning of "this chapter", *see* same catchline in the notes to 56-9-1 NMSA 1978.

Cross references. — For removal for failure to furnish new bond, *see* 46-6-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 30, 31, 100, 105, 106.

56-9-36. [Dismissal of assignee.]

On the return of the citation, the court, or judge thereof, may require the assignee to file an inventory and to give a bond, with good and sufficient security, at any time, as he may deem reasonable, or may proceed at once to dismiss such assignee from his trust.

History: Laws 1889, ch. 71, § 27; C.L. 1897, § 2853; Code 1915, § 309; C.S. 1929, § 7-136; 1941 Comp., § 23-136; 1953 Comp., § 27-1-36.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors § 92.

What constitutes abandonment or rejection of property or assets of bankrupt estate by trustees so as to revest title thereto in bankrupt, 19 A.L.R.2d 890.

6A C.J.S. Assignments for Benefit of Creditors §§ 82, 172.

56-9-37. [Insolvency or removal of security on bond.]

The like proceedings as are prescribed in the last two preceding sections [56-9-35, 56-9-36 NMSA 1978] may be had whenever it shall appear to the court or judge that any person who shall have become security for any assignee in any bond given for due execution of his trust, has or is likely to become insolvent, or has removed or is about to remove from the state.

History: Laws 1889, ch. 71, § 28; C.L. 1897, § 2854; Code 1915, § 310; C.S. 1929, § 7-137; 1941 Comp., § 23-137; 1953 Comp., § 27-1-37.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 73, 84, 89, 134.

6A C.J.S. Assignments for Benefit of Creditors §§ 81, 82.

56-9-38. [Appointment of new assignee.]

The court, or judge thereof, shall have power to appoint an assignee in all cases of dismissal of an assignee from his trust, and like bond and security shall be required and given by the assignee so appointed as are required and given by an assignee appointed by an assignor.

History: Laws 1889, ch. 71, § 29; C.L. 1897, § 2855; Code 1915, § 311; C.S. 1929, § 7-138; 1941 Comp., § 23-138; 1953 Comp., § 27-1-38.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 27, 44, 89, 90.

6A C.J.S. Assignments for Benefit of Creditors §§ 16, 79 to 84.

56-9-39. [Dismissal of assignee; delivery of papers, moneys and effects.]

When any assignee shall be dismissed from his trust, the court or judge shall order all the books, papers, effects, moneys and evidences of debt to be forthwith delivered to his successor in trust, or to such other persons as the court or judge shall appoint to receive the same for the time being.

History: Laws 1889, ch. 71, § 30; C.L. 1897, § 2856; Code 1915, § 312; C.S. 1929, § 7-139; 1941 Comp., § 23-139; 1953 Comp., § 27-1-39.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors § 92.

What constitutes abandonment or rejection of property or assets of bankrupt estate by trustee so as to revest title thereto in bankrupt, 19 A.L.R.2d 890.

6A C.J.S. Assignments for Benefit of Creditors §§ 82, 83.

56-9-40. [Sale of property; order of court; bond of assignee.]

The district court, or the judge thereof in vacation, shall make an order for the sale of all the real and personal estate conveyed by any deed of assignment, either for cash in hand or upon reasonable credit, and upon such other terms and notice as shall appear to the court or judge to be most advantageous to all the parties in interest, and shall by order, direct the nature of the security to be taken at sales made by assignees under this chapter. Before any sale of such real estate shall be made, the assignee shall give bond with at least two good securities, to be approved by the court, or judge thereof in vacation, in an amount equal to the value of the real estate to be sold, conditioned that the said assignee will faithfully make the same under such order, and duly account for the proceeds thereof under the provisions contained in this chapter.

History: Laws 1889, ch. 71, § 31; C.L. 1897, § 2857; Code 1915, § 313; C.S. 1929, § 7-140; 1941 Comp., § 23-140; 1953 Comp., § 27-1-40.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-

9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Sales of assigned property must be in accordance with this section. *Moore v. Western Meat Co.*, 1911-NMSC-014, 16 N.M. 107, 113 P. 827; *In re Zeiger*, 1909-NMSC-017, 15 N.M. 150, 106 P. 345.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 2, 4, 22, 47, 60, 102.

Estoppel of person by failure to disclose his interest in property sold by assignee for benefit of creditors, 50 A.L.R. 787.

Good will of business, sale of, by assignee of creditors as implying restriction against competition by former owner, in absence of provisions in that regard, 82 A.L.R. 1038.

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 A.L.R.2d 395.

Circumstances authorizing sale of debtor's assets in bankruptcy arrangement proceedings, 24 A.L.R.2d 1214.

6A C.J.S. Assignments for Benefit of Creditors §§ 33, 52, 93 to 98, 137.

56-9-41. [Time for payment of claims; notice; refusal to pay; penalty; dismissal.]

As soon as practicable and not exceeding thirty days after a time for allowance of demands had under this chapter, provided sufficient money shall have then come into his hands, the assignee or assignees shall pay upon the demands allowed, according to their right, as much as the means on hand will permit after reserving enough for proper fees, costs, expenses and demands, including expenses of litigation then pending, and as often thereafter as a dividend of five per centum can be paid upon the demands allowed as aforesaid, the assignee or assignees shall give notice thereof for publication for one week in the same newspaper in which was published the notice for allowance of demands, or in such other newspaper as the court or judge thereof may direct; and if such assignee or assignees shall neglect or refuse to make payment out of such trust fund, as in this section required, for more than three days after the same have become due and have been demanded by the person entitled thereto, his agent or attorney, or if he or they shall in any way neglect or refuse to comply with the provisions of this section, he or they shall for every such neglect or refusal, forfeit and pay to the person or persons aggrieved, five per centum per month interest on such sum as such person or persons were entitled to at the time of such demand, to be recovered by motion in the court having jurisdiction of said assignment; and any judgment rendered by said court on the hearing of said motion shall be against said assignee or assignees and his or their securities on their trust provided for in this chapter, and such assignee or

assignees shall in addition to such forfeiture, be subject to be dismissed from his or their trust by said court for such neglect and refusal and on motion and citation for that purpose.

History: Laws 1889, ch. 71, § 32; C.L. 1897, § 2858; Code 1915, § 314; C.S. 1929, § 7-141; 1941 Comp., § 23-141; 1953 Comp., § 27-1-41.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — Laws 1889, ch. 67, § 9, presently compiled as 56-9-9 NMSA 1978, provides the procedure should an assignee not settle within 12 months. *See* the compiler's notes to 56-9-8 NMSA 1978.

The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Cross references. — For publication of notice, *see* Chaper 14, Article 11 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Lessor's right to compensation out of estate for use of premises by assignee for creditors not adopting lease, 43 A.L.R. 740.

6A C.J.S. Assignments for Benefit of Creditors §§ 74, 98, 145.

56-9-42. [Assignee to give information as to condition of estate.]

Every assignee, upon the reasonable request of any person entitled to any demand allowed, or of his agent, shall exhibit to such person or agent the condition of the assets of the assignment and give him all reasonable information concerning the same.

History: Laws 1889, ch. 71, § 33; C.L. 1897, § 2859; Code 1915, § 315; C.S. 1929, § 7-142; 1941 Comp., § 23-142; 1953 Comp., § 27-1-42.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

56-9-43. [Petition for relief against assignee; citation; procedure.]

Upon petition in behalf of any such person to the district court, or judge thereof in vacation, showing good cause therefor, verified by affidavit, such court or judge shall cause any assignee to be cited to appear before the court or judge at such time as may be designated, to answer the allegation of such petition and to do and abide such order as shall be made by such court or judge in the premises, and for the purpose of preventing multiplicity of petitions or other proceedings, two or more may join in seeking the relief demanded by each, verifying their respective causes of complaint: provided, the relief sought by each are not antagonistic to each other, and upon the hearing the court or judge shall make such order as shall be deemed fit and lawful in the premises for enforcing the provisions of this chapter.

History: Laws 1889, ch. 71, § 34; C.L. 1897, § 2860; Code 1915, § 316; C.S. 1929, § 7-143; 1941 Comp., § 23-143; 1953 Comp., § 27-1-43.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Cross references. — For joinder of parties, *see* Rule 1-020 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors § 104.

6A C.J.S. Assignments for Benefit of Creditors § 83.

56-9-44. [Exempt property not included in assignment.]

All property, both real and personal, exempt from execution under the laws of this state shall not be conveyed by the deed of assignment, and if enumerated therein shall not pass to the assignee, but shall be reserved for the benefit of the assignor, or his family, to be set off and appraised by the appraiser mentioned in the first part of this chapter.

History: Laws 1889, ch. 71, § 35; C.L. 1897, § 2861; Code 1915, § 317; C.S. 1929, § 7-144; 1941 Comp., § 23-144; 1953 Comp., § 27-1-44.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Cross references. — For appraisal, *see* 56-9-13 to 56-9-17 NMSA 1978.

For exemptions from execution, *see* 42-10-1 to 42-10-13 NMSA 1978.

Individual exemptions unavailable to members of insolvent partnership. — Individual partners of an insolvent partnership are not entitled to exemption as head of a family out of the assets. *In re Spitz Bros.*, 1896-NMSC-025, 8 N.M. 622, 45 P. 1122.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 58, 129.

Individual partner's right on assignment by firm for benefit of creditors to claim exemption in partnership property, 4 A.L.R. 308.

6A C.J.S. Assignments for Benefit of Creditors § 167.

56-9-45. [Prior liens not affected.]

That nothing herein contained shall be so construed as to deprive any person of the benefit of any lien that may have attached to any of the assignor's property, either at law or in equity, prior to assignment.

History: Laws 1889, ch. 71, § 36; C.L. 1897, § 2862; Code 1915, § 318; C.S. 1929, § 7-145; 1941 Comp., § 23-145; 1953 Comp., § 27-1-45.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "herein contained" possibly refer only to this section, but they may refer to Laws 1889, ch. 71, §§ 1 to 44, presently compiled as 56-9-10 to 56-9-53 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 49 to 85, 115, 119, 127, 131.

Landlord's lien on goods in hands of assignee for creditors of tenant, 9 A.L.R. 322, 96 A.L.R. 249.

Waiver of or estoppel to assert lien by filing claim with or receiving dividend from assignee for creditors, 55 A.L.R. 993.

Right of assignee for benefit of creditors of lien claimant to file mechanic's lien, 83 A.L.R. 20.

6A C.J.S. Assignments for Benefit of Creditors §§ 149 to 156.

56-9-46. [Attachment not to issue after assignment.]

No process by attachment shall issue on behalf of any creditor of the assignor after such assignment has been duly made, as in this chapter contemplated, until a court of competent jurisdiction shall have first pronounced the assignment void, ab initio by proper suit or action brought by one or more creditors for that purpose, in which case, after the bill is filed and proper service is had, the court, or judge in vacation, shall fix the time for making up the issues, and render a final decree as soon as practicable.

History: Laws 1889, ch. 71, § 37; C.L. 1897, § 2863; Code 1915, § 319; C.S. 1929, § 7-146; 1941 Comp., § 23-146; 1953 Comp., § 27-1-46.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Attachment after assignment barred. — Writ of attachment issued and levied, in an action of assumpsit, after deed of general assignment for benefit of creditors has been executed, is properly quashed on motion of defendant. *Schofield v. Folsom*, 1894-NMSC-015, 7 N.M. 601, 38 P. 251.

Execution of deed of assignment. — The assignment has been duly made and attachment barred when the assignment has been "proved, or acknowledged, and certified and recorded," even though the assignee has not qualified and filed bond. *Schofield v. Folsom*, 1894-NMSC-015, 7 N.M. 601, 38 P. 251.

Creditor has action if assignment colorable. — If the assignee should fail to qualify within a reasonable time, or if, without having executed the required bond, he should

take possession of the assigned property, or if, after the execution of the deed of assignment, the assignor should exercise a control inconsistent with his changed relation to the property, as for instance, if he should undertake to dispose of it, or in fine, if, by reason of any circumstances connected with the transaction, a creditor should be of the opinion that the assignment was merely colorable, he would be authorized to bring his action under this section to have the assignment pronounced void ab initio. *Schofield v. Folsom*, 1894-NMSC-015, 7 N.M. 601, 38 P. 251.

Stock attachable if not transferred upon books. — An attachment of corporate stock assigned by the debtor under this act, but not transferred upon the books of the company as required by law, will not be quashed. *Lyndonville Nat'l Bank v. Folsom*, 1894-NMSC-016, 7 N.M. 611, 38 P. 253.

Law reviews. — For article, "Attachment in New Mexico - Part I," *see* 1 Nat. Resources J. 303 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 35, 43, 68, 87; 6 Am. Jur. 2d Attachment and Garnishment § 492.

6A C.J.S. Assignments for Benefit of Creditors §§ 75, 76.

56-9-47. [Preferences inure to benefit of all creditors alike.]

Should any preference be made in favor of any creditor, other than in this chapter provided, such preference shall inure to the benefit of all creditors alike.

History: Laws 1889, ch. 71, § 38; C.L. 1897, § 2864; Code 1915, § 320; C.S. 1929, § 7-147; 1941 Comp., § 23-147; 1953 Comp., § 27-1-47.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "in this chapter," the first time they appear, were inserted by the 1915 Code compilers; the words "this chapter," the second time they appear, were substituted for "this act." Presumably, "this chapter" refers to 56-9-1 to 56-9-55 NMSA 1978, whereas "this act" refers only to Laws 1889, ch. 67, §§ 1 to 9, presently compiled as 56-9-1 to 56-9-9 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 69 to 74, 115 to 119.

6A C.J.S. Assignments for Benefit of Creditors §§ 9, 44, 45, 128.

56-9-48. [Discharge; application by assignee; notice; contents of petition.]

