

CASE LAW SUPPORTING 2010 MEMBER PROPOSITIONS

(Member Propositions may be reviewed here:

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*133 CORPORATE LAW-FORMULATING AND APPLYING A "PROPER PURPOSE" ANALYSIS TO A BOOKS AND RECORDS INSPECTION REQUEST-SCHEIN V. NORTHERN RIO ARRIBA ELECTRIC CO- OPERATIVE, Inc.

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I. INTRODUCTION

In *Schein v. Northern Rio Arriba Electric Cooperative, Inc.* [FNI] the New Mexico Supreme Court held that a rural electric cooperative member could inspect cooperative books and records when she desired to inform herself and others of the records' contents through publication of her findings. [FN2] The court allowed inspection because the member stated a "proper purpose." [FN3] The Schein opinion sets guidelines for what constitutes a "proper purpose" when members request information from cooperatives and when shareholders request information from companies. The court's decision is significant because it establishes, for the first time in New Mexico, that a "proper purpose" for access to corporate information should reasonably relate to the shareholder's interest and should not harm the cooperative/corporation or its members/shareholders.[FN4] This Note examines the court's formulation of the "proper purpose" boundaries and discusses the significance of the decision for New Mexico business enterprises, their members and shareholders, and also for business development in our state.

II. STATEMENT OF THE CASE [FN5]

Maureen Schein (Schein) lives in Rio Arriba County, New Mexico, within the area served by the Northern Rio Arriba Electric Cooperative (NORA), a "cooperative nonprofit membership corporation" [FN6] organized under the Rural Electric Cooperative Act. [FN7]

She receives her electricity from NORA and is a member in good standing. Schein works for the Rio Grande Sun newspaper in Espanola, New Mexico.

In 1992, Schein requested seven years of financial information from NORA, which NORA refused. After Schein filed a mandamus action, NORA voluntarily surrendered the documents and Schein dismissed her suit. In 1994, Schein requested NORA's budget materials for that year. NORA granted her request with the exception of one excluded page. A subsequent demand letter from Schein's counsel led to the full disclosure of the missing document. That same year, Schein also asked for access to salary figures of all NORA employees. When NORA refused, Schein brought her second mandamus action in which she sought not only current salary levels but also access to present and future

budget records. Although the district court *134 **dismissed this action. because disclosure might violate privacy interests of NORA employees, it indicated that Schein should have access to other financial records, books and reports.**

In 1995, Schein filed a third mandamus action, which is the subject of this case. Earlier that year, she requested copies of legal bills that two law firms had submitted to NORA for defending the cooperative in the previous two mandamus actions. **When Schein's request for billing information led NORA to produce only edited copies of the requested bills, Schein filed Page 1 of 21 suit.**

Following an in camera review of the itemization sought, **the district court granted Schein's writ.** Not only did it provide for disclosure of the redacted billing information, the district court gave Schein prospective access to NORA's books and records upon reasonable request. Additionally, the writ of mandamus retained jurisdiction for the district court in the event that NORA refused to disclose a requested item.

On appeal, the New Mexico Supreme Court found that the writ exceeded its permissible scope. However, **the supreme court affirmed the disral electric cooperative's legal bill was therefore a proper purpose.**

III. BACKGROUND

A. Other Jurisdictions

Corporate shareholders' long-recognized right of inspection has evolved in their favor, **entrenched not only in common law but in state statutes as well. [FN8] The law confers similar inspection rights not only on corporate shareholders, but also on other business forms, including cooperatives. [FN9] However, the inspection right is limited.** Before exercising the right, **a shareholder must have a "proper purpose,"** a nebulous term that has spawned much litigation. [FN 10] This section will summarize the evolution of American shareholder inspection rights, discussing the types of organizations affected and focusing on the proper purpose requirements. It will also examine the embryonic stage of New Mexico case law within the existing state statutory framework.

