SUMMARY
April 4, 2019

2019COA49

No. 17CA0923, *State of Colorado v. Castle Law Group* — Appeals — Law of the Case Doctrine; Constitutional Law — Fifth Amendment — Right Against Self-Incrimination; Consumers — Colorado Consumer Protection Act — Civil Penalties

This appeal arose out of the subprime mortgage crisis. The State of Colorado filed a civil enforcement action under the Colorado Consumer Protection Act, sections 6-1-101 to -1121, C.R.S. 2018, against a law firm and some of its affiliated vendors. The trial court ruled against the State on all its claims but one. The State appealed those claims, and the law firm cross-appealed.

A division of the court of appeals rejects both of the State's contentions. It therefore affirms the trial court's judgment as to those contentions. First, the division rejects the State's assertion that the trial court disregarded the law of the case doctrine because

it did not follow the supreme court's decision in *State ex rel. Coffman v. Castle Law Group, LLC*, 2016 CO 54. Second, the division concludes that the trial court did not err when it did not (1) require two nonparty witnesses to take the witness stand to invoke their Fifth Amendment rights; or (2) draw an adverse inference against the law firm based on the witnesses' invocation of their Fifth Amendment rights.

The division agrees that the trial court erred when it assessed civil penalties against the law firm under section 6-1-112, C.R.S. 2018, of the Consumer Protection Act. The division concludes that the State had to show that an alleged deceptive practice significantly impacted the public as an actual or potential consumer. But, the allegation in this case — that the law firm did not disclose to two of its clients that its principals had an ownership interest in one of its vendors — did not significantly impact members of the public as actual or potential consumers. So the division reverses that part of the judgment, and it remands the case to the trial court to vacate the judgment against the law firm.

COLORADO COURT OF APPEALS **2019COA49**

Court of Appeals No. 17CA0923
City and County of Denver District Court No. 14CV32763
Honorable Morris B. Hoffman, Judge

State of Colorado ex rel. Philip J. Weiser, Attorney General; and Jan M. Zavislan, Administrator, Uniform Consumer Credit Code,

Plaintiffs-Appellants and Cross-Appellees,

v.

Castle Law Group, LLC; Lawrence E. Castle; and Caren A. Castle,

Defendants-Appellees and Cross-Appellants,

and

Absolute Posting & Process Services, LLC; Ryan J. O'Connell; Kathleen A. Benton; and RE Records Research, LLC,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by CHIEF JUDGE BERNARD
Hawthorne and Tow, JJ., concur

Announced April 4, 2019

Philip J. Weiser, Attorney General, Alissa H. Gardenswartz, Deputy Attorney General, Megan Paris Rundlet, Assistant Solicitor General, Jennifer H. Hunt, First Assistant Attorney General, Mark L. Boehmer, Assistant Attorney General, Denver, Colorado, for Plaintiffs-Appellants and Cross-Appellees

Richards Carrington, LLC, Christopher P. Carrington, Denver, Colorado; Law Office of Ruth Moore, P.C., Ruth M. Moore, Conifer, Colorado; Reilly Pozner

LLP, Larry Pozner, Denver, Colorado; Pan American Legal Services, LLC, Phillip A. Vaglica, Glendale, Colorado, for Defendants-Appellees and Cross-Appellants Castle Law Group, LLC, Lawrence E. Castle, and Caren A. Castle

Senter Goldfarb & Rice, L.L.C., Billy-George Hertzke, Ashley J. DeVerna, Denver, Colorado, for Defendants-Appellees Absolute Posting & Process Services, LLC, Ryan J. O'Connell, and Kathleen A. Benton

Vedra Law, LLC, Daniel J. Vedra, Denver, Colorado, for Defendant-Appellee RE Records Research, LLC

¶ 1 Plaintiffs, the State of Colorado and the State's Administrator of the Uniform Commercial Code, brought a civil law enforcement action against defendants (1) Castle Law Group, LLC and its principals, Lawrence E. Castle and Caren A. Castle; (2) Absolute Posting & Process Services, LLC and its principals Ryan J. O'Connell and Kathleen A. Benton; and (3) RE Records Research, LLC. We will refer to the plaintiffs collectively as "the State." (The State also sued a fourth company that is not part of this appeal.)

