

## NEW MEXICO

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### **I. MECHANIC'S LIEN BASICS**

In New Mexico, NMSA 1978, Sections 48-2-1 through 48-2-17 (1880, as amended through 2011) govern mechanic's and materialmen's liens. A mechanic's lien allows every person who performs labor, provides or hauls equipment, tools or machinery or who furnishes materials to be used in the construction of any building or who surveys real property to obtain a security interest in real property.<sup>1</sup>

**A. Requirements.** In order for a lien to be valid and enforceable, the claimant must give proper notice. An enforceable lien must also be perfected.

**1. Pre-Lien Notice.** NMSA 1978, Section 48-2-2.1 (2007) governs pre-lien notice. A claimant for a lien of more than \$5,000 must give notice of his right to claim a lien for nonpayment.<sup>2</sup> Such notice must be given to the owner or the original contractor not more than sixty (60) days after initially furnishing work or materials.<sup>3</sup> The required notice must contain a description of the property; the name, address and phone number of the claimant; and the name and address of the person with whom the claimant contracted or to whom the claimant furnished labor or materials.<sup>4</sup> This notice requirement does not apply to claims of liens made on residential property of four (4) or less units or to claims of liens made by mechanics or materialmen who contract directly with the original contractor.<sup>5</sup>

**2. Lien Perfection.** To perfect a lien, every claimant must first record the lien in the county clerk's office of the county in which the property is located.<sup>6</sup> The statement must contain all of the information required by the statute, and it must be verified.<sup>7</sup> If a general contractor is recording the lien, it must be recorded within one hundred and twenty (120) days after the completion of the contract.<sup>8</sup> If a subcontractor is recording the lien, it must be recorded within ninety (90) days after the completion of the project or repair.<sup>9</sup> To perfect a lien on residential property, the lien holder must file the lien before the closing of the sale of the property.<sup>10</sup>

**B. Enforcement and Foreclosure.** According to NMSA 1978, Section 39-4-1 (1919), a sheriff's sale of the property may be initiated following successful enforcement of the lien. Proceeds from the sale are used to pay off interest holders in the property based upon their priority. Alternatively, any person holding a mechanics lien on any real estate may subject that real estate to a foreclosure action.<sup>11</sup>

A mechanic's lien-holder assumes priority when the lien-holder commences to improve any building or structure, or when the lien-holder first provides materials.<sup>12</sup> For purposes of determining the priority of liens, a lien recorded after work has begun on a construction project relates back to the date when the lien filer first started working on the construction project.<sup>13</sup>

**C. Ability to Waive and Limitations on Lien Rights.** According to NMSA 1978, Section 48-2-10 (2007), no lien provided for in Sections 48-2-1 through 48-2-17 remains valid for more than two (2) years. An enforcement action must be filed within two (2) years after the lien is recorded.<sup>14</sup> If proceedings are not commenced within two (2) years, the mechanic's lien becomes unenforceable.<sup>15</sup>

## **II. PUBLIC PROJECT CLAIMS**

In New Mexico, public works contracts are governed by NMSA 1978, Sections 13-4-1 to 43 (1923, as amended through 2016). The statute requires "contracts for the construction of public works or for the repair, reconstruction, including highway reconstruction, demolition or alteration thereof," be awarded "to a resident contractor whenever practicable."<sup>16</sup> In *Bradbury & Stamm Construction v. Board of County Commissioners' of Bernalillo County*, the term "practicable" was defined by the New Mexico Court of Appeals to be measured by the mathematical formulas provided in NMSA 1978, Section 13-4-2(E).<sup>17</sup> However, Section 13-4-2 was amended in 2016, eliminating the previously required formulas included in subsection E. It remains to be seen whether the various requirements remaining in the current version of Section 13-4-2 will similarly be held to be mandatory by the courts, despite the lack of any clear mathematical formulas. Given the Court's reasoning in *Bradbury*, New Mexico courts will continue to apply Section 13-4-2 when considering claims regarding the award of public project contracts.<sup>18</sup>

## **III. STATUTES OF LIMITATION AND REPOSE**

**A. Statutes of Limitation and Limitations on Applications of Statutes.** New Mexico does not have a statute of limitation applicable to defective or unsafe conditions of improved real property. However, the following general statute of limitations may apply to certain construction contracts:

1. A claim based on a written contract must be filed within six (6) years.<sup>19</sup>
2. A claim based on a verbal contract must be filed within four (4) years.<sup>20</sup>
3. A personal injury claim must be brought within three (3) years.<sup>21</sup> The limitation period begins to run from the time the injury manifests itself in a physically objective

manner and is ascertainable.<sup>22</sup> In other words, the statute of limitation period begins to run when the person knew or should have known of the injury.<sup>23</sup>

## **B. Statutes of Repose and Limitations on Application of Statutes**

1. NMSA 1978, Section 37-1-27 (1967) contains a statute of repose, which is applicable to construction claims. The statute states that no action to recover damages for any injury to property or person arising out of the defective or unsafe condition of a physical improvement to real property against a person involved with the construction or improvement of that property shall be brought against that person after ten (10) years from the date of substantial completion of the construction or improvement project.<sup>24</sup> This limitation does not apply to contract or warranty actions that contain express provisions to the contrary.<sup>25</sup>

The word “improvement,” as used in the context of Section 37-1-27, means “the enhancement or augmentation of value or quality: a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.”<sup>26</sup>

Section 37-1-27 “does not eliminate the duty to exercise reasonable care in the design, construction, planning, or inspection of an improvement in the first place; it merely forecloses suit for redress after ten years have passed since the substantial completion of an improvement.”<sup>27</sup>

2. Contribution and indemnification claims arising out of defective or unsafe conditions of improvements cannot be brought after ten (10) years from the date of substantial completion of the construction or improvement project.<sup>28</sup>

It is important to note that although a claimant has ten (10) years to bring a claim arising out of a construction project’s defective or unsafe conditions under the applicable statute of repose, the claimant’s claim may nevertheless be time barred. Because New Mexico does not have a statute of limitation applicable to construction claims arising out of defective or unsafe conditions, the above general statute of limitations apply. As such, a claimant’s claim may be time barred even if the claimant brings the claim within the applicable ten-year statute of repose. For example, a claimant injured by a new construction project’s defective or unsafe condition has three years to file his personal injury claim. If the claimant files his claim five years after substantial completion of the construction project, the claimant’s claim will be barred by the personal injury statute of limitation period even though the claim was filed within the applicable statute or repose time period.

On the other hand, the statute of repose can operate to bar a claimant’s claim even though it was brought within the applicable statute of limitations period. For example, the personal injury statute of limitation period does not begin to run until the injured person knows or should know of his injury. If a claimant is injured eight years after substantial completion of a construction project, but the claimant does not know or have reason to know of his injury until

year eleven, his claim would be untimely under the applicable statute of repose even though the claim was filed within the applicable statute of limitations period.

#### **IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE**

Currently, New Mexico does not have statutes or cases dealing with this section.

#### **V. INSURANCE COVERAGE AND ALLOCATION ISSUES**

**A. General Coverage Issues.** According to New Mexico's Uniform Jury Instruction 13-1703, "[a] liability insurance company has a duty to defend its insured against all claims, which fall within the coverage of the insurance policy. A liability insurance company must act reasonably under the circumstances to conduct a timely investigation and fair evaluation of its duty to defend." Furthermore, "if a reasonable investigation would include seeking information from other sources apart from the complaint, the insurer should seek such information."<sup>29</sup>

**B. Trigger of Coverage.** No New Mexico case has decided what trigger of coverage theory should apply under any particular fact pattern in New Mexico. The question of what event triggers coverage under an insurance policy or policies has been a matter of debate in various other jurisdictions.

The first common trigger theory used is the first contact trigger. Under this theory, the date on which the injury-producing event first occurs triggers coverage.<sup>30</sup>

The second common trigger theory used is the manifestation trigger. Under this theory, the insurer insuring the property at the time the damage first manifests itself is solely responsible for the indemnification of the insured.<sup>31</sup> This theory is mainly used in the context of first party property claims.<sup>32</sup>

The third common trigger theory is the "continuous injury (or multiple) trigger." Under this theory, "bodily injuries and property damage that are continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods."<sup>33</sup> Under this theory, neither the date of the accident, event, or conditions causing the injury or damage nor the date of discovery of the damage or injury are controlling.<sup>34</sup> Only the effect triggers the potential liability coverage.<sup>35</sup>