When any assignee becomes satisfied that it is no longer advantageous to the creditors of his assignor to keep the assignment open, he may apply to the district court for a discharge from his trust, upon a notice of his intention to make such application, stating the time thereof, which notice shall be published in the newspaper aforesaid, for at least four weeks next before such time, at which time he may file his petition in said court for such discharge; which petition, verified by his affidavit, shall set forth the disposition made of the assets of the assignment to him; what portion of them remains on hand, and their condition; the amount realized from the assets; the particular disposition of such amount; the demands allowed particularly, with their respective amounts, and owners' names, and the sums paid on each, with an offer to deliver into the charge of the court what remains of the assets, and the evidence thereof, and accompanied by all vouchers therewith connected.

History: Laws 1889, ch. 71, § 39; C.L. 1897, § 2865; Code 1915, § 321; C.S. 1929, § 7-148; 1941 Comp., § 23-148; 1953 Comp., § 27-1-48.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For publication of notice, *see* 14-11-1 to 14-11-3, 14-11-13 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 50, 51, 53, 54, 66, 88.

Debtor's transfer of assets to representative of creditors as effectuating release of unsecured claims, in absence of express agreement to that effect, 8 A.L.R.3d 903.

6A C.J.S. Assignments for Benefit of Creditors §§ 112 to 126, 172.

56-9-49. [Hearing and determination of application for discharge.]

If no person interested shall, within one week after filing such petition, file written objections to such discharge, accompanied by specific reasons, the court may refer the application to some competent and reliable person to examine the merits of the application and report to the court, with all convenient speed thereon; and, upon the filing of such report, the court shall make such further order in the premises as it shall adjudge right, or the court or judge thereof may hear and determine such application without reference, and may discharge said assignee from all further duty or obligation under the assignment; and thereupon, shall order such assignee to deliver into the charge and custody of the court such portion of the assets and evidences thereof as

remain in his hands, where they shall be kept with all papers connected with such assignment, subject to the future control and disposition of the court.

History: Laws 1889, ch. 71, § 40; C.L. 1897, § 2866; Code 1915, § 322; C.S. 1929, § 7-149; 1941 Comp., § 23-149; 1953 Comp., § 27-1-49.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For masters, *see* Rule 1-053 NMRA.

56-9-50. [Appeals from final judgment.]

Appeals may be taken from the final judgment of the court, in the same manner as now provided by law, for appeals or writs of error in ordinary cases.

History: Laws 1889, ch. 71, § 41; C.L. 1897, § 2867; Code 1915, § 323; C.S. 1929, § 7-150; 1941 Comp., § 23-150; 1953 Comp., § 27-1-50.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors § 112.

56-9-51. [Bad or doubtful debts; sale or compromise; release of rights; report; notice; objections.]

Whenever it may appear to the best interest of the estate assigned, the court, or judge thereof in vacation may make an order directing the assignee to sell, compound or compromise all bad or doubtful debts upon such terms and conditions as appear proper and most beneficial to the estate; and in like manner the court, or judge thereof in vacation, may make an order directing the assignee to release and discharge any vested, contingent or possible right or interest in or to any estate or effects assigned, upon such terms and conditions as the court, or judge thereof in vacation, may deem proper and just for the best interest of the estate. The assignee shall report his proceedings under this section to the court, or judge in vacation; and if in vacation, he shall notify the creditors by publication in the newspaper aforesaid for at least two weeks, the last insertion to be not less than ten days prior to the time of the hearing on said report, which notice shall state the object of said report and when and where the same will be heard, and upon a hearing thereof, the court, or judge in vacation, may approve or disapprove the same as the facts and circumstances may warrant: and

provided, that any creditor may file his objections to said report on or before the date fixed by the notice, and such objection shall be heard and determined without delay, and nothing in this section authorized to be done by the assignee shall be final until the approval of the court as provided in this chapter.

History: Laws 1889, ch. 71, § 42; C.L. 1897, § 2868; Code 1915, § 324; C.S. 1929, § 7-151; 1941 Comp., § 23-151; 1953 Comp., § 27-1-51.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The words "provided in this chapter" were substituted for "herein provided" by the compilers of the 1915 Code. The former would apply to 56-9-1 to 56-9-53 NMSA 1978 while the latter would seem to apply only to this section, although it may refer to Laws 1889, ch. 71 compiled as 56-9-10 to 56-9-53 NMSA 1978.

Cross references. — For publication of notice, *see* 14-11-1 to 14-11-3, 14-11-13 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 51, 53, 54, 61, 66, 103.

6A C.J.S. Assignments for Benefit of Creditors §§ 51, 112 to 126, 172.

56-9-52. [Compensation of assignee and counsel.]

The fees and commissions to which the assignee may be entitled for services performed by him in the execution of his trust shall be fixed and allowed by the court, or judge thereof in vacation, for such amount, at such times and in such manner as the court or judge may direct, to be applied out of the trust funds in the hands of the assignee. In like manner the court shall allow counsel for the assignee reasonable compensation for professional services necessarily performed for and on behalf of the assignee in the execution of his trust.

History: Laws 1889, ch. 71, § 43; C.L. 1897, § 2869; Code 1915, § 325; C.S. 1929, § 7-152; 1941 Comp., § 23-152; 1953 Comp., § 27-1-52.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors § 91.

Trust receipt, right of assignee for creditors of one giving, to commission and counsel fees in defense of action by holder of receipt, out of proceeds of goods, 49 A.L.R. 307, 87 A.L.R. 302, 101 A.L.R. 453, 168 A.L.R. 359.

Allowance of attorney's fees against property or fund for services rendered in action by assignee for creditors, 107 A.L.R. 758.

6A C.J.S. Assignments for Benefit of Creditors §§ 122, 124, 125.

56-9-53. [Compensation of assignee as counsel.]

In case the assignee should be an attorney-at-law, in active practice, and performs the duties of assignee and counsel in the protection and execution of the trust, he shall be allowed by the court such compensation, in his capacity as such counsel, together with a reasonable allowance as assignee, at such times, in such manner and in such amounts as the court under all the circumstances may deem just and reasonable.

History: Laws 1889, ch. 71, § 44; C.L. 1897, § 2870; Code 1915, § 326; C.S. 1929, § 7-153; 1941 Comp., § 23-153; 1953 Comp., § 27-1-53.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assignments for Benefit of Creditors §§ 37, 55, 91, 119, 131, 132.

6A C.J.S. Assignments for Benefit of Creditors §§ 46, 53, 124, 125, 141.

56-9-54. [Permission to assign moneys due from state or subdivision; procedure and limitations.]

Assignments of moneys due or to become due from the state of New Mexico or from any municipal corporation, county or political subdivision or agency thereof under the terms of any construction, improvement, maintenance or repair contract or contracts for equipment or supplies shall be permitted subject to the following limitations and restrictions:

A. the assignment must, subject to Subparagraph D hereof, be to a bank, trust company or other financing institution;

B. the contract under which such moneys shall be due or become due must provide for payments to the assignor aggregating $500.00 or more;

C. the contract must not contain a provision prohibiting such assignment;

D. unless otherwise expressly permitted by the contract, such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

E. notice shall be given as required by Section 2 [56-9-55 NMSA 1978] of this act.

History: 1941 Comp., § 23-154, enacted by Laws 1947, ch. 22, § 1; 1953 Comp., § 27-1-54.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

"Acceptance companies" fall within the definition of a "financing institution," as such term is used in this section. 1958 Op. Att'y Gen. No. 58-232.

Lease-purchase agreements assignable to "acceptance companies". — Suppliers may assign lease-purchase agreements entered into with a county and the rentals due thereon to financing organizations of a class generally known as "acceptance companies." 1958 Op. Att'y Gen. No. 58-232.

56-9-55. [Written notices of assignment required.]

In the event of such assignment, the assignee thereof shall file written notice of the assignment, together with a true copy of the instrument of assignment:

A. with the officer of the state, municipal corporation, county, political subdivision or agency who will make the payment under the contract assigned; and

B. with the officer who executed the contract on behalf of the state or such municipal corporation, county, political subdivision or agency; and

C. with the surety or sureties upon the bond or bonds, if any, given to secure the performance of such contract.

History: 1941 Comp., § 23-155, enacted by Laws 1947, ch. 22, § 2; 1953 Comp., § 27-1-55.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

ARTICLE 10
Uniform Voidable Transactions

56-10-1 to 56-10-13. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 382, § 13 repealed 56-10-1 to 56-10-13 NMSA 1978, as enacted by Laws 1959, ch. 116, §§ 1-13, relating to fraudulent conveyances, effective June 16, 1989. For present comparable provisions, *see* 56-10-14 NMSA 1978 et seq.

56-10-14. Short title.

Sections 56-10-14 through 56-10-29 NMSA 1978 may be cited as the "Uniform Voidable Transactions Act".

History: Laws 1989, ch. 382, § 1; 2015, ch. 54, § 9.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, changed the name of the Uniform Fraudulent Transfer Act to the Uniform Voidable Transactions Act; changed "This act" to "Sections 56-10-14 through 56-10-29 NMSA 1978", and after "Uniform", deleted "Fraudulent Transfer" and added "Voidable Transactions".

Federal preemption. — A motion for the appointment of a receiver for a development corporation due to an allegedly fraudulent transfer which the corporation had made in violation of this article was denied, since the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1821, preempts the plaintiffs' count for fraudulent conveyance and does not allow for non-monetary relief. *Glenborough N.M. Assocs. v. Resolution Trust Corp.*, 802 F. Supp. 387 (D.N.M. 1992).

Law reviews. — For note, "Matching the Historical Legal Principles on New Mexico's Exemption Laws to the Modern Identity of Annuities: Dona Ana Savings & Loan Ass'n v. Dofflemeyer," *see* 24 N.M.L. Rev. 365 (1994).

56-10-15. Definitions.

As used in the Uniform Voidable Transactions Act:

A. "affiliate" means:

(1) a person that directly or indirectly owns, controls or holds, with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

(a) as a fiduciary or agent without sole discretionary power to vote the securities; or

(b) solely to secure a debt, if the person has not in fact exercised the power to vote;

(2) a corporation, twenty percent or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with power to vote, by the debtor or a person that directly or indirectly owns, controls or holds, with power to vote, twenty percent or more of the outstanding voting securities of the debtor, other than a person that holds the securities:

(a) as a fiduciary or agent without sole discretionary power to vote the securities; or

(b) solely to secure a debt, if the person has not in fact exercised the power to vote;

(3) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(4) a person that operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets;

B. "asset" means property of a debtor, but the term does not include:

(1) property to the extent it is encumbered by a valid lien;

(2) property to the extent it is generally exempt under nonbankruptcy law; or

(3) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant;

C. "claim", except when used in the phrase "claim for relief", means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured;

D. "creditor" means a person that has a claim;

E. "debt" means liability on a claim;

F. "debtor" means a person that is liable on a claim;

G. "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities;

H. "insider" includes:

(1) if the debtor is an individual:

(a) a relative of the debtor or of a general partner of the debtor;

(b) a partnership in which the debtor is a general partner;

(c) a general partner in a partnership described in Subparagraph (b) of this paragraph; or

(d) a corporation of which the debtor is a director, officer or person in control;

(2) if the debtor is a corporation:

(a) a director of the debtor;

(b) an officer of the debtor;

(c) a person in control of the debtor;

(d) a partnership in which the debtor is a general partner;

(e) a general partner in a partnership described in Subparagraph (d) of this paragraph; or

(f) a relative of a general partner, director, officer or person in control of the debtor;

(3) if the debtor is a partnership:

(a) a general partner in the debtor;

(b) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(c) another partnership in which the debtor is a general partner;

(d) a general partner in a partnership described in Subparagraph (c) of this paragraph; or

(e) a person in control of the debtor;

(4) an affiliate or an insider of an affiliate as if the affiliate were the debtor; and

(5) a managing agent of the debtor;

I. "lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien or a statutory lien;

J. "organization" means a person other than an individual;

K. "person" means an individual, an estate, a business or nonprofit entity, a public corporation, a government or governmental subdivision, agency or instrumentality or another legal entity;

L. "property" means anything that may be the subject of ownership;

M. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

N. "relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree;

O. "sign" means, with present intent to authenticate or adopt a record, to:

(1) execute or adopt a tangible symbol; or

(2) attach to or logically associate with the record an electronic symbol, a sound or a process;

P. "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, license and creation of a lien or other encumbrance; and

Q. "valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

History: Laws 1989, ch. 382, § 2; 2015, ch. 54, § 10.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, substituted "Uniform Voidable Transactions Act" for reference to the former Uniform Fraudulent Transfer Act and amended certain definitions as used in the Voidable Transactions Act; in the introductory sentence, deleted "Fraudulent Transfer" and added "Voidable Transactions"; throughout the section, after "person", changed "who" to "that"; in Subsection A, Paragraph (1)(b), after "not", added "in fact"; in Subsection A, Paragraph

(2)(a), after "sole", added "discretionary"; in Subsection C, after "'claim'", added "except when used in the phrase 'claim for relief'"; added Subsection G and redesignated former Subsections G and H as Subsections H and I, respectively; added Subsection J; redesignated former Subsection I as Subsection K; in Subsection K, after "individual", deleted "partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust or any other legal or commercial entity" and added "an estate, a business or nonprofit entity, a public corporation, a government or governmental subdivision, agency or instrumentality or another legal entity"; redesignated former Subsection J as Subsection L; added Subsection M; redesignated former Subsection K as Subsection N; added Subsection O; redesignated former Subsections L and M as Subsections P and Q, respectively; and in Subsection P, after "lease", added "license".

"Insiders". — As close relatives of the debtors, the children are "insiders" as defined under Subsection G. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

"Transfer". — A quitclaim deed is a conveyance of title, and therefore is a "transfer" under this article. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

Ownership of asset. — Given the debtors' failure to segregate the trailer park from their assets at any material time or to trace the money that allegedly funded a trust for their children, there was no factual basis on which the court could conclude that a trust should be imposed; the debtors acquired equitable title to the trailer park at the time of purchase and it was their "asset" at the time of any purported transfer. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37 Am. Jur. 2d Fraudulent Conveyances §§ 58, 66, 100, 103, 132, 145, 149.