¶ 2 Following a bench trial, the trial court ruled in favor of defendants on all the claims but one. The State appeals the trial court's judgment on its unsuccessful claims. We affirm this part of the judgment.

¶ 3 As to the State's one successful claim, the trial court assessed civil penalties against the Castle Law Group, LLC and its principals, which we shall call "the law firm," under the Colorado Consumer Protection Act, section 6-1-105(1)(*l*), C.R.S. 2018. The law firm filed a cross-appeal challenging this ruling. For the reasons stated below, we reverse this portion of the trial court's judgment and

remand to the trial court to vacate the judgment against the law firm.

I. Background

¶ 4 The allegations in this case arise in the context of the subprime mortgage crisis that occurred about a decade ago. During the crisis, homeowners began defaulting in record numbers on their home loans. When a homeowner defaulted, the lender could initiate a foreclosure proceeding through the public trustee. § 38-38-101, C.R.S. 2018. Because of the sheer number of foreclosures during this period, mortgage servicers, acting on behalf of lenders, hired foreclosure law firms using comprehensive retainer agreements. (As is pertinent to this appeal, these mortgage servicers included two quasi-public entities: (1) the Federal National Mortgage Association, or "Fannie Mae"; and (2) the Federal Home Loan Mortgage Corporation, or "Freddie Mac.")

¶ 5 Under the retainer agreements at issue in this case, the mortgage servicers would agree to pay the law firm a flat fee for each case, and the law firm would arrange for all the foreclosure legal work, including posting of notices and land title research. The

law firm would hire an outside vendor to complete these services. The mortgage servicers would then reimburse the firm for its "actual, necessary, and reasonable" costs for these services, in accordance with Colorado law, section 38-38-107(3)(b), C.R.S. 2018, as well as the homeowners' loan documents, and the retainer agreements.

¶ 6 The law firm was the largest foreclosure law firm in Colorado during this period. The State alleged that the law firm exploited this reimbursement system by engaging in a deceptive scheme with Absolute Posting & Process Services, which we shall call "the posting company," and RE Records Research, which we shall call "the title company."

¶ 7 The law firm hired the posting company to provide two posting services pertinent to this case. First, in 2009, our legislature passed a law that allowed eligible borrowers to defer a foreclosure and required that the mortgage servicer give notice of the deferral opportunity by posting a notice on the property. Ch. 404, sec. 5, § 38-38-802, 2009 Colo. Sess. Laws 2222-23. Second, in 2010, the legislature passed a bill requiring mortgage servicers to post a

