

# The Significant Public Impact Requirement in Colorado Consumer Protection Act Claims Following *Coors v. Security Life of Denver Insurance Company*

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## Introduction

Efforts to protect consumers from a variety of abuses in the marketplace resulted in the passage during the past few decades of substantial prophylactic legislation at both the federal and state levels.<sup>1</sup> Colorado was no exception: in 1969 the General Assembly enacted the Colorado Consumer Protection Act (“CCPA”).<sup>2</sup> The CCPA was seldom the subject of appellate court decisions until the 1990’s.<sup>3</sup> More recently, however, there has been a significant increase in litigation regarding the CCPA. In particular, courts have been asked to decide what constitutes a “significant public impact,” under the Act, a required element in all civil CCPA claims.<sup>4</sup>

In 2003, the Court of Appeals decided *Coors v. Security Life of Denver Ins. Co.*,<sup>5</sup> an insurance dispute involving in part a CCPA claim. The court ruled as a matter of law that an insurer’s misconduct affecting approximately 200 out of 20,000 policyholders, “at most one percent,” does not “constitute public impact.”<sup>6</sup> When the Colorado Supreme Court accepted certiorari in *Coors*,<sup>7</sup>

attorneys on both sides of the bar anticipated receiving much-needed guidance from the court as to the proper approach for assessing a “significant impact.” Unfortunately, the high court did not reach a consensus, as it was split 3-3 on the issue of whether under the facts a significant public impact was present. By operation of C.A.R. 35(e), the Court of Appeals’ holding in *Coors* remains intact.<sup>8</sup>

This article offers a brief overview of the CCPA, discusses the history of the “significant public impact” requirement, and considers *Coors*’ impact on future CCPA claims.

## Overview of the CCPA

The CCPA was enacted in 1969 to regulate commercial activities and practices which, “because of their nature, may prove injurious, offensive, or dangerous to the public.”<sup>9</sup> Although the CCPA is based upon the Revised Uniform Deceptive Trade Practices Act, the Colorado General Assembly made a substantial number of changes, including the right of individual consumers to recover damages.<sup>10</sup> Colorado’s CPA “serves more than a merely restitution-

ary function: a primary purpose of the CCPA is to deter and punish deceptive trade practices.”<sup>11</sup> To further its several purposes, the statute provides both for enforcement by the attorney general and for a private right of action by any person injured by the deceptive acts or practices committed by a business.<sup>12</sup>

From a deserving consumer’s perspective, the remedies provisions of the CCPA make it worthwhile pursuing these claims. A consumer may recover three times his or her actual damages, if “bad faith conduct” is established by clear and convincing evidence.<sup>13</sup> “Bad faith conduct” is defined as “fraudulent, willful, knowing, or intentional conduct that causes injury.”<sup>14</sup> In order to ensure the broadest possible application of the CCPA, a successful plaintiff is entitled not only to damages, but recovery of costs and reasonable attorney fees as well.<sup>15</sup>

In construing the CCPA, the Colorado Supreme Court instructed that to further the CCPA’s broad purposes and scope, it must be expansively and liberally construed.<sup>16</sup> This expansive approach was reaffirmed in *Showpiece*

*Homes, Corp. v. Assurance Co. of America*,<sup>17</sup> where the Supreme Court held that the CCPA allows consumers to bring private actions against insurance companies.

To recover under the CCPA, a plaintiff seeking to establish a private cause of action must prove five distinct elements:

(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 significantly impacts 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.<sup>18</sup>

In considering the third element, whether the challenged practice significantly affects the public, courts are to consider the following factors: (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.<sup>19</sup> No single factor is dispositive in determining whether the public impact requirement is met.<sup>20</sup>

In 1998, the Colorado Supreme Court decided two companion cases which concerned the reach of the CCPA. In the first, *Hall v. Walter*,<sup>21</sup> the court was asked to construe the phrase "any person" in order to determine whether "third-party non-consumers" had standing to bring CCPA claims. The pertinent statutory provision then in effect, C.R.S. §6-1-113(1), allowed "any person" to obtain damages resulting from a deceptive trade practice. The Walters owned real property near a newly-created residential home subdivision. The developers of the subdivision misrepresented in advertising that a road

through the Walters' property was a public right-of-way that could be used to travel to and from the subdivision. The subsequent traffic caused significant damage to the Walters' property.