37 C.J.S. Fraudulent Conveyances §§ 1, 56.

56-10-16. Insolvency.

A. A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets.

B. A debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

C. Assets under this section do not include property that has been transferred, concealed or removed with intent to hinder, delay or defraud creditors or that has been transferred in a manner making the transfer voidable under the Uniform Voidable Transactions Act.

D. Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

History: Laws 1989, ch. 382, § 3; 2015, ch. 54, § 11.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, substituted "Uniform Voidable Transactions Act" for reference to the former Uniform Fraudulent Transfer Act and clarified the meaning of "insolvency"; in Subsection A, after "insolvent if,", added "at a fair valuation", after "than", deleted "all" and added "the sum", and after "assets", deleted "at a fair valuation"; in Subsection B, after "debtor", deleted "who" and added "that", after "paying", deleted "his" and added "the debtor's", after "due", added "other than as a result of a bona fide dispute", and after "insolvent.", added the last sentence; deleted Subsection C, relating to an insolvent partnership, and redesignated former Subsections D and E as Subsections C and D, respectively; and in Subsection C, after "Uniform", deleted "Fraudulent Transfer" and added "Voidable Transactions".

Purpose of the Uniform Fraudulent Conveyance Act is to protect creditors when a debtor has made a conveyance of his property which diminishes the creditor's assets to the detriment of the rights of the creditor. *Michel v. J's Foods, Inc.*, 1983-NMSC-019, 99 N.M. 574, 661 P.2d 474.

Insolvency essential element. — To proceed under a theory of fraudulent conveyance, certain essential elements must be alleged and proved. Among these elements is the intent to hinder, delay or defraud creditors. Another element is the insolvency of the debtor. Allegation and proof of the commonly accepted badges of fraud can also be used to establish a fraudulent conveyance. *American Cas. Co. v. Line Materials Indus.*, 332 F.2d 393 (10th Cir. 1964), cert. denied, 379 U.S. 960, 85 S. Ct. 646, 13 L. Ed. 2d 555 (1965).

Both insolvency and lack of consideration required. — This section clearly requires that both insolvency and lack of fair consideration be proven in order that a debtor's acts amount to fraud upon his creditors. *First Nat'l Bank v. Abraham*, 1982-NMSC-006, 97 N.M. 288, 639 P.2d 575.

"Badges of fraud". — Among the commonly recognized badges of fraud are: the insolvency or indebtedness of the debtor, the lack of consideration for the conveyance, the retention by the grantor of possession of the property, the close relationship between the transferor and the transferee and the threat or pendency of litigation. *First Nat'l Bank v. Abraham*, 1982-NMSC-006, 97 N.M. 288, 639 P.2d 575.

Conveyance by insolvent debtors without consideration fraudulent. — The assigning of mining leases to the corporation in return for which the corporation issued original stock in the names of the children, the insolvency of the judgment debtor and the failure of consideration from the children placed the transaction neatly within the

language of this section. *Atlas Corp. v. DeVilliers*, 447 F.2d 799 (10th Cir. 1971), cert. denied, 405 U.S. 933, 92 S. Ct. 939, 30 L. Ed. 2d 809, *reh'g denied*, 405 U.S. 1033, 92 S. Ct. 1288, 31 L. Ed. 2d 491 (1972).

Where a husband who has become legally insolvent and whose tax difficulties have become apparent, effects a conveyance without consideration whereby husband and wife, holding as joint tenants, title to the residence to a trustee who then deeds it back to wife as the sole owner, the conveyance is in fraud of the rights of the United States under this section. *United States v. Eaves*, 499 F.2d 869 (10th Cir. 1974).

Prior loans and services fair consideration. — Conveyance of stock is not a fraudulent transfer where assignee receives his assignment from judgment debtor in consideration of prior loans and services. *Atlas Corp. v. DeVilliers*, 447 F.2d 799 (10th Cir. 1971), cert. denied, 405 U.S. 933, 92 S. Ct. 939, 30 L. Ed. 2d 809, *reh'g denied*, 405 U.S. 1033, 92 S. Ct. 1288, 31 L. Ed. 2d 491 (1972).

Fair salable value of corporation's assets not reflected by "forced-sale" auction. — An auction, due to its "forced sale" nature whose terms were "without reserve," did not reflect the fair salable value of a corporation's assets at the time of their conveyance to the debtor, which took place one year prior to the auction. Substantial evidence supported the finding that the corporation was not insolvent before or immediately after the prior conveyance of its assets. *Allied Prods. Corp. v. Arrow Freightways, Inc.*, 1986-NMSC-062, 104 N.M. 544, 724 P.2d 752.

Setting aside conveyance of radio license subject to FCC approval. — In an action to set aside the transfer of a radio license as a fraudulent conveyance, the trial court's order that the conveyance be set aside subject to FCC approval did not infringe FCC jurisdiction to make radio license determinations. *Beagles v. Espinoza*, 1990-NMCA-121, 111 N.M. 206, 803 P.2d 1111.

Court error in determining assets of insolvents. *Western Prod. Credit Ass'n v. Kear*, 1986-NMSC-055, 104 N.M. 494, 723 P.2d 965.

Law reviews. — For article, "Attachment in New Mexico - Part I," *see* 1 Nat. Resources J. 303 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37 Am. Jur. 2d Fraudulent Conveyances §§ 1, 15 to 18, 21.

Support, conveyance in consideration of, as affected by solvency of grantor, 2 A.L.R. 1449, 23 A.L.R. 584.

Opinion or conclusion of witness as to insolvency, based on examination of books and accounts, 81 A.L.R. 1431.

Valuation of notes and accounts receivable in determining question of insolvency, 133 A.L.R. 1274.

"Going concern" value as factor in determining solvency or insolvency, 158 A.L.R. 968.

Conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent against creditors, 45 A.L.R.2d 500.

37 C.J.S. Fraudulent Conveyances §§ 7, 104 to 106, 110, 140; 68 C.J.S. Partnership §§ 185, 191.

56-10-17. Value.

A. Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

B. For the purposes of Paragraph (2) of Subsection A of Section 56-10-18 and Section 56-10-19 NMSA 1978, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement.

C. A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

History: Laws 1989, ch. 382, § 4; 2015, ch. 54, § 12.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, in Subsection B, after "Section", deleted "5 and Section 6 of the Uniform Fraudulent Transfer Act" and added "56-10-18 and Section 56-10-19 NMSA 1978".

Value not given. — The children did not give value since they exchanged no property as consideration for the transfers and, absent any accounting, there was no showing of the existence of an antecedent debt. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

56-10-18. Transfer or obligation voidable as to present or future creditor.

A. A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(a) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(b) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

B. In determining actual intent under Paragraph (1) of Subsection A of this section, consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor has been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

C. A creditor making a claim for relief under Subsection A of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

History: Laws 1989, ch. 382, § 5; 2015, ch. 54, § 13.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, changed "fraudulent" transfers to "voidable" transfers, as used in the Voidable Transactions Act; in the catchline, changed "Transfers fraudulent as to present and future creditors" to "Transfer or obligation voidable as to present or future creditor"; in Subsection A, after "debtor is", deleted "fraudulent" and added "voidable"; in Subsection A, Paragraph (2)(b), after "that", deleted "he" and added "the debtor", and after "beyond", deleted "his" and added "the debtor's"; and added Subsection C.

Burden of proof. — The creditor bears the burden of proof to establish that the transferee did not pay reasonably equivalent value to the debtor in exchange for the transfer of property to the transferee. *Ellen Equip. Corp. v. C.V. Consultants & Assocs.*, 2008-NMCA-057, 144 N.M. 55, 183 P.3d 940.

No intent to hinder, delay or defraud. — Where the transferee guaranteed a loan so that the debtor could purchase and develop property; the debtor transferred the property to the transferee when the debtor could not pay the loan; the debtor was released from liability on the loan; and the transferee gave a mortgage on the property to the bank to secure his obligation to pay the loan, substantial evidence supported the finding that the debtor did not transfer the property to the transferee with the intent to hinder, delay or defraud the creditor. *Ellen Equip. Corp. v. C.V. Consultants & Assocs.*, 2008-NMCA-057, 144 N.M. 55, 183 P.3d 940.

Setting aside conveyance of radio license subject to FCC approval. — In an action to set aside the transfer of a radio license as a fraudulent conveyance, the trial court's order that the conveyance be set aside subject to FCC approval did not infringe FCC jurisdiction to make radio license determinations. *Beagles v. Espinoza*, 1990-NMCA-121, 111 N.M. 206, 803 P.2d 1111.

Factors in determining voidable transfers. — The noninclusive enumeration of factors contained in this section and 56-10-19 NMSA 1978 are to be considered when determining whether the funds that ordinarily would be exempt from attachment under 42-10-2 and 42-10-3 NMSA 1978 should be set aside as the result of a voidable transfer. *Dona Ana Sav. & Loan Ass'n v. Dofflemeyer*, 1993-NMSC-031, 115 N.M. 590, 855 P.2d 1054.

Bankruptcy trustee met burden as to actual fraud. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

56-10-19. Transfer or obligation voidable as to present creditor.

A. A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

B. A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent.

C. Subject to Subsection B of Section 56-10-16 NMSA 1978, a creditor making a claim for relief under Subsection A or B of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

History: Laws 1989, ch. 382, § 6; 2015, ch. 54, § 14.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, changed "fraudulent" transfers to "voidable" transfers, as used in the Voidable Transactions Act; in the catchline, changed "Transfers fraudulent as to present creditors" to "Transfer or obligation voidable as to present creditor"; in Subsection A, after "debtor is", deleted "fraudulent" and added "voidable"; in Subsection B, after "debtor is", deleted "fraudulent" and added "voidable"; and added Subsection C.

Factors in determining voidable transfers. — The noninclusive enumeration of factors contained in 56-10-18 NMSA 1978 and this section are to be considered when determining whether the funds that ordinarily would be exempt from attachment under 42-10-2 and 42-10-3 NMSA 1978 should be set aside as the result of a voidable transfer. *Dona Ana Sav. & Loan Ass'n v. Dofflemeyer*, 1993-NMSC-031, 115 N.M. 590, 855 P.2d 1054.

Trustee failed to meet burden of proving debtor's insolvency. — Where debtor, a corporation wholly owned by defendants, filed a Chapter 11 bankruptcy petition, which was later converted to a Chapter 7 bankruptcy petition, and where the Chapter 7 trustee filed a fraudulent transfer claim, seeking to recover approximately $1,200,000 in transfers that debtor made to third parties as shareholder distributions, the bankruptcy court held that the trustee failed to satisfy its burden of showing that debtor was insolvent at the time of the alleged constructive fraudulent transfers and thus could not prevail on avoidance claims. *In re Quick Cash*, 620 B.R. 358 (Bankr. D. N.M. 2020).

56-10-20. When transfer is made or obligation is incurred.

For the purposes of the Uniform Voidable Transactions Act:

A. a transfer is made:

(1) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against which applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(2) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under the Uniform Voidable Transactions Act that is superior to the interests of the transferee;

B. if applicable law permits the transfer to be perfected as provided in Subsection A of this section and the transfer is not so perfected before the commencement of an action for relief under the Uniform Voidable Transactions Act, the transfer is deemed made immediately before the commencement of the action;

C. if applicable law does not permit the transfer to be perfected as provided in Subsection A of this section, the transfer is made when it becomes effective between the debtor and the transferee;

D. a transfer is not made until the debtor has acquired rights in the asset transferred; and

E. an obligation is incurred:

(1) if oral, when it becomes effective between the parties; or

(2) if evidenced by a record, when the record signed by the obligor is delivered to or for the benefit of the obligee.

History: Laws 1989, ch. 382, § 7; 2015, ch. 54, § 15.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, substituted "Uniform Voidable Transactions Act" for references to the former Uniform Fraudulent Transfer Act; after "Uniform", deleted "Fraudulent Transfer" and added "Voidable Transactions" throughout the section; in Subsection A, Paragraph (1), after "against", deleted "whom" and added "which"; and in Subsection E, Paragraph (2), after "evidenced by a", deleted "writing" and added "record", and after "when the", deleted "writing executed" and added "record signed".

Ownership of asset. — Given the debtors' failure to segregate the trailer park from their assets at any material time or to trace the money that allegedly funded a trust for their children, there was no factual basis on which the court could conclude that a trust should be imposed; the debtors acquired equitable title to the trailer park at the time of purchase and it was their "asset" at the time of any purported transfer. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

Despite a prior unrecorded assignment to which the sellers orally consented, the debtors owned the trailer park when the quitclaim deed was recorded, and its recording was the first "transfer" of the debtors' interest for purposes of this article. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

56-10-21. Remedies of creditor.

A. In an action for relief against a transfer or obligation under the Uniform Voidable Transactions Act, a creditor, subject to the limitations in Section 56-10-22 NMSA 1978, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee if available under applicable law; and

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(a) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(b) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(c) any other relief the circumstances may require.

B. If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

History: Laws 1989, ch. 382, § 8; 2015, ch. 54, § 16.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, substituted "Uniform Voidable Transactions Act" for references to the former Uniform Fraudulent Transfer Act; in the catchline, changed "creditors" to "creditor"; in Subsection A, after "Uniform", deleted "Fraudulent Transfer" and added "Voidable Transactions", after "Section", deleted "9 of

that act" and added "56-10-22 NMSA 1978"; and in Subsection A, Paragraph (2), after "transferee", deleted "in accordance with procedures prescribed b law; or" and added "if available under applicable law; and".

Bankruptcy trustee entitled to avoid transfers. — Because the bankruptcy debtors made transfers with the actual intent to hinder, delay or defraud the judgment creditors, the trustee was entitled to avoid the transfers effected by the 1991 quitclaim deed and the 1992 recording of the assignment. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

56-10-22. Defenses, liability and protection of transferee or obligee.

A. A transfer or obligation is not voidable under Paragraph (1) of Subsection A of Section 56-10-18 NMSA 1978 against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.