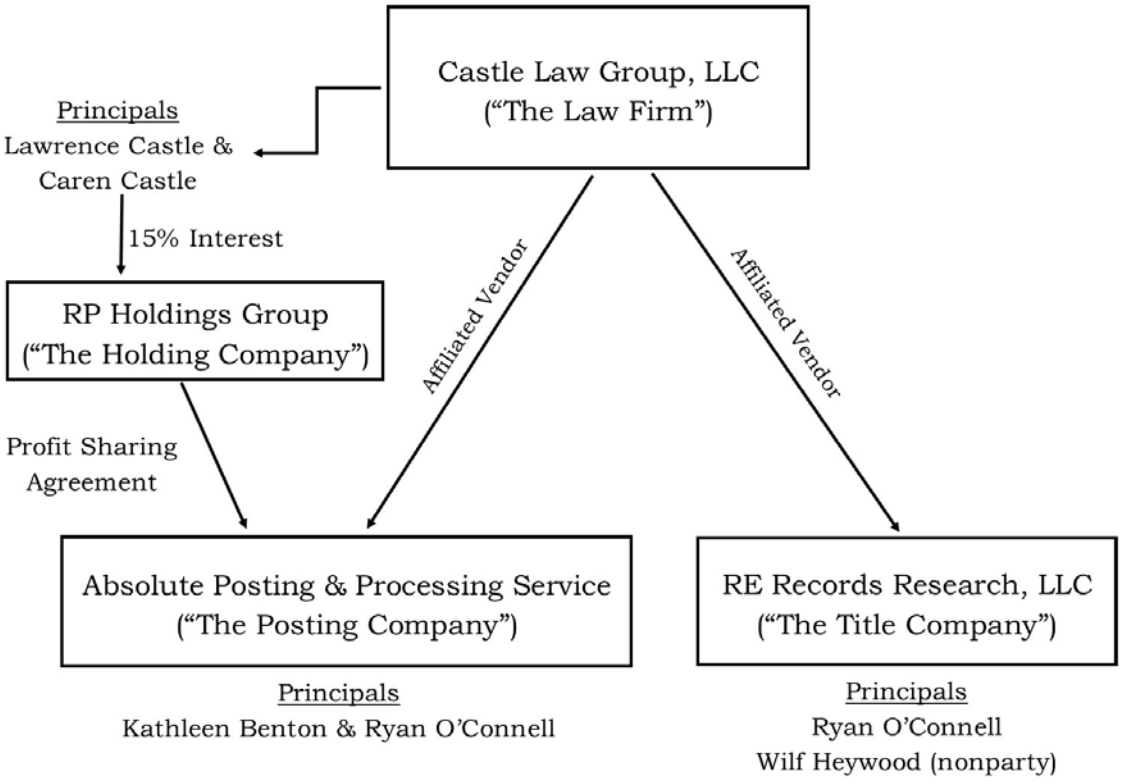
notice of the time and date of a foreclosure hearing on the property. Ch. 200, sec. 2, § 38-38-105, 2010 Colo. Sess. Laws 872. The posting company charged $125 for each posting.

¶ 8 The law firm hired the title company to do title searches and periodic updates to those searches. The title company charged the law firm $275 for the title search and $75 for an update.

¶ 9 Generally, the agreements between the law firm and a mortgage servicer allowed the law firm to hire "affiliated vendors" for posting and title services. But some agreements required the law firm to disclose any financial interest in, or other relationship with, its affiliated vendors. As is relevant to this appeal, the principals of the law firm held a minority interest in RP Holdings Group, which we shall call "the holding company." In 2009, the holding company negotiated an agreement with the posting company under which the holding company received 40% of the posting company's net profits in exchange for cash and stock in the holding company. The law firm never disclosed this interest to its clients.

¶ 10 We prepared the following diagram to help the reader understand the relationships among the various individuals and

businesses that we have just described.



¶ 11 In 2014, the State sued the law firm, the posting company, the title company, and their respective principals for making "false or misleading statements of fact concerning the price" of their foreclosure services under section 6-1-105(1)(*l*) of the Colorado Consumer Protection Act. We note that this Act is sometimes called the CCPA for short, but, to be more descriptive, we shall refer to it as "the Consumer Act." (The State brought similar claims under

the Colorado Fair Debt Collection Practices Act, sections 12-14-101 to -136, C.R.S. 2016, but the trial court found that those claims merely "duplicate[d]" the claims under the Consumer Act.) The State also alleged that the law firm had illegally fixed prices in violation of the Colorado Antitrust Act of 1992, which we shall call "the Antitrust Act." § 6-4-104, C.R.S. 2018.

¶ 12 The State contended that the law firm, the title company, and the posting company engaged in a conspiracy that went like this: (1) the law firm conspired with the title company and the posting company to charge a price for services in excess of the market rate; (2) the law firm convinced its clients that the price was the "actual, necessary, and reasonable" cost for those services; (3) the law firm paid those costs to the title company and the posting company, and then passed them along to the servicers, who reimbursed the law firm; and (4) the title company and the posting company shared a portion of the inflated costs with the law firm.

