Overcoming the Public Impact Hurdle to CCPA Claims

by Justin C. Berg and Jason T. Pink

This article discusses key cases analyzing the public impact element of CCPA claims and offers some guidance on pursuing CCPA claims, given the large swath of consumers sellers are able to reach in today's era of Internet advertising and other electronic media.

The public impact element of a claim under the Colorado Consumer Protection Act (CCPA), CRS §§ 6-1-101 *et seq.*, has proven to be a difficult hurdle for many litigators to overcome. This has been the case since "public impact" was first identified as a required element of a CCPA claim by the Colorado Supreme Court in 1998; it has since then resulted in the failure of many CCPA claims. As advertising has evolved in the information age, however, advertisers' power to reach a much larger audience may actually make the public impact element of a CCPA claim easier to establish, despite an apparent trend in case law that seems to be limiting claimants' ability to prove public impact.

This article briefly discusses the purpose and history of the CCPA and summarizes key cases analyzing the public impact element. It also offers some tactical advice on how litigators can preserve and investigate a CCPA claim pre-filing, properly plead a CCPA claim in their initial complaint, and develop facts supporting a CCPA claim during discovery.

CCPA Purpose and History

At its core, consumer protection derives from the Federal Trade Commission Act (FTCA), 15 USC §§ 41 *et seq.*, which was enacted in 1914 and was designed to prevent "unfair methods of competition in or affecting commerce" and "unfair or deceptive acts or practices in or affecting commerce."[1] The FTCA does not provide a private cause of action to consumers. Therefore, enforcement is expressly reserved to the jurisdiction of the Bureau of Consumer Protection (BCP), which is itself constrained in the violations it actually pursues by (among other things) political pressure and limited resources.[2] As a result of the FTCA's and the BCP's limitations, all fifty states have developed their own laws granting consumers a private cause of action to protect against and deter deceptive trade practices.[3] Colorado's version is codified in the CCPA, and was enacted in 1969.[4]

Generally speaking, it is helpful to view the CCPA as creating a cause of action not simply when a consumer has purchased a "bad" product or service, but rather when a consumer was somehow duped into purchasing a product or service through misleading advertising, and where the same or similar advertising is reaching thousands of other consumers. This is because the CCPA was never intended to redress a purely private wrong, such as breach of contract for failing to deliver a product as promised; it was enacted to protect the consumer public from deceptive trade practices. Even so, the CCPA provides a substantial benefit to an individual consumer who is willing to take on a purveyor of goods or services that engages in deceptive trade practices and, in turn, provides a substantial deterrent against such activities, due to a plaintiff's ability to recover treble damages and attorney fees through a successful CCPA claim.[5]

As such, anytime a plaintiff's claims arise out of the purchase of goods, services, or property, a litigator is well served to investigate and analyze whether the CCPA may provide an additional cause of action, given the obvious leverage created by the defendant's exposure to treble damages and attorney fees. While the CCPA itself is instructive as to certain aspects of a CCPA claim, to properly plead and develop facts in support of a CCPA claim, litigators must understand how Colorado courts have defined the elements of a CCPA claim, as well as how subsequent authority has narrowed (or sometimes expanded) the application of those elements.

The Origin of the Public Impact Requirement

One of two seminal cases establishing the elements a plaintiff must establish to prove a CCPA claim is *Hall v. Walter*.[6] The *Hall* Court articulated those elements as follows:

> (1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of the defendant's business, vocation, or occupation; (3) that it

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> significantly impacts the public as actual or potential consumers of the defendants' goods, services, or property; (4) that the plaintiff suffered an injury in fact to legally protected interest; and (5) that the challenged practice caused the injury.[7]

Hall made clear that for consumers to bring claims under the CCPA, they must establish that the defendant's alleged deceptive or unfair trade practice impacted the public. Although this may not be the most novel concept, especially given the overarching purpose of consumer protection law, establishing the public impact element can be troublesome for plaintiffs absent effective investigation and fact development specific to this issue. As such, some exploration of the factual underpinnings of *Hall* and its progeny is useful for any practitioner evaluating whether to bring a CCPA claim on behalf of a client.