B. To the extent a transfer is avoidable in an action by a creditor under Paragraph (1) of Subsection A of Section 56-10-21 NMSA 1978:

(1) except as otherwise provided in this section, the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection C of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) the first transferee of the asset or the person for whose benefit the transfer was made; or

(b) an immediate or mediate transferee of the first transferee, other than: 1) a good-faith transferee that took for value; or 2) an immediate or mediate good-faith transferee of a person described in Item 1) of this subparagraph; and

(2) recovery pursuant to Paragraph (1) of Subsection A or Subsection B of Section 56-10-21 NMSA 1978 of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in Subparagraph (a) or (b) of Paragraph (1) of this subsection.

C. If the judgment under Subsection B of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

D. Notwithstanding voidability of a transfer or an obligation under the Uniform Voidable Transactions Act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) a lien on or a right to retain an interest in the asset transferred;

(2) enforcement of an obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

E. A transfer is not voidable under Paragraph (2) of Subsection A of Section 56-10-18 NMSA 1978 or under Section 56-10-19 NMSA 1978 if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with Chapter 55, Article 9 NMSA 1978, other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

F. A transfer is not voidable under Subsection B of Section 56-10-19 NMSA 1978:

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, except to the extent the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

G. In determining the burden of proving matters referred to in this section:

(1) a party that seeks to invoke Subsection A, D, E or F of this section has the burden of proving the applicability of that subsection;

(2) except as otherwise provided in Paragraphs (3) and (4) of this subsection, the creditor has the burden of proving each applicable element of Subsection B or C of this section;

(3) the transferee has the burden of proving the applicability to the transferee of Item 1) or 2) of Subparagraph (b) of Paragraph (1) of Subsection B of this section; and

(4) a party that seeks adjustment under Subsection C of this section has the burden of proving the adjustment.

H. The standard of proof required to establish matters referred to in this section is preponderance of the evidence.

History: Laws 1989, ch. 382, § 9; 2015, ch. 54, § 17.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, substituted "Uniform Voidable Transactions Act" for references to the former Uniform Fraudulent Transfer Act; in Subsection A, changed "Section 5 of the Uniform Fraudulent Transfer Act" to "56-10-18 NMSA 1978", after "person", deleted "who" and added "that", and after "value", added "given the debtor"; in Subsection B, after "B.", added "To the extent a transfer is avoidable in an action by a creditor under Paragraph (1) of Subsection A of Section 56-10-21 NMSA 1978:"; designated the language in the former introductory paragraph of Subsection B as Paragraph (1) of Subsection B, and after "section", deleted "to the extent a transfer is avoidable in an action by a creditor under Paragraph (1) of Subsection A of Section 8 of that act"; designated former Paragraph (1) of Subsection B as Subparagraph B(1)(a); deleted Paragraph (2) of Subsection B; added Subsection B, Paragraph (1)(b); added a new Paragraph (2) of Subsection B; in Subsection D, after "Uniform", deleted "Fraudulent Transfer" and added "Voidable Transactions"; in introductory sentence of Subsection E, after "Section", deleted "5 or Section 6 of the Uniform Fraudulent Transfer Act" and added "56-10-18 NMSA 1978 or under Section 56-10-19 NMSA 1978"; in Subsection E, Paragraph (2), after "1978", added "other than acceptance of collateral in full or partial satisfaction of the obligation it secures"; in the introductory sentence of Subsection F, after "Section", deleted "6 of the Uniform Fraudulent Transfer Act" and added "56-10-19 NMSA 1978"; in Subsection F, Paragraph (1), after "made", deleted "unless" and added "except to the extent"; and added Subsections G and H.

Burden of proving transfers not voidable was not met. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

56-10-23. Extinguishment of cause of action.

A cause of action with respect to a transfer or obligation under the Uniform Voidable Transactions Act is extinguished unless action is brought:

A. under Paragraph (1) of Subsection A of Section 56-10-18 NMSA 1978 not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

B. under Paragraph (2) of Subsection A of Section 56-10-18 NMSA 1978 or Subsection A of Section 56-10-19 NMSA 1978 not later than four years after the transfer was made or the obligation was incurred; or

C. under Subsection B of Section 56-10-19 NMSA 1978 not later than one year after the transfer was made.

History: Laws 1989, ch. 382, § 10; 2015, ch. 54, § 18.

ANNOTATIONS

The 2015 amendment, effective January 1, 2016, substituted "Uniform Voidable Transactions Act" for references to the former Uniform Fraudulent Transfer Act; in the introductory sentence, after "respect to a", deleted "fraudulent", and after "Uniform", deleted "Fraudulent Transfer" and added "Voidable Transactions"; in Subsection A, after "Section", deleted "5 of the Uniform Fraudulent Transfer Act within" and added "56-10-18 NMSA 1978 not later than", and after "if later", deleted "within" and added "not later than"; and in Subsection B, after the first occurrence of "Section", deleted "5" and added "56-10-18 NMSA 1978", and after the second occurrence of "Section", deleted "6 of that act within" and added "56-10-19 NMSA 1978 not later than"; and in Subsection C, after "Section", deleted "6 of that act within" and added "56-10-19 NMSA 1978 not later than", and after "made", deleted "or the obligation was incurred".

Applicability. — Since the court found for the bankruptcy trustee on his claim of actual fraud, the one-year statute of limitations contained in this section was inapplicable. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

When the claimant bank purchased a judgment against the debtor from the Federal Deposit Insurance Corporation (FDIC), an action against the debtor to set aside an allegedly fraudulent transfer of property by the debtor had to be brought within four years from the date of transfer, not from the date of entry of the judgment in favor of the FDIC. *First Sw. Fin. Servs. v. Pulliam*, 1996-NMCA-032, 121 N.M. 436, 912 P.2d 828.

56-10-24. Governing law.

A. In this section, in determining a debtor's location, a debtor:

(1) who is an individual is located at the individual's principal residence;

(2) that is an organization and has only one place of business is located at its place of business; and

(3) that is an organization and has more than one place of business is located at its chief executive office.

B. A claim for relief in the nature of a claim for relief under the Uniform Voidable Transactions Act is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

History: 1978 Comp., § 56-10-24, enacted by Laws 2015, ch. 54, § 20.

ANNOTATIONS

Recompilations. — Laws 2015, ch. 54, § 19 recompiled and amended former 56-10-24 NMSA 1978, relating to supplement provisions, as 56-10-26 NMSA 1978, effective January 1, 2016.

Compiler's notes. — Laws 2015, ch. 54, § 20 enacted a new 56-10-24 NMSA 1978, effective January 1, 2016.

Effective dates. — Laws 2015, ch. 54, §25 made Laws 2015, ch. 54, § 20 effective January 1, 2016.

56-10-25. Application to series organization.

A. As used in this section:

(1) "protected series" means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in Paragraph (2) of this subsection; and

(2) "series organization" means an organization that, pursuant to the law under which it is organized, has the following characteristics:

(a) the organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of or associated with the protected series;

(b) debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only, and not against the property of or associated with the organization or other protected series of the organization; and

(c) debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

B. A series organization and each protected series of the organization is a separate person for purposes of the Uniform Voidable Transactions Act, even if for other purposes a protected series is not a person separate from the organization or other protected series of the organization.

C. The provisions of the Uniform Voidable Transactions Act do not authorize or prohibit the creation of a protected series or series organization.

History: 1978 Comp., § 56-10-25, enacted by Laws 2015, ch. 54, § 22.

ANNOTATIONS

Recompilations. — Laws 2015, ch. 54, § 21 recompiled and amended former 56-10-25 NMSA 1978, relating to uniformity of application and construction, as 56-10-27 NMSA 1978, effective January 1, 2016. Laws 2015, ch. 54, § 22 enacted a new 56-10-25 NMSA 1978, effective January 1, 2016.

Effective dates. — Laws 2015, ch. 54, § 25 made Laws 2015, ch. 54, § 22 effective January 1, 2016.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37 Am. Jur. 2d Fraudulent Conveyances § 4.

Maxim "he who comes into equity must come with clean hands," as basis for refusal of relief to party to fraudulent transfer, 4 A.L.R. 99.

Pari delicto, fact that the parties to a conveyance in fraud of creditors are not in, as affecting the right of the party guilty of fraud to relief, 7 A.L.R. 150.

Complainants' purpose to defraud creditors as defense to suit to recover property paid for by him but conveyed to defendant, 117 A.L.R. 1464.

37 C.J.S. Fraudulent Conveyances § 371.

56-10-26. Supplementary provisions.

A. Unless displaced by the provisions of the Uniform Voidable Transactions Act, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency or other validating or invalidating cause, supplement its provisions.

B. The provisions of the Uniform Voidable Transactions Act are not the exclusive law on the subject of voidable transfers and obligations.

C. The provisions of the Uniform Voidable Transactions Act operate independently of rules in organic law that govern the internal affairs of business organizations that limit distributions by those organizations to their equity owners. Compliance with those rules does not insulate such distributions from being voidable pursuant to the provisions of that act.

History: Laws 1989, ch. 382, § 11; 1978 Comp., § 56-10-24 recompiled and amended as § 56-10-26 by Laws 2015, ch. 54, § 19.

ANNOTATIONS

Recompilations. — Laws 2015, ch. 54, § 19 recompiled and amended former 56-10-24 NMSA 1978 as 56-10-26 NMSA 1978, effective January 1, 2016.

The 2015 amendment, effective January 1, 2016, substituted "Uniform Voidable Transactions Act" for references to the former Uniform Fraudulent Transfer Act; designated the previously undesignated language in the section as Subsection A; in Subsection A, after "Uniform", deleted "Fraudulent Transfer" and added "Voidable Transactions"; and added Subsections B and C.

56-10-27. Uniformity of application and construction.

The Uniform Voidable Transactions Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the Uniform Voidable Transactions Act among states enacting it.

History: Laws 1989, ch. 382, § 12; 1978 Comp., § 56-10-25, recompiled and amended as § 56-10-27 by Laws 2015, ch. 54, § 21.

ANNOTATIONS

Recompilations. — Laws 2015, ch. 54, § 21 recompiled and amended former 56-10-25 NMSA 1978 as 56-10-27 NMSA 1978, effective January 1, 2016.

The 2015 amendment, effective January 1, 2016, substituted "Uniform Voidable Transactions Act" for references to the former Uniform Fraudulent Transfer Act; and after each occurrence of "Uniform", deleted "Fraudulent Transfer" and added "Voidable Transactions".

56-10-28. Relation to Electronic Signatures in Global and National Commerce Act.

The Uniform Voidable Transactions Act modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History: 1978 Comp., § 56-10-28, enacted by Laws 2015, ch. 54, § 23.

ANNOTATIONS

Effective dates. — Laws 2015, ch. 54, § 25 made Laws 2015, ch. 54, § 23 effective January 1, 2016.

56-10-29. Applicability.

A. The provisions of the Uniform Voidable Transactions Act:

(1) apply to a transfer made or obligation incurred on or after January 1, 2016; but

(2) do not apply to:

(a) a transfer made or an obligation incurred before January 1, 2016; or

(b) a right of action that has accrued before January 1, 2016.

B. A transfer made or an obligation incurred before January 1, 2016 and the rights, obligations and interests flowing from that transfer or obligation are governed by the Uniform Fraudulent Transfer Act as if the Uniform Voidable Transactions Act had not been enacted and may be terminated, completed, consummated or enforced pursuant to the Uniform Fraudulent Transfer Act.

C. For the purposes of this section, a transfer is made and an obligation is incurred at the time provided in Section 56-10-20 NMSA 1978.

History: 1978 Comp., § 56-10-29, enacted by Laws 2015, ch. 54, § 24.

ANNOTATIONS

Effective dates. — Laws 2015, ch. 54, § 25 made Laws 2015, ch. 54, § 24 effective January 1, 2016.

ARTICLE 11
Artists' Consignment

56-11-1. Short title.

Sections 1 through 3 [56-11-1 to 56-11-3 NMSA 1978] of this act may be cited as the "Artists' Consignment Act."

History: Laws 1979, ch. 196, § 1.

56-11-2. Definitions.

As used in the Artists' Consignment Act:

A. "art" means a painting, sculpture, drawing, work of graphic art, pottery, weaving, batik, macrame or quilt containing the artist's original handwritten signature on the work of art;

B. "artist" means the creator of a work of art, or, if he is deceased, the artist's heirs or personal representative;

C. "art dealer" means a person primarily engaged in the business of selling works of art;

D. "creditor" means a "creditor" as defined in Section 55-1-201 NMSA 1978; and

E. "person" means an individual, partnership, corporation or association.

History: Laws 1979, ch. 196, § 2.

56-11-3. Art consignment; priority of claims, liens or security interests.

A work of art delivered to an art dealer by an artist for the purpose of exhibition or sale, and the artists' [artist's] share of the proceeds from the sale of the work by the dealer, whether to the dealer on his own account or to a third person, shall create a priority in favor of the artist over the claims, liens or security interests of the creditors of the art dealer, notwithstanding any provision of the Uniform Commercial Code [Chapter 55 NMSA 1978].

History: Laws 1979, ch. 196, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

ARTICLE 12
Pawnbrokers

56-12-1. Short title.

This act [56-12-1 through 56-12-16] may be cited as the "Pawnbrokers Act."

History: Laws 1985, ch. 228, § 1.

ANNOTATIONS

Applicability. — The Pawnbrokers Act only applies to those pawns arising after the effective date of the act. *Wing Pawn Shop v. Taxation & Rev. Dep't*, 1991-NMCA-024, 111 N.M. 735, 809 P.2d 649).

56-12-2. Definitions.