The Walters sued the developers alleging, inter alia, a CCPA claim. Applying the rules of statutory construction, the court ruled that the phrase "any person" "encompassed more than just actual or potential consumers."<sup>22</sup> The General Assembly took exception to the ruling and promptly enacted legislation restricting those able to prosecute CCPA claims to "actual or potential consumers," or "a successor in interest to an actual consumer," or a person injured by a deceptive trade practice "in the course of his business or occupation."<sup>23</sup>

The second significant 1998 CCPA decision, *Martinez v. Lewis*,<sup>24</sup> made clear that purely private conduct was outside the intended reach of the CCPA. In *Martinez*, the defendant, Dr. Lewis, conducted an examination of the plaintiff's alleged neurological injuries at the request of an insurer. In reliance on Dr. Lewis's conclusion that the plaintiff was malingering, the insurer terminated future payments for care. The plaintiff sued the insurer, State Farm, and Dr. Lewis, and included a claim under the CCPA. The alleged deceptive trade practices concerning Dr. Lewis were his misrepresentations to State Farm as to his qualifications and expertise to conduct neurological medical examinations. The Supreme Court considered "whether misrepresentations involving a single consumer like State Farm significantly impact the public as consumers of Dr. Lewis's services."<sup>25</sup> The court decided the question in the negative, and refused to reach the question of "whether Martinez's interests, arising primarily from personal injury, are legally protected under the CCPA."<sup>26</sup> In rendering its decision, the court relied heavily upon the fact that only a single consumer, State Farm, was the recipient of Dr. Lewis's misrepresentation, not the general public.

In 2001 Colorado joined a growing number of jurisdictions in holding that state consumer protection acts apply to the insurance industry, and that the provision of insurance constitutes a service for purposes of the CCPA.<sup>27</sup> In *Showpiece Homes Corp. v. Assurance Co. of America*, a homebuilder sued its commercial general liability carrier after being denied a defense and indemnification for claims brought against it by a dissatisfied purchaser. *Showpiece* emphasized that "in determining whether conduct falls within the purview of the CCPA, it should ordinarily be assumed that the CCPA applies to the conduct. That assumption is appropriate because of the strong and sweeping remedial purposes of the CCPA."<sup>28</sup> Also essential to any discussion of public impact is *Showpiece's* recognition that because deceptive trade practices in the insurance industry "could clearly injure the public," such misconduct is "within the purview of the CCPA."<sup>29</sup>

Several years later, in *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, the Colorado Supreme Court once again considered the element of a significant public impact and instructed that purely personal transactions are not within the CCPA's purview.<sup>30</sup> That case involved a distributor's allegations that a manufacturer failed to honor their right to territorial exclusivity. The court held that "three affected dealers out of approximately 550 worldwide does not significantly affect the public, especially when the proper remedy . . . is a private breach of contract action."<sup>31</sup> The court cited with approval an opinion from the District of Colorado holding that consumer protection laws primarily prohibit deceptive practices only as they "affect consumers generally . . ."<sup>32</sup>

These decisions set the stage for the Court of Appeals' decision in *Coors* concerning how to measure "significant public impact" "for purposes of the CCPA."<sup>33</sup> Significant public impact is not required by the Act itself, but has

been an element read into the Act by the Colorado Supreme Court. Other courts (notably Washington State) that the Colorado Supreme Court looks to in consumer protection matters, have not adopted such a requirement.

### The Trial Court's Findings of Fact and Conclusions of Law:

The plaintiff, William K. Coors, purchased a life insurance policy from Security Life of Denver Insurance Company. After learning that Security Life had charged him an expense charge of \$.90 per \$1,000 of basic benefit, rather than the \$.131 per \$1,000 rate provided for in the policy, Coors brought suit. According to Security Life, a computer truncation error resulted in the overcharge, causing Coors' to be charged an additional \$2,340 monthly.<sup>34</sup>

Coors sued for breach of contract, fraud and violation of the CCPA. Following a bench trial, the trial court found in favor of Coors on all claims and awarded him \$1,085,506.73, including treble damages and an award of attorney fees pursuant to the CCPA. The trial court's findings of facts in support of this award present a series of troubling acts by the insurer. These findings include:

