

1 **13-2502. Unconscionable trade practices; elements.**

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

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

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

12 [Conduct may be said to take advantage of a person's lack of knowledge, ability,
13 experience, or capacity to a grossly unfair degree if the conduct was designed to take advantage of
14 particular characteristics or vulnerabilities of the person and resulted in gross unfairness.]

15 [A gross disparity exists between value received and price paid if, considering the
16 transaction between the parties, the value received by a person from the transaction is grossly
17 disproportionate to what the person gave up in the transaction.]

18 USE NOTES

19 This UJI should be used when the plaintiff is alleging the defendant engaged in an
20 unconscionable trade practice. The last two bracketed paragraphs are definitional and may be used

1 when they would be helpful to the jury’s understanding of “grossly unfair degree” and/or “gross
2 disparity” in the circumstances of the case. It may be appropriate to draft other definitional
3 instructions to assist the jury in evaluating the conduct at issue in the case.

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

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7 **Committee commentary** — The UPA defines an unconscionable trade practice as:

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

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

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

16 NMSA 1978, § 57-12-2(E) (2019).

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

21 In *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, 329 P.3d 658, the
22 New Mexico Supreme Court examined the practices of defendants in regard to marketing and

1 selling high-cost signature loans, which were held by the district court to violate Section 57-12-

2 2(E). The Court in *B&B Investment Group* held that

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

8 2014-NMSC-024, ¶ 13.

9 **Takes advantage to a grossly unfair degree**

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

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

23
24 *Ribble*, 2003-NMCA-093, ¶ 15.

25 Similarly, in *B&B Investment Group*, the defendants’ pattern of conduct demonstrated that
26 “they were leveraging the borrowers’ cognitive and behavioral weaknesses to Defendants’
27 advantage, and that the borrowers were clearly among the most financially distressed people in

1 New Mexico.” 2014-NMSC-024, ¶ 25, 329 P.3d 658. The Court held that “[t]his evidence
2 supported a reasonable inference that Defendants were taking advantage of borrowers to a ‘grossly
3 unfair degree.’ ” *Id.*

4 **Gross disparity**

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

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

17 Under the common law, substantive unconscionability is found where the contract terms
18 themselves are illegal, contrary to public policy, or grossly unfair. *See B&B Inv. Grp., Inc.*, 2014-
19 NMSC-024, ¶ 32.

**UJI-CIVIL
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[NEW MATERIAL]**

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- 2 after February 21, 2022.]