

## CHAPTER 29

### THE COLORADO CONSUMER PROTECTION ACT

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## Introductory Note

1. The General Assembly enacted the Colorado Consumer Protection Act (CCPA), §§ 6-1-101 to -115, C.R.S., in 1969, substantially adopting the major provisions of the 1966 Uniform Deceptive Trade Practices Act (UDTA) but with numerous variations. **People ex rel. Dunbar v. Gym of Am., Inc.**, 177 Colo. 97, 493 P.2d 660 (1972). The CCPA differs from the UDTA in that the legislature granted a private right of action to individual consumers to recover damages for violation of the Act. **Hall v. Walter**, 969 P.2d 224 (Colo. 1998).

2. The CCPA provides for both public and private enforcement. The Attorney General and the county district attorneys have concurrent public enforcement authority. § 6-1-103, C.R.S. Public enforcement remedies include injunctive relief, civil penalties, and criminal actions. §§ 6-1-107 to -112, -114, C.R.S. While causation and actual damages are required in a private cause of action, **Hall**, 969 P.2d at 236, they are not necessary in a public enforcement cause of action. **May Dep't Stores Co. v. State ex rel. Woodard**, 863 P.2d 967 (Colo. 1993). Civil penalties and restitution amounts unverifiable by statute or other fixed standard may not be imposed without an evidentiary hearing followed by Rule 52 findings of fact and conclusions of law. **People v. Wunder**, 2016 COA 46, ¶¶ 29-47, 371 P.3d 785 (a public enforcement action). For a discussion of tribal immunity as a bar to state enforcement of the CCPA, see **Cash Advance & Preferred Cash Loans v. State ex rel. Suthers**, 242 P.3d 1099 (Colo. 2010).

3. Public enforcement actions are intended to proscribe acts, not to compensate injured persons, and are essentially equitable in nature; therefore defendants are not entitled to trial by jury. **People v. Shifrin**, 2014 COA 14, ¶¶ 20-22, 342 P.3d 506. Injunctive relief must be within the authority of the court to proscribe and sufficiently precise to allow the enjoined party to avoid the prohibited conduct. **Wunder**, 2016 COA 46, ¶¶ 21-28 (holding that the vagueness and overbreadth of a broad provision with undefined terms violated C.R.C.P. 65, and remanding that portion of the injunction for reformulation). Chapter 29 does not address the public enforcement mechanisms contained in part 1 of the Act, nor does it address parts 2 through 9 of the CCPA that pertain to specific types of business environments (e.g., auto rental contracts, telemarketing, mobile home sales, and a variety of others). This chapter addresses only the private cause of action and civil damages available when a defendant engages in acts and practices that are prohibited by part 1 of the CCPA.

4. The CCPA regulates commercial activities and practices that “because of their nature, may prove injurious, offensive, or dangerous to the public” and prohibits conduct that has “a tendency or capacity to attract customers through deceptive trade practices.” **Dunbar**, 177 Colo. at 112-13, 493 P.2d at 667-68 (upholding the CCPA against constitutional challenges on due process and equal protection grounds); see **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004) (rejecting constitutional challenge to CCPA treble damage provision on substantive and procedural due process grounds). “Our cases have consistently applied the CCPA to advertising and marketing practices that fit within its tenets based on the applicability of the Act to the actions alleged and without regard to the occupational status of the defendant.” **Crowe v. Tull**, 126 P.3d 196, 202 (Colo. 2006).

5. The CCPA is not an exclusive remedy. § 6-1-105(3), C.R.S. For discussions concerning the scope of the CCPA, see **Crowe**, 126 P.3d at 202-05 (discussing different types of

harms addressed by CCPA and common-law professional negligence claims, and specifically, legal malpractice claims); **Showpiece Homes Corp. v. Assurance Co. of America**, 38 P.3d 47 (Colo. 2001) (answering certified questions in the insurance context); **Coors v. Security Life of Denver Insurance Co.**, 91 P.3d 393 (Colo. App. 2003) (examining relationship between the Unfair Claims-Deceptive Practices Act and CCPA), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005).

