ADVANCE SHEET HEADNOTE
May 15, 2023

2023 CO 23

No. 21SC781, *State v. Ctr. for Excellence in Higher Educ., Inc.*—Colorado Consumer Protection Act—Colorado Uniform Consumer Credit Code—Right to Jury Trial—Evidence of Unconscionability.

In this civil enforcement action initiated in Denver District Court under the Colorado Consumer Protection Act ("CCPA") and the Colorado Consumer Credit Code ("UCCC"), Colorado's Attorney General and the Administrator of the UCCC (collectively, the "State") and the respondent corporate entities and individuals that made up the career school known as CollegeAmerica (collectively, "CollegeAmerica") ask the supreme court to consider whether a division of the court of appeals erred when it (1) concluded that civil penalty claims under the CCPA are equitable and thus that CollegeAmerica is not entitled to a jury trial on those claims; (2) remanded the case for a new trial on each of the State's CCPA claims; and (3) concluded that section 5-6-112(3)(a), C.R.S. (2022), of the UCCC requires individualized evidence (e.g., evidence regarding specific consumers) in determining whether CollegeAmerica's loan program was unconscionable.

The court now concludes that the division below properly determined that the State's CCPA civil penalty claims are equitable in nature and thus do not entitle CollegeAmerica to a jury trial on those claims. The court further concludes, however, that the division erred in remanding the case for a new trial without first assessing whether the parties had a full and fair opportunity to litigate the issue of significant public impact and, if so, whether the evidence sufficiently established such an impact. Last, the court concludes that the division correctly determined that CollegeAmerica's loan program was not unconscionable, although it disagrees with the division's conclusion that individualized evidence regarding the probability of repayment was necessary to establish unconscionability.

Accordingly, the court affirms in part and reverses in part the judgment of the division below, and it remands this case to the division for further proceedings consistent with its opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 23

Supreme Court Case No. 21SC781
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA1692

Petitioners/Cross-Respondents:

State of Colorado, ex rel. Philip J. Weiser, as Attorney General of the State of Colorado and Martha Fulford as Administrator of the Uniform Consumer Credit Code,

v.

Respondents/Cross-Petitioners:

Center for Excellence in Higher Education, Inc., a not-for-profit company; CollegeAmerica Denver, Inc.; CollegeAmerica Arizona, Inc., divisions thereof, d/b/a CollegeAmerica; Stevens-Henager College Inc., a division thereof, d/b/a Stevens-Henager College; CollegeAmerica Services, Inc., a division thereof; The Carl Barney Living Trust; Carl Barney, Chairman of Center for Excellence in Higher Education, Inc. and Trustee of the Carl Barney Living Trust; and Eric Juhlin, Chief Executive Officer of Center for Excellence in Higher Education, Inc.

Judgment Affirmed in Part and Reversed in Part
en banc
May 15, 2023

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, and **JUSTICE SAMOUR** joined.
JUSTICE BERKENKOTTER did not participate.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 In this civil enforcement action initiated in Denver District Court under the Colorado Consumer Protection Act ("CCPA") and the Colorado Uniform Consumer Credit Code ("UCCC"), Colorado's Attorney General and the Administrator of the UCCC (collectively, "the State") sought to enjoin the respondent corporate entities and individuals that made up the career school known as CollegeAmerica (collectively, "CollegeAmerica") from engaging in conduct that the State believed to be in violation of Colorado law. Specifically, the State contended that several aspects of CollegeAmerica's marketing and admissions operations constituted deceptive trade practices under the CCPA and that CollegeAmerica's institutional loan program, "EduPlan," was unconscionable under the UCCC.

¶2 We granted certiorari to consider four questions,[1] although these questions really present three issues for our determination: (1) whether CollegeAmerica is

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[1] Specifically, we granted certiorari to review the following issues:

1. Whether the division erred when it assumed reversible prejudice based on an error that could have theoretically affected a party's strategic incentives at trial.
2. Whether the division erred in requiring a new trial where other procedures, including additional proceedings under Rule 59(f), would satisfy the requirements of substantial justice.

entitled to a jury trial on the State's CCPA civil penalty claims; (2) whether the division properly remanded the case for a new trial on each of the State's CCPA claims; and (3) whether section 5-6-112(3)(a), C.R.S. (2022), of the UCCC requires individualized evidence (e.g., evidence regarding specific consumers) in determining whether CollegeAmerica's EduPlan loan program was unconscionable.

¶3 We now conclude, as did the division below, that the State's CCPA civil penalty claims are equitable in nature and thus CollegeAmerica is not entitled to a jury trial on those claims. We further conclude that the division erred in remanding this case for a new trial without first assessing whether CollegeAmerica had, in fact, had a full and fair opportunity to litigate the issue of significant public impact and, if so, whether the evidence sufficiently established such an impact. Last, we conclude that the division correctly determined that CollegeAmerica's EduPlan loans as a whole were not unconscionable, although

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3. Whether the court of appeals erred when it created requirements for individualized evidence in applying the unconscionability standard in section 5-6-112, C.R.S. (2021).
4. Whether there is a right to a jury trial when the State seeks large monetary penalties under the Colorado Consumer Protection Act (the "CCPA").

we disagree with the division's conclusion that individualized evidence regarding the probability of repayment was necessary to establish unconscionability.

¶4 Accordingly, we affirm in part and reverse in part the judgment of the division below, and we remand this case to the division for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶5 In 2014, after conducting a two-year investigation, the State filed suit against CollegeAmerica, alleging that it had deceptively marketed its degree programs and had misled students about the likelihood that graduates would earn more money and obtain better jobs with a CollegeAmerica degree. The State further alleged that CollegeAmerica had deceptively advertised and offered its EduPlan loan program as a way to make college affordable and to help students reestablish their credit, despite CollegeAmerica's knowledge that a large percentage of its students were defaulting on their EduPlan loans.