1. When Security Life initially learned of the computer error, it did not consider whether any policyholders had been adversely affected.<sup>35</sup>
2. Only after an agent reported a customer's concerns did Security Life investigate and determine that 227 policies had been affected.<sup>36</sup>
3. The total overcharged by Security Life was \$21.7 million, which it did not intend to refund to its insureds.<sup>37</sup>
4. Instead, Security Life's legal department concocted and implemented a scheme to mislead its policyholders regarding their contractual rights under the insurance policies and to create defenses should anyone object and assert claims against it.<sup>38</sup>

### The Court of Appeals' Decision:

The Court of Appeals reversed the trial court's judgment on several grounds, including its determination that Security Life's conduct violated the CCPA. In reaching the latter conclusion, the court of appeals devoted little discussion to the question of whether Security Life's affirmative misconduct constituted a "significant public impact." Relying only upon *Rhino Linings*, the court found that the trial court "made only a cursory and inadequate conclusion" about the potential or actual impact on consumers.<sup>39</sup> The court also faulted the trial court for not evaluating whether 200 policyholders out of 20,000 represented a "sufficient segment of the public to warrant a conclusion that Security Life's acts significantly impacted the public," and decided "that an impact on at most one percent of the policyholders could not constitute public impact."<sup>40</sup> Hence, the court concluded that the misconduct was personal, not public. The court further opined that Coors was a sophisticated businessman who was accompanied by his attorney when he selected his life insurance policy, and did not require the protections of the CCPA. Absent from the Court of Appeals' decision was any meaningful discussion of the import of Security Life's plan to retain the overpayments while striving to mislead its policyholders and the Colorado Division of Insurance.

There are several shortcomings with the decision. First, the record contains ample evidence of significant public impact which the Court of Appeals overlooked or considered insufficient due to a misapprehension or misapplication of the relevant factors set down in *Rhino Linings*. The *Rhino Linings* quantity factor should neither be dispositive nor analyzed on a percentage basis, yet that is precisely what the court did. The court held that 227 directly affected policyholders was an insufficient number, as a matter of law, to establish a public impact because they comprised little more than one percent of 20,000

purchasers of the insurance company's product.<sup>41</sup> This approach vitiates the Supreme Court's reaffirmation in *Showpiece* that the CCPA is to be broadly and liberally construed to effectuate its remedial purposes, and also ignores the juridical presumption that the conduct falls within the CCPA.<sup>42</sup>

Further, the factors considered in determining whether a practice significantly impacts the public include a consumer's "relative sophistication and bargaining power."<sup>43</sup> Inherent in this is a consideration ignored by the Court of Appeals, i.e., the context in which the challenged practice occurs - here, a transaction in a business regulated by the state to promote the welfare of the public. The *Coors* decision also contains no discussion of the relative bargaining power between Coors and Security Life, thus ignoring the Supreme Court's longstanding recognition that the relationship between an insurer and its insured is intrinsically unequal.<sup>44</sup>

In this regard, policyholders are inadequately protected when the public impact factor is quantified and hinged primarily on the percentage of persons in a discrete group directly affected by the challenged practice. Instead, significant public impact must be qualitatively considered in light of the CCPA's broad remedial purposes and, in the insurance context, the regulatory scheme governing the business of insurance. The Court of Appeals' approach leaves unanswered what percentage of the consuming public must be affected by a particular practice in order to establish a statutory violation - 5%, 10%, 25%, or more? It also leads to the paradoxical result that the smaller the group to which a deceptive practice is directed, the more likely that a significant public impact will be found. If, for example, the insurance policy in question had been purchased by only 500, rather than 20,000 persons, then almost 50% of Security Life's customers would have been impacted by the insurer's conduct. Presumably this fact alone would have

led the Court of Appeals to reach a different conclusion, even though the nature and scope of Security Life's conduct would have been no different. And, it is unclear how, considering the level of numeric proof of affected policyholders required by the court, a large insurance company purveying hundreds of thousands, or even millions, of insurance policies to Colorado consumers could ever be held accountable for its miscreant actions otherwise violative of the CCPA's strictures.

The Court of Appeals also appears to have placed undue importance on the fact that the record lacked specifics concerning the other 226 affected policyholders. Depending on their ages and smoking statuses, the effect on the other 226 policyholders, the Court of Appeals surmised, might be de minimus.<sup>45</sup> Not only was this a speculative observation but, Colorado does not require a claimant to present evidence as to the actual impact on non-parties who were likewise subjected to the defendant's deceptive practices.<sup>46</sup> Otherwise, if this were necessary, the proof problems would be insurmountable, allowing a wrongdoing defendant to escape liability for its actions.

