A BILL FOR AN ACT

CONCERNING THE CREATION OF ADDITIONAL PROTECTIONS IN THE
COLORADO CONSUMER CODE, AND, IN CONNECTION THERewith, enabling enforcement of the "COLORADO CONSUMER PROTECTION ACT" FOR RECKLESS ACTS AND PROHIBITING CERTAIN TERMS IN STANDARD FORM CONTRACTS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://leg.colorado.gov.)

The bill:

! Adds "recklessly" as a culpable mental state for certain
violations of the "Colorado Consumer Protection Act" (Act) so that a person violates certain provisions of the Act by acting knowingly or recklessly;

! Increases the potential penalty for a violation of the Act brought by the attorney general or a district attorney from $2,000 to $20,000 per violation and from $10,000 to $50,000 per violation committed against an elderly person;

! Specifies the calculation of potential damage awards in a private civil action for violations of the Act; and

! Specifies certain terms that are prohibited in standard form contracts.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 6-1-105, amend (1)(a), (1)(b), (1)(c), (1)(e), (1)(o), (1)(ll), (1)(hhh), and (1)(iii); and add (1)(kkk), (1)(lll), (1)(mmm), and (4) as follows:

6-1-105. Unfair or deceptive trade practices. (1) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person:

(a) Knowingly OR RECKLESSLY passes off goods, services, or property as those of another;

(b) Knowingly OR RECKLESSLY makes a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;

(c) Knowingly OR RECKLESSLY makes a false representation as to affiliation, connection, or association with or certification by another;

(e) Knowingly OR RECKLESSLY makes 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;
(o) Knowingly OR RECKLESSLY fails to identify flood-damaged or water-damaged goods as to such damages;

(ii) Knowingly OR RECKLESSLY makes a false representation as to the results of a radon test or the need for radon mitigation;

(hhh) Knowingly OR RECKLESSLY represents that hemp, hemp oil, or any derivative of a hemp plant constitutes retail marijuana or medical marijuana unless it fully satisfies the definition of such products pursuant to section 44-12-103 (22) or section 44-11-104 (11);

(iii) Knowingly OR RECKLESSLY enters into, or attempts to enforce, an agreement regarding the recovery of an overbid on foreclosed property if the agreement concerns the recovery of funds in the possession of:

(I) A public trustee prior to transfer of the funds to the state treasurer under section 38-38-111; C.R.S.; or

(II) The state treasurer and does not meet the requirements for such an agreement as specified in section 38-13-128.5; C.R.S.;

(kkk) ENGAGES IN ANY UNFAIR, UNCONSCIONABLE, ABUSIVE, OR DECEPTIVE ACT OR PRACTICE;

(III) ENGAGES IN ANY CONDUCT THAT CREATES A LIKELIHOOD OF CONFUSION OR MISUNDERSTANDING;

(mmm) OFFERS, OR INDUCES OR ATTEMPTS TO INDUCE ANOTHER PARTY TO ENTER INTO, A STANDARD FORM CONTRACT CONTAINING ONE OR MORE OF THE TERMS DECLARED VOID IN SECTION 6-1-1201.

(4) STANDING TO BRING AN ACTION UNDER THIS ARTICLE 1 DOES NOT REQUIRE PROOF THAT A DECEPTIVE TRADE PRACTICE HAS A SIGNIFICANT PUBLIC IMPACT.

SECTION 2. In Colorado Revised Statutes, 6-1-112, amend
(1)(a) and (1)(c); and add (2) as follows:

6-1-112. Civil penalties. (1) The attorney general or a district attorney may bring a civil action on behalf of the state to seek the imposition of civil penalties as follows:

(a) Any person who violates or causes another to violate any provision of this article ARTICLE 1 shall forfeit and pay to the general fund of this state a civil penalty of not more than two TWENTY thousand dollars for each such violation. For purposes of this paragraph (a) SUBSECTION (1)(a), a violation of any provision shall constitute a separate violation with respect to each consumer or transaction involved. except that the maximum civil penalty shall not exceed five hundred thousand dollars for any related series of violations.

(c) Any person who violates or causes another to violate any provision of this article ARTICLE 1, where such violation was committed against an elderly person, shall forfeit and pay to the general fund of the state a civil penalty of not more than ten FIFTY thousand dollars for each such violation. For purposes of this paragraph (c) SUBSECTION (1)(c), a violation of any provision of this article shall constitute ARTICLE 1 IS A separate violation with respect to each elderly person involved.