As used in the Pawnbrokers Act:

A. "pawnbroker" means a person engaged in the business of making pawn transactions;

B. "pawn service charge" means the sum of all charges, payable directly or indirectly by the pledgor and imposed directly or indirectly by the pawnbroker as an incident to the pawn transaction;

C. "pawnshop" means the location or premises at which a pawnbroker regularly conducts his business;

D. "pawn transaction" means either the act between a pawnbroker and a person pledging a good of lending money or extending credit on the security of pledged goods or of purchasing tangible personal property with an express or implied agreement or understanding that it may be redeemed or repurchased by the seller at a stipulated price;

E. "person" means an individual, partnership, corporation, joint venture, trust, association or any other legal entity however organized;

F. "pledged goods" means tangible personal property other than choses in action, securities or printed evidences of indebtedness, which property is deposited with or otherwise actually delivered into the possession of a pawnbroker in the course of his business in connection with the pawn transaction;

G. "local law enforcement agency" means the chief of police, his designee, or the police department if applicable to a municipality, or the county sheriff, his designee, or the county sheriff's department if applicable to a county; and

H. "local government" means a municipality or county.

History: Laws 1985, ch. 228, § 2.

ANNOTATIONS

"Pawn service charge". — A storage fee of $30, charged by pawnbroker at the beginning of each pawn transaction, was, in fact, a "pawn service charge" and was illegal because it exceeded the maximum set forth in this chapter. *Yazzie v. Ray Vicker's Special Cars, Inc.*, 12 F. Supp. 2d 1230 (D.N.M. 1998).

56-12-3. Purpose.

The purpose of the Pawnbrokers Act is to:

A. prevent frauds, unfair practices, discriminations against, impositions on or abuses of the citizens of New Mexico;

B. exercise the police power of the state to insure a sound system of making pawn transactions and acquiring and disposing of tangible personal property by and through pawnshops and to prevent unlawful pawn transactions, particularly in stolen property, through regulating pawnbrokers and certain persons employed by or in pawnshops;

C. ensure financial responsibility to the state and to the public;

D. ensure compliance with federal, state and local laws, rules, regulations and ordinances;

E. assist local governments in the exercise of their police power; and

F. to protect from exploitation, abuse or its own improvidence that segment of society in this state which relies from time to time for its need upon money or credit extended by pawnbrokers and given upon the security of native art, handicraft or movable personal possessions.

History: Laws 1985, ch. 228, § 3.

56-12-4. Permits required; inspection fee; penalty.

A. In addition to any occupational or other license required by the local government, every pawnbroker shall obtain a pawnbroker permit from his local government, and that permit shall be conspicuously displayed in the pawnbroker's place of business. Said permit will expire on July 1 of each year and must be renewed by that date. Upon obtaining the permit, every pawnbroker shall register with the local law enforcement agency.

B. The local government may impose upon pawnbrokers a pawnbroker permit fee, in an amount to be set by the local government, to cover the expense of administration of the Pawnbrokers Act. No person who has been convicted of a felony shall be eligible for a permit.

C. Doing business as a pawnbroker without a permit constitutes a violation of this section and is subject to the general penalty provisions of the Pawnbrokers Act.

History: Laws 1985, ch. 228, § 4.

ANNOTATIONS

Cross references. — For general penalties, *see* 56-12-15 NMSA 1978.

56-12-5. Administration; applicability of other laws.

A. The local government shall adopt such rules and regulations as necessary for the equitable administration of the Pawnbrokers Act.

B. Nothing in the Pawnbrokers Act shall be construed to prohibit a local government from enacting additional requirements governing pawnbrokers, not inconsistent with that act.

History: Laws 1985, ch. 228, § 5.

56-12-6. Pawnbroker; bond required.

No person shall engage in business as a pawnbroker without having executed and delivered a bond to his local government in the sum of five thousand dollars ($5,000). The bond shall be in a form approved by the local government and shall be conditioned upon the conduct of the pawnbroker's business according to the provisions of the Pawnbrokers Act. The bond shall be for the benefit of each and every person damaged by a breach of any condition set forth in the bond. Every pawnbroker shall provide the local government with thirty days' notice in writing of the cancellation of the bond.

History: Laws 1985, ch. 228, § 6.

56-12-7. Application for permit; requirements.

A. Each application for an original or a renewal permit shall be submitted in writing to the local government and contain such information as is required by the local government and be accompanied by the applicable permit fee amount.

B. Each application shall be accompanied by the name, social security number or individual taxpayer identification number, address and date of birth of each agent, servant and employee of the applicant engaged in the business of pawn transactions. Changes in such list shall be indicated on each renewal application.

C. Every pawnbroker shall furnish with each application for an original or renewal permit proof of execution and delivery of the bond to the local government.

History: Laws 1985, ch. 228, § 7; 2021, ch. 70, § 1.

ANNOTATIONS

The 2021 amendment, effective June 18, 2021, allowed submission of an individual taxpayer identification number as an alternative to a social security number in an application for an original or a renewal pawnbroker permit; and in Subsection B, after "social security number", added "or individual taxpayer identification number".

56-12-8. Suspension or revocation of permit; notice; hearing.

A. The local government authority may institute proceedings for the suspension or revocation of any permit issued pursuant to the Pawnbrokers Act upon the filing of a written complaint by the local law enforcement agency, the designated representative of

that local law enforcement agency or the attorney general, charging the permit holder or an employee thereof, of having violated any provision of the Pawnbrokers Act.

B. The local government authority shall serve written notice upon the permitholder of the alleged violation. The notice requirement is satisfied if personal service of the notice is had upon the holder of the permit or is posted in a conspicuous place upon the permitholder's place of business.

C. The local government authority shall set a date for hearing on the complaint not more than ten days, nor less than five days, after the date of notice unless waived by all parties thereto. The notice provided for in Subsection B of this section shall specify the date and time of the hearing.

D. The permitholder and any other interested person shall have the right to appear at this administrative hearing and to produce evidence. The rules of evidence shall not apply. If, after holding this hearing, the local government authority determines that the permitholder is in violation of the provisions of the Pawnbrokers Act as charged in the complaint, the local government authority shall issue a written order. The order may suspend the permit for a stated period of time or permanently revoke the permit. The local government authority shall cause such order to be served upon the permitholder and filed in the office of the clerk for public inspection within five business days after the hearing. Service of the order on the permitholder shall be as specified in Subsection B of this section, and the official serving the order shall have the authority to remove the permit from the premises and deliver that permit to the local government authority. This hearing shall be the final administrative remedy.

History: Laws 1985, ch. 228, § 8.

56-12-9. Pawnbroker reports; records; delivery; violations.

A. Every pawnbroker shall each day accurately complete a report of all used property of every kind received or purchased in a pawn transaction during the preceding business day on a form approved by the local law enforcement agency. Either a driver's license or other photo identification card shall be required of each person entering into a pawn transaction with a pawnbroker. Each item received shall be listed on a separate report form. Said report shall include the following:

(1) name of item;

(2) description of the item including make and model number, if any;

(3) serial number and other identifying marks, if any;

(4) date, time and type of pawn transaction;

(5) name and address of person offering the item;

(6) description of the person offering the item including sex, complexion, hair color, approximate height and weight, and date of birth; and

(7) type of identification used by person offering item and identifying number of said identification. If the person presents a driver's license, the report shall also indicate the state of issuance.

B. All reports required by this section shall be completed accurately and be made available by 12 o'clock noon of the day following the day of the pawn transaction and shall be delivered or mailed to the local law enforcement agency within three days of the pawn transaction.

C. Property purchased directly from another permitholder regulated by the Pawnbrokers Act who has already reported the item pursuant to this section is exempt from the requirements of this section.

D. Persistent or frequent erroneous or incomplete entries in or delays in the submitting of the above required reports shall constitute a violation of this section and are subject to the general penalty provisions of the Pawnbrokers Act.

E. The reports and records of the permitholder required pursuant to this section, as well as every item received in pawn, shall be available for inspection by the local government authority, the attorney general, the local law enforcement agency or any sworn member of that law enforcement agency at all reasonable times.

F. Each item pledged to or purchased by the permitholder for which a report is required shall have attached to it a tag with an alphabetic or numerical identification system matching that item with its corresponding report and record.

History: Laws 1985, ch. 228, § 9.

ANNOTATIONS

Cross references. — For general penalties, *see* 56-12-15 NMSA 1978.

Use of copy of driver's license. — Pawnbroker's practice of attaching copy of driver's license to pawn ticket did not comply with the requirements of this chapter that the pawnbroker report pawned items to the police and include on the pawn ticket itself a complete description of the person pawning the item. *Yazzie v. Ray Vicker's Special Cars, Inc.*, 12 F. Supp. 2d 1230 (D.N.M. 1998).

56-12-10. Pawn ticket.

A. Every pawnbroker shall at the time of each pawn transaction deliver to the person pawning any good, a ticket signed by the pawnbroker containing the substance

of the entry required to be made in his report pursuant to Section 9 [56-12-9 NMSA 1978] of the Pawnbrokers Act.

B. The holder of such ticket shall be presumed to be the person entitled to redeem the pledge and the pawnbroker shall deliver such article to the person so presenting such ticket on payment of principal and all lawful charges.

C. The pawn ticket required by this section shall further contain all disclosures of credit terms required to be disclosed to the pledgor by the federal Truth in Lending Act.

History: Laws 1985, ch. 228, § 10.

ANNOTATIONS

Cross references. — For the federal Truth in Lending Act, *see* 15 U.S.C. § 1601 et seq.

Use of copy of driver's license. — Pawnbroker's practice of attaching copy of driver's license to pawn ticket did not comply with the requirements of this chapter that the pawnbroker report pawned items to the police and include on the pawn ticket itself a complete description of the person pawning the item. *Yazzie v. Ray Vicker's Special Cars, Inc.*, 12 F. Supp. 2d 1230 (D.N.M. 1998).

56-12-11. Default; disposition of pledged property.

A. Except as otherwise specified in this section, upon default by the pledgor, the pawnbroker shall comply with the requirements of Chapter 55, Article 9 NMSA 1978 in the disposition of the pledged goods.

B. If there is a conflict between a specific provision of the Pawnbrokers Act and a more general provision of Chapter 55, Article 9 NMSA 1978, the more specific provision of the Pawnbrokers Act shall control.

C. Notwithstanding the provisions of Subsection A of this section, the pawnbroker shall not dispose of the pledged property, except by redemption, until at least ninety days after the indebtedness has become due.

D. Notwithstanding the provisions of Subsection A of this section, if the pawnbroker disposes of the pledged property by sale in the regular course of business, such sale shall conform to the requirements of Chapter 55, Article 9 NMSA 1978 and, if a surplus remains after sale of the pledged property, the pawnbroker shall make a record of the sale and the amount of the surplus and notify the pledgor by first class mail sent to the pledgor's last known address of the amount of the surplus and the pledgor's right to claim it at a specified location within ninety days of the date of mailing of the notice if the surplus is one hundred dollars ($100) or less or within twelve months of the date of mailing of the notice if the surplus is greater than one hundred dollars ($100). In the

event that the first class mail addressed to any person is returned unclaimed to the pawnbroker, then the pawnbroker shall post and maintain on a conspicuous public part of the pawnbroker's premises an appropriately entitled list naming each such person. Ninety days or twelve months, as applicable, after the date of the mailing or posting, whichever is later, the pawnbroker may retain any surplus remaining unclaimed by the pledgor as the pawnbroker's own property.

History: Laws 1985, ch. 228, § 11; 2009, ch. 187, § 1.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, added Subsection B and in Subsection D, after "conform to the requirements of", deleted "Section 55-9-504" and added "Chapter 55, Article 9".

56-12-12. Record of disposition of pledged property.

Every pawnbroker shall keep a permanent record, fully itemized, of all pledged property disposed of following default by the pledgor. The record shall include the following:

A. the number of the pawn transaction;

B. the name and address of the pledgor;

C. the date of the pawn transaction and the date of the last payment received as service charge or on principal;

D. the date of disposition of the pledged property pursuant to Section 11 [56-12-11 NMSA 1978] of the Pawnbrokers Act;

E. the method of disposition of the pledged property; and

F. the amount and disposition of any surplus following disposition of the pledged property.

History: Laws 1985, ch. 228, § 12.

56-12-13. Pawn service charge.

A. For the first thirty-day period of the pawn transaction, a pawnbroker may charge seven dollars fifty cents ($7.50) or ten percent of the amount loaned, whichever is greater, provided that such charge shall not be made on the refinancing of an existing loan or credit transaction. A loan or extension of credit shall be considered to be refinancing of an existing loan if any part of the proceeds of the subsequent loan is applied toward the payment of a prior loan with the same pawnbroker.

B. For the remaining period of the pawn transaction, including any refinancing, no pawnbroker shall charge directly, indirectly or by any subterfuge a pawn service charge in connection with any pawn transaction at a rate in excess of four percent per month on the unpaid principal balance of the loan or extension of credit.

C. The foregoing pawn service charges are limiting maximums and nothing herein shall be construed to prohibit a pawnbroker from contracting for or receiving a lesser rate than here established.

History: Laws 1985, ch. 228, § 13.

ANNOTATIONS

Storage fee. — A storage fee of $30, charged by pawnbroker at the beginning of each pawn transaction, was, in fact, a "pawn service charge" and was illegal because it exceeded the maximum set forth in this section. *Yazzie v. Ray Vicker's Special Cars, Inc.*, 12 F. Supp. 2d 1230 (D.N.M. 1998).

56-12-14. Prohibited practices.

A pawnbroker shall not:

A. knowingly enter into a pawn transaction with a person under the age of eighteen years or under the influence of alcohol, any narcotic, drug, stimulant or depressant;

B. make any agreement requiring the personal liability of a pledgor in connection with the pawn transaction;

C. accept any waiver, in writing or otherwise, of any right or protection accorded a pledgor under the Pawnbrokers Act;

D. fail to exercise reasonable care to protect pledged goods from loss or damage;

E. fail to return a pledged good to a pledgor upon payment of the full amount due to the pawnbroker on the pawn transaction. In the event a pledged good is lost or damaged while in the possession of the pawnbroker, the pawnbroker shall compensate the pledgor for the reasonable value of the lost or damaged good;

F. make any charge for insurance in connection with a pawn transaction;

G. purchase or otherwise receive any item of property from which the manufacturer's name plate, serial number or identification mark has been obviously defaced, altered, covered or destroyed;

H. purchase or otherwise receive any item of property which the permitholder knows is not lawfully owned by the person offering the same;

I. enter into a pawn transaction in which the unpaid principle [principal] balance exceeds two thousand dollars ($2,000); or

J. require that any of the proceeds of any cash loan be spent at the pawnbroker's place of business or in any other manner directed by the pawnbroker.

