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IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

SUSAN BISHOP and MARK SKOFIELD,
as class representatives in their capacities as
Personal Representatives of the Estate of
RICHARD H. SKOFIELD , individually and
in his capacity as class representative,

Plaintiffs/Appellants,
and Cross-Respondents

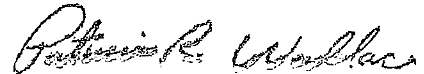
Ct. App. No. 25, 510
Dist. Ct. No. CV-99-07830

vs.

THE EVANGELICAL LUTHERAN
GOOD SAMARITAN SOCIETY, a foreign
corporation d/b/a MANZANO DEL SOL
GOOD SAMARITAN VILLAGE,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

MAR 22 2006



Defendant/Respondent,
and Cross-Appellant.

RESPONDENT AND CROSS-APPELLANT GOOD SAMARITAN'S REPLY BRIEF

On Appeal From the Second Judicial District Court

The Honorable Wendy S. York (presiding until appeal)
The Honorable Linda M. Vanzi (currently presiding)

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SUPREME COURT OF NEW MEXICO
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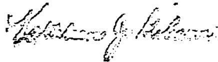

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ARGUMENT

I. THE CCA'S PROVISION CONCERNING "REASONABLE RETURN ON INVESTMENT" WAS UNCONSTITUTIONALLY VAGUE.

Skofield fails to address Good Samaritan's main arguments why the Continuing Care Act ("CCA") provision requiring fee increases to be based on a "reasonable return on investment," NMSA 1978 § 24-17-5(B)(11), was unconstitutionally vague. Skofield focuses his entire argument on the term "reasonable." *See* Appellants' Answer Brief ("Answer"), pp. 7-12. But Skofield neglects the more difficult threshold question of the meaning of "return on investment." Return on investment is, importantly, a *mathematical calculation* – a ratio of income to investment over a defined period of time. In calculating return on investment to comply with the CCA, a continuing care provider would first have to divide a measure of income by a measure of investment in a particular period, yielding a percentage return. Then, and only then, could the provider compare that numerical result to some defined numerical measure of "reasonableness," before making a prospective decision on a fee increase. As Good Samaritan showed, there were insoluble problems with each step of this calculation under the CCA.

First, the CCA nowhere defined what measure of investment was to be used as the denominator of the return on investment ratio. Plausible definitions could use equity, or assets, *i.e.*, equity *plus* long-term debt. Depending on the definition, calculations of "return on investment" could yield widely disparate results. Indeed, Skofield's accountant, Bruce Malott, testified that his results for calculations of return on equity and return on assets for Good Samaritan's Manzano del Sol facility were "dramatically different." 9/19/02 Tr. 213.[1]

[1] Malott, moreover, admitted that there is no Generally Accepted Accounting Principle definition of "return on investment." *See* Transcript of Proceedings ("Tr.") 9/19/02, pp. 195, 197; 9/20/02 Tr. 29-30. This admission meant that Malott's subsequent testimony as a supposed "expert" was without foundation. As Good Samaritan argued in its brief-in-chief, Malott's testimony should have been excluded. *See* Good Samaritan's Brief-in-Chief, pp. 22-24.

Skofield's Answer ignores this threshold problem with defining "return on investment."

Second, Skofield also ignores the problem created by the CCA's failure to define the period over which return on investment is to be measured. Measurement over a number of years would make the most sense, as doing so would counteract the volatility of the market. Annual measurement, by contrast, would force providers (and residents) to ride up and down with the market. Again, however, the key point in analyzing whether the statute is "void for vagueness" is that a calculation of return on investment averaging returns over a number of years could vary dramatically from a calculation of only one year's return. Unless the period over which the return is to be calculated is defined, "return on investment" is practically meaningless.