The infirmities with the Court of Appeals' approach are demonstrated by a recent Tenth Circuit Court of Appeals decision, *Dean Witter Reynolds, Inc. v. Variable Annuity Life Ins. Co.*<sup>47</sup> There, the district court dismissed a CCPA claim on summary judgment, finding no significant public impact where the defendant misrepresented to a customer that a stop-payment request would be timely processed. The defendant had over two million accounts and received approximately 600 inquiries monthly, but there was some evidence that the defendant's customer service department had a history of giving unwarranted assurances to its customers. The Tenth Circuit reversed the district court's judgment reasoning that "[t]he issue . . . is not whether another . . . customer is likely to be subjected to the lost check fiasco endured by Mrs. Bass, but rather

whether similarly situated customers will be subjected to misleading information in the future."<sup>48</sup> The Tenth Circuit found that there was adequate evidence of significant public impact for the CCPA claim to survive summary judgment.<sup>49</sup> Notably, the percentage of customers potentially affected by the defendant's alleged practice amounted to a mere 0.0003% - far less than the 1% deemed inadequate by the Court of Appeals in *Coors*.

The Court of Appeals also seemed to ignore the very substantial amount of money involved in Security Life's scheme. While the impact on the other 226 policyholders (35 of whom remained ignorant of Security Life's deception because they were never notified) might have been de minimus, the insurer's accumulation of \$21.7 million was assuredly not. Thus, although the evidence of record related to only 1% of the total purchasers who were directly affected by the company's actions, Security Life's monetary enrichment exceeded \$20 million - an undeniably significant impact by any calculation.

Another troubling aspect of the decision concerns its discussion of the consumer's, i.e., Coors' "relative sophistication and bargaining power."<sup>50</sup> The Court of Appeals pointed out that the plaintiff, William Coors, was a "sophisticated businessman."<sup>51</sup> Yet, to find that Coors' general sophistication as a businessperson and his retention of an attorney, without more, establishes sophistication as to matters involving insurance is a non sequitur.<sup>52</sup> Furthermore, even if a consumer is, in fact, sophisticated in the business of insurance, that consideration goes only to the issue of whether a policy was a contract of adhesion or actually negotiated by equals.<sup>53</sup>

Indeed, there was no evidence in the record to suggest that the product sold was anything other than the typical "take-it-or-leave-it" contract form as opposed to a contract where the terms were negotiated by parties of equal

power and knowledge. For many reasons, insurance contracts are not commonplace bilateral contracts.<sup>54</sup> Chief among these is the definitive "disparity of bargaining power between insurer and insured," as materially different coverage cannot be readily obtained elsewhere and, therefore, policy provisions are available only on a "take-it-or-leave-it" basis. This "disparity in bargaining power" is also reflected in a consumer's forced reliance on the insurer's superior information and experience. The CCPA specifically targets deceptive trade practices that flourish as a result of a consumer's limited access to information - as *Coors* vividly demonstrates. In fact, in *Martinez*, the Supreme Court observed that the prohibited practices set forth in C.R.S. §6-1-105(1) "serve essentially to prevent injury created by false or misleading information" and provide protection for "consumers who are in a position of relative weakness against a range of deceptive practices."<sup>55</sup> As *Martinez* demonstrates, "relative weakness" is by no measure confined to comparisons of economic power, but rather, refers to relative weakness in terms of access to information and experience. The provisions of C.R.S. §6-1-105(1) protect the public as consumers in situations "where consumers do not have and cannot reasonably gain access to truthful information relevant to a contemplated transaction unless it comes from the person offering the good, service, or property."<sup>56</sup>

In contrast, Coors' relationship with Security Life demonstrates that he was a "consumer" as contemplated by the CCPA. His participation in the transaction was minimal and limited to choosing the amount of benefits payable. He did not negotiate the terms of his insurance contract with Security Life. An actuary employed by Security Life calculated the premium and expense charge by referring to the company's internal tables.<sup>57</sup> Coors had no independent means of determining

the proper cost of Security Life's expense charge and no knowledge that it was intended as a profit component. Instead, he relied entirely on Security Life to convey accurately this financial information - information that Security Life misrepresented to him and 226 other policyholders.

