

Please Support HB23-1192 (Rep. Weissman & Sens. Gonzales & Rodriguez)
Concerning the creation of additional protections in the consumer code.

WHAT THE BILL DOES

- **§1 – amendments to Consumer Protection Act - unfair or deceptive trade practices**
 - Remove mental state from “catchall” provision
 - consumer protection law is fundamentally about unfair & deceptive practices (which are terms of art), not scienter requirements
 - Add new provision prohibiting void or substantively unconscionable terms
 - these provisions can injure consumers even though they would not stand up in court
 - Address JUDICIALLY-CREATED “significant public impact” barrier to CPA claims
 - this provision, dating to a 1998 court case, has crippled the CPA for 25 years
 - *Colorado is one of only 7 states with a “significant public impact” requirement*
 - Revise “recklessly” definition
 - Existing definition speaks to “truth or falsity of a statement or advertisement” – this misses the reality that the CPA encompasses conduct beyond advertisements
- **§2 – amendments to Consumer Protection Act – price gouging**
 - Prior to COVID, Colorado was one of only 14 states with NO price gouging law
 - In 2020, at the onset of COVID, the legislature adopted a narrow price gouging law – limited to actions brought within 180 days after BEGINNING of disaster declaration¹
 - Experience (COVID itself & Marshall Fire among others) has shown that market disturbances can persist past 180 days.
 - Therefore, this bill proposes to extent price gouging cause of action for 180 days after END of disaster declaration.
- **§3 – repeal & re-enact Colorado Antitrust Act (first substantial amendments in 30 years)**
 - Prohibit aiding & abetting violations (not just directly violating the CAA)
 - Allow civil discovery where a person “may have information related to a violation”
 - Clarify AG discretion to keep private investigation records for the sake of not compromising ongoing investigations
 - Allow action where a party is injured indirectly as well as directly (*Illinois Brick* repeal).
 - Adjust civil and criminal money penalty maxima (these have changed only once in 30 years).²
 - Clarify statute of limitations – “last in a series of acts or practices” – to be able to act against “merger in pieces”

BRIEF HISTORY RELEVANT TO THIS BILL

- **1914** – Congress passes Federal Trade Commission Act – 15 USC §41 et. seq. “*Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.*”³
- **1969** – Colorado passes first Consumer Protection Act
- **1998** – Colorado Supreme Court imposes a requirement for a CPA claim that claimant prove conduct “significantly impacts the public”.⁴ This requirement is found nowhere in the text of the CPA (CRS 6-1-101 et seq.)
- **2021** – CO ranks 12th highest of 50 states in per capita reports of fraud to FTC.⁵

¹ <https://leg.colorado.gov/bills/hb20-1414>

² SB09-054

³ 15 U.S.C. § 45(a)(1)

⁴ Hall v. Walter, 969 P.2d 224, 235 (Colo. 1998).

⁵ https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf

LIMITATIONS / SAFEGUARDS CONCERNING CPA / CAA CLAIMS

- CAA
 - Most provisions enforceable only by attorney general (as under current law)
- Price gouging
 - Only specific goods and services are covered – 6-1-730(2)
 - “Safe harbor” provision – 6-1-730(3)
 - *“a price shall not be considered unreasonably excessive if the seller can prove that, due to the events that gave rise to the disaster declaration, the price charged by the seller is directly attributable to additional costs imposed by the seller's supplier or suppliers or other direct costs of providing the good or service sold or offered for sale by the seller.”*
 - Enforceable only by AG or DA – no private cause of action – 6-1-730(4)
 - *“This section is enforceable solely by, and at the discretion of, the attorney general or the district attorney with jurisdiction over the conduct at issue.”*
- CPA § 6-1-105
 - Key terms – “unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent” - are TERMS OF ART with significant legislative history and case gloss and do NOT mean any simple contract dispute arising out of a business context
 - *“Unlike a breach of contract claim, which arises when one contracting party breaks a promise, a CCPA claim arises when a party knowingly makes a misrepresentation or makes a false representation that has the capacity to deceive. A breach of contract claim, without additional conduct, cannot constitute an actionable claim under the CCPA. ‘The basis for a contract action is the parties' agreement; to succeed under the consumer protection law, one must show not necessarily an agreement, but in all cases, an unfair or deceptive practice.’” *Rhino Linings USA v Rocky Mountain Rhino Lining, 62 P.3d 142, 148 (Colo. 2003) (citation omitted) (emphasis added).**
 - Heightened requirements for treble damages remedy
 - *“Three times the amount of actual damages sustained, if it is established by clear and convincing evidence that such person engaged in bad faith conduct.” 6-1-113(2)(a)(III) (emphasis added).*
 - In turn, *“‘bad faith conduct’ means fraudulent, willful, knowing, or intentional conduct that causes injury.” 6-1-113(2.3)*
 - Penalty for bad faith action
 - *“Any person who brings an action under this article 1 that is found by the court to be frivolous, groundless and in bad faith, or for the purpose of harassment shall be liable to the defendant for the costs of the action together with reasonable attorney fees as determined by the court.” 6-1-113(3)*