History: Laws 1985, ch. 228, § 14.

56-12-15. General penalties.

Any permitholder who is found guilty of a violation of any provision of the Pawnbrokers Act shall be guilty of a petty misdemeanor. Any permitholder who violates any provision of the Pawnbrokers Act shall be subject to having his permit revoked or suspended by the local government pursuant to the provisions of Section 8 [56-12-8 NMSA 1978] of the Pawnbrokers Act. Revocation or suspension of such permit will not bar prosecution of the permitholder under the penal provisions of the Pawnbrokers Act. Criminal prosecution will not bar proceedings to revoke or suspend the holder's permit.

History: Laws 1985, ch. 228, § 15.

ANNOTATIONS

Cross references. — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

56-12-16. Forfeiture.

The violation of any provision of the Pawnbrokers Act in any covered transaction shall be deemed a forfeiture of the entire amount of the pawn service charge contracted for or allowable under the transaction. In the event a pawn service charge in excess of the amounts allowable under the Pawnbrokers Act has been paid in any covered transaction, the person by whom it has been paid, or has [his] legal representative, may recover back by civil action triple the amount of service charge paid. Any civil action under this section shall be commenced within two years from the date the usurious transaction was consummated.

History: Laws 1985, ch. 228, § 16.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

ARTICLE 13
Farm Products Secured Interests

56-13-1. Short title.

Sections 1 through 14 [56-13-1 to 56-13-14 NMSA 1978] of this act may be cited as the "Farm Products Secured Interest Act".

History: Laws 1987, ch. 177, § 1.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

Cross references. — For secured transactions under the Uniform Commercial Code, *see* Chapter 55, Article 9 NMSA 1978.

56-13-2. Legislative purpose.

It is the intent of the legislature to adopt a central filing system for security interests relating to farm products pursuant to Section 1324 of the Food Security Act of 1985, Public Law 99-198. It is also the intent of the legislature that upon the adoption of the central filing system, security interest holders be encouraged to use such system in lieu of any other notice provided by Section 1324 of the Food Security Act of 1985 for farm products used or produced in New Mexico which are included in the central filing system.

History: Laws 1987, ch. 177, § 2.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

Cross references. — For Section 1324 of the federal Food Security Act of 1985, *see* 7 U.S.C. § 1631.

56-13-3. Definitions.

As used in the Farm Products Secured Interest Act:

A. "buyer in the ordinary course of business" means a person who, in the ordinary course of business, buys farm products from a person engaged in farming operations who is in the business of selling farm products;

B. "central filing system" means the system for filing effective financing statements established pursuant to Section 4 [56-13-4 NMSA 1978] of the Farm Products Secured Interest Act;

C. "commission merchant" means any person engaged in the business of receiving any farm product for sale, on commission or for or on behalf of another person;

D. "debtor" means the person subjecting a farm product to a security interest;

E. "effective financing statement" means a statement that:

(1) is an original or reproduced copy thereof;

(2) is signed and filed by the secured party in the office of the secretary of state;

(3) is signed by the debtor;

(4) contains:

(a) the name and address of the secured party;

(b) the name and address of the debtor;

(c) the social security number of the debtor or, in the case of a debtor doing business other than as an individual, the internal revenue service taxpayer identification number of such debtor;

(d) a description of the farm products subject to the security interest;

(e) a list of each county in New Mexico where the farm product is used or produced or to be used or produced;

(f) the crop year unless every crop of the farm product in question, for the duration of the effective financing statement, is to be subject to the particular security interest;

(g) further details of the farm product subject to the security interest if needed to distinguish it from other quantities of such product owned by the same person but not subject to the particular security interest; and

(h) such other information that the secretary of state may require to comply with Section 1324 of the Food Security Act of 1985, Public Law 99-198 or to more efficiently carry out the secretary of state's duties under the Farm Products Secured Interest Act;

(5) shall be amended in writing within three months, similarly signed and filed, to reflect material changes;

(6) remains effective for a period of five years from the date of filing, subject to extensions for additional periods of five years each by refiling or filing a continuation statement within six months before the expiration of the five-year period;

(7) lapses on either the expiration of the effective period of the statement or the filing of a notice signed by the secured party that the statement is terminated, whichever occurs first;

(8) is accompanied by the requisite filing fee set pursuant to Section 6 [56-13-6 NMSA 1978] of the Farm Products Secured Interest Act; and

(9) substantially complies with the requirements of this section even though it contains minor errors that are not seriously misleading, provided, however, for the purpose of this paragraph, errors in social security numbers and internal revenue service taxpayer identification numbers do not constitute minor errors. An effective financing statement may for any given debtor cover more than one farm product located in more than one county;

F. "farm product" means an agricultural commodity, as species of livestock used or produced in farming operations, or a product of such crop or livestock in its unmanufactured state, that is in the possession of a person engaged in farming operations and includes a list of farm products that are covered by this general definition as prepared by the secretary of state;

G. "person" means any individual, partnership, corporation, trust or any other business entity and the singular includes the plural;

H. "security interest" means an interest in farm products that secures payment or performance of an obligation; and

I. "selling agent" means any person, other than a commission merchant, who is engaged in the business of negotiating the sale and purchase of any farm product on behalf of a person engaged in farming operations.

History: Laws 1987, ch. 177, § 3.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

Cross references. — For Section 1324 of the federal Food Security Act of 1985, *see* 7 U.S.C. § 1631.

56-13-4. Implementation of central filing system.

The secretary of state shall design and implement a central filing system for effective financing statements. The secretary of state shall be the system operator. The system shall provide a means for filing effective financing statements or notices of such financing statements on a statewide basis. The system shall include requirements that:

A. an effective financing statement or notice of such financing statement shall be filed in the office of the secretary of state;

B. the secretary of state shall compile all such statements or notices into a master list:

(1) organized according to farm product;

(2) arranged within each such product:

(a) in alphabetical order according to the last name of the individual debtors or, in the case of debtors doing business other than as individuals, the first word in the name of such debtors;

(b) in numerical order according to the social security number of the individual debtors or, in the case of debtors doing business other than as individuals, the internal revenue service taxpayer identification number of such debtors;

(c) geographically by county; and

(d) by crop year; and

(3) containing the information referred to in Subsection E of Section 3 [56-13-3 NMSA 1978] of the Farm Products Secured Interest Act;

C. the secretary of state shall have the information on the master list published in lists by farm product arranged alphabetically by debtor and by farm product arranged numerically by the debtor's social security number for individual debtors or, in the case of debtors doing business other than as individuals, the internal revenue service taxpayer identification number of such debtors. If a registered buyer so requests, the list or lists for such buyer may be limited to any county or group of counties where the farm product is used or produced or to any crop year or a combination of such identifiers;

D. all buyers of farm products, commission merchants, selling agents and other persons may register with the secretary of state to receive lists described in Subsection C of this section. Any buyer of farm products, commission merchant, selling agent or

other person conducting business from multiple locations shall be considered as one entity. Such registration shall be on an annual basis. The secretary of state shall provide the form for registration which shall include the name and address of the registrant and the lists described in Subsection C of this section which such registrant desires to receive. A registration shall not be completed until the form provided is properly completed and received by the secretary of state accompanied by the proper registration fee. The fee for annual registration shall be thirty dollars ($30.00). A registrant shall pay an additional annual fee to receive quarterly lists described in Subsection C of this section. For each farm product list provided on microfilm, the annual fee shall be one hundred fifty dollars ($150). For each farm product list provided on paper, the annual fee shall be three hundred dollars ($300). The annual fee for a special list which is a list limited to fewer than all counties or less than all crop years shall be one hundred fifty dollars ($150) for each farm product. The secretary of state shall maintain a record of the registrants and the lists and contents of the lists received by the registrants for a period of five years;

E. the lists as identified pursuant to Subsection D of this section shall be distributed by the secretary of state on a quarterly basis and shall be in written or printed form. A registrant may choose in lieu of receiving a written or printed form to receive statewide lists on microfilm. The distribution shall be made by certified mail, return receipt requested. The secretary of state shall, by rule and regulation, establish the dates upon which the quarterly distributions will be made, the dates after which a filing of an effective financing statement will not be reflected on the next quarterly distribution of lists and the dates by which a registrant must complete a registration to receive the next quarterly list; and

F. the secretary of state shall remove lapsed and terminated effective financing statements or notices of such financing statements from the master list prior to preparation of the lists required to be distributed by Subsection E of this section.

History: Laws 1987, ch. 177, § 4.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

56-13-5. Certification of system.

The secretary of state shall apply to the secretary of the United States department of agriculture for certification of the central filing system provided by the Farm Products Secured Interest Act.

History: Laws 1987, ch. 177, § 5.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

56-13-6. Filing.

A. The fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing of an effective financing statement, an amendment, a continuation statement or a termination statement shall be eleven dollars and fifty cents ($11.50).

B. The fees set forth in Subsection A of this section shall apply to filing of all instruments on paper of a size as prescribed by the secretary of state. For instruments filed on paper of any other size, there shall be added to the original fee for filing the sum of three dollars ($3.00). The fee for attachments to all instruments submitted for filing shall be fifty cents ($.50) per page.

History: Laws 1987, ch. 177, § 6.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

Cross references. — For filing of financing statement under the Uniform Commercial Code, *see* 55-9-501 to 55-9-508 NMSA 1978.

56-13-7. Continuation statement.

A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in Paragraph (6) of Subsection E of Section 56-13-3 NMSA 1978. Any such continuation statement shall be signed by the secured party, shall identify the original statement by file number and shall state that the original statement is still effective. Upon timely filing of the continuation statement, the effectiveness of the original statement shall be continued for five years after the last date to which the filing was effective, whereupon it shall lapse unless another continuation statement is filed prior to such lapse. If an effective financing statement exists at the time insolvency proceedings are commenced by or against the debtor, the effective financing statement shall remain effective until termination of the insolvency proceedings and thereafter for a period of sixty days or until the expiration of the five-year period, whichever occurs later. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement.

History: Laws 1987, ch. 177, § 7; 1999, ch. 99, § 1.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

The 1999 amendment, effective July 1, 1999, updated a statutory reference in the first sentence and deleted "and the debtor" following "secured party" in the second sentence.

56-13-8. Lapse or waiver.

A. Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party shall notify the debtor in writing of his right to have a notice of lapse of his effective financing statement filed which shall lead to the removal of his name from the files and lists compiled by the secretary of state. In lieu of such notice, the secured party may acquire a waiver of the debtor of such right and a request by the debtor that his effective financing statement be retained on file. Such notice may be given or waiver acquired by the secured party at any time prior to the time specified in this subsection for giving the notice.

B. If the secured party does not furnish the notice or obtain the waiver specified in Subsection A of this section, the secured party shall, within ten days of final payment of all secured obligations, provide the debtor with a written notification of the debtor's right to have a notice of lapse filed. The secured party shall on written demand by the debtor send the debtor a notice of lapse to the effect that he no longer claims a security interest by file number. The notice of lapse need only be signed by the secured party.

C. If the affected secured party fails to send a notice of lapse within ten days after proper demand pursuant to Subsection B of this section, such secured party shall be liable to the debtor for five hundred dollars ($500) in addition for any loss caused to the debtor by such failure.

D. On presentation to the secretary of state of a notice of lapse, the secretary of state shall treat it as a termination statement and note it in the index. The secretary of state shall return one copy of the notice of lapse to the filing party stamped to show the time of receipt thereof.

History: Laws 1987, ch. 177, § 8.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

56-13-9. Oral and written inquiries.

A. Oral and written inquiries regarding information provided by the filing of effective financing statements may be made at the office of the secretary of state during regular business hours. The fee for furnishing file information in writing shall be fifteen dollars ($15.00) for each debtor name searched by the secretary of state. Written confirmation of an oral or written inquiry shall be mailed no later than the end of the next business day after the inquiry is received.

B. The secretary of state shall provide a system that assigns an identifying number to each inquiry made pursuant to Subsection A of this section. Such number shall be given to the inquiring party at the time of the oral response and shall be included in the written confirmation. The secretary of state shall maintain a record of inquiries made under this section which shall identify who made the inquiry, on whom the inquiry was made and the date of the inquiry.

C. The secretary of state may provide for a computerized system for inquiry and confirmation which may be used in lieu of the inquiry and confirmation under Subsection A of this section. When such a system is implemented and used, it shall have the same effect as an inquiry and confirmation under Subsection A of this section.

History: Laws 1987, ch. 177, § 9.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

56-13-10. Seller disclosure.

In order to verify the existence or the nonexistence of a security interest, a buyer in the ordinary course of business, commission merchant or selling agent may request a seller to disclose such seller's social security number or, in the case of a seller doing business other than as an individual, the internal revenue service taxpayer identification number of such seller.

History: Laws 1987, ch. 177, § 10.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

56-13-11. Adoption of rules and regulations.

The secretary of state shall adopt and promulgate rules and regulations necessary to implement the Farm Products Secured Interest Act. If necessary to obtain federal certification of the central filing system, additional or alternative requirements made in conformity with Section 1324 of the Food Security Act of 1985 may be imposed by the secretary of state by rule and regulation. The secretary of state shall prescribe all forms to be used for filing effective financing statements and subsequent actions.

History: Laws 1987, ch. 177, § 11.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

Cross references. — For Section 1324 of the federal Food Security Act of 1985, *see* 7 U.S.C. § 1631.

56-13-12. Receipt of notice.

For purposes of Section 1324 of the Food Security Act of 1985, Public Law 99-198, "receipt of written notice" means the date the notice is actually received by a buyer in the ordinary course of business or the first date upon which delivery is attempted by a carrier. A buyer in the ordinary course of business shall act in good faith. In all cases a buyer in the ordinary course of business shall be presumed to have received the notice ten days after it was mailed.

