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Colorado Bill Significantly Broadens Scope of the Consumer Protection Act

Eliminates "Significant Public Impact" Requirement

With legislation proposed last week, Colorado is poised to go from having one of the more conservative consumer protection acts in the country to potentially having one of the more sweeping laws on the books. The new bill, HB19-1289, includes a number of measures designed to significantly broaden the scope of conduct covered under the Colorado Consumer Protection Act ("CCPA"), including:

- In certain provisions requiring that knowledge of a particular practice be demonstrated to show a violation, e.g., "knowingly passes off goods, service, or products as those of another," amending the provision to read "knowingly or recklessly." This negates the holding in the Colorado Court of Appeals case *State of Colorado v. The Mandatory Poster Agency, Inc. et al.*, 260 P. 3d 9 (Colo. App. 2009), which required showing actual knowledge where the CCPA provision included a knowledge requirement.
- Making it a deceptive trade practice to knowingly or recklessly engage in any "unfair, unconscionable, abusive or deceptive act or practice," or to engage in any conduct "that creates a likelihood of confusion or misunderstanding."
- Adding a new provision clarifying that standing to bring an action under the CCPA does not require proving that the alleged deceptive trade practice has a "significant public impact." The Colorado Supreme Court as well as lower courts have required that a private litigant alleging violations under the CCPA demonstrate the violations had a significant public impact, which prevented private parties from making private disputes into CCPA cases. The Colorado Court of Appeals very recently determined that the significant public impact requirement also applies to enforcement actions by the state. See *State of Colorado v. Castle Law Group et al.*, 2019COA49, ¶ 107.

The proposed bill additionally expands the financial remedies available for CCPA violations. It increases the per violation penalty maximum from \$2000 to \$20,000, and removes the \$500,000 cap for any related series of violations. Where any violations are found to be committed against elderly persons, the legislation increases the per penalty maximum from \$10,000 to \$50,000 with no cap. These civil penalties would be considered damage awards for accounting purposes under the proposed bill. Finally, the bill allows for prejudgment interest to be included the award of actual damages sustained by a private plaintiff, calculated from the date the claim accrued.

If passed in its current form, HB19-1289 would create opportunity for more aggressive enforcement by the Colorado attorney general and district attorneys as well as much more private litigation under the CCPA. For example, state attorneys general as well as private parties are increasingly litigating issues around the collection and use of consumer data. It is far easier to allege collection and use of consumer data without express permission as “unfair” than to allege that practice as violating one of the CCPA’s current, more specific provisions. Similar broadly-worded statutes in California and New Jersey have led to a significant increase in private plaintiff litigation and costs for companies doing business in those states. Additionally, the elimination of the significant public impact requirement has the potential to transform any private business dispute into a CCPA action, and to invite a treble damages award if the plaintiff can demonstrate by clear and convincing evidence that the defendant acted in bad faith.

The bill narrowly passed out of the house judiciary committee 6-5 early this week. The committee struck a section of the bill that would have made certain provisions in standard form consumer and employment contracts unenforceable. An amendment was proposed that would have imposed the significant public impact requirement only on private parties, but that amendment was defeated.

As this bill moves through the Colorado general assembly, businesses operating in Colorado should take note of the possibility that far more of their activities could fall within the purview of the CCPA if this legislation passes as currently drafted.

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