Appendix A is a set of capsule summaries of the strengths and weaknesses of each state's statute. Appendix B gives detail about the criteria we used in rating the statutes. Appendix C, available online, provides a detailed analysis of each state's law (see <http://www.nclc.org/issues/how-well-do-states-protect-consumers.html>).

A handful of states have more than one UDAP-type statute. In many of those states, only one of the UDAP statutes is commonly used by consumers and state enforcement agencies, so this report analyzes only that statute.

This report updates NCLC's 2009 report *Consumer Protection in the States: A 50-State Report on UDAP Statutes*. NCLC's legal treatise *Unfair and Deceptive Acts and Practices*, provides a comprehensive analysis of state UDAP statutes, including extensive discussion of decisions from all states, key regulations, and the role of related statutes.

Why UDAP Statutes Are Important

UDAP statutes provide the basic protections for the thousands of everyday transactions that each consumer in the United States enters into each year. Although UDAP statutes vary widely from state to state, their basic premise is that unfair and deceptive tactics in the marketplace are inappropriate. UDAP statutes are the basic legal underpinning for fair treatment of consumers in the marketplace.

Before the adoption of state UDAP statutes in the 1970s and 1980s, neither consumers nor state agencies had effective tools against fraud and abuse in the consumer marketplace. This was so even though the Federal Trade Commission (FTC) Act had prohibited unfair or deceptive acts or practices since 1938. In most states, there was no state agency with a mandate to root out consumer fraud and abuse, much less tools to pursue fraud artists.

Consumers had even fewer tools at their disposal. A consumer who was defrauded often found that fine print in the contract immunized the seller or creditor. Consumers could fall back only on claims such as common law fraud, which requires rigorous and often insurmountable proof of numerous elements, including the seller's state of mind. Even if a consumer could mount a claim, and even if the consumer won, few states had any provisions for reimbursing the consumer for attorney fees. As a result, even a consumer who won a case against a fraudulent seller or creditor was rarely made whole. Without the possibility of reimbursement from the seller, often a consumer could not even find an attorney.

UDAP statutes were passed in recognition of these deficiencies. States worked from several different model laws, all of which adopted at least some features of the FTC Act by prohibiting at least some categories of unfair or deceptive practices. But all go beyond the FTC Act by giving a state agency the authority to enforce these prohibitions, and all now also provide remedies that consumers who were cheated can invoke.

Laws other than UDAP statutes rarely fill this need. For example, much consumer fraud is not a criminal offense. Even where an activity might violate a criminal law, police and

prosecuting authorities usually have few resources to devote to non-violent crime. In addition, the burden of proof is extremely high in a criminal case, and the result of the case may only be punishment of the offender—not the refund that the consumer wants. State UDAP statutes provide a way for consumers to get their money back when they have been cheated.

A number of federal laws protect consumers, and many of them were strengthened after the 2008 mortgage meltdown revealed the weaknesses of federal-level regulation of mortgage transactions. However, the federal consumer protection laws tend to focus on a single industry. Many people are surprised to learn that no federal statute includes a broadly-applicable prohibition of unfair or deceptive practices that is enforceable by consumers. And many of the federal consumer protections laws that exist are currently under attack. The role of the states in protecting consumers has never been more important.

UDAP statutes bring consumer justice to the state, local, and individual level. They enable state agencies to protect their citizens by responding quickly to emerging frauds. They give effective remedies that consumers themselves can invoke. UDAP statutes help the marketplace as well. By providing disincentives for unfair and deceptive practices, UDAP statutes help honest merchants compete.

UDAP statutes are primarily civil statutes. Some allow criminal penalties for extreme violations, but almost all enforcement is through the civil courts.