¶6 The State relied on the foregoing allegations as the bases for six claims for relief under the CCPA and one claim for relief under the UCCC, in which the State sought a preliminary injunction (which the trial court ultimately denied) and the full panoply of relief provided by the CCPA and the UCCC. Specifically, the State sought (1) a permanent injunction; (2) restitution, disgorgement of the tuition and fees paid by almost all of the students who had registered at a CollegeAmerica

campus in Colorado since 2006 (an amount totaling over $232 million), or other equitable relief; (3) civil penalties totaling $3 million; (4) attorney fees and costs; and (5) "[a]ny further orders as the Court may deem just and proper to effectuate the purposes of the CCPA and the UCCC."

¶7 In 2015, CollegeAmerica filed a jury demand requesting a jury trial on each of the State's claims. The State moved to strike this demand, and the trial court subsequently granted the State's motion. In doing so, the trial court concluded that CollegeAmerica was not entitled to a jury trial on either the State's CCPA claims or its UCCC claim because (1) the basic thrust of the State's CCPA claims was equitable in nature and (2) "the UCCC invests courts with broad discretion to exercise their equitable powers of coercion to protect consumers and borrowers on one hand, and to punish and deter deceptive trade practices on the other," and thus, the State's UCCC claim was also "equitable in nature." As to the latter claim, the court added that even had it viewed the State's UCCC claim as legal in nature, the court "could not escape the conclusion that the overriding reason for the current action [was] equitable."

¶8 The case proceeded, and in the year leading up to trial, CollegeAmerica filed several motions for summary judgment. In two of these motions, CollegeAmerica argued that to succeed on its claims under the CCPA, the State had to demonstrate

a "significant public impact" arising from CollegeAmerica's alleged deceptive trade practices and that, as a matter of law, the State could not meet that burden.

¶9 On the eve of trial, the trial court denied CollegeAmerica's pre-trial dispositive motions, concluding, as pertinent here, that the significant public impact element, as outlined by this court in *Hall v. Walter*, 969 P.2d 224, 235 (Colo. 1998), did not apply to a civil enforcement action brought by the Attorney General because, among other reasons, *Hall* had been devised and applied "exclusively in cases involving private litigants." The trial court hastened to add, however, that its ruling did not mean that the evidence cited by the parties in support of and opposition to the establishment of the significant public impact element would be irrelevant at trial. To the contrary, in the court's view, "the nature and magnitude of the harm, if any, resulting from the deceptive trade practices of which Defendants are accused" would "obviously" be "relevant to the nature and extent of any remedy" that the court might fashion.

¶10 The trial commenced the next day and ultimately lasted for four weeks.

¶11 Two weeks after the trial had concluded, the parties respectively submitted proposed findings of fact and conclusions of law for the court's review. In CollegeAmerica's proposed order, it re-raised the significant public impact issue, flagging for the court's attention the fact that a state trial court had ruled that the significant public impact requirement, in fact, applied to cases brought by the

Attorney General. CollegeAmerica proposed that the trial court find its sister court's reasoning persuasive, "reconsider[] and amend[] its earlier decision," and hold that the State "must show significant public impact in order to prevail on its CCPA claims." Moreover, CollegeAmerica requested that the trial court conclude, with respect to specific claims, that the evidence that the State had presented at trial was insufficient to satisfy the significant public impact requirement.

¶12 The trial court did not issue its findings of fact, conclusions of law, and judgment until approximately two years and nine months later. In the interim, a division of the court of appeals had affirmed the pertinent portion of the state trial court decision that CollegeAmerica had referenced in its proposed findings of fact and conclusions of law. *See State ex rel. Weiser v. Castle L. Grp., LLC*, 2019 COA 49, ¶ 111, 457 P.3d 699, 717 (concluding that the State was required to prove significant public impact in CCPA enforcement actions), *superseded by statute*, Ch. 268, sec. 1, § 6-1-103, 2019 Colo. Sess. Laws 2515, 2515.

¶13 In the wake of this appellate decision, the State filed a motion for leave to submit supplemental proposed findings of fact and conclusions of law on the question of significant public impact. Specifically, recognizing that "[j]udicial decisions are generally applied retroactively," the State sought to provide supplemental proposed findings "in order to clearly articulate the manner in which the State ha[d] established significant public impact." The State noted,

however, that it was not asking the trial court to reopen the evidentiary phase of the case. The State did not believe that reopening the evidence was necessary because in its view, "the trial record contain[ed] sufficient evidence to establish the 'significant public impact' element."

¶14 Notably, CollegeAmerica did not disagree that the trial court could decide this issue on the evidence that had been presented at trial. Thus, in responding to the State's request for leave to submit supplemental proposed findings and conclusions, CollegeAmerica argued that the trial court should deny the request because "the Court ha[d] a detailed understanding of the evidence, such that no supplementation [was] needed." CollegeAmerica added, however, "[I]f the Court were inclined to receive additional description and argument about significant public impact, that [could] be done far more efficiently through briefing" on CollegeAmerica's previously filed motion for reconsideration of the denial of its summary judgment motion and for partial judgment on the issue of significant public impact.

¶15 Ultimately, the trial court granted the State's request to submit supplemental proposed findings of fact and conclusions of law, ordering the parties to do so within ten days and in no more than twenty pages. The parties complied, and in submitting their respective supplemental proposed findings and

conclusions on the significant public impact element, they relied on the evidence that had been presented at trial.

