

## RESTORING CLASS ACTIONS UNDER THE COLORADO CONSUMER PROTECTION ACT

### Summary

The Colorado Consumer Protection Act C.R.S. § 6-1-101 *et seq.* (“CCPA” or “Act”), passed in 1969, was enacted to safeguard Colorado consumers from deceptive business practices. To ensure robust enforcement, the CCPA allows the Attorney General to investigate and bring claims and also allows for a private right of action to anyone who “is an actual or potential consumer of the defendant’s goods, services, or property and is injured as a result of such deceptive trade practice....” C.R.S. § 6-1-113.

But here’s the rub: while class actions were allowed under the Act from 1969 onward, that all changed with the joint decisions in *Martinez v. Nash Finch Co.*, 886 F.Supp. 2d 1212 (D. Colo. 2012) (“*Martinez I*”) and *Martinez v. Nash Finch Co.*, 2013 U.S. Dist. LEXIS 45576, 2013 WL 1313899 (D. Colo. Mar. 29, 2013) (“*Martinez II*”) (collectively the “*Martinez Decisions*”). Breaking from precedent, the *Martinez Decisions*, citing a 1999 Amendment to the CCPA (the “1999 Amendment”), held that the plain language of the Act doesn’t allow class actions. This is so despite the fact that the Colorado legislature never intended the 1999 Amendment, or any other amendment to do away with class actions.

Rather, the 1999 Amendment’s deletion of class relief was the result of a typo that has had demonstrably negative repercussions. Since 2012, courts from Ohio to California have struck down CCPA class actions as being expressly disallowed under the Act. That places Colorado in the company of states like Alabama, Mississippi, Tennessee and South Carolina—all of which have chosen to deny their citizens the ability to join together in class actions under their respective state consumer fraud laws.

Absent the prospect of class relief, few victims of CCPA violations can vindicate their rights. \$500 in individual damages, even when attorneys’ fees are theoretically included, simply fails to incentivize counsel to take such cases. A legislative fix is needed to restore class actions to the CCPA.

### **Facts: Until the *Martinez Decisions*, Class Actions Were Always Allowed Under The CCPA**

- From 1969 until 2012, litigants routinely brought class actions under the CCPA. The CCPA was amended in 1987 to insert language indicating that treble damages, or statutory damages of \$250, were available to prevailing litigants under the Act “except in a class action.”
- Despite the addition of such “except in a class action” language, Colorado courts uniformly agreed that class actions under the CCPA were still allowed for *actual damages*—just not for *treble damages* or *statutory damages*. The central case during this time was *Robinson v. Lynmar Racquet Club, Inc.*, which explained that “...the statute (§ 6-1-113(2)) does not preclude class members from bringing an action for actual damages....” 851 P.2d 274 (Colo. App. 1993). *Robinson* was widely followed.
- The 1999 Amendment wasn’t passed to delete class actions from the Act at all. Rather, in 1999 the Legislature sought to limit the type of person who could sue under the Act to an actual or prospective consumer of a defendant’s goods or services. By making certain “redline” edits, the end result could give the impression that class actions are not allowed at all.
- Because the 1999 Amendment wasn’t designed to do away with class actions, it wasn’t until 13 years later in 2012 that a litigant raised the issue for the first time.<sup>1</sup> In the *Martinez* decisions, Chief Judge

<sup>1</sup> Indeed, during the interim period, courts proceeded as if nothing had changed and that class actions for actual damages were allowed under the CCPA. *See e.g. Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92,

Kreiger of the United States District Court for the District of Colorado (federal court) held that the plain language of the CCPA disallows class actions for money damages. Courts have relied on *Martinez* ever since to dismiss alleged CCPA class actions of all stripes.

### **Cases: Since The *Martinez* Decisions, CCPA Class Actions Have Been Routinely Dismissed**

Not surprisingly, since 2012, numerous courts across the Country have used *Martinez* to deny private litigants the ability to proceed on their CCPA claims on a class basis—effectively gutting enforcement of rights under the CCPA. These cases include, for example:

- *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, No. 12-CV-02432-WYD-KMT, 2015 WL 4036319, at \*4 (D. Colo. July 1, 2015) (Daniel, J.) (Dismissing class claims against rental car company for violations of CCPA loss-damage-waiver provision);
- *In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1234 (D. Kan. 2015) (class claims by corn farmers against seed maker for deceptive practices and fraud dismissed);
- *Simmons v. Author Sols., LLC*, No. 13CV2801 DLC, 2015 WL 4002243, at \*5 (S.D.N.Y. July 1, 2015) (dismissing CCPA class claims for deceptive marketing);
- *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, No. 13cv1803 (EMC), 2014 WL 1048710, at \*10 (N.D.Cal. Mar. 14, 2014) (dismissing CCPA claim, “to the extent it seeks to assert a class action for monetary relief”);
- *In re: Elk Cross Timbers Decking Mktg.*, No. 2577, 2015 WL 6467730, at \*17 (D.N.J. Oct. 26, 2015) (dismissing defective products class action under CCPA);
- *Chapman v. Tristar Prod., Inc.*, No. 16-CV-1114, 2016 WL 6216135, at \*5 (N.D. Ohio Oct. 25, 2016) (“[T]he CCPA prohibits monetary damages in class actions.”);
- *Fuentes v. Kroenke Sports & Entertainment, LLC*, 2014 CV 32619 (Dist Ct. Denver Jan. 26, 2015) (Dismissing alleged class action under CCPA’s ticket restriction laws)
- *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087 (D.N.M. 2017) (Dismissing CCPA class claim in the context of litigation against Big Tobacco for deceptive sales practices);
- *Dillon v. DTG Operations, Inc.*, 2012 IL App (1st) 102441-U, ¶ 24 (Dismissing class claims for violations of CCPA loss-damage-waiver provision);

### **Conclusion**

The Colorado General Assembly never intended to remove class actions from the CCPA. Yet courts, following the *Martinez* Decisions, have read class actions out of the statute. This, in turn, has had a chilling effect on the ability of consumers to vindicate their CCPA rights. The time has come for the legislature to fix this drafting error and to restore the ability of consumers to join together to enforce their rights by bringing class actions for damages and injunctive relief under the CCPA.

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94 (Colo. 2011) (CCPA class action adjudicated by CO Supreme Court with no mention that the entire action was disallowed under Colorado law).