The typical UDAP statute allows a state enforcement agency, usually the Attorney General, to obtain an order prohibiting a seller or creditor from engaging in a particular unfair or deceptive practice. The Attorney General can also ask the court to impose civil penalties of a certain dollar amount for violations, and to order the seller or creditor to return consumers' payments. The typical statute also allows consumers to seek similar remedies - return of payments or compensation for other losses, often with some sort of enhancement to account for intangible or hard-to-document losses and to act as a deterrent. In some states consumers can seek an injunction against repetition of the fraudulent practices, and, in most states, they can ask that the fraudulent seller or creditor be ordered to reimburse them for their attorney fees.

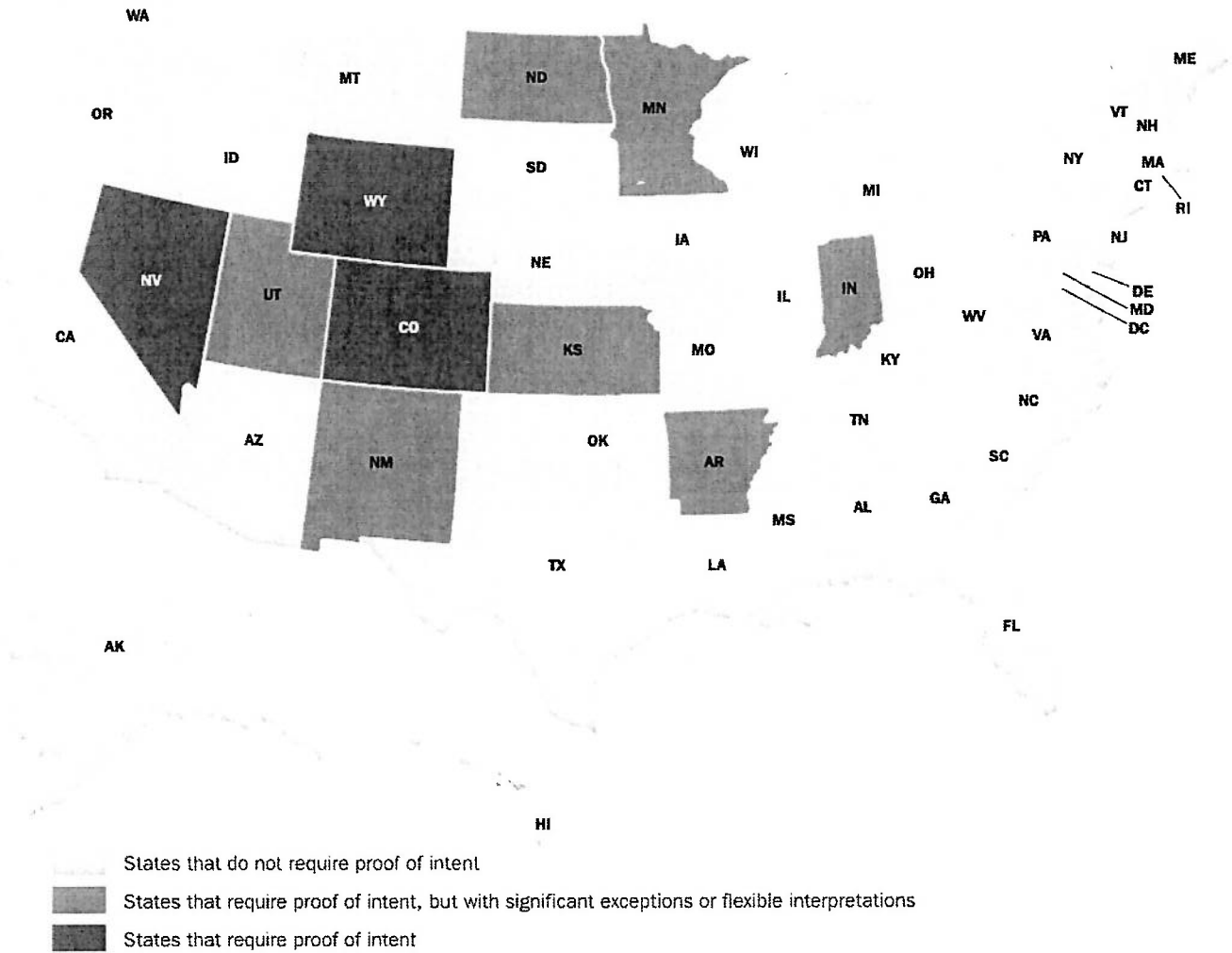
HOW STATE UDAP STATUTES STACK UP

This report evaluates the strengths and weaknesses of state UDAP statutes in four areas:

- **Substantive prohibitions.**
 - Does the statute include broad prohibitions of deception and unfairness or unconscionability?
 - Does the statute give a state agency the authority to issue substantive rules?

