



DAMAGE DISCLOSURE AFFIDAVITS

WHAT ARE THEY? BEATS ME!

07/25/2023

Agenda

The 6% and inspection rules

What is an “affidavit” for the purpose of the UPA?

Notary requirements for affidavits in other contexts.

Hernandez v. Outwest Auto Corral, LLC (Test Case)

Synthesis of the 6% affidavit rule

Must 6% affidavits be notarized?

Suggestions for the Future



New Mexico's 6% Rule – NMSA § 57-12-6

- The dealer MUST, where the "flat rate manual cost of the alteration or chassis repair [is six percent or more] of the sales price of the vehicle...furnish at the time of sale of a motor vehicle an AFFIDAVIT" that:
 - Describes the vehicle;
 - "States to *the best of the seller's knowledge* whether there has been an alteration or chassis repair due to wreck damage."

New Mexico's 6% Rule Inspection Regulation – NMAC § 12.2.14.1 *et seq.*

- A dealer “shall furnish at the time of sale of a motor vehicle an affidavit that states to the best of the seller’s knowledge whether there has been an alteration or chassis repair due to wreck damage...”
- A dealer will be deemed to have complied with the 6% rule where they:
 - Conduct a vehicle inspection in compliance with the regulation;
 - Complete an inspection report in compliance with the regulation;
 - Provide the inspection report to the buyer;
 - Maintain the inspection report in the seller’s records for four years.

The Dealer MUST COMPLY WITH BOTH RULES

- To be clear, the Dealer MUST provide the customer:
 1. The 6% damage disclosure affidavit, AND;
 2. The regulatory inspection report.

Q: What is an affidavit for the purposes of the 6% rule? A: Beats me!

- The 6% rule simply states "shall furnish at the time of sale of a motor vehicle an affidavit...".
- The rule never defines affidavit or details what should be on the affidavit other than (1) description of the vehicle; and (2) "state[] to the best of the seller's knowledge whether there has been an alteration or chassis repair due to wreck damage."
- There is nothing in the rule or regulation stating that the "affidavit" must be notarized.

How does the law define “Affidavit” in other contexts? **ELECTIONS**

- *Kiehne v. Atwood*, 93 N.M. 657 (N.M. 1979) – In this election law case, the New Mexico Supreme Court held that a notary was required for absentee voters under statute because:
 - “We hold that, as to the affidavits in question, swearing to and subscribing by the voter and attesting to by a notary or other official are not mere technicalities. The statutes prescribing these duties are not simply directory. The acts called for are significant safeguards against fraud and mistake, are necessary to preserve the purity of our elections, and are mandatory duties.”

How does the law define “Affidavit” in other contexts? MVD LICENSURE

- *Stephens v. Transp. Dept., M.V.D.*, 106 N.M. 198 (N.M. Ct. App. 1987) – In this case, an arresting officer completed an MVD “affidavit” to take a DWI suspect’s license. The form provided for a notary stamp, but it was not notarized when submitted to the MVD. The New Mexico Court of Appeals held that the absence of a notary stamp rendered the revocation invalid. The court reasoned:
 - The statute specifically provides that the statement must be made “under penalty of perjury” and that the absence of a notary stamp renders the document unsworn and invalid.

How does the law define “Affidavit” in other contexts? WILLS AND ESTATES

- *Ridlington v. Contreras*, No. A-1-CA-37029 (N.M. Ct. App. Apr. 23, 2020) – In this case, deceased father’s daughter filed suit against her brother to contest her father’s transfer of property to the son alone immediately before his death. The daughter alleged undue influence and improper notary certification on the deed. The New Mexico Court of appeals upheld the property transfer reasoning as follows:
 - “In any event, notarization is not a requirement for the deeds to be binding as between the parties involved. See NMSA 1978, § 14-13-12 (1901) (“An acknowledgment of an instrument of writing shall not be necessary to its execution unless expressly so provided by statute.”)” *Ridlington v. Contreras*, No. A-1-CA-37029, at *8 (N.M. Ct. App. Apr. 23, 2020)

How does the law define “Affidavit” in other contexts? COURT RULES

- Court Rules – “A written statement...or other document that is not notarized shall have the same effect in a court proceeding as a notarized written statement”, provided that the statement includes (1) the date the statement was given; (2) it is signed by the person making the statement; and (3) it contains “a written affirmation under penalty of perjury under the laws of the State of New Mexico that the statement is true and correct.” N.M. R. Civ. P. Dist. Ct. 1-011.

