# Case Law Update – Business Law

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# CASE LAW UPDATE

## COLORADO CASE LAW

### I. *Nelson v. Encompass PAHS Rehabilitation Hospital, LLC,* No. 22SA195 (Colo. January 9, 2023).

Introduction

This case involves choice of venue under Colorado Rules of Civil Procedure (C.R.C.P) 98. C.R.C.P 98(f) states "The court may, on good cause shown, change the place of trial in the following cases: (1) When the county designated in the complaint is not the proper county; and (2) When the convenience of witnesses and the ends of justice would be promoted by the change". C.R.C.P. 98(c) interpreted in *Denver Air Center v. District Court* states "If the defendant is not a Colorado resident, then venue is appropriate in the county of plaintiff's choice".

Relevant Facts

Floyd Nelson alleged he sustained injuries from a fall at a rehabilitation hospital owned by Encompass PAHS Rehabilitation, LLC (Encompass) located in Arapahoe County. Nelson brought the action in Boulder County District Court although he is a resident of Arapahoe County, Encompass is located in Arapahoe County, and the alleged tort occurred in Arapahoe County.

Procedural History

Encompass moved to change venue from Boulder County to Arapahoe County pursuant to C.R.C.P 98(f). Nelson opposed the motion asserting the trial court should look to the residences of Encompass's two limited liability members, one of which owns 68% stake and is a Delaware-chartered corporation. Nelson argued that pursuant to C.R.C.P 98(c) as interpreted in *Denver Air Center v. District Court*, Nelson could file suit in the county of his choosing because an LLC can reasonably be found to reside where any of its members may reside. Nelson's argument relied on cases dealing with federal diversity jurisdiction cases. The trial court denied the motion for change of venue and Encompass filed a petition for a rule to show cause.

Holding/Analysis

The Colorado Supreme Court explained that for diversity purposes, a corporation's citizenship or domicile is where it is registered to do business or its principal place of business. In contrast, an LLC takes the citizenship of all its members for diversity purposes. The Court further explained that federal diversity jurisdiction and venue principles are legally distinct concepts. Federal diversity jurisdiction concerns a court's competence to adjudicate a particular category of cases. Subject matter jurisdiction must be determined first and then venue.

The Colorado Supreme Court found that for venue purposes, the LLC is treated separately from its members. Accordingly, the Court held that the residence of an LLC's members cannot properly be considered in determining the LLC's residence for venue purposes under C.R.C.P. 98.

Instead, courts must determine an LLC's residence for venue purposes like a corporation's: by looking to the LLC's residence.

## II. *Highlands Broadway OPCO, LLC v. Barre Boss, LLC.*, No. 21CA 1735 (Colo. App. January 19, 2023).

Introduction

This case references the defense of impossibility, frustration of purpose, and failure to mitigate damages in response to the effect COVID-19 had on a business. During this time, these defenses were commonly seen in an attempt to avoid contract obligations. Early cases involving the impossibility defense often interpreted the word "impossible" literally, while newer case law does not require the cause of nonperformance to be actually impossible, but rather an undue burden, although proving impossibility is harder than it may seem. Notably, economic hardship, even that resulting in bankruptcy or insolvency, does not constitute a factor bearing on the determination of impossibility. Even in the event of a government-issued order, a party asserting impossibility generally must have explored viable alternatives that would permit performance.

Frustration of purpose refers to an excuse for non-performance of contractual duties when a later and unforeseen event impedes the purpose for entering into the contract. Both parties must have been aware of the primary purpose for the contract to begin with. Lastly, a plaintiff has a duty to take reasonable steps under the circumstances to mitigate or minimize its damages.

Relevant Facts

In May 2017, Barre Boss, LLC (Barre Boss) entered into an 84-month lease with Highlands Broadway OPCO, LLC (Highlands Broadway) for commercial property with the plan to operate a fitness facility. The lease contained a force majeure clause that excused a party's delay in performing under the lease, but did not excuse a tenant from the prompt payment of any rent.