MAP 9

States that Deny Consumer Relief Unless the State Proves the Business's Knowledge or Intent

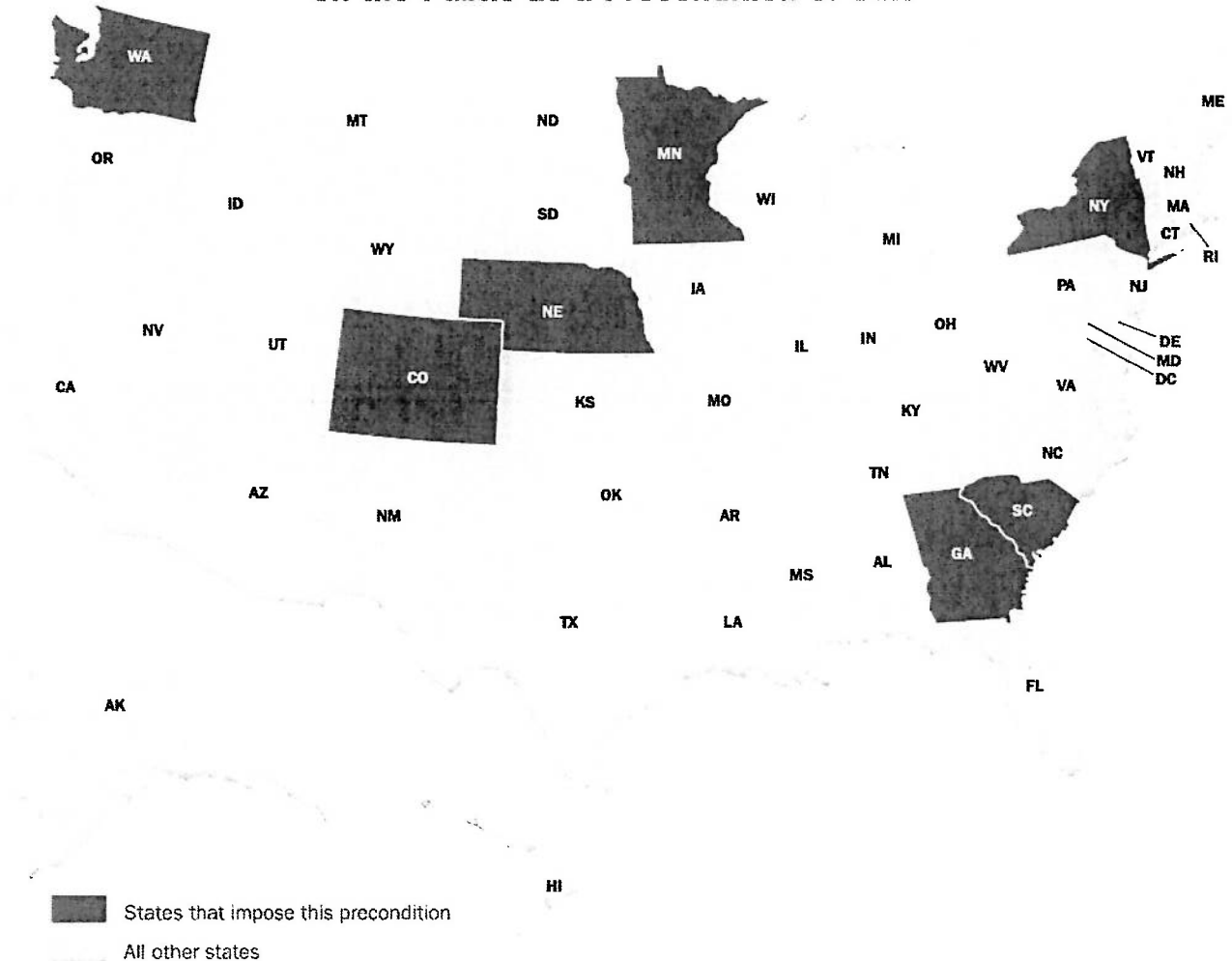


Source: ©National Consumer Law Center, 2018.

