

# **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, repeals 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 provisions of former section, see 1981 Supplement. 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**

**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, repeals 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 provisions of former section, see 1981 Supplement. 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 canceled 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 in Subsection C was inserted by the compiler; it was not enacted by the legislature and is not a 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**

**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 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**

**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

**"Effective date hereof".** - 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 clauses.** - Laws 1965, ch. 258, § 14, provides 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**

**Meaning of "this act".** - The words "this act," in the heading 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 repeals 56-1-16 NMSA 1978, effective June 30, 1985. However, Laws 1985, ch. 69, § 1 repeals 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 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

**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 items 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**

**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 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 [56-4-1 to 56-4-4 NMSA 1978]:

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.

### **56-4-4. 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 [56-4-1 to 56-4-4 NMSA 1978], 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

**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.

**"Effective date of the Credit Card Act".** - The phrase "effective date of the Credit Card Act" in the introductory language of Subsection B refers to the effective date of Laws 1971, ch. 154, which enacted the Credit Card Act [56-4-1 to 56-4-4 NMSA 1978] effective May 19, 1971.

**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*, 28 N.M. 312, 211 P. 601 (1922).

**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*, 18 N.M. 503, 138 P. 205 (1914).

**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*, 28 N.M. 312, 211 P. 601 (1922).

**Generally, no demand for performance is necessary when agreement is absolute and unconditional.** *Data Gen. Corp. v. Communications Diversified, Inc.* 105 N.M. 59, 728 P.2d 469 (1986).

**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*, 54 N.M. 56, 213 P.2d 231 (1949).

**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

**Cross references.** - For fees of a notary public, see 14-12-19 NMSA 1978.

**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.

## **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**

**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

**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. 1943-44 Op. Att'y Gen. No. 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

**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. 1941-42 Op. Att'y Gen. No. 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.

#### **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**

**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**

**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**

**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**

**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**

**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**

**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**

**United States Warehouse Act.** - 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; negligence, acts or omissions of indemnitee; certain agreements void.]**

Any provision, contained in any agreement relating to the construction, installation, alteration, modification, repair, maintenance, servicing, demolition, excavation, drilling, reworking, grading, paving, clearing, site preparation or development, of any real

property, or any improvement of any kind whether on, above or under real property, including without limitation, buildings, shafts, wells and structures, by which any party to the agreement agrees to indemnify the indemnitee, or the agents and employees of the indemnitee, 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, or the agents or employees of the indemnitee, or any legal entity for whose negligence, acts or omissions any of them may be liable, is against public policy and is void and unenforceable, unless such provision shall provide that the agreement to indemnify shall not extend to liability, claims, damages, losses or expenses, including attorney fees, arising out of:

A. the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the indemnitee, or the agents or employees of the indemnitee; or

B. the giving of or the failure to give directions or instructions by the indemnitee, or the agents or employees of the indemnitee, where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to property.

The word "indemnify" as used in this section includes, without limitation, an agreement to remedy damage or loss caused in whole or in part by the negligence, act or omission of the indemnitee, the agents or employees of the indemnitee, or any legal entity for whose negligence, acts or omissions any of the foregoing may be liable.

**History:** 1953 Comp., § 28-2-1, enacted by Laws 1971, ch. 107, § 1.

## ANNOTATIONS

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

**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*, 106 N.M. 573, 746 P.2d 1105 (1987).

**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).

**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.*," 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 contained in, collateral to or affecting an agreement pertaining to a well for oil, gas or water, or mine for a mineral that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified in Paragraphs (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 Paragraphs (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.

## ANNOTATIONS

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

**Indemnatee 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 indemnatee for injuries or death "arising from the . . . concurrent negligence of the indemnatee" means only that the indemnatee cannot contract away liability for his own percentage of negligence. *Guitard v. Gulf Oil Co.* 100 N.M. 358, 670 P.2d 969 (Ct. App. 1983); *Brashar v. Mobil Oil Corp.* 626 F. Supp. 434 (D.N.M. 1984); *Tipton v. Texaco, Inc.* 103 N.M. 689, 712 P.2d 1351 (1985).

**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 indemnatee. *Amoco Prod. Co. v. Action Well Serv., Inc.* 107 N.M. 208, 755 P.2d 52 (1988).

**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.

**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.*," 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.

## **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**

**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**

**Meaning of "above denomination".** - The words "above denomination" refer 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**

I. General Consideration.

II. Money Due by Contract.

A. In General.

B. Date of Accrual.

III. Money Retained Without Consent.

IV. Money Due on Matured Accounts.

#### **I. GENERAL CONSIDERATION.**

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

For interest rate on National Housing Act loans, see 58-8-1, 58-8-2 NMSA 1978.

**Prior History.** - In 1983, 56-8-3 NMSA 1978 was repealed and reenacted by Laws 1983, Chapter 254, § 1. 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.