In response to COVID-19, the governor issued an executive order requiring Barre Boss to close effective in March 2020. Following this order, the parties signed a letter agreement with terms for Highlands Broadway to defer Barre Boss' rent obligation. Additionally, Highlands Broadway was able to market the premise to prospective new tenants and terminate the lease for any reason giving 30 days' advance written notice. In December 2020, Barre Boss notified Highlands Broadway that it could no longer make monthly rent payments and that it was immediately surrendering possession of the premises.

Procedural History

Highlands Broadway sued Barre Boss for breach of contract. Barre Boss raised the affirmative defense of impossibility, frustration of purpose, and failure to mitigate damages. The trial court held that the affirmative defenses were unsupported and entered judgement in favor of Highlands Broadway.

Barre Boss appealed.

Holding/Analysis

On appeal, Barre Boss argued that the trial court erred by holding the defense of impossibility and frustration of purpose were unsupported. It argued that there was no tenant liability towards Highlands Broadway because COVID-19 was unforeseeable, and the executive order made the tenant's performance illegal, therefore impossible. The Court of Appeals reasoned that the lease's force majeure clause manifested the parties' clear intent to allocate to the tenant the economic risks associated with paying rent. Additionally, the events of COVID-19 were not unforeseeable as Barre Boss and Highlands Broadway entered into a letter agreement and lease amendment in response to the financial impact resulting from the circumstances. Lastly, the executive order did not make it illegal to pay rent, which is the only contractual duty Highlands Broadway alleged Barre Boss breached.

Secondly, Barre Boss argued that Highlands Broadway did not mitigate damages by failing to take reasonable steps to find a new tenant. The Court reasoned that Highlands Broadway advertised for the premises' re-lease. Highlands Broadway's real estate broker also testified that he took standard steps to re-lease the premises. Further, Barre Boss did not call their own expert witness to testify that efforts were unreasonable. Therefore, the Court of Appeals found the trial court did not err.

The Court held that the defenses of impossibility and frustration of purpose are premised on the occurrence of an unanticipated event. Additionally, standard steps that are not proven to be unreasonable are sufficient to rule against a mitigation of damages claim. The judgment was affirmed, and the case was remanded for the determination and award of Highlands Broadway's reasonable attorney fees and costs incurred on appeal.

## III. *Air Solutions, Inc. v. Spivey*, No. 2020CA1998 (Colo. App. February 9, 2023).

Introduction

In this case, the Colorado Court of Appeals addresses issues relating to specific performance as a remedy for a breach of contract, particularly, the adequacy of damages.

Relevant Facts

Benjamin Vrbancic negotiated to buy Air Cleaning Specialists, Inc. for $2.5 million. Vrbancic filed articles of incorporation for Air Solutions, Inc., the entity purchasing Air Cleaning Specialists, and indicated Air Solutions would issue 1,000 shares of stock.

Vrbancic did not qualify to borrow the full purchase price under a Small Business Administration loan (SBA), and the sellers agreed to carry $375,000 of the price as a loan. Still needing $250,000, Vrbancic entered into an agreement with Christopher Spivey who contributed $250,100. Spivey was immediately entitled to 17.5% ownership interest with the right to 49% ownership interest when the company repaid its SBA loan. Contract terms were never fully revised and after the business sale closed, Spivey began working as Chief Financial Officer for Air

Solutions. Vrbancic terminated Spivey's employment who then demanded his shares. Air Solutions took the position that Spivey was not a shareholder and the $250,100 was merely a loan.

Procedural History

Air Solutions and Vrbancic filed the lawsuit seeking a declaration that (a) Spivey is not an Air Solutions owner because there was never a binding agreement, (b) Spivey is not entitled to expense reimbursement; and (c) Air Solutions' return of Spivey's $250,100 contribution with interest would resolve the dispute between the parties. Spivey counterclaimed for breach of contract and fraud seeking equitable relief. The district court instructed the jury to decide:

(i) whether there was a contract; and
(ii) if so, whether there was a breach.