1. Right of Inspection

Historically, a shareholder had a right to inspect corporate records in English common law. (FN 11] This right of inspection survived in America, with qualifications. [FN12] Generally stated, the common law allowed a shareholder, acting in good faith, to inspect corporate records at reasonable times and for proper purposes. (FN13] **However, *135 inspection was not granted to satisfy a shareholder's idle curiosity [FN14] or in broad recognition of an unqualified right. [FN 15]**

In the nineteenth century, with the growth in complexity and numbers of corporations, shareholders desired a more reliable mechanism to promote the flow of information between the two groups. [FN i 6] The ensuing codification of the common law right of

inspection, with its proper purpose requirement, initially placed a significant burden upon the shareholder and bred litigation. [FN 17] Thus, many state legislatures abandoned the proper purpose requirement as too restrictive, which, in turn, led to shareholder abuse of access rights. [FN18] Finally, the pendulum swung back towards where it points today, with the proper purpose limitation restored. [FN19]

Now, every United States jurisdiction has codified the shareholder right of inspection, [FN20] which most state courts interpret as expanding the pre-existing common law right. [FN21] Generally stated, inspection rights extend "(1) to qualified shareholders (2) upon written demand (3) at reasonable times and (4) for a proper purpose.

The right of shareholder inspection stems from the shareholder's property interest in the business. [FN23] Inspection embodies the shareholder's need for self-protection. [FN24] Thus, because shareholders are owners interested in the corporation and its officers, who act on behalf of the corporation's investors, the law provides a means for promoting accountability. [FN25]

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2. Types of Organizations

All corporations, whether closely or publicly held, are subject to inspection by their shareholders. [FN26] Statutes also extend inspection rights to not-for-profit *136 corporations, [FN27] condominium associations, [FN28] cooperatives generally, [FN29] and to rural electric cooperatives specifically. [FN30] In the only decision involving rural electric cooperative members' inspection rights, the Idaho Supreme Court interpreted a statutory scheme in which such cooperatives were formed under that state's Nonprofit Corporation Act.

[FN31] Both of Idaho's Nonprofit Corporation Act and Idaho's Business Corporation Act provide for member/shareholder inspection rights. [FN32] Although the Nonprofit Act controls, [FN3 3] the court has held that inspection rights would exist under either statute. [FN34]

3. Proper Purpose

Much of the litigation on shareholder inspection revolves around the propriety of "purpose." In general, a shareholder states a proper purpose when his request: 1) relates to his position as a shareholder; [FN35] 2) is lawful; and 3) is not contrary or harmful to the interest of the corporation. [FN36] Courts construe the "proper purpose" test liberally in favor of shareholders. [FN37] Indeed, the burden of proof is on the corporation to prove an improper purpose. [FN38] In application, courts in other jurisdictions have

*137 found a wide variety of proper inspection purposes. For example, proper purposes can include determining whether corporate affairs are legally conducted, [FN39] obtaining a list of other shareholders in hopes of consummating a tender offer, [FN40] and valuing one's stock. [FN41] **Examples of improper purpose defeating the inspection right include non-specific demands for a shareholder list, [FN42] strictly personal investment concerns, [FN43] and to gain a competitive advantage over the party resisting the inspection. [FN44]**

In a notable line of Delaware cases, improper purposes were rendered irrelevant and did not preclude inspection so long as the shareholder had previously established a proper purpose. [FN45] .

B. New Mexico

New Mexico statutory law on shareholder inspection of business [FN46] and non-profit [FN47] corporation books and records substantially comports with that of a majority of other jurisdictions. [FN48] Indeed, the inspection right section of the state's Business Corporation *138 Act adopted that of the 1970 Model Business Act nearly verbatim. [FN49] State case law interpreting the statutes, however, is underdeveloped. In the only significant New Mexico shareholder inspection decision. *Schwartzman v. Schwartzman Packing Co.*, [FN50] **the supreme court interpreted. the business corporation inspection law generously, in favor of the shareholders, but with limits.** [FN51] The *Schwartzman* court affirmed that the minority shareholders, who had alleged misappropriation of assets and oppressive conduct on the part of the majority shareholders, could inspect the books of a closely held family corporation. [FN52] However, the court held that such rights had boundaries, which the trial court properly fixed. [FN53] At issue in *Schwartzman*, therefore, was the scope of inspection rights, rather than their existence. [FN 54]

139 A. Right of Inspection

In *Schein*, the court stated the majority rule, codified [FN62] and applied previously in *Schwartzman*, [FN63] **that a shareholder has the right to inspect corporate records at reasonable times and places, for proper purposes.** [FN64] Indicating its support for a policy of "generous access" in favor of shareholders, and setting the tone Page 3 of 21 for the decision, the court credited a shareholder's possessory interest in the corporation as grounds for supporting inspection. [FN65]