Test Case: *Hernandez v. Outwest Auto Corral, LLC et. al.* D-202-CV-2018-03785 (Currently on Appeal)

Factual Summary

- Dealer sells used vehicle where prior damage/repairs exceed 6% of sale price;
- The customer signs an inspection and “damage disclosure statement”;
- The “damage disclosure statement” does not include language that it is under oath, sworn, etc. ;
- Customer sues dealer for failure to disclose;
- Hon. Victor Lopez holds that the Dealer violated the UPA as a matter of law because the “damage disclosure statement” is not sufficient to satisfy the affidavit requirement.

Test Case: *Hernandez v. Outwest Auto Corral, LLC et. al.* D-202-CV-2018-03785 (Currently on Appeal)

Legal Rational:

- Going back to “New Mexico’s Territorial days” notaries have been empowered to administer oaths.
- Black’s Law Dictionary defines “Affidavit as a written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.”
- Based on the judge’s cited authority, “The Legislature imposed a serious burden on sellers under the Unfair Practices Act to prevent misrepresentation of a vehicle’s condition...[a]lthough the form...might qualify under the Act if the signer had signed the form before a notary public...a simple signature, without an oath or affirmation component by a notary public is insufficient.”

Test Case: *Hernandez v. Outwest Auto Corral, LLC et. al.* D-202-CV-2018-03785 (Currently on Appeal)

Implications of the Ruling

- The ruling is limited to the facts of the specific case and are not formally binding on other judges in other cases;
- The ruling could be used by consumer lawyers to convince other judges that affidavits must be notarized;
- Appeal of this issue to a higher court or regulatory action may be necessary in the future to obtain clarity on the issue.

Thoughts on the Ruling

- The “damage disclosure statement” was defective in other ways. For example, nowhere did it state that it was an “affidavit” or that it was sworn.

Synthesis of the Affidavit Rule

- At the very least, all damage disclosure affidavits must contain language that they are signed “under penalty of perjury”, “swear or affirm”, or “under oath”, etc.
- At the very least, all damage disclosure affidavits must be signed by the consumer and the dealer.

MUST A DAMAGE DISCLOSURE AFFIDAVIT BE NOTARIZED? YES OR NO!

The answer is complicated:

- Judge Lopez's ruling is not binding precedent.
- There is some case law and statutory support for the notion that a notary stamp is not required.

SERIOUSLY, DO I HAVE THE AFFIDAVITS NOTARIZED OR NOT!

- Without better guidance from the Legislature, Attorney General, or Courts, whether to notarize affidavits is a *business decision* that every dealer must make for themselves.

NOTARIZING DAMAGE DISCLOSURE AFFIDAVITS: PROS VS. CONS

PROS

- Gold standard compliance;
- Near complete defense to consumers alleging they did not sign disclosures.

CONS

- Temptation to cut corners;
- Probability of error;
- Reliance on sales or finance staff to become licensed and keep good records;
- All the blanks must be filled in!

SUGGESTIONS FOR THE FUTURE

- The Attorney General should publish a *de facto* compliant damage disclosure affidavit that does not require a notary stamp.
- The Legislature could amend the UPA to explicitly state, one way or another, whether the affidavit must be notarized.
- An appellate court could hold that, absent specific direction from the legislature or regulatory authority, that an affidavit is valid so long as it is given under oath, signed, and dated.



Thank you

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