¶16 Shortly after the parties provided these additional proposed findings, the General Assembly amended section 6-1-103 of the CCPA to state that an action "brought by the attorney general or a district attorney *does not* require proof that a deceptive trade practice has a significant public impact." 2019 Colo. Sess. Laws at 2515 (emphasis added). In light of this development, the State filed a C.R.C.P. 56(h) motion, seeking a determination as to whether this amendment should apply retroactively to the present case. CollegeAmerica opposed this motion, and the trial court did not immediately rule on it.

¶17 Over a year later, and not without expressions of concern from the parties regarding the court's lengthy delay in deciding this case, the trial court issued its findings of fact, conclusions of law, and judgment. In its 160-page order, the trial court (1) found that CollegeAmerica had violated the CCPA and the UCCC; (2) entered detailed injunctive relief on both the CCPA and UCCC claims; and (3) ordered CollegeAmerica to pay $3 million in civil penalties. The court, however, denied the State's requests for "very broad restitution" and disgorgement of the tuition and fees paid by "virtually every student who ha[d] registered at a CollegeAmerica campus in Colorado since 2006[,]" which, as noted above, would have resulted in liability totaling more than $232 million.

¶18 Although the court's findings of fact and conclusions of law comprised almost 800 paragraphs, most of which tracked, verbatim, the State's proposed submissions, *State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 2021 COA 117, ¶ 8, 499 P.3d 1081, 1087, only two of the court's conclusions are germane to the issues now before us.

¶19 First, the court determined that the General Assembly's 2019 amendment to section 6-1-103 of the CCPA "was a clarification of the law, rather than a change," and thus the amended statute applied in this case. Even had the amendment represented a change in the law, however, the court opined that its "retroactive application of HB-1289 would not be unconstitutionally retrospective." Accordingly, the court concluded that the State was not required to prove the significant public impact element after all.

¶20 Second, when analyzing the State's claim that CollegeAmerica had fraudulently or unconscionably induced consumers to enter into EduPlan loan agreements, the court determined that it could not find under section 5-6-112(3)(a) of the UCCC, which lists as a factor in the unconscionability analysis borrowers' probability of repayment, that CollegeAmerica "should have reasonably believed at the time EduPlan loans were made that, according to the credit terms or schedule of payments, there was no reasonable probability of payment in full of the obligation by CollegeAmerica students."

¶21 In reaching this conclusion, the court found that although the State had relied heavily on "statistical and macroeconomic" evidence such as the fact that CollegeAmerica annually wrote off as uncollectible "upwards of 40% of debt owed by students," the State had "failed to demonstrate that this was directly a result of the credit terms and schedule of payments under the loans themselves, as required under C.R.S. § 5-6-112(3)(a)." The court added, however, that

> even meeting the State's evidence on its own terms, it seems inescapable that the existence of the Great Recession, and the effect which it had on CollegeAmerica students' job prospects during a significant portion of the time at issue in this case, played at least a role in the less than stellar EduPlan default rate of such students.

And the court found that although CollegeAmerica seemed to have regarded EduPlan loans as something of a "loss leader," this was not evidence of unconscionability, as the State had contended. Rather, it was the type of judgment that businesses made on a daily basis.

¶22 In light of the foregoing, the court noted that there appeared to be no grounds for finding these loans to be unconscionable, "especially when the state has not tied CollegeAmerica students' poor performance on paying off their EduPlan loans directly and specifically to the credit terms and payment schedules of the loans themselves, as required by the statute." Accordingly, the court concluded that consideration of the reasonable probability of repayment factor "militate[d] against a finding of unconscionability in the EduPlan program."

¶23 But the court did not end its unconscionability analysis there. Rather, it went on to consider the remaining factors that section 5-6-112(3) of the UCCC requires courts to consider in an unconscionability analysis, and, after doing so, it ultimately found that the EduPlan loans were not unconscionable as to all CollegeAmerica borrowers in general, although the loans were unconscionable as to certain specific borrowers.

¶24 Both parties appealed. On appeal, CollegeAmerica contended that the trial court had erred when, among other things, it (1) struck CollegeAmerica's jury demand prior to trial, even though the State had sought $3 million in penalties and another $232 million by way of disgorgement; (2) retroactively applied the amendment that eliminated the State's requirement to prove significant public impact; and (3) abridged CollegeAmerica's procedural rights by delaying ruling on the case for "almost three years" and then "copying most of the State's proposed findings." The State, in turn, argued that the trial court had impermissibly limited the probability of repayment factor to consider only whether the terms of a particular loan made nonpayment likely. In the State's view, this was inconsistent with the UCCC's plain meaning and long-established purpose, and proper construction of that statute established that all of the EduPlan loans (not just the loans made to certain student borrowers) were unconscionable.

¶25 In a unanimous, published opinion, a division of the court of appeals reversed the trial court's judgment in part and remanded the case for a new bench trial on each of the State's CCPA claims. *Ctr. for Excellence*, ¶ 14, 499 P.3d at 1088.

¶26 In so ruling, the division first reviewed whether the amendment that eliminated the significant public impact element should have applied prospectively or retroactively to the case at hand. *See id.* at ¶¶ 49–56, 499 P.3d at 1093–94. The division determined that because there was no clear indication in the statute, either express or implied, reflecting an intent that the amendment apply retroactively, the presumption that the General Assembly intended the amendment to apply prospectively controlled its decision. *Id.* at ¶ 51, 499 P.3d at 1093. The question then became what the pre-amendment (and therefore applicable) law was, and the division concluded that this court's decision in *Hall* "required the Attorney General to prove significant public impact as part of its case." *Id.* at ¶ 54, 499 P.3d at 1094. Accordingly, the division determined that the trial court had erred in concluding that the State did not need to prove significant public impact. *See id.* at ¶ 14, 499 P.3d at 1088.