The Court of Appeals' decision also suggests that the presence of counsel at the initial sales meeting is somehow dispositive as to the consumer's sophistication and the lack of public impact. The court, however, never discussed whether the attorney had any special or in-depth knowledge of insurance, training that is vital in understanding many insurance transactions, let alone how the attorney's background and training may have affected Coors' understanding of a complicated insurance transaction.

Finally, the Court of Appeals seemed not to consider the likelihood that Security Life would engage in improper conduct in the future; yet, the degree and depth of the deceptive scheme described in the trial court's findings called into question the fundamental corporate integrity of Security Life and necessarily implicated its willingness to engage in future misconduct. Other jurisdictions have recognized that past conduct is a reliable forecast of future behavior, and should be considered in determining if consumer protection acts have been violated.<sup>58</sup> According to the trial court, Security Life had already demonstrated a pattern of deceptive practices, and, in fact, that pattern continued during trial. Not only did Security Life deceive its insureds, it also fashioned a scheme to hide its wrongdoing from the Colorado Division of Insurance ("Insurance Division") and protect itself from discovery during any market conduct examination. Periodic market conduct examinations are required to be conducted by the Insurance Division under C.R.S. §10-1-201, et seq., and the scope of the review may be extensive:

An examination under this article shall not be limited to an examina-

tion of the financial condition of a company but may, in the discretion of the commissioner, also include all other activities and affairs of the company.<sup>59</sup>

The trial court expressly found that Security Life's enclosing a new policy face page that included the statutorily-required "20 day right to examine policy" was an intentional act designed to keep hidden from the Insurance Division its unilateral changes to 227 policy contracts.<sup>60</sup> This conduct thwarted the Insurance Division from carrying out its crucial investigatory functions on behalf of the general public. The trial court ruled that Security Life had tried to side-step the very regulatory scheme designed to protect the public from insurers engaging in "deceptive or misleading practices." Not only did its conduct result in its improper withholding of \$21.7 million from its own insureds, the court held, but it also attempted to deceive the general public by creating documents intentionally designed to mislead the Insurance Division, the entity charged with promoting the public welfare by regulating the business of insurance, about its profound mistreatment of its insureds. As the Tenth Circuit found in *Dean Witter*, a company's demonstrated propensity to deceive is sufficient to establish that a number of consumers may be affected in the future.<sup>61</sup> No more should be required.

### The Future:

Following *Rhino Linings*, and certainly after *Coors*, meeting the "substantial public impact" requirement for CCPA claims has become more difficult, no matter the size of the monetary loss or the egregiousness of the deceptive trade practice.<sup>62</sup> As matters stand now, it appears that a plaintiff alleging a violation of the CCPA must establish each deceptive trade practice and be prepared to demonstrate specifically how that practice impacted a significant percentage of the consumers potentially

affected by the practice. Hopefully, in the not-to-distant future, another case will reach the Supreme Court which will allow the court to address some of the problematic and troubling questions raised by *Coors*.

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- <sup>1</sup> See, e.g., Federal Trade Commission Act 15 U.S.C. §§41-58; Deceptive Trade Practices Act, ALA. Code §§8-19-1, et seq.; California Business and Professions Code §§17200; Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§42-110a, et seq.
- <sup>2</sup> C.R.S. §6-1-101, et seq.
- <sup>3</sup> Catherine A. Tallerico, *The Colorado Consumer Protection Act: An Update*, 29 THE COLORADO LAWYER 37 (Jan. 2000) (citing to Lee, Note, *The Colorado Consumer Protection Act: Panacea or Pandora's Box*, 70 DENV. U. L. REV. 141, 141 (1992)).
- <sup>4</sup> *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003) (en banc).
- <sup>5</sup> *Coors v. Security Life of Denver Ins. Co.*, 91 P.3d 393 (Colo. App. 2003).
- <sup>6</sup> *Id.* at 399.
- <sup>7</sup> The court accepted *certiorari* on three questions, only one of which is relevant to this discussion: "Whether the court of appeals erred in concluding, as a matter of law, that the record lacked substantial evidence of public impact resulting from the defendant's conduct, as required for violation of the Colorado Consumer Protection

Act.” Justice Hobbs would have also granted *certiorari* on the issue of whether a violation of Colorado’s Unfair Competition-Deceptive Practice Act, which identifies and makes unlawful certain unfair trade practices in the insurance industry is a *per se* violation of the Colorado Consumer Protection Act. The Colorado Trial Lawyers Association filed an *amicus* brief in the supreme court as did the Colorado Defense Lawyers Association.

