

PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL PROPOSAL 2021-021

March 17, 2021

The Uniform Jury Instructions – Civil Committee has recommended the adoption of a new Chapter 25 to the Civil Uniform Jury Instructions, new UJI 13-25 Introduction NMRA; new UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and new UJI 13-25 Appendix NMRA for the Supreme Court’s consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court’s web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

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New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
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505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 16, 2021, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing.

[NEW MATERIAL] 13-25-Introduction.

Introduction

The instructions in this chapter are for use in cases involving claims brought pursuant to New Mexico’s Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with an instruction that sets forth the elements a plaintiff must prove in a UPA claim. Following the elements instruction is an instruction to be used when there is an allegation of an unconscionable trade practice and then three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); UJI 13-Chapter 18 NMRA (Damages).

As the preceding considerations indicate, the instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter—UJIs from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these UJIs for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-

NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists.)

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2501. Unfair Practices Act; elements.

For _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) violated the Unfair Practices Act, _____ (*name of plaintiff*) must prove that:

1. _____ (*name of defendant*) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was either false or misleading; and
2. The false or misleading statement was knowingly made [in connection with the sale, lease, rental, or loan of goods or services] and in the regular course of the defendant's business; and
3. The representation was of the type that may, tends to, or does deceive or mislead any person.

USE NOTES

This instruction should be given in every case alleging violations of the UPA. It sets forth the elements of a claim pursuant to the UPA. The bracketed text in the second numbered paragraph should be used only as it pertains to an issue to be decided by the jury. The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case. When the claim arises out of an alleged misrepresentation in the extension of credit or the collection of debts, *see* NMSA 1978, § 57-12-2(D) (2019), the second numbered paragraph should be modified accordingly.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.” *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

- (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434; *cf. Albuquerque Cab Co.*,

Inc. v. Lyft, Inc., 460 F.Supp.3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2502. Unconscionable trade practices.

For _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) engaged in an unconscionable trade practice, _____ (*name of plaintiff*) must prove that:

1. _____ (*name of defendant*) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and

2. That [act] [or] [practice] [took advantage of _____'s (*name of plaintiff/consumer*) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (*name of plaintiff/consumer*) and the price paid].

[In order to decide whether _____ (*name of defendant*) took advantage of _____ (*name of plaintiff/consumer*) to a grossly unfair degree, you must consider _____'s (*name of defendant*) [acts] [or] [practices] in their entirety, as well as _____'s (*name of plaintiff/consumer*) characteristics.]

[In order to determine whether a gross disparity exists, you must look at the bargain made by the parties and determine whether on its face the value received by _____ (*name of plaintiff/consumer*) was grossly out of proportion to the price paid.]

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in unconscionable trade practices. The plaintiff's name should be inserted in the indicated blanks if the conduct alleged to be unconscionable involved the plaintiff. In cases where the plaintiff alleges unconscionable conduct involving another consumer, for example in those cases brought by the Office of the Attorney General, the name of the consumer should be inserted.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – The UPA defines an unconscionable trade practice as:

[A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, Section 57-12-2(E) (2019).

“Given Plaintiff’s potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

to support the district court’s ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers’ deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers’ detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree, we look “at practices in the aggregate, as well as the borrowers’ characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat’l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134 N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank’s pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple’s ranch:

[T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a ‘grossly unfair degree’ because of (1) the Ribbles’ advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants’ pattern of conduct demonstrated that “they were leveraging the borrowers’ cognitive and behavioral weaknesses to Defendants’ advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico.” 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that “[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a ‘grossly unfair degree.’ ” *Id.*

Gross disparity

“In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity.” *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See Robey*, 2017-NMCA-038, ¶ 54 (“Under Plaintiff’s view of *B&B Investment Group*, any time a defendant

breaches a contract, the plaintiff's subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.”).

“[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate.” *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). “Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate.” *Id.*

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2503. Knowingly; definition.

The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____ (*name of defendant*) was actually aware that the statement was false or misleading when it was made, or

_____ (*name of defendant*), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA—i.e., that the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of a UPA claim, that a “false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business.” *Lohman v. Daimler-Chrysler Corporation*. 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). “‘[K]nowingly made’ is an integral part of all UPA claims and must be the subject of actual proof.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal quotation marks, and citation omitted).

“[T]he misrepresentation need not be intentionally made, but it must be knowingly made.” *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed “knowledge” and “knowingly made” in this context, as follows:

‘Knowledge’ does not necessarily mean ‘actual knowledge,’ but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The ‘knowingly made’ requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable

diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2504. In connection with the sale of goods or services.

A claim under the Unfair Practices Act requires that a false or misleading representation be made in connection with the sale of goods or services. However, a sale of goods or services from _____ (*name of defendant*) to _____ (*name of plaintiff*) is not required. It is sufficient if _____ (*name of defendant*) made a false or misleading misrepresentation in connection with a sale of goods or services to a third party.

USE NOTES

This instruction should be given when the alleged UPA violation does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the act. “The conjunctive phrase ‘in connection with’ seems designed to encompass a broad array of commercial relationships.” *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An “unfair or deceptive trade practice” does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* (“Similarly, the UPA allows claims to be brought by ‘any person’ who suffers damages ‘as a result’ of any unfair or deceptive trade practice by another.” (citing NMSA 1978, § 57-12-10(B) (2005)). “[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally” by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329 P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—“arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties.” *Lohman*, 2007-NMCA-100, ¶ 30. “[A] commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim.” *Id.* ¶ 33.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2505. Willful conduct.

In this case _____ (*name of plaintiff*) claims that _____’s (*name of defendant*) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____’s (*name of plaintiff*) claim only if you first find that _____ (*name of defendant*) violated the New Mexico Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. *See* NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The UPA provides for two tiers of monetary remedies for individuals.” *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. “For a basic violation, a private party can recover ‘actual damages or the sum of one hundred dollars (\$100), whichever is greater.’” *Id.* (quoting Section 57-12-10(B)). “For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars (\$300), whichever is greater.” *Id.* (internal quotation marks, citation, and alteration omitted). “Thus, in a jury trial (1) the jury may assess actual, or compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define “willfully.” In addressing the issue as a matter of first impression in *Atherton*, the Court of Appeals concluded that, “[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate ‘willfulness.’” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result.” The definition provides “a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid foundation for punishment.” *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12; *cf. Hale*, 1990-NMSC-068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second, “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2506. Damages.

If you decide that _____ (*name of defendant*) violated the Unfair Practices Act, _____ (*name of plaintiff or consumer*) is entitled to recover actual damages resulting from the violation or the sum of one hundred dollars (\$100), whichever is greater.

_____ (*name of plaintiff or consumer*) seeks actual damages in the amount of _____ (*insert amount of actual damages claimed*) for the following: (*include brief description of the actual damages claimed*).

The plaintiff has the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If _____ (*name of plaintiff or consumer*) does not prove actual damages, _____ (*he/she/they*) may recover one hundred dollars (\$100) in damages. _____ (*name of plaintiff or consumer*) is not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of one hundred dollars (\$100).

USE NOTES

This instruction is to be used in all cases alleging violations of the Unfair Practices Act. The Court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, if the jury finds that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice. *See* NMSA 1978, § 57-12-10(B) (2005); UJI 13-2505 NMRA. The Appendix to this chapter contains an example applying this instruction to a fact pattern.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – Under the UPA,

[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, to the party complaining of the practice.

Section 57-12-10(B).

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars (\$100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that “the UPA . . . require[s] proof of a causal link between

conduct and loss.” 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found “nothing in the language of [the UPA] requiring proof of a link between conduct and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’ ” *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25-Appendix.

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing an Unfair Practices Act violation claim could be structured. There are other acceptable approaches that may be taken, provided the general design of the UJI 13-302 NMRA series of instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in Chapter 1) and general instructions (such as those found in Chapter 2 and Chapter 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was sold as a “new demonstrator.” Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and had been repaired by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at \$13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at \$10,500. The Romeros had the car repainted for \$1,000 and eventually traded it in for a new car, receiving a trade-in value of \$10,000.

Joseph and Kathryn Romero brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

[13-302A]

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

[13-302B]

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it failed to disclose to the Romeros the repairs made to the Ford Fiesta.

[13-302C]

Defendant Desert Auto Sales denies that it represented the condition of the car as new, because it disclosed that the vehicle had been used as a demonstrator.

[13-302E]

Related to the above, Plaintiffs Joseph and Kathryn Romero say, and have the burden of proving, that Defendant Desert Auto Sales willfully made misrepresentations related to the Ford Fiesta.

[13-2501]

For Joseph and Kathryn Romero to prove that Desert Auto Sales violated the Unfair Practices Act, the Romeros must prove:

1. Desert Auto Sales made an oral statement, a written statement, or a representation that was either false or misleading; and
 2. The false or misleading statement was knowingly made in connection with the sale of goods; and
 3. The representation was of the type that may, tends to or does deceive or mislead any person.
- [13-2503]

The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto Sales was actually aware that the statement was false or misleading when it was made; or

Desert Auto Sales, by using reasonable diligence, should have been aware the statement was false or misleading.

[13-2505]

In this case, Joseph and Kathryn Romero claim that Desert Auto Sales’ conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros’ claim only if you first find that Desert Auto Sales violated the Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

[13-2506]

If you decide that Desert Auto Sales violated the Unfair Practices Act, then Joseph and Kathryn Romero are entitled to recover actual damages resulting from the violation or the sum of 100 dollars (\$100), whichever is greater.

Actual damages means the loss of money or property.

The Romeros seek actual damages in the amount of \$4,000 for the following:

- \$1,000 for the cost to re-paint the car; and
- \$3,000 for the difference between the value of the car had it been undamaged, and the value they received at trade-in.

The Romeros have the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If the Romeros do not prove actual damages, they may recover 100 dollars (\$100) in damages. The Romeros are not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of 100 dollars (\$100).

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is “No,” you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

If the answer to Question No. 1 is “Yes”, you are to answer Question No. 2.

Question No. 2: Was Desert Auto Sales’ violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)
Regardless of whether the answer to Question No. 2 is “Yes” or “No”, go on to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, select, by marking with an X, only one of the following statements:

_____ We find the total amount of actual damages suffered by the Romeros to be _____. *(Here enter the amount of actual damages to be awarded to the Romeros.)*

_____ We do not find that the Romeros suffered any actual damages. In accordance with the damages instruction, we award the Romeros \$100.

[Adopted by Supreme Court Order No. _____, effective _____.]
Foreperson _____

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April 13, 2021

Via email only to nmsupremecourtclerk@nmcourts.gov

Joey D. Moya, Clerk
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504-0848

Re: Proposed Unfair Practice Act jury instructions

Dear Mr. Moya and UJI Committee Members:

I appreciate the Committee's work on the proposed Unfair Practices Act ("UPA") jury instructions. I also appreciate the opportunity to provide comments.

I am a New Mexico attorney who has spent the last 20 years exclusively practicing consumer protection law, representing consumers in hundreds of lawsuits, nearly all of which have included a UPA claim. Some of the lawsuits where I represented the plaintiff ended up in jury trial. As a result, I have spent significant time working on UPA jury instructions that accurately reflect the law. UPA jury instructions that I drafted have been accepted by many New Mexico courts.

I have flagged several problems with the UPA jury instructions as currently proposed, as set forth in more detail in the attached redline. The primary problems I see include:

1. The damages instruction, 13-2506, requires the plaintiff to list specific itemized amounts. This proposed structure is unfair to a plaintiff. It does not fairly account for "soft" damages where a plaintiff might want to leave it up to the jury on how much to award, or at least wait until closing argument to suggest a number or a range. In addition, even with some categories of "hard" damages – for example, loss of use – trial evidence, possibly involving issues of admissibility, would be needed before the damages can be accurately calculated.
2. Some of the instructions omit "the collection of debts" as a covered activity, while other, for example, 13-2502, include this covered activity. *See* NMSA 57-12-2(D). To avoid jury confusion and to make the instructions consistent, this apparent inadvertent admission should be fixed.
3. The case law makes clear that an action or defendant's conduct can be a covered "representation." *See Jaramillo v. Gonzales*, 2002-NMCA-72, ¶¶ 26-31 *cert. denied* 132 N.M. 288, 47 P.3d 447 (2002); *Duke v. Garcia*, No. 11-CV-784, 2014 U.S. Dist. LEXIS 48047 at *19-23 (D.N.M. Feb. 28, 2014). Moreover, a material omission is expressly a UPA violation. *See* NMSA 57-12-2(D)(14). The instructions, as drafted, misleadingly suggest that covered "representations" must be in the form of a statement.

Other suggested changes represent an effort to more accurately track the statutory language or the applicable case law.

Please feel free to contact me to further discuss. I am happy to help in any way. In these pandemic times, I am best reached via my cell (505) 604-8314. Thank you.

Truly yours,

A handwritten signature in black ink, consisting of a series of fluid, connected strokes that form a stylized, elongated shape.

Rob Treinen

Attachment

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2021-021**

[NEW MATERIAL]

13-25-Introduction.

Introduction

The instructions in this chapter are for use in cases involving claims brought pursuant to New Mexico's Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with an instruction that sets forth the elements a plaintiff must prove in a UPA claim. Following the elements instruction is an instruction to be used when there is an allegation of an unconscionable trade practice and then three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); UJI 13-Chapter 18 NMRA (Damages).

As the preceding considerations indicate, the instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter—UJIs from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these UJIs for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists.)

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2501. ~~Unfair Practices Act~~ Unfair or deceptive trade practice claim; elements.

For _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) violated the Unfair Practices Act, _____ (*name of plaintiff*) must prove that:

1. _____ (*name of defendant*) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was either false or misleading; and

2. The false or misleading statement, description, or representation was knowingly made [in connection with the sale, lease, rental, or loan of goods or services] [in the extension of credit] [in the collection of debts] and in the regular course of the defendant's business; and

3. _____ The representation was of the type that may, tends to, or does deceive or mislead any person.

~~3.~~ [The UPA specifically states that the following conduct constitutes an unfair or deceptive trade practice:

(insert enumerated practice(s) from NMSA 1978 § 57-12-2(D))]

USE NOTES

This instruction should be given in every case alleging ~~violations of the~~ an unfair or deceptive trade practice under the UPA. It sets forth the elements of a claim for unfair or deceptive

trade practices pursuant to the UPA. The bracketed text in the second numbered paragraph should be used only as it pertains to an issue to be decided by the jury. ~~The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case. When the claim arises out of an alleged misrepresentation in the extension of credit or the collection of debts, see NMSA 1978, § 57-12-2(D) (2019), the second numbered paragraph should be modified accordingly.~~ The bracketed text in the final paragraph should be used when the plaintiff asserts that the defendant has violated one of the enumerated practices listed in NMSA 1978 § 57-12-2(D).

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.” *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

- (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading;
- (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business;
- and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434; *cf. Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F.Supp.3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2502. Unconscionable trade practices.

For _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) engaged in an unconscionable trade practice, _____ (*name of plaintiff*) must prove that:

1. _____ (*name of defendant*) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and

2. That [act] [or] [practice] [took advantage of _____’s (*name of plaintiff/consumer*) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (*name of plaintiff/consumer*) and the price paid]. Substantive unconscionability is found where terms are illegal, contrary to public policy, or grossly unfair.

~~[In order to decide whether _____ (*name of defendant*) took advantage of~~

____ (name of plaintiff/consumer) to a grossly unfair degree, you must consider
____'s (name of defendant) [acts] [or] [practices] in their entirety, as well as
____'s (name of plaintiff/consumer) characteristics.]

~~[In order to determine whether a gross disparity exists, you must look at the bargain made by the parties and determine whether on its face the value received by _____ (name of plaintiff/consumer) was grossly out of proportion to the price paid.]~~

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in unconscionable trade practices. ~~The plaintiff's name should be inserted in the indicated blanks if the conduct alleged to be unconscionable involved the plaintiff. In cases where the plaintiff alleges unconscionable conduct involving another consumer, for example in those cases brought by the Office of the Attorney General, the name of the consumer should be inserted.~~

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – The UPA defines an unconscionable trade practice as:

[A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, Section 57-12-2(E) (2019).

“Given Plaintiff’s potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

to support the district court's ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers' detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree,

we look “at practices in the aggregate, as well as the borrowers’ characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat’l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134 N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank’s pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple’s ranch:

[T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a ‘grossly unfair degree’ because of (1) the Ribbles’ advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants’ pattern of conduct demonstrated that “they were leveraging the borrowers’ cognitive and behavioral weaknesses to Defendants’ advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico.” 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that “[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a ‘grossly unfair degree.’ ” *Id.*

Gross disparity

“In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity.” *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See Robey*, 2017-NMCA-038, ¶ 54 (“Under Plaintiff’s view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff’s subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.”).

“[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate.” *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). “Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate.” *Id.*

“Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair.” *B&B Investment Group, Inc.*, 2014-NMSC-024, ¶ 32.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2503. False or misleading oral statements, written statements, visual descriptions, or representations of any kind

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

USE NOTES

This instruction should be given in cases involving UPA claims when the first element of UJI 13-2501 NMRA—i.e., that the defendant made an oral statement, a written statement, a visual description, or a representation of any kind that was either false or misleading—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair deceptive trade practices claim, that “the party charged made an oral or written statement, visual description or other representation that was either false or misleading.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97. Actions such as failing to acknowledge legal obligations can constitute misrepresentations. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459 (holding that a bank’s failure to acknowledge liability pursuant to the FTC Holder Rule was an unfair practice). Material omissions are actionable. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). Under New Mexico law, “a fact is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important.” *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶72, 133 N.M. 669.

[NEW MATERIAL]

13-25032504. Knowingly; definition.