¶27 The division proceeded to address whether the trial court's error in this regard necessitated reversal and a remand for a new trial on the State's CCPA claims. The division concluded that it did because even though both parties had asked the division to decide whether the State's evidence had met the burden of

proof as to significant public impact, *id.* at ¶ 54, 499 P.3d at 1094, the trial court "did not make any factual findings on this issue," *id.* at ¶ 55, 499 P.3d at 1094. Thus, the division "[did] not know whether the court would have decided the case differently if it had made such findings." *Id.* "More importantly," the division continued, "the parties lacked the incentive to present evidence, rebut evidence, and develop a record on this issue." *Id.* at ¶ 56, 499 P.3d at 1094. Accordingly, the division concluded that a new trial on all of the State's CCPA claims was required. *Id.* And having so ruled, the division did not address the parties' remaining arguments regarding the State's CCPA claims. *See id.* at ¶¶ 72, 82, 499 P.3d at 1096–97.

¶28 Next, the division addressed CollegeAmerica's argument that it was entitled to a jury trial because the monetary relief that the State had requested "overwhelmed" the equitable relief that it had sought, "thereby revealing the fundamentally legal character of the action." *Id.* at ¶ 63, 499 P.3d at 1095. The division rejected this argument, finding *People v. Shifrin*, 2014 COA 14, 342 P.3d 506, persuasive. *Ctr. for Excellence*, ¶ 66, 499 P.3d at 1095. In *Shifrin*, ¶¶ 19–22, 342 P.3d at 512–13, a division of the court of appeals had concluded that the defendant was not entitled to a jury trial on the State's CCPA civil penalty claims because a primary purpose of the CCPA, like similar consumer protection statutes that courts in other jurisdictions had deemed primarily equitable, is to deter and

punish deceptive trade practices. The division here agreed with *Shifrin* and therefore concluded that the State's CCPA claims in this case were equitable and that CollegeAmerica was not entitled to a jury trial on those claims. *Ctr. for Excellence*, ¶¶ 66, 71, 499 P.3d at 1095–96.

¶29 The division then considered the State's contention that the trial court had misapplied the probability of repayment factor in its UCCC unconscionability analysis. *Id.* at ¶ 99, 499 P.3d at 1100. The division first agreed with the State that the trial court had read this factor too narrowly when it reasoned that the factor "begins and ends with the terms of a loan—and, therefore, does not require consideration of a borrower's personal circumstances." *Id.* at ¶¶ 100, 102, 499 P.3d at 1100. In the division's view, the UCCC's legislative history and purpose showed that "the probability of repayment factor requires courts to look beyond the terms of a loan to the circumstances of the consumer." *Id.* at ¶ 110, 499 P.3d at 1101. Thus, the State could not rely solely on evidence that was "statistical and macroeconomic in nature" but rather was required to introduce "evidence about specific consumers." *Id.* at ¶ 112, 499 P.3d at 1101. Even so, the division did not believe that reversal was required because the trial court's factual findings with respect to the entirety of the State's UCCC claim were supported by the record. *Id.* at ¶ 90, 499 P.3d at 1098–99. Accordingly, the division affirmed the trial court's

judgment in this regard, determining that the State had not established that all of the EduPlan loans were unconscionable. *Id.*

¶30 Lastly, the division ordered that all further proceedings on remand be held before a different judge. *Id.* at ¶ 117, 499 P.3d at 1102. In so ordering, the division concluded that the trial court's significant delay in ruling was "an extreme circumstance that require[d] a new judge to take over the case on remand to 'preserve the appearance of justice.'" *Id.* at ¶ 120, 499 P.3d at 1102 (quoting *United States v. Aragon*, 922 F.3d 1102, 1113 (10th Cir. 2019)).

¶31 CollegeAmerica and the State each petitioned for certiorari review, and we granted their respective petitions.

II. Analysis

¶32 We begin by setting forth our standard of review and the applicable principles of statutory construction. Next, we discuss the civil jury trial right in Colorado generally, and we consider whether defendants facing possible civil penalties in State enforcement actions under the CCPA have a right to a jury trial. We then review the division's decision to remand each of the State's CCPA claims for a new trial. We end by considering whether the division erred in concluding that the UCCC's probability of repayment factor requires evidence about specific consumers in determining whether CollegeAmerica's EduPlan loan program was unconscionable but that reversal was nonetheless not required.

A. Standards of Review and Principles of Construction

¶33 A trial court's judgment following a bench trial presents a mixed question of law and fact. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 2017 CO 68, ¶ 12, 396 P.3d 651, 654. We review the court's factual findings for an abuse of discretion and its legal conclusions de novo. *Id.*

¶34 We interpret the Colorado Rules of Civil Procedure de novo. *Mason v. Farm Credit of S. Colo.*, 2018 CO 46, ¶ 7, 419 P.3d 975, 979. In doing so, we interpret the rules according to their commonly understood and accepted meaning. *Id.* Moreover, we construe the rules liberally to effectuate their objective to secure the just, speedy, and inexpensive determination of every case. *Id.*; *accord* C.R.C.P. 1(a).

¶35 We likewise review questions of statutory construction de novo. *Colo. State Bd. of Educ. v. Brannberg*, 2023 CO 11, ¶ 15, 525 P.3d 290, 293. When interpreting statutes, we seek to discern and give effect to the General Assembly's intent. *Id.* In undertaking this analysis, we apply words and phrases in accordance with their plain and ordinary meanings, and we read the statutory scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts. *Id.* Furthermore, we avoid constructions that would render any words or phrases superfluous or that would lead to illogical or absurd results. *Id.* And because we must respect the General Assembly's choice of language, we do not add words to a statute or subtract words from it. *Id.* If the statutory language is unambiguous, then we will

apply it as written, and we need not resort to other rules of construction. *Id.* at ¶ 16, 525 P.3d at 293.