In *Hall*, the public impact element was ultimately established because the defendants made misrepresentations related to "widely advertised" residential lots and "offered them for sale to the general public."[8] In its decision, the *Hall* Court explained that "a more precise reading of the [CCPA]'s function requires an impact on the public as consumers of the defendant's 'goods, services, or property,'" and that "the challenged practice must significantly impact the public as actual or potential consumers. . . ."[9] The Court then applied this test and determined that:

> there is no dispute that [the defendants'] deceptive practices implicated the public as consumers because *the misrepresentations were directed to the market generally, taking the form of widespread advertisement* and deception of actual and prospective purchasers, [which] did not constitute a "purely private wrong."[10]

While the cases discussed below do limit the application of the *Hall* holding in some respects, this fundamental premise of *Hall*—that widespread deceptive advertisement alone can establish a public impact—is still good law and has far-reaching implications in the present day, given the ability of advertisers to reach extremely widespread audiences through Internet advertising and other electronic media.

In *Martinez v. Lewis*,[11] a companion case decided on the same day as *Hall*, the Colorado Supreme Court provided additional guidance for determining whether a public impact exists. The *Martinez* Court identified the following three factors to consider: (1) "the number of consumers directly affected by the challenged practice"; (2) "the relative sophistication and bargaining power of the consumers affected by the challenged practice"; and (3) "evidence that the challenged practice previously has impacted other consumers or has significant potential to do so in the future."[12]

The Court applied these factors to plaintiff's claims and determined that: (1) the plaintiff's insurance carrier, as opposed to the plaintiff herself, was "the only 'person' implicated as a consumer of [the defendant IME doctor]'s services . . . suggest[ing] 'a purely private wrong'"; (2) the plaintiff's insurance carrier was, in any event, "a large insurance provider that relies on the assistance of experts like [the defendant IME doctor] in making a broad range of coverage decisions," which "is not the type of consumer that the CCPA generally contemplates requiring protection"; and (3) "there is no *allegation* that consumers of [the defendant IME doctor]'s services were previously affected by his alleged misrepresentations or likely to be so affected in the future."[13]

The key distinction in the application of the public impact analysis in *Hall* versus that in *Martinez* is clear. In *Hall*, there was a "widespread advertisement . . . directed to the market generally" that contained the alleged misrepresentations.[14] In *Martinez*, there were no advertisements containing misrepresentations at all. To the contrary, the alleged misrepresentations by the defendant IME doctor were—even assuming the truth of the allegations contained in the complaint—limited to a single transaction.[15] Today's practitioners are well served to keep these fundamental tenets of CCPA claim analysis in mind as they evaluate the merits of a potential CCPA claim, especially in light of changes in advertising techniques due to technology and the evolution of case law limiting the ability of claimants to establish the public impact element.

Other Cases Applying the Public Impact Requirement

Since *Hall* and *Martinez*, there have been several key Colorado cases applying the three public impact factors. Most of these cases seem to limit a plaintiff's ability to prove public impact through their application of the *Martinez* factors.

In *Curragh Queensl. Mining Ltd. v. Dresser Indus.*, the plaintiff brought a CCPA claim against the seller of a piece of mining equipment that was defective.[16] The trial court granted summary judgment on the plaintiff's CCPA claim in favor of the seller. The Court of Appeals affirmed, applying the public impact factors established in *Martinez* as follows:

> 1) although Seller advertised its Dragline to about 3,000 mining companies, only a very few could muster the financial resources necessary to purchase a $38 million Dragline; (2) Buyer was neither economically vulnerable nor unsophisticated in matters pertaining to mining equipment; (3) Buyer, represented by counsel, negotiated at length with Seller the terms of the purchase agreement and several subsequent modifications; and (4) Buyer negotiated a number of custom-made features for the Dragline.[17]
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> The *Curragh* court then concluded:
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> These circumstances persuade us that the trial court correctly determined, as a matter of law, that the parties' transaction would not significantly affect the public as actual or potential consumers.[18]

The holding in *Curragh* is significant for two reasons. First, it shifts the focus of the analysis from the size of the advertising audience itself to the size of the audience that is capable of purchasing the product. Second, and perhaps more important, it recognizes that the public impact element can be determined as a matter of law, thus opening the door to fervent litigation of dispositive motions on this element, and effectively making the establishment of public impact—or at least a disputed issue of fact related thereto—a prerequisite to moving forward with a CCPA claim.