(2) A fine or penalty received by the state under this ARTICLE 1 IS A DAMAGE AWARD.

SECTION 3. In Colorado Revised Statutes, 6-1-113, amend (2) introductory portion and (2)(a)(I) as follows:

6-1-113. Damages. (2) Except in a class action or a case brought for a violation of section 6-1-709, AND NOTWITHSTANDING ANY OTHER LAW, any person who, in a private civil action, is found to have engaged in or caused another to engage in any deceptive trade practice listed in
ARTICLE 1 IS liable in an amount equal to the sum of:

(a) The greater of:

(I) The amount of actual damages sustained, INCLUDING PREJUDGMENT INTEREST OF EITHER EIGHT PERCENT PER YEAR OR AT THE RATE PROVIDED IN SECTION 13-21-101, WHICHEVER IS GREATER, FROM THE DATE THE CLAIM UNDER THIS ARTICLE 1 ACCRUED; or

SECTION 4. In Colorado Revised Statutes, add part 12 to article 1 of title 6 as follows:

PART 12

STANDARD FORM CONTRACTS

6-1-1201. Terms in standard form contracts - definitions.

(1) As used in this section:

(a) "Consumer" means an individual, partnership, association, or corporation that obtains, maintains, uses, purchases, leases, or has legal or practical responsibility for goods, services, or real or personal property used primarily for personal, family, or household purposes.

(b) "Employee" means:

(I) Any person described in section 8-4-101 (5); or

(II) Any person who is not classified by a business as an employee but who claims to be an employee and whose claims against the purported employer relate to this alleged misclassification.

(c) "Standard form contract" means a writing in which the terms and conditions stated in the writing are set by one or more of the parties, and the consumer or employee party or parties have little or no ability to negotiate the writing's material
TERMS AT THE TIME THE WRITING IS EXECUTED OR BECOMES ENFORCEABLE, REGARDLESS OF WHETHER THE PARTY MAY NEGOTIATE LIMITED TERMS WITHIN THE WRITING, IF THE WRITING AFFECTS THE CONSUMER'S OR EMPLOYEE'S INTEREST IN:

(I) GOODS OR SERVICES;
(II) REAL OR PERSONAL PROPERTY; OR
(III) EMPLOYMENT.

(2) IN ORDER TO PROMOTE THE EFFICIENT ADMINISTRATION OF JUSTICE, THE FOLLOWING CONTRACTUAL TERMS ARE NEVER ENFORCEABLE AND ARE HEREBY DECLARED VOID AS AGAINST PUBLIC POLICY WHEN INCLUDED IN A STANDARD FORM CONTRACT:

(a) A REQUIREMENT THAT THE CONSUMER OR EMPLOYEE PARTY ADJUDICATE A CLAIM ARISING IN COLORADO IN A LOCATION THAT IS MORE THAN ONE HUNDRED MILES FROM WHERE THE CONSUMER OR EMPLOYEE PARTY RESIDES OR WHERE THE CONTRACT WAS EXECUTED;

(b) A PRECONDITION TO INITIATING A LEGAL PROCEEDING THAT:
   (I) WAIVES THE CONSUMER OR EMPLOYEE PARTY'S RIGHT TO CLAIMS OR DAMAGES RESULTING FROM A FAILURE TO COMPLY WITH THE PRECONDITION; OR
   (II) PREVENTS OR IS REASONABLY LIKELY TO PREVENT THE CONSUMER OR EMPLOYEE PARTY FROM ASSERTING A LEGAL CLAIM FOR A PERIOD OF MORE THAN SIXTY DAYS;

(c) A REQUIREMENT THAT A PARTY TO THE CONTRACT BE ALLOWED TO UNILATERALLY SELECT THE INDIVIDUAL OR ENTITY WHO WILL RESOLVE DISPUTES BETWEEN THE PARTIES;

(d) A TERM THAT ATTEMPTS TO AWARD OR LIMIT COSTS OR FEES IN A MANNER THAT IS INCONSISTENT WITH COLORADO LAW OR
CONTROLLING CASE LAW; OR

(e) A COST-SHIFTING, FEE-SHIFTING, OR LOSER PAYS TERM, UNLESS IT APPLIES ONLY TO A CLAIM THAT IS GROUNDLESS, FRIVOLOUS, OR MADE IN BAD FAITH.