6. As originally enacted, CCPA remedies were available to “any person” suffering harm from a prohibited practice. **Hall**, 969 P.2d at 231, interpreted “person” broadly to include non-consumers of defendant’s products or services. In apparent response to this decision, the definition of “any person” was amended in 1999 to be an “actual or potential consumer,” a successor-in-interest to an “actual consumer,” or a person injured in “the course of the person’s business or occupation.” § 6-1-113(1)(a), (c), C.R.S. Section 6-1-113(1)(a) provides that actual and potential consumers may bring an action under the Act. Subsection (b) permits a right of action by “any successor in interest to an actual consumer who purchased the defendant’s goods, services, or property.” Based on the plain language of the statute, the court of appeals held that “the only assignees authorized to bring an action are those whose assignors were actual consumers who purchased the defendant’s goods, services, or property.” **U.S. Fax Law Ctr., Inc. v. Myron Corp.**, 159 P.3d 745 (Colo. App. 2006) (action by the assignee of the rights of organizations that received unsolicited facsimiles but made no purchase dismissed for lack of standing).

7. The CCPA’s conferral of the right to bring a civil action may be waived and subject to mandatory arbitration by an agreement between the parties because the statute does not contain a nonwaiver provision preventing enforcement of an arbitration agreement. **Triple Crown at Observatory Vill. Assoc., Inc.**, 2013 COA 150M, ¶¶ 42-45, 328 P.3d 275.

8. The CCPA provides its own three-year limitation of action subject to the discovery rule and a further one-year extension if plaintiff proves that the defendant engaged in conduct calculated to cause plaintiff to forego or delay in asserting a claim. § 6-1-115, C.R.S.

9. The certificate of review requirement of section 13-20-602, C.R.S., applies to CCPA claims against licensed professionals where expert testimony is necessary to establish the standard of conduct against which liability will be measured. **Baumgarten v. Coppage**, 15 P.3d 304 (Colo. App. 2000); **Teiken v. Reynolds**, 904 P.2d 1387 (Colo. App. 1995) (dismissing CCPA claim against physicians based upon allegations of misrepresentations as to the nature, safety, and suitability of breast implants for failure to file a certificate of review).

10. In **Colorado v. Hopp & Associates, LLC**, 2018 COA 71, ¶ 4, 422 P.3d 617, a public enforcement action brought by the Colorado Attorney General subsequent to defendants’ discharge of debts in bankruptcy, the trial court awarded attorney fees and costs incurred by the State in pursuing the action. The court of appeals affirmed the award, holding that fines, penalties, or forfeitures for the benefit of a governmental unit are not dischargeable in bankruptcy. *Id.* at ¶ 16.

## 29:1 ELEMENTS OF LIABILITY

**For plaintiff, (*name*), to recover from defendant, (*name*), on the claim that defendant violated the Colorado Consumer Protection Act, you must find that all of the following have been proved by a preponderance of the evidence:**

- 1. The defendant (engaged in) (or) (caused another to engage in) a deceptive trade practice;**
- 2. The deceptive trade practice occurred in the course of defendant's (business) (vocation) (occupation);**
- 3. The deceptive trade practice significantly impacted the public as actual or potential consumers of the defendant's (goods) (services) (or) (property);**
- 4. The plaintiff (was an actual or potential consumer of the defendant's [goods] [services] or [property]) (or) (was injured in the course of [his] [her] [its] business or occupation as a result of the deceptive trade practice); and**
- 5. The deceptive trade practice caused actual damages or losses to the plaintiff.**

**If you find that any one of these statements has not been proved, then your verdict on this claim must be for the defendant.**

**On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider defendant's affirmative defense of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).**

**If you find that defendant's affirmative defense has been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that the affirmative defense has not been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.
2. Use whichever parenthesized or bracketed portions are appropriate.
3. When the plaintiff is the successor-in-interest to the actual consumer, the consumer's name should be used in place of the word "plaintiff" in paragraph 4 of the instruction.
4. If there are affirmative defenses, additional instructions should be given. *See, e.g.,* § 6-1-106, C.R.S. (exceptions to CCPA applicability).

5. In **Hall v. Walter**, 969 P.2d 224 (Colo. 1998), the Colorado Supreme Court held that to establish a private cause of action under the CCPA, the plaintiff must prove five distinct elements: (1) that defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that the practice significantly impacted the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury. *Accord* **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007); **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006).