- 8 *Coors v. Security Life of Denver Ins. Co.*, 112 P.3d 59, 63-64 (Colo. 2005). The remaining justices were evenly divided, with Justices Kourlis, Rice, and Coats, finding no public impact under the CCPA, with the other three justices, Mullarkey, Bender, and Hobbs, determining that Coors established a significant public impact for purposes of his CCPA claim.
- 9 *May Department Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 973 n.9 (Colo. 1993); *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146 (Colo. 2003) (quoting *People ex rel. Dunbar v. Gym of America, Inc.*, 177 Colo. 97, 112, 493 P.2d 660, 667 (1972); see also *Martinez v. Lewis*, 969 P.2d 213, 220 (Colo. 1998).
- 10 *Hall v. Walter*, 969 P.2d 224, 232 (Colo. 1998).
- 11 *Id.* at 231.
- 12 C.R.S. §6-1- 110, §6-1-113.
- 13 C.R.S. §6-1-113(2)(a)(III).
- 14 C.R.S. §6-1-113(2.3).
- 15 C.R.S. §6-1-113(2)(b).
- 16 *Hall* at 230.
- 17 *Showpiece Homes, Corp. v. Assurance Co. of America*, 38 P.3d 47, 52 (Colo. 2002).
- 18 *Hall* at 234-35.
- 19 *Martinez v. Lewis*, 969 P.2d 213, 222 (Colo. 1998).
- 20 *Id.*
- 21 See *supra* note 10.

- 22 *Hall*, at 231.
- 23 SB 99-143, now codified at C.R.S. §6-1-113(1)(a)-(c).
- 24 See *supra* note 19.
- 25 *Martinez* at 222.
- 26 *Martinez* at 223.
- 27 See *supra* note 17.
- 28 *Id.* at 53.
- 29 *Id.* at 54.
- 30 *Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 150 (Colo. 2003).
- 31 *Id.*
- 32 *Id.* (citing *United States Welding, Inc. v. Burroughs Corp.*, 615 F.Supp. 554 at 555 (D. Colo. 1985)).
- 33 Significant public impact is not required by the Act itself, but has been an element read into the Act by the Colorado Supreme Court. Other courts, notably Washington, which our supreme court looks to in consumer protection matters, see *Showpiece*, 38 P.3d at 54; *Hall*, 969 P.2d at 233, have not adopted such a requirement.
- 34 Finding of Fact, Conclusions of Law, Order and Judgment (“Order”) at ¶¶ 12-15.
- 35 Order at ¶ 15.
- 36 *Id.* at ¶ 16.
- 37 *Id.* at ¶¶ 17, 21.
- 38 A second-year law student, intern ing at Security Life, submitted the following memorandum to its General Counsel, which the insurer adopted with few modifications (emphasis in original):  
I have given, and continue to give, much thought about how to deal with the reformation issue. Although you indicated that we should leave the business decisions to the business people while we stick to the law, my idea is a hybrid. I just wanted to put it out there for you to think about so we can brainstorm a little on its possible effects. It may turn out to be a

very bad idea.

My idea is this: send out a casual notice to the effected [sic] policyholders that there was a computer error that caused a misprint on the policy and that SLD is generating a new policy page to replace the incorrect one to reflect the terms as they were agreed to when the company accepted the insured’s application. Then wait.

We know that we *may* be required to give prompt notice in order to get reformation. Additionally, as soon as a party has notice of the mistake, much of the case law indicates that if they continue as normal after the notice of the mistake, they may have waived their opportunity to challenge the mistake. Also, as soon as they learn of the mistake the statutes of limitations begin to run. And, where the statute of limitations does not apply, if they wait too long, we have a good argument of laches or waiver as a defense against *them*.

If we took such a position [sic] SLD’s notice requirement, if there is one, would be met, and the insured would be the party initiating the suit (which might discourage a few that would have fought a suit for reformation initiated by us), in which case we could file a counterclaim for reformation if it falls within the waiver/laches time limit, and a defense of waiver or bar by the statute of limitations if it is beyond the limit. Make the defenses work in our favor instead of against us. My concern is how such an action would be viewed by a court, i.e., bad faith, etc.