History: Laws 1987, ch. 177, § 12.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

Cross references. — For Section 1324 of the federal Food Security Act of 1985, *see* 7 U.S.C. § 1631.

56-13-13. Rights of buyer in the ordinary course of business.

A. A buyer in the ordinary course of business, in buying farm products covered by the central filing system, shall take subject to the security interest identified under such system, except that a registrant or a buyer in the ordinary course of business making an inquiry under Section 9 [56-13-9 NMSA 1978] of the Farm Products Secured Interest Act shall not take subject to the security interest if the central filing system does not correctly identify the debtor.

B. A buyer in the ordinary course of business buying farm products covered by an effective financing statement takes free of any security interest on such products if such buyer secures a waiver or release of the security interest specified in such effective financing statement from the secured party. If a buyer in the ordinary course of business buying farm products covered by the central filing system tenders to the seller the total purchase price by means of a check or other instrument payable to such seller and each security interest holder of the seller identified in the central filing system for such products and if such security interest holder authorizes the negotiation of such check or other instrument, such authorization or endorsement and payment thereof shall constitute a waiver or release of the security interest specified to the extent of the amount of the instrument. Such waiver or release of the security interest shall not serve to establish or alter in any way security interest or lien priorities under law.

History: Laws 1987, ch. 177, § 13.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

56-13-14. Liability of secretary of state waived.

The secretary of state shall not be liable to any party for the authenticity of the information provided in an effective financing statement.

History: Laws 1987, ch. 177, § 14.

ANNOTATIONS

Compiler's notes. — Laws 1995, ch. 190, § 19 amended Laws 1987, ch. 177, § 16, as amended by Laws 1992, ch. 8, § 1, to delete the provision providing that Laws 1987, ch. 177 is effective until July 1, 1997.

Effective dates. — Laws 1987, ch. 177, § 16 made Laws 1987, ch. 177, § 14 effective January 1, 1988.

ARTICLE 14
Worthless Checks

56-14-1. Civil action; damages.

A. In any civil action against a person for drawing any worthless check, the plaintiff may recover from the defendant damages in the amount equal to one hundred dollars ($100) or triple the amount for which the check is drawn, whichever is greater; provided that damages recovered under this section shall not exceed the amount of the check by more than five hundred dollars ($500) and may be awarded only if:

(1) the plaintiff made written demand of the defendant for payment of the amount of the check not less than ten days before commencing action; and

(2) the defendant failed to tender to the plaintiff prior to the commencement of the action an amount of money not less than the amount demanded.

B. The written demand by the plaintiff shall include notice that if the money is not paid within ten days, triple damages may be incurred by the defendant. The plaintiff shall provide the defendant written notice of demand for payment by certified mail at the last known address of the defendant with a request for a return receipt and marked "deliver to addressee only".

C. Subsequent to the commencement of the civil action but prior to the hearing, the defendant may tender to the plaintiff as satisfaction of the claim, an amount of money equal to the sum of the amount of the check and the incurred court and service costs.

D. If the court or jury determines that the failure of the defendant to satisfy the worthless check was due to economic hardship resulting from an inevitable accident or act of God, the court or jury may waive all or part of the statutory damages; provided the court or jury shall render judgment against the defendant for not less than the amount of the worthless check plus incurred court and service costs.

E. As used in this section:

(1) "draw" means making, drawing, uttering or delivering a worthless check;

(2) "thing of value" includes money, property, services, goods, wares and lodging; and

(3) "worthless check" means a check, draft or order for payment drawn upon any bank or other depository and issued in exchange for anything of value with intent to defraud when the drawer knows at the time of the issuing that there are insufficient funds in or credit with the bank or depository for the payment of the check, draft or order in full upon presentation; but does not mean any check where the payee or holder

knows or has been expressly notified prior to the drawing of the check, draft or order for payment or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment on its presentation nor does it mean any postdated check.

History: Laws 1987, ch. 14, § 1.

ARTICLE 15
Uniform Assignment of Rents

56-15-1. Short title.

This act [56-15-1 to 56-19-19 NMSA 1978] may be cited as the "Uniform Assignment of Rents Act".

History: Laws 2011, ch. 141, § 1.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-2. Definitions.

As used in the Uniform Assignment of Rents Act:

A. "assignee" means a person entitled to enforce an assignment of rents;

B. "assignment of rents" means a transfer of an interest in rents in connection with an obligation secured by real property located in New Mexico and from which the rents arise;

C. "assignor" means a person that makes an assignment of rents or the successor owner of the real property from which the rents arise;

D. "cash proceeds" means proceeds that are money, checks, deposit accounts or the like;

E. "day" means a calendar day;

F. "deposit account" means a demand, time, savings, passbook or similar account maintained with a bank, savings bank, savings and loan association, credit union or trust company;

G. "document" means information that is inscribed on a tangible medium or that is stored on an electronic or other medium and is retrievable in perceivable form;

H. "notification" means a document containing information that the Uniform Assignment of Rents Act requires a person to provide to another, signed by the person required to provide the information;

I. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality or any other legal or commercial entity;

J. "proceeds" means personal property that is received or collected on account of a tenant's obligation to pay rents;

K. "purchase" means to take by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property;

L. "rents" means:

(1) sums payable for the right to possess or occupy, or for the actual possession or occupation of, real property of another person;

(2) sums payable to an assignor pursuant to a policy of rental interruption insurance covering real property;

(3) claims arising out of a default in the payment of sums payable for the right to possess or occupy real property of another person;

(4) sums payable to terminate an agreement to possess or occupy real property of another person;

(5) sums payable to an assignor for payment or reimbursement of expenses incurred in owning, operating and maintaining, or constructing or installing improvements on, real property; or

(6) any other sums payable pursuant to an agreement relating to the real property of another person that constitute rents pursuant to any law of New Mexico other than the Uniform Assignment of Rents Act;

M. "secured obligation" means an obligation, the performance of which is secured by an assignment of rents;

N. "security instrument" means a document, however denominated, that creates or provides for a security interest in real property, whether or not it also creates or provides for a security interest in personal property;

O. "security interest" means an interest in property that arises by agreement and secures performance of an obligation;

P. "sign" means, with present intent to authenticate or adopt a document:

(1) to execute or adopt a tangible symbol; or

(2) to attach to or logically associate with the document an electronic sound, symbol or process;

Q. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States;

R. "submit for recording" means to submit a document complying with applicable legal standards, with required fees, to the office of the county clerk in the county or counties designated in Section 14-9-1 NMSA 1978; and

S. "tenant" means a person that has an obligation to pay sums for the right to possess or occupy, or for possessing or occupying, the real property of another person.

History: Laws 2011, ch. 141, § 2.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-3. Manner of giving notification.

A. Except as otherwise provided in Subsections C and D of this section, a person gives a notification or a copy of a notification pursuant to the Uniform Assignment of Rents Act:

(1) by depositing it with the United States postal service or with a commercially reasonable delivery service, properly addressed to the intended recipient's address as specified in Subsection B of this section, with first-class postage or cost of delivery provided; or

(2) if the recipient agreed to receive notification by facsimile transmission, electronic mail or other electronic transmission, by sending it to the recipient in the agreed manner at the address specified in the agreement.

B. The following rules determine the proper address for giving a notification pursuant to Subsection A of this section:

(1) a person giving a notification to an assignee shall use the address for notices to the assignee provided in the document creating the assignment of rents, but, if the assignee has provided the person giving the notification with a more recent address for notices, the person giving the notification shall use that address;

(2) a person giving a notification to an assignor shall use the address for notices to the assignor provided in the document creating the assignment of rents, but, if the assignor has provided the person giving the notification with a more recent address for notices, the person giving the notification shall use that address; and

(3) if a tenant's agreement with an assignor provides an address for notices to the tenant and the person giving notification has received a copy of the agreement or knows the address for notices specified in the agreement, the person giving the notification shall use that address in giving a notification to the tenant. Otherwise, the person shall use the address of the premises covered by the agreement.

C. If a person giving a notification pursuant to the Uniform Assignment of Rents Act and the recipient have agreed to the method for giving a notification, any notification shall be given by that method.

D. If a notification is received by the recipient, it is effective even if it was not given in accordance with Subsection A or C of this section.

History: Laws 2011, ch. 141, § 3.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-4. Security instrument creates assignment of rents; assignment of rents creates security interest.

A. An enforceable security instrument creates an assignment of rents arising from the real property described in the security instrument, unless the security instrument provides otherwise.

B. An assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property described in the document creating the assignment, regardless of whether the document is in the form of an absolute assignment, an absolute assignment conditioned upon default, an assignment as additional security or any other form. The security interest in rents is separate and distinct from any security interest held by the assignee in the real property.

History: Laws 2011, ch. 141, § 4.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-5. Recordation; perfection of security interest in rents; priority of conflicting interests in rents.

A. A document creating an assignment of rents may be submitted for recording in the office of the county clerk in the same manner as any other document evidencing a conveyance of an interest in real property.

B. Upon recording, the security interest in rents created by an assignment of rents is fully perfected, even if a provision of the document creating the assignment or law of New Mexico other than the Uniform Assignment of Rents Act would preclude or defer enforcement of the security interest until the occurrence of a subsequent event, including a subsequent default of the assignor, the assignee's obtaining possession of the real property or the appointment of a receiver.

C. Except as otherwise provided in Subsection D of this section, a perfected security interest in rents takes priority over the rights of a person that, after the security interest is perfected:

(1) acquires a judicial lien against the rents or the real property from which the rents arise; or

(2) purchases an interest in the rents or the real property from which the rents arise.

D. A perfected security interest in rents has priority over the rights of a person described in Subsection C of this section with respect to future advances to the same extent as the assignee's security interest in the real property has priority over the rights of that person with respect to future advances.

History: Laws 2011, ch. 141, § 5.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-6. Enforcement of security interest in rents.

A. An assignee may enforce an assignment of rents using one or more of the methods specified in Sections 7, 8 and 9 [56-15-7, 56-15-8 and 56-15-9 NMSA 1978] of the Uniform Assignment of Rents Act or any other method sufficient to enforce the assignment pursuant to any law of New Mexico other than that act.

B. From the date of enforcement, the assignee or, in the case of enforcement by appointment of a receiver pursuant to Section 7 of the Uniform Assignment of Rents Act, the receiver is entitled to collect all rents that:

(1) have accrued but remain unpaid on that date; and

(2) accrue on or after that date, as those rents accrue.

History: Laws 2011, ch. 141, § 6.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-7. Enforcement by appointment of receiver.

A. An assignee is entitled to the appointment of a receiver for the real property subject to the assignment of rents if:

(1) the assignor is in default and:

(a) the assignor has agreed in a signed document to the appointment of a receiver in the event of the assignor's default;

(b) it appears likely that the real property may not be sufficient to satisfy the secured obligation;

(c) the assignor has failed to turn over to the assignee proceeds that the assignee was entitled to collect; or

(d) a subordinate assignee of rents obtains the appointment of a receiver for the real property; or

(2) other circumstances exist that would justify the appointment of a receiver pursuant to the Receivership Act [44-8-1 to 44-8-10 NMSA 1978] or any other law of New Mexico other than the Uniform Assignment of Rents Act.

B. An assignee may file a petition for the appointment of a receiver in connection with an action:

(1) to foreclose the security instrument;

(2) for specific performance of the assignment;

(3) seeking a remedy on account of waste or threatened waste of the real property subject to the assignment; or

(4) otherwise to enforce the secured obligation or the assignee's remedies arising from the assignment.

C. An assignee that files a petition pursuant to Subsection B of this section shall also give a copy of the petition in the manner specified in Section 3 [56-15-3 NMSA 1978] of the Uniform Assignment of Rents Act to any other person that, ten days before the date the petition is filed, held a recorded assignment of rents arising from the real property.

D. If an assignee enforces an assignment of rents pursuant to this section, the date of enforcement is the date on which the court enters an order appointing a receiver for the real property subject to the assignment.

E. From the date of its appointment, a receiver is entitled to collect rents as provided in Subsection B of Section 6 [56-15-6 NMSA 1978] of the Uniform Assignment of Rents Act. The receiver also has the authority provided in the order of appointment, the Receivership Act and any other law of New Mexico other than the Uniform Assignment of Rents Act.

F. The following rules govern priority among receivers:

(1) if more than one assignee qualifies pursuant to this section for the appointment of a receiver, a receivership requested by an assignee entitled to priority in rents pursuant to the Uniform Assignment of Rents Act has priority over a receivership requested by a subordinate assignee, even if a court has previously appointed a receiver for the subordinate assignee; and

(2) if a subordinate assignee obtains the appointment of a receiver, the receiver may collect the rents and apply the proceeds in the manner specified in the order appointing the receiver until a receiver is appointed pursuant to a senior assignment of rents.

History: Laws 2011, ch. 141, § 7.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-8. Enforcement by notification to assignor.

A. Upon the assignor's default, or as otherwise agreed by the assignor, the assignee may give the assignor a notification demanding that the assignor pay over the proceeds of any rents that the assignee is entitled to collect pursuant to Section 6 [56-15-6 NMSA 1978] of the Uniform Assignment of Rents Act. The assignee shall also give a copy of the notification to any other person that, ten days before the notification date, held a recorded assignment of rents arising from the real property.

B. If an assignee enforces an assignment of rents pursuant to this section, the date of enforcement is the date on which the assignor receives a notification pursuant to Subsection A of this section.

C. An assignee's failure to give a notification pursuant to Subsection A of this section to any person holding a recorded assignment of rents does not affect the effectiveness of the notification as to the assignor, but the other person is entitled to any relief permitted pursuant to any law of New Mexico other than the Uniform Assignment of Rents Act.

D. An assignee that holds a security interest in rents solely by virtue of Subsection A of Section 4 [56-15-4 NMSA 1978] of the Uniform Assignment of Rents Act shall not enforce the security interest pursuant to this section while the assignor occupies the real property as the assignor's primary residence.

History: Laws 2011, ch. 141, § 8.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-9. Enforcement by notification to tenant.

