

**PHILIP J. WEISER**  
Attorney General

**NATALIE HANLON LEH**  
Chief Deputy Attorney General

**ERIC R. OLSON**  
Solicitor General

**JUNE TAYLOR**  
Chief Operating Officer



**RALPH L. CARR**  
**COLORADO JUDICIAL CENTER**  
1300 Broadway, 10th Floor  
Denver, Colorado 80203  
Phone (720) 508-6000

**STATE OF COLORADO**  
**DEPARTMENT OF LAW**

**Attorney General Phil Weiser**  
**Testimony Before the**  
**Committee on the Judiciary,**  
**Colorado House of Representatives**  
**- April 9, 2019 -**

---

Thank you, Chairman Weissman and members of the Judiciary Committee for this opportunity to testify about House Bill 19-1289, “Concerning the Creation of Additional Protections in the Colorado Consumer Code”<sup>1</sup> (“HB 19-1289”).

As Attorney General, one of my most important responsibilities, laid out in statute by the legislature, is to protect Colorado consumers from unfair business practices. When we cannot protect Colorado consumers, we all lose. Victims lose, as their hard-earned money and time are stolen from them. Vulnerable groups, including older Coloradans, military families, and student loan borrowers lose, because they are singled out and targeted by scammers. Taxpayers lose, too, because we must absorb the costs of consumer fraud. And ethical businesses lose, because when their competitors can make money doing things the wrong way, it makes it more costly for the vast majority of Colorado businesses that are doing things the right way.

Let me repeat: effective consumer protection laws don’t just protect consumers – they protect the vast majority of Colorado companies that operate in a responsible manner. Here in Colorado, we celebrate businesses that do the right thing, entrepreneurs who take risks, and companies that do well by playing by the rules. Our State should be a national leader in ethical business, and strong consumer protection laws are crucial to that goal.

Unfortunately, Colorado’s consumer protection law is among the weakest in the nation. We lack the common-sense tools needed to crack down on scammers and sham businesses – tools that almost every other State in the Union has. In fact, in

---

<sup>1</sup> H.B. 19-1289, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

2018, the National Consumer Law Center singled out Colorado's Consumer Protection Act as one of the three weakest consumer protection laws in the nation.<sup>2</sup>

**When it comes to protecting Colorado consumers, 48th place isn't good enough.**<sup>3</sup> Our consumers and businesses deserve the same protections as the other 97% of American citizens. This is why HB 19-1289 is so important. So today, I want to highlight the most important changes that HB 19-1289 makes to the Colorado Consumer Protection Act, and why we need those changes to better protect Colorado consumers and ethical business leaders.

First, the bill shifts the "intent" requirement to prove that a company has engaged in a scam. In nearly all other states, if a court finds that a scammer "recklessly" harms consumers, that scammer can be held accountable.<sup>4</sup> "Recklessness" means a company or person acted with reckless disregard for the truth. In Colorado, though, we are one of a few states that impose a much more demanding test: that a company have "actual knowledge" that it was committing a deceptive business practice before we can hold them accountable.<sup>5</sup> In other words, that the company was "*aware* that its conduct was *certain* to cause the result."<sup>6</sup>

Imagine a computer store owner knows her store was flooded, and knows the flood reached the stockroom of computers, and knows the flood reached the shelf where computers are stored. But, the owner doesn't bother to check if their products were damaged or destroyed by the water. Instead, she turns around and sells them to unsuspecting consumers, passing them off as undamaged. Now, in 47 states, this would be illegal, and the store would be held accountable. But not in Colorado. Instead, under our existing standard, the store would be in the clear.<sup>7</sup> In a sense, the store would even be rewarded for its irresponsibility: because it did not make an effort to learn the true condition of their goods, it would not be liable under the "actual knowledge" standard currently required by the CCPA.

This is not okay: when irresponsible companies take advantage of unknowing consumers, we need the tools to hold them accountable. As a practical matter, proving that a company was subjectively "aware" and "certain" that their representations were false is incredibly challenging, even for those companies that were. Sometimes, we'll find a "smoking gun" email or conversation where a scammer admits he *knew* he was acting wrongly. But the risk is simply too high that

---

<sup>2</sup> Carolyn Carter, "Consumer Protection in the States: A 50-State Evaluation Of Unfair And Deceptive Practices Laws," National Consumer Law Center 13 (Mar. 2018) ("Consumer Protection in the States"), *available at* <http://www.nclc.org/images/pdf/udap/udap-report.pdf>.

<sup>3</sup> The other states were South Dakota and Oregon. *Id.*

<sup>4</sup> *Id.* at 28.

<sup>5</sup> *See, e.g.*, Colo. Rev. Stat. Ann. § 6-1-105(1)(a) (unfair practice when one "[k]nowingly passes off goods, services, or property as those of another.") (emphasis added).

<sup>6</sup> COLO. REV. STAT. § 18-1-501(6).