B. No Right to Jury Trial on CCPA Civil Penalty Claims

¶36 CollegeAmerica contends that the trial court erred in denying its demand for a jury trial on the State's CCPA civil penalty claims. In its view, monetary penalties, by definition, are legal rather than equitable. Although some of the case law on which CollegeAmerica relies, and also the substantial disgorgement remedy that the State pursued (which, to some degree, resembled a damages demand), tend to support CollegeAmerica's argument, we ultimately disagree with that argument.

¶37 "In Colorado there is no constitutional right to a trial by jury in a civil action." *Kaitz v. Dist. Ct.*, 650 P.2d 553, 554 (Colo. 1982). Rather, the right derives from C.R.C.P. 38, *id.* at 554–55, which states, in pertinent part, "Upon the filing of a demand and the simultaneous payment of the requisite jury fee by any party *in actions wherein a trial by jury is provided by constitution or by statute*, . . . all issues of fact shall be tried by a jury," C.R.C.P. 38(a) (emphasis added).

¶38 Even when the constitution or a statute does not expressly provide a right to a jury trial, however, we have interpreted C.R.C.P. 38 and its predecessors as providing such a right in proceedings that are legal, rather than equitable, in

nature. *Mason*, ¶ 10, 419 P.3d at 979. And we have recognized two methods for determining whether an action is legal or equitable. *Id.* at ¶ 27, 419 P.3d at 983.

¶39 Under the first method, courts examine the nature of the remedy sought. *Id.*; *see also Cont'l Title Co. v. Dist. Ct.*, 645 P.2d 1310, 1316 (Colo. 1982) (stating that when a court must decide whether a remedy is legal or equitable for purposes of the jury trial right, the "determinative issue is the characterization of the nature of the relief sought"). Typically, actions for money damages are considered legal while actions seeking to invoke the coercive powers of the court, such as those seeking injunctions or specific performance, are considered equitable. *Mason*, ¶ 27, 419 P.3d at 983.

¶40 We have long observed, however, that "[t]he fact that plaintiff asked for a money judgment is by no means decisive that the action was one at law." *Cree v. Lewis*, 112 P. 326, 327 (Colo. 1910). Indeed, in a number of cases, this court has concluded that a jury trial was not required, even though the plaintiff was seeking monetary remedies. *See, e.g.*, *Lloyd A. Fry Roofing Co. v. State Dep't of Health Air Pollution Variance Bd.*, 553 P.2d 800, 806 (Colo. 1976) (recognizing that "a jury trial was not required as a matter of law" in an action by the State seeking civil penalties under the Air Pollution Control Act); *Cont'l Title Co.*, 645 P.2d at 1318 (concluding that the provision for back pay in the Colorado Antidiscrimination Act of 1957 was

"an integral part of a broader equitable remedy and does not provide a basis for requiring a jury trial under C.R.C.P. 38(a)").

¶41 Under the second method for determining whether an action is legal or equitable, we look to the historical nature of the right that a plaintiff is seeking to enforce. *Mason*, ¶ 27, 419 P.3d at 983. If the plaintiff is seeking to enforce a right originally created in or decided by an equity court, then the claim is equitable. *Peterson v. McMahon*, 99 P.3d 594, 597–98 (Colo. 2004). Conversely, "[i]f the right was historically enforced by a court of law, the claim is legal." *Mason*, ¶ 27, 419 P.3d at 983.

¶42 CollegeAmerica argues that under either of the foregoing methods, civil penalty claims under the CCPA should be classified as legal rather than equitable. In support of this assertion, CollegeAmerica maintains that (1) civil penalties are the "antitheses" of equitable remedies and (2) the State's claim under the CCPA is analogous to eighteenth century actions at law, such as fraud, deceit, and misrepresentation. We address and reject each of these contentions in turn.

¶43 First, regarding the nature of the remedy being sought, the equitable purpose of the CCPA as a whole militates against the conclusion that the nature of the civil penalty remedy under the CCPA is legal.

¶44 Since the CCPA's enactment, we have recognized that its broad legislative purpose is "to provide prompt, economical, and readily available remedies against

consumer fraud." *W. Food Plan, Inc. v. Dist. Ct.*, 598 P.2d 1038, 1041 (Colo. 1979). And it was with such "broad remedial relief and deterrence purposes" in mind that we previously concluded that the CCPA, consistent with its intent "to proscribe deceptive acts and not the consequences of those acts," does not require the State to prove an actual injury or loss before a civil penalty can be awarded. *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 972–73 (Colo. 1993). In making this determination, we further recognized that the CCPA's civil penalty remedy "is intended to punish and deter the wrongdoer and not to compensate the injured party." *Id.* at 972.

¶45 The noncompensatory nature of the CCPA's civil penalty remedy distinguishes that remedy from the primarily compensatory forms of relief offered in courts of law. *Cf. Curtis v. Loether*, 415 U.S. 189, 195–96 (1974) (agreeing with the court of appeals that a damages action under the Civil Rights Act of 1968, which authorized "the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach," was "analogous to a number of tort actions recognized at common law," and further noting that the actual and punitive damages sought comprised "the traditional form of relief offered in the courts of law"). And we are not the first court to recognize this distinction between compensatory and noncompensatory forms of relief in deciding whether a consumer protection statute is primarily equitable. *See generally Shifrin*,

¶¶ 19–20 & n.2, 342 P.3d at 512–13 & n.2 ("The majority of courts in other jurisdictions have concluded that similar consumer protection actions are primarily equitable.") (collecting cases and then discussing and finding illustrative *State ex rel. Douglas v. Schroeder*, 384 N.W.2d 626 (Neb. 1986)).