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act ~~The Unfair Practices Act~~ requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____ (name of defendant) was actually aware that the statement was false or misleading when it was made, or

_____ (name of defendant), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA—i.e., that the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair or deceptive trade practices —UPA—claim, that a “false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business.” *Lohman v. Daimler- Chrysler Corporation*. 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). “‘[K]nowingly made’ is an integral part of all UPA claims and must be the subject of actual proof.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal

quotation marks, and citation omitted).

“[T]he misrepresentation need not be intentionally made, but it must be knowingly made.” *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed “knowledge” and “knowingly made” in this context, as follows:

‘Knowledge’ does not necessarily mean ‘actual knowledge,’ but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The ‘knowingly made’ requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25042505. In connection with the sale of goods or services.

~~A-In _____’s (name of plaintiff) unfair or deceptive trade practice claim under the Unfair Practices Act requires that a false or misleading representation be made in connection with the sale of goods or services. However,~~ a sale of goods or services from _____ (name of defendant) to _____ (name of plaintiff) is not required. It is sufficient if _____ (name of defendant) made a false or misleading misrepresentation in connection with a sale of goods or services to a third party.

USE NOTES

This instruction should be given when the alleged UPA violation involves a sale of goods or services but does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the act. “The conjunctive phrase ‘in connection with’ seems designed to encompass a broad array of commercial relationships.” *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An “unfair or deceptive trade practice” does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* (“Similarly, the UPA allows claims to be brought by ‘any person’ who suffers damages ‘as a result’ of any unfair or deceptive trade practice by another.” (citing NMSA 1978, § 57-12-10(B) (2005))). “[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally” by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329

P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—“arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties.” *Lohman*, 2007-NMCA-100, ¶ 30. “[A] commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim.” *Id.* ¶ 33.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2506. May, tends to or does deceive or mislead

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

USE NOTES

This instruction should be given in cases involving UPA claims when the fourth element of UJI 13-2501 NMRA—i.e., that the representation be of the type that may, tends to, or does deceive or mislead any person—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The fourth element of a UPA claim is that “the representation must have been of the type that may, tends to or does, deceive or mislead any person.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97, 100, 811 P.2d 1308. The UPA does not require reliance. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265 (“the UPA does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’”).

[NEW MATERIAL]

13-25052507. Willful conduct.

In this case _____ (*name of plaintiff*) claims that _____’s (*name of defendant*) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____’s (*name of plaintiff*) claim only if you first find that _____ (*name of defendant*) violated the New Mexico Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. *See* NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The UPA provides for two tiers of monetary remedies for individuals.” *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. “For a basic violation, a private party can recover ‘actual damages or the sum of one hundred dollars (\$100), whichever is greater.’” *Id.* (quoting Section 57-12-10(B)). “For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars (\$300), whichever is greater.” *Id.* (internal quotation marks, citation, and alteration omitted). “Thus, in a jury trial (1) the jury may assess actual, or

compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define “willfully.” In addressing the issue as a matter of first impression in *Atherton*, the Court of Appeals concluded that, “[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate ‘willfulness.’ ” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result.” The definition provides “a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid foundation for punishment.” *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12; *cf. Hale*, 1990-NMSC-068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second, “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25062508. Damages.

If you decide that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff or consumer) is entitled to recover actual damages resulting from the violation or the sum of one hundred dollars (\$100), whichever is greater.

~~_____ (name of plaintiff or consumer) seeks actual damages in the amount of _____ (insert amount of actual damages claimed) for the following: (include brief description of the actual damages claimed).~~

The plaintiff has the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If _____ (name of plaintiff or consumer) does not prove actual damages, _____ (he/she/they) may recover one hundred dollars (\$100) in damages. _____ (name of plaintiff or consumer) is not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of one hundred dollars (\$100).

USE NOTES

This instruction is to be used in all cases alleging violations of the Unfair Practices Act. The Court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, if the jury finds that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice. *See* NMSA 1978, § 57-12-10(B) (2005); UJI 13-~~2505~~-2507 NMRA. The Appendix to this chapter contains an example applying this instruction to a fact pattern.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – Under the UPA,

[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, to the party complaining of the practice.

Section 57-12-10(B).

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars (\$100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that “the UPA . . . require[s] proof of a causal link between conduct and loss.” 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found “nothing in the language of [the UPA] requiring proof of a link between conduct and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’ ” *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25-Appendix.

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing an Unfair Practices Act violation claim could be structured. There are other acceptable approaches that may be taken, provided the general design of the UJI 13-302 NMRA series of instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in

Chapter 1) and general instructions (such as those found in Chapter 2 and Chapter 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was sold as a “new demonstrator.” Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and had been repaired by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at \$13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at \$10,500. The Romeros had the car repainted for \$1,000 and eventually traded it in for a new car, receiving a trade-in value of \$10,000.

Joseph and Kathryn Romero brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

[13-302A]

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

[13-302B]

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it failed to disclose to the Romeros the repairs made to the Ford Fiesta.

[13-302C]

Defendant Desert Auto Sales denies that it represented the condition of the car as new, because it disclosed that the vehicle had been used as a demonstrator.

[13-302E]

Related to the above, Plaintiffs Joseph and Kathryn Romero say, and have the burden of proving, that Defendant Desert Auto Sales ~~willfully made misrepresentations related to the Ford Fiesta~~ violated the Unfair Practices Act.

[13-2501]

For Joseph and Kathryn Romero to prove that Desert Auto Sales violated the Unfair Practices Act, the Romeros must prove:

1. Desert Auto Sales made an oral statement, a written statement, or a representation that was either false or misleading; and
2. The false or misleading statement was knowingly made in connection with the sale of goods and in the regular course of Desert Auto Sales’ business; and
3. The representation was of the type that may, tends to or does deceive or mislead any person.

[13-2503]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

3. [13-25032504]

The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto Sales was actually aware that the statement was false or misleading when it was made; or

Desert Auto Sales, by using reasonable diligence, should have been aware the statement was false or misleading.

[13-2506.]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

[13-25062507]

In this case, Joseph and Kathryn Romero claim that Desert Auto Sales’ conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros’ claim only if you first find that Desert Auto Sales violated the Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

[13-25062508]

If you decide that Desert Auto Sales violated the Unfair Practices Act, then Joseph and Kathryn Romero are entitled to recover actual damages resulting from the violation or the sum of 100 dollars (\$100), whichever is greater.

~~Actual damages means the loss of money or property.~~

~~The Romeros seek actual damages in the amount of \$4,000 for the following:~~

~~—\$1,000 for the cost to re-paint the car; and~~

~~—\$3,000 for the difference between the value of the car had it been undamaged, and the value they received at trade-in.~~

The Romeros have the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If the Romeros do not prove actual damages, they may recover 100 dollars (\$100) in damages. The Romeros are not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of 100 dollars (\$100).

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is “No,” you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

If the answer to Question No. 1 is “Yes”, you are to answer Question No. 2.

Question No. 2: Was Desert Auto Sales’ violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)

Regardless of whether the answer to Question No. 2 is “Yes” or “No”, go on to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, select, by marking

with an X, only one of the following statements:

_____ We find the total amount of actual damages suffered by the Romeros to be _____. *(Here enter the amount of actual damages to be awarded to the Romeros.)*

_____ We do not find that the Romeros suffered any actual damages. In accordance with the damages instruction, we award the Romeros \$100.

Foreperson

[Adopted by Supreme Court Order No. _____, effective _____.]

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April 14, 2021

Joey D. Moya, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848

By E-Mail

Re: *Proposed Unfair Practice Act Jury Instructions*

Dear Mr. Moya and UJI Committee Members:

Thank you for your efforts drafting jury instructions for New Mexico's Unfair Practices Act (UPA). I appreciate the thoughtful consideration these instructions exhibit and have only a few comments based on my experiences bringing UPA claims since I went into private practice in Santa Fe in 1983.

I have reviewed the proposed UPA with several other attorneys whom I collaborate with on consumer law issues. The issues we have identified with the UPA jury instructions as currently proposed, are set forth in more detail in the attached redline. Those issues include:

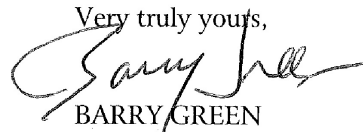
1. The damages instruction, 13-2506, requires the plaintiff to list specific itemized amounts. This proposed structure is unfair to a plaintiff. It does not fairly account for "soft" damages where a plaintiff might want to leave it up to the jury on how much to award, or at least wait until closing argument to suggest a number or a range. In addition, even with some categories of "hard" damages - for example, loss of use - trial evidence, possibly involving issues of admissibility, would be needed before the damages can be accurately calculated.
2. Some of the instructions omit "the collection of debts" as a covered activity, while other, for example, 13-2502, include this covered activity. See NMSA 57-12-2(D). To avoid jury confusion and to make the instructions consistent, "the collection of debts" should be added to all the appropriate UJI.

3. The case law makes clear that an action or defendant's conduct can be a covered "representation." *See Jaramillo v. Gonzales*, 2002-NMCA-072, ¶¶26-31, *cert. denied*. 132 N.M. 288, 47 P.3d 447 (2002); *Duke v. Garcia*, No. 11-CV-784, 2014 U.S. Dist. LEXIS 48047 at *19-23 (D.N.M. Feb. 28, 2014). Moreover, a material omission is expressly a UPA violation. *See* NMSA 57-12-2(D)(14). The instructions, as drafted, misleadingly suggest that covered "representations" must be in the form of a statement.

Other suggested changes represent an effort to more accurately track the statutory language or the applicable case law.

I would be happy to speak with you further about these UJI so please feel free to contact me.

Thank you for your consideration.

Very truly yours,

BARRY GREEN

Attachment

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2021-021**

[NEW MATERIAL]

13-25-Introduction.

Introduction

The instructions in this chapter are for use in cases involving claims brought pursuant to New Mexico's Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with an instruction that sets forth the elements a plaintiff must prove in a UPA claim. Following the elements instruction is an instruction to be used when there is an allegation of an unconscionable trade practice and then three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); UJI 13-Chapter 18 NMRA (Damages).

As the preceding considerations indicate, the instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter—UJIs from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these UJIs for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists.)

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2501. ~~Unfair Practices Act~~ Unfair or deceptive trade practice claim; elements.

For _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) violated the Unfair Practices Act, _____ (*name of plaintiff*) must prove that:

1. _____ (*name of defendant*) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was either false or misleading; and

2. The false or misleading statement, description, or representation was knowingly made [in connection with the sale, lease, rental, or loan of goods or services] [in the extension of credit] [in the collection of debts] and in the regular course of the defendant's business; and

3. _____ The representation was of the type that may, tends to, or does deceive or mislead any person.

3-. [The UPA specifically states that the following conduct constitutes an unfair or deceptive trade practice:

(insert enumerated practice(s) from NMSA 1978 § 57-12-2(D))]

USE NOTES

This instruction should be given in every case alleging ~~violations of the~~ an unfair or deceptive trade practice under the UPA. It sets forth the elements of a claim for unfair or deceptive trade practices pursuant to the UPA. The bracketed text in the second numbered paragraph should be

used only as it pertains to an issue to be decided by the jury. ~~The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case. When the claim arises out of an alleged misrepresentation in the extension of credit or the collection of debts, see NMSA 1978, § 57-12-2(D) (2019), the second numbered paragraph should be modified accordingly. The bracketed text in the final paragraph should be used when the plaintiff asserts that the defendant has violated one of the enumerated practices listed in NMSA 1978 § 57-12-2(D).~~

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.” *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

- (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434; *cf. Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F.Supp.3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2502. Unconscionable trade practices.

For _____ (name of plaintiff) to prove that _____ (name of defendant) engaged in an unconscionable trade practice, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and

2. That [act] [or] [practice] [took advantage of _____’s (name of plaintiff/consumer) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (name of plaintiff/consumer) and the price paid]. Substantive unconscionability is found where terms are illegal, contrary to public policy, or grossly unfair.

[In order to decide whether _____ (name of defendant) took advantage of _____ (name of plaintiff/consumer) to a grossly unfair degree, you must consider _____’s (name of defendant) [acts] [or] [practices] in their entirety, as well as

_____'s (*name of plaintiff/consumer*) characteristics.]

~~[In order to determine whether a gross disparity exists, you must look at the bargain made by the parties and determine whether on its face the value received by _____ (*name of plaintiff/consumer*) was grossly out of proportion to the price paid.]~~

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in unconscionable trade practices. ~~The plaintiff's name should be inserted in the indicated blanks if the conduct alleged to be unconscionable involved the plaintiff. In cases where the plaintiff alleges unconscionable conduct involving another consumer, for example in those cases brought by the Office of the Attorney General, the name of the consumer should be inserted.~~

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – The UPA defines an unconscionable trade practice as:

[A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, Section 57-12-2(E) (2019).

“Given Plaintiff's potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

to support the district court's ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers' detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree, we look “at practices in the aggregate, as well as the borrowers' characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat'l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134

N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank's pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple's ranch:

[T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a 'grossly unfair degree' because of (1) the Ribbles' advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants' pattern of conduct demonstrated that "they were leveraging the borrowers' cognitive and behavioral weaknesses to Defendants' advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico." 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that "[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a 'grossly unfair degree.' " *Id.*

Gross disparity

"In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity." *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See Robey*, 2017-NMCA-038, ¶ 54 ("Under Plaintiff's view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff's subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.").

"[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate." *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). "Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate." *Id.*

"Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair." *B&B Investment Group, Inc.*, 2014-NMSC-024, ¶ 32.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2503. False or misleading oral statements, written statements, visual descriptions, or representations of any kind

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the

representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

USE NOTES

This instruction should be given in cases involving UPA claims when the first element of UJI 13-2501 NMRA—i.e., that the defendant made an oral statement, a written statement, a visual description, or a representation of any kind that was either false or misleading—is at issue.
[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair deceptive trade practices claim, that “the party charged made an oral or written statement, visual description or other representation that was either false or misleading.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97. Actions such as failing to acknowledge legal obligations can constitute misrepresentations. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459 (holding that a bank’s failure to acknowledge liability pursuant to the FTC Holder Rule was an unfair practice). Material omissions are actionable. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). Under New Mexico law, “a fact is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important.” *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶72, 133 N.M. 669.

[NEW MATERIAL]

13-25032504. Knowingly; definition.

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act ~~The Unfair Practices Act~~ requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____ (name of defendant) was actually aware that the statement was false or misleading when it was made, or

_____ (name of defendant), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA—i.e., that the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair or deceptive trade practices ~~UPA~~ claim, that a “false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business.” *Lohman v. Daimler- Chrysler Corporation*. 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). “‘[K]nowingly made’ is an integral part of all UPA claims and must be the subject of actual proof.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal quotation marks, and citation omitted).

“[T]he misrepresentation need not be intentionally made, but it must be knowingly made.” *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed “knowledge” and “knowingly made” in this context, as follows:

‘Knowledge’ does not necessarily mean ‘actual knowledge,’ but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The ‘knowingly made’ requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25042505. In connection with the sale of goods or services.

~~A-In _____’s (name of plaintiff) unfair or deceptive trade practice claim under the Unfair Practices Act requires that a false or misleading representation be made in connection with the sale of goods or services. However,~~ a sale of goods or services from _____ (name of defendant) to _____ (name of plaintiff) is not required. It is sufficient if _____ (name of defendant) made a false or misleading misrepresentation in connection with a sale of goods or services to a third party.

USE NOTES

This instruction should be given when the alleged UPA violation involves a sale of goods or services but does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the act. “The conjunctive phrase ‘in connection with’ seems designed to encompass a broad array of commercial relationships.” *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An “unfair or deceptive trade practice” does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* (“Similarly, the UPA allows claims to be brought by ‘any person’ who suffers damages ‘as a result’ of any unfair or deceptive trade practice by another.” (citing NMSA 1978, § 57-12-10(B) (2005)). “[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally” by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329 P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—“arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties.” *Lohman*, 2007-NMCA-100, ¶ 30. “[A] commercial transaction between a claimant and a defendant need not be

alleged in order to sustain a UPA claim.” *Id.* ¶ 33.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2506. May, tends to or does deceive or mislead

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

USE NOTES

This instruction should be given in cases involving UPA claims when the fourth element of UJI 13-2501 NMRA—i.e., that the representation be of the type that may, tends to, or does deceive or mislead any person—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The fourth element of a UPA claim is that “the representation must have been of the type that may, tends to or does, deceive or mislead any person.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97, 100, 811 P.2d 1308. The UPA does not require reliance. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265 (“the UPA does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’”).

[NEW MATERIAL]

13-25052507. Willful conduct.

In this case _____ (*name of plaintiff*) claims that _____’s (*name of defendant*) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____’s (*name of plaintiff*) claim only if you first find that _____ (*name of defendant*) violated the New Mexico Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. *See* NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The UPA provides for two tiers of monetary remedies for individuals.” *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. “For a basic violation, a private party can recover ‘actual damages or the sum of one hundred dollars (\$100), whichever is greater.’” *Id.* (quoting Section 57-12-10(B)). “For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars (\$300), whichever is greater.” *Id.* (internal quotation marks, citation, and alteration omitted). “Thus, in a jury trial (1) the jury may assess actual, or compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define “willfully.” In addressing the issue as a matter of first impression in

Atherton, the Court of Appeals concluded that, “[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate ‘willfulness.’ ” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result.” The definition provides “a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid foundation for punishment.” *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12; *cf. Hale*, 1990-NMSC-068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second, “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25062508. Damages.

If you decide that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff or consumer) is entitled to recover actual damages resulting from the violation or the sum of one hundred dollars (\$100), whichever is greater.

~~_____ (name of plaintiff or consumer) seeks actual damages in the amount of _____ (insert amount of actual damages claimed) for the following: (include brief description of the actual damages claimed).~~

The plaintiff has the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If _____ (name of plaintiff or consumer) does not prove actual damages, _____ (he/she/they) may recover one hundred dollars (\$100) in damages. _____ (name of plaintiff or consumer) is not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of one hundred dollars (\$100).