Seven states—**Colorado, Georgia, Minnesota, Nebraska, New York, South Carolina, and Washington**—require consumers to prove not just that they were cheated, but that the business cheats consumers frequently or as a general rule, or that their practices impact consumers at large. These states vary in how they formulate this requirement. Some **Minnesota** courts impose a barrier so high that no consumer is ever likely to meet it. **New York** courts have dismissed hundreds of UDAP cases simply because the consumer alleged only that the business cheated him or her.

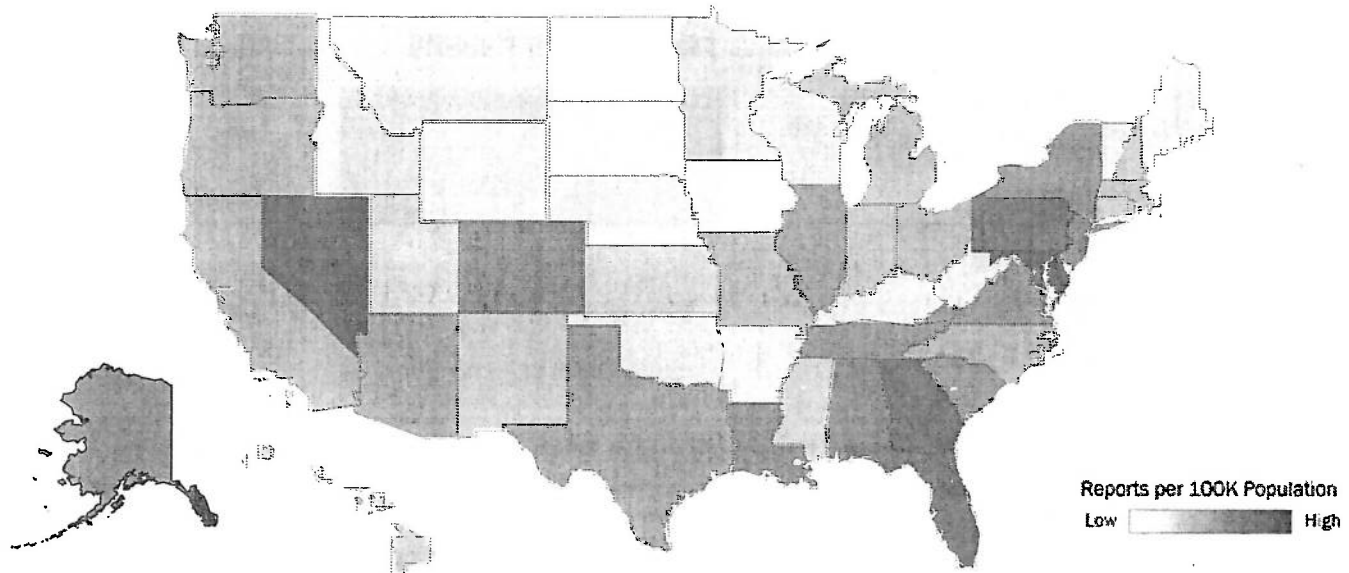
MAP 12

States that Require Consumers to Prove an Impact on the Public as a Precondition of Suit



Source: ©National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, § 11.4.3.