Finally, the CCA also lacked a defined numerical threshold for what would constitute a "reasonable" return on investment. The District Court selected 15% as a threshold. *See* RP 3395, Findings of Fact and Conclusions of Law ("Findings"), ¶ 32. Malott had initially suggested a lower figure for a "reasonable" return, 12.35%. *Id.*, ¶ 21 (RP 3392). But Malott also admitted at trial that large cap stocks, which were part of his model, returned an *average* of 37.4% in 1996, 23.1% in 1997, 33.4% in 1998 and 28.6% in 1999. 9/20/02 Tr. 45-46. Obviously, the notion of what is a "reasonable" return can vary within a wide spectrum, depending on what comparison is made, and the period over which the return is analyzed.

These gaps all go to the fundamental problem Good Samaritan identified with the CCA, namely, that it mandated a mathematical calculation without defining a methodology for performing the calculation. Because of these gaps – only recently filled by new regulations from the Agency on Aging[2] – Good Samaritan could not "steer between lawful and unlawful

[2] The Agency on Aging issued new regulations interpreting "rate and fee increases by continuing care communities" on January 31, 2006, after Good Samaritan had filed its brief-in-chief. *See* 9 N.M.A.C. 2.24.1 *et seq.* These new regulations are discussed below.

conduct," and was instead subject to the District Court's "*ad hoc* and subjective" interpretation of the law. Skofield simply ignores these problems.

Instead, Skofield cites a number of cases for generic propositions regarding the "void for vagueness" doctrine. But the distinction between a statute like the CCA provision at issue here, which creates a *quantitative* standard and mandates a *mathematical* calculation, and statutes creating qualitative standards that require no such calculations, makes the case law Skofield cites uniformly inapposite, as the facts of those cases show. *See, e.g., Garcia v. Village of Tijeras,* 108 N.M. 116, 767 P.2d 355 (Ct. App. 1988)(challenged language was definition of "American Pit Bull Terriers"); *State ex rel. Health and Social Servs. Dep't. v. Natural Father,* 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979)(challenged language was definition of "neglected child"). Even the cases cited by Skofield regarding statutes that include the word "reasonable" make the same point, because they uniformly involve qualitative, as opposed to quantitative standards. *See, e.g., State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950)(challenged language concerned when an underground artesian reservoir had "reasonably ascertainable boundaries"); *United States v. Hsu*, 40 F.Supp.2d 623 (E.D. Pa. 1999)(challenged language concerned when owner of trade secrets had used "reasonable measures" to keep them secret).

Indeed, the cases cited by Skofield support Good Samaritan's position. In *Natural Father,* for instance, language defining when a child is "neglected" provided adequate notice because it was not "so vague that a person of common intelligence must necessarily guess at its meaning." 93 N.M. at 225. But here, the problem with the CCA's "return on investment" language was precisely that because it is a quantitative, not qualitative standard, it *necessarily* required Good Samaritan to "guess" at it what formula to use in calculating its return.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186 (1982), cited by Skofield, also supports Good Samaritan's position. In *Hoffman Estates*, the United States Supreme Court held that a village ordinance requiring licensure of stores selling drug paraphernalia was not unconstitutionally vague, but did so in large part because the village had also issued written guidelines explicitly defining covered items such as "roach clips." Moreover, the Court noted that future regulations might cure any ambiguity in the ordinance. 455 U.S. at 504. But here, the District Court enforced the CCA provision on "reasonable return on investment" in the absence of *any* defining guidelines or regulations.

Finally, Skofield is simply wrong when he asserts that Good Samaritan did nothing whatsoever to attempt to comply with the CCA. *See* Answer, p. 1. It was undisputed that Manzano's administrator, Kayln Johnson, considered in her annual budgeting process all of the other three factors enumerated in the CCA, including "economic necessity, the reasonable cost of operating the community, [and] the cost of care." 9/24/02 Tr. 79-81.