The jury found in Vrbancic's favor on fraud counterclaims but found in Spivey's favor that there was a contract and it was breached. Spivey asked the district court for a decree of specific performance and declaratory relief. The district court denied this request and his remaining declaratory judgment and equitable counterclaims.

Spivey appealed.

Holding/Analysis

The district court denied Spivey's request for specific performance for three reasons: (1) damages are an adequate remedy because "the company" can be valued; (2) specific performance would not be "appropriate or workable" because of animosity between Spivey and Vrbancic, and there would be a "host of logistical and practical problems in implementing and enforcing an order of specific performance"; and (3) because the jury awarded Spivey damages and "he will get his $250,100 returned," "further remedy is not warranted."

The Court of Appeals held that the reasons the district court gave for denying specific performance are based on incorrect understandings and applications of the governing law, a fundamental misreading of the contract that the jury found, or, as to Spivey's supposed entitlement to return of his $250,100 contribution, a plainly erroneous understanding of the other remedies actually awarded. Accordingly, specific performance of the contract that the jury found is appropriate, and the district court abused its discretion by ruling otherwise.

The judgments denying Spivey specific performance and declaratory relief against Air Solutions and Vrbancic were reversed. The award of damages to Spivey on his breach of contract counterclaim was vacated. The case was remanded for further proceedings on the specific performance and declaratory relief issues. The judgment was otherwise affirmed.

## IV. *Mid-Century Insurance Co. v. HIVE Construction, Inc.*, No. 21CA1393 (Colo. App. March 16, 2023).

Introduction

The Colorado Court of Appeals considered whether the economic loss rule bars a willful or wanton negligence claim when the breach resulted in purely economic damages. Under the economic loss rule, a party suffering only economic loss from the breach of a contractual duty may not assert a tort claim for such breach absent an independent duty of care under tort law. In its opinion, the Court stated, "Even if the duty allegedly breached is separately recognized under tort law, it is not 'independent' of the contract for the purposes of the economic loss rule if it addresses the same obligations created by the contract."

Relevant Facts

Masterpiece Kitchen Lowry, LLC (Masterpiece Kitchen) contracted HIVE Construction, Inc (HIVE) and LIV Studio (LIV) for a build-out of a restaurant in Denver. HIVE served as the general contractor while LIV served as the architect. LIV's project design included a wall to separate the restaurant's kitchen from the dining room with two-layered dry wall on the kitchen side. HIVE substituted a layer of fire-resistant (but combustible) plywood in place of a layer of drywall. Two years later, a fire erupted in the wall. Mid-Century Insurance Company's (Mid-Century) fire expert's opinion was that the fire was caused by ignition of the substitute plywood due to heat conducted through the wall from the broiler.

Procedural History

Masterpiece Kitchen was paid $482,508.22 for fire related damage after filing a claim on its insurance policy with Mid-Century. Mid-Century filed a negligence claim against HIVE alleging that HIVE's installation of the combustible plywood demonstrated a careless and reckless disregard constituting willful and wanton conduct. HIVE argued the economic loss rule barred Mid-Century's negligence claim and moved for a directed verdict.

The district court denied the motion for a directed verdict relying on Colorado precedent maintaining the economic loss rule does not apply to intentional conduct. The jury returned a verdict for Mid-Century finding HIVE had engaged in willful and wanton conduct and LIV, as a designated nonparty at fault, had been negligent. 85% of Mid-Century's damages were allocated to HIVE. 15% of the damages were allocated to LIV.

HIVE appealed.

Holding/Analysis

Mid-Century argued that HIVE invited the district court to err by opposing Mid-Century's motion to amend the complaint to substitute a contract claim for its tort claim. Under the invited error doctrine, a party is prevented from complaining to an appellate court of an error that the party invited or injected into the case. Here, HIVE did not declare a tort claim, compared to a contract claim, was the right claim for Mid-Century to pursue. Therefore, Mid-Century's argument fails.

Based on the economic loss rule, Mid-Century argued HIVE waived the right to seek a directed verdict because HIVE failed to include it as a defense in the trial management order as required by CRCP 16(f). CRCP 16(f)(3)(I) states:

> The parties shall set forth a brief description of the nature of the case and a summary identification of the claims and defenses remaining for trial. Any claims or defenses set forth in the pleadings which will not be at issue at trial shall be designated as "withdrawn" or "resolved".