¶ 13 The State alleged that this scheme also benefitted, in part, from a second conspiracy, in which the law firm conspired with its largest competitor, Aronowitz & Mecklenburg, which we shall call

"the competitor," to set the minimum price for one kind of posting. The allegation continued that, after reaching this agreement with the competitor, the law firm convinced its clients that this pre-set minimum price was the market rate.

¶ 14 In January 2016, about one week before the trial was scheduled to begin, the trial court precluded the State from presenting evidence of rates charged by other vendors. *State ex rel. Coffman v. Castle Law Group, LLC*, 2016 CO 54, ¶ 18 (*Castle I*). The State wanted to present this evidence to establish a market rate to show that the fees charged by the title company and the posting company were grossly inflated above the average market rate. *Id.* at ¶ 17. By showing the difference in pricing, the State hoped to prove that the law firm's charges were not "actual, necessary, or reasonable." *Id.* at ¶¶ 9, 17. If the price was not "actual, necessary, or reasonable," then, as the State contended, the law firm, the title company, and the posting company had engaged in a deceptive statement about the price of the service, which was a practice that the Consumer Act prohibited. *Id.*

¶ 15 But the trial court believed that the market rate evidence was irrelevant. *Id.* at ¶ 16. Rather, the trial court thought that "[c]harging high prices is not deceptive or unjust, as long as those prices are accurately disclosed." *Id.* at ¶ 18. In the trial court's opinion, it did not matter what the title company and the posting company charged for their services; it only mattered whether the law firm benefitted by getting a "kickback." *Id.* The court made it clear in its order that "the only reason [it] did not knock out [the Consumer Act claim] on dispositive motion[] is because [it] read [the State's] complaint to allege that some part of these high prices were kicked back to [the law firm] in a scheme to avoid contractual or regulatory caps on their attorney fees." *Id.*

¶ 16 The State appealed the trial court's exclusion of the market rate evidence by filing an original proceeding under C.A.R. 21. *Id.* at ¶ 19. The supreme court issued a rule to show cause, and it ordered the trial court to stay the trial pending resolution of the Rule 21 proceeding. *Id.* at ¶ 20. The supreme court then reversed the trial court.

¶ 17 In December 2016 and January 2017, after the trial court's jurisdiction was restored, it held a bench trial that lasted about three weeks. More than twenty witnesses testified, and the court received more than 250 exhibits. The court issued its detailed, ninety-two-page written order in April 2017.

II. State's Claims

¶ 18 The State makes two contentions on appeal. First, it contends that the trial court erred by misapplying the law of the case because it did not follow *Castle I*. Second, the State maintains that the trial court erred when it did not require two nonparty witnesses to take the witness stand for purposes of invoking their Fifth Amendment rights.

A. Law of the Case

¶ 19 The State asserts that the trial court disregarded the law of the case doctrine, in the form of *Castle I*, in determining that the posting and the title search charges were "actual" and "reasonable." We disagree.

1. Preservation

¶ 20 The law firm and the title company assert that the State did not preserve this issue for appellate review. (The posting company does not contest preservation.)

¶ 21 The State contends that it preserved the issue during its opening statement, argument on its motion for directed verdict, and its closing argument. The law firm and the title company counter that the State never mentioned the supreme court's mandate and that it did not specifically object to the trial court's orders that it believed had contradicted the law of the case.

¶ 22 We conclude that the State did enough to preserve the issue. In the portions of the record that the State cites, it tried to express its position on the question of whether the charges were "actual" or "reasonable." We do not think that the State had to mention the mandate to preserve the issue. *See Rael v. People*, 2017 CO 67, ¶ 17 ("We do not require that parties use 'talismanic language' to preserve an argument for appeal.").