USE NOTES

This instruction is to be used in all cases alleging violations of the Unfair Practices Act. The Court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, if the jury finds that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice. *See* NMSA 1978, §

57-12-10(B) (2005); UJI 13-2505–2507 NMRA. The Appendix to this chapter contains an example applying this instruction to a fact pattern.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – Under the UPA,

[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, to the party complaining of the practice.

Section 57-12-10(B).

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars (\$100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that “the UPA . . . require[s] proof of a causal link between conduct and loss.” 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found “nothing in the language of [the UPA] requiring proof of a link between conduct and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’ ” *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25-Appendix.

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing an Unfair Practices Act violation claim could be structured. There are other acceptable approaches that may be taken, provided the general design of the UJI 13-302 NMRA series of instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in Chapter 1) and general instructions (such as those found in Chapter 2 and Chapter 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was

sold as a “new demonstrator.” Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and had been repaired by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at \$13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at \$10,500. The Romeros had the car repainted for \$1,000 and eventually traded it in for a new car, receiving a trade-in value of \$10,000.

Joseph and Kathryn Romero brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

[13-302A]

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

[13-302B]

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it failed to disclose to the Romeros the repairs made to the Ford Fiesta.

[13-302C]

Defendant Desert Auto Sales denies that it represented the condition of the car as new, because it disclosed that the vehicle had been used as a demonstrator.

[13-302E]

Related to the above, Plaintiffs Joseph and Kathryn Romero say, and have the burden of proving, that Defendant Desert Auto Sales ~~willfully made misrepresentations related to the Ford Fiesta~~ violated the Unfair Practices Act.

[13-2501]

For Joseph and Kathryn Romero to prove that Desert Auto Sales violated the Unfair Practices Act, the Romeros must prove:

1. Desert Auto Sales made an oral statement, a written statement, or a representation that was either false or misleading; and
2. The false or misleading statement was knowingly made in connection with the sale of goods and in the regular course of Desert Auto Sales’ business; and
3. The representation was of the type that may, tends to or does deceive or mislead any person.

[13-2503]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

3. [13-2503]2504]

The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto Sales was actually aware that the statement was false or misleading when it was made; or

Desert Auto Sales, by using reasonable diligence, should have been aware the statement was false or misleading.

[13-2506.]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant's conduct actually deceive a person; it permits recovery even if the conduct only "tends to deceive."

[13-25062507]

In this case, Joseph and Kathryn Romero claim that Desert Auto Sales' conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros' claim only if you first find that Desert Auto Sales violated the Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

[13-25062508]

If you decide that Desert Auto Sales violated the Unfair Practices Act, then Joseph and Kathryn Romero are entitled to recover actual damages resulting from the violation or the sum of 100 dollars (\$100), whichever is greater.

~~Actual damages means the loss of money or property.~~

~~The Romeros seek actual damages in the amount of \$4,000 for the following:~~

~~—\$1,000 for the cost to re-paint the car; and~~

~~—\$3,000 for the difference between the value of the car had it been undamaged, and the value they received at trade-in.~~

The Romeros have the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If the Romeros do not prove actual damages, they may recover 100 dollars (\$100) in damages. The Romeros are not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of 100 dollars (\$100).

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is "No," you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

If the answer to Question No. 1 is "Yes", you are to answer Question No. 2.

Question No. 2: Was Desert Auto Sales' violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)

Regardless of whether the answer to Question No. 2 is "Yes" or "No", go on to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, select, by marking with an X, only one of the following statements:

_____ We find the total amount of actual damages suffered by the Romeros to be _____. *(Here enter the amount of actual damages to be awarded to the Romeros.)*

_____ We do not find that the Romeros suffered any actual damages. In

accordance with the damages instruction, we award the Romeros \$100.

Foreperson

[Adopted by Supreme Court Order No._____, effective_____.]

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April 15, 2021

SUPREME COURT OF NEW MEXICO
FILED

Via email only to nmsupremecourtclerk@nmcourts.gov

Joey D. Moya, Clerk
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504-0848

APR 15 2021



Re: Proposed Unfair Practices Act jury instructions

Dear Mr. Moya and UJI Committee Members:

I am writing to comment on the proposed Unfair Practices Act ("UPA") jury instructions. The proposed instructions will be helpful to Courts and litigants. I appreciate the effort that went into creating them. Attached, please find some proposed changes that are essential to assuring the instructions are accurate and complete. Please note that these proposed changes are the same as those submitted by other consumer advocates including Rob Treinen.

I am a consumer protection attorney working in Albuquerque, New Mexico. Over the years, my firm has litigated literally hundreds of cases involving UPA claims. Many of our cases have gone to trial, and we have significant experience drafting UPA instructions. I believe that the proposed instructions, if they are modified as suggested, will accurately reflect the UPA and the body of caselaw interpreting it.

Here is the rationale behind the proposed changes:

- 13-2501. The elements listed only concern unfair and deceptive trade practices claims, not unconscionability claims. The instruction should also give the litigant the opportunity to list the enumerated acts set forth in NMSA § 57-12-2(D).
- 13-2502. The deleted provisions misleadingly take language from **discussions** of the UPA and present it as **elements** of the UPA. This language is unnecessarily restrictive.
- 13-2503. Crucially, the UPA applies to omissions as well as representations. Moreover, case law explains that "representation" applies to conduct (it is not the same as a "statement," which is listed separately in the instructions). This is an issue that comes up frequently in UPA litigation.
- 13-2504. The "knowing" requirement only applies to unfair and deceptive trade practices claims, not unconscionability claims.

- 13-2505. Rephrased for clarity.
- 13-2506. Case law is absolutely clear that actual deception and reliance are not required. This issue comes up very frequently in UPA litigation and should be clarified in the instructions.
- 13-2508. There is no requirement that a party list its UPA damages in a jury instruction. The explanation that “actual damages” are permitted is adequate. In the appendix, the use of this instruction is even more problematic, setting forth an improper definition of actual damages and listing examples of measures of damages that arguably do not reflect the law (e.g. the \$3,000 and \$1,000).

I would be happy to provide further information concerning the UPA instructions. Contact me at 505-243-7773 or nmattison@nmconsumerwarriors.com.

Sincerely,

/s/Nicholas H. Mattison

Nicholas H. Mattison

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2021-021**

[NEW MATERIAL]

13-25-Introduction.

Introduction

The instructions in this chapter are for use in cases involving claims brought pursuant to New Mexico's Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with an instruction that sets forth the elements a plaintiff must prove in a UPA claim. Following the elements instruction is an instruction to be used when there is an allegation of an unconscionable trade practice and then three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); UJI 13-Chapter 18 NMRA (Damages).

As the preceding considerations indicate, the instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter—UJIs from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these UJIs for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists.)

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2501. Unfair Practices Act Unfair or deceptive trade practice claim; elements.

For _____ (name of plaintiff) to prove that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was either false or misleading; and
 2. The false or misleading statement, description, or representation was knowingly made [in connection with the sale, lease, rental, or loan of goods or services] [in the extension of credit] [in the collection of debts] and in the regular course of the defendant's business; and
 3. The representation was of the type that may, tends to, or does deceive or mislead any person.
4. [The UPA specifically states that the following conduct constitutes an unfair or deceptive trade practice:
(insert enumerated practice(s) from NMSA 1978 § 57-12-2(D)) _____]

USE NOTES

This instruction should be given in every case alleging violations of the unfair or deceptive trade practice under the UPA. It sets forth the elements of a claim for unfair or deceptive

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~~trade practices~~ pursuant to the UPA. The bracketed text in the second numbered paragraph should be used only as it pertains to an issue to be decided by the jury. The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case. When the claim arises out of an alleged misrepresentation in the extension of credit or the collection of debts, *see* NMSA 1978, § 57-12-2(D) (2019), the second numbered paragraph should be modified accordingly. The bracketed text in the final paragraph should be used when the plaintiff asserts that the defendant has violated one of the enumerated practices listed in NMSA 1978 § 57-12-2(D).

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.” *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

- (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434; *cf. Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F.Supp.3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2502. Unconscionable trade practices.

For _____ (name of plaintiff) to prove that _____ (name of defendant) engaged in an unconscionable trade practice, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and

2. That [act] [or] [practice] [took advantage of _____’s (name of plaintiff~~-consumer~~) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (name of plaintiff~~-consumer~~) and the price paid]. Substantive unconscionability is found where terms are illegal, contrary to public policy, or grossly unfair.

[In order to decide whether _____ (name of defendant) took advantage of

_____ (name of plaintiff/consumer) to a grossly unfair degree, you must consider
_____s (name of defendant) [acts] [or] [practices] in their entirety, as well as
_____s (name of plaintiff/consumer) characteristics.]
[In order to determine whether a gross disparity exists, you must look at the bargain made
by the parties and determine whether on its face the value received by _____ (name of
plaintiff/consumer) was grossly out of proportion to the price paid.]

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in unconscionable trade practices. The plaintiff's name should be inserted in the indicated blanks if the conduct alleged to be unconscionable involved the plaintiff. In cases where the plaintiff alleges unconscionable conduct involving another consumer, for example in those cases brought by the Office of the Attorney General, the name of the consumer should be inserted.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – The UPA defines an unconscionable trade practice as:

[A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, Section 57-12-2(E) (2019).

"Given Plaintiffs potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff." *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

to support the district court's ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers' detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree.

we look “at practices in the aggregate, as well as the borrowers’ characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat’l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134 N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank’s pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple’s ranch:

[T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a ‘grossly unfair degree’ because of (1) the Ribbles’ advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants’ pattern of conduct demonstrated that “they were leveraging the borrowers’ cognitive and behavioral weaknesses to Defendants’ advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico.” 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that “[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a ‘grossly unfair degree.’” *Id.*

Gross disparity:

“In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity.” *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See Robey*, 2017-NMCA-038, ¶ 54 (“Under Plaintiff’s view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff’s subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.”).

“[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate.” *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). “Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate.” *Id.*

“Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair.” *B&B Investment Group, Inc.*, 2014-NMSC-024, ¶ 32.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2503. False or misleading oral statements, written statements, visual descriptions, or representations of any kind

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

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An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

USE NOTES

This instruction should be given in cases involving UPA claims when the first element of UJI 13-2501 NMRA—i.e., that the defendant made an oral statement, a written statement, a visual description, or a representation of any kind that was either false or misleading—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary.— The UPA requires, as an element of an unfair deceptive trade practices claim, that “the party charged made an oral or written statement, visual description or other representation that was either false or misleading.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97. Actions such as failing to acknowledge legal obligations can constitute misrepresentations. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459 (holding that a bank’s failure to acknowledge liability pursuant to the FTC Holder Rule was an unfair practice). Material omissions are actionable. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). Under New Mexico law, “a fact is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important.” *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶72, 133 N.M. 669.

[NEW MATERIAL]

13-2503.2504. Knowingly; definition.

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act. The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____(name of defendant) was actually aware that the statement was false or misleading when it was made, or

_____(name of defendant), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA—i.e., that the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary.— The UPA requires, as an element of an unfair or deceptive trade practices—UPA—claim, that a “false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business.” *Lohman v. Daimler- Chrysler Corporation*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). “‘[K]nowingly made’ is an integral part of all UPA claims and must be the subject of actual proof.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal

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quotation marks, and citation omitted).

"[T]he misrepresentation need not be intentionally made, but it must be knowingly made." *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed "knowledge" and "knowingly made" in this context, as follows:

'Knowledge' does not necessarily mean 'actual knowledge,' but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The 'knowingly made' requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25042505. In connection with the sale of goods or services.

A-In _____'s (*name of plaintiff*) unfair or deceptive trade practice claim under the Unfair Practices Act requires that a false or misleading representation be made in connection with the sale of goods or services. However, a sale of goods or services from _____ (*name of defendant*) to _____ (*name of plaintiff*) is not required. It is sufficient if _____ (*name of defendant*) made a false or misleading misrepresentation in connection with a sale of goods or services to a third party.

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USE NOTES

This instruction should be given when the alleged UPA violation involves a sale of goods or services but does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the act. "The conjunctive phrase 'in connection with' seems designed to encompass a broad array of commercial relationships." *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An "unfair or deceptive trade practice" does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* ("Similarly, the UPA allows claims to be brought by 'any person' who suffers damages 'as a result' of any unfair or deceptive trade practice by another." (citing NMSA 1978, § 57-12-10(B) (2005)). "[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally" by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329

P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—"arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties." *Lohman*, 2007-NMCA-100, ¶ 30. "[A] commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim." *Id.* ¶ 33.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2506. May, tends to or does deceive or mislead

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant's conduct actually deceive a person; it permits recovery even if the conduct only "tends to deceive."

USE NOTES

This instruction should be given in cases involving UPA claims when the fourth element of UJI 13-2501 NMRA—i.e., that the representation be of the type that may, tends to, or does deceive or mislead any person—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The fourth element of a UPA claim is that "the representation must have been of the type that may, tends to or does, deceive or mislead any person." *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97, 100, 811 P.2d 1308. The UPA does not require reliance. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265 ("the UPA does not require that the defendant's conduct actually deceive a consumer; it permits recovery even if the conduct only 'tends to deceive.'").

[NEW MATERIAL]

13-25052507. Willful conduct.

In this case _____ (name of plaintiff) claims that _____'s (name of defendant) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____'s (name of plaintiff) claim only if you first find that _____ (name of defendant) violated the New Mexico Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. *See* NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — "The UPA provides for two tiers of monetary remedies for individuals." *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. "For a basic violation, a private party can recover 'actual damages or the sum of one hundred dollars (\$100), whichever is greater.'" *Id.* (quoting Section 57-12-10(B)). "For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars (\$300), whichever is greater." *Id.* (internal quotation marks, citation, and alteration omitted). "Thus, in a jury trial (1) the jury may assess actual, or

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compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define “willfully.” In addressing the issue as a matter of first impression in *Atherton*, the Court of Appeals concluded that, “[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate ‘willfulness.’ ” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result.” The definition provides “a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid foundation for punishment.” *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12; *cf. Hale*, 1990-NMSC-068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second, “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25062508. Damages.

If you decide that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff or consumer) is entitled to recover actual damages resulting from the violation or the sum of one hundred dollars (\$100), whichever is greater.

~~_____ (name of plaintiff or consumer) seeks actual damages in the amount of _____ (insert amount of actual damages claimed) for the following: (include brief description of the actual damages claimed).~~

The plaintiff has the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If _____ (name of plaintiff or consumer) does not prove actual damages, _____ (he/she/they) may recover one hundred dollars (\$100) in damages. _____ (name of plaintiff or consumer) is not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of one hundred dollars (\$100).

USE NOTES

This instruction is to be used in all cases alleging violations of the Unfair Practices Act. The Court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, if the jury finds that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice. *See* NMSA 1978, § 57-12-10(B) (2005); UJI 13-2505-2507 NMRA. The Appendix to this chapter contains an example applying this instruction to a fact pattern.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – Under the UPA,

[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, to the party complaining of the practice.

Section 57-12-10(B).

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars (\$100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that “the UPA . . . require[s] proof of a causal link between conduct and loss.” 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found “nothing in the language of [the UPA] requiring proof of a link between conduct and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’” *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25-Appendix.

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing an Unfair Practices Act violation claim could be structured. There are other acceptable approaches that may be taken, provided the general design of the UJI 13-302 NMRA series of instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in

Chapter 1) and general instructions (such as those found in Chapter 2 and Chapter 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was sold as a "new demonstrator." Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and had been repaired by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at \$13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at \$10,500. The Romeros had the car repainted for \$1,000 and eventually traded it in for a new car, receiving a trade-in value of \$10,000.

Joseph and Kathryn Romero brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

[13-302A]

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

[13-302B]

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it failed to disclose to the Romeros the repairs made to the Ford Fiesta.

[13-302C]

Defendant Desert Auto Sales denies that it represented the condition of the car as new, because it disclosed that the vehicle had been used as a demonstrator.

[13-302E]

Related to the above, Plaintiffs Joseph and Kathryn Romero say, and have the burden of proving, that Defendant Desert Auto Sales willfully made misrepresentations related to the Ford Fiesta violated the Unfair Practices Act.

[13-2501]

For Joseph and Kathryn Romero to prove that Desert Auto Sales violated the Unfair Practices Act, the Romeros must prove:

1. Desert Auto Sales made an oral statement, a written statement, or a representation that was either false or misleading; and
2. The false or misleading statement was knowingly made in connection with the sale of goods and in the regular course of Desert Auto Sales' business; and
3. The representation was of the type that may, tends to or does deceive or mislead any person.

[13-2503]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

4. [13-25042504]

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The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto Sales was actually aware that the statement was false or misleading when it was made; or

Desert Auto Sales, by using reasonable diligence, should have been aware the statement was false or misleading.

[13-2506.]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

[13-25052507]

In this case, Joseph and Kathryn Romero claim that Desert Auto Sales’ conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros’ claim only if you first find that Desert Auto Sales violated the Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

[13-25062508]

If you decide that Desert Auto Sales violated the Unfair Practices Act, then Joseph and Kathryn Romero are entitled to recover actual damages resulting from the violation or the sum of 100 dollars (\$100), whichever is greater.

~~Actual damages means the loss of money or property.~~

~~The Romeros seek actual damages in the amount of \$1,000 for the following:~~

~~— \$1,000 for the cost to re-paint the car; and~~

~~— \$3,000 for the difference between the value of the car had it been undamaged, and the value they received at trade-in.~~

The Romeros have the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If the Romeros do not prove actual damages, they may recover 100 dollars (\$100) in damages. The Romeros are not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of 100 dollars (\$100).

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is “No,” you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

If the answer to Question No. 1 is “Yes”, you are to answer Question No. 2.

Question No. 2: Was Desert Auto Sales’ violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)

Regardless of whether the answer to Question No. 2 is “Yes” or “No”, go on to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, select, by marking

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with an X, only one of the following statements:

_____ We find the total amount of actual damages suffered by the Romeros to be _____. *(Here enter the amount of actual damages to be awarded to the Romeros.)*

_____ We do not find that the Romeros suffered any actual damages. In accordance with the damages instruction, we award the Romeros \$100.