With this context, the Court should put itself in the place of an administrator like Ms. Johnson, running a non-profit retirement community, and faced with a statute that had never before been interpreted or defined by the Agency on Aging (although the statute contained a mandate to the Agency to enact regulations, NMSA § 24-17-17). She has sent Manzano's financial statements to the Agency for years without response.[3] She considers the increasing costs of medical care and the normal inflation in other goods and services she must buy to run the facility. She decides on a modest fee increase *going forward* that will be even less than that

[3] It was undisputed that Good Samaritan annually filed financial statements for Manzano with the Agency on Aging, and that the Agency never had any negative feedback on them. 9/18/02 Tr. 216-17, 221-222. Indeed, the District Court acknowledged that "no guidance was provided to the Defendant, and the indications it did receive from the State Agency on Aging were that it was in compliance." *See* Findings ¶ 45.

inflation. Then, many years later, a judge *looking backward* to a six-year period cherry-picked by Plaintiff says that the fee increase was too much, to the tune of $122,548 of "damages" for 150 apartments, or about $11 per month on apartments that rent for over $1000 a month.

In sum, the judge, with the benefit of hindsight, is telling the administrator that she misjudged how much she could raise the fees at Manzano *by about 1%.* But how could the administrator have known, without any guidance from the Agency on Aging, that her business decisions would later be second-guessed with such microscopic precision? How could she possibly "steer between lawful and unlawful conduct"? The "reasonable return on investment" criterion in the CCA was too vague to permit Good Samaritan to know *in advance* what would violate it, and thus was unconstitutional.

II. UNDER A RATIONAL INTERPRETATION OF THE CCA, FEE INCREASES AT MANZANO DURING THE CLASS PERIOD WERE "REASONABLE."

A. Good Samaritan's Challenge To The District Court's Interpretation Of The CCA Is A Legal Issue This Court Must Review *De Novo.*

If the Court holds that the statute is not unconstitutionally vague, the Court still must interpret the statute's language. The interpretation of statutory language and decisions as to what persuasive authority to adopt are, of course, quintessential legal issues that this Court reviews *de novo*. *See, e.g., State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379 (1995). Nevertheless, Skofield attempts to characterize the issue as one of fact, so that he can argue that the standard of review is "substantial evidence." *See* Answer, p. 12. Skofield is obviously wrong; however, he makes one threshold point to which Good Samaritan must respond, as it might otherwise be misleading to the Court.

Skofield argues that Good Samaritan has not challenged specific findings of fact entered by the District Court as being unsupported by "substantial evidence." *Id.* To be sure, Good Samaritan has *not* mounted a retail challenge to specific, individual findings; instead, Good

Samaritan's challenge was a wholesale challenge to the legal interpretations and definitions of statutory language adopted by the District Court, interpretations which necessarily underpin its findings. Good Samaritan's position throughout this litigation has been that its financial records present undisputed facts – the numbers are what they are – and the only issue for the District Court was the legal issue of how the statute would be defined so a provider would know which numbers to select and how they should be related in the analysis.

Thus, the District Court first adopted a *definition* of "return on investment" as return on equity. *See* Findings, ¶¶ 15-16 (RP 3391). From this initial definition, its analysis flowed, including the numerical figures for return on equity recited in the Findings. *Id.*, ¶¶ 17-18. Similarly, the District Court adopted a definition of a "reasonable" return as a return up to 15%, explicitly labeling this definition as a legal interpretation. *Id.*, ¶¶ 31-32. From this definition, its subsequent analysis also flowed, yielding a finding that Manzano's return on equity had been over the threshold of "reasonableness," and that Good Samaritan thus breached its contracts with the class members and violated the Continuing Care Act. *Id.*, ¶¶ 33-35. But in each case, the initial "finding" was not a finding of fact all, but an *interpretation* of the CCA's statutory language. To the extent those initial interpretations were wrong – as shown below, they were – the factual findings that flow from them are also necessarily wrong.

B. The District Court's Interpretation Of The CCA Was Incorrect.

As to the interpretation of "reasonable return on investment," any interpretation of the CCA's language that purports to prohibit fee increases that are less than inflation is unfair and irrational, because in real terms *the fees have not increased at all.* It was undisputed that the fee increases at Manzano were less than the relevant rates of inflation. 9/19/02 Tr. 146-148.

