

1 **13-834. Misrepresentation.**

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3 _____ (*name of defendant*) claims that the contract upon which _____
4 (*name of plaintiff*) relies is void because of misrepresentation by _____ (*name of*
5 *plaintiff*).

6 To establish the defense of misrepresentation, _____ (*name of defendant*)
7 must prove all of the following:

8 1. That _____ (*name of plaintiff*) made a misrepresentation;

9 2. That the misrepresentation was [fraudulent] [or] [material];

10 3. That _____ (*name of defendant*) would not have entered into the
11 contract if [he][she][it] had known that the representation was untrue; and

12 4. That _____ (*name of defendant*)'s reliance on the misrepresentation
13 was justified.

14 [A material misrepresentation is any untrue statement upon which the other party did in
15 fact rely in entering into the contract, and without which the other party would not have entered
16 into the agreement.]

17 [A misrepresentation is fraudulent if one party makes it with the intent to deceive and to
18 cause the other party to act on it. If a fraudulent misrepresentation is at issue, it must be proven
19 by clear and convincing evidence.]

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USE NOTES

1 Use this instruction when the defendant contends that a contract is void because of a
2 misrepresentation by the plaintiff. Include the first bracketed paragraph when a material
3 misrepresentation is alleged. Include the second bracketed paragraph when a fraudulent
4 misrepresentation is alleged. If the defendant contends that the misrepresentation was fraudulent,
5 the jury should also be instructed that a fraudulent misrepresentation must be proven by clear and
6 convincing evidence. *See* UJI 13-405 NMRA.

7 [Adopted by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on
8 or after December 31, 2020.]

9 **Committee commentary.** — Misrepresentations by one party as to a writing can make a
10 contract voidable by the other party. *See, e.g., Gross Kelly & Co. v. Bibo*, 1914-NMSC-085, ¶¶
11 17, 35, 19 N.M. 495, 145 P. 480. “In order for this to occur, the recipient of the
12 misrepresentation must show that (1) there was a misrepresentation that was (2) material or
13 fraudulent and which (3) induced the recipient to enter into the agreement, and that (4) the
14 recipient's reliance on the misrepresentation was justified.” *Sisneros v. Citadel Broadcasting Co.*,
15 2006-NMCA-102, ¶ 10, 140 N.M. 266, 142 P.3d 34.

16 The contractual defense does not require fraud, or that the misrepresentations be
17 intentional. “The rule in New Mexico is that irrespective of the good faith with which a
18 misrepresentation of material fact is made, if it is justifiably relied on by one seeking rescission
19 of the contract, such rescission should be allowed.” *Jones v. Friedman*, 1953-NMSC-051, ¶ 22,
20 57 N.M. 361, 251 P.2d 1131; *see also Maxey v. Quintana*, 1972-NMCA-069, ¶ 9, 84 N.M. 38,
21 499 P.2d 356 (“Rescission may be effected without regard to the good faith with which a

1 misrepresentation is made.”). However, when the misrepresentation is not material, fraudulent
2 intent must be shown. *See Sisneros*, 2006-NMCA-102, ¶ 10; *cf. McElhannon v. Ford*, 2003-
3 NMCA-091, ¶ 15, 134 N.M. 124, 73 P.3d 827 (“[R]escission may be allowed in certain cases of
4 non-fraudulent, but material, nondisclosure.”).

5 The burden of proof is different depending on whether fraud or misrepresentation is at
6 issue. Where the misrepresentations are fraudulent, the defendant must prove the defense under
7 the higher clear and convincing standard. *See, e.g., McLean v. Paddock*, 1967-NMSC-165, ¶ 16,
8 78 N.M. 234, 430 P.2d 392 (requiring the defense of fraud to be proven by clear and convincing
9 evidence), *overruled on other grounds by Duke City Lumber Co., Inc. v. Terrel*, 1975-NMSC-
10 041, ¶ 7, 88 N.M. 299, 540 P.2d 229.

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