Foreperson

[Adopted by Supreme Court Order No. _____, effective _____.]



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April 13, 2021

Via email only to nmsupremecourtclerk@nmcourts.gov

Joey D. Moya, Clerk
New Mexico Supreme Court
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Santa Fe, New Mexico 87504-0848

SUPREME COURT OF NEW MEXICO
FILED

APR 16 2021

Re: *Proposed Unfair Practice Act jury instructions*

Dear Mr. Moya and UJI Committee Members:

I appreciate the Committee's work on the proposed Unfair Practices Act ("UPA") jury instructions. I also appreciate the opportunity to provide comments.

I am the Senior New Mexico attorney for DNA Legal Services. Our organization frequently represents indigent clients in various consumer issues under the UPA.

I am in agreement with Rob Treinan's analysis of the current jury instructions and the proposed changes as he sets out below. My recommendations are the same as submitted by other consumer advocates including Feferman, Warran and Mattison.

ANALYSIS AND PROPOSAL BY ROB TREINAN

1. The damages instruction, 13-2506, requires the plaintiff to list specific itemized amounts. This proposed structure is unfair to a plaintiff. It does not fairly account for "soft" damages where a plaintiff might want to leave it up to the jury on how much to award, or at least wait until closing argument to suggest a number or a range. In addition, even with some categories of "hard" damages – for example, loss of use – trial evidence, possibly involving issues of admissibility, would be needed before the damages can be accurately calculated.
2. Some of the instructions omit "the collection of debts" as a covered activity, while other, for example, 13-2502, include this covered activity. *See NMSA 57-12-2(D)*. To avoid jury confusion and to make the instructions consistent, this apparent inadvertent admission should be fixed.
3. The case law makes clear that an action or defendant's conduct can be a covered "representation." *See Jaramillo v. Gonzales*, 2002-NMCA-72, ¶¶ 26-31 *cert. denied* 132 N.M. 288, 47 P.3d 447 (2002); *Duke v. Garcia*, No. 11-CV-784, 2014 U.S. Dist. LEXIS 48047 at *19-23 (D.N.M. Feb. 28, 2014). Moreover, a material omission is expressly a UPA violation. *See NMSA 57-12-2(D)(14)*. The instructions, as drafted, misleadingly suggest that covered "representations" must be in the form of a statement.

Other suggested changes represent an effort to more accurately track the statutory language or the applicable case law.

Sincerely,

/s/ J. Kevin Kiser

J. Kevin Kiser
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April 15, 2021

Joey D. Moya, Clerk
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SUPREME COURT OF NEW MEXICO
FILED

APR 16 2021

Via e-mail to nmsupremecourtclerk@nmcourts.gov

RE: Proposed UPA Uniform Jury Instructions



Dear Mr. Moya and UJI Committee Members,

I write with some input or thoughts on the proposed Unfair Practices Act jury instructions. I appreciate the effort of the Committee to draft Uniform Jury Instructions in this important area of New Mexico law.

I have practiced law in New Mexico since 2004 and since roughly 2011, my practice has been predominantly to seek justice for consumers harmed by unfair and deceptive trade practices. The UPA is my primary tool. I also worked for several years for the Office of the Attorney General where I ran a program to help consumers avoid foreclosure and assisted on other cases such as predatory lending and for-profit school cases. Again, the UPA was our main remedy.

Here are my concerns:

1. The proposed damages instruction, 13-2506, requires the plaintiff to list specific itemized amounts. This proposed structure is unfair to a plaintiff. It does not fairly account for all types of damages including emotional distress damages as well as more easily determined damages. The jury should have flexibility to determine the "actual damages" caused by the violations of law.
2. Some of the instructions fail to include "the collection of debts" as a covered type of "good or service", while others, for example, 13-2502, include debt collection. Debt collection is an area rife with abuses in my experience and this conduct or area of activity should be expressly listed consistently to avoid it being seen as an intentional omission or "loophole." See NMSA 57-12-2(D).

3. New Mexico and national case law makes clear that an action or defendant's conduct can be a covered "representation." *See Jaramillo v. Gonzales*, 2002-NMCA-72, ¶¶ 26-31 *cert. denied* 132 N.M. 288, 47 P.3d 447 (2002); *Duke v. Garcia*, No. 11-CV-784, 2014 U.S. Dist. LEXIS 48047 at *19-23 (D.N.M. Feb. 28, 2014). Moreover, an omission of a material fact that would be important to a consumer/buyer is expressly a UPA violation. *See* NMSA 57-12-2(D)(14). The instructions, as drafted, tend to indicate that covered "representations" must be in the form of an affirmative statement. Many UDAP statutes and cases around the nation have found that silence can be a unfair practice in the correct circumstances.

I have attached a redline of the draft instructions. Thank you for receiving my comments. Please feel free to contact me anytime.

Sincerely,

/s David C. Kramer

David C. Kramer

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2021-021**

[NEW MATERIAL]

13-25-Introduction.

Introduction

The instructions in this chapter are for use in cases involving claims brought pursuant to New Mexico's Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with an instruction that sets forth the elements a plaintiff must prove in a UPA claim. Following the elements instruction is an instruction to be used when there is an allegation of an unconscionable trade practice and then three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); UJI 13-Chapter 18 NMRA (Damages).

As the preceding considerations indicate, the instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter—UJIs from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these UJIs for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists.)

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2501. ~~Unfair Practices Act~~ Unfair or deceptive trade practice claim; elements.

For _____ (name of plaintiff) to prove that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was either false or misleading; and

2. The false or misleading statement, description, or representation was knowingly made [in connection with the sale, lease, rental, or loan of goods or services] [in the extension of credit] [in the collection of debts] and in the regular course of the defendant's business; and

3. _____ The representation was of the type that may, tends to, or does deceive or mislead any person.

~~3.~~ [The UPA specifically states that the following conduct constitutes an unfair or deceptive trade practice:

(insert enumerated practice(s) from NMSA 1978 § 57-12-2(D))]

USE NOTES

This instruction should be given in every case alleging ~~violations of the~~ an unfair or deceptive trade practice under the UPA. It sets forth the elements of a claim for unfair or deceptive

trade practices pursuant to the UPA. The bracketed text in the second numbered paragraph should be used only as it pertains to an issue to be decided by the jury. ~~The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case. When the claim arises out of an alleged misrepresentation in the extension of credit or the collection of debts, see NMSA 1978, § 57-12-2(D) (2019), the second numbered paragraph should be modified accordingly.~~ The bracketed text in the final paragraph should be used when the plaintiff asserts that the defendant has violated one of the enumerated practices listed in NMSA 1978 § 57-12-2(D).

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.” *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

- (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading;
- (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business;
- and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434; *cf. Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F.Supp.3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2502. Unconscionable trade practices.

For _____ (name of plaintiff) to prove that _____ (name of defendant) engaged in an unconscionable trade practice, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and

2. That [act] [or] [practice] [took advantage of _____’s (name of plaintiff/consumer) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (name of plaintiff/consumer) and the price paid]. Substantive unconscionability is found where terms are illegal, contrary to public policy, or grossly unfair.

~~[In order to decide whether _____ (name of defendant) took advantage of~~

~~_____ (name of plaintiff/consumer) to a grossly unfair degree, you must consider
_____'s (name of defendant) [acts] [or] [practices] in their entirety, as well as
_____'s (name of plaintiff/consumer) characteristics.]~~

~~[In order to determine whether a gross disparity exists, you must look at the bargain made
by the parties and determine whether on its face the value received by _____ (name of
plaintiff/consumer) was grossly out of proportion to the price paid.]~~

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in unconscionable trade practices. ~~The plaintiff's name should be inserted in the indicated blanks if the conduct alleged to be unconscionable involved the plaintiff. In cases where the plaintiff alleges unconscionable conduct involving another consumer, for example in those cases brought by the Office of the Attorney General, the name of the consumer should be inserted.~~

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – The UPA defines an unconscionable trade practice as:

[A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, Section 57-12-2(E) (2019).

“Given Plaintiff's potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

to support the district court's ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers' detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree,

we look “at practices in the aggregate, as well as the borrowers’ characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat’l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134 N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank’s pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple’s ranch:

[T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a ‘grossly unfair degree’ because of (1) the Ribbles’ advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants’ pattern of conduct demonstrated that “they were leveraging the borrowers’ cognitive and behavioral weaknesses to Defendants’ advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico.” 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that “[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a ‘grossly unfair degree.’ ” *Id.*

Gross disparity

“In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity.” *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See Robey*, 2017-NMCA-038, ¶ 54 (“Under Plaintiff’s view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff’s subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.”).

“[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate.” *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). “Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate.” *Id.*

“Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair.” *B&B Investment Group, Inc.*, 2014-NMSC-024, ¶ 32.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2503. False or misleading oral statements, written statements, visual descriptions, or representations of any kind

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

USE NOTES

This instruction should be given in cases involving UPA claims when the first element of UJI 13-2501 NMRA—i.e., that the defendant made an oral statement, a written statement, a visual description, or a representation of any kind that was either false or misleading—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair deceptive trade practices claim, that “the party charged made an oral or written statement, visual description or other representation that was either false or misleading.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97. Actions such as failing to acknowledge legal obligations can constitute misrepresentations. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459 (holding that a bank’s failure to acknowledge liability pursuant to the FTC Holder Rule was an unfair practice). Material omissions are actionable. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). Under New Mexico law, “a fact is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important.” *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶72, 133 N.M. 669.

[NEW MATERIAL]

13-25032504. Knowingly; definition.

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____ (name of defendant) was actually aware that the statement was false or misleading when it was made, or

_____ (name of defendant), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA—i.e., that the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair or deceptive trade practices —UPA—claim, that a “false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business.” *Lohman v. Daimler- Chrysler Corporation*. 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). “ ‘[K]nowingly made’ is an integral part of all UPA claims and must be the subject of actual proof.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal

quotation marks, and citation omitted).

“[T]he misrepresentation need not be intentionally made, but it must be knowingly made.” *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed “knowledge” and “knowingly made” in this context, as follows:

‘Knowledge’ does not necessarily mean ‘actual knowledge,’ but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The ‘knowingly made’ requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25042505. In connection with the sale of goods or services.

A-In _____’s (*name of plaintiff*) unfair or deceptive trade practice claim under the Unfair Practices Act ~~requires that a false or misleading representation be made in connection with the sale of goods or services. However,~~ a sale of goods or services from _____ (*name of defendant*) to _____ (*name of plaintiff*) is not required. It is sufficient if _____ (*name of defendant*) made a false or misleading misrepresentation in connection with a sale of goods or services to a third party.

USE NOTES

This instruction should be given when the alleged UPA violation involves a sale of goods or services but does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the act. “The conjunctive phrase ‘in connection with’ seems designed to encompass a broad array of commercial relationships.” *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An “unfair or deceptive trade practice” does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* (“Similarly, the UPA allows claims to be brought by ‘any person’ who suffers damages ‘as a result’ of any unfair or deceptive trade practice by another.” (citing NMSA 1978, § 57-12-10(B) (2005))). “[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally” by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329

P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—“arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties.” *Lohman*, 2007-NMCA-100, ¶ 30. “[A] commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim.” *Id.* ¶ 33.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2506. May, tends to or does deceive or mislead

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

USE NOTES

This instruction should be given in cases involving UPA claims when the fourth element of UJI 13-2501 NMRA—i.e., that the representation be of the type that may, tends to, or does deceive or mislead any person—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The fourth element of a UPA claim is that “the representation must have been of the type that may, tends to or does, deceive or mislead any person.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97, 100, 811 P.2d 1308. The UPA does not require reliance. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265 (“the UPA does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’”).

[NEW MATERIAL]

13-25052507. Willful conduct.

In this case _____ (name of plaintiff) claims that _____’s (name of defendant) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____’s (name of plaintiff) claim only if you first find that _____ (name of defendant) violated the New Mexico Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. *See* NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The UPA provides for two tiers of monetary remedies for individuals.” *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. “For a basic violation, a private party can recover ‘actual damages or the sum of one hundred dollars (\$100), whichever is greater.’” *Id.* (quoting Section 57-12-10(B)). “For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars (\$300), whichever is greater.” *Id.* (internal quotation marks, citation, and alteration omitted). “Thus, in a jury trial (1) the jury may assess actual, or

compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define “willfully.” In addressing the issue as a matter of first impression in *Atherton*, the Court of Appeals concluded that, “[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate ‘willfulness.’ ” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result.” The definition provides “a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid foundation for punishment.” *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12; *cf. Hale*, 1990-NMSC-068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second, “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25062508. Damages.

If you decide that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff or consumer) is entitled to recover actual damages resulting from the violation or the sum of one hundred dollars (\$100), whichever is greater.

~~_____ (name of plaintiff or consumer) seeks actual damages in the amount of _____ (insert amount of actual damages claimed) for the following: (include brief description of the actual damages claimed).~~

The plaintiff has the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If _____ (name of plaintiff or consumer) does not prove actual damages, _____ (he/she/they) may recover one hundred dollars (\$100) in damages. _____ (name of plaintiff or consumer) is not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of one hundred dollars (\$100).

USE NOTES

This instruction is to be used in all cases alleging violations of the Unfair Practices Act. The Court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, if the jury finds that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice. *See* NMSA 1978, § 57-12-10(B) (2005); UJI 13-~~2505~~-2507 NMRA. The Appendix to this chapter contains an example applying this instruction to a fact pattern.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – Under the UPA,

[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, to the party complaining of the practice.

Section 57-12-10(B).

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars (\$100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that “the UPA . . . require[s] proof of a causal link between conduct and loss.” 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found “nothing in the language of [the UPA] requiring proof of a link between conduct and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’ ” *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25-Appendix.

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing an Unfair Practices Act violation claim could be structured. There are other acceptable approaches that may be taken, provided the general design of the UJI 13-302 NMRA series of instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in

Chapter 1) and general instructions (such as those found in Chapter 2 and Chapter 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was sold as a “new demonstrator.” Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and had been repaired by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at \$13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at \$10,500. The Romeros had the car repainted for \$1,000 and eventually traded it in for a new car, receiving a trade-in value of \$10,000.

Joseph and Kathryn Romero brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

[13-302A]

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

[13-302B]

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it failed to disclose to the Romeros the repairs made to the Ford Fiesta.

[13-302C]

Defendant Desert Auto Sales denies that it represented the condition of the car as new, because it disclosed that the vehicle had been used as a demonstrator.

[13-302E]

Related to the above, Plaintiffs Joseph and Kathryn Romero say, and have the burden of proving, that Defendant Desert Auto Sales ~~willfully made misrepresentations related to the Ford Fiesta~~ violated the Unfair Practices Act.

[13-2501]

For Joseph and Kathryn Romero to prove that Desert Auto Sales violated the Unfair Practices Act, the Romeros must prove:

1. Desert Auto Sales made an oral statement, a written statement, or a representation that was either false or misleading; and
2. The false or misleading statement was knowingly made in connection with the sale of goods and in the regular course of Desert Auto Sales' business; and
3. The representation was of the type that may, tends to or does deceive or mislead any person.

[13-2503]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

3. [13-25032504]

The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto Sales was actually aware that the statement was false or misleading when it was made; or

Desert Auto Sales, by using reasonable diligence, should have been aware the statement was false or misleading.

[13-2506.]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

[13-25052507]

In this case, Joseph and Kathryn Romero claim that Desert Auto Sales’ conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros’ claim only if you first find that Desert Auto Sales violated the Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

[13-25062508]

If you decide that Desert Auto Sales violated the Unfair Practices Act, then Joseph and Kathryn Romero are entitled to recover actual damages resulting from the violation or the sum of 100 dollars (\$100), whichever is greater.

~~Actual damages means the loss of money or property.~~

~~The Romeros seek actual damages in the amount of \$4,000 for the following:~~

~~— \$1,000 for the cost to re-paint the car; and~~

~~— \$3,000 for the difference between the value of the car had it been undamaged, and the value they received at trade-in.~~

The Romeros have the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If the Romeros do not prove actual damages, they may recover 100 dollars (\$100) in damages. The Romeros are not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of 100 dollars (\$100).

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is “No,” you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

If the answer to Question No. 1 is “Yes,” you are to answer Question No. 2.

Question No. 2: Was Desert Auto Sales’ violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)

Regardless of whether the answer to Question No. 2 is “Yes” or “No”, go on to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, select, by marking

with an X, only one of the following statements:

_____ We find the total amount of actual damages suffered by the Romeros to be _____. *(Here enter the amount of actual damages to be awarded to the Romeros.)*

_____ We do not find that the Romeros suffered any actual damages. In accordance with the damages instruction, we award the Romeros \$100.

[Adopted by Supreme Court Order No. _____, effective _____.]

Foreperson



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April 15, 2021

Joey D. Moya, Clerk
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504-0848

Via email to nmsupremecourtclerk@nmcourts.gov

SUPREME COURT OF NEW MEXICO
FILED

APR 16 2021

Re: Proposed Unfair Practice Act Jury Instruction Revisions

Dear Mr. Moya and UJI Committee Members,

The Senior Citizens' Law Office, Inc. (SCLO) appreciates the Committee's work on the proposed Unfair Practices Act (UPA) jury instructions as well as the opportunity to provide comments.

SCLO provides free civil legal services for persons aged 60 and older in Central New Mexico, the vast majority of whom are low-income seniors earning at or below 200% of the FPL. Since SCLO's inception in 1983, SCLO has represented clients in various aspects of consumer law. SCLO often asserts claims under the UPA during representation on consumer issues although the office generally does not have the resources to bring a UPA claim to trial. When SCLO identifies a strong case for litigation under the UPA, SCLO generally refers the client to a private attorney for trial. However, SCLO believes it is in the interests of consumers in the state of New Mexico and SCLO's clients for the UPA UJI to be revised.