Less than one year later, in *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, the Colorado Supreme Court revisited the breadth of the advertising audience factor it first articulated in *Hall* and elaborated on in *Martinez*.[19] In *Rhino Linings*, a plaintiff-dealer entered into a contract with Rhino Linings USA, Inc. (Rhino) for the exclusive right to sell Rhino products in Adams County, Colorado, then later entered into another contract with a dealer in Adams County.[20] At a bench trial, the trial court ruled in favor of the plaintiff and, without resolving disputed facts about whether Rhino knowingly made false representations to the third-party dealer, determined that the plaintiff "proved a claim

under the CCPA because Rhino engaged in the deceptive trade practice of selling dealerships, and this practice coupled with Rhino's dealership advertisements significantly impacted prospective dealer-purchasers."[21] The appellate court affirmed, stating that Rhino "violated the CCPA by advertising and selling dealerships that promised territorial exclusivity as part of a dealer's contract, with no intention to honor that promise."[22]

The Colorado Supreme Court reversed. The Court explained that: (1) the plaintiff did not claim or argue that he was falsely misled into entering his dealer contract with Rhino; (2) there was no finding that Rhino did not intend to honor its promise of exclusivity with the plaintiff at the time the contract with plaintiff was executed; and (3) Rhino's breach of the exclusivity provision in its contract with the plaintiff by subsequently allowing a third-party dealer to sell Rhino products in the plaintiff's territory was only a breach of contract—that is, a "purely private wrong"—and, thus, did not amount to a deceptive trade practice under the CCPA.[23] More specific to the public impact element, the Court also held that "[t]hree affected dealers out of approximately 550 worldwide does not significantly affect the public," because "Rhino's public advertisements reveal nothing disingenuous about the nature or exclusivity of dealership territories" compared to the "widespread [false] advertisements" at issue in *Hall*.[24] While the *Rhino Linings* Court touched briefly on the size of the advertising audience, its holding was based more on the plaintiff's failure to establish that statements about exclusivity were intentionally misleading at the time they were made, versus merely constituting a breach of contract.

The Colorado Supreme Court case of *Crowe v. Tull* is notable because it is the first CCPA case to touch on the broadened audience inherent in television and Internet advertising.[25] In *Crowe*, the plaintiff (Crowe) hired a lawyer (Tull) to represent him in connection with a personal injury claim. In his decision to retain Tull, plaintiff relied on certain television advertisements in which Tull's firm, Azar & Associates, represents to the general public that it can recover money for its clients that other attorneys cannot, and that it will always "obtain as much as we can, as fast as we can."[26] Plaintiff subsequently accepted Tull's advice to accept a settlement that was far below the value of his claim. Plaintiff sued Tull for professional negligence and deceptive trade practices under the CCPA.[27] The trial court dismissed the CCPA claim as duplicative of his professional negligence claim, reasoning that the "actual practice of law" was not a commercial activity regulated by the CCPA, and that the advertisement at issue did not cause plaintiff's damages.[28]

> The Colorado Supreme Court reversed and held that
> the CCPA applies to protect the vulnerable consumer of legal services and the consumer public as a whole in the situation in which the purveyor of those services knowingly misrepresents the quality and likely benefit of those services [through attorney advertising, which] *potentially affects a large swath of the public via television, print media, radio, and the internet*.[29]

The Court focused on the significant difference between attorneys' bargaining power and level of sophistication and expertise, compared to the typical consumers of such personal injury attorney services, as well as the potential for misleading attorney advertisements to impact such consumers in the future.[30]

Finally, in *Brodeur v. Am. Home Assur. Co.*, the Colorado Supreme Court again offered guidance as to the public impact element in affirming the remand of a case for further discovery on that element.[31] In *Brodeur*, the plaintiff's husband was denied certain workers' compensation benefits, and later died in an unrelated accident.[32] The plaintiff brought a CCPA claim against the insurance carrier, arguing that the insurance carrier's internal claims processing practices significantly impacted the public.[33] The trial court did not allow discovery on the issue, however, and dismissed the CCPA claim. On appeal, the plaintiff argued that she

> does not need to show specific "public impact" because the public nature of workers' compensation insurance satisfies per se the public impact element of a CCPA claim, and . . . public impact is inherent in [the insurance carrier's] workers' compensation practices.

