

1 **13-861. Punitive Damages.**

2 [If you find that _____ (*name of party making claim for punitive*
3 *damages*) should recover compensation for damages, and if you further find that the conduct of
4 _____ (*name of party whose conduct gives rise to a claim for punitive*
5 *damages*) was [malicious], [reckless], [wanton], [oppressive], or [fraudulent], then you may
6 award punitive damages.]

7 In this case, _____ (*name of party making claim for punitive damages*) seeks to
8 recover punitive damages from _____ (*name of party against whom punitive damages are*
9 *sought*). You may consider punitive damages only if you find that _____ (*party making*
10 *claim*) should recover compensatory damages. Not every breach of contract warrants punitive
11 damages.

12 Only if you find that _____ (*name of party against whom punitive damages are*
13 *sought*) breached the contract and that [his] [her] [its] conduct in committing the breach was
14 [malicious], [reckless], [wanton], [oppressive], [or] [fraudulent] [rather than being legitimate or
15 justified in the circumstances], then you may award punitive damages against [him] [her] [it].

16 [Malicious conduct is the intentional doing of a wrongful act with knowledge that the act
17 was wrongful.]

18 [Reckless conduct is the intentional doing of an act with utter indifference to the
19 consequences.]

20 [Wanton conduct is the doing of an act with utter indifference to or conscious disregard
21 for a person's rights.]

1 [Fraudulent conduct consists of a misrepresentation of fact that the maker knows to be
2 untrue [or that is made recklessly], by which the maker intends to deceive another for the
3 purpose of causing the other to act in reliance on the misrepresentation, and on which the other
4 does rely.]

5 ~~[Such additional]~~Punitive damages are awarded for the limited purpose of punishment
6 and to deter others from the commission of like offenses. The amount of punitive damages must
7 be based on reason and justice taking into account all the circumstances, including the nature and
8 enormity of the wrong and such aggravating and mitigating circumstances as may be shown. The
9 property or wealth of the defendant is a legitimate factor for your consideration.The amount
10 awarded, if any, must be reasonably related to the injury and to the damages given as
11 compensation and not disproportionate to the circumstances.

USE NOTES

14 Appropriate bracketed language should be selected depending on the type of conduct
15 ~~[offered]~~ alleged to ~~[justify]~~ support punitive damages and, as to the bracketed phrase regarding
16 a “legitimate or justified” breach in the second paragraph, on whether there is evidence that any
17 breach that occurred was committed for a legitimate or justifiable reason. For punitive damages
18 in insurance bad faith cases, see UJI 13-1718 NMRA.

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

1 Committee commentary. — [~~In *Romero v. Mervyn's*, 109 N.M. 249, 784 P.2d~~
2 992 (1989), the New Mexico Supreme Court thoroughly reviewed punitive damages in breach of
3 contract cases. The Court noted that in New Mexico, the award of punitive damages for breach
4 of contract is “conceptualized . . . in terms of the quality of the conduct constituting the breach
5 itself,” rather than in terms of an independent tort or breach of the implied covenant of good
6 faith, as in some other jurisdictions. *Id.* at 257, 784 P.2d at 1000. “Overreaching, malicious, or
7 wanton conduct” justifying punitive damages “is inconsistent with legitimate business interests,
8 violates community standards of decency, and tends to undermine the stability of expectations
9 essential to contractual relationships.” *Id.* at 258, 784 P.2d at 1001.

10 The Court observed that “[o]ur previous cases clearly establish that, in contract cases not
11 involving insurance, punitive damages may be recovered for breach of contract when the
12 defendant’s conduct was malicious, fraudulent, oppressive, or committed recklessly with a
13 wanton disregard for the plaintiff’s rights.” 109 N.M. at 255, 784 P.2d at 998. “Each of the terms
14 listed, standing alone, will support an award of punitive damages.” *Id.* “[I]n the sense that malice
15 and wantonness . . . suggest an absence either of a good faith reason or of an innocent mistake,
16 they describe the conduct targeted by our punitive damages rule.” *Id.* “[T]hese words broadly
17 distinguish ‘wrongful’ breaches of contract from those committed intentionally for legitimate
18 business reasons or those that are the result of inadvertence.” *Id.* at 256, 784 P.2d at 999.
19 “Nonetheless, we remain convinced that the nuances distinguishing the terms ‘malice,’ ‘fraud,’
20 and ‘oppression’ make it useful to retain these words as distinct standards to guide the jury’s
21 exercise of discretion in particular cases.” *Id.*

1 ~~With regard to the definitional language included in the bracketed parts of the~~
2 ~~instruction, see UJI 13-834 and 13-1827 nmra. In Romero the Supreme Court stated that~~
3 ~~oppressive conduct would exist when a party “has breached a contract believing that the wronged~~
4 ~~party cannot afford to contest the matter in court.” 109 N.M. at 258 n.6, 784 P.2d at 1001 n.6.~~
5 ~~Because oppressive conduct has not been sufficiently well defined in New Mexico case law, no~~
6 ~~definition is provided. Such conduct is a foundation for punitive damages, and in the appropriate~~
7 ~~case the Court should provide a definition drawing upon Romero and other sources. The~~
8 ~~Committee suggests the following definition as appropriate in some contexts: “Oppressive~~
9 ~~conduct is marked by an unjust use of power or advantage.”~~