The fourth common trigger theory is the "injury-in-fact" trigger. Under this theory, coverage is first triggered at that point in time where an actual injury can be shown to have been first suffered.<sup>36</sup> This trigger is frequently used in property damage third-party liability cases, but difficulty arises when the court is faced with a continuous, deteriorating type of property damage.<sup>37</sup>

New Mexico has not yet decided which insurance trigger theory applies to construction law claims. However, New Mexico is likely to adopt the majority view adopted in *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995). In *Montrose*, the California Supreme Court developed or popularized the continuous trigger-of-coverage theory for use in continuous

or progressively deteriorating property damage cases.<sup>38</sup> Under this theory, “bodily injuries and property damage that are continuous or progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods.”<sup>39</sup>

**C. Allocation Among Insurers.** Currently, New Mexico does not have statutes or cases dealing with this section.

**D. Issues with Additional Insurance.** Currently, New Mexico does not have statutes or cases dealing with this section.

## **VI. CONTRACTUAL INDEMNIFICATION**

Generally, New Mexico does not allow indemnification in construction contracts.<sup>40</sup> Construction contracts are defined by the statute as a “public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or maintenance of any real property in New Mexico.”<sup>41</sup> This “includes agreements for architectural services, demolition, design services, development, engineering services, excavation or other improvement to real property, including buildings, shafts, wells and structures.”<sup>42</sup> Where a contract is so generic that one cannot tell what type of work will be performed, New Mexico courts will look past the contract to the nature of the work being performed at the time of accident to determine whether the anti-indemnity statute will apply.<sup>43</sup>

NMSA 1978, Section 56-7-1(A) (2005) holds that provisions requiring indemnification for the indemnitee’s negligence are void and unenforceable.<sup>44</sup> The New Mexico Court of Appeals has held that this section refers only to the particular provision within the indemnity clause, and not to the entire indemnity clause.<sup>45</sup> This holding is based on 2003 and 2005 amendments to the statute creating two exceptions to the general rule provided by section A. First, indemnity provisions that require indemnification against the indemnitor’s negligence are enforceable.<sup>46</sup> Second, an indemnity provision is valid where there is a specific agreement to insure against the risk of a construction project.<sup>47</sup> To hold an entire indemnity clause void under NMSA 1978, Section 56-7-1 (A) would negate the purpose of sections B(1) and (2) of the statute, allowing for these two exceptions.<sup>48</sup> Additionally, a contract indemnification clause is not invalid as against public policy simply because it fails to expressly exclude indemnification prohibited under Section 56-7-1.<sup>49</sup>

## **VII. CONTINGENT PAYMENT AGREEMENTS**

**A. Enforceability.** New Mexico has yet to determine the enforceability of contingent payment agreements within construction contracts. The Tenth Circuit,<sup>50</sup> interpreting New Mexico’s Retainage Act,<sup>51, 52</sup> held that the New Mexico Supreme Court would – if presented with a contingent payment agreement – likely enforce a contingent payment agreement.<sup>53</sup>

**B. Requirements.** New Mexico’s Prompt Payment Act requires all construction contracts to “provide that contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts owed for work performed . . . within seven days after receipt of payment from the owner, contractor or subcontractor.”<sup>54</sup> The Act also requires “all

construction contracts shall provide that payment for amounts due shall be paid within twenty-one days after the owner receives an undisputed request for payment.”<sup>55</sup> There is a distinction for public projects allowing payment within forty-five days after submission of an undisputed request when grant money is a source of funding. The contract must contain “clear and conspicuous” terms regarding payment later than twenty-one days after submission of an undisputed request and a legend or type setting forth the specified number of days must appear on each page of both bidding and construction plans.<sup>56</sup> The statute provides an example of what constitutes an appropriate legend or “clear and conspicuous” type.<sup>57</sup>

## **VIII. SCOPE OF DAMAGE RECOVERY**

**A. Personal Injury Damages vs. Construction Defect Damages.** Currently, there are no New Mexico cases or statutes providing any specific distinctions regarding damage recovery for personal injury vs. construction defects. For an outline of the damages available under New Mexico law, see subsections B through H below.