¶46 For example, the California Supreme Court recently determined that two of California's most prominent consumer protection statutes must properly be considered equitable, rather than legal, in nature. *Nationwide Biweekly Admin., Inc. v. Superior Ct.*, 462 P.3d 461, 464, 487–88 (Cal. 2020). In so concluding, the court first reasoned that the primary objective of the statutes at issue was "preventive, authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising." *Id.* at 488. Furthermore, although in some contexts the imposition of civil penalties is a type of remedy that is "properly considered legal in nature," the court determined that the civil penalties awarded under California's consumer protection statutes, "unlike the classic legal remedy of damages, are noncompensatory in nature; they require no showing of actual harm to consumers and are not based on the amount of losses incurred by the targets of unfair practices or misleading advertising." *Id.* Thus, the court concluded, there was no right to a jury trial in a cause of action under the consumer protection statutes there at issue, "including when the action is brought by a government official and seeks both injunctive relief and civil penalties." *Id.*

¶47 We consider cases like the foregoing—specifically, those that analyze the nature of the remedy sought in the context of the primary purpose of similar consumer protection statutes—to be well-reasoned and equally applicable to the CCPA claims before us, and we adopt that reasoning here.

¶48 Second, regarding the historical nature of the right at issue, we are not persuaded by CollegeAmerica's contention that an action under the CCPA is analogous to a common law fraud claim.

¶49 In Colorado, a plaintiff seeking to prevail on a fraud claim must generally establish that (1) the defendant made a false representation of material fact; (2) the defendant knew that it was false; (3) the person to whom the representation was made was ignorant of that falsity; (4) the representation was made with the intent that it be acted upon; and (5) that reliance resulted in damage to the plaintiff. *See Bristol Bay Prods., LLC v. Lampack*, 2013 CO 60, ¶ 26, 312 P.3d 1155, 1160. As mentioned above, however, "the CCPA does not require proof of an actual injury or loss before a civil penalty can be awarded." *May Dep't Stores*, 863 P.2d at 973. Thus, a common law fraud action and a CCPA civil penalty claim differ in significant ways, thereby undermining an assertion that the two actions are directly analogous. *See also Nationwide*, 462 P.3d at 485–86 (listing as other differences the facts that (1) the consumer protection statutes there at issue "were enacted for the specific purpose of creating new rights and remedies that were not

available at common law"; and (2) "none of the early English statutes authorized a prosecuting official to seek and obtain, *in the same action*, a civil penalty and an injunction that would explicitly restrain the business from committing the prohibited conduct in the future").

¶50 Accordingly, we conclude that under either of the two methods for determining whether an action is legal or equitable, a State enforcement action seeking civil penalties under the CCPA is equitable in nature. As a result, we need not consider the parties' arguments regarding the applicability of the "basic thrust" doctrine (which looks to the overall character of an action to determine whether it is fundamentally legal or equitable, *Mason*, ¶ 11, 419 P.3d at 980), or whether the plain language of the CCPA expressly contemplates that state enforcement actions must be tried to a court.

¶51 We do agree with the State, however, that the structure of the CCPA provides further support for our conclusion that CollegeAmerica is not entitled to a jury trial here.

¶52 Section 6-1-113(1), C.R.S. (2022), of the CCPA expressly provides for relief in the form of actual damages "in a civil action for any claim against any person who has engaged in or caused another to engage in any deceptive trade practice . . . ." In contrast to the civil penalties provided by section 6-1-112, C.R.S. (2022), a private plaintiff seeking actual damages under section 6-1-113 must

establish that they were injured as a result of the defendant's deceptive trade practices. § 6-1-113(1)(c). Such damages are quintessentially the type of monetary remedy available in a court of law. Moreover, as section 6-1-113(1) makes clear, when the General Assembly intended to craft a remedy at law, it knew how to do so.

¶53 We are not persuaded otherwise by CollegeAmerica's contention that the language in section 6-1-112 itself defeats any distinction between civil penalties and actual damages. Section 6-1-112(2) states, "For accounting purposes, a fine or penalty received by the state under this article 1 is a damage award." Because we must presume that each word or phrase in a statute has a meaning that is consistent with the intent of the statute, *see May Dep't Stores*, 863 P.2d at 976, we conclude that the phrase "for accounting purposes" must, at the very least, mean what it says: civil penalties are considered a damages award for accounting purposes only.

¶54 We likewise are unpersuaded by the Seventh Amendment-based case law on which CollegeAmerica relies. Principally, CollegeAmerica contends that *Tull v. United States*, 481 U.S. 412 (1987), should control our decision today. In *Tull*, 481 U.S. at 424–25, the Supreme Court concluded that the petitioner had a constitutional right to a jury trial to determine his liability in an action brought under the Clean Water Act for both injunctive relief and civil penalties.

¶55 We acknowledge, as we must, the *Tull* court's statement that "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Id.* at 422. *Tull* ultimately rested, however, on the Supreme Court's interpretation of the right to a civil jury trial as expressly set forth in the Seventh Amendment. *Id.* at 427. Because Colorado has no such constitutional right, we cannot say that *Tull*'s reasoning applies here.

¶56 For all of these reasons, we conclude that CollegeAmerica was not entitled to a jury trial on the State's CCPA civil penalty claims.

C. Remand for a New Trial

¶57 The State next asserts that the division below erred when it remanded each of the State's CCPA claims for a new trial. Although the State does not here challenge the division's conclusion that the State was required to prove significant public impact as part of its CCPA case, *Ctr. for Excellence*, ¶ 54, 499 P.3d at 1094, the State argues that (1) pursuant to C.R.C.P. 61, the division should have considered, on the record before it, whether the trial court's error in concluding otherwise affected the substantial rights of the parties or substantially influenced the outcome of the case (i.e., whether the error was harmless); (2) the division should have considered whether substantial justice could have been achieved through a remedy short of a new trial; and (3) regardless, we should conclude that

the trial court's error was harmless because "[t]he record here leaves no room for doubt regarding the significant public impact of CollegeAmerica's deceptive conduct."