SCLO agrees with and supports the recommendations submitted by other consumer advocates including the Law Offices of Feferman, Warren & Mattison and Mr. Rob Treinen. SCLO believes the suggested changes made by these consumer advocates should be adopted because the revisions provide clarity to juries who determine the outcome of UPA claims and that the proposed changes closely track UPA statutes and case law.

For these reasons, SCLO encourages the adoption of the revised UPA UJI.

Sincerely,

Brwyn Downing, Esq.
Executive Director

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2021-021**

[NEW MATERIAL]

13-25-Introduction.

Introduction

The instructions in this chapter are for use in cases involving claims brought pursuant to New Mexico's Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with an instruction that sets forth the elements a plaintiff must prove in a UPA claim. Following the elements instruction is an instruction to be used when there is an allegation of an unconscionable trade practice and then three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); UJI 13-Chapter 18 NMRA (Damages).

As the preceding considerations indicate, the instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter—UJIs from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these UJIs for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists.)

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2501. ~~Unfair Practices Act~~ Unfair or deceptive trade practice claim; elements.

For _____ (name of plaintiff) to prove that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was either false or misleading; and
 2. The false or misleading statement, description, or representation was knowingly made [in connection with the sale, lease, rental, or loan of goods or services] [in the extension of credit] [in the collection of debts] and in the regular course of the defendant's business; and
 3. _____ The representation was of the type that may, tends to, or does deceive or mislead any person.
3. [The UPA specifically states that the following conduct constitutes an unfair or deceptive trade practice:

(insert enumerated practice(s) from NMSA 1978 § 57-12-2(D))

USE NOTES

This instruction should be given in every case alleging ~~violations of the~~ unfair or deceptive trade practice under the UPA. It sets forth the elements of a claim for unfair or deceptive trade practices pursuant to the UPA. The bracketed text in the second numbered paragraph should be

used only as it pertains to an issue to be decided by the jury. ~~The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case. When the claim arises out of an alleged misrepresentation in the extension of credit or the collection of debts, see NMSA 1978, § 57-12-2(D) (2019), the second numbered paragraph should be modified accordingly. The bracketed text in the final paragraph should be used when the plaintiff asserts that the defendant has violated one of the enumerated practices listed in NMSA 1978 § 57-12-2(D).~~

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.” *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

- (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434; *cf. Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F.Supp.3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2502. Unconscionable trade practices.

For _____ (name of plaintiff) to prove that _____ (name of defendant) engaged in an unconscionable trade practice, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and

2. That [act] [or] [practice] [took advantage of _____’s (name of plaintiff/consumer) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (name of plaintiff/consumer) and the price paid]. Substantive unconscionability is found where terms are illegal, contrary to public policy, or grossly unfair.

[In order to decide whether _____ (name of defendant) took advantage of _____ (name of plaintiff/consumer) to a grossly unfair degree, you must consider _____’s (name of defendant) [acts] [or] [practices] in their entirety, as well as

_____'s (*name of plaintiff/consumer*) characteristics.]

~~[In order to determine whether a gross disparity exists, you must look at the bargain made by the parties and determine whether on its face the value received by _____ (*name of plaintiff/consumer*) was grossly out of proportion to the price paid.]~~

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in unconscionable trade practices. ~~The plaintiff's name should be inserted in the indicated blanks if the conduct alleged to be unconscionable involved the plaintiff. In cases where the plaintiff alleges unconscionable conduct involving another consumer, for example in those cases brought by the Office of the Attorney General, the name of the consumer should be inserted.~~

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – The UPA defines an unconscionable trade practice as:

[A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, Section 57-12-2(E) (2019).

“Given Plaintiff's potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

to support the district court's ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers' detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree, we look “at practices in the aggregate, as well as the borrowers' characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat'l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134

N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank's pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple's ranch:

[T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a 'grossly unfair degree' because of (1) the Ribbles' advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants' pattern of conduct demonstrated that "they were leveraging the borrowers' cognitive and behavioral weaknesses to Defendants' advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico." 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that "[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a 'grossly unfair degree.'" *Id.*

Gross disparity

"In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity." *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See Robey*, 2017-NMCA-038, ¶ 54 ("Under Plaintiff's view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff's subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.").

"[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate." *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). "Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate." *Id.*

"Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair." *B&B Investment Group, Inc.*, 2014-NMSC-024, ¶ 32.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2503. False or misleading oral statements, written statements, visual descriptions, or representations of any kind

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the

representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

USE NOTES

This instruction should be given in cases involving UPA claims when the first element of UJI 13-2501 NMRA—i.e., that the defendant made an oral statement, a written statement, a visual description, or a representation of any kind that was either false or misleading—is at issue.
[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair deceptive trade practices claim, that “the party charged made an oral or written statement, visual description or other representation that was either false or misleading.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97. Actions such as failing to acknowledge legal obligations can constitute misrepresentations. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459 (holding that a bank’s failure to acknowledge liability pursuant to the FTC Holder Rule was an unfair practice). Material omissions are actionable. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). Under New Mexico law, “a fact is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important.” *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶72, 133 N.M. 669.

[NEW MATERIAL]

13-25032504. Knowingly; definition.

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act ~~The Unfair Practices Act~~ requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____ (name of defendant) was actually aware that the statement was false or misleading when it was made, or

_____ (name of defendant), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA—i.e., that the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair or deceptive trade practices —UPA—claim, that a “false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business.” *Lohman v. Daimler- Chrysler Corporation*. 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). “‘[K]nowingly made’ is an integral part of all UPA claims and must be the subject of actual proof.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal quotation marks, and citation omitted).

“[T]he misrepresentation need not be intentionally made, but it must be knowingly made.” *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed “knowledge” and “knowingly made” in this context, as follows:

‘Knowledge’ does not necessarily mean ‘actual knowledge,’ but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The ‘knowingly made’ requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25042505. In connection with the sale of goods or services.

A-In _____’s (*name of plaintiff*) unfair or deceptive trade practice claim under the Unfair Practices Act ~~requires that a false or misleading representation be made in connection with the sale of goods or services. However,~~ a sale of goods or services from _____ (*name of defendant*) to _____ (*name of plaintiff*) is not required. It is sufficient if _____ (*name of defendant*) made a false or misleading misrepresentation in connection with a sale of goods or services to a third party.

USE NOTES

This instruction should be given when the alleged UPA violation involves a sale of goods or services but does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the act. “The conjunctive phrase ‘in connection with’ seems designed to encompass a broad array of commercial relationships.” *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An “unfair or deceptive trade practice” does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* (“Similarly, the UPA allows claims to be brought by ‘any person’ who suffers damages ‘as a result’ of any unfair or deceptive trade practice by another.” (citing NMSA 1978, § 57-12-10(B) (2005)). “[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally” by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329 P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—“arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties.” *Lohman*, 2007-NMCA-100, ¶ 30. “[A] commercial transaction between a claimant and a defendant need not be

alleged in order to sustain a UPA claim.” *Id.* ¶ 33.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2506. May, tends to or does deceive or mislead

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

USE NOTES

This instruction should be given in cases involving UPA claims when the fourth element of UJI 13-2501 NMRA—i.e., that the representation be of the type that may, tends to, or does deceive or mislead any person—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The fourth element of a UPA claim is that “the representation must have been of the type that may, tends to or does, deceive or mislead any person.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97, 100, 811 P.2d 1308. The UPA does not require reliance. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265 (“the UPA does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’”).

[NEW MATERIAL]

13-25052507. Willful conduct.

In this case _____ (name of plaintiff) claims that _____’s (name of defendant) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____’s (name of plaintiff) claim only if you first find that _____ (name of defendant) violated the New Mexico Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. *See* NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The UPA provides for two tiers of monetary remedies for individuals.” *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. “For a basic violation, a private party can recover ‘actual damages or the sum of one hundred dollars (\$100), whichever is greater.’” *Id.* (quoting Section 57-12-10(B)). “For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars (\$300), whichever is greater.” *Id.* (internal quotation marks, citation, and alteration omitted). “Thus, in a jury trial (1) the jury may assess actual, or compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define “willfully.” In addressing the issue as a matter of first impression in

Atherton, the Court of Appeals concluded that, “[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate ‘willfulness.’ ” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result.” The definition provides “a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid foundation for punishment.” *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12; *cf. Hale*, 1990-NMSC-068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second, “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25062508. Damages.

If you decide that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff or consumer) is entitled to recover actual damages resulting from the violation or the sum of one hundred dollars (\$100), whichever is greater.

~~_____ (name of plaintiff or consumer) seeks actual damages in the amount of _____ (insert amount of actual damages claimed) for the following: (include brief description of the actual damages claimed).~~

The plaintiff has the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If _____ (name of plaintiff or consumer) does not prove actual damages, _____ (he/she/they) may recover one hundred dollars (\$100) in damages. _____ (name of plaintiff or consumer) is not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of one hundred dollars (\$100).

USE NOTES

This instruction is to be used in all cases alleging violations of the Unfair Practices Act. The Court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, if the jury finds that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice. *See NMSA 1978, §*

57-12-10(B) (2005); UJI 13-~~2505~~-2507 NMRA. The Appendix to this chapter contains an example applying this instruction to a fact pattern.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – Under the UPA,

[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act. may bring an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, to the party complaining of the practice.

Section 57-12-10(B).

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars (\$100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that “the UPA . . . require[s] proof of a causal link between conduct and loss.” 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found “nothing in the language of [the UPA] requiring proof of a link between conduct and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’ ” *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25-Appendix.

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing an Unfair Practices Act violation claim could be structured. There are other acceptable approaches that may be taken, provided the general design of the UJI 13-302 NMRA series of instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in Chapter 1) and general instructions (such as those found in Chapter 2 and Chapter 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was

sold as a “new demonstrator.” Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and had been repaired by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at \$13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at \$10,500. The Romeros had the car repainted for \$1,000 and eventually traded it in for a new car, receiving a trade-in value of \$10,000.

Joseph and Kathryn Romero brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

[13-302A]

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

[13-302B]

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it failed to disclose to the Romeros the repairs made to the Ford Fiesta.

[13-302C]

Defendant Desert Auto Sales denies that it represented the condition of the car as new, because it disclosed that the vehicle had been used as a demonstrator.

[13-302E]

Related to the above, Plaintiffs Joseph and Kathryn Romero say, and have the burden of proving, that Defendant Desert Auto Sales ~~willfully made misrepresentations related to the Ford Fiesta~~ violated the Unfair Practices Act.

[13-2501]

For Joseph and Kathryn Romero to prove that Desert Auto Sales violated the Unfair Practices Act, the Romeros must prove:

1. Desert Auto Sales made an oral statement, a written statement, or a representation that was either false or misleading; and
2. The false or misleading statement was knowingly made in connection with the sale of goods and in the regular course of Desert Auto Sales’ business; and
3. The representation was of the type that may, tends to or does deceive or mislead any person.

[13-2503]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

3. [13-25032504]

The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto Sales was actually aware that the statement was false or misleading when it was made; or

Desert Auto Sales, by using reasonable diligence, should have been aware the statement was false or misleading.

[13-2506.]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant's conduct actually deceive a person; it permits recovery even if the conduct only "tends to deceive."

[13-25062507]

In this case, Joseph and Kathryn Romero claim that Desert Auto Sales' conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros' claim only if you first find that Desert Auto Sales violated the Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

[13-25062508]

If you decide that Desert Auto Sales violated the Unfair Practices Act, then Joseph and Kathryn Romero are entitled to recover actual damages resulting from the violation or the sum of 100 dollars (\$100), whichever is greater.

~~Actual damages means the loss of money or property.~~

~~The Romeros seek actual damages in the amount of \$4,000 for the following:~~

~~— \$1,000 for the cost to re-paint the car; and~~

~~— \$3,000 for the difference between the value of the car had it been undamaged, and the value they received at trade-in.~~

The Romeros have the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If the Romeros do not prove actual damages, they may recover 100 dollars (\$100) in damages. The Romeros are not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of 100 dollars (\$100).

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is "No," you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

If the answer to Question No. 1 is "Yes", you are to answer Question No. 2.

Question No. 2: Was Desert Auto Sales' violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)

Regardless of whether the answer to Question No. 2 is "Yes" or "No", go on to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, select, by marking with an X, only one of the following statements:

_____ We find the total amount of actual damages suffered by the Romeros to be _____. *(Here enter the amount of actual damages to be awarded to the Romeros.)*

_____ We do not find that the Romeros suffered any actual damages. In

accordance with the damages instruction, we award the Romeros \$100.

Foreperson

[Adopted by Supreme Court Order No. _____, effective _____.]



SUPREME COURT OF NEW MEXICO
FILED

Joey D. Moya, Clerk
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504

APR 16 2021

Via Email: NMSupremecourtclerk@nmcourts.gov

April 16, 2021

Re: Proposed Unfair Practices Act Uniform Jury Instructions

Dear Mr. Moya and Members of the UJI Committee,

On behalf of the New Mexico Center on Law & Poverty, we submit these comments in response to Supreme Court Proposal 2021-021 on Uniform Jury Instructions for cases involving claims brought under the New Mexico Unfair Practices Act. The New Mexico Center on Law & Poverty is a 501(c)(3) nonprofit organization that advances economic and social justice in New Mexico through education, advocacy, and litigation. In particular, we employ our multifaceted advocacy approach to improve state lending laws and regulations and their enforcement to ensure that all New Mexicans have access to fair credit and are not harmed by deceptive debt collection practices. We represent low-income New Mexicans who have been subjected to unfair trade practices and we express our support to ensure that the uniform jury instructions accurately represent the elements of an Unfair Practices Act claim.

We urge the Court to adopt the proposal, with the redlined edits and additions proposed by our colleague Rob Treinen who has extensive experience trying cases brought pursuant to the New Mexico Unfair Trade Practices Act and whose jury instructions on UPA cases are routinely accepted and adopted by New Mexico courts. A copy of Mr. Treinen's April 13, 2021 redlined edits are attached for reference.

The proposed UJI, together with Mr. Treinen's edits, present a clear, up-to-date representation of the elements that must be proven in a jury trial on claims brought pursuant to New Mexico's Unfair Practices Act, particularly with regards to claims of unconscionable trade practices. Specifically, Mr. Treinen's proposed additions and clarify the activities and conduct covered by the Unfair Practices Act and make the instructions consistent with statutory language and applicable case law. Mr. Treinen's edits also amend the damages instruction to account for damages that cannot be specifically itemized, but should be left to the discretion of the jury to fully and accurately calculate and account for damages.

Adopting Proposal 2021-021 to align the standards for Unfair Practices Act cases is a commonsense fix that will create consistent standards across all state courts. We strongly urge

the committee to adopt Proposal 2021-021, along with the additions and edits proposed by Mr. Treinen.

Sincerely,

Lindsay Cutler
Attorney
505.255.2840
Lindsay@nmpovertylaw.org

Maria Griego
Director, Economic Equity
Maria@nmpovertylaw.org



[nmsupremecourtclerk-grp] Comments to 2021 Proposed Rule Amendments

1 message

Chief Judge Jennifer DeLaney <demdjed@nmcourts.gov>

Fri, Apr 16, 2021 at 10:04 AM

Reply-To: demdjed@nmcourts.gov

To: nmsupremecourtclerk@nmcourts.gov

Cc: "Hofacket, Jarod" <demdjkh@nmcourts.gov>, Tom Stewart <sildtfs@nmcourts.gov>, Jim Foy <sildjbf@nmcourts.gov>

Mr. Moya,

Attached are the comments from the District Judges of the Sixth Judicial District concerning the 2021 proposed rule amendments. Please let me know if I need to submit each one separately or if the attached document is sufficient to distribute to each of the rule committees. Thank you,

Chief Judge DeLaney

--

Jennifer E. DeLaney

Chief Judge, Division II

Sixth Judicial District Court

[855 S. Platinum Avenue](#)

[Deming, New Mexico 88030](#)

(575) 543-1546

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2021 Proposed Rule Amendment Comments.docx
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Code of Professional Conduct Committee

Proposal 2021-006 – Lawyer communications and solicitation of clients

[Rules 16-701, 16-702, and 16-703 NMRA; and Withdrawn Rules 16-704 and 16-705 NMRA]

The Code of Professional Conduct Committee proposes to amend Rules 16-701, 16-702, and 16-703 NMRA to incorporate certain of the 2018 amendments to the ABA Model Rules of Professional Conduct. Because the proposed amendments to Rules 16-701, 16-702, and 16-703 also incorporate some provisions and commentary from Rules 16-704 and 16-705 NMRA, the Committee proposes to withdraw Rules 16-704 and 16-705.

No issues regarding this proposed change.

Rules of Civil Procedure for State Courts Committee

Proposal 2021-007 – Production of documents and things

[Rule 1-034 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1-034 NMRA to: (1) clarify that in answering a request for production, the responding party shall permit inspection in its entirety unless the responding party files a proper objection; (2) require the responding party to state the specific reasons for an objection to a request for production; (3) require the responding party to state whether the response includes all responsive materials; and (4) if the responding party withholds any responsive materials based on an objection, the objection must clearly describe with reasonable particularity the materials withheld for each objection. The Committee also added committee commentary to further explain the amendments.

No issues regarding this proposed change.

Proposal 2021-008 – Electronic filing and service fees as recoverable costs

[Rules 1-054, 2-701, and 3-701 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rules 1-054, 2-701, and 3-701 NMRA to clarify that electronic filing and service fees are recoverable costs.

This rule change helps to clarify what is included in fees and that is helpful to the Court.