The Court found there is no defense that failing to list the economic loss rule required by CRCP 16(f) waives the defense. The Court explains that Mid-Century had notice of the defense as it was asserted in HIVE's answer. Further, a waiver is an intentional relinquishment of a known right, and the record shows no intent of HIVE to relinquish the economic loss rule as a defense.

Here, HIVE's tort duty is indistinguishable from its duty under the contract as HIVE expressly assumed the duty to perform its work as a general contractor. HIVE cites *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, which does not preclude the application of the economic loss rule to bar common law negligence claims involving willful and wanton conduct. The district court erred by failing to apply the economic loss rule to bar Mid-Century's negligence claim.

The Court of Appeals held that a negligence claim based solely on the breach of a contractual duty that results in purely economic loss is barred by the economic loss rule regardless of whether the negligence was willful or wanton. The judgment was reversed, and the case was remanded with instructions to direct a verdict in favor of HIVE.

## V. ***Safeway Stores 46, Inc. v. WY Plaza, L.C.*, Nos. 20-8064 & 20-8066 (10th Cir. April 7, 2023).**

<u>Introduction</u>

This case raises the issue of restitution for overpayments to conform to a contract. The doctrine of laches and unilateral mistakes are referred to in the analysis. The doctrine of laches refers to a defense asserting that there has been an unreasonable delay in pursuing the claim, aiming to prevent injustice caused by a time-lapse. The delay must have prejudiced the defendant or prevented the defendant from putting on a defense. This differs from a statute of limitations as statute of limitations are concerned with whether the statutory period has lapsed while the doctrine of laches is concerned with the reasonableness of a delay in filing a legal action, making it much more case specific. A unilateral mistake refers to one party's misinterpretation of the terms of a contract and only makes a contract voidable when the mistakes are mechanical errors such as mistakes in calculation or understanding. Mistakes arising from personal opinions regarding the quality or value of an item cannot make the contract voidable.

Relevant Facts

Safeway Stores 46, Inc. (Safeway) leased a store from City View Partners owing a fixed monthly payment and yearly payments based on a percentage of its sales revenue. If Safeway expanded the store, it was allowed to deduct the construction costs from the yearly payments. Safeway expanded the store and City View Partners sold the property to WY Plaza, L.L.C. (WY Plaza). Safeway and WY Plaza modified the lease keeping the terms for yearly payments. Safeway did not owe WY Plaza payments for the first 3 years because sales were too low and construction costs did not need to be deducted. In 2005 Safeway's sales increased triggering yearly payments which were made from 2005-2017 without deducting construction costs. In 2018, Safeway realized it could have been deducting construction costs and demanded reimbursement for the overpayments. WY Plaza refused the demand and Safeway made its 2018 and 2019 yearly payments under protest.

Procedural History

Safeway sued for restitution and a declaration of the right to deduct the balance of the amortization account from the yearly payments. Both parties moved for summary judgment. The district court granted summary judgment to WY Plaza holding that:

(i) the doctrine of laches prevented relief because Safeway's delay had prejudiced WY Plaza; and
(ii) restitution was not available because Safeway's mistake was unilateral and the parties had a written contract.

Safeway appealed to the Court of Appeals for the Tenth Circuit arguing that WY Plaza did not seek summary judgment based on laches but the district court sua sponte raised the laches defense without providing Safeway with notice and a reasonable opportunity to respond.

Holding/Analysis

Safeway argued that the district court erred by not granting its summary judgment motion. In objection, WY Plaza asserted an affirmative defense of laches. The court reasoned that unless the defendant creates a material dispute of fact on an affirmative defense, the district court must grant summary judgment to the plaintiff. The court held WY Plaza failed to create a material dispute of fact on laches, therefore Safeway established its claim.

WY Plaza objected to the restitution claim on grounds that restitution was not available because a valid contract existed, and the mistake was unilateral. The court held restitution is available as a matter of law despite the existence of a contract and unilateral mistake.