**B. Attorneys’ Fees Shifting and Limitations on Recovery.** New Mexico generally follows the American Rule, which states that, absent statute, court rule, or contractual agreement, each party is responsible for paying their own attorney’s fees.<sup>58</sup> New Mexico therefore allows for the award of attorney’s fees pursuant to a contractual agreement between the parties,<sup>59</sup> and where authorized by statute.<sup>60</sup> For example, NMSA 1978, Section 39-2-2.1 (1975) states: “In any civil action in the district court, small claims court or magistrate court to recover on an open account, the prevailing party may be allowed a reasonable attorney fee set by the court, and taxed and collected as costs.” Additionally, attorney fees may be awarded based on bad faith or frivolous litigation.<sup>61</sup>

**C. Consequential Damages.** Generally, breaches of contract recoveries are limited to general or consequential damages.<sup>62</sup> General damages are damages that arise naturally and necessarily as a result of the contractual breach.<sup>63</sup> General damages are based on the concept that the plaintiff should be awarded the value of the very thing promised so that his balance sheet will reflect capital assets he would have had upon the defendant’s full performance.<sup>64</sup> Specifically, New Mexico has held that where a contract creates an at-will business relationship, future profits are not within the contemplation of the parties, and therefore not recoverable on a breach of contract claim.<sup>65</sup> “In a contract action, a defendant is liable only for those consequential damages that were objectively foreseeable as a probable result of his or her breach when the contract was made.”<sup>66</sup> Additionally, New Mexico allows recovery for emotional distress as long as the distress is causally connected to the underlying breach of contract and is severe enough that “a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.”<sup>67</sup>

**D. Delay and Disruption Damages.** Delay and disruption damages are available in New Mexico.<sup>68</sup> Additionally, “[i]ncidental damages resulting from a seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.”<sup>69</sup>

**E. Economic Loss Doctrine.** New Mexico follows the economic loss doctrine.<sup>70</sup> The purpose of the economic loss doctrine is to preserve the contract principle that contract damages should “be limited to those within the contemplation and control of the parties in framing their agreement.”<sup>71</sup>

**F. Interest.** “Interest shall be allowed on judgments and decrees for the payment of money from entry and shall be calculated at the rate of eight and three-fourths percent per year.”<sup>72</sup> When judgment is rendered on a written instrument having a different rate of interest, interest is computed at a rate no higher than the percentage rate specified in the instrument.<sup>73</sup> But, when the judgment is based on tortious conduct, bad faith or intentional or willful acts, interest is computed at the rate of fifteen percent.<sup>74</sup> In the absence of a contract specifying the rate of interest, the rate of interest can not be more than fifteen percent annually in cases on money due by contract, in cases on money received to the use of another and retained without the owner’s consent, and in cases on money due upon the settlement of matured accounts from the day the balance is ascertained.<sup>75</sup> Finally, “the court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant,” depending upon whether the plaintiff caused unreasonable delay in the adjudication of its claims and whether the defendant had made a “reasonable and timely” settlement offer in the litigation.<sup>76</sup>

**G. Punitive Damages.** Although no New Mexico construction law case has decided this issue, New Mexico allows recovery of punitive damages in other contract actions. As such, it is likely New Mexico would allow recovery of punitive damages in construction contract claims. But, punitive damages may be recovered under a breach of contract action only when the wrongful conduct was willful, wanton, or malicious.<sup>77</sup>

**H. Liquidated Damages.** In New Mexico, when a contract contains a liquidated damage clause, the amount of recovery will be confined to the stipulated amount except when “the stipulated amount is so extravagant or disproportionate as to show fraud, mistake or oppression.”<sup>78</sup> Recovery of liquidated damages does not, however, preclude any recovery of actual damages, “an award of actual damages unrelated to delay does not preclude an award of liquidated damages for delay-related damages...”<sup>79</sup> [T]he vice to be guarded against is a duplication of damages.”<sup>80</sup>

Liquidated damages in the form of delay provisions are applicable in New Mexico even when the contractor has abandoned the contract prior to a stipulated completion date.<sup>81</sup> Furthermore, the Supreme Court of New Mexico has held “We reiterate that while a liquidated delay damage clause is generally controlling on the amount the jury should be permitted to award for delays, the jury should also be instructed that the clause does not compensate the party

for non-delay-related damages, such as the higher cost of the replacement contractor. We conclude that such a clause is applicable where a contractor abandons or repudiates the contract, but that it applies only to delay-related damages.”<sup>82</sup>

## **IX. CASE LAW AND LEGISLATION UPDATE**

There have not been any significant updates to any relevant New Mexico legislation or case law as of July 2022.