6. The instruction omits the fourth element stated in **Hall**, 969 P.2d at 235, that plaintiff suffered injury-in-fact to a legally protected interest. This element presents a question of law as to standing and will thus not be submitted for jury determination. *But see* **Anson v. Trujillo**, 56 P.3d 114 (Colo. App. 2002). Injuries to property are a legally protected interest actionable under the CCPA. **Hall**, 969 P.2d at 237.

7. While the causation and injury requirements may be inferred from circumstantial evidence common to a class sought to be certified under C.R.C.P. 23, the trial court must rigorously analyze individuals presented to determine if class-wide inferences are appropriate. **Garcia v. Medved Chevrolet, Inc.**, 263 P.3d 92 (Colo. 2011) (affirming court of appeals remand of class certification order to analyze the effect of individualized rebuttal evidence of new car sales transactions).

### Source and Authority

1. This instruction is supported by section 6-1-113(1), C.R.S.; **Brodeur**, 169 P.3d at 155; **Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.**, 62 P.3d 142 (Colo. 2003); **Hall**, 969 P.2d at 235; and **Park Rise Homeowners Ass'n v. Resource Construction Co.**, 155 P.3d 427 (Colo. App. 2006).

2. Section 6-1-115, C.R.S., provides a three-year limitation of action period for actions brought under the CCPA, which period may be extended by one year if plaintiff can prove conduct by the defendant that induced the failure to commence suit on a timely basis. Given this statutory extension provision, equitable tolling may not be applied to extend the CCPA's statute of limitations further. **Damian v. Mtn. Parks Elec., Inc.**, 2012 COA 217, ¶ 17, 310 P.3d 242.

3. The CCPA is not an exclusive remedy. § 6-1-105(3), C.R.S. A private cause of action under the CCPA is cumulative of other statutory and common-law remedies, and a "plaintiff may bring both 'CCPA and other causes of action based on the same facts.'" **Hall**, 969 P.2d at 237 (quoting **Lexton-Ancira Real Estate Fund, 1972 v. Heller**, 826 P.2d 819, 823 (Colo. 1992)). *See also* **Crowe**, 126 P.3d at 205 (claims against attorneys for professional negligence, on the one hand, and CCPA violations on the other are distinct and serve different purposes); **Showpiece Homes Corp. v. Assurance Co. of Am.**, 38 P.3d 47 (Colo. 2001) (insured may maintain action against its insurer for bad faith handling of the insured's claim as well as a claim under the CCPA).

4. Despite the fact that certain violations of the Act appear to incorporate terms of negligence, *see, e.g.*, § 6-1-105(1)(g) (liability created when advertiser represents that services are of certain quality when he “knows or should know” they are of another quality), “[a] CCPA claim will only lie if the plaintiff can show the defendant knowingly engaged in a deceptive trade practice.” **Crowe**, 126 P.3d at 204 (it is “an absolute defense” that representation was caused by negligence or honest mistake).

5. Corporate officers may be sued individually for their participation in deceptive practices covered by the Act. **Hoang v. Arbess**, 80 P.3d 863 (Colo. App. 2003); **People ex rel. MacFarlane v. Albert Corp.**, 660 P.2d 1295 (Colo. App. 1982).

6. Under some circumstances, the CCPA may apply to post-sale conduct. **Showpiece Homes**, 38 P.3d at 58 (bad-faith handling of insurance claim); **Dodds v. Frontier Chevrolet Sales & Serv., Inc.**, 676 P.2d 1237 (Colo. App. 1983) (fraudulently obtained post-sale release).

7. A trial court’s dismissal of a class action CCPA claim involving parking fines and late fees was affirmed because (1) the use of a metered parking space is not a consumer transaction; (2) the challenged conduct complied with city ordinances and was, thus, exempt from CCPA regulation; and (3) plaintiffs were not consumers of the services at issue. **Rector v. City & Cty. of Denver**, 122 P.3d 1010 (Colo. App. 2005); *see* **Shotkoski v. Denver Inv. Group, Inc.**, 134 P.3d 513 (Colo. App. 2006) (real estate purchaser’s agent’s failure to have broker’s license at time she negotiated purchase was not violation of section 6-1-105(1)(z), because CCPA subsection applied to performance of services and sale of property, not to real estate purchases).