C. Proper Purpose

In reaching its decision in *Schein*, the court placed the burden of proof upon the respondent to prove a shareholder's improper purpose. [FN78] The *Schein* court considered an improper purpose to be one harmful to the corporation. [FN79] ~~Consistent with this policy of allowing generous access," the court assumed shareholders act in good faith and have a proper purpose. [FN80] Further, bare assertions of impropriety will not suffice to stop inspection, as the court noted in *Curkendall v. United Federation of Correction Officers, Inc.* [FN81] The *Schein* court cited *Curkendall* with approval. [FN82] There, the corporation's motion to deny inspection, supported with

affidavits of the shareholder's bad faith, met the corporation's burden of showing improper purpose. [FN83] **Thus, a corporation in New Mexico must enunciate "strong and articulable" reasons for denying inspection.** [FN84]

The Schein court's determination of what constitutes a proper shareholder purpose relied on other jurisdictions favoring access to corporate records for legitimate shareholder concerns. [FN85] In the course of its survey, the court first found that a proper purpose should reasonably relate to legitimate shareholder interests, such as assessing corporate investments.

[FN86] The court then found that a proper purpose should not harm the corporation or other shareholders. [FN87]

According to the opinion, Schein gave three primary purposes for her desire to inspect NORA's legal bills. [FN88] First, she wanted to inform herself of the bills' contents; second, she hoped to inform other cooperative members; and third, she *141 proposed to notify the general public of any newsworthy information. [FN89] In finding that these purposes reasonably related to her membership in the cooperative, the court validated her interest in the cooperative's use of legal services. [FN90] **The court reasoned that contracting for legal services and the value of services received can affect the value of a share or lot] rural electric cooperative capital account.** [FN91] **Thus, shareholders' and members' interest in such legal services questions reasonably relates to their position as shareholders and members concerned about their investment.** [FN92]

The court further found none of Schein's purposes harmful to the corporation or other shareholders. [FN93] Proposed publication of the legal billing information that Schein sought, in this situation, would not defeat inspection. [FN94] In so finding, the supreme court deferred to the district court, which it deemed better positioned to assess the propriety of the redacted information that the district court had reviewed in camera. [FN95] That Schein court found the redacted information, even if published, would not harm NORA. [FN96] Thus, because Schein's request reasonably related to her role as a shareholder and did not pose any harm to NORA, Schein met the proper purpose test. [FN97]

V.ANALYSIS

By its selective treatment of Schein's stated purposes, the Schein court seemed determined to grant inspection and to find publication to be a proper purpose. **In doing so, the court rejected arguments that the billing information sought was confidential information and inappropriate** for newspaper publication. [FN98] The court said nothing about a potentially improper purpose raised in deposition, [FN99] only partially addressed another, [FN100] and instead discussed a purpose that Schein never alleged. [FN 1 01]

The Schein court could have barred disclosure, even with a finding of proper purpose, had it adopted NORA's argument that the attorney-client privilege protected the redacted billing information. [FN102] While recognizing that materials subject to the *142 attorney-client privilege may be kept from shareholders, the court held that the limits of the privilege do not extend to billing information. [FN103] The court likened the materials sought to information about the purpose for which NORA retained an attorney, the steps the attorney took in fulfilling his obligations, and the general nature of legal services provided, none of which are confidential and protected. [FN104]

The court also rejected NORA's assertion of confidentiality, holding that a mere assertion of sensitivity would lead to unwarranted protection. [FN 1 05] Thus, the court's action reinforces existing authority holding that simple inquiries into the dates legal services are rendered, the time allotted, and the nature of the work performed are not privileged. [FN 106] More importantly, it limits corporate options in searching for a device to protect against disclosure of information relating to the company's dealings with its lawyers. A question of shareholder access will not create exceptions for traditional boundaries of attorney-client privilege.

The common-law shareholder right of inspection, purportedly adopted by the court in Schein, [FNI07] denied that right when its object was merely to satisfy curiosity. [FNI08]

The court's decision, however, does little to clarify the line in New Mexico between mere curiosity and legitimate proper purpose. The court defined Schein's goal as to "inform" herself and others about the bills' contents, and perhaps publish her findings. [FN 109] However, certain of her statements taken in deposition could lead one to believe that Schein was engaged in nothing more than the sort of fishing expedition frowned upon by the common law. [FN 110]

Perhaps due to Schein's invocation of several other purposes, or the fact that curiosity underlies every request for shareholder access, the Schein court chose not to address statements suggestive of mere inquisitiveness.

