

1 **13-2505. Willful conduct.**

2 In this case \_\_\_\_\_ (*name of plaintiff*) claims that \_\_\_\_\_'s (*name of*  
3 *defendant*) conduct in violating the Unfair Practices Act was willful. You may consider this portion  
4 of \_\_\_\_\_'s (*name of plaintiff*) claim only if you first find that \_\_\_\_\_ (*name of defendant*)  
5 violated the New Mexico Unfair Practices Act. Willful conduct is the intentional doing of an act  
6 with knowledge that harm may result.

7 USE NOTES

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

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

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

1 damage or three hundred dollars (\$300), whichever is greater.” *Id.* (internal quotation marks,  
2 citation, and alteration omitted). “Thus, in a jury trial (1) the jury may assess actual, or  
3 compensatory, damages and (2) the court, in its discretion, may increase the award to a maximum  
4 of triple the compensatory damages if the jury finds willful misconduct.” *McLelland v. United*  
5 *Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

6 The UPA does not define “willfully.” In addressing the issue as a matter of first impression  
7 in *Atherton*, the Court of Appeals concluded that, “[g]iven the material difference in the available  
8 remedies, it is clear that the Legislature contemplated proof of some culpable mental state to  
9 demonstrate ‘willfulness.’” 2015-NMCA-003, ¶ 50 (citing *Sloan v. State Farm Mut. Auto Ins. Co.*,  
10 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230); *see also Hale v. Basin Motor Co.*, 1990-  
11 NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006 (“Multiplication of damages pursuant to statutory  
12 authority is a form of punitive damages.”). Correspondingly, the Court of Appeals concluded that  
13 the definition of “willful” in UJI 13-1827 NMRA (Punitive damages) provides useful guidance.  
14 *Atherton*, 2015-NMCA-003, ¶ 53. UJI 13-1827 defines “[w]illful conduct [as] the intentional  
15 doing of an act with knowledge that harm may result.” The definition provides “a clear method for  
16 proof of a culpable mental state by requiring a showing of deliberation and a disregard for  
17 foreseeable risk.” *Atherton*, 2015-NMCA-003, ¶ 54. “Proof of these two elements provides a solid  
18 foundation for punishment.” *Id.*

19 In a case in which the plaintiff seeks punitive damages based upon both a non-UPA cause  
20 of action and a UPA cause of action, two limitations apply. *McLelland*, 1999-NMCA-055, ¶¶ 11-

1 12. First, if the plaintiff recovers both types of awards based upon the same conduct, the plaintiff  
2 must elect between the remedies to prevent a double recovery. *Id.* ¶ 12. *Cf. Hale*, 1990-NMSC-  
3 068, ¶ 21 (“When a party may recover damages under separate theories of liability based upon the  
4 same conduct of the defendant, and each theory has its own measure of damages, the court may  
5 make an award under each theory. In that event the prevailing party must elect between awards  
6 that have duplicative elements of damages.”); *see also id.* ¶ 20 (citing illustrative cases). Second,  
7 “to obtain punitive damages beyond those permitted by the statutory treble-damages provision, the  
8 plaintiff must establish a cause of action other than one under the UPA.” *McLelland*, 1999-NMCA-  
9 055, ¶ 13; *see, e.g., Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶¶ 26-41, 356 P.3d 531  
10 (addressing this issue in the context of breach of contract and breach of implied covenant of good  
11 faith and fair dealing theories).

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