8. Section 6-1-702(1)(c), C.R.S., provides that violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, and the rules promulgated under it constitutes a deceptive trade practice. Determining that a claim for liquidated damages under the TCPA is one for a penalty and, therefore, unassignable, the supreme court reinstated a trial court’s dismissal of claims brought by an assignee for lack of standing. **Kruse v. McKenna**, 178 P.3d 1198 (Colo. 2008); *see also* **Consumer Crusade, Inc. v. Clarion Mortg. Capital, Inc.**, 197 P.3d 285 (Colo. App. 2008). In **McKenna v. Oliver**, 159 P.3d 697 (Colo. App. 2006), the court held that assignees of claims under the TCPA lacked standing to pursue an action under the Act because it is an action in the nature of invasion of privacy, which is not assignable under Colorado law. *Accord* **U.S. Fax Law Ctr., Inc. v. T2 Techs., Inc.**, 183 P.3d 642 (Colo. App. 2007).

## 29:2 DECEPTIVE TRADE PRACTICES — DEFINED

**A defendant engages in a deceptive trade practice if, in the course of (his) (her) (its) (business) (trade) (occupation), the defendant:**

*(Insert, using separately numbered paragraphs for each, a suitable description of any relevant deceptive trade practice(s) of which there is sufficient evidence. Additional instructions may need to be given to fully define the deceptive trade practice(s) alleged.)*

### Notes on Use

The CCPA lists a large number of deceptive trade practices. *See* § 6-1-105(1), C.R.S.

### Source and Authority

1. This instruction is supported by section 6-1-105(1), (2) and (3); **Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.**, 62 P.3d 142 (Colo. 2003); and **Hall v. Walter**, 969 P.2d 224 (Colo. 1998).

2. Although some of the deceptive practices listed suggest that there can be a negligent violation of the statute, *see, e.g.*, § 6-1-105(1)(f) and (g), the Colorado Supreme Court has held that liability under the CCPA may be implicated only by intentional conduct, and that there can be no liability where a misrepresentation was “caused by negligence or an honest mistake.” **Crowe v. Tull**, 126 P.3d 196, 204 (Colo. 2006); *see also* **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139, 156 (Colo. 2007) (“The crux of a CCPA claim is a deceptive trade practice, which, by definition, must be intentionally inflicted on the consumer public.” (quoting **Crowe**, 126 P.3d at 204)); **Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP**, 230 P.3d 1275 (Colo. App. 2010) (“bait-and-switch” claim requires intent to deceive); **State ex rel. Suthers v. Mandatory Poster Agency, Inc.**, 260 P.3d 9 (Colo. App. 2009) (defendant who acted with mere negligence and not actual knowledge of falsity did not “knowingly” make a false representation under section 6-1-105(1)(b), (c), and (e)).

3. As a matter of law, the failure of a service provider to inform a consumer that it was acting in conformity with the law does not state a claim for an unfair or deceptive trade practice under the CCPA. **Wainscott v. Centura Health Corp.**, 2014 COA 105, ¶ 67, 351 P.3d 513 (hospital’s failure to inform a patient that it was pursuing a statutory hospital lien to collect actual charges rather than bill Medicare for a reduced amount, as it was legally allowed to do, was not an unfair or deceptive trade practice).

4. For discussions concerning the scope of the CCPA, *see* **Crowe**, 126 P.3d 196; **Showpiece Homes Corp. v. Assurance Co. of America**, 38 P.3d 47 (Colo. 2001) (answering certified questions in the insurance context); and **Coors v. Security Life of Denver Insurance Co.**, 91 P.3d 393 (Colo. App. 2003) (examining relationship between the Unfair Claims-Deceptive Practices Act and CCPA), *aff’d in part, rev’d in part on other grounds*, 112 P.3d 59 (Colo. 2005).

5. In **Mendoza v. Pioneer General Insurance Co.**, 2014 COA 29, ¶ 31, 365 P.3d 371, a jury's finding that automobile dealer engaged in a deceptive practice was constituted a final determination of fraud as a matter of law for purposes of triggering a bond issued pursuant to the Motor Vehicle Dealer Bond Statute.