Annotations to decisions under prior versions of 56-8-3 NMSA 1978 and their predecessor (which contained various legal rates of interest) appear in the annotations to decisions under this section.

**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*, 115 N.M. 639, 857 P.2d 39 (Ct. App. 1993).

**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. Western 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.* 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), 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*, 84 N.M. 544, 505 P.2d 1220 (1973).

**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. Southwestern Pub. Serv. Co.* 49 N.M. 270, 161 P.2d 878 (1945).

**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*, 102 N.M. 560, 698 P.2d 430 (1985).

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*, 110 N.M. 10, 791 P.2d 461 (1990).

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*, 119 N.M. 522, 892 P.2d 969 (Ct. App. 1995).

**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.* 118 N.M. 558, 883 P.2d 144 (1994).

**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*, 112 N.M. 748, 819 P.2d 1306 (1991).

**Construction with 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. Property & Cas. Ins. Guar. Ass'n*, 115 N.M. 475, 853 P.2d 726 (1993).

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

**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.* 118 N.M. 558, 883 P.2d 144 (1994).

**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*, 14 N.M. 282, 91 P. 716 (1907).

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

**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).

**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.

Validity and effect of anticipatory provision in contract in relation to rate of interest in the event of default, 12 A.L.R. 367.

Waiver of usury by renewal or other executory agreement, 13 A.L.R. 1213, 74 A.L.R. 1184.

Right to interest on overdue installments of interest in absence of provision therefor, 27 A.L.R. 81.

Interest on interest coupons, 27 A.L.R. 89.

Possession pending performance, but before default, of executory contract for sale of real estate, effect on right to, of provision for payment of interest by purchaser, 28 A.L.R. 1079.

Provision in statute or ordinance limiting interest per annum as precluding requirement of payment at maximum rate at intervals of less than a year, 29 A.L.R. 1109.

Public policy as to agreement to pay interest on interest, 37 A.L.R. 325, 76 A.L.R. 1484.

Guardians, executors or administrators, and trustees, rate of interest chargeable against, 37 A.L.R. 447, 55 A.L.R. 950, 112 A.L.R. 833, 156 A.L.R. 936.

Liability for interest on proceeds of property wrongfully seized as belonging to alien enemy, 51 A.L.R. 233.

Interest on claim for legal services, 52 A.L.R. 197.

Validity of statute as to interest on bank deposit, 62 A.L.R. 489.

Rate of interest as between partners, 66 A.L.R. 53.

Constitutionality of statute regulating rate of interest on small loans, 69 A.L.R. 581, 125 A.L.R. 743, 149 A.L.R. 1424.

Rate of interest after maturity on contract naming rate but not employing term "until paid," or similar phrase, 75 A.L.R. 399.

Income tax, interest deductible in computing, 80 A.L.R. 214, 154 A.L.R. 934.

Executor, trustee, or guardian, rate of interest chargeable on funds of estate deposited in bank acting as, or in which executor is interested, 88 A.L.R. 208.

Provision in bond of public depository as to interest, in addition to, or in conflict with statutory conditions, 88 A.L.R. 549.

Bonds of municipality or other public body, right to sell at less than par as affected by statute limiting rate of interest on bonds, 91 A.L.R. 7, 162 A.L.R. 396.

Funding or refunding, obligations which increase interest rate as subject to condition respecting limitation of indebtedness or approval by voters, 97 A.L.R. 461.

National banks as subject to state laws fixing rate of interest, 101 A.L.R. 750.

Bond given as condition of extension of time for payment of income tax, rate of interest recoverable on, 117 A.L.R. 464.

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.

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.

## 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*, 67 N.M. 405, 356 P.2d 117 (1960).

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

**Money due on settlement from insurance policy is "due by contract,"** and is therefore subject to interest at the rate of 6%. *O'Meara v. Commercial Ins. Co.* 71 N.M. 145, 376 P.2d 486 (1962).

#### 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*, 67 N.M. 405, 356 P.2d 117 (1960).

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

**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.* 56 N.M. 107, 240 P.2d 1143 (1952).

#### 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*, 11 N.M. 645, 72 P. 12 (1903).

**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.* 108 N.M. 575, 775 P.2d 1292 (1989).

**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*, 118 N.M. 85, 879 P.2d 86 (1994).

**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*, 117 N.M. 373, 872 P.2d 346 (1994).

#### 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 San. Dist.* 82 N.M. 556, 484 P.2d 1266 (1971).

**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*, 43 N.M. 334, 93 P.2d 993 (1939).

#### **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-quarters percent per year, unless 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 the judgment is based on tortious conduct, bad faith, intentional or willful acts, in which case interest shall be computed at the rate of fifteen percent.

B. 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.

## ANNOTATIONS

- I. General Consideration.
- II. Prejudgment Interest.

### I. GENERAL CONSIDERATION.

**The 1993 amendment**, effective June 18, 1993, in Subsection A, substituted "eight and three-quarters percent" for "fifteen percent" near the middle and the language beginning "no higher than specified" for "specified in the instrument" at the end.