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<sup>1</sup> NMSA 1978, § 48-2-2 (1993).

<sup>2</sup> § 48-2-2.1(B) (2007).

<sup>3</sup> *Id.*

<sup>4</sup> § 48-2-2.1(D).

<sup>5</sup> § 48-2-2.1(A).

<sup>6</sup> NMSA 1978, § 48-2-6 (1979).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> NMSA 1978, § 48-2A-11 (1989); NMSA 1978, § 48-2A-12 (1989).

<sup>11</sup> NMSA 1978, § 39-4-13 (1933).

<sup>12</sup> NMSA 1978 § 48-2-5 (1991).

<sup>13</sup> *Valley Fed. Sav. & Loan Ass'n v. T-Bird Home Centers, Inc.*, 1987-NMSC-067, ¶ 15, 106 N.M. 223, 741 P.2d 826.

<sup>14</sup> NMSA 1978, § 48-2-10 (2007).

<sup>15</sup> *Id.*

<sup>16</sup> NMSA 1978, § 13-4-1 (1984).

<sup>17</sup> *Bradbury & Stamm Constr. v. Bd. of Cty. Comm'rs*, 2001-NMCA-106, ¶ 17, 131 N.M. 293, 35 P.3d 298.

<sup>18</sup> *Id.*

<sup>19</sup> NMSA 1978, § 37-1-3(A) (2015).

<sup>20</sup> NMSA 1978, § 37-1-4 (1880).

<sup>21</sup> NMSA 1978, § 37-1-8 (1976).

<sup>22</sup> *Pacheco v. Cohen*, 2009-NMCA-070, ¶¶ 8–9, 146 N.M. 643, 213 P.3d 793.

<sup>23</sup> *Id.*

<sup>24</sup> NMSA 1978, § 37-1-27 (1967).

<sup>25</sup> *Id.*

<sup>26</sup> *Mora-San Miguel Elec. Coop. v. Hicks & Ragland Consulting & Eng'r Co.*, 1979-NMCA-082, ¶ 4, 93 N.M. 175, 598 P.2d 218.

<sup>27</sup> *Coleman v. United Eng'rs & Constructors, Inc.*, 1994-NMSC-074, ¶ 13, 118 N.M. 47, 878 P.2d 996.

<sup>28</sup> NMSA 1978, § 37-1-27 (1967).

<sup>29</sup> *G & G Services, Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 29, 128 N.M. 434, 993 P.2d 751.

<sup>30</sup> *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 893 (Cal. 1995).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 893–94.

<sup>33</sup> *Id.* at 894.

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.* at 881.

<sup>39</sup> *Id.* at 894.

<sup>40</sup> NMSA 1978, § 56-7-1(A) (2005).

<sup>41</sup> § 56-7-1(E).

<sup>42</sup> *Id.*

<sup>43</sup> *Holguin v. Fulco Oil Services LLC*, 2010-NMCA-091, ¶ 16, 149 N.M. 98, 245 P.3d 42.