## 29:3 FALSE REPRESENTATION/MISREPRESENTATION — DEFINED

A “misrepresentation” or “false representation” is a false statement that (induces the person to whom it is made to act or to refrain from acting) (has the capacity or tendency to attract consumers) (has the capacity to deceive the recipient even if it did not).

### Notes on Use

This instruction should be given when the CCPA claim uses the words “misrepresentation” or “false representation.” § 6-1-105(1), C.R.S.

### Source and Authority

1. This instruction is supported by **Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.**, 62 P.3d 142 (Colo. 2003).
2. A promise made in a contract cannot constitute a misrepresentation unless the promisor did not intend to honor the promise at the time it was made. **Rhino Linings USA**, 62 P.3d at 148. In such cases, it may be appropriate to give a modified version of Instruction 19:12.
3. Only knowing misrepresentations are actionable under the CCPA, as there must be an intent to defraud. **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006); *see* **Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007); **State ex rel. Suthers v. Mandatory Poster Agency, Inc.**, 260 P.3d 9 (Colo. App. 2009) (defendant who did not have actual knowledge of falsity of his statements acted with mere negligence and did not “knowingly” make a false representation within the meaning of CCPA).
4. As a matter of law, “mere puffery” is not actionable under the CCPA. **Park Rise Homeowners Ass’n v. Res. Constr. Co.**, 155 P.3d 427 (Colo. App. 2006) (touting “quality construction” of condominiums was “mere puffery,” not actionable under the CCPA).

## 29:4 SIGNIFICANT IMPACT ON THE PUBLIC — DEFINED

In determining whether the challenged trade practice(s) significantly impacted the public as actual or potential consumers of the defendant's (goods), (services), or (property), you shall consider all of the following:

1. The number of consumers directly affected by the challenged trade practice(s); (and)
2. The relative sophistication of the consumers directly affected by the challenged trade practice(s); (and)
3. The bargaining power of the consumers directly affected by the challenged trade practice(s); (and)
4. Evidence that the challenged trade practice(s) (has) (have) previously impacted other consumers; (and)
5. Evidence that the challenged trade practice(s) (has) (have) a significant potential to impact other consumers in the future(.) (; and)
- (6. *Include any other factors the court has determined are relevant in determining significant public impact.*)

### Notes on Use

1. Unless the facts are undisputed, the determination as to whether there is a significant public impact is a factual one and not a question of law. **One Creative Place, LLC v. Jet Ctr. Partners, LLC**, 259 P.3d 1287 (Colo. App. 2011).
2. Conclusory allegations of public impact without reference to facts that allege harm or potential harm to identifiable member of the public are insufficient to support a CCPA claim. **Rees v. Unleaded Software, Inc.**, 2013 COA 164, ¶ 42, 383 P.3d 20, *aff'd in part, rev'd in part on other grounds*, 2016 CO 51, 373 P.3d 603.
3. The factors set forth in this instruction are relevant considerations on the public impact issue and should be used as applicable but appear not conclusive or exhaustive of the issue in every case. **Rhino Linings USA, Inc. v. Rocky Mtn. Rhino Lining, Inc.**, 62 P.3d 142 (Colo. 2003); **Martinez v. Lewis**, 969 P.2d 213 (Colo. 1998).
4. It is uncertain whether "relative sophistication" referred to in the second factor refers to sophistication regarding the business out of which the challenged practices arise or to general business sophistication. *See* **Rhino Linings USA**, 62 P.3d at 150 (one plaintiff was represented by counsel and the other plaintiff was "relatively sophisticated in his education and knowledge of the business of selling the product"); **Martinez**, 969 P.2d at 222 (State Farm "has extensive experience as a consumer of this type of service."); **Coors v. Sec. Life of Denver Ins. Co.**, 91 P.3d 393 (Colo. App. 2003) (noting that plaintiff was "a sophisticated businessman" in a general

sense), *aff'd in part, rev'd in part on other grounds*, 112 P.3d 59 (Colo. 2005); **Rees**, 2013 COA 164, ¶¶ 43-44 (a private contract dispute between sophisticated business entities does not state a CCPA claim).

### Source and Authority

1. This instruction is supported by **Rhino Linings USA**, 62 P.3d at 150; **Hall v. Walter**, 969 P.2d 224 (Colo. 1998); and **Martinez v. Lewis**, 969 P.2d 213 (Colo. 1998).