**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.

**1983 amendment applies prospectively.** North v. Public Serv. Co. 101 N.M. 222, 680 P.2d 603 (Ct. App. 1983).

**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).

**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, 107 N.M. 715, 764 P.2d 142 (Ct. App. 1988), overruled in part on other grounds, Folz v. State, 115 N.M. 639, 857 P.2d 39 (Ct. App. 1993).

**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, 113 N.M. 774, 833 P.2d 251 (Ct. App. 1992).

**Applicability to workers' compensation awards.** - There is a legislative intent to apply this section to final compensation orders in workers' compensation cases. Sanchez v. Siemens Transmission Sys. 112 N.M. 236, 814 P.2d 104 (Ct. App.), rev'd on other grounds, 112 N.M. 533, 817 P.2d 726 (1991).

**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 County Sheriff's Dep't*, 106 N.M. 744, 749 P.2d 1123 (Ct. App. 1988).

**Interest is an element of damages to be considered by the trial court.** As such, it is left to the discretion of the trial court. *Kennedy v. Moutray*, 91 N.M. 205, 572 P.2d 933 (1977).

The granting of interest is within the discretion of the trial court and is not a matter of right under this section. *Trujillo v. Beaty Elec. Co.* 91 N.M. 533, 577 P.2d 431 (Ct. App. 1978).

**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).

**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.* 96 N.M. 36, 627 P.2d 878 (1981); *Archuleta v. Jacquez*, 103 N.M. 254, 704 P.2d 1130 (Ct. App. 1985).

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.* 106 N.M. 416, 744 P.2d 544 (Ct. App. 1986).

**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.* 71 N.M. 145, 376 P.2d 486 (1962).

**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.* 71 N.M. 145, 376 P.2d 486 (1962).

**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*, 95 N.M. 182, 619 P.2d 1226 (1980).

**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 (1999).

**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*, 117 N.M. 373, 872 P.2d 346 (1994) (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*, 5 N.M. 142, 20 P. 787 (1889).

**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*, 5 N.M. 142, 20 P. 787 (1889); *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, 44 N.M. 469, 104 P.2d 742 (1940).

**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, 81 N.M. 87, 463 P.2d 511 (1969).

**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, 117 N.M. 602, 874 P.2d 1266 (Ct. App. 1994).

**Workers' compensation cases.** - There is nothing which indicates that Subsection A should not apply in workers' compensation cases. Candelaria v. General Elec. Co. 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986).

**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, 115 N.M. 639, 857 P.2d 39 (Ct. App. 1993).

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.

**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.

## II. PREJUDGMENT INTEREST.

**Construction with 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.

**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 Colleges, Inc.* 117 N.M. 269, 871 P.2d 365 (1994).

**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. *New Mexico Tire & Battery Co. v. Ole Tires, Inc.* 101 N.M. 357, 683 P.2d 39 (1984).

**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).

**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-NMSA-051, 124 N.M. 764, 955 P.2d 693.

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*, 113 N.M. 774, 833 P.2d 251 (Ct. App. 1992).

**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.* 120 N.M. 133, 899 P.2d 576 (1995).

**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*, 116 N.M. 34, 859 P.2d 1061 (1993).

**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.* 95 N.M. 594, 624 P.2d 536 (Ct. App. 1981), 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.* 106 N.M. 719, 749 P.2d 1098 (1987), 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*, 102 N.M. 560, 698 P.2d 430 (1985).

**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.* 117 N.M. 82, 868 P.2d 1307 (Ct. App. 1994).

**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.* 103 N.M. 480, 709 P.2d 649 (1985).

**Denial of prejudgment interest.** - 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.* 120 N.M. 133, 899 P.2d 576 (1995).

**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.* 117 N.M. 82, 868 P.2d 1307 (Ct. App. 1994).

**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*, 115 N.M. 475, 853 P.2d 726 (1993).

**Award of prejudgment interest was inappropriate in workmen's compensation case** where, at the time the complaint was filed, neither this section nor the Workmen's Compensation Act, Chapter 52, Article 1 NMSA 1978, allowed for such an award. *Lopez v. Smith's Mgt. Corp.* 106 N.M. 416, 744 P.2d 544 (Ct. App. 1986).

**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*, 108 N.M. 326, 772 P.2d 360 (Ct. App. 1989).

**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), promulgated under 52-5-4A NMSA 1978 (authority of director to adopt rules and regulations). *Bryant v. Lear Siegler Mgt. Servs. Corp.* 115 N.M. 502, 853 P.2d 753 (Ct. App. 1993).

**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*, 113 N.M. 774, 833 P.2d 251 (Ct. App. 1992).

**A 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.

### **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. Chavez*, 15 N.M. 258, 110 P. 699 (1910).

**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*, 3 N.M. (Gild.) 557, 9 P. 359 (1886).

**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 Mtg. & 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*, 3 N.M. (Gild.) 557, 9 P. 359 (1886).