State Rankings: Fraud and Other Reports



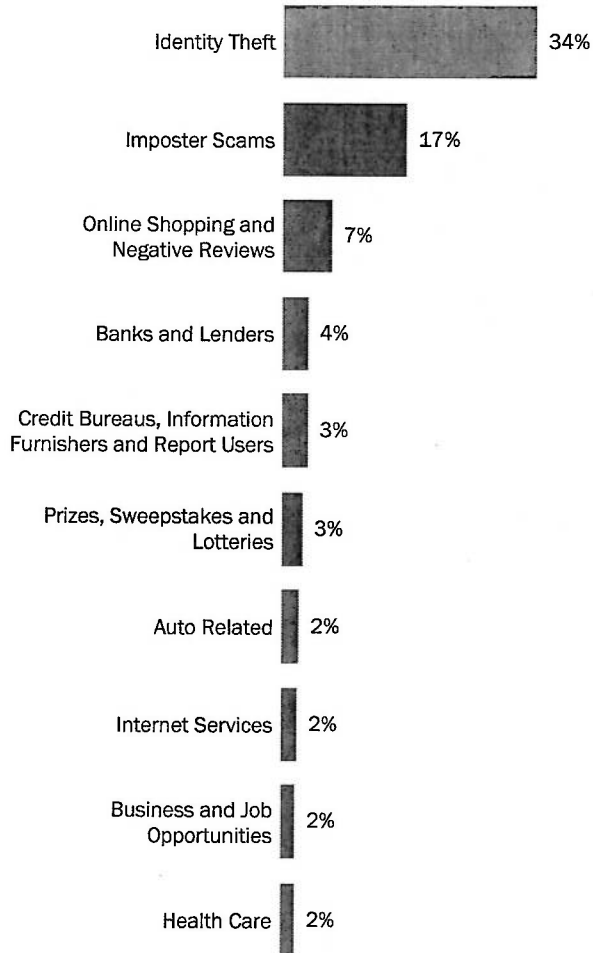
Rank	State	Reports per 100K Population	# of Reports
1	Georgia	1,421	150,898
2	Maryland	1,415	85,568
3	Delaware	1,410	13,726
4	Nevada	1,407	43,339
5	Florida	1,370	294,328
6	Alabama	1,217	59,669
7	Pennsylvania	1,205	154,313
8	Louisiana	1,193	55,456
9	Tennessee	1,157	79,012
10	Alaska	1,156	8,458
11	South Carolina	1,149	59,177
12	Colorado	1,119	64,464
13	New Jersey	1,107	98,316
14	Virginia	1,099	93,763
15	New York	1,083	210,749
16	Texas	1,080	313,044
17	Illinois	1,078	136,640
18	Rhode Island	1,066	11,289
19	Arizona	1,065	77,534
20	North Carolina	1,036	108,698
21	Washington	1,013	77,128
22	California	991	391,517
23	Massachusetts	980	67,515
24	Ohio	976	114,140
25	Oregon	970	40,908
26	Missouri	953	58,485

Rank	State	Reports per 100K Population	# of Reports
27	Connecticut	917	32,686
28	New Hampshire	914	12,429
29	Mississippi	906	26,958
30	New Mexico	888	18,613
31	Michigan	881	87,996
32	Indiana	861	57,988
33	Hawaii	851	12,051
34	Vermont	848	5,292
35	Kansas	845	24,615
36	Utah	823	26,373
37	Maine	821	11,035
38	Idaho	809	14,464
39	Minnesota	809	45,599
40	Montana	806	8,612
41	Wisconsin	803	46,755
42	Arkansas	801	24,176
43	West Virginia	797	14,287
44	Kentucky	796	35,544
45	Oklahoma	783	30,996
46	Wyoming	731	4,230
47	Nebraska	697	13,475
48	Iowa	636	20,071
49	North Dakota	608	4,637
50	South Dakota	549	4,854
	District of Columbia	1,701	12,004
	Puerto Rico	260	8,315

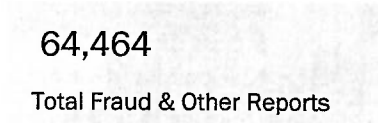
The District of Columbia and Puerto Rico are included in the table but are not ranked. States are ranked based on the number of reports per 100,000 population. Population estimates are based on 2019 U.S. Census population estimates. Ranking excludes state-specific data contributor reports.