A. Upon the assignor's default, or as otherwise agreed by the assignor, the assignee may give to a tenant of the real property a notification demanding that the tenant pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue. The assignee shall give a copy of the notification to the assignor and to any other person that, ten days before the notification date, held a recorded assignment of rents arising from the real property. The notification shall be signed by the assignee and shall:

(1) identify the tenant, assignor, assignee, premises covered by the agreement between the tenant and the assignor and assignment of rents being enforced;

(2) provide the recording data for the document creating the assignment or other reasonable proof that the assignment was made;

(3) state that the assignee has the right to collect rents in accordance with the assignment;

(4) direct the tenant to pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue;

(5) describe the manner in which Subsections C and D of this section affect the tenant's payment obligations;

(6) provide the name and telephone number of a contact person and an address to which the tenant can direct payment of rents and any inquiry for additional information about the assignment or the assignee's right to enforce the assignment; and

(7) contain a statement that the tenant may consult a lawyer if the tenant has questions about its rights and obligations.

B. If an assignee enforces an assignment of rents pursuant to this section, the date of enforcement is the date on which the tenant receives a notification substantially complying with Subsection A of this section.

C. Subject to Subsection D of this section and any other claim or defense that a tenant has pursuant to any law of New Mexico other than the Uniform Assignment of Rents Act, following receipt of a notification substantially complying with Subsection A of this section:

(1) a tenant is obligated to pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue, unless the tenant has previously received a notification from another assignee of rents given by that assignee in accordance with this section and the other assignee has not canceled that notification;

(2) unless the tenant occupies the premises as the tenant's primary residence, a tenant that pays rents to the assignor is not discharged from the obligation to pay rents to the assignee;

(3) a tenant's payment to the assignee of rents then due satisfies the tenant's obligation pursuant to the tenant's agreement with the assignor to the extent of the payment made; and

(4) a tenant's obligation to pay rents to the assignee continues until the tenant receives a court order directing the tenant to pay the rent in a different manner or a signed document from the assignee canceling its notification, whichever occurs first.

D. A tenant that has received a notification pursuant to Subsection A of this section is not in default for nonpayment of rents accruing within thirty days after the date the notification is received before the earlier of:

(1) ten days after the date the next regularly scheduled rental payment would be due; or

(2) thirty days after the date the tenant receives the notification.

E. Upon receiving a notification from another creditor that is entitled to priority pursuant to Subsection C of Section 5 [56-15-5 NMSA 1978] of the Uniform Assignment of Rents Act that the other creditor has enforced and is continuing to enforce its interest in rents, an assignee that has given a notification to a tenant pursuant to Subsection A of this section shall immediately give another notification to the tenant canceling the earlier notification.

F. An assignee's failure to give a notification pursuant to Subsection A of this section to any person holding a recorded assignment of rents does not affect the effectiveness of the notification as to the assignor and those tenants receiving the notification. However, the person entitled to the notification is entitled to any relief permitted by any law of New Mexico other than the Uniform Assignment of Rents Act.

G. An assignee that holds a security interest in rents solely by virtue of Subsection A of Section 4 [56-15-4 NMSA 1978] of the Uniform Assignment of Rents Act shall not enforce the security interest pursuant to this section while the assignor occupies the real property as the assignor's primary residence.

History: Laws 2011, ch.141, § 9.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-10. Notification to tenant; form.

No particular phrasing is required for the notification specified in Section 9 [56-15-9 NMSA 1978] of the Uniform Assignment of Rents Act. However, the following form of notification, when properly completed, is sufficient to satisfy the requirements of that section:

"NOTIFICATION TO PAY RENTS TO PERSON OTHER THAN LANDLORD

Tenant:

[Name of Tenant]

Property Occupied by Tenant (the "Premises"):

[Address]

Landlord:

[Name of Landlord]

Assignee:

[Name of Assignee]

Address and Telephone Number of Assignee:

[Address of Assignee]

1. The Assignee named above has become the person entitled to collect your rents on the Premises listed above pursuant to _____ [name of document] (the "Assignment of Rents") dated _____, and recorded at _____ [recording data] in the office of the county clerk of the following county or counties: _____. You may obtain additional information about the Assignment of Rents and the Assignee's right to enforce it at the address listed above.

2. The Landlord is in default pursuant to the Assignment of Rents. Pursuant to the Assignment of Rents, the Assignee is entitled to collect rents from the Premises.

3. This notification affects your rights and obligations pursuant to the agreement pursuant to which you occupy the Premises (your "Agreement"). In order to provide you with an opportunity to consult with a lawyer, if your next scheduled rental payment is due within thirty days after you receive this notification, neither the Assignee nor the Landlord can hold you in default pursuant to your Agreement for nonpayment of that rental payment until ten days after the due date of that payment or thirty days following the date you receive this notification, whichever occurs first. You may consult a lawyer

at your expense concerning your rights and obligations pursuant to your Agreement and the effect of this notification.

4. You shall pay to the Assignee at the address listed above all rents pursuant to your Agreement that are due and payable on the date you receive this notification and all rents accruing pursuant to your Agreement after you receive this notification. If you pay rents to the Assignee after receiving this notification, the payment will satisfy your rental obligation to the extent of that payment.

5. Unless you occupy the Premises as your primary residence, if you pay any rents to the Landlord after receiving this notification, your payment to the Landlord will not discharge your rental obligation, and the Assignee may hold you liable for that rental obligation notwithstanding your payment to the Landlord.

6. If you have previously received a notification from another person that also holds an assignment of the rents due pursuant to your Agreement, you should continue paying your rents to the person that sent that notification until that person cancels that notification. Once that notification is canceled, you shall begin paying rents to the Assignee in accordance with this notification.

7. Your obligation to pay rents to the Assignee will continue until you receive either:

(a) a written order from a court directing you to pay the rent in a manner specified in that order; or

(b) written instructions from the Assignee canceling this notification.

[Name of Assignee]

By:
[Officer/Authorized Agent of Assignee]".

History: Laws 2011, ch. 141, § 10.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-11. Effect of enforcement.

The enforcement of an assignment of rents by one or more of the methods identified in Sections 7, 8 and 9 [56-15-7, 56-15-8 and 56-15-9 NMSA 1978] of the Uniform Assignment of Rents Act, the application of proceeds by the assignee pursuant to Section 12 [56-15-12 NMSA 1978] of that act after enforcement, the payment of

expenses pursuant to Section 13 [56-15-13 NMSA 1978] of that act or an action pursuant to Subsection D of Section 14 [56-15-14 NMSA 1978] of that act does not:

A. make the assignee a mortgagee in possession of the real property;

B. make the assignee an agent of the assignor;

C. constitute an election of remedies that precludes a later action to enforce the secured obligation;

D. make the secured obligation unenforceable; or

E. limit any right available to the assignee with respect to the secured obligation.

History: Laws 2011, ch. 141, § 11.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-12. Application of proceeds.

Unless otherwise agreed, an assignee that collects rents pursuant to the Uniform Assignment of Rents Act or collects upon a judgment in an action pursuant to Subsection D of Section 14 [56-15-14 NMSA 1978] of that act shall apply the sums collected in the following order to:

A. the assignee's reasonable expenses of enforcing its assignment of rents, including, to the extent provided for by agreement and not prohibited by any law of New Mexico other than the Uniform Assignment of Rents Act, reasonable attorney fees and costs incurred by the assignee;

B. reimbursement of any expenses incurred by the assignee to protect or maintain the real property subject to the assignment;

C. payment of the secured obligation;

D. payment of any obligation secured by a subordinate security interest or other lien on the rents if, before distribution of the proceeds, the assignor and assignee receive a notification from the holder of the interest or lien demanding payment of the proceeds; and

E. the assignor.

History: Laws 2011, ch. 141, § 12.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-13. Application of proceeds to expenses of protecting real property; claims and defenses of tenant.

A. Unless otherwise agreed by the assignee, and subject to Subsection C of this section, an assignee that collects rents following enforcement pursuant to Section 8 or 9 [56-15-8, 56-15-9 NMSA 1978] of the Uniform Assignment of Rents Act need not apply them to the payment of expenses of protecting or maintaining the real property subject to the assignment.

B. Unless a tenant has made an enforceable agreement not to assert claims or defenses, the right of the assignee to collect rents from the tenant is subject to the terms of the agreement between the assignor and tenant and any claim or defense arising from the assignor's nonperformance of that agreement.

C. The Uniform Assignment of Rents Act does not limit the standing or right of a tenant to request a court to appoint a receiver for the real property subject to the assignment or to seek other relief on the grounds that the assignee's nonpayment of expenses of protecting or maintaining the real property has caused or threatened harm to the tenant's interest in the property. Whether the tenant is entitled to the appointment of a receiver or other relief is governed by any law of New Mexico other than the Uniform Assignment of Rents Act.

History: Laws 2011, ch. 141, § 13.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-14. Turnover of rents; commingling and identifiability of rents; liability of assignor.

A. As used in this section, "good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

B. If an assignor collects rents that the assignee is entitled to collect pursuant to the Uniform Assignment of Rents Act:

(1) the assignor shall turn over the proceeds to the assignee, less any amount representing payment of expenses authorized by the assignee; and

(2) the assignee continues to have a security interest in the proceeds so long as they are identifiable.

C. For purposes of the Uniform Assignment of Rents Act, cash proceeds are identifiable if they are maintained in a segregated account or, if commingled with other funds, to the extent the assignee can identify them by a method of tracing, including application of equitable principles, that is permitted pursuant to any law of New Mexico other than the Uniform Assignment of Rents Act with respect to commingled funds.

D. In addition to any other remedy available to the assignee pursuant to any law of New Mexico other than the Uniform Assignment of Rents Act, if an assignor fails to turn over proceeds to the assignee as required by Subsection B of this section, the assignee may recover from the assignor in a civil action:

(1) the proceeds, or an amount equal to the proceeds, that the assignor was obligated to turn over pursuant to Subsection B of this section; and

(2) reasonable attorney fees and costs incurred by the assignee to the extent provided for by agreement and not prohibited by any law of New Mexico other than the Uniform Assignment of Rents Act.

E. The assignee may maintain an action pursuant to Subsection D of this section without bringing an action to foreclose any security interest that it may have in the real property. Any sums recovered in the action shall be applied in the manner specified in Section 12 [56-15-12 NMSA 1978] of the Uniform Assignment of Rents Act.

F. Unless otherwise agreed, if an assignee entitled to priority pursuant to Subsection C of Section 5 [56-15-5 NMSA 1978] of the Uniform Assignment of Rents Act enforces its interest in rents after another creditor holding a subordinate security interest in rents has enforced its interest pursuant to Section 8 or 9 [56-15-8, 56-15-9 NMSA 1978] of that act, the creditor holding the subordinate security interest in rents is not obligated to turn over any proceeds that it collects in good faith before the creditor receives notification that the senior assignee has enforced its interest in rents. The creditor shall turn over to the senior assignee any proceeds that it collects after it receives the notification.

History: Laws 2011, ch. 141, § 14.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-15. Perfection and priority of assignee's security interest in proceeds.

A. As used in this section:

(1) "Article 9" means Chapter 55, Article 9 NMSA 1978 or, to the extent applicable to any particular issue, Article 9 of the Uniform Commercial Code as adopted by the state whose laws govern that issue pursuant to the choice-of-laws rules contained in Chapter 55, Article 9 NMSA 1978; and

(2) "conflicting interest" means an interest in proceeds, held by a person other than an assignee, that is:

(a) a security interest arising pursuant to Article 9; or

(b) any other interest if Article 9 resolves the priority conflict between that person and a secured party with a conflicting security interest in the proceeds.

B. An assignee's security interest in identifiable cash proceeds is perfected if its security interest in rents is perfected. An assignee's security interest in identifiable noncash proceeds is perfected only if the assignee perfects that interest in accordance with Article 9.

C. Except as otherwise provided in Subsection D of this section, priority between an assignee's security interest in identifiable proceeds and a conflicting interest is governed by the priority rules in Article 9.

D. An assignee's perfected security interest in identifiable cash proceeds is subordinate to a conflicting interest that is perfected by control pursuant to Article 9 but has priority over a conflicting interest that is perfected other than by control.

History: Laws 2011, ch. 141, § 15.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-16. Priority subject to subordination.

The Uniform Assignment of Rents Act does not preclude subordination by agreement as to rents or proceeds.

History: Laws 2011, ch. 141, § 16.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-17. Uniformity of application and construction.

In applying and construing the Uniform Assignment of Rents Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History: Laws 2011, ch. 141, § 17.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-18. Relation to Federal Electronic Signatures in Global and National Commerce Act.

The Uniform Assignment of Rents Act modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act but does not modify, limit or supersede Section 101(c) of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

History: Laws 2011, ch. 141, § 18.

ANNOTATIONS

Cross references. — For the federal Electronic Signatures in Global and National Commerce Act, *see* 15 U.S.C. § 7001.

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.

56-15-19. Application to existing relationships.

A. Except as otherwise provided in this section, the Uniform Assignment of Rents Act governs the enforcement of an assignment of rents and the perfection and priority of a security interest in rents, even if the document creating the assignment was signed and delivered before the effective date of that act.

B. The Uniform Assignment of Rents Act does not affect an action or proceeding commenced before the effective date of that act.

C. Subsection A of Section 4 [56-15-4 NMSA 1978] of the Uniform Assignment of Rents Act does not apply to any security instrument signed and delivered before the effective date of that act.

D. The Uniform Assignment of Rents Act does not affect:

(1) the enforceability of an assignee's security interest in rents or proceeds if, immediately before the effective date of that act, that security interest was enforceable;

(2) the perfection of an assignee's security interest in rents or proceeds if, immediately before the effective date of that act, that security interest was perfected; or

(3) the priority of an assignee's security interest in rents or proceeds with respect to the interest of another person if, immediately before the effective date of that act, the interest of the other person was enforceable and perfected, and that priority was established.

History: Laws 2011, ch. 141, § 19.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 141, § 20 made §§ 1 through 19, the Uniform Assignment of Rents Act, effective January 1, 2012.