2. The CCPA is not intended to provide additional remedies to claimants whose disputes have no public impact but are purely private transactions. **Rhino Linings USA**, 62 P.3d at 150. Factors to be considered in determining whether there was significant public impact include: (1) the number of consumers directly affected by the challenged practice; (2) the relative sophistication and bargaining power of the consumers; and (3) evidence that the challenged practice has previously impacted other consumers or has significant potential to do so in the future. *Id.*; **accord Brodeur v. Am. Home Assur. Co.**, 169 P.3d 139 (Colo. 2007); **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006); **Bankr. Estate of Morris v. COPIC Ins Co.**, 192 P.3d 519 (Colo. App. 2008); *see also* **Martinez**, 969 P.2d at 222; **Coors**, 91 P.3d at 399. Further, although the public nature of a business may be a factor to consider in determining whether a challenged practice significantly affects the public, that fact alone is insufficient to satisfy this element. **Brodeur**, 169 P.3d at 155-56 (public nature of state's workers' compensation program is not enough to constitute per se public impact under Act); *see* **Bankr. Estate of Morris**, 192 P.3d at 528 (rejecting notion that tort of insurance bad faith, by its very nature, involves public impact).

3. The "public impact" element was held satisfied in **Shekarchian v. Maxx Auto Recovery, Inc.**, 2019 COA 60, ¶ 56, 487 P.3d 1026 (towing company's practice of requiring vehicle owners to sign a form release containing a false statement before inspecting the impounded vehicle at the request of a third-party lender); and **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004) (affirming CCPA judgment based on evidence that 950 other consumers lodged complaints of product defect similar to those made by plaintiff).

4. The "public impact" element was found not shown in **Brodeur**, 169 P.3d at 156 (public nature of workers' compensation insurance program is not sufficient to constitute per se public impact under CCPA); **State ex rel. Weiser v. Castle Law Group, LLC**, 2019 COA 49, ¶ 116, 457 P.3d 699, 457 P.3d 699 (law firm's failure to disclose to two of its clients that its principals had ownership interest in one of its vendors did not significantly impact actual or potential consumers of its services); **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010) (reversing CCPA judgment for owners who bought a home in a 38-residence development where proof of direct impact of the builder-vendor's misrepresentations was confined to plaintiffs, and the record contained no evidence of impact on other home buyers, the bargaining power and sophistication of other purchasers, or widespread dissemination of sales brochure); **General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP**, 230 P.3d 1275 (Colo. App. 2010) (where no false information was conveyed that attorney would act as lead counsel in all cases for his firm, there was no public impact); **Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9 (Colo. App. 2009) (no direct public impact because Internet posting seeking possible franchise purchasers was widely available, where only 68 packets of

information were actually sent out to persons responding to posting, nothing in posting was untrue, and posting was not an offer to contract); **Bankruptcy Estate of Morris**, 192 P.3d at 528 (rejecting assertion that claim for insurance bad faith, by its very nature, involves public impact); and **Coors**, 91 P.3d at 399 (evidence that defendant's deception involved 223 other consumers did not satisfy public impact element because number affected was only 1% of all consumers of product, which was insufficient proof of public impact, and record contained no evidence of actual harm to other consumers).

## 29:5 ACTUAL DAMAGES

**No instruction provided.**

### Note

1. Neither the statute nor Colorado case law defines what “actual damages” means in the CCPA; however, where actual damages have been proven, the plaintiff is entitled to at least \$500.00. § 6-1-113(2)(a)(I) & (II), C.R.S.

2. Although a plaintiff may bring both a CCPA claim and other causes of action based on the same conduct, double recovery of the same actual damages or of both punitive and treble damages is not permitted. **Coors v. Sec. Life of Denver Ins. Co.**, 112 P.3d 59 (Colo. 2005); **Lexton-Ancira Real Estate Fund, 1972 v. Heller**, 826 P.2d 819 (Colo. 1992).

3. A statutory offer to settle “all claims” in a case that included a CCPA claim was held to encompass “all relief sought on the basis of a claim in the original complaint,” including statutory attorney fees awardable under section 6-1-113(2)(b). **Bumbal v. Smith**, 165 P.3d 844, 846 (Colo. App. 2007).