The Court of Appeals for the Tenth Circuit determined that restitution may be available when a party overperforms based on a unilateral mistake of fact even when the parties have a contract. The judgment was vacated, and the case was remanded for further proceedings.

## VI. *Macasero v. ENT Credit Union*, No. 21CA1421 (Colo. App. May 4, 2023).

Introduction

The Colorado Court of Appeal in this case examines whether plaintiff, Cecilia Macasero, was put on constructive notice that defendant, ENT Credit Union (ENT), had updated the terms of its membership agreement to include an arbitration agreement, and that she had the right to opt out of the arbitration agreement within a certain time period.

Relevant Facts

In 2014, Macasero purchased a car and entered into a finance agreement with an automobile dealer. The dealer assigned the agreement to ENT. As a result, Macasero was required to open a savings account and sign an authorization with ENT. In 2019, ENT updated the membership agreement's terms to include an arbitration agreement. Members were notified via email or mail, depending on how they had agreed to receive important notices, with their monthly bank statement. The arbitration provision provided members with an opt-out option. The email was never opened by Macasero.

When Macasero purchased her car, she also purchased a Guaranteed Automobile Protection (GAP) waiver that provided that, if the purchaser's automobile insurance payout on a "total loss" claim does not cover the remaining loan balance, the creditor would waive the difference.

Procedural History

In 2020, Macasero filed a class action complaint in district court alleging breach of contract on behalf of herself and the members who entered into finance agreements with GAP, paid off their agreements ahead of schedule, and were not refunded the unearned GAP waiver fees. In 2021, ENT filed a motion to dismiss and compel arbitration. The district court denied, holding that Macasero did not have constructive notice of the arbitration agreement.

ENT appealed.

Holding/Analysis

The Court of Appeals held Macasero had constructive notice of the updated terms.

The Court referenced Black's Law Dictionary's term of constructive notice in addition to previous case law interpretations of the term. It concluded, when determining whether a plaintiff had constructive notice of an arbitration agreement based on email correspondence, courts consider (i) the parties' prior course of dealing, (ii) whether the email was designed in such a way that the notice or hyperlink was reasonably conspicuous, and (iii) the accessibility of the change in terms.

First, Macasero agreed to receive all communications from ENT via email, therefore both parties mutually understood that important notices would be conveyed in this manner.

Second, the term “reasonably conspicuous” is based on the reasonable person standard and questions whether a reasonable person have known about the terms and conduct that would be required to assent to them. The Court found that the notice was not buried or hidden in ENT’s emails or the surrounding information on the screen. Macasero argues ENT was required to send multiple emails to alert her of the updates, but the Court found that this would be asking the Court to improperly hold arbitration agreements to a higher standard than other types of notices.

Third, the hyperlink in the email took readers to a webpage clearly titled “Important Disclosures” with a subheading titled “Important Account Information”.

Therefore, the Court held that Macasero had constructive notice of the arbitration agreement because ENT’s notice was: (i) provided to Macasero in the exact manner to which she had agreed to receive important information and consistent with her prior course of dealings with ENT; (ii) reasonably conspicuous such that a reasonable person would have known about the updates and the process for assenting to, or opting-out of, the arbitration agreement; and (iii) easily accessible by using the included hyperlinks.

The district court’s order was reversed.

## VII. *Grubb v. DPX Enterprises*, No. 22-5073 (10th Cir. 2023).

Introduction

This case involves a breach of contract claim that arises from an employment agreement.

Relevant Facts

DXP Enterprises, Inc. (DPX) sells industrial pumps and pumping equipment. Grubb executed an employment agreement (agreement) with DXP to lead the development and production of horizontal pumps. The agreement stated that the parties intended to create a new company to produce the pumps and that Grubb would own 10% of the new company. The agreement further provided that if the project were successful, Grubb had the right to require DXP to buy his ownership stake at a price based on the new company’s gross revenue. The project was successful, and Grubb notified DXP that he wanted to sell his ownership stake in accordance with the agreement. DXP then informed Grubb that it had never formed the new company, so there was nothing for it to purchase under the agreement.

