

1 **13-2501. Unfair or deceptive trade practices; elements; misrepresentation.**

2 The Unfair Practices Act prohibits unfair or deceptive trade practices. For
3 _____ (*name of plaintiff*) to prove that _____ (*name of defendant*) engaged
4 in an unfair or deceptive trade practice, _____ (*name of plaintiff*) must prove that:

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

8 2. The [statement] [description] [or] [representation] was knowingly made; and

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

12 4. The [statement] [description] [or] [representation] was of the type that may, tends
13 to, or does deceive or mislead any person.

14 [Practices prohibited by the Unfair Practices Act include _____ (*insert enumerated*
15 *practice(s) from NMSA 1978, § 57-12-2(D)*).]

16 [A representation need not involve words in order to violate the Unfair Practices Act. A
17 nonverbal action or failure to act may amount to a false or misleading representation.]

18 [A [statement] [description] [or] [representation] is false or misleading if it omits a material
19 fact and, as a result, is deceptive or tends to deceive. A fact is material if a reasonable person would
20 attach importance to its existence or nonexistence in determining a choice of action or if the maker

1 of the [statement] [description] [or] [representation] knows or has reason to know that its recipient
2 regards or is likely to regard the fact as important.]

3 [A false or misleading [statement] [description] [or] [representation] need not actually
4 deceive any person in order to violate the Unfair Practices Act. The Act may be violated by any
5 [statement] [description] [or] [representation] that may, tends to, or does deceive.]

6 USE NOTES

7 This instruction should be given in every case alleging an unfair or deceptive trade practice
8 under the UPA. It sets out the elements of the claim with a focus on the foundational element of a
9 false or misleading representation. The bracketed text in the four numbered sentences of the first
10 paragraph should be used as required by the circumstances of the case. The third numbered
11 sentence should be given, if at all, only to the extent it frames disputed issues for determination by
12 the jury. The bracketed text in the second paragraph may be used when the plaintiff asserts that
13 the defendant has violated one of the enumerated practices listed in Section 57-12-2(D) NMSA
14 1978. The bracketed text in the third paragraph may be used when the defendant’s nonverbal
15 actions are alleged to amount to a false or misleading representation and the court determines that
16 the conduct in question could be found to be a representation within the scope of the UPA. The
17 bracketed text in the fourth paragraph should be used if the plaintiff’s claim is based on an alleged
18 material omission. The bracketed text in the final paragraph should be used if the court determines
19 it would be helpful to the jury in understanding “tends to deceive.” The definitional instructions
20 that follow should be used in conjunction with this instruction as appropriate given the
21 circumstances of the case.

1 [Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or
2 after February 21, 2022.]

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

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

14
15 *Id.* (citing NMSA 1978, § 57-12-2(D) (2003); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-
16 051, ¶ 13, 112 N.M. 97, 811 P.2d 1308).

17 Nonverbal conduct may implicate the UPA. *Jaramillo v. Gonzales*, 2002-NMCA-072,
18 ¶ 28, 132 N.M. 459, 50 P.3d 554 (“The UPA does not require a statement, but rather any
19 representation.”). For example, acts or failures to act which indicate that the defendant has a right
20 to act in a particular way or that the defendant owes no legal obligation to the plaintiff, if false or
21 misleading, can be the basis for a UPA claim. *See id.*.

22 Omission of a material fact, if deceptive, may violate the UPA. *See* NMSA 1978, § 57-12-
23 2(D)(14). “[A] fact is material if a reasonable man would attach importance to its existence or
24 nonexistence in determining his choice of action or the maker of the representation knows or has

1 reason to know that its recipient regards or is likely to regard the matter as important.” *Azar v.*
2 *Prudential Ins. Co.*, 2003-NMCA-062, ¶ 72, 133 N.M. 669, 68 P.3d 909 (internal quotation marks
3 and citation omitted).

4 Although a breach of contract may fit the statutory definition of “failing to deliver the
5 quality or quantity of goods or services contracted for,” *see* NMSA 1978, § 57-12-2(D)(17), a
6 breach must also satisfy the “knowingly made” element in order to be actionable as a UPA
7 violation. *See Stevenson*, 1991-NMSC-051, ¶¶ 15-17, 112 N.M. 97, 811 P.2d 1308. *See also* UJI
8 13-2503 committee commentary.

9 An unfair or deceptive trade practice is one “that may, tends to or does deceive or mislead
10 any person.” NMSA 1978, § 57-12-2(D). A UPA violation may be established without proof of
11 actual deception. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 21, 135 N.M. 265, 87
12 P.3d 545 (“[T]he UPA does not require that the defendant's conduct actually deceive a consumer;
13 it permits recovery even if the conduct only ‘tends to deceive.’”).

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

**UJI-CIVIL
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[NEW MATERIAL]**

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- 1 [Adopted by Supreme Court Order No. 22-8300-001, effective for all cases pending or filed on or
- 2 after February 21, 2022.]