**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*, 83 N.M. 172, 489 P.2d 885 (Ct. App. 1971).

**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.* 16 N.M. 461, 117 P. 856 (1911).

**Higher rate by agreement of parties.** - 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.* 108 N.M. 401, 773 P.2d 346 (1989).

**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 repeals 56-8-6 NMSA 1978, as enacted by Laws 1865-1866, ch. 14, § 1, relating to grain purchase contracts, effective April 4, 1991. Laws 1991, ch. 246, § 1 enacts a new 56-8-6 NMSA 1978. For provisions of former section, see 1986 Replacement Pamphlet.

### **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 [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

**Cross references.** - For service charge by small moneylenders, see 58-15-15 NMSA 1978.

**A note given for interest and not commissions is not unlawful.** *Tompkins v. Rain*, 26 N.M. 631, 195 P. 800 (1921).

**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 \$1000 and 2% on the remainder. *Forrest Currell Lumber Co. v. Thomas*, 81 N.M. 161, 464 P.2d 891 (1970).

**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*, 76 N.M. 660, 417 P.2d 798 (1966).

**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*, 100 N.M. 143, 667 P.2d 450 (1983).

**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 in this section was inserted by the compiler; it was not enacted by the legislature and is not a 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*, 100 N.M. 143, 667 P.2d 450 (1983).

**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*, 81 N.M. 161, 464 P.2d 891 (1970).

**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.* 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985).

**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 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 which 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 even if the rate exceeds the rate set forth in Section 56-8-11 NMSA 1978.

D. In addition to the maximum interest or discount which 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, an 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.

**History:** 1953 Comp., § 50-6-15, enacted by Laws 1957, ch. 209, § 1; 1977, ch. 293, § 4; 1980, ch. 39, § 6.

## ANNOTATIONS

**Cross references.** - For rates and charges on bank installment loans, see 58-7-1 to 58-7-9 NMSA 1978.

**Severability clauses.** - Laws 1980, ch. 39, § 7, provides for the severability of the act if any part or application thereof is held invalid.

**Compiler's notes.** - Section 56-8-11 NMSA 1978, referred to in Subsection C, was repealed by Laws 1981, ch. 263, § 4.

**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).

**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.

**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*, 100 N.M. 143, 667 P.2d 450 (1983).

**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.

**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*, 78 N.M. 455, 432 P.2d 811 (1967).

**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. 65-9.

**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. 1957-58 Op. Att'y Gen. No. 58-184.

**This section is equally inapplicable to revolving credit plans.** 1957-58 Op. Att'y Gen. No. 58-184.

**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*, 78 N.M. 455, 432 P.2d 811 (1967).

**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 amended by Laws 1980, ch. 65, § 1, relating to the rates of interest allowed, effective July 1, 1981. For provisions of former section, see 1981 Supplement.

**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 to 56-8-11.3. Repealed.**

### **ANNOTATIONS**

**Repeals.** - Laws 1991, ch. 120, § 10 repeals 56-8-11.1 through 56-8-11.3 as amended by Laws 1990, ch. 69, § 1, relating to maximum interest and disclosure requirements, effective June 14, 1991. For provisions of former section, see 1986 Replacement Pamphlet.

## **56-8-11.4. Repealed.**

### **ANNOTATIONS**

**Repeals.** - Laws 1983, ch. 44, § 1, repeals 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. For provisions of former section, see 1982 Supplement.

## **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*, 85 N.M. 512, 514 P.2d 31 (1973), overruled on other grounds *Maulsby v. Magnuson*, 107 N.M. 223, 755 P.2d 67 (1988).

**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*, 35 N.M. 654, 5 P.2d 528 (1931), overruled on other grounds, 85 N.M. 512, 514 P.2d 31 (1973); *McBroom v. Scottish Mtg. & Land Inv. Co.* 6 N.M. 573, 30 P. 859 (1892), 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*, 89 N.M. 623, 556 P.2d 31 (1976).

**Specific intent required.** - Knowingly charging an illegal interest rate requires a showing of some usurious intent to exploit. *Maulsby v. Magnuson*, 107 N.M. 223, 755 P.2d 67 (1988) (overruling *Hays v. Hudson* and *First Nat'l Bank v. Danek*, appearing in 1986 Replacement Pamphlet).

**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*, 89 N.M. 623, 556 P.2d 31 (1976).

**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*, 81 N.M. 291, 466 P.2d 568 (1970).

**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*, 85 N.M. 512, 514 P.2d 31 (1973), overruled on other grounds *Maulsby v. Magnuson*, 107 N.M. 223, 755 P.2d 67 (1988).

**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*, 89 N.M. 623, 556 P.2d 31 (1976).

**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*, 58 N.M. 193, 269 P.2d 743 (1954) (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 Mtg. & 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 as, 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 provides 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 repeals 56-8-15 to 56-8-20 NMSA 1978, as enacted by Laws 1965, ch. 263, §§ 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 provisions of former sections, see 1978 Original Pamphlet. For present comparable provisions, see Chapter 56, Article 12 NMSA 1978.