¶ 23 We therefore will review any putative error under the harmless error standard. C.R.C.P. 61. We will not reverse unless "the error

substantially influenced the verdict or affected the fairness of the trial." *Leiting v. Mutha*, 58 P.3d 1049, 1053-54 (Colo. App. 2002).

2. Law of the Case Doctrine

¶ 24 The law of the case "doctrine contains two branches, analyzed differently, depending on whether the prior 'law' of the case involved a court's own rulings or the rulings of a higher court." *Hardesty v. Pino*, 222 P.3d 336, 339 (Colo. App. 2009). We address the latter in this case, which is known as the "mandate rule." *Id.*

¶ 25 "Conclusions of an appellate court on issues presented to it as well as rulings logically necessary to sustain such conclusions become the law of the case." *Super Valu Stores, Inc. v. Dist. Court*, 906 P.2d 72, 79 (Colo. 1995). A trial court does not have discretion to disregard the binding rulings of an appellate court. *Hardesty*, 222 P.3d at 340.

3. The Supreme Court's Mandate

¶ 26 We begin by discussing the supreme court's "[c]onclusions [in *Castle I*] . . . on [the] issues presented to it as well as rulings logically necessary to sustain such conclusions." *Super Valu Stores, Inc.*, 906 P.2d at 79.

¶ 27 First, the supreme court rejected, as a matter of law, the trial court's determination that "charging high prices is not deceptive as long as the prices are accurately disclosed." *Castle I*, ¶ 29. Instead, the supreme court reasoned that disclosure alone does not cure the false claim if "the prices themselves are deceptive." *Id.* Said another way, the deception — the alleged scheme to inflate prices above the market rate and then to share in the benefits — occurred *before* the law firm invoiced its clients.

¶ 28 Second, the supreme court concluded that the market rate evidence was therefore relevant to determine whether the prices the title company and the posting company charged were "the actual or reasonable costs of such services." *Id.* at ¶ 30. If the prices the title company and the posting company charged were not "actual" or "reasonable," then they could potentially be part of a "false or misleading statement of fact concerning the price of [that] service[]." § 6-1-105(1)(*l*). So the court indicated that market rate evidence gave "some reference point by which to measure the actual, necessary, or reasonable cost." *Castle I*, ¶ 23.

¶ 29 Third, the supreme court held that the evidence was also relevant to establish whether the law firm's vendors "also benefitted" from the conspiracy with the law firm. *Id.* That is, the supreme court rejected the trial court's assumption that there could only be a violation of the Consumer Act if the law firm received kickbacks from its vendors. Rather, the price could still be deceptive, presumably, if only the vendors themselves financially benefitted from the artificially inflated price.

4. Analysis

¶ 30 The State contends that the trial court disregarded the supreme court's opinion when it determined that the prices of the title company and the posting company were "actual" and "reasonable."

¶ 31 We pause here momentarily so we may lay some additional groundwork regarding the words "actual," "necessary," and "reasonable." We first note that the trial court and our supreme court refer to phrases such as "actual, necessary, and reasonable"; "actual, necessary, or reasonable"; "actual and reasonable;" and "actual or reasonable" interchangeably and without any clarification

as to whether there is a difference among these different arrangements of the terms. In its order, the trial court placed the terms in two separate categories: (1) actual; and (2) necessary and reasonable. And the State bifurcates its argument in a similar way: (1) actual; and (2) reasonable. Because no one has asserted that the word "necessary" conveys some additional indispensable meaning to the terms "actual" and "reasonable," we will confine our discussion to the latter two terms.

¶ 32 Our supreme court did not define either "actual" or "reasonable." But the court gave us one important piece of information regarding how we should interpret these words: The State's market rate evidence was intended to give "some reference point by which to measure the actual . . . or reasonable cost." *Id.* at ¶ 23. So, if the State could prove that the prices charged by the title company and the posting company did not reflect the market rate, then it could establish that they were not the "actual" or "reasonable" costs of those services.

¶ 33 Under the State's "actual-and-reasonable theory," it had to first show that the title company and the posting company charged

an above