Colorado

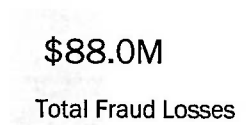
Top Ten Report Categories



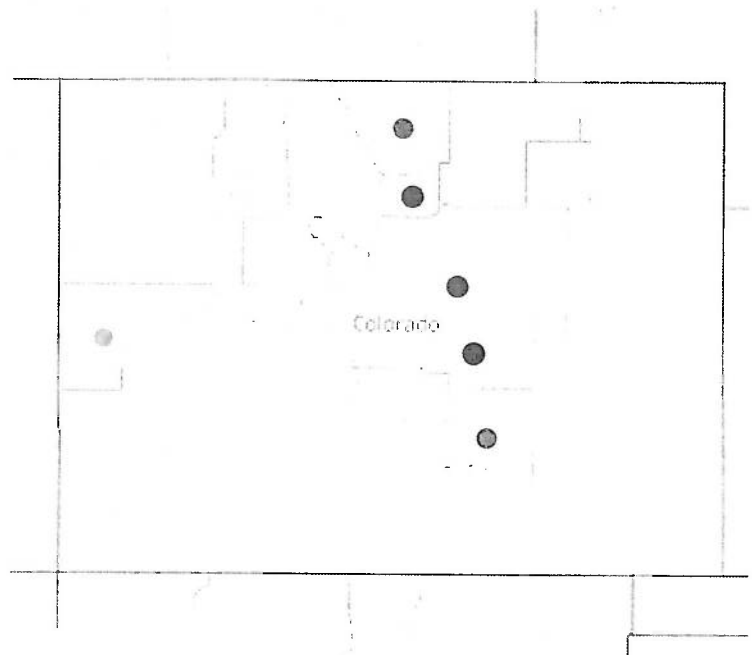
Fraud & Other Reports



Fraud Losses

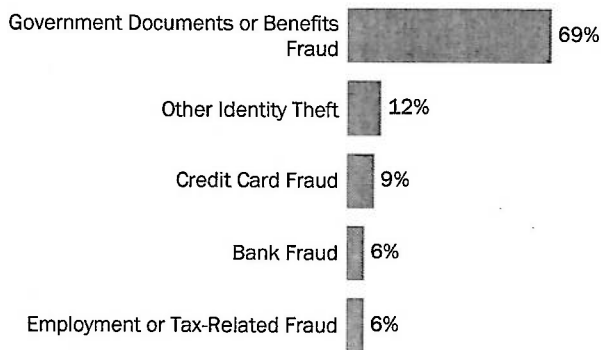


Fraud & Other Reports by Metropolitan Area

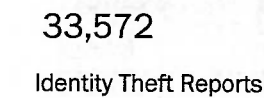


Reports per 100K Population
792 ● 1,219

Top Identity Theft Types



Identity Theft Reports



Percentages are based on the total number of relevant 2021 reports from Colorado consumers, as indicated in the chart title. Consumers can report multiple types of identity theft.

Unconscionability in Colorado case law

"In order to support a finding of unconscionability, there must be evidence of some overreaching on the part of one of the parties such as that which results from an inequality of bargaining power or under other circumstances in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to that party." 712 P.2d 985, 991 (Colo. 1986) (Citing *McMillion v. McMillion*, 522 P.2d 125 (Colo.App.1974)).

Some unconscionability references in C.R.S.

4-2-302. Unconscionable contract or clause. [UCC]

(1) If the court, as a matter of law, finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect, to aid the court in making the determination.

4-2.5-108. Unconscionability. [UCC]

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

5-3.1-122. Unconscionability. [deferred deposit loan act]

(4) If a lender complies with the requirements of subsections (2) and (3) of this section, and the deferred deposit loan otherwise complies with this article and other applicable law, neither the consumer's inability to repay the loan nor the lender's decision to obtain or not obtain additional information concerning the consumer's creditworthiness shall be cause to determine that a loan is unconscionable.

5-4-106. Unconscionability. [insurance]

(2) If consumer credit insurance otherwise complies with this article and other applicable law, neither the amount nor the term of the insurance nor the amount of a charge therefor is in itself unconscionable.

5-5-109. Unconscionability - inducement by unconscionable conduct - unconscionable debt collection. [Consumer Credit Code - Remedies and Penalties]

5-6-112. Injunctions against unconscionable agreements and fraudulent or unconscionable conduct. [Colorado Fair Debt Collection Practices Act]

5-10-903. Unconscionability. [rental purchase agreements]

6-1-1109. Unconscionability. [foreclosure consultants]

6-1-1119. Unconscionability. [equity purchasers]

38-33.3-112. Unconscionable agreement or term of contract. [CCOIA]

Contractual provisions found void by the courts

Where former § 10-4-703 (6) defined “insured” to include “relatives of the named insured who reside in the same household as the named insured”, a policy that attempted to exclude from UM/UIM coverage vehicle-owning relatives meeting that definition is void and unenforceable. Pacheco v. Shelter Mut. Ins. Co., 583 F.3d 735 (10th Cir. 2009) (decided under law in effect in 2000).

A household exclusion clause, excluding coverage of family members residing in the same household, is void as against public policy. Meyer v. State Farm Mut. Auto. Ins. Co., 689 P.2d 585 (Colo. 1984) (decided prior to 1986 enactment of § 10-4-418 (2)(b)).

Contractual provisions declared void in C.R.S.

13-20-1204. Waiver of liability void. [actions for sexual misconduct against minors]

Any pre-incident waiver, either for consideration or gratuitously, of a person’s right to bring an action pursuant to this part 12 is void as against public policy.