Laws 1985, ch. 228 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 14, 1985.

### **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**

**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.

**Section has no applicability to action involving violation of 56-8-7 NMSA 1978,** limiting commission rates on procuring loans. *Diane, Inc. v. Kapnison*, 100 N.M. 143, 667 P.2d 450 (1983).

**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*, 89 N.M. 623, 556 P.2d 31 (1976).

**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*, 89 N.M. 623, 556 P.2d 31 (1976).

**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*, 103 N.M. 649, 711 P.2d 1387 (1985).

### **56-8-23. Purpose of act.**

The purpose of the Residential Home Loan Act [56-8-22 to 56-8-30 NMSA 1978] 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**

**Compiler's notes.** - Sections 56-8-25 to 56-8-28 NMSA 1978, referred to in this section, were repealed by Laws 1981, ch. 263, § 4, effective July 1, 1981.

### **56-8-24. Definitions.**

As used in the Residential Home Loan Act [56-8-22 to 56-8-30 NMSA 1978]:

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 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, creates the regulation and licensing department, composed of several divisions, including the financial institutions division. Laws 1983, ch. 297, § 31, provides 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. The bracketed material was inserted by the compiler; it was not enacted by the legislature and is not a part of the law.

**Compiler's notes.** - Sections 56-8-25 to 56-8-28 NMSA 1978, referred to in this section, were repealed by Laws 1981, ch. 263, § 4, effective July 1, 1981.

**"Residence".** - Subsection A contains no requirement that the dwelling be the primary family residence. *Naumburg v. Pattison*, 103 N.M. 649, 711 P.2d 1387 (1985).

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*, 103 N.M. 649, 711 P.2d 1387 (1985).

**56-8-25 to 56-8-28. Repealed.**

## ANNOTATIONS

**Repeals.** - Laws 1981, ch. 263, § 4, repeals 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. For provisions of former section, see 1981 Supplement.

**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 [56-8-22 to 56-8-30 NMSA 1978] 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 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

**Compiler's notes.** - 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 56-8-25 to 56-8-28 NMSA 1978, there are no longer any interest rate limitations in the Residential Home Loan Act [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, the evidence of indebtedness of a home loan, a real estate contract or an obligation secured by a real estate mortgage requiring a penalty or premium for prepayment of the balance of the indebtedness is enforceable.

**History:** Laws 1980, ch. 64, § 9.

## ANNOTATIONS

**Saving clauses.** - Laws 1980, ch. 64, § 11, provides that if the provisions of § 6 of the act (since repealed) pertaining to the use of the federal national mortgage association auction weighted average yield to determine the maximum rate of interest under the act are held invalid by a court of competent jurisdiction and all avenues of appeal have been exhausted, then on the date the court's order becomes effective the director shall adopt under § 6 of the act as the maximum rate of interest that can be charged a rate one percent above the rate which in his judgment is accurately representative of the national mortgage market rate.

**Severability clauses.** - Laws 1980, ch. 64, § 10, provides for the severability of the act if any part or application thereof is held invalid.

**A complete prohibition against prepayment** is a penalty forbidden by this section. *Naumburg v. Pattison*, 103 N.M. 649, 711 P.2d 1387 (1985).

**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

**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.

**Compiler's notes.** - The compilers of the 1915 Code substituted the words "county clerk" for the words "county recorder."

**Meaning of "this chapter".** - 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.

**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*, 9 N.M. 31, 49 P. 723 (1897).

**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*, 15 N.M. 150, 106 P. 345 (1909).

**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*, 12 N.M. 192, 76 P. 310 (1904).

**Applies to assignments only.** - This section does not apply to fraudulent conveyances other than assignments. *Douglas Fir Lumber Co. v. Star Lumber Co.* 27 N.M. 403, 201 P. 867 (1921).

**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*, 47 N.M. 13, 132 P.2d 426 (1942).

**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*, 30 N.M. 154, 228 P. 1076 (1924).

**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 word "complaint" was inserted by the compiler in compliance with Rule 1-007A NMRA 1997, which prescribes allowed pleadings. The bracketed material was not enacted by the legislature and is not a part of the law.

**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 1997.

**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*, 11 N.M. 221, 67 P. 734 (1902).

**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*, 11 N.M. 221, 67 P. 734 (1902); *Early Times Distillery Co. v. Zeiger*, 9 N.M. 31, 49 P. 723 (1897).

**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

**Cross references.** - For publication of notice, see Chapter 14, Article 11 NMSA 1978.

For joinder of parties, see Rule 1-020A NMRA 1997.

For class actions, see Rule 1-023 NMRA 1997.

**"Bill of complaint".** - Rule 1-007A NMRA 1997 designates the allowed pleadings and speaks of a "complaint," not a "bill of complaint." Rule 1-003 NMRA 1997 provides that a complaint commences a civil action.