<sup>7</sup> COLO. REV. STAT. § 6-1-105(1)(c); *See also State ex rel. Suthers v. The Mandatory Poster Agency, Inc.*, 260 P.3d 9 (Colo. App. 2009).

fraudulent schemes could go unpunished under this high standard, allowing even intentional bad actors to go unpunished.<sup>8</sup> The common-sense measures in HB 19-1289 ends this problem, bringing Colorado in line with nearly all other states.

Second, the bill brings Colorado in line with the vast majority of states, and the federal government, in adding a catch-all provision against “any unfair, unconscionable, abusive, or deceptive act or practice” and “any conduct which creates a likelihood of confusion or misunderstanding” that harms consumers. A century ago, when Congress passed the first Federal Trade Act, it recognized why these catch-all provisions were so important, writing:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If [our legislature] were to adopt the method of definition, it would undertake an endless task.<sup>9</sup>

Unfortunately, “the method of definition” is exactly what the current CCPA called for. Since 1969, we tried to “define our way” out of unfair business conduct by prohibiting more than 60 specific defined acts and practices, from failing to disclose the “actual retail value” of a magazine contest prizes<sup>10</sup> to “knowingly making a false representation about radon.”<sup>11</sup> But what we have not done is adopted a simple, broad ban on “unfair practices” that allows 44 other states to stop new scams as they arise.<sup>12</sup>

It is time to protect Colorado consumers by protecting them against a range of new scams as they arise. To take just a few examples, invoice scams involving corporate registration and yellow-pages listings, websites that deceptively charge consumers for publicly available government information they could otherwise obtain for free (such as voter registration information), and deceptive subscription practices are all on the rise. We are living in a time of unprecedented technological and social change, and the bad actors aren’t standing still. If we want to keep consumers safe, we should be in line with what 44 other states have done.

Third, HB 19-1289 updates civil penalties that can be imposed against those that violate our consumer laws. Current law imposes some of the lowest penalties in the nation: just \$2,000 dollars per violation, with a cap of \$500,000 total.<sup>13</sup> For major corporations – big banks, pharmaceutical manufacturers, and international scammers – these low penalties provide little, if any, deterrent. Moreover, when Colorado confronts some of the biggest and most offensive crimes against the public,

---

<sup>8</sup> See Consumer Protection in the States, 28.

<sup>9</sup> H.R. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914).

<sup>10</sup> COLO. REV. STAT. § 6-1-105(1)(y).

<sup>11</sup> COLO. REV. STAT. § 6-1-105(1)(ll).

<sup>12</sup> Consumer Protection in the States, 14.

<sup>13</sup> COLO. REV. STAT. § 6-1-112(1)(a).

such as pharmaceutical companies who intentionally misled consumers and contributed to the opioid epidemic, we should not tie our hands behind our back (compared to other states).<sup>14</sup> HB 19-1289 changes this state of affairs, putting Colorado on an even playing field.

Fourth, the bill removes one of the biggest obstacles for citizens victimized by a fraudulent scheme: a court-created requirement that a deceptive trade practice must have a “significant public impact.” This requirement was imposed by the courts, not by the General Assembly. But today, this extra requirement is part of the Colorado Consumer Protection Act, even though it is not something our legislature voted for.<sup>15</sup> And when courts imposed this requirement, the consequence was that it became much, much harder for ordinary people to secure their rights. Forcing ordinary consumers to provide comprehensive evidence about the social impact of a fraud or scam is a bar that very few people can meet. And it’s not a bar they should have to meet: if a Colorado consumer can prove that she has been personally harmed by a deceptive trade practice or unfair or abusive business practice, that should be enough to protect their rights in court. Just because a deceptive practice was committed against one person, or one hundred persons – it should be a crime regardless. This also places my office in an odd position in which we may be aware of a deceptive practice occurring, but, before taking action to stop it, we may not have a case until we witness more victims falling prey to deceptive practices. The bill corrects this problem.

In closing, each of these measures is an important step in the right direction. Together, they will bring Colorado in line with nearly every other state. These tools will better protect Colorado consumers – and help us live up to our aspiration to be the best place in the country to run an ethical business. In our State, we have outstanding, ethical actors in the private sector that are models of how businesses should run. By updating the Colorado Consumer Protection Act, the Department of Law will be able to better weed out bad actors and protect Colorado consumers.

Thank you and I am happy to respond to questions you may have.

---

<sup>14</sup> See, e.g., Tex. Bus. & Com. Code Ann. § 17.47 (allowing State to recover \$20,000 per proven violation, without limit); State of Texas Original Petition in *State of Texas v. Purdue Pharma L.P.*, No. D-1-GN-18-002403, in the District Court of Travis County, Texas, filed May 15, 2018, 2018 WL 2230020 (seeking such damages from Purdue Pharmaceuticals for intentionally misleading consumers and exacerbating the opioid epidemic).

<sup>15</sup> See *Hall v. Walter*, 969 P.2d 224, 234 (Colo. 1998).