10 ~~No definition is provided of fraudulent conduct because the elements of fraud are~~
11 ~~separately stated in UJI 13-834 NMRA, and the jury will already have been instructed on~~
12 ~~conduct that constitutes fraud.]~~

13 Unlike some other jurisdictions, New Mexico determines the availability of punitive
14 damages in contract cases, as in tort cases, based on “the quality of the conduct constituting the
15 breach itself.” See *Romero v. Mervyn’s*, 1989-NMSC-081, ¶¶ 31-33, 109 N.M. 249, 784 P.2d
16 992. New Mexico case law “clearly establish[es] that, in contract cases not involving insurance,
17 punitive damages may be recovered for breach of contract when the defendant’s conduct was
18 malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the
19 plaintiff’s rights.” *Id.* ¶ 23.

20 Contract law is to be distinguished from tort law with respect to punitive damages,
21 however, in that a breach of contract may not be a basis for punitive damages even if the breach

1 is intentional and “even if the other party will clearly be injured by the breach.” *Bogle v. Summit*
2 *Inv. Co.*, 2005-NMCA-024, ¶ 28, 137 N.M. 80, 107 P.3d 520. New Mexico law acknowledges
3 this fact by distinguishing “ ‘wrongful’ breaches . . . from those committed intentionally for
4 legitimate business reasons.” *Romero*, 1989-NMSC-081, ¶ 26; *see also McGinniss v. Honeywell,*
5 *Inc.*, 1990-NMSC-043, ¶ 31, 110 N.M. 1, 791 P.2d 452 (noting that “even if deliberate, the
6 breach may be justified in some sense if the promisee can be fully compensated for the loss and
7 the benefit to the promisor from the breach may provide society with a net gain -- i.e., the breach
8 may be ‘efficient’”); *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P.*, 1998-
9 NMCA-005, ¶ 42, 124 N.M. 440, 952 P.2d 435 (Hartz, J., concurring in part and dissenting in
10 part).

11 Generally, the case law indicates that the kind of conduct targeted by punitive damages is
12 “[o]verreaching, malicious, or wanton conduct” that “is inconsistent with legitimate business
13 interests, violates community standards of decency, and tends to undermine the stability of
14 expectations essential to contractual relationships.” *Romero*, 1989-NMSC-081, ¶ 34; *see also*
15 *Constr. Contracting & Mgmt., Inc. v. McConnell*, 1991-NMSC-066, ¶ 16, 112 N.M. 371, 815
16 P.2d 1161 (stating that a breach that is fully compensated and results in a net social gain will not
17 support punitive damages “unless there is an intention to inflict harm on the nonbreaching party
18 or conduct which violates community standards of decency”). This instruction thus differs from
19 the instruction regarding punitive damages in tort, UJI 13-1827 NMRA, by allowing for the
20 possibility that the breaching party may offer evidence to show that the breach was committed
21 for a legitimate or justifiable reason.

1 New Mexico precedent indicates that “a party’s inability to perform a contract without
2 incurring a substantial financial loss would constitute a legitimate business reason” for
3 nonperformance. *Constr. Contracting*, 1991-NMSC-066, ¶ 16. Other grounds that would expose
4 a breaching party to compensatory but not punitive damages have yet to be defined. *See*
5 *Cafeteria Operators*, 1998-NMCA-005, ¶ 49 (Hartz, J., concurring in part and dissenting in
6 part). In some cases, the court may be called upon to determine whether a reason offered by a
7 breaching party to justify nonperformance of a contract is supported by sufficient evidence to be
8 presented to the jury and whether the reason offered would, if established, provide a legally
9 sufficient basis to avoid punitive damages for the breach.

10 In addition to breaches that are malicious in that they are intended to cause harm, *see*
11 *Constr. Contracting*, 1991-NMSC-066, ¶ 16, New Mexico precedent indicates that punitive
12 damages are justified where a party breaches a contract after making the contract with
13 knowledge it would not be performed or with a conscious disregard for whether it would be
14 performed, *Romero*, 1989-NMSC-081, ¶¶ 36-37, or attempts to avoid any obligation by
15 breaching while “believing that the wronged party cannot afford to contest the matter in court,”
16 *id.* ¶ 33 & n.6, or adopts a construction of an ambiguous contract that is “unreasonable and . . . in
17 wanton disregard of [the other party’s] rights,” *Pub. Serv. Co. v. Diamond D Constr. Co.*, 2001-
18 NMCA-082, ¶ 43, 131 N.M. 100, 33 P.3d 651.

19 The language defining malicious, reckless, and wanton conduct in the bracketed parts of
20 the instruction is taken from UJI 13-1827. The language defining fraudulent conduct is taken
21 from *Prudential Insurance Co. v. Anaya*, 1967-NMSC-132, ¶ 9, 78 N.M. 101, 428 P.2d 640.

1 Oppressive conduct is not defined in New Mexico case law. A definition will have to be added
2 by the court where conduct alleged to be oppressive is at issue. The Committee suggests the
3 following definition may be appropriate in some contexts: “Oppressive conduct is marked by an
4 unjust use of power or advantage.”
5 [As amended by Supreme Court Order No. 20-8300-006, effective _for all cases pending or filed
6 on or after December 31, 2020.]