¶58 As a preliminary matter, CollegeAmerica contends that we need not address any of these arguments because the State did not properly preserve them for our review. Specifically, CollegeAmerica asserts that even though the State argued below that the record established significant public impact, the State never contended that any error by the trial court in concluding that the State was not required to prove significant public impact was harmless under C.R.C.P. 61.

¶59 Although we acknowledge the force of CollegeAmerica's position, we cannot ignore the fact that C.R.C.P. 61 appears to contemplate that courts should ordinarily consider whether a trial error affected the substantial rights of the parties. *See* C.R.C.P. 61 ("The court at every stage of the proceeding *must* disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.") (emphasis added). Further, because the State argued that the trial court record established the significant public impact element and the division, had it considered that argument, would have had to weigh whether any error by the trial court affected the parties' substantial rights, we conclude that the State's arguments sufficiently, if only indirectly, focused the court's attention on this issue. *Cf. Am. Fam. Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 326 (Colo. 2009)

(concluding that a party's arguments about admitted evidence could not be considered on appeal because the party's objection at trial "contained no phrases or arguments that could reasonably be expected to focus the court's attention" on the party's concerns).

¶60 Turning then to the merits of the division's decision, we have previously stated that under C.R.C.P. 61, an appellate court may reverse for the erroneous exclusion of evidence "only if the exclusion affected a substantial right of a party." *Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010) (citations omitted). "An error affects a substantial right only if 'it can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself.'" *Id.* (quoting *Banek v. Thomas*, 733 P.2d 1171, 1178 (Colo. 1986)). Simply put, a new trial is appropriate only "where the record affirmatively shows that the error was prejudicial." *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 2012 CO 30M, ¶ 17, 280 P.3d 649, 655.

¶61 Here, the division reviewed the record and determined that a new trial was necessary because the trial court's pre-trial rulings affected the parties' incentives to present evidence, rebut evidence, and develop a record on the significant public impact element. *Ctr. for Excellence*, ¶ 56, 499 P.3d at 1094. Although it did not say so expressly, the division apparently determined that without such incentives, at least one party's substantial rights were affected.

¶62 As our lengthy recitation of the facts and the procedural history above indicates, however, the parties heavily litigated, both before and after trial, the question of whether the State had to prove the significant public impact element. Moreover, even though the trial court's pre-trial order concluded that the State was not required to prove that element, the record further indicates that the trial court made clear that evidence regarding significant public impact would still be relevant at trial. And perhaps most important, both parties repeatedly argued, both before and after trial, that the trial court and the division below could decide on the record before them that the evidence that the State had presented was sufficient (or insufficient) to establish this element. *See id.* at ¶ 54, 499 P.3d at 1094.

¶63 In these circumstances, it is not at all clear to us that the trial court's pre-trial rulings on significant public impact so undermined the parties' incentives to litigate the issue that a new trial is necessarily required. To the contrary, at a minimum, the division should first have considered whether the parties had, in fact, had a full and fair opportunity to litigate the merits of the significant public impact issue. Accordingly, we conclude that a remand to decide this question is warranted and appropriate before determining whether a new trial is required.

¶64 In reaching our decision, we are unpersuaded by CollegeAmerica's argument that the division's decision to remand the State's claims for a new trial was appropriate because the division had, at least implicitly, determined that the

"extreme" and "extraordinary" circumstances of the trial court's judgment (including the court's long delay in issuing the judgment, the timing thereof, and the fact that the court adopted, almost verbatim, the State's proposed findings) affected the substantial rights of the parties. *See id.* at ¶ 120, 499 P.3d at 1102.

¶65 To be sure, the division considered these circumstances in concluding that a new judge must hear the case on remand. *Id.* The division did not, however, expressly state that those concerns likewise supported its decision to remand the case for a new trial. *See id.*

¶66 For these reasons, we cannot say, on the record before us, that a new trial on all of the State's CCPA claims is necessarily warranted. Instead, we remand this case to the division to determine whether CollegeAmerica had a full and fair opportunity to litigate the significant public impact element (and, in doing so, we recognize that a limited remand to the trial court may be necessary to make additional findings on this issue).

¶67 If the division ultimately concludes that CollegeAmerica had such an opportunity, then the division should proceed to decide (1) whether the evidence presented at trial was sufficient to establish significant public impact (and, thus, whether the trial court's error in not making findings on this issue was harmless) and (2) any remaining arguments affecting the State's CCPA claims that the

division did not consider because of its decision to remand the claims for a new trial. *See id.* at ¶ 14, 499 P.3d at 1088.

¶68 Conversely, if the division determines that CollegeAmerica was not given a meaningful opportunity to litigate the significant public impact element, then it should proceed to decide, consistent with C.R.C.P. 61, the scope of remand necessary to achieve substantial justice for the parties, which could potentially require less than an entirely new trial on the State's CCPA claims.

D. Evidence of Unconscionability Under the UCCC

¶69 Finally, the State contends that the division erred by eliminating the State's ability to rely on evidence common to a group of borrowers, such as statistical or macroeconomic evidence, and by concluding that the UCCC's probability of repayment factor always requires evidence regarding specific consumers. Although we agree that the division erred on this point, we nonetheless conclude that the division properly affirmed the trial court's finding that the EduPlan loans as a whole were not unconscionable.

