

### Which state consumer protection provisions could be used to protect consumers from junk food marketing?

The Colorado Consumer Protection Act (“CCPA”) is one of just a few states that itemizes a long list of prohibited trade practices but does not contain a “catch-all” provision outlawing deceptive trade practices in general. Dea Pridgen, CONSUMER PROTECTION AND THE LAW (VOL. 1) 41 (2003); Colo. Rev. Stat. § 6-1-108 et seq. The CCPA defines “food” as “any raw, cooked, or processed edible substance, beverage, or ingredient used or intended for use or for sale in whole or part for human consumption.” Colo. Rev. Stat. § 6-1-102 (4.5). CCPA provisions relevant to food marketing include:

- “Knowingly mak[ing] a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith.” Colo. Rev. Stat. § 6-1-105(e);
- “Represent[ing] that goods, food, services, or property are of a particular standard, quality, or grade, or that goods are of a particular style or model, if he knows or should know that they are of another.” Colo. Rev. Stat. § 6-1-105(g).

The CCPA also prohibits the failure to “disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction.” Colo. Rev. Stat. § 6-1-105(u). The provision does not reference “food” but seems to apply to all advertising for consumer goods.

### Does Colorado law provide any special protections for child consumers?

The CCPA’s has no specific provision protecting children as vulnerable consumers. The CCPA does require a showing that the alleged trade practice “significantly impacts the public as actual or potential consumers violation,” *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 147 (Colo. 2003). When evaluating “public impact,” the Colorado Supreme Court has recognized “the relative sophistication and bargaining power of the consumers affected by the challenged practice.” *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003). Young children are by their very nature relatively unsophisticated and have little bargaining power in a typical consumer transaction.

### Who can bring a lawsuit?

The Attorney General, Colo. Rev. Stat. §§ 6-1-110, 6-1-111, 6-1-112, and individual consumers, Colo. Rev. Stat. § 6-1-113, may bring suit under the CCPA. Class actions are permitted. *See, e.g., Mangone v. U-Haul Intern. Inc.*, 7 P.3d 189 (Colo. App. 1999) (allowing a class action for violations of CCPA).

### What needs to be shown to make out a claim?

To make out a claim under the CCPA, a plaintiff must show: “(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 the challenged practice significantly impacts the public as actual or potential consumers of the defendant’s goods, services, or property; (4) that

### Using State Consumer Protection Law to Limit Junk Food Marketing to Children

This project conducted a 50-state survey of existing state consumer protection law and the potential role it might play to limit junk food marketing to children. Each State legal summary describes the most relevant existing consumer protection statute and identifies provisions that might be invoked to protect children from junk food marketing. Procedural provisions and criminal penalties are not discussed.

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the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury." *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146-147 (Colo. 2003) (citing *Hall v. Walter*, 969 P.2d 224, 235 (Colo. 1998)).

Intent to deceive is a necessary element of the prohibitions related to food marketing outlined above. Causation is a necessary element that may be established by proving reliance. *Crowe v. Tull*, 126 P.3d 196, 210 (Colo. 2006). However, the causation element might be satisfied even without a showing of reliance. *See, e.g., Hall v. Walter*, 969 P.2d 224, 237-238 (misrepresentations made by defendants to third parties about plaintiff's property caused destruction of plaintiff's property and there was no need to prove reliance by third parties).

In considering whether the practice "significantly impacts the public," the court will 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 has previously impacted other consumers or has the significant potential to do so in the future." *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003).

Statements considered "puffery" are not actionable under the CCPA. *Park Rise Homeowners Ass'n, Inc. v. Resource Const. Co.*, 155 P.3d 427, 435 (Colo.Ct.App. 2006) ("[T]he CCPA does not, as a matter of law, make actionable a statement which would otherwise be mere puffery.") Puffery (or puffing) is defined as "[t]he expression of an exaggerated opinion — as opposed to a factual misrepresentation — with the intent to sell a good or service." BLACK'S LAW DICTIONARY (8th ed. 2004).

#### **What are the powers of the Attorney General to protect kids from junk food marketing?**

The Colorado Attorney General has the power to investigate, Colo. Rev. Stat. § 6-1-107, issue subpoenas, Colo. Rev. Stat. § 6-1-108, conduct hearings, Colo. Rev. Stat. § 6-1-108, seek injunctive relief or temporary restraining orders, Colo. Rev. Stat. §§ 6-1-109, 6-1-110, pursue civil penalties not to exceed \$2,000 per violation (Colo. Rev. Stat. § 6-1-112), and obtain restitution for consumers, Colo. Rev. Stat. § 6-1-112(1)(a). The Attorney General has the power to promulgate rules under the CCPA, Colo. Rev. Stat. § 6-1-108.

#### **How does the law compensate consumers?**

Except in a class action, in a private action for damages, a prevailing plaintiff is entitled to (1) the greater of actual damages, \$500, or treble damages (if the conduct was willful, knowing or intentional); and (2) costs and reasonable attorney's fees. Colo. Rev. Stat. § 6-1-113(2)(a).

#### **Who is liable for attorney's fees?**

A prevailing plaintiff, Colo. Rev. Stat. § 6-1-113(2)(a), or Attorney General, Colo. Rev. Stat. § 6-1-113(4), is entitled to reasonable attorney's fees.

Any person bringing an action that is groundless, in bad faith, or used for harassment, may, at the court's discretion, be liable for defendant's attorney's fees and costs. Colo. Rev. Stat. § 6-1-113(3).

**DISCLAIMER:** This legal summary is for informational purposes only. Please consult an attorney for legal advice. All information reflects legal research conducted in 2010.

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