Proposal 2021-009 – Court trust account requirements

[Rule 1-102 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1-102 NMRA to clarify that district courts must deposit litigant funds within two (2) business days of receipt in a bank that is a member of the Federal Deposit Insurance Corporation and in an account that is distinct from the court's accounts for general funds. The Committee additionally proposes to amend Rule 1-102 NMRA to specify that funds deposited in a court trust fund checking account

must be invested and maintained in a financial institution located within the court's judicial district and in accordance with governing statutes and any regulation prescribed by the Director of the Administrative Office of the Courts. The Committee also replaced the references to "social security number" and "employer identification number" with the more-inclusive term "taxpayer identification number," and also cited Form W-9 (Request for Taxpayer Identification Number and Certification) by name.

No comment.

Proposal 2021-010 – Tribal court personal representative
[Rule 1B-102 NMRA; and Forms 4B-801 and 4B-802 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1B-102 NMRA, and Forms 4B-801 and 4B-802 NMRA, to clarify that a domiciliary foreign personal presentative includes a tribal court appointee designated by a tribal court or the Bureau of Indian Affairs. The Committee further proposes to amend Forms 4B-801 and 4B-802 NMRA to recognize tribal court appointments. Finally, the Committee proposes to amend Form 4B-801 NMRA to allow "equivalent indicia of authority from a tribal court or the Bureau of Indian Affairs" to serve as a substitute for Letters of Administration or Letters Testamentary, recognizing that tribal courts may title documents differently than probate courts.

No comment.

Proposal 2021-011 – Summons and order for free process
[Rules 2-202 and 3-202 NMRA; and Forms 4-204 and 4-223 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rules 2-202 and 3-202 NMRA by replacing "incapacitated" with "incompetent" for consistency with Rules 1-004(I) and 1-017(D) NMRA applicable to the district courts.

The Committee also proposes to amend Rules 2-202 and 3-202 NMRA, as well as Form 4-204 NMRA, to permit *pro se* parties to serve a summons by mail.

Finally, the Committee proposes to amend Form 4-223 NMRA to specify the methods of service a person seeking free service of process must first attempt in the district, magistrate, and metropolitan courts.

The revisions are helpful in making the rule more clear.

Proposal 2021-012 – Title page of transcript of civil proceedings
[Form 4-708 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Form 4-708 NMRA for consistency with the comparable criminal form, Form 9-608 NMRA, to reflect that the court clerk, rather than the judge, issues the title page of a transcript of civil proceedings.

No objections to the new forms as proposed.

Rules of Criminal Procedure for State Courts Committee

Proposal 2021-013 – Order of trial

[Rule 5-607 NMRA; and New Rules 6-603.1 and 7-603.1 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rule 5-607 NMRA to clarify and make housekeeping changes to its text and committee commentary, and to adopt new Rules 6-603.1 and 7-603.1 NMRA that import Rule 5-607's sequence of trial events into jury trial practice in the magistrate and metropolitan courts.

No objections to the new rules as proposed.

Proposal 2021-014 – Time limits for filing citations

[Rules 6-201, 7-201, and 8-201 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rules 6-201, 7-201, and 8-201 NMRA to incorporate an express time limitation for the filing of a citation and an explicit remedy—the potential dismissal of the citation with prejudice—for a late-filed citation.

This is a necessary amendment to each of the above listed rules.

Proposal 2021-015 – Interview subpoenas

[Rule 6-606 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rule 6-606 NMRA to provide that a judge-issued subpoena in magistrate court will lie “only after good faith efforts to secure an interview . . . have been unsuccessful[.]” the same criterion that governs the issuance of interview subpoenas in metropolitan court under Rule 7-606 NMRA

The changes help to clarify and will reduce the procedure where litigants come straight to the court to obtain an interview subpoena.

Proposal 2021-016 – Time limits for probation violation hearings

[Rules 6-802, 7-802, and 8-802 NMRA]

6-802 (C)(2), 7-802 (C)(2), and 8-802(C)(2) With our current use of technology, there is no reason that a hearing should take two days longer to set if the person is in custody in an out of district detention center. It should be 3 days regardless if the defendant is in detention.

8-802 (D). Municipal ordinances are generally very low-level offenses and allowing someone to remain in custody for 18 days (3 before initial hearing and 15 from that date) seems extremely severe. There should be limited reasons why this kind of case could not be adjudicated with seven days from the initial appearance. The time should be reduced.

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rules 6-802, 7-802, and 8-802 NMRA to provide explicit time limits for the holding of a probation violation hearing in the limited jurisdiction criminal courts.

Proposal 2021-017 – Waiver of counsel and other public defender forms

[Forms 9-401, 9-403, 9-403A, and 9-403B NMRA; and Withdrawn Form 9-401A NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Forms 9-401, 9-403, 9-403A, and 9-403B NMRA, and to withdraw Form 9-401A NMRA, to adopt a single, detailed “Waiver of Counsel Advisement” for use in all courts of criminal jurisdiction, align the form provisions governing the appointment of defense counsel with the current policies of the Law Offices of the Public Defender, and clarify the form provisions governing appeals of indigency determinations.

In the Waiver of Counsel form, the language is definitely much clearer than the previous form; however, there is still a lot of legalese especially in paragraphs six and seven. Additionally, there should be added language that the prosecutor has not duty to assist a self-represented criminal defendant and has no duty of loyalty to him/her.

Proposal 2021-018 – Dismissal of criminal charges on completion of deferred sentence

[Form 9-603A NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Form 9-603A NMRA to make clear the mandatory nature of the dismissal remedy available to a defendant upon the defendant’s completion of the terms of a deferred sentence without revocation.

No comment.

UJI-Civil Committee

Proposal 2021-019 – Insurance has no bearing

[UJI 13-208 NMRA]

The UJI-Civil Committee proposes to amend UJI 13-208 NMRA to align the instruction with jurors’ current understanding of the role played by insurance and to provide for possible use of the instruction prior to the commencement of a trial.

The amendments appear to clarify the UJI, which is helpful.

Proposal 2021-020 – Request for admission

[New UJI 13-215 NMRA]

The UJI-Civil Committee proposes to adopt new UJI 13-215 NMRA to address the introduction of admitted facts at trial. The proposed instruction provides jurors with the definition of a request for admission and informs them of the effect of an admitted fact at trial.

These amendments help to streamline the UJI and increase clarity.

Proposal 2021-021 – Unfair Practices Act claims

[New UJI 13-25 Introduction NMRA; New UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and New UJI 13-25 Appendix NMRA]

The UJI-Civil Committee proposes to adopt a new Chapter 25 to the Civil Uniform Jury Instructions to use with Unfair Practices Act (UPA) claims. Proposed Chapter 25 includes new UJI 13-25 Introduction NMRA; new UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and new UJI 13-25 Appendix NMRA. The proposed Introduction orients practitioners and judges to Chapter 25 and explains how the instructions in the chapter may be used with other UJI chapters. Proposed UJI 13-2501 sets out the elements that a plaintiff alleging a UPA violation must prove and is intended for use in all cases alleging a UPA violation. Proposed UJI 13-2502 instructs the jury on the proof required to establish that a defendant engaged in an unconscionable trade practice under the UPA. Proposed UJI 13-2503, -2504, and -2505 are definitional instructions to be used as appropriate in a given case. Proposed UJI 13-2506 provides a damages framework for UPA claims. The proposed Appendix provides a sample set of jury instructions for a hypothetical case containing UPA violations.

The new UJI will help to give the parties a better framework for proceeding in these cases and assisting jurors in their role as fact finders.

UJI-Criminal Committee

Proposal 2021-022 – Explanation of trial procedure

[UJI 14-101 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-101 NMRA to simplify instructions on outside communications and internet use and to clarify that jurors ordinarily will not receive transcripts of witness testimony.

This seems like an excellent rule change. This has always been a challenging part of the jury script.

Proposal 2021-023 – Procedure for instructing on uncharged offenses

[UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378, 14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA]

The UJI-Criminal Committee proposes to amend the Use Notes to UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378,

14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA to reference the procedure for instruction on uncharged offenses outlined in UJI 14-140 NMRA.

This seems like a helpful correction to make the use of 14-140 mandatory instead of referencing it. I think the old rule was adequate. This is more clear.

Proposal 2021-024 – Stalking and aggravated stalking
[UJI 14-331 and 14-333 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-331 and 14-333 NMRA to conform more closely to the language of NMSA 1978, Section 30-3A-3 (2009), defining the crime of stalking, and NMSA 1978, Section 30-3A-3.1 (1997), defining the crime of aggravated stalking.

I think this change is a reach. The statute changed in 2009. No case has interpreted the statute the way the committee is attempting to, namely that proving that the Defendant was acting without lawful authority is an element for the State to prove. I do not believe the rules committee should be making this fundamental change to the law so long after the statute they are referencing changed.

Proposal 2021-025 - Reliance in fraud
[UJI 14-1640 NMRA]

The UJI-Criminal Committee proposes to amend the committee commentary to UJI 14-1640 NMRA to reference the definition of reliance provided in *State v. Garcia*, 2016-NMSC-034, 384 P.3d 1076, and to remove outdated citations.

No problem with this change. Nice update.

Proposal 2021-026 – Securities offenses
[UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA to update statutory references and style conventions.

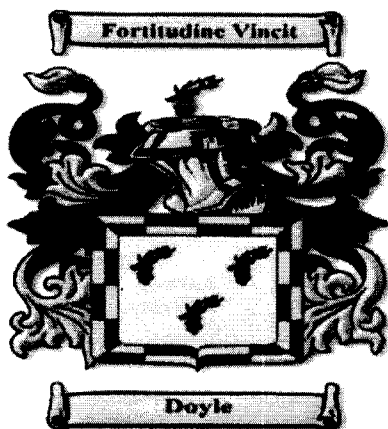
No problem with this change. Nice update.

Proposal 2021-027 – Life without possibility of release or parole
[UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029, 14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA]

Good clarity to provide the Court and practitioners guidance on these cases. No issues.

The UJI-Criminal Committee proposes to amend UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029,

14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA to provide instructions for sentencing proceedings for life imprisonment without possibility of release or parole in response to the repeal of the death penalty and in conformity with *State v. Chadwick-McNally*, 2018-NMSC-018, 414 P.3d 326, Rule 5-705 NMRA, and proposed changes to Rule 14-101 NMRA.



April 16, 2021

Via email Only to supjdm@nmcourts.gov

Joey D. Moya, Clerk

New Mexico Supreme Court

P O Box 848

Santa Fe, New Mexico 87504-0848

SUPREME COURT OF NEW MEXICO
FILED

APR 16 2021

RE: *Re: Proposed Unfair Practice Act jury instructions*

Dear Mr. Moya and UJI Committee Members:

I have reviewed the proposed Unfair Practice Act jury instructions and met with other practitioners who practice in this area and believe that changes need to be made to the proposed jury instruction. I worked with Rob Treinen and others to propose changes to the jury instruction. I believe that Mr. Treinen already sent you proposed changes. I concur with the changes he sent.

1. The damages instruction, 13-2506, requires the plaintiff to list specific itemized amounts. This proposed structure is unfair to a plaintiff. It does not fairly account for "soft" damages where a plaintiff might want to leave it up to the jury on how much to award, or at least wait until closing argument to suggest a number or a range. In addition, even with some categories of "hard" damages—for example, loss of use—trial evidence, possibly involving issues of admissibility, would be needed before the damages can be accurately calculated.
2. Some of the instructions omit "the collection of debts" as a covered activity, while other, for example, 13-2502, include this covered activity. See NMSA 57-12-2(D). To avoid jury confusion and to make the instructions consistent, this apparent inadvertent admission should be fixed.
3. The case law makes clear that an action or defendant's conduct can be a covered "representation." See *Jaramillo v. Gonzales*, 2002-NMCA-72, ¶126-31 cert. denied 132

Michael J. Doyle, Esq.
Attorney at Law

Page 1

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N.M. 288, 47 P.3d 447 (2002); *Duke v. Garcia*, No. 11-CV-784, 2014 U.S. Dist. LEXIS 48047 at *19-23 (D.N.M. Feb. 28, 2014). Moreover, a material omission is expressly a UPA violation. *See* NMSA 57-12-2(D)(14). The instructions, as drafted, misleadingly suggest that covered "representations" must be in the form of a statement.

Please call me with any questions.

Sincerely,

/s/ Michael J. Doyle

Michael J. Doyle, Esq.



New Mexico Legal Aid, Inc.

SUPREME COURT OF NEW MEXICO
FILED

APR 16 2021

Friday, April 16, 2021

Joey D. Moya, Clerk
New Mexico Supreme Court
Submitted via online comment on nmcourts.gov

www.newmexicolegalaid.org

505 Marquette Ave NW

P.O. Box 25486

Albuquerque, NM 87125

Mari Kempton, Managing Attorney

Consumer Law Practice Group

Direct line: (505)545-8540

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marik@nmlegalaid.org

Re: Comment on Proposal 2021-21 (Unfair Practices Act jury instructions)

Dear Mr. Moya and UJI Committee Members:

Thank you for the opportunity to comment on the proposed Unfair Practices Act (“UPA”) jury instructions and your attention to this matter. On behalf of New Mexico Legal Aid, I submit this letter urging the Committee to adopt the edits proposed in the comment previously submitted by Rob Treinen/Treinen Law Office.

New Mexico Legal Aid frequently litigates claims under the Unfair Practices Act in the course of our work protecting the rights of low-income consumers and tenants. We fully support the changes outlined by Mr. Treinen’s letter, a summary of which appear below.

1. Adjust section 13-2506 to allow jury to determine damages amount or later calculation of proposed damages
2. Include “the collection of debts” as a covered activity in all instructions
3. Clarify in instructions that “representation” can include conduct or omission
4. Additional edits as suggested in the attachments to Mr. Treinen’s letter.

Sincerely,

Mari Kempton
Managing Attorney, Consumer Law Practice Group



1306 Rio Grande Blvd NW, Suite B
Albuquerque, NM 87104
Tel: 505-585-4529
Fax: 505-393-1139
Josh@BradleyLawNM.com

April 16, 2021

Via email only to nmsupremecourtclerk@nmcourts.gov

Joey D. Moya, Clerk
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504-0848

SUPREME COURT OF NEW MEXICO
FILED

APR 16 2021

Re: *Proposed Unfair Practice Act jury instructions*

Dear Mr. Moya and UJI Committee Members:

I appreciate the Committee's work on the proposed Unfair Practices Act ("UPA") jury instructions. Thank you for the opportunity to provide comments.

I am a New Mexico attorney. My practice focuses mostly on consumer protection laws, with violations of the UPA being the most common allegation. I have worked with other consumer protection attorneys in New Mexico to ensure that the instructions proposed accurately reflect the statutory language, applicable case law, and mitigated any potential problem areas with the proposed instruction.

I am aware that Rob Treinen has sent those proposed changes, and I have attached the changes to this correspondence as well.

Please feel free to contact me to further discuss. I am happy to help in any way. Thank you.

Sincerely,

Josh Bradley

Attachment: Proposed edits to UPA instructions

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2021-021**

**[NEW MATERIAL]
13-25-Introduction.**

Introduction

The instructions in this chapter are for use in cases involving claims brought pursuant to New Mexico's Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with an instruction that sets forth the elements a plaintiff must prove in a UPA claim. Following the elements instruction is an instruction to be used when there is an allegation of an unconscionable trade practice and then three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); UJI 13-Chapter 18 NMRA (Damages).

As the preceding considerations indicate, the instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter—UJIs from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these UJIs for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists.)

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2501. Unfair Practices Act Unfair or deceptive trade practice claim; elements.

For _____ (name of plaintiff) to prove that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was either false or misleading; and

2. The false or misleading statement, description, or representation was knowingly made [in connection with the sale, lease, rental, or loan of goods or services] [in the extension of credit] [in the collection of debts] and in the regular course of the defendant's business; and

3. The representation was of the type that may, tends to, or does deceive or mislead any person.

4. [The UPA specifically states that the following conduct constitutes an unfair or deceptive trade practice: _____
(insert enumerated practice(s) from NMSA 1978 § 57-12-2(D))]

USE NOTES

This instruction should be given in every case alleging violations of the unfair or deceptive trade practice under the UPA. It sets forth the elements of a claim for unfair or deceptive

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trade practices pursuant to the UPA. The bracketed text in the second numbered paragraph should be used only as it pertains to an issue to be decided by the jury. The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case. When the claim arises out of an alleged misrepresentation in the extension of credit or the collection of debts, see NMSA 1978, § 57-12-2(D) (2019), the second numbered paragraph should be modified accordingly. The bracketed text in the final paragraph should be used when the plaintiff asserts that the defendant has violated one of the enumerated practices listed in NMSA 1978 § 57-12-2(D).

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.” *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

- (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434; *cf. Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F.Supp.3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2502. Unconscionable trade practices.

For _____ (name of plaintiff) to prove that _____ (name of defendant) engaged in an unconscionable trade practice, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and

2. That [act] [or] [practice] [took advantage of _____'s (name of plaintiff-consumer) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (name of plaintiff-consumer) and the price paid]. Substantive unconscionability is found where terms are illegal, contrary to public policy, or grossly unfair.

[In order to decide whether _____ (name of defendant) took advantage of

_____ (name of plaintiff/consumer) to a grossly unfair degree, you must consider
_____s (name of defendant) [acts] [or] [practices] in their entirety, as well as
_____s (name of plaintiff/consumer) characteristics.]

[In order to determine whether a gross disparity exists, you must look at the bargain made by the parties and determine whether on its face the value received by _____ (name of plaintiff/consumer) was grossly out of proportion to the price paid.]

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in unconscionable trade practices. The plaintiff's name should be inserted in the indicated blanks if the conduct alleged to be unconscionable involved the plaintiff. In cases where the plaintiff alleges unconscionable conduct involving another consumer, for example in those cases brought by the Office of the Attorney General, the name of the consumer should be inserted.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – The UPA defines an unconscionable trade practice as:

[A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, Section 57-12-2(E) (2019).

