

1 **13-841. Prevention; excuse for nonperformance.**

2 A party to a contract who prevents the other party from performing a contractual obligation
3 cannot take advantage of the non-performance. The party prevented from performing is excused
4 from the obligation to perform.

5 USE NOTES

6 This instruction is to be used where one party prevents either fulfillment of a condition
7 precedent to performance or performance itself. The instruction should be modified if a party
8 contends that it was wrongfully hindered, as opposed to prevented, from performing.

9 [Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006,
10 effective for all cases pending or filed on or after December 31, 2020.]

11 **Committee commentary.** — “A party to a contract cannot take advantage of [his][their] own act
12 or omission to escape liability thereon.” *Gibbs v. Whelan*, 1952-NMSC-005, ¶ 10, 56 N.M. 38,
13 239 P.2d 727. In keeping with that principle, “[a] party to a contract, who prevents its performance
14 by the adverse party, cannot rely on the adverse party’s non-performance to defeat [his][their]
15 liability. The party who has been prevented from discharging [his][their] part of the obligation is
16 to be treated as though [he][they] had performed it.” [*Estate*]*Est. of Griego v. Reliance Standard*
17 *Life Ins. Co.*, 2000-NMCA-022, ¶ 27, 128 N.M. 676, 997 P.2d 150 (in part, paraphrasing *Nat’l*
18 *Old Line Ins. Co. v. Brown*, 1988-NMSC-071, ¶ 21, 107 N.M. 482, 760 P.2d 775 (internal quotation
19 marks and citation omitted)). In other words, the party who prevents the other party from
20 performing cannot use the non-performance to avoid the contract or to claim a breach of contract.
21 Instead, the non-performance is excused.

22 The foregoing principles may apply when a party prevents fulfillment of a condition precedent to
23 performance, *see Dechert v. Allsup’s Convenience Stores, Inc.*, 1986-NMSC-074, 104 N.M. 748,

1 726 P.2d 1378 (discussing but finding principle inapplicable) or performance of a contractual
2 obligation, *Gibbs*, 1952-NMSC-005, ¶ 12.
3 Further guidance regarding the doctrine of prevention, as it relates to a party who wrongfully
4 prevents or hinders the other party from performing under the contract, may be found in the
5 Restatement (Second) of Contracts § 245 (1981) as well as 13 Richard A. Lord, *A Treatise on the*
6 *Law of Contracts* by Samuel Williston §§ 39:3-12 (4th ed. 2013).
7 [As amended by Supreme Court Order No. 20-8300-006~~], effective for all cases pending or filed~~
8 ~~on or after December 31, 2020~~]; as amended by Supreme Court Order No. S-1-RCR-2025-00126.]