The Court of Appeals remanded the CCPA claim because "the trial court did not permit adequate discovery of [the insurance carrier's] internal claim processing practices that may have allowed [plaintiff] to show an impact on the public."[34]

The Colorado Supreme Court affirmed the appellate court's order remanding the case for further discovery, but specifically held that "the public nature of the workers' compensation program is not sufficient to constitute a per se public impact under the CCPA," and further warned that "[w]e have never found that the public nature of a particular business satisfies per se the public impact element of a CCPA claim" and that "it is not enough that the defendant's industry affects the public interest." In doing so, the Court cited *Hall* and went on to state that:

> the public nature of a business may be a factor to consider when determining if the challenged *practice* affects the public, it is not enough, standing alone, to satisfy the public impact element of the CCPA.[35]

As such, *Brodeur* makes clear that it is the public impact of the deceptive trade practice itself, as opposed to merely the defendants' business, that is material to a CCPA claim.

Recent Applications of the *Martinez* Public Impact Factors

Recent cases applying the *Martinez* public impact factors continue to provide guidance for practitioners in focusing on key areas

of fact development to support CCPA claims. As widely disseminated advertising, predominantly through the Internet, becomes the norm, practitioners must anticipate CCPA claim defenses based not on the breadth of the advertising audience itself, but instead based on the breadth of the audience that is actually capable of purchasing the products, property, or services, as well as the relative sophistication of the purchasers to the sellers.

Two recent Colorado Court of Appeals cases addressing these factors are *Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.* and *One Creative Place, LLC v. Jet Ctr. Partners, LLC*. In *Colorado Coffee Bean*, the plaintiffs purchased certain franchises in reliance on representations made by the defendants on the Internet concerning their profitability.[36] In dismissing the CCPA claim for lack of public impact, the court of appeals applied the three public impact factors established in *Martinez* and determined that the defendant's Internet posting containing the alleged misrepresentations about profitability also contained a bold-faced disclaimer that stated: "FOR *GENERAL* INFORMATION ONLY AND . . . NOT INTENDED TO BE THE OFFER OF A FRANCHISE."[37] The appellate court thus held that the plaintiffs' case was more akin to the fact pattern in *Curragh Queensland Mining*, where the applicants were similarly screened and only a few ended up being qualified purchasers, and distinguishable from *Hall*, "because there the defendants 'widely advertised these lots and offered them for sale to the general public.'"[38]

Similarly, in *One Creative Place*, the plaintiff successfully outbid the defendant to become the fixed based operator and exclusive fuel supplier at an airport in Montrose, Colorado.[39] Defendant subsequently began selling fuel and other services typically provided by a fixed based operator and launched an extensive campaign advertising these services, including print, broadcast, and Internet advertising, directed almost exclusively to pilots. Plaintiff sued for deceptive trade practices under the CCPA.[40] Plaintiff introduced no evidence that any consumer was directly affected, but was able to present "evidence tending to show that [the defendant]'s extensive advertising campaign might have had significant potential to impact consumers in the future."[41] The trial court determined that the CCPA claim failed for lack of a significant public impact because: (1) "pilots are not likely to be unsophisticated consumers with bargaining weaknesses"; and (2) "no deception to actual purchasers or consumers had been shown."[42]

The appellate court reviewed the issue as one of fact due to the aforementioned evidence of an impact in the future and its determination that, under such circumstances, "the question of public impact cannot be determined as a matter of law"; however, the appellate court ultimately found that the trial court's finding of no public impact was not clearly erroneous.[43] *One Creative Place* almost suggests that certain purveyors of products to select groups of sophisticated purchasers may be unreachable under the CCPA; however, that is likely not the case if actual deception can be shown. No reviewing court in Colorado has addressed that fact pattern.