"Given Plaintiff's potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff." *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

to support the district court's ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers' detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree,

we look “at practices in the aggregate, as well as the borrowers’ characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat’l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134 N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank’s pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple’s ranch:

[T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a ‘grossly unfair degree’ because of (1) the Ribbles’ advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants’ pattern of conduct demonstrated that “they were leveraging the borrowers’ cognitive and behavioral weaknesses to Defendants’ advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico.” 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that “[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a ‘grossly unfair degree.’” *Id.*

Gross disparity

“In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity.” *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See Robey*, 2017-NMCA-038, ¶ 54 (“Under Plaintiff’s view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff’s subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.”).

“[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate.” *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). “Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate.” *Id.*

“Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair.” *B&B Investment Group, Inc.*, 2014-NMSC-024, ¶ 32.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2503. False or misleading oral statements, written statements, visual descriptions, or representations of any kind

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

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An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

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USE NOTES

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This instruction should be given in cases involving UPA claims when the first element of UJI 13-2501 NMRA—i.e., that the defendant made an oral statement, a written statement, a visual description, or a representation of any kind that was either false or misleading—is at issue.

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[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair deceptive trade practices claim, that “the party charged made an oral or written statement, visual description or other representation that was either false or misleading.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97. Actions such as failing to acknowledge legal obligations can constitute misrepresentations. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459 (holding that a bank’s failure to acknowledge liability pursuant to the FTC Holder Rule was an unfair practice). Material omissions are actionable. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). Under New Mexico law, “a fact is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important.” *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶72, 133 N.M. 669.

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[NEW MATERIAL]

13-25032504. Knowingly; definition.

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act. The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____(name of defendant) was actually aware that the statement was false or misleading when it was made, or

_____(name of defendant), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA—i.e., that the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair or deceptive trade practices —UPA—claim, that a “false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business.” *Lohman v. Daimler- Chrysler Corporation*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). “‘[K]nowingly made’ is an integral part of all UPA claims and must be the subject of actual proof.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal

quotation marks, and citation omitted).

"[T]he misrepresentation need not be intentionally made, but it must be knowingly made." *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed "knowledge" and "knowingly made" in this context, as follows:

'Knowledge' does not necessarily mean 'actual knowledge,' but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The 'knowingly made' requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25042505. In connection with the sale of goods or services.

A-In _____'s (*name of plaintiff*) unfair or deceptive trade practice claim under the Unfair Practices Act requires that a false or misleading representation be made in connection with the sale of goods or services. However, a sale of goods or services from _____ (*name of defendant*) to _____ (*name of plaintiff*) is not required. It is sufficient if _____ (*name of defendant*) made a false or misleading misrepresentation in connection with a sale of goods or services to a third party.

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USE NOTES

This instruction should be given when the alleged UPA violation involves a sale of goods or services but does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the act. "The conjunctive phrase 'in connection with' seems designed to encompass a broad array of commercial relationships." *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An "unfair or deceptive trade practice" does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* ("Similarly, the UPA allows claims to be brought by 'any person' who suffers damages 'as a result' of any unfair or deceptive trade practice by another." (citing NMSA 1978, § 57-12-10(B) (2005))). "[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally" by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329

P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—“arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties.” *Lohman*, 2007-NMCA-100, ¶ 30. “[A] commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim.” *Id.* ¶ 33.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2506. May, tends to or does deceive or mislead

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

USE NOTES

This instruction should be given in cases involving UPA claims when the fourth element of UJI 13-2501 NMRA—i.e., that the representation be of the type that may, tends to, or does deceive or mislead any person—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The fourth element of a UPA claim is that “the representation must have been of the type that may, tends to or does, deceive or mislead any person.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97, 100, 811 P.2d 1308. The UPA does not require reliance. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265 (“the UPA does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’”).

[NEW MATERIAL]

13-25052507. Willful conduct.

In this case _____ (name of plaintiff) claims that _____’s (name of defendant) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____’s (name of plaintiff) claim only if you first find that _____ (name of defendant) violated the New Mexico Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. See NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The UPA provides for two tiers of monetary remedies for individuals.” *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. “For a basic violation, a private party can recover ‘actual damages or the sum of one hundred dollars (\$100), whichever is greater.’” *Id.* (quoting Section 57-12-10(B)). “For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars (\$300), whichever is greater.” *Id.* (internal quotation marks, citation, and alteration omitted). “Thus, in a jury trial (1) the jury may assess actual, or

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compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define “willfully.” In addressing the issue as a matter of first impression in *Atherton*, the Court of Appeals concluded that, “[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate ‘willfulness.’ ” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result.” The definition provides “a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid foundation for punishment.” *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12; *cf. Hale*, 1990-NMSC-068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second, “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25062508. Damages.

If you decide that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff or consumer) is entitled to recover actual damages resulting from the violation or the sum of one hundred dollars (\$100), whichever is greater.

_____ (name of plaintiff or consumer) seeks actual damages in the amount of _____ (insert amount of actual damages claimed) for the following: (include brief description of the actual damages claimed).

The plaintiff has the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If _____ (name of plaintiff or consumer) does not prove actual damages, _____ (he/she/they) may recover one hundred dollars (\$100) in damages. _____ (name of plaintiff or consumer) is not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of one hundred dollars (\$100).

USE NOTES

This instruction is to be used in all cases alleging violations of the Unfair Practices Act. The Court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, if the jury finds that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice. *See* NMSA 1978, § 57-12-10(B) (2005); UJI 13-2505-2507 NMRA. The Appendix to this chapter contains an example applying this instruction to a fact pattern.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – Under the UPA,

[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, to the party complaining of the practice.

Section 57-12-10(B).

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars (\$100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that “the UPA . . . require[s] proof of a causal link between conduct and loss.” 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found “nothing in the language of [the UPA] requiring proof of a link between conduct and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’ ” *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25-Appendix.

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing an Unfair Practices Act violation claim could be structured. There are other acceptable approaches that may be taken, provided the general design of the UJI 13-302 NMRA series of instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in

Chapter 1) and general instructions (such as those found in Chapter 2 and Chapter 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was sold as a "new demonstrator." Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and had been repaired by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at \$13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at \$10,500. The Romeros had the car repainted for \$1,000 and eventually traded it in for a new car, receiving a trade-in value of \$10,000.

Joseph and Kathryn Romero brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

[13-302A]

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

[13-302B]

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it failed to disclose to the Romeros the repairs made to the Ford Fiesta.

[13-302C]

Defendant Desert Auto Sales denies that it represented the condition of the car as new, because it disclosed that the vehicle had been used as a demonstrator.

[13-302E]

Related to the above, Plaintiffs Joseph and Kathryn Romero say, and have the burden of proving, that Defendant Desert Auto Sales willfully made misrepresentations related to the Ford Fiesta violated the Unfair Practices Act.

[13-2501]

For Joseph and Kathryn Romero to prove that Desert Auto Sales violated the Unfair Practices Act, the Romeros must prove:

1. Desert Auto Sales made an oral statement, a written statement, or a representation that was either false or misleading; and
2. The false or misleading statement was knowingly made in connection with the sale of goods and in the regular course of Desert Auto Sales' business; and
3. The representation was of the type that may, tends to or does deceive or mislead any person.

[13-2503]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

3. [13-25032504]

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The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto Sales was actually aware that the statement was false or misleading when it was made; or

Desert Auto Sales, by using reasonable diligence, should have been aware the statement was false or misleading.

[13-2506.]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

[13-25052507]

In this case, Joseph and Kathryn Romero claim that Desert Auto Sales’ conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros’ claim only if you first find that Desert Auto Sales violated the Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

[13-25062508]

If you decide that Desert Auto Sales violated the Unfair Practices Act, then Joseph and Kathryn Romero are entitled to recover actual damages resulting from the violation or the sum of 100 dollars (\$100), whichever is greater.

~~Actual damages means the loss of money or property.~~

~~The Romeros seek actual damages in the amount of \$4,000 for the following:~~

~~— \$1,000 for the cost to re-paint the car; and~~

~~— \$3,000 for the difference between the value of the car had it been undamaged, and the value they received at trade-in.~~

The Romeros have the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If the Romeros do not prove actual damages, they may recover 100 dollars (\$100) in damages. The Romeros are not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of 100 dollars (\$100).

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is “No,” you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

If the answer to Question No. 1 is “Yes”, you are to answer Question No. 2.

Question No. 2: Was Desert Auto Sales’ violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)

Regardless of whether the answer to Question No. 2 is “Yes” or “No”, go on to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, select, by marking

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with an X, only one of the following statements:

_____ We find the total amount of actual damages suffered by the Romeros to be _____. *(Here enter the amount of actual damages to be awarded to the Romeros.)*

_____ We do not find that the Romeros suffered any actual damages. In accordance with the damages instruction, we award the Romeros \$100.

Foreperson

[Adopted by Supreme Court Order No. _____, effective _____.]

LAW OFFICES OF
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April 16, 2021

Via email only to nmsupremecourtclerk@nmcourts.gov

Joey D. Moya, Clerk
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504-0848

SUPREME COURT OF NEW MEXICO
FILED

APR 19 2021



Re: Proposed Unfair Practice Act jury instructions

Dear Mr. Moya and UJI Committee Members:

Thank you for the Committee's work on the proposed Unfair Practices Act ("UPA") jury instructions, and for providing me with the opportunity to comment on the proposed instructions.

For the past 25 years, my law firm has practiced exclusively consumer law. Over that time period, we have filed well over a thousand cases involving Unfair Practice Act claims, many of which have gone to jury trial, where we have worked on UPA jury instructions.

I am attaching comments we have on the proposed instructions, in a redlined format, but please call me to discuss them if you have any questions. These instructions are obviously very important, and we are happy to help. You can reach me at (505) 463-7674. Thank you.

Sincerely,

/s/ Susan Warren

Susan Warren

SMW/

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2021-021**

[NEW MATERIAL]

13-25-Introduction.

Introduction

The instructions in this chapter are for use in cases involving claims brought pursuant to New Mexico's Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2019) (UPA). The chapter begins with an instruction that sets forth the elements a plaintiff must prove in a UPA claim. Following the elements instruction is an instruction to be used when there is an allegation of an unconscionable trade practice and then three definitional instructions to be used as appropriate to a given case. The final instruction addresses damages specific to UPA violations. The damages instruction is intended to encompass the concept of causation if the plaintiff is seeking actual damages. If other claims with other types of damages are at issue in a case, instructions specific to those categories of damages should also be given to the jury. *See, e.g.*, UJI 13-305 NMRA (Causation); UJI 13-Chapter 18 NMRA (Damages).

As the preceding considerations indicate, the instructions that should be given in a case involving UPA claims may not be entirely contained in this chapter—UJIs from other chapters should be used as appropriate. Further, practitioners may need to draft additional instructions or modify these UJIs for individual cases. *See* Rule 1-051 NMRA; *Mac Tyres, Inc. v. Vigil*, 1979-NMSC-010, ¶ 17, 92 N.M. 446, 589 P.2d 1037 (stating that modified UJIs or non-UJIs may be given when no applicable instruction exists.)

A sample set of jury instructions and a special verdict form in a hypothetical case involving UPA claims appear in the Appendix to this chapter. The example is meant to serve as a guide for assembling a set of instructions in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2501. ~~Unfair Practices Act~~ Unfair or deceptive trade practice claim; elements.

For _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) violated the Unfair Practices Act, _____ (*name of plaintiff*) must prove that:

1. _____ (*name of defendant*) made [an oral statement] [a written statement] [a visual description] [or] [a representation of any kind] that was either false or misleading; and

2. The false or misleading statement, description, or representation was knowingly made [in connection with the sale, lease, rental, or loan of goods or services] [in the extension of credit] [in the collection of debts] and in the regular course of the defendant's business; and

3. _____ The representation was of the type that may, tends to, or does deceive or mislead any person.

3-. [The UPA specifically states that the following conduct constitutes an unfair or deceptive trade practice:

(insert enumerated practice(s) from NMSA 1978 § 57-12-2(D))

USE NOTES

This instruction should be given in every case alleging ~~violations of the~~ an unfair or deceptive trade practice under the UPA. It sets forth the elements of a claim for unfair or deceptive trade practices pursuant to the UPA. The bracketed text in the second numbered paragraph should be

used only as it pertains to an issue to be decided by the jury. ~~The definitional instructions that follow should be used in conjunction with this instruction as appropriate given the circumstances of the case. When the claim arises out of an alleged misrepresentation in the extension of credit or the collection of debts, see NMSA 1978, § 57-12-2(D) (2019), the second numbered paragraph should be modified accordingly. The bracketed text in the final paragraph should be used when the plaintiff asserts that the defendant has violated one of the enumerated practices listed in NMSA 1978 § 57-12-2(D).~~

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.” *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted). The three essential elements of a UPA claim are:

- (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Id. (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

The Legislature intended the UPA to serve as a remedial statute for consumer protection, and in general it does not encompass competitor suits for competitive injury. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶¶ 23-24, 453 P.3d 434; *cf. Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F.Supp.3d 1215, 1223-24 (D.N.M. 2020) (holding that a UPA claim based on competitive injury was permitted and did not conflict with *GandyDancer, LLC* where a provision of the Motor Carrier Act, NMSA 1978, § 65-2A-33(J) (2013), explicitly provides for such a UPA claim).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2502. Unconscionable trade practices.

For _____ (name of plaintiff) to prove that _____ (name of defendant) engaged in an unconscionable trade practice, _____ (name of plaintiff) must prove that:

1. _____ (name of defendant) [committed an act] [or] [engaged in a practice] [in connection with the sale, lease, rental, or loan of any goods or services] [in connection with the offering for sale, lease, rental, or loan of any goods or services] [in the extension of credit] [in the collection of debts], and
2. That [act] [or] [practice] [took advantage of _____’s (name of plaintiff/consumer) lack of knowledge, ability, experience, or capacity to a grossly unfair degree] [or] [resulted in a gross disparity between the value received by _____ (name of plaintiff/consumer) and the price paid]. Substantive unconscionability is found where terms are illegal, contrary to public policy, or grossly unfair.

~~[In order to decide whether _____ (name of defendant) took advantage of _____ (name of plaintiff/consumer) to a grossly unfair degree, you must consider _____’s (name of defendant) [acts] [or] [practices] in their entirety, as well as~~

_____'s (name of plaintiff/consumer) characteristics.]

~~[In order to determine whether a gross disparity exists, you must look at the bargain made by the parties and determine whether on its face the value received by _____ (name of plaintiff/consumer) was grossly out of proportion to the price paid.]~~

USE NOTES

This UJI should be used when the plaintiff is alleging the defendant engaged in unconscionable trade practices. ~~The plaintiff's name should be inserted in the indicated blanks if the conduct alleged to be unconscionable involved the plaintiff. In cases where the plaintiff alleges unconscionable conduct involving another consumer, for example in those cases brought by the Office of the Attorney General, the name of the consumer should be inserted.~~

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – The UPA defines an unconscionable trade practice as:

[A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

NMSA 1978, Section 57-12-2(E) (2019).

“Given Plaintiff's potential award for treble damages and attorney fees in an unconscionable trade practice claim, Section 57-12-10, we believe that the Legislature intended that those seeking relief for an unconscionability claim must establish that the defendant economically exploited the plaintiff.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 56, 392 P.3d 642.

In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the New Mexico Supreme Court examined the practices of defendants in regard to marketing and selling high-cost signature loans, which were held by the district court to violate Section 57-12-2(E). The Court in *B&B Investment Group* held that

to support the district court's ruling that the defendants violated Section 57-12-2(E), there must be substantial evidence that the borrowers lacked knowledge, ability, experience, or capacity in credit consumption; that Defendants took advantage of borrowers' deficits in those areas; and that these practices took advantage of borrowers to a grossly unfair degree to the borrowers' detriment.

2014-NMSC-024, ¶ 13.

Takes advantage to a grossly unfair degree

In considering whether the plaintiffs were taken advantage of to a grossly unfair degree, we look “at practices in the aggregate, as well as the borrowers' characteristics.” *B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 25 (citing *Portales Nat'l Bank v. Ribble*, 2003-NMCA-093, ¶ 15, 134

N.M. 238, 75 P.3d 838). In *Ribble*, the Court of Appeals considered a bank's pattern of conduct and demographic factors of the borrowers in determining whether the bank had violated Section 57-12-2(E)(1) in foreclosing on an elderly couple's ranch:

[T]he pattern of conduct by the Bank . . . when considered in the aggregate, constitutes unconscionable trade practices [under] Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the Ribbles to a 'grossly unfair degree' because of (1) the Ribbles' advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank that could have justified their belief that the Bank had sufficient collateral in their property.

Ribble, 2003-NMCA-093, ¶ 15.

Similarly, in *B&B Investment Group*, the defendants' pattern of conduct demonstrated that "they were leveraging the borrowers' cognitive and behavioral weaknesses to Defendants' advantage, and that the borrowers were clearly among the most financially distressed people in New Mexico." 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that "[t]his evidence supported a reasonable inference that Defendants were taking advantage of borrowers to a 'grossly unfair degree.' " *Id.*

Gross disparity

"In a UPA claim for unconscionability, the burden is on the plaintiff to provide the court with evidence to demonstrate a gross disparity." *Robey*, 2017-NMCA-038, ¶ 54. A showing of breach of contract is not necessarily sufficient to establish unconscionability. *See Robey*, 2017-NMCA-038, ¶ 54 ("Under Plaintiff's view of *B&B Investment Group*, any time a defendant breaches a contract, the plaintiff's subjective, perceived value of the contract would be lowered and thus be disproportionate to the price paid. Under this theory, practically every breach of contract claim would also be an unconscionability claim, which is not, we believe, what the Legislature intended in enacting the UPA.").