¶70 Section 5-6-112 of the UCCC authorizes the administrator of the UCCC to seek an injunction to prevent creditors "from engaging in a course of," among other things, "[m]aking or enforcing unconscionable terms or provisions of consumer credit transactions" or "[f]raudulent or unconscionable conduct in

inducing consumers to enter into consumer credit transactions." § 5-6-112(1)(a)–(b).

¶71 To grant relief under section 5-6-112, a court must find that (1) the creditor "has made unconscionable agreements or has engaged or is likely to engage in a course of fraudulent or unconscionable conduct"; (2) the creditor's agreements or conduct "has caused or is likely to cause injury to consumers"; and (3) the creditor "has been able to cause or will be able to cause the injury primarily because the transactions involved are credit transactions." § 5-6-112(2)(a)–(c).

¶72 The UCCC expressly directs courts applying section 5-6-112 to consider each of the following factors, among others, in determining whether a consumer credit transaction was unconscionable:

> (a) Whether the creditor should have reasonably believed at the time consumer credit transactions were made that, *according to the credit terms or schedule of payments*, there was no reasonable probability of payment in full of the obligation by the consumer;
>
> (b) Whether the creditor reasonably should have known, at the time of the transaction, of the inability of the consumer to receive substantial benefits from the transaction;
>
> (c) Gross disparity between the price of the transaction and its value measured by the price at which similar transactions are readily obtainable by like consumers;
>
> (d) The fact that the creditor contracted for or received separate charges for insurance with respect to consumer credit transactions with the effect of making the transactions, considered as a whole, unconscionable;

(e) The fact that the respondent has knowingly taken advantage of the inability of the consumer reasonably to protect his or her interests by reason of physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement, or similar factors; and

(f) Any of the factors set forth in section 5-5-109(4).

§ 5-6-112(3)(a)–(f) (emphasis added).

¶73 And although the UCCC does not expressly define unconscionability, it is well established that

> [i]n order to support a finding of unconscionability, there must be evidence in the record of some overreaching on the part of one of the parties, such as that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of the second party, together with contract terms unreasonably favorable to the first party.

Leprino v. Intermountain Brick Co., 759 P.2d 835, 836 (Colo. App. 1988) (examining unconscionability in the context of section 4-2-719(3), C.R.S. (2022)); *see also* 8 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 18:9 (4th ed. 1998) ("*Williston on Contracts*") ("Perhaps most courts today consider two aspects as central to determining whether a contract or clause is unconscionable: The 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'") (footnote omitted).

¶74 Notwithstanding the State's suggestion to the contrary, then, unconscionability does not turn solely on the question of whether there was no

reasonable probability of payment in full of the obligation by the consumer. As the trial court observed, under the UCCC, the probability of default must be tied to "the credit terms or schedule of payments," § 5-6-112(3)(a), and this interpretation is consistent with the well-established understanding of unconscionability noted above, *see Leprino*, 759 P.2d at 836; 8 *Williston on Contracts*, at § 18:9.

¶75 Moreover, the trial court found, with ample record support, that the State did not carry its burden of proving that the alleged rate of default resulted from the loans' terms or payment schedules. Indeed, in so finding, the trial court properly looked at *all* of the relevant facts and circumstances—and all of the above-quoted UCCC factors—and determined that the loans were not unconscionable as to the EduPlan loan borrowers as a whole (although they were unconscionable as to certain specific borrowers). We perceive no basis on which to disturb the trial court's findings in this regard.

¶76 Nonetheless, we are constrained to address the division's conclusion that the State's aggregate data evidence was insufficient because the probability of repayment factor requires the administrator of the UCCC to present "evidence about specific consumers." *Ctr. for Excellence*, ¶ 112, 499 P.3d at 1101.

¶77 As noted above, the text of section 5-6-112(3)(a) does not, by its terms, require a court to consider the circumstances of the particular consumer. Rather,

the statute unambiguously directs courts to consider, among other things, whether "according to the credit terms or schedule of payments," the creditor should have reasonably believed that "there was no reasonable probability of payment in full of the obligation by the consumer." § 5-6-112(3)(a). In our view, depending on the facts of a given case, statistical or macroeconomic evidence may well be sufficient to establish this factor, even absent individualized evidence regarding specific borrowers. We, however, need not, and do not, decide today the circumstances in which such statistical or macroeconomic evidence would alone be sufficient.

¶78 Accordingly, we disagree with the division's conclusion that a party seeking to prove unconscionability *must always* introduce individualized evidence regarding the probability of repayment, and we respectfully disavow that determination.

III. Conclusion

¶79 For the foregoing reasons, we conclude that the division below properly (1) rejected CollegeAmerica's contention that it was entitled to a jury trial on the State's CCPA civil penalties claims and (2) affirmed the trial court's finding that the EduPlan loans as a whole were not unconscionable. We deem premature, however, the division's decision to remand all of the State's CCPA claims for a new trial. Accordingly, we remand this case to the division to determine, first, whether CollegeAmerica had, in fact, had a full and fair opportunity to litigate the

significant public impact element. If the division ultimately concludes that CollegeAmerica had such an opportunity, then the division should proceed to decide (1) whether the evidence presented at trial was sufficient to establish significant public impact (and, thus, whether the trial court's error in not making findings on this issue was nonetheless harmless) and (2) any remaining arguments affecting the State's CCPA claims that the division did not consider because of its decision to remand those claims for a new trial. *See id.* at ¶ 14, 499 P.3d at 1088. If, conversely, the division determines that CollegeAmerica was not given a meaningful opportunity to litigate the significant public impact element, then the division should proceed to decide, consistent with C.R.C.P. 61, the scope of remand necessary to achieve substantial justice for the parties, which could potentially require less than an entirely new trial on the State's CCPA claims.

¶80 We therefore affirm in part and reverse in part the judgment of the division below, and we remand this case for further proceedings consistent with this opinion.