Procedural History

Grubb sued DXP, asserting claims for breach of contract, actual and constructive fraud, conversion, breach of fiduciary duty, and unjust enrichment, and sought a declaratory judgment. He also alleged that the employment agreement had created a general partnership between Grubb and DXP. The district court determined that although the contract showed the parties’ intent to form a new company, it did not require a new company to be formed.

The court also determined that formation of the new company was a necessary precondition for the exercise of the sale-right provision, and because no new company had been formed, DXP had no contractual obligation under the provision. It further held that even if the contract had required the new company's formation, Grubb's breach-of-contract claim would have accrued when the new company should have been formed in 2008, so his claim would be barred by Oklahoma's five-year statute of limitations. The court also rejected Grubb's partnership claim, ruling that no facts supported the theory. On cross-motions for summary judgment, the district court granted summary judgment in favor of DXP on all claims.

Grubb appealed.

Holding/Analysis

On appeal, Grubb argued that even if the creation of the new company was a condition precedent, the implied duty of good faith and fair dealing required DXP to attempt to satisfy the condition. He asserted that there were no impediments to DXP creating a separate entity at any time, so DXP breached the employment agreement by not creating the new company. Here, the contract's recital that the parties intended to create a new company expressed only an intent and was not a binding provision. But while there was no express contractual commitment to create a new company, DXP may still breach the agreement by denying Grubb the benefit of the sale-right provision through its bad faith failure to adhere to the parties' mutual intention to form the new company. Further, there is substantial evidence that DXP acted in bad faith in refusing to create the company once the horizontal pump endeavor had become sufficiently profitable and Grubb wished to invoke the sale-right provision, and this evidence would support a jury finding that DXP acted in bad faith in that its reason for not forming the new company was to avoid paying Grubb what he was owed under the employment contract. And because the failure of the condition precedent resulted from DXP's bad faith attempt to avoid its payment obligation to Grubb, the breach of contract claim did not accrue until DXP refused to pay Grubb under the sale-right provision. Accordingly, since Grubb filed suit shortly after the refusal to pay, his claim is not barred by the statute of limitations.

Grubb also contended that the district court erred in dismissing his partnership claims because he formed a partnership with DXP in 2008. Here, the employment agreement did not create a partnership, and there is no evidence that Grubb and DXP's relationship was a business for profit. The district court thus did not err in finding that no partnership had been formed, and it properly granted summary judgment in favor of DXP on Grubb's partnership claims.

Grubb further argued that the district court erred in granting summary judgment on his tort claims for conversion, breach of fiduciary duty, unjust enrichment, and constructive fraud. Grubb's claims for conversion and breach of fiduciary duty rely on the existence of a general partnership between the parties, so these claims fail because no partnership was formed. In addition, the unjust enrichment claim fails under Oklahoma law because a party is not entitled to pursue an unjust enrichment claim when it has an adequate remedy at law for breach of contract. As to the constructive fraud claim, Grubb failed to show that DXP had a duty to disclose that no company had been created. And even if DXP had promised to create a company, the remedy for breaking a promise is a claim for breach of contract. Therefore, the district court properly granted summary judgment to DXP on Grubb's tort claims.

The grant of summary judgment in favor of DXP was reversed in part and the case was remanded for further proceedings.

# OTHER INTERSTING CASE LAW

## I. *Ghorab v. Donnie P*, No. 2:19-CV-00718 (W.D. La. March 29, 2023).

Introduction

This case involves Louisiana Blue Sky Laws which are designed to prevent fraud in the sale of securities by requiring an investigation before the securities are placed on the market. The sale of any security in Louisiana is prohibited unless it has been registered by notification or qualification. The commissioner may revoke the registration of any security if upon further examination if appears that (i) the issuer is insolvent, (ii) the issuer had violated any provision of the act or any order of the commissioner of which he had notice, (iii) the issuer has been engaged in or is about to engage in a fraudulent transaction, (iv) the issuer is in any other way dishonest or has made any fraudulent representations in any prospectus or in any other literature that has been distributed concerning the issuer of its securities, or (v) the issuer does not conduct his business in accordance with the law of upon sound business principles.