VI. IMPLICATIONS

The Schein decision may adversely affect companies and their shareholders, and cooperatives and their members, in New Mexico. **Among managers, the Schein decision should promote accountability. A wide range of business forms should now be on notice that their shareholders or members are afforded a general presumption of propriety when seeking access to corporate books, records and probably shareholder lists. New Mexico cooperative members will better appreciate their highly respected ownership rights.** All parties interested in the impact of law on economic development, including New Mexico courts, may well be concerned if New Mexico adopts a general rule that publication is always a proper purpose. Although the publication purpose should clearly be limited to the facts of this case, the analysis in Schein may nonetheless discourage business enterprises considering incorporating here.

This section will therefore discuss Schein's implications for managers and shareholders, and will then discuss how business enterprises and New Mexico courts might react.

Further, the New Mexico shareholder need not fear alleging mismanagement as a proper purpose. Although Schein did not raise the issue, the opinion is replete with language recognizing that a shareholder's

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[reasonable suspicion of mismanagement will warrant inspection.](#) [FN 137]

New Mexico has already recognized the legitimacy of that purpose in *Schwartzman v. Schwartzman Packing Co.* [FN138] Because the issue there was *146 the scope of relief, the supreme court presumed the shareholders' propriety of purpose in successfully alleging managerial wrongdoing. [FN 139]

Supported allegations of mismanagement can serve as a springboard to other actions. For example, mismanagement can be the purpose for inspection when a disgruntled shareholder is upset with a lack of dividends. Because under New Mexico statute, a corporation is under no obligation to pay a dividend, [FN 140] simple allegations to that effect will not succeed.

However, if the basis for a failure to pay dividends is managerial impropriety, as is often the case, the court may grant inspection, which in turn could lead to larger relief. [FN 14 I] Mismanagement can also provide support for access to a company's shareholder list. [Management may be so bad that a shareholder suing the corporation can successfully gain access to the list to recruit other plaintiffs from among shareholder ranks to join in a lawsuit.](#) [FN142]

The forgoing is copied from 133 ALR

It is a sample of the 21 page document which the public can access from the N.M. Supreme Court Library's web site. The items below are inserted to, in addition to this ALR, illustrate how in appropriate and misleading the advice given is that suggest that "a by-law granting members the right to inspect books, records, audits, etc. of Socorro Electric Co-op, for a proper purpose is unlawful due to the "Schein v. Northern Rio Arriba decision.

[FN8]. See, e.g., *Guthrie v. Harkness*, 199 U.S. 148, 154-55 (1905) (adding that "those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property"); see also *Durnin v. Allentown Fed. Say. & Loan Ass'n*, 218 F. Supp. 716, 718 (E.D. Pa. 1963); *Kalanges v. Champlain Valley Exposition, Inc.*, 632 A.2d 357,359 (Vt. 1993).

William Coale Dev. Co. v. Kennedy, 170 N.E. 434, 435 (Ohio 1930). The court stated: Can anything be plainer than the fact that the owner of property has a clear right to inspect his own property? When the owner of property selects an agent or agents to care for and manage his property, how can that act be held to clothe the agent with power to manage the owner as well as to manage the property, and to prevent the owner from even looking at his own property except he do so pursuant to the rules and restrictions promulgated by the agent, who is wholly without power or authority to formulate any such rules or regulations? Are we to forget and abandon all the law pertaining to the relation of principal and agent?

Id.

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Id. 62-15-7. Bylaws.

The original bylaws of a cooperative shall be adopted by its board of trustees. Thereafter by-laws shall be adopted, amended or repealed by the majority of the members present at any regular annual meeting or special meeting called for that purpose, a quorum being present. The bylaws shall set forth the rights and duties of members and trustees and may contain other provisions for the regulation and management of the affairs of the cooperative not inconsistent with this act [62-15-1 to 62-15-32 NMSA 1978] or with its articles of incorporation. History: Laws 1939, ch. 47, § 7; 1941 Comp., § 48-407; 1953 Comp., § 45-4-7; Laws 1957, ch. 97, § 1.

62-15-8. Members.