**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*, 12 N.M. 192, 76 P. 310 (1904); *Early Times Distillery Co. v. Zeiger*, 9 N.M. 45, 45 P. 1118 (1897); *Early Times Distillery Co. v. Zeiger*, 9 N.M. 31, 49 P. 723 (1897).

**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

**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 1997.

**Meaning of "courts of law".** - For the meaning of the words "courts of law," see Rules 1-001 and 1-002 NMRA 1997 which provides 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."

**Meaning of "this chapter".** - 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 §§ 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

**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

**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

**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

**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*, 7 N.M. 601, 38 P. 251 (1894).

**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*, 7 N.M. 601, 38 P. 251 (1894).

**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

**Cross references.** - For voluntary assignments, see 56-9-1 to 56-9-7 NMSA 1978.

For supplication of 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.

**"Bill of complaint".** - Rule 1-007A NMRA 1997 designates the allowed pleadings and speaks of a "complaint," not a "bill of complaint." Rule 1-003 NMRA 1997 provides that a complaint commences a civil action.

**Meaning of "this chapter".** - 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.

### **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

**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.

**Meaning of "this chapter".** - 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.

**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*, 7 N.M. 601, 38 P. 251 (1894).

**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*, 15 N.M. 150, 106 P. 345 (1909).

**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.* 7 N.M. 630, 41 P. 517 (1895), (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**

**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.

### **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**

**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**

**Cross references.** - As to 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.

### **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 in this section was inserted by the compiler; it was not enacted by the legislature and is not a part of the law.

### **56-9-17. [Additional property; appraisalment.]**

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 word "sections" was inserted by the compilers 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. The bracketed material was not enacted by the legislature and is not a part of the law.

### **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 appraisalment, 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

**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.

**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.

**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*, 7 N.M. 611, 38 P. 253 (1894).

**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

**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.

### **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.

### **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.

### **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.

### **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**

**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**

**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**

**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.

### **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

**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

**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.

### **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

**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

**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

**Meaning of "this chapter".** - 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**

**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**

**Cross references.** - For removal for failure to furnish new bond, see 46-6-3 NMSA 1978.

**Meaning of "this chapter".** - See same catchline in the notes to 56-9-1 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**

**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**

**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**

**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

**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

**Meaning of "this chapter".** - 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. 16 N.M. 107, 113 P. 827 (1911); In re Zeiger, 15 N.M. 150, 106 P. 345 (1909).



**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

**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.

**Meaning of "this chapter".** - 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.** - 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.

### **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

**Cross references.** - For joinder of parties, see Rule 1-020 SCRA 1978.

**Meaning of "this chapter".** - 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 § 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**

**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.

**Meaning of "this chapter".** - 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.

**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. 8 N.M. 622, 45 P. 1122 (1896).

**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

**Meaning of "herein contained".** - 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

**Meaning of "this chapter".** - 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, 7 N.M. 601, 38 P. 251 (1894).

**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, 7 N.M. 601, 38 P. 251 (1894).

**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, 7 N.M. 601, 38 P. 251 (1894).

**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, 7 N.M. 611, 38 P. 253 (1894).

**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**

**Meaning of "this chapter".** - 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**

**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**

**Cross references.** - For masters, see Rule 1-053 NMRA 1997.

### **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**

**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

**Cross references.** - For publication of notice, see 14-11-1 to 14-11-3, 14-11-13 NMSA 1978.

**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.

**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

**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**

**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

**"Acceptance companies" fall within the definition of a "financing institution,"** as such term is used in this section. 1957-58 Op. Att'y Gen. No. 58-232.

**Therefore 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." 1957-58 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.

## **ARTICLE 10 FRAUDULENT TRANSFERS**

### **56-10-1 to 56-10-13. Repealed.**

## ANNOTATIONS

**Repeals.** - Laws 1989, ch. 382, § 13 repeals 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 provisions of former sections, see 1986 Replacement Pamphlet. For present comparable provisions, see 56-10-14 NMSA 1978 et seq.

### **56-10-14. Short title.**

This act [56-10-14 to 56-10-25 NMSA 1978] may be cited as the "Uniform Fraudulent Transfer Act".

**History:** Laws 1989, ch. 382, § 1.

## ANNOTATIONS

**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).

### 56-10-15. Definitions.

As used in the "Uniform Fraudulent Transfer Act" [56-10-14 to 56-10-25 NMSA 1978]:

A. "affiliate" means:

(1) a person who 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 who 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 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 who 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 who holds the securities:

(a) as a fiduciary or agent without sole 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 who 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 entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant;

C. "claim" 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 who has a claim;

E. "debt" means liability on a claim;

F. "debtor" means a person who is liable on a claim;

G. "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 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;

H. "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;

I. "person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust or any other legal or commercial entity;

J. "property" means anything that may be the subject of ownership;

K. "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;

L. "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 and creation of a lien or other encumbrance;  
and

M. "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.

## **ANNOTATIONS**

**"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 the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

B. A debtor who is generally not paying his debts as they become due is presumed to be insolvent.

C. A partnership is insolvent under Subsection A of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

D. 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 Fraudulent Transfer Act [56-10-14 to 56-10-25 NMSA 1978].

E. 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.

## **ANNOTATIONS**

**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.* 99 N.M. 574, 661 P.2d 474 (1983).

**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*, 97 N.M. 288, 639 P.2d 575 (1982).

**"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*, 97 N.M. 288, 639 P.2d 575 (1982).

**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, rehearing 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, rehearing 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.* 104 N.M. 544, 724 P.2d 752 (1986).