Skofield never counters this simple economic logic. Instead, he offers rhetoric. He argues that considering inflation would "fly squarely in the face of the structure and purpose of

the Continuing Care Act." *See* Answer, p. 14. But the primary purpose of the CCA is to ensure the long-term viability and solvency of New Mexico continuing care communities and to provide for disclosure of information to prospective residents. *See* NMSA § 24-17-2. Considering inflation in setting fee increases does not "fly in the face" of these purposes. Meanwhile, the intent of the CCA's provision on fee increases is self-evidently to prevent price gouging – raising prices so steeply that elderly residents on fixed incomes cannot pay. But where residents are typically Social Security recipients whose incomes are routinely adjusted by COLAs, raising fees *less* than the rate of inflation cannot be price gouging, because the residents will have more money in real terms *after* the fee increase than before.

The District Court also misinterpreted the CCA's provision on "reasonable return on investment" because it refused to consider the most extensive body of case law dealing with returns on investment, utility ratemaking cases. Specifically, whatever standard for "return on investment" it had chosen, the District Court erred by not analyzing Manzano's return in comparison to "similar investments at the same time and in the same part of the country," as required in those cases. *See, e.g., Mountain States Tel. and Tel. Co. v. New Mexico State Corp. Comm'n*, 102 N.M. 409, 410, 696 P.2d 1002 (1985). The District Court also erred by analyzing Manzano's return retrospectively, with the benefit of hindsight, rather than prospectively, as required by utility ratemaking cases. *See, e.g., Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n,* 90 N.M. 325, 241, 563 P.2d 588 (1977)("[t]here is no better established rule… than the one that holds that rate fixing may not be accomplished retroactively").

Skofield's analysis at trial compared Manzano's returns on investment to "rates of return experienced by broad segments of the market" averaged with returns on Real Estate Investment Trusts, or "REITs." *See* Findings, ¶ 21 (RP 3392). Specifically, Skofield used "Ibbotson" data

representing the average returns on thousands of publicly traded S&P 500-type stocks over a seventy-three year period, a pool his accountant referred to as "almost all the publicly traded stocks in the country." 9/19/02 Tr. 202-03, 205, 234-35. Moreover, Skofield's model looked backward, cherry-picking years where Manzano's return on equity exceeded his invented threshold. Obviously, Skofield's methodology, which was largely adopted by the District Court, would not be acceptable under the New Mexico Supreme Court precedent governing prospective utility ratemaking.[4]

Skofield does not address, much less contradict, this conclusion. Instead, he argues that Good Samaritan "simply did not carry its burden of proof," presumably of proving that its rates were reasonable. *Id.*, p. 17. But, besides the obvious confusion regarding who bears the burden of proof – Skofield as the plaintiff did – Good Samaritan's point has been that there was simply no way to "prove" or "disprove" the reasonableness of its fee increases, since the statute provides no guidance about how even to *calculate* a "return on investment."

None of Skofield's arguments deal with the substantive issues posed by Good Samaritan's discussion of utility ratemaking cases, namely, whether the return on investment of an entity providing services to the public should be judged against similar enterprises operating at the same time in the Southwest, or against seventy-plus years of average returns for all American businesses (Skofield's methodology); and whether the entity's return on investment should be judged prospectively, or whether a court sitting years later should be able to judge business decisions with the benefit of hindsight.

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[4] And, of course, this analysis begs the question of whether trial courts are the appropriate entities to be micro-managing rate-making decisions for New Mexico continuing care communities, where trial courts obviously will lack the expertise and decades of experience of the Public Regulation Commission, which sets utility rates for New Mexico.

C. The New Regulations Issued By The Agency On Aging Demonstrate That The District Court's Interpretation of the CCA's "Reasonable Return On Investment" Provision Was Incorrect.