4. Except in class actions or an action brought to enforce liability under section 6-1-709, C.R.S. (sales of manufactured homes), a successful claimant under the Act is entitled to an award of “costs of the action together with reasonable attorney fees as determined by the court.” § 6-1-113(2)(b), C.R.S.; *see* **Holcomb v. Steven D. Smith, Inc.**, 170 P.3d 815, 817 (Colo. App. 2007).

5. When the award of attorney fees depends upon “a successful result in the litigation in which they are to be awarded and the fees are for services rendered in connection with that litigation, a determination of the propriety of an award of fees need not be made until that litigation is completed and the result is known.” **Roa v. Miller**, 784 P.2d 826, 829 (Colo. App. 1989).

6. Because entitlement to attorney fees under the Act requires successful proof of defendant’s liability for commission of deceptive acts, attorney fees recoverable under the CCPA are “costs” under section 13-16-122(1)(h), C.R.S. (attorney fees authorized by statute may be awarded as costs).

7. Fees awarded as costs need not be specifically pleaded, are determined by the court post-trial, and are not subject to doubling or trebling; their determination does not delay the time for appeal of the underlying judgment. **Ferrell v. Glenwood Brokers, Ltd.**, 848 P.2d 936 (Colo. 1993).

8. For a discussion of the method to be used and factors to be considered in determining the amount of the mandatory award of attorney fees and costs under section 6-1-113(2)(b), see **Payan v. Nash Finch Co.**, 2012 COA 135M, 310 P.3d 212.

9. This chapter does not address public enforcement mechanisms. *But see* **People v. Wunder**, 2016 COA 46, ¶¶ 21-28, 371 P.3d 785 (reversing criminal enforcement judgment

awarding civil penalties and restitution in amounts unverifiable by statute or other fixed standard and remanding with directions to hold an evidentiary hearing with C.R.C.P. 52 findings of fact and conclusions of law supporting monetary awards).

## 29:6 TREBLE DAMAGES

**If you find in favor of plaintiff and award (him) (her) (it) actual damages on (his) (her) (its) claim of violation of the Colorado Consumer Protection Act, then you must consider whether the plaintiff has proved by clear and convincing evidence that the defendant engaged in bad faith conduct.**

**“Bad faith conduct” means fraudulent, willful, knowing, or intentional conduct that causes (injuries) (damages) (or) (losses).**

**A fact has been proved by “clear and convincing evidence” if, considering all evidence, you find it to be highly probable and you have no serious or substantial doubt.**

### Notes on Use

1. When there is sufficient evidence to submit the question of bad faith conduct to the jury, the question should be submitted as a special interrogatory on the jury verdict form.

2. Instruction 3.2, defining clear and convincing evidence, should be given with this instruction.

3. If liability under the CCPA and “bad faith conduct” under this instruction are established, an award of treble damages is mandatory. **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004).

4. The court of appeals has held that a trial court’s refusal to advise the jury that any award of actual damages may be trebled was not error but declined to hold that a jury may never be advised of treble damages. **Heritage Vill. Owners Ass’n v. Golden Heritage Inv’rs, Ltd.**, 89 P.3d 513 (Colo. App. 2004).

### Source and Authority

1. This instruction is supported by section 6-1-113(2)(a)(III), (2.3), C.R.S.

2. If both treble and punitive damages are awarded based on the same conduct, the claimant must elect between the awards and may not recover both types of these statutory damages. **Lexton-Ancira Real Estate Fund, 1972 v. Heller**, 826 P.2d 819 (Colo. 1992); *see also* **Martinez v. Affordable Housing Network, Inc.**, 109 P.3d 983 (Colo. App. 2004) (trial court properly remitted punitive damages award because it awarded treble damages under section 6-1-113), *rev’d on other grounds*, 123 P.3d 1201 (Colo. 2005).

3. Where the record supports verdicts for both punitive and treble damages, reversal of a judgment under the CCPA may require remand to consider reinstatement of the punitive damage award. **Coors v. Sec. Life of Denver Ins. Co.**, 112 P.3d 59 (Colo. 2005).

4. No Colorado appellate decision has yet expressly addressed the issue of whether, in a case where entitlement to treble damages has been proved, prejudgment interest should be added to the actual damage award before or after trebling.