**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*, 111 N.M. 206, 803 P.2d 1111 (Ct. App. 1990).

**Court error in determining assets of insolvents.** - See *Western Prod. Credit Ass'n v. Kear*, 104 N.M. 494, 723 P.2d 965 (1986).

**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 5 [56-10-18 NMSA 1978] and Section 6 [56-10-19 NMSA 1978] of the Uniform Fraudulent Transfer Act, 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.

### **ANNOTATIONS**

**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. Transfers fraudulent as to present and future creditors.**

A. A transfer made or obligation incurred by a debtor is fraudulent 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 he would incur, debts beyond his 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.

**History:** Laws 1989, ch. 382, § 5.

## ANNOTATIONS

**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*, 111 N.M. 206, 803 P.2d 1111 (Ct. App. 1990).

**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 NMSA 1978 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*, 115 N.M. 590, 855 P.2d 1054 (1993).

**Bankruptcy trustee met burden** as to actual fraud. *Mazer v. Jones*, 184 Bankr. 377 (Bankr. D.N.M. 1995).

### **56-10-19. Transfers fraudulent as to present creditors.**

A. A transfer made or obligation incurred by a debtor is fraudulent 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 fraudulent 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.

**History:** Laws 1989, ch. 382, § 6.

## **ANNOTATIONS**

**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 NMSA 1978 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*, 115 N.M. 590, 855 P.2d 1054 (1993).

### **56-10-20. When transfer is made or obligation is incurred.**

For the purposes of the Uniform Fraudulent Transfer Act [56-10-14 to 56-10-25 NMSA 1978]:

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 whom 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 Fraudulent Transfer 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 Fraudulent Transfer 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 writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

**History:** Laws 1989, ch. 382, § 7.

## ANNOTATIONS

**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 creditors.**

A. In an action for relief against a transfer or obligation under the Uniform Fraudulent Transfer Act [56-10-14 to 56-10-25 NMSA 1978] a creditor, subject to the limitations in Section 9 [56-10-22 NMSA 1978] of that act, 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 in accordance with procedures prescribed by law; or

(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.

## ANNOTATIONS

**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.**

A. A transfer or obligation is not voidable under Paragraph (1) of Subsection A of Section 5 [56-10-18 NMSA 1978] of the Uniform Fraudulent Transfer Act against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

B. Except as otherwise provided in this section, to the extent a transfer is avoidable in an action by a creditor under Paragraph (1) of Subsection A of Section 8 [56-10-21 NMSA 1978] of that act, 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:

(1) the first transferee of the asset or the person for whose benefit the transfer was made; or

(2) any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

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 Fraudulent Transfer Act [56-10-14 to 56-10-25 NMSA 1978], 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 any interest in the asset transferred;

(2) enforcement of any 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 5 [56-10-18 NMSA 1978] or Section 6 [56-10-19 NMSA 1978] of the Uniform Fraudulent Transfer Act 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.

F. A transfer is not voidable under Subsection B of Section 6 of the Uniform Fraudulent Transfer Act:

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless 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.

**History:** Laws 1989, ch. 382, § 9.

## ANNOTATIONS

**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 fraudulent transfer or obligation under the Uniform Fraudulent Transfer Act [56-10-14 to 56-10-25 NMSA 1978] is extinguished unless action is brought:

A. under Paragraph (1) of Subsection A of Section 5 [56-10-18 NMSA 1978] of the Uniform Fraudulent Transfer Act, within four years after the transfer was made or the obligation was incurred or, if later, within 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 5 or Subsection A of Section 6 [56-10-19 NMSA 1978] of that act, within four years after the transfer was made or the obligation was incurred; or

C. under Subsection B of Section 6 of that act, within one year after the transfer was made or the obligation was incurred.

**History:** Laws 1989, ch. 382, § 10.

## ANNOTATIONS

**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 S.W. Fin. Servs. v. Pulliam*, 1996-NMCA-032, 121 N.M. 436, 912 P.2d 828.

### **56-10-24. Supplementary provisions.**

Unless displaced by the provisions of the Uniform Fraudulent Transfer Act [56-10-14 to 56-10-25 NMSA 1978], 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.