Secondly, the court relies on the Howey test for its analysis. The Howey test is a legal framework used in the United States to determine if a transaction qualifies as an investment contract under securities regulations. The test consists of four elements: investment of money, expectation of profits, common enterprise, and efforts of others.

Relevant Facts

Khaled Ghorab purchased A Plus Family and Community Services, LLC (A Plus), a member-managed limited liability company, on February 19, 2019. A Plus's primary source of revenue was derived from providing psychosocial therapy services and other treatments to Medicaid patients and billing the health insurance providers. Shortly after Dr, Ghorab assumed management of A Plus, he discovered the business prospects had been grossly misrepresented. The three insurance providers had either been terminated or were in jeopardy of being terminated as sources of income because A Plus failed to obtain the accreditation required by the Louisiana Department of Health.

Procedural History

Dr. Ghorab sought rescission of the contract based on Donnnie P's failure to disclose materially financial information regarding the business. Additionally, Dr. Ghorab sought attorney's fees for breach of contract, violations of the Louisiana Blue Sky Law, Louisiana Revised Statute Sections 51:701, and the Securities Act of 1933. Dr. Ghorab filed a motion for partial summary judgment seeking a judgment that Donnie P was liable under Sections 51:712(A)(2), Louisiana Blue Sky Laws.

Holding/Analysis

Dr. Ghorab asked the Court to rule of the issue of liability under Louisiana Revised Statute Sections 51:70 claiming revenue information regarding A Plus was not disclosed to him. Donnie P argued Sections 51:701 do not apply. The Court applies the Howey test to determine whether this transaction is an investment contract looking at investment of money, common enterprise, and expectation of profits derived solely from the efforts of others.

The first prong, investment of money, raises the issue of whether the investor risked a financial loss by committing assets to the enterprise and whether the purchaser of the purported security was required to give up something of value in exchange. Here, Dr. Ghorab purchased 100% of the LLC interest in A Plus for $279,000,000 made payable in cash and by promissory note. Therefore, the Court concluded the first prong is satisfied.

The second prong requires there to be a common enterprise whereby the focus is on whether the profitability of an individual's investment is intertwined with the success or failure of other parties in the enterprise. Here, A Plus was formed as a Louisiana LLC solely owned by Donnie P at all times prior to the sale on February 19. Dr. Ghorab as the sole member of Ghorab Surgical Associates, LLC purchased 100% of A Plus's member-managed LLC interest from Donnie P. A Plus's articles of organization stated there was no operating agreement in effect. Additionally, the purchase was neither a fractional purchase not a pooling together of funds for sharing in profits and loses with other investors. Therefore, the Court concluded that there is no common enterprise as the purchase of A Plus was for the entire membership interest, assets, and liabilities from one owner to Ghorab Surgical Associates and the second prong is not satisfied.

The third prong the focus is on whether the investor provided consideration with the expectation of a profit or return on investment. In the context of partnerships, the Fifth Circuit applies the factors of *Williamson v. Tucker* to Howey. The *Williamson* factors include:

> (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers

Here, the purchase of A Plus resembles nothing of a limited partner's interest and it singularly resides in the sole member-manager of the LLC, Ghorab Surgical Associates, owned solely by Dr. Ghorab who assumed management after the purchase. Secondly, the Court found Dr. Ghorabs experience and knowledge is greater than a member of the general public. Thirdly, it is clear that the sole investor and manager of A Plus are one in the same, Dr. Ghorab. Therefore, the Court concluded the interests purchased with A Plus resemble those of a general partner.

The Court held that the purchase of A Plus was not a purchase of a common enterprise with the expectation of profits derived solely from the efforts of others, and consequently, the purchase of A Plus was neither the purchase of an investment contract nor a security under the Howey test, the 1933 Act, or Louisiana Blue Sky Law. The motion for partial summary judgment was accordingly denied.