(3) THE LIST IN SUBSECTION (2) OF THIS SECTION IS NOT EXHAUSTIVE. A TERM IN A STANDARD FORM CONTRACT THAT IS NOT LISTED IN SUBSECTION (2) OF THIS SECTION MAY BE FOUND UNENFORCEABLE OR VOID AS AGAINST PUBLIC POLICY PURSUANT TO COMMON LAW.

(4) IN ORDERING A REMEDY FOR AN UNENFORCEABLE TERM IN A STANDARD FORM CONTRACT, A COURT MAY:

(a) REFUSE TO ENFORCE THE ENTIRE CONTRACT OR THE SPECIFIC PART, CLAUSE, OR PROVISION CONTAINING THE TERM;

(b) ENFORCE THE CONTRACT, INCLUDING THE SPECIFIC PART, CLAUSE, OR PROVISION CONTAINING THE TERM, WHILE SEVERING ONLY THE ILLEGAL OR UNENFORCEABLE TERM; OR

(c) LIMIT THE APPLICATION OF THE ILLEGAL OR UNENFORCEABLE TERM OR THE PART, CLAUSE, OR PROVISION CONTAINING THAT TERM TO AVOID ANY ILLEGAL OR UNENFORCEABLE RESULT.

(5) IN ORDERING A REMEDY UNDER SUBSECTION (4) OF THIS SECTION, A COURT SHALL CONSIDER THE FOLLOWING FACTORS:

(a) WHETHER SEVERING THE TERM AND ENFORCING THE CONTRACT IN ITS ABSENCE:

(I) CREATES AN INCENTIVE FOR CONTRACT DRAFTERS TO INCLUDE ILLEGAL OR UNENFORCEABLE TERMS IN STANDARD FORM CONTRACTS; OR

(II) REMOVES IN WHOLE OR IN PART THE INCENTIVE FOR CONTRACT DRAFTERS TO DRAFT ENFORCEABLE STANDARD FORM CONTRACTS THAT DO
NOT INCLUDE SUCH TERMS;

(b) WHETHER INCLUSION OF AN UNENFORCEABLE TERM MIGHT DETER THE CONSUMER OR EMPLOYEE PARTY FROM ASSERTING THE PARTY'S RIGHTS UNDER THE CONTRACT OR MIGHT DETER THE CONSUMER OR EMPLOYEE PARTY FROM CHALLENGING THE ENFORCEMENT OF THE ILLEGAL OR UNENFORCEABLE TERM;

(c) WHETHER THE CONTRACT DRAFTING PARTY ACTED IN BAD FAITH, FOR EXAMPLE BY INCLUDING A TERM THAT WAS, AT THE TIME THE CONTRACT WAS EXECUTED OR BECAME ENFORCEABLE, ILLEGAL OR UNENFORCEABLE UNDER ESTABLISHED PRECEDENT; AND

(d) THE INTENT OF THE PARTIES ENTERING INTO THE STANDARD FORM CONTRACT.

(6) EXCEPT WHEN A MORE SPECIFIC STATUTE DIRECTS OTHERWISE, WHERE A STANDARD FORM CONTRACT PROVIDES FOR AN AWARD OF ATTORNEY FEES OR LITIGATION EXPENSES TO ONE OR MORE PARTIES TO A CONTRACT, THAT PROVISION IN THE STANDARD FORM CONTRACT SHALL BE CONSTRUED AS AWARDING SUCH FEES AND EXPENSES TO THE PREVAILING PARTY AS A MATTER OF RIGHT, AND WHERE MORE THAN ONE SUCH PROVISION EXISTS IN A STANDARD FORM CONTRACT, EACH PROVISION MUST RELATE TO THE ISSUE OVER WHICH THE PARTY OR PARTIES PREVAILED.

(7) WHERE AN ACTION HAS BEEN VOLUNTARILY DISMISSED OR DISMISSED PURSUANT TO A SETTLEMENT OF THE CASE, THERE SHALL BE NO PREVAILING PARTY FOR PURPOSES OF THIS SECTION.

(8) FOR ANY STANDARD FORM CONTRACT, THERE IS A REBUTTABLE PRESUMPTION THAT THE CONSUMER OR EMPLOYEE PARTY'S RIGHT TO OPT OUT OF THE STANDARD FORM CONTRACT OR ANY OF ITS PROVISIONS DOES

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SECTION 5. Applicability. Sections 1, 2, and 4 of this act apply to civil actions filed on or after the effective date of this act. Section 3 of this act applies to judgments entered into on or after the effective date of this act.

SECTION 6. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.