**History:** Laws 1989, ch. 382, § 11.

### **56-10-25. Uniformity of application and construction.**

The Uniform Fraudulent Transfer Act [56-10-14 to 56-10-25 NMSA 1978] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the Uniform Fraudulent Transfer Act among states enacting it.

**History:** Laws 1989, ch. 382, § 12.

## ANNOTATIONS

**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.

# **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 [56-11-1 to 56-11-3 NMSA 1978]:

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 in this section was inserted by the compiler; it was not enacted by the legislature and is not a part of the law.

## **ARTICLE 12**

### **PAWNBROKERS**

#### **56-12-1. Short title.**

This act [56-12-1 to 56-12-16 NMSA 1978] 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 & Revenue Dep't ex rel. State*, 111 N.M. 735, 809 P.2d 649 (Ct. App. 1991).

#### **56-12-2. Definitions.**

As used in the Pawnbrokers Act [56-12-1 to 56-12-16 NMSA 1978]:

- 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*, 12 F. Supp. 2d 1230 (D.N.M. 1998).

### **56-12-3. Purpose.**

The purpose of the Pawnbrokers Act [56-12-1 to 56-12-16 NMSA 1978] 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 [56-12-1 to 56-12-16 NMSA 1978]. 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 [56-12-1 to 56-12-16 NMSA 1978].

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 [56-12-1 to 56-12-16 NMSA 1978]. 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, 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 must 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.

### **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 [56-12-1 to 56-12-16 NMSA 1978] 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 [56-12-1 to 56-12-16 NMSA 1978] 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*, 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**

**Truth in Lending Act.** - The federal Truth in Lending Act, referred to in Subsection C, appears as 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*, 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 Sections 55-9-501 through 55-9-507 NMSA 1978 in the disposition of the pledged goods.

B. Notwithstanding 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.

C. Notwithstanding Subsection A of this section, if the pawnbroker disposes of the pledged property by sale in the regular course of his business, such sale shall conform to the requirements of Section 55-9-504 NMSA 1978 and if a surplus remains after sale of the pledged property the pawnbroker must make a record of the sale and the amount of the surplus and must 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 the 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 must post and maintain on a conspicuous public part of his premises an appropriately entitled list naming each such person. Ninety days or twelve months, as applicable, after the date of such mailing or posting whichever is later, the pawnbroker may retain any surplus remaining unclaimed by the pledgor as his own property.

**History:** Laws 1985, ch. 228, § 11.

### **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*, 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 [56-12-1 to 56-12-16 NMSA 1978];

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 permit holder 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 permit holder who is found guilty of a violation of any provision of the Pawnbrokers Act [56-12-1 to 56-12-16 NMSA 1978] shall be guilty of a petty misdemeanor. Any permit holder 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 permit holder 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 [56-12-1 to 56-12-16 NMSA 1978] 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.

# ARTICLE 13

## FARM PRODUCTS SECURED INTERESTS

### 56-13-1. Short title.

Sections 1 through 14 [56-13-1 through 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

**Cross references.** - For secured transactions under the Uniform Commercial Code, see Chapter 55, Article 9 NMSA 1978.

**Compiler's notes.** - Laws 1995, ch. 190, § 19 amends 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.

### 56-13-2. 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 amends 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.

**Food Security Act.** - Section 1324 of the federal Food Security Act of 1985, referred to in this section, appears as 7 U.S.C. § 1631.

### 56-13-3. Definitions.

As used in the Farm Products Secured Interest Act [56-13-1 through 56-13-14 NMSA 1978]:

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 amends 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.

**Food Security Act.** - Section 1324 of the federal Food Security Act of 1985, referred to in this section, appears as 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 amends 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 [56-13-1 through 56-13-14 NMSA 1978].

**History:** Laws 1987, ch. 177, § 5.

## ANNOTATIONS

**Compiler's notes.** - Laws 1995, ch. 190, § 19 amends 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**

**Cross references.** - For filing of financing statement under the Uniform Commercial Code, see 55-9-401 to 55-9-408 NMSA 1978.

**Compiler's notes.** - Laws 1995, ch. 190, § 19 amends 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.

### **56-13-7. 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

**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.

**Compiler's notes.** - Laws 1995, ch. 190, § 19 amends 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.

### **56-13-8. 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 amends 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 amends 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 amends 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 [56-13-1 through 56-13-14 NMSA 1978]. 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 amends 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.

**Food Security Act.** - Section 1324 of the federal Food Security Act of 1985, referred to in this section, appears as 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 amends 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.

**Food Security Act.** - Section 1324 of the federal Food Security Act of 1985, referred to in this section, appears as 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**

**Cross references.** - As to protection of buyers of goods under the Uniform Commercial Code, see 55-9-307 NMSA 1978.

**Compiler's notes.** - Laws 1995, ch. 190, § 19 amends 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**

**Effective dates.** - Laws 1987, ch. 177, § 16 makes the act effective on January 1, 1988.

**Compiler's notes.** - Laws 1995, ch. 190, § 19 amends 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.

## **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.