A. No person who is not an incorporator shall become a member of a cooperative unless he agrees to use electric energy furnished by the cooperative when electric energy is available through its facilities. The by-laws of a cooperative may provide that any person, including an incorporator, shall cease to be a member of a cooperative if he fails or refuses to use electric energy made available by the cooperative or if the electric energy is not made available to that person by the cooperative within a specified time after he becomes a member of the cooperative. Membership in the cooperative shall not be transferable except as provided in the bylaws. The bylaws may prescribe additional qualifications and limitations in respect of membership.

B. An annual meeting of the members shall be held at such time as shall be provided in the bylaws or, if not contrary to the bylaws, by the board of trustees.

C. Special meetings of the members may be called by the board of trustees, by any three trustees, by petition signed by not less than ten percent of the members or by the president.

D. Annual and special meetings of members whether general or by voting districts established pursuant to the Rural Electric Cooperative Act [62-15-1 NMSA 1978], shall be held at such place as may be provided in the bylaws. In the absence of any such provision, all general meetings shall be held in the city or town in which the principal office of the cooperative is located and all meetings by voting districts shall be held at a location set by the board of trustees within the boundaries of each district.

E. Except as otherwise provided in the Rural Electric Cooperative Act, written or printed notice stating the time and place of each meeting of members and, in the case of a special meeting, the purpose for which the meeting is called shall be given to each member by the board of trustees or the secretary, or their legal representatives, either personally or by mail not less than ten or more than twenty-five days before the date of the meeting. Failure to receive notice deposited in the mail addressed to a member at the member's address shown on the cooperative's books and records shall not affect the validity of any

business conducted at a meeting.

F. Five percent of all members present in person constitute a quorum for the transaction of business at all meetings of the members, unless the bylaws prescribe the presence of a greater or lesser number of members for a quorum. If less than a quorum is present at any meeting, a majority of those present in person may adjourn the meeting from time to time without further notice. The failure to hold a meeting of members due to the absence of a quorum shall not affect the validity of any business conducted by the board of trustees.

G. Each member shall be entitled to one vote on each matter submitted to a vote at a meeting. Voting shall be in person; provided that if the bylaws provide for voting by proxy or by mail, the bylaws shall prescribe the conditions under which proxy or mail voting shall be exercised. No person shall vote as proxy for more than three members at any meeting of the members.

62-15-10. Voting districts.

Notwithstanding any other provision of this act [62-15-1 to 62-15-32 NMSA 1978], the bylaws may provide that the territory in which a cooperative supplies electric energy to its members shall be divided into two or more voting districts, and that, in respect of each such voting district:

A. a designated number of trustees shall be elected by the members residing therein; or

B. a designated number of delegates shall be elected by such members; or

C. both such trustees and delegates shall be elected by such members.

In any such case the bylaws shall prescribe the manner in which such voting districts and the members thereof, and the delegates and trustees, if any, elected there from shall function, and the powers of the delegates, which may include the power to elect trustees.

No member at any voting district meeting and no delegate at any meeting shall vote by proxy or by mail.

History: Laws 1939, ch. 47, § 10; 1941 Comp., § 48-410; 1953 Comp., § 45-4-10.

The following laws are taken from the New Mexico State Laws, Article 15, "RURAL ELECTRIC COOPERATIVES", Sections 62-15-1 through 62-15-37

The sections cited, 62-15-7- Bylaws, 62-15-8 - Members, 62-15-10 - Voting Districts, Are pertinent to the upcoming Annual Meeting and the Propositions passed by the members of District 3 and District 5 which are to be voted upon at that meeting. A reading of these actual laws and the NM Supreme Court ruling which precedes this page will show that accusations of illegality of any of these member propositions are fabrications. In particular, Section-62-15-8, G. and Section-62-15-10, C. addresses the question of voting by mail. If the "Fair Election" member proposition is passed at the Annual Meeting, voting at all meetings, Annual, Special, etc. will be the standard and members will no longer have to drive hundreds of mile to exercise their voting rights. The only exception will be "voting District meeting(s)." as described in 62-15-10 and this

law is being examined with the intent of doing away with this restriction which presents a barrier to the exercise of voting rights in our large cooperative districts statewide.

The By-Laws that deal with Election of Trustees can be found in The Socorro Electric Cooperative by-laws. Pertinent sections are Article V, Sections 2, 3, & 4; Article III, Sections 3, 5, 6, 7, 8, 10, 11, & 12.