13-50.5-102. Right to contribution - contract or agreement provision to indemnify or hold harmless void against public policy. [uniform contribution among tortfeasors]

(8)(a) Any such covenant, promise, agreement, or combination thereof requiring an indemnity obligor to defend, indemnify, or hold harmless any public entity from that public entity’s own negligence is void as against public policy and wholly unenforceable.

8-13.3-416. Employer policies. [family & medical leave]

An employer policy adopted or retained must not diminish an employee’s right to paid sick leave under this part 4. Any agreement by an employee to waive the employee’s rights under this part 4 is void as against public policy.

6-1-1106. Waiver of rights - void. [foreclosure consulting contracts]

(1) A provision in a foreclosure consulting contract is void as against public policy if the provision attempts or purports to...

6-1-1116. Waiver of rights - void. [equity purchasers]

(1) A provision in a contract between an equity purchaser and home owner is void as against public policy if it attempts or purports to:

6-1-507. Other remedies - waiver of rights void - limitation of coverage. [warranties for facilitative technology]

(3) If a consumer waives the rights granted to consumers pursuant to this part 5, such waiver shall be void as against public policy.

6-1-408. Other remedies - waiver of rights void. [warranties for assistive technology]

(2) If a consumer waives the rights granted to consumers pursuant to this part 4, such waiver shall be void as against public policy.

5-19-108. Waivers and exemptions. [Colorado Credit Services Organization Act]

(1) Any waiver by a buyer of any part of this part 1 is void as against public policy. Any attempt by a credit services organization to have a buyer waive rights given by this part 1 is a violation of this part 1.

38-38-703. No waiver of or agreement to shorten right to cure. [foreclosure sales]

A waiver of or agreement to shorten the time period to exercise the right to cure a default granted by the provisions of this article that is made before the date of the default as to which the waiver is granted under a deed of trust, mortgage, or other instrument evidencing a lien or an evidence of debt secured thereby shall be void as against public policy.

8-2-113. Unlawful to intimidate worker - agreement not to compete - prohibition - exceptions - notice - definition. [labor relations]

(2)(a) Except as provided in subsections (2)(b) and (3) of this section, any covenant not to compete that restricts the right of any person to receive compensation for performance of labor for any employer is void.

13-21-111.5. Civil liability cases - pro rata liability of defendants - respondeat superior - shifting financial responsibility for negligence in construction agreements - legislative declaration. [damages]

(6)(b) Except as otherwise provided in paragraphs (c) and (d) of this subsection (6), any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable.

10-1-135. Reimbursement for benefits - limitations - notice - definitions - legislative declaration.

(3)(a)(i) Any provision in a policy, contract, or benefit plan allowing or requiring reimbursement or subrogation in circumstances in which the injured party has not been fully compensated is void as against public policy.

22-30.5-508. Institute charter schools - contract contents - regulations. [charter schools]

(5) Any term included in a charter contract that would require an institute charter school to waive or otherwise forgo receipt of any amount of operational or capital construction funds provided to the institute charter school pursuant to the provisions of this part 5 or pursuant to any other provision of law is hereby declared null and void as against public policy and is unenforceable.

22-30.5-105. Charter schools - contract contents - regulations. [charter schools]

(5) A term included in a charter contract that would require a charter school to waive or otherwise forgo receipt of any amount of additional mill levy revenue due to the charter school as provided in section 22-32-108.5 or any amount of operational or capital construction money provided to the charter school pursuant to the provisions of this article 30.5 or pursuant to any other provision of law is hereby declared null and void as against public policy and is unenforceable.

6-1-718. Ticket sales and resales - prohibitions - unlawful conditions - definitions.

(3)(a) It is void as against public policy to apply a term or condition to the original sale to the purchaser to limit the terms or conditions of resale, including, but not limited to, a term or condition:

8-13.3-510. Coordination of benefits. [family leave]

(2)(b) After December 31, 2020, an employer policy adopted or retained shall not diminish an employee's right to benefits under this part 5. Any agreement by an employee to waive the employee's rights under this part 5 is void as against public policy.

6-1-716. Notification of security breach. [data privacy]

(2)(e) A waiver of these notification rights or responsibilities is void as against public policy.

24-73-103. Governmental entity - notification of security breach. [data privacy]

(2)(j) A waiver of these notification rights or responsibilities is void as against public policy.