As the Court is aware, the Agency on Aging has recently issued new regulations governing the interpretation and application of the CCA's provision on when fee increases can be imposed at New Mexico continuing care communities. *See* 9 N.M.A.C. 2.24.1 *et seq.* Skofield raises these new regulations on two occasions in his Answer brief, *see* Answer, pp. 10, 15, and he apparently believes that the regulations support the District Court's interpretation of the CCA, but he provides no substantive analysis of the regulations. Actually reading the regulations shows why Skofield did not discuss them substantively – the regulations adopt nearly every criticism Good Samaritan has made of the District Court's analysis.

First, the new regulations clearly define "return on investment" as "net income divided by the sum of common stock equity, preferred stock equity, *and long-term debt.*" *See* 9 N.M.A.C. 2.24.7(L)(emphasis added). This is the precise definition Good Samaritan urged in its summary judgment motion. RP 848. This definition – also known as "return on assets" – yields figures much lower than the return on equity figures calculated by Skofield's accountant, Mr. Malott, and adopted by the District Court. Indeed, Malott himself presented calculations of Manzano's return on assets at trial. 9/19/02 Tr. 191, 213-217; *see also,* Trial Exhibit 62 at Exh. H thereto. Comparing Malott's return on assets calculations to the return on equity figures adopted by the District Court, *see* Findings, ¶ 17 (RP 3391), shows the disparity between the two calculations clearly:

Year	Return on Equity	Return on Assets
1993	16.09%	3.90%
1994	17.17%	4.86%
1995	18.13%	6.26%
1996	21.34%	8.24%

1997	22.42%	9.86%
1998	12.62%	6.90%
1999	10.18%	5.49%

Second, the new regulations provide a *specific* threshold for when fee increases are unreasonable: "a return on investment consistently greater than six percentage points higher than the annual average secondary market interest rate on ninety-day United States treasury bills shall be presumed to be unreasonable." 9 N.M.A.C. 2.24.14(B). The average annual secondary market rates of return on ninety-day United States treasury bills from 1993 to 1999 were: 3.0% (1993), 4.25% (1994), 5.49% (1995), 5.01% (1996), 5.06% (1997), 4.58% (1998), and 4.64% (1999).[5] The return on investment at Manzano under the Agency on Aging's new regulations for the years 1993 to 1999 would thus have easily been *less* than six percent higher than these rates, and thus well *under* the Agency's threshold for "reasonableness."

Third, the new regulations also solve the problem with the District Court's methodology of looking at only one year's return on investment, by requiring that "a continuing care community shall base rate or fee increases on four years of historical data plus current fiscal year projections." N.M.A.C. 9.2.24.12(A).

Fourth, the new regulations state that "a continuing care community shall base rate and fee increases on *one or more* of the following four factors." 9 N.M.A.C. 2.24.8(C). The regulation thus appears to state that a continuing care community need not even consider return on investment if one of the other statutory factors – economic necessity, the reasonable cost of operating the community, or the cost of care – independently justifies a fee increase. As shown

[5] This data is taken from a U.S. Census Bureau publication, *The Statistical Abstract of the United States*, Table No. 822, "Money Market Interest Rates and Mortgage Rates, 1980-1999," which is accessible online at http://www.census.gov/prod/2001pubs/statab/sec16.pdf. The Court can take judicial notice of these facts at this stage of the proceedings pursuant to Rule 11-201 NMRA 2006F.

above, Kayln Johnson's undisputed testimony that she considered those other factors would, under the Agency's new regulations, justify fee increases.

Finally, the new regulations state plainly that "a continuing care community may contractually base rate and fee increases on published federal economic data used for the purpose of cost of living and inflation adjustments provided that such increases do not exceed what otherwise would be allowable under this rule." 9 N.M.A.C. 2.24.8(E). As previously noted, Good Samaritan repeatedly showed in its summary judgment motion and at trial that its fee increases, because they were always below the rate of inflation, were necessarily "reasonable." The new regulations from the Agency on Aging confirm this common-sense interpretation.