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- <sup>44</sup> § 56-7-1(A).
- <sup>45</sup> *Holguin*, 2010-NMCA-091, ¶ 38.
- <sup>46</sup> § 56-7-1(B)(1).
- <sup>47</sup> § 56-7-1(B)(2).
- <sup>48</sup> *Holguin*, 2010-NMCA-091, ¶ 38.
- <sup>49</sup> *J.R. Hale Contracting Co., Inc. v. Union Pacific Railroad*, 2008-NMCA-037, ¶ 63, 143 N.M. 574, 179 P.3d 579.
- <sup>50</sup> *MidAmerica Constr. Mgt., Inc. v. MasTec N. Am., Inc.*, 436 F.3d 1257, 1265 (10th Cir. 2006).
- <sup>51</sup> NMSA 1978, §§ 57-28-1 to -11 (2001, as amended through 2007).
- <sup>52</sup> *MidAmerica Constr. Mgt., Inc. v. MasTec N. Am., Inc.*, 436 F.3d 1257, 1265 (The Retainage Act states, in pertinent part, that: all construction contracts shall provide that payment for amounts due, except for retainage, shall be paid within twenty-one days after the owner receives an undisputed request for payment . . . All construction contracts shall provide that contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts owed for work performed on the construction project within seven days after receipt of payment from the owner, contractor or subcontractor . . . These payment provisions apply to all tiers of contractors subcontractors, and suppliers.”)(quoting NMSA 1978, § 57-28-5(A), (C) (2007)).
- <sup>53</sup> *Id.* at 1267.
- <sup>54</sup> § 57-28-5(C).
- <sup>55</sup> § 57-28-5(A).
- <sup>56</sup> § 57-28-5(B)(1).
- <sup>57</sup> § 57-28-5(B)(2).
- <sup>58</sup> *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P. 2d 450.
- <sup>59</sup> *Aspen Landscaping Inc. v. Longford Homes of New Mexico, Inc.*, 2004-NMCA-063, ¶ 21, 135 N.M. 607, 92 P.3d 53; *see also Fort Knox Self Storage, Inc. v. Western Technologies, Inc.*, 2006-NMCA-096, ¶ 29, 140 N.M. 233, 142 P.3d 1.
- <sup>60</sup> *New Mexico Right to Choose/NARAL*, 1999-NMSC-028, ¶ 9.
- <sup>61</sup> *Siepert v. Johnson*, 2003-NMCA-119, ¶ 12, 134 N.M. 394, 77 P.3d 298.
- <sup>62</sup> *Camino Real Mobile Home Park Partnership v. Wolfe*, 1995-NMSC-013, ¶ 20, 119 N.M. 436, 891 P.2d 1190, *overruled on other grounds by, Sunnyland Farms, Inc. v. C. New Mexico Elec. Co-op., Inc.*, 2013-NMSC-017, 301 P.3d 387.
- <sup>63</sup> *Id.*
- <sup>64</sup> *Id.*
- <sup>65</sup> *Guest v. Allstate Ins. Co.*, 2010-NMSC-047, ¶¶ 46, 54, 149 N.M. 74, 244 P.3d 342; *see also Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.*, 2005-NMCA-051, ¶ 43, 137, N.M. 524, 113 P.3d 347.
- <sup>66</sup> *Sunnyland Farms, Inc. v. C. New Mexico Elec. Co-op., Inc.*, 2013-NMSC-017, ¶ 16, 301 P.3d 387.
- <sup>67</sup> *Ettenson v. Burke*, 2001-NMCA-003, ¶ 34, 130 N.M. 67, 17 P.3d 440.
- <sup>68</sup> *Burt v. Horn*, 1982-NMCA-037, ¶ 20, 97 N.M. 515, 641 P.2d 546 (holding that the evidence sustained trial court's finding as to damages sustained by owner as result of delay and defects in construction of residence.).
- <sup>69</sup> NMSA 1978, § 55-2-715(1) (1961).
- <sup>70</sup> *In re Consolidated Vista Hills Retaining Wall Litigation*, 1995-NMSC-020, ¶ 26, 119 N.M. 542, 893 P.2d 438 (citing *Utah Int'l, Inc. v. Caterpillar Tractor Co.*, 1989-NMCA-010, 108 N.M. 539, 775 P. 2d 741).
- <sup>71</sup> *Id.* ¶ 28 (citing *City of Richmond v. Madison Management Group, Inc.*, 918 F.2d 438, 446 (4th Cir.1990)).
- <sup>72</sup> NMSA 1978, § 56-8-4(A) (2004).
- <sup>73</sup> *Id.*
- <sup>74</sup> *Id.*
- <sup>75</sup> NMSA 1978, § 56-8-3 (1983).
- <sup>76</sup> § 56-8-4(B).
- <sup>77</sup> *Ettenson v. Burke*, 2001-NMCA-003, ¶ 33, 130 N.M. 67, 17 P.3d 440.
- <sup>78</sup> *Construction Contracting & Mgmt., Inc. v. McConnell*, 1991-NMSC-066, ¶ 26, 112 N.M. 371, 815 P.2d 1161.
- <sup>79</sup> *Id.*
- <sup>80</sup> *Id.* (quoting *Louis Lyster General Contractor, Inc. v. City of Las Vegas*, 1971-NMSC-094, ¶ 32, 83 N.M. 138, 489 P.2d 646)
- <sup>81</sup> *Id.*
- <sup>82</sup> *Id.* ¶ 27.