- 39 *Coors*, 91 P.3d at 399.
- 40 *Id.*
- 41 *Id.*
- 42 *Showpiece*, 38 P.3d at 53.
- 43 *Martinez* at 222.
- 44 *Huizar v. Allstate Ins. Co.*, 952 P.2d

342, 344 (Colo. 1998) (citing to *Schmidt v. Midwest Fam. Mut. Ins. Co.*, 426 N.W.2d 870, 874 (Minn. 1988) (although an insurance policy may not qualify as a contract of adhesion in the strictest sense, it possesses certain facets of such contracts including the lack of mutuality of remedy and minimal opportunity for arms length negotiation).

<sup>45</sup> *Coors*, 91 P.3d at 399.

<sup>46</sup> *See Hall*, 969 P.2d at 235-36.

<sup>47</sup> *Dean Witter Reynolds, Inc. v. Variable Annuity Life Ins. Co.*, 373 F.3d 1100 (10th Cir. 2004).

<sup>48</sup> *Id.* at 1114.

<sup>49</sup> *Id.*

<sup>50</sup> *Martinez*, 969 P.2d at 222.

<sup>51</sup> *Coors* at 399.

<sup>52</sup> *See, e.g., Coleman Co., Inc. v. California Union Ins. Co.*, 960 F.2d 1529, 1532 n.7 (10th Cir. 1992) (construing Kansas state law to “strictly construe an insurance policy against the insurer, even though the insured is a sophisticated party and of relatively equal bargaining power, so long as the insured did not participate in the drafting of the policy”); *Jefferson Ins. Co. of New York v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 677 N.E.2d 225, 229 n.11 (Mass. App. 1997) (holding that ambiguities in an insurance policy are construed against the insurer,

even where the insured is a sophisticated entity, as long as the insured is a noninsurer).

<sup>53</sup> *See First Nat’l Bank of Palmerton v. Motor Club of Am. Ins. Co.*, 708 A.2d 69, 72 (N.J. Super. 1997). *See also AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1265 (Cal. 1990) (refusing to depart from principle of *contra preferendum* as to a sophisticated corporate insured with equal bargaining power absent evidence that the insured “understood the policy language in any technical or restrictive manner”).

<sup>54</sup> *Huizar*, 952 P.2d at 344 (although an insurance policy may not qualify as a contract of adhesion in the strictest sense, it possesses certain facets of such contracts including the lack of mutuality of remedy and minimal opportunity for arms length negotiation).

<sup>55</sup> *Martinez*, 969 P.2d at 222.

<sup>56</sup> *Id.*

<sup>57</sup> In fact, the policy issued to Coors was not the contract he believed he had purchased. When he purchased the policy, he believed that that it would pay a \$5.2 million death benefit and that the annual premium would be fully paid after ten years. Order at 2, ¶ 5. Instead, the policy contained a provision that provided for a monthly expense charge against the “account value.” *Id.* at 14.

<sup>58</sup> Trial Court’s Findings of Fact, Conclusions of Law, Order and

Judgment at 2, ¶ 4.

<sup>59</sup> *See, e.g., Crary v. Djebelli*, 496 S.E.2d 21, 23 (S.C. 1998) (holding that the potential for repetition of unfair or deceptive acts may be shown by past misconduct).

<sup>60</sup> The trial court’s Order noted that “The evidence in this case has shown that Security Life obscured the identity of its decision makers as well as its decision process throughout the discovery phase of this case.” Order at 18, ¶ 10.

<sup>61</sup> C.R.S. §10-1-204(1)(b).

<sup>62</sup> Order at 10, ¶¶ 39-40.

<sup>63</sup> *Dean Witter Reynolds, Inc. v. Variable Annuity Life Ins. Co.*, 373 F.3d 1100, 1114.

<sup>64</sup> *See, e.g., State Farm Mut. Auto. Ins. Co. v. Lee*, 353 F. Supp. 2d 1119, 1129-30 (D. Colo. 2005) (dismissing CCPA claim for lack of significant public impact where only 17 claims out of were 2,200 claims concerned stacking); *Travelers Indemnity Co. of Ill. v. Hardwicke*, 339 F. Supp. 2d 1127 (D. Colo. 2004) (dismissing CCPA claim for the lack of a public impact where the insurer failed to offer enhanced PIP benefits to a single insured); *but see Bainbridge, Inc. v. Ray*, Douglas County District Court Case No. 03-CV-837 (finding a significant public impact upon actual or potential consumers where homebuilder marketed itself to a “limited” market).

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