Practice Pointers

Although not entirely confined to the public impact element, the following pointers should be useful to any practitioner pursuing potential CCPA claims. They may be helpful for investigation, pleading, and fact development in discovery.

Pre-Filing Preservation and Investigation

➢ Preserve the advertisement immediately. Publications via the Internet, websites, and other electronic media can change or disappear and can be difficult and expensive to recover after the fact. After preserving, consider putting the defendant on notice of the claim and demand that the defendant preserve the advertisement and any documents related thereto.

➢ Obtain PACER and CoCourts reports to determine whether there are other lawsuits about the defendant's goods, products, or services. Run searches for Better Business Bureau (BBB) complaints and other Internet complaints, such as "Ripoff Reports."

➢ If contact information for other consumers is attainable, consider contacting other consumers to determine whether they had negative experiences with the defendant's goods, products, or services, and obtain information regarding the relative sophistication of the consumers if they will share it. Avoid defaming the defendant or otherwise interfering with the defendant's relationships with other consumers. Consider using a private investigator to conduct the interviews or at least to memorialize the statements of other consumers to avoid making yourself a witness.

Pleading Pointers

➢ Do not rely on the mere negligence or non-specific puffery of the defendant. It is necessary to plead statements of fact that rise to the level of intentional deception, or at least conduct that is significantly out of line with industry standards.[44]

➢ Allege that the advertisement is directed to the market generally. Focus on the specific form of the advertisement or representation in the complaint to establish a broad-reaching audience of actual and prospective consumers—that is, Internet, website, mass e-mail communication, and/or other electronic media (including Facebook, LinkedIn, Twitter, etc.).[45]

➢ Allege that the scope of actual and prospective consumers is broad and not limited to a small class of consumers who are uniquely capable of purchasing the goods, products, or services.[46]

➢ Consider alleging that there are other consumers who have already been affected by the misrepresentations contained in the

advertisement. (This allegation should be made only after conducting a reasonable investigation; be prepared to produce at least one such consumer during the course of discovery.)

➢ Allege that the advertisement itself is deceptive, and that the same or similar misrepresentations continue to be published by the defendant to the general public and, thus, has the potential to impact other consumers in the future.[47]

➢ Allege that the defendant has superior knowledge, bargaining power, and/or sophistication; and/or that the class of consumers actually and/or potentially affected by the defendant's conduct is precisely the type that was meant to be protected under the CCPA.[48]

➢ In the alternative, consider alleging that some of the facts necessary to establish one or more of the three public impact factors in *Martinez* are within the unique control of the defendant such that the investigation and ability to plead with more specificity is limited. For example, on information and belief, the names, addresses, and phone numbers of other affected consumers are not public and are in the possession of the defendant. This may, as long as it is not alleged in bad faith, result in the denial of a dispositive motion until the plaintiff has had a reasonable opportunity to conduct CCPA-related discovery.[49]

Fact Development During Discovery

➢ Seek discovery regarding the number of consumers receiving the advertisement and the defendant's knowledge at the time the representations are made.[50] It is critical to propound discovery regarding the identities of individuals or entities who may be performing advertising or website design services for a defendant, so that those individuals or entities can be deposed and/or served with subpoenas to produce documents evidencing their advertising activity on a defendant's behalf, and the defendant's knowledge related thereto.

➢ Seek discovery regarding the number of responses to and/or "hits" on the specific advertisement.[51] Again, consider ways to obtain this information from third parties conducting advertising services, especially over the Internet or through any type of direct marketing.

➢ Seek discovery regarding the number of actual purchasers of the goods, products, or services, and the identity of the actual purchasers.

➢ Seek discovery regarding the number of consumer complaints about the defendant's goods, products, or services, and the identity of the complainants.

Conclusion

In the past, the public impact element of a CCPA claim has been difficult for litigators to overcome. Nevertheless, the potential for advertisers to reach much larger audiences than ever before may have made it easier to establish that a particular advertisement or representation has reached a large audience as required by *Hall*, provided that litigants are diligent in investigating and pleading CCPA claims. Given this overarching increase in the breadth of the advertising audience, courts will increasingly look to the second and third *Martinez* factors in determining whether a plaintiff can establish the necessary public impact. Practitioners will be well served to develop facts related to the ability of consumers to actually purchase the product at issue, as well as the relative sophistication of the purchasers, to avoid dismissal of a CCPA claim on dispositive motions.