To uphold the judgment in this matter, this Court would have to conclude that the District Court's interpretation of that provision was correct for the period 1993 through 1999, and, moreover, that this interpretation was *predictable* by Good Samaritan at the time, so that Good Samaritan's conduct in raising fees at its Manzano facility during those years could fairly be deemed illegal. The Court would have to reach this conclusion, even though the Agency on Aging has now issued regulations authoritatively interpreting the statute in a diametrically different way, and even though Good Samaritan's fee increases would have easily been *legal* under those new regulations. Such an outcome, illogical on its face, would be grossly unfair to Good Samaritan.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY REOPENING THE TRIAL TO PERMIT SKOFIELD TO SUBMIT PROOF ON "TURNOVER."

With regard to the propriety of the District Court's decision to reopen the trial record, Skofield admits the salient point – that he did not introduce sufficient evidence of apartment "turnover" at Manzano at the original trial in this matter in September 2002, but only did so

eighteen months later at the reopened trial "after the Court indicated that she would enter judgment for the Defendant in the absence of such evidence." *See* Answer, pp. 20-21. Skofield thus concedes that, if the burden of proof on the point was his, he initially failed to carry it.

The burden of proof, of course, was Skofield's. As the District Court rightly concluded, Skofield's failure to consider turnover – the fact that residents moved into and out of Manzano apartments during the class period – was a fatal flaw in his case, because some residents had *agreed* to higher rates when they moved in. *See* Findings, ¶¶ 61-63 (RP 3400). By providing an analysis that simply focused on *apartments*, and assumed that every *apartment* had been subject to every fee increase and had been damaged thereby, Skofield failed to prove which residents had been members of his class – i.e., residents of those apartments who actually had their fees increased. Thus, when Skofield argues that somehow the burden shifted to Good Samaritan to prove turnover because he had provided "competent" evidence of damages, *see* Answer, p. 23, he misses the point; the thrust of the District Court's findings on turnover was precisely that Skofield had *not* produced competent evidence of damages, because he had not shown whether any residents had been damaged *at all*.[6] Indeed, the case Skofield cites for the proposition, *First Nat'l. Bank v. Sanchez,* 112 N.M. 317, 815 P.2d 613 (1991), makes the point plainly that "when it is possible to present accurate evidence on the amount of damages, the party upon whom the burden rests to prove damages must present such evidence," and "when the only evidence in support of a theory of recovery is inadequate or incompetent to support an award," the defendant need *not* offer evidence in rebuttal. 112 N.M. at 323-4. The evidentiary hearing on turnover was

[6] The District Court expressly found that Skofield "did not introduce any admissible evidence identifying any particular plaintiff or the amount of time a Plaintiff lived in any particular apartment at any particular rate after any allegedly illegal increase in rent." *See* Findings, ¶ 60 (RP3400).

simply the District Court's ill-conceived method of saving Skofield from his own failure of proof.

Notably, Skofield does not argue that he was *not* on notice that turnover would be an issue at the original trial in September 2002; he just says that whether he knew is "not relevant." *See* Answer, p. 23. But whether Skofield was on notice of the issue is precisely relevant to the question of whether the District Court abused its discretion in reopening the record to admit new evidence on turnover. *See, e.g., Aybar v. Crispin-Reyes,* 118 F.3d 10, 16 (1st Cir. 1997)("Rule 59… does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.") Because Skofield knew that turnover was going to be an issue at trial, should have known that he bore the burden on that issue, and yet consciously decided not to introduce evidence of turnover (in order to pursue a strategy for inflating his "damages"), he should not have been permitted a second chance by the District Court. Skofield simply failed to carry his burden of proof. Reopening the trial record to save him from that failure was an abuse of discretion.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY AWARDING PREJUDGMENT INTEREST.