"[W]e do not look to a breach [of contract] to determine whether there exists a disparity that is disproportionate." *Id.* ¶ 55 (discussing *B & B Inv. Grp., Inc.*, 2014-NMSC-024). "Rather, we look to the bargain of the parties and determine whether on its face the benefit of the bargain (value received) and the price paid are grossly disparate." *Id.*

"Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair." *B&B Investment Group, Inc.*, 2014-NMSC-024, ¶ 32.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2503. False or misleading oral statements, written statements, visual descriptions, or representations of any kind

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the

representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

USE NOTES

This instruction should be given in cases involving UPA claims when the first element of UJI 13-2501 NMRA—i.e., that the defendant made an oral statement, a written statement, a visual description, or a representation of any kind that was either false or misleading—is at issue.
[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair deceptive trade practices claim, that “the party charged made an oral or written statement, visual description or other representation that was either false or misleading.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97. Actions such as failing to acknowledge legal obligations can constitute misrepresentations. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 28, 132 N.M. 459 (holding that a bank’s failure to acknowledge liability pursuant to the FTC Holder Rule was an unfair practice). Material omissions are actionable. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). Under New Mexico law, “a fact is material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important.” *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶72, 133 N.M. 669.

[NEW MATERIAL]

13-25032504. Knowingly; definition.

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act ~~The Unfair Practices Act~~ requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

_____ (name of defendant) was actually aware that the statement was false or misleading when it was made, or

_____ (name of defendant), by using reasonable diligence, should have been aware that the statement was false or misleading.

USE NOTES

This instruction should be given in cases involving UPA claims when the second element of UJI 13-2501 NMRA—i.e., that the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The UPA requires, as an element of an unfair or deceptive trade practices ~~UPA~~ claim, that a “false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant’s business.” *Lohman v. Daimler- Chrysler Corporation*. 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091 (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97, 811 P.2d 1308). “‘[K]nowingly made’ is an integral part of all UPA claims and must be the subject of actual proof.” *Robey v. Parnell*, 2017-NMCA-038, ¶ 48, 392 P.3d 642 (alteration, internal quotation marks, and citation omitted).

“[T]he misrepresentation need not be intentionally made, but it must be knowingly made.” *Stevenson*, 1991-NMSC-051, ¶ 15. The Court has discussed “knowledge” and “knowingly made” in this context, as follows:

‘Knowledge’ does not necessarily mean ‘actual knowledge,’ but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent man ought to exercise, to a knowledge of the actual facts. One who intentionally remains ignorant is chargeable in law with knowledge.

The ‘knowingly made’ requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading. Thus, for example, in a bait-and-switch, although the party may advertise an item at a special price, and he only has a very limited amount of that particular item, he should be aware that his advertising is misleading.

Id. ¶¶ 16-17 (internal quotation marks and citation omitted).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25042505. In connection with the sale of goods or services.

~~A-In _____’s (name of plaintiff) unfair or deceptive trade practice claim under the Unfair Practices Act requires that a false or misleading representation be made in connection with the sale of goods or services. However,~~ a sale of goods or services from _____ (name of defendant) to _____ (name of plaintiff) is not required. It is sufficient if _____ (name of defendant) made a false or misleading misrepresentation in connection with a sale of goods or services to a third party.

USE NOTES

This instruction should be given when the alleged UPA violation involves a sale of goods or services but does not involve a transaction directly between the plaintiff and the defendant.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement under the UPA that a false or misleading representation be made in connection with the sale of goods or services has been liberally construed and applied in keeping with the plain language and remedial purpose of the act. “The conjunctive phrase ‘in connection with’ seems designed to encompass a broad array of commercial relationships.” *Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091. An “unfair or deceptive trade practice” does not require a transaction between a plaintiff and a defendant; nor does it require a misrepresentation during the course of a sale between a plaintiff and a defendant. *See id.* ¶ 30 (discussing NMSA 1978, § 57-12-2(D) (2003)); *see also id.* (“Similarly, the UPA allows claims to be brought by ‘any person’ who suffers damages ‘as a result’ of any unfair or deceptive trade practice by another.” (citing NMSA 1978, § 57-12-10(B) (2005)). “[I]t merely requires that the misrepresentation be made in connection with the sale of goods or services generally” by the defendant. *Maese v. Garrett*, 2014-NMCA-072, ¶ 18, 329 P.3d 713 (internal quotation marks, citation, ellipsis, and alteration omitted). As a consumer protection statute, the scope of the UPA is broad—“arguably, broad enough to encompass misrepresentations which bear on downstream sales by and between third parties.” *Lohman*, 2007-NMCA-100, ¶ 30. “[A] commercial transaction between a claimant and a defendant need not be

alleged in order to sustain a UPA claim.” *Id.* ¶ 33.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-2506. May, tends to or does deceive or mislead

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant’s conduct actually deceive a person; it permits recovery even if the conduct only “tends to deceive.”

USE NOTES

This instruction should be given in cases involving UPA claims when the fourth element of UJI 13-2501 NMRA—i.e., that the representation be of the type that may, tends to, or does deceive or mislead any person—is at issue.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The fourth element of a UPA claim is that “the representation must have been of the type that may, tends to or does, deceive or mislead any person.” *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶13, 112 N.M. 97, 100, 811 P.2d 1308. The UPA does not require reliance. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265 (“the UPA does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’”).

[NEW MATERIAL]

13-25052507. Willful conduct.

In this case _____ (*name of plaintiff*) claims that _____’s (*name of defendant*) conduct in violating the Unfair Practices Act was willful. You may consider this portion of _____’s (*name of plaintiff*) claim only if you first find that _____ (*name of defendant*) violated the New Mexico Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

USE NOTES

This instruction should be given when there is an issue as to whether a defendant willfully violated the UPA. *See* NMSA 1978, § 57-12-10(B) (2005). When this instruction is given, the jury should be asked to make a determination as to whether the conduct at issue was willful in the special verdict form. The Appendix to this chapter includes a sample special verdict form for use in a UPA case.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — “The UPA provides for two tiers of monetary remedies for individuals.” *Atherton v. Gopin*, 2015-NMCA-003, ¶ 48, 340 P.3d 630. “For a basic violation, a private party can recover ‘actual damages or the sum of one hundred dollars (\$100), whichever is greater.’” *Id.* (quoting Section 57-12-10(B)). “For more aggravated circumstances—where the defendant has willfully engaged in the trade practice—the court may award up to three times actual damage or three hundred dollars (\$300), whichever is greater.” *Id.* (internal quotation marks, citation, and alteration omitted). “Thus, in a jury trial (1) the jury may assess actual, or compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

The UPA does not define “willfully.” In addressing the issue as a matter of first impression in

Atherton, the Court of Appeals concluded that, “[g]iven the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate ‘willfulness.’ ” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance. *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional doing of an act with knowledge that harm may result.” The definition provides “a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid foundation for punishment.” *Id.*

In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff must elect between the remedies to prevent a double recovery. *Id.* ¶ 12; *cf. Hale*, 1990-NMSC-068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second, “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531 (addressing this issue in the context of breach of contract and breach of implied covenant of good faith and fair dealing theories).

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25062508. Damages.

If you decide that _____ (name of defendant) violated the Unfair Practices Act, _____ (name of plaintiff or consumer) is entitled to recover actual damages resulting from the violation or the sum of one hundred dollars (\$100), whichever is greater.

~~_____ (name of plaintiff or consumer) seeks actual damages in the amount of _____ (insert amount of actual damages claimed) for the following: (include brief description of the actual damages claimed).~~

The plaintiff has the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If _____ (name of plaintiff or consumer) does not prove actual damages, _____ (he/she/they) may recover one hundred dollars (\$100) in damages. _____ (name of plaintiff or consumer) is not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of one hundred dollars (\$100).

USE NOTES

This instruction is to be used in all cases alleging violations of the Unfair Practices Act. The Court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, if the jury finds that the defendant charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice. *See* NMSA 1978, §

57-12-10(B) (2005); UJI 13-2505–2507 NMRA. The Appendix to this chapter contains an example applying this instruction to a fact pattern.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary – Under the UPA,

[a]ny person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars (\$100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars (\$300), whichever is greater, to the party complaining of the practice.

Section 57-12-10(B).

Statutory damages are available in the absence of any actual loss.

Our appellate courts have interpreted Section 57-12-10(B) to allow statutory damages of one hundred dollars (\$100) in the absence of any actual loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 44, 142 N.M. 437, 166 P.3d 1091 (citing *Page & Wirtz Construction Co. v. Solomon*, 1990-NMSC-063, ¶¶ 22-23, 110 N.M. 206, 794 P.2d 349, *abrogated on other grounds by GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, 453 P.3d 434; *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104).

Causation is a requirement for actual damages; reliance is not.

In *Smoot v. Physicians Life Ins. Co.*, the Court of Appeals, in the context of comparing reliance and causation, observed that “the UPA . . . require[s] proof of a causal link between conduct and loss.” 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87 P.3d 545. The Court of Appeals held that reliance was not an element of a UPA claim. *Id.* ¶¶ 19-23. It found “nothing in the language of [the UPA] requiring proof of a link between conduct and purchase or sale. To the contrary, Section 57-12-2-(D)(14) . . . does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only ‘tends to deceive.’ ” *Smoot*, 2004-NMCA-027, ¶ 21.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

13-25-Appendix.

Introduction

This appendix provides a sample series of instructions in a case alleging violation of the Unfair Practices Act. The appendix provides one way in which the instructions addressing an Unfair Practices Act violation claim could be structured. There are other acceptable approaches that may be taken, provided the general design of the UJI 13-302 NMRA series of instructions is followed. For purposes of this example, preliminary jury instructions (such as those found in Chapter 1) and general instructions (such as those found in Chapter 2 and Chapter 20) have not been included. These instructions have been modified from the Uniform Jury Instructions where appropriate to reflect the issues in dispute in the fact pattern.

Statement of Facts

Joseph and Kathryn Romero purchased a Ford Fiesta from Desert Auto Sales. The car was

sold as a “new demonstrator.” Several months after the purchase, the paint on the passenger side front fender and door began to fade. The Romeros learned that the car had been in a crash and had been repaired by Desert Auto Sales before their purchase of the car. The Romeros took the car to another auto dealer, who said he would value the car at \$13,000 if it were undamaged, but because it had been in a collision and needed a new paint job, he would value it at \$10,500. The Romeros had the car repainted for \$1,000 and eventually traded it in for a new car, receiving a trade-in value of \$10,000.

Joseph and Kathryn Romero brought suit against Desert Auto Sales, alleging violations of the Unfair Practices Act.

[13-302A]

In this case, Plaintiffs Joseph and Kathryn Romero seek compensation from Defendant Desert Auto Sales for damages that Plaintiffs say were caused by violation of the Unfair Practices Act.

[13-302B]

The Romeros say, and have the burden of proving, that Desert Auto Sales violated the Unfair Practices Act when it failed to disclose to the Romeros the repairs made to the Ford Fiesta.

[13-302C]

Defendant Desert Auto Sales denies that it represented the condition of the car as new, because it disclosed that the vehicle had been used as a demonstrator.

[13-302E]

Related to the above, Plaintiffs Joseph and Kathryn Romero say, and have the burden of proving, that Defendant Desert Auto Sales ~~willfully made misrepresentations related to the Ford Fiesta~~ violated the Unfair Practices Act.

[13-2501]

For Joseph and Kathryn Romero to prove that Desert Auto Sales violated the Unfair Practices Act, the Romeros must prove:

1. Desert Auto Sales made an oral statement, a written statement, or a representation that was either false or misleading; and
2. The false or misleading statement was knowingly made in connection with the sale of goods and in the regular course of Desert Auto Sales’ business; and
3. The representation was of the type that may, tends to or does deceive or mislead any person.

[13-2503]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires a false or misleading oral statement, written statement, visual description, or representation of any kind. This may include statements and representations, but also deceptive conduct and material omissions.

An omission is a failure to state a fact. A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action or if the maker of the representation knew or has reason to know that its recipient regards or is likely to regard the matter as important.

3. [13-2503]2504]

The Unfair Practices Act requires that a statement be “knowingly” made. Knowingly is not the same as intentionally. A statement is knowingly made for purposes of the Unfair Practices Act if:

Desert Auto Sales was actually aware that the statement was false or misleading when it was made; or

Desert Auto Sales, by using reasonable diligence, should have been aware the statement was false or misleading.

[13-2506.]

An unfair or deceptive trade practices claim pursuant to the Unfair Practices Act requires that the representation be of the type that may, tends to or does deceive or mislead any person. The Unfair Practices Act does not require that the defendant's conduct actually deceive a person; it permits recovery even if the conduct only "tends to deceive."

[13-25062507]

In this case, Joseph and Kathryn Romero claim that Desert Auto Sales' conduct in violating the Unfair Practices Act was willful. You may consider this portion of the Romeros' claim only if you first find that Desert Auto Sales violated the Unfair Practices Act.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

[13-25062508]

If you decide that Desert Auto Sales violated the Unfair Practices Act, then Joseph and Kathryn Romero are entitled to recover actual damages resulting from the violation or the sum of 100 dollars (\$100), whichever is greater.

~~Actual damages means the loss of money or property.~~

~~The Romeros seek actual damages in the amount of \$4,000 for the following:~~

~~—\$1,000 for the cost to re-paint the car; and~~

~~—\$3,000 for the difference between the value of the car had it been undamaged, and the value they received at trade-in.~~

The Romeros have the burden of proving the amount of actual damages. Whether actual damages have been proven is for you to determine based on the evidence presented at trial.

If the Romeros do not prove actual damages, they may recover 100 dollars (\$100) in damages. The Romeros are not required to prove actual damages as a result of the unfair trade practice in question in order to recover damages in the amount of 100 dollars (\$100).

Special Verdict Form

Question No. 1: Did Desert Auto Sales violate the Unfair Practices Act?

Answer: _____ (Yes or No)

If the answer to Question No. 1 is "No," you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for Desert Auto Sales and against the Romeros.

If the answer to Question No. 1 is "Yes", you are to answer Question No. 2.

Question No. 2: Was Desert Auto Sales' violation of the Unfair Practice Act willful?

Answer: _____ (Yes or No)

Regardless of whether the answer to Question No. 2 is "Yes" or "No", go on to answer Question No. 3.

Question No. 3: In accordance with the damages instruction given by the court, select, by marking with an X, only one of the following statements:

_____ We find the total amount of actual damages suffered by the Romeros to be _____. *(Here enter the amount of actual damages to be awarded to the Romeros.)*

_____ We do not find that the Romeros suffered any actual damages. In

accordance with the damages instruction, we award the Romeros \$100.

Foreperson

[Adopted by Supreme Court Order No._____, effective_____.]

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April 16, 2021

Joey D. Moya, Clerk
NEW MEXICO SUPREME COURT
New Mexico Supreme Court
Post Office Box 848
Santa Fe, NM 87504-0848

Via E-Mail Only to
nmsupremecourtclerk@nmcourts.gov

Re: Proposed Unfair Practice Act Jury Instructions

Dear Mr. Moya and UJI Committee Members:

We concur with the submissions from Nick Mattison and Rob Treinen.

Please take their suggestions into consideration.

Thank you.

Very truly yours,

Kevin J. Hanratty

KJH:sb

SUPREME COURT OF NEW MEXICO
FILED

APR 19 2021





Parnall & Adams Law

April 16, 2021

Email only to nmsupremecourtclerk@nmcourts.gov

Joey D. Moya, Clerk
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504-0848

SUPREME COURT OF NEW MEXICO
FILED

APR 19 2021

Re: *Proposed Unfair Practice Act jury instructions*

Dear Mr. Moya and UJI Committee Members:

I appreciate the Committee's work on the proposed Unfair Practices Act ("UPA") jury instructions. I also appreciate the opportunity to provide comments.

I am a New Mexico attorney who has spent the last 15 years practicing consumer protection law, representing consumers in hundreds of lawsuits, nearly all of which have included a UPA claim. For the past 7 years of my career, I have included UPA claims in my personal injury and insurance bad faith cases.

Some of the lawsuits where I represented the plaintiff ended up in jury trial. As a result, I have spent significant time working on UPA jury instructions that accurately reflect the law. UPA jury instructions that I drafted have been accepted by many New Mexico courts.

The proposed instructions are problematic in several respects, as set forth in more detail in the redline attachment provided to you by Rob Treinen, a well-established local consumer protection attorney who is nationally recognized for his consumer protection work.

Specifically, the primary problems identified by Mr. Treinen, myself, and the overwhelming majority (if not all) of consumer protection attorneys in New Mexico, include:

1. The damages instruction, 13-2506, requires the plaintiff to list specific itemized amounts. This proposed structure is unfair to a plaintiff. It does not fairly account for "soft" damages where a plaintiff might want to leave it up to the jury on how much to award, or at least wait until closing argument to suggest a number or a range. In addition, even with some categories of "hard" damages – for example, loss of use – trial evidence, possibly involving issues of admissibility, would be needed before the damages can be accurately calculated.

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2. Some of the instructions omit “the collection of debts” as a covered activity, while other, for example, 13-2502, include this covered activity. *See* NMSA 57-12-2(D). To avoid jury confusion and to make the instructions consistent, this apparent inadvertent admission should be fixed. Specifically, the use of brackets is inconsistent throughout the instruction; some sections bracket phrases, others do not.
3. The case law makes clear that an action or defendant’s conduct can be a covered “representation.” *See Jaramillo v. Gonzales*, 2002-NMCA-72, ¶¶ 26-31 *cert. denied* 132 N.M. 288, 47 P.3d 447 (2002); *Duke v. Garcia*, No. 11-CV-784, 2014 U.S. Dist. LEXIS 48047 at *19-23 (D.N.M. Feb. 28, 2014). As explained in *Duke v. Garcia*, an action, such as proceeding with a repossession or remaining on a consumer’s property, is a false representation. Moreover, a material omission is expressly a UPA violation. *See* NMSA 57-12-2(D)(14). The instructions, as drafted, misleadingly suggest that covered “representations” must be in the form of a statement, when the law clearly covers actions and other representations “of any kind”

Other suggested changes represent an effort to more accurately track the statutory language and the applicable case law.

Please feel free to contact me to further discuss. I am happy to help in any way. In these pandemic times, I am best reached via my cell (505) 600-1417. Thank you.

Sincerely,

Charles S. Parnall

DMA/csp