Notes

1. 15 USC § 45(a)(1).
2. Sovern, "Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model," 52 *Ohio State L.J.* 437, 441-42 (1991).
3. Dunbar, "Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation," 59 *Tulane L.Rev.* 427 (Dec. 1984).
4. *See* CRS §§ 6-1-101 *et seq*.
5. *See* CRS § 6-1-113(2)(a) and (b).
6. *See Hall v. Walter*, 959 P.2d 224 (Colo. 1998).
7. *Id*. at 235.
8. *Id*. at 227-28.
9. *Id*. at 234.
10. *Id*. at 235 (emphasis added).
11. *See Martinez v. Lewis*, 969 P.2d 213 (Colo. 1998).
12. *Id*. at 222.
13. *Id*. at 222-23 (emphasis added).
14. *See Hall*, 969 P.2d at 235.
15. *See Martinez*, 969 P.2d at 222-23.
16. *Curragh Queensl. Mining Ltd. v. Dresser Indus*., 55 P.3d 235 (Colo.App. 2002).
17. *Id*. at 241.
18. *Id.*
19. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142 (Colo. 2003).
20. *Id*. at 144.
21. *Id*. at 145.
22. *Id*. at 146.
23. *Id*. at 149.
24. *Id*. at 150.
25. *Crowe v. Tull*, 126 P.3d 196 (Colo. 2006).
26. *Id*. at 200.
27. *Id.*
28. *Id*. at 201.
29. *Id*. at 209 (emphasis added).
30. *Id.*
31. *See Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139 (Colo. 2007).
32. *Id.*
33. *Id*. at 155.
34. *Id.*
35. *Id.*
36. *Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.*, 251 P.3d 9, 14 (Colo.App. 2010).
37. *Id*. at 26 (emphasis added).
38. *Id*. at 25-26.
39. *One Creative Place, LLC v. Jet Ctr. Partners, LLC*, 259 P.3d 1287, 1288 (Colo.App. 2011).
40. *Id.*
41. *Id*. at 1290.
42. *Id.*
43. *Id.*
44. *See, e.g., Park Rise Homeowners Ass'n v. Resource Constr. Co.*, 155 P.3d 427, 435 (Colo.App. 2006) (sales literature touting condominium units as "quality construction" was mere puffery and/or opinion and was thus insufficient to establish public impact).
45. *See, e.g., Hildebrand v. New Vista Homes, LLC*, 252 P.3d 1159, 1170 (Colo.App. 2010) (finding no public impact because plaintiffs presented no evidence of how many potential purchasers had received the sales brochure with a ten-year structural warranty that was alleged to be a misrepresentation).
46. *See, e.g., Curragh Queensl. Mining Ltd.*, 55 P.3d 235.
47. *See, e.g., Rhino Linings USA, Inc.*, 62 P.3d at 150.

48. *See, e.g., Crowe*, 126 P.3d at 209. *See also Adams v. FedEx Ground Package Sys.*, 546 Fed.Appx. 772, 776 (10th Cir. 2013):

> While [the plaintiff] does allege that she and 3,000 other people signed Operating Agreements with FedEx, she did not indicate what percentage of those people were harmed" and "her complaint addressed neither the relative sophistication and bargaining power of other consumers nor the prior and potential impacts on other consumers.

49. *See* Benson *et al.*, *The Practitioner's Guide to Colorado Construction Law* § 14.6.2 (1st ed., CBA-CLE, 2013):

> At least one district court has held that where the facts necessary to establish a non-disclosure claim under the CCPA, or the defendant's scienter, are generally within the control of the defendant, a motion to dismiss for failure to plead a CCPA claim with specificity will be denied until the plaintiff has had a reasonable opportunity to conduct discovery on these issues.

50. *See, e.g., Hildebrand*, 252 P.3d at 1170.

51. *See, e.g., id.* ■