Skofield admits that Good Samaritan offered in pre-trial settlement discussions to spend $2 million on improvements to the Manzano facility. His argument why this offer was not "reasonable" – and thus why he deserved pre-judgment interest under NMSA § 56-8-4 – boils down to asserting that the offer would not have "returned a dime to residents between 1993 and 1999," apparently because he now contends that none of them still lived in the Manzano apartments. *See* Answer, p. 27. But Skofield also argues that his notice of the pending action to the class members was sufficient even though the bulk of his mailed notices were sent on the eve

of trial to residents *at Manzano.* *See* Answer, pp. 30-31; *see also, id.,* p. 3 ("most identifiable members of the class first received notice by mailing at Manzano del Sol").

Clearly there were a substantial number of class members still living at Manzano in 2001 and 2002, when Good Samaritan made its offers, who would have benefited from improvements to the facility. By contrast, it is now five years after Good Samaritan's initial offer, and the three hundred or so class members have received literally nothing from the efforts of class counsel and, even if the judgment amount of $122,548 is sustained, those class members who remain will ultimately receive very little indeed. Meanwhile, Skofield's *lowest* settlement offer – for $1.4 million on the eve of trial before attorney's fees and costs, RP 3598-3602 – was more than *ten times* what he recovered. Under these circumstances, the District Court abused its discretion in awarding prejudgment interest.

V. THE JUDGMENT ENTERED BY THE DISTRICT COURT WAS DEFECTIVE.

Good Samaritan's final issue on appeal was that the judgment entered by the District Court was defective because it failed to include a list of the names of individual class members who had been identified, who had received class notice, and who had not opted out of the class, as required by Rule 1-023(B)(3) NMRA, and that, absent proof of those facts, the District Court should have decertified the class. Both Good Samaritan and Skofield concede that the law surrounding these issues is not definitive. *See* Brief in Chief, pp. 31-32; Answer, p. 29.

The more central question, however, is a factual question: namely, *why* crafting a judgment containing a list of individual class members could not have been done. As Skofield must concede, this was a relatively small class – his Notice was, for instance, nominally sent to less than 300 individuals, although he knew that only 111 of the putative class members still lived at Manzano, where the mailing was sent. RP 2796, 3879-82. And, of course, nearly 60 of

the residents who did receive the Notice opted out.[7] RP 4708-10, ¶ 3. The number of class members who actually received the notice and did not opt out was thus very small, perhaps as few as 50 individuals. Skofield must also concede that he had in his possession information identifying those individuals – since he mailed notice to them – and also showing when they lived at Manzano. Nevertheless, Skofield failed to put into the trial record those identities, or when individual class members lived at Manzano. He could have done so and he should have done so.

Ultimately, the confusion at the heart of Skofield's response to Good Samaritan's brief-in-chief crystallizes when he says that Good Samaritan "simply did not carry its burden of proof." *See* Answer, p. 17. The burden of proof in this action rested on Skofield. Skofield failed to put into the record sufficient evidence of the identities of his class members, when they lived at Manzano, and, most importantly, when, if at all, they had their monthly fees increased. Absent such evidence, Skofield could not prove that anyone (other than himself) was actually a member of his class, much less prove damages to anyone. Skofield has continued to avoid this central failure of proof.

[7] It is worth noting that the number of Manzano residents who opted out of the class was remarkably high. Research shows that typically less than 1% of class members opt out of class actions. *See* Theodore Eisenberg & Geoffrey P. Miller, The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues (N.Y.U. L. & Econ. Research Paper), available at http://www.ssrn.com=528146.

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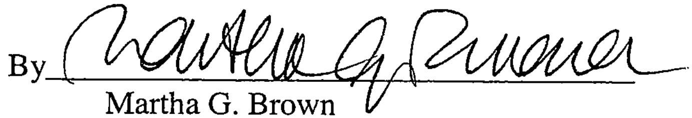
By 
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WE HEREBY CERTIFY that a true
and correct copy of the fore-
going pleading was mailed to
all counsel of record this
22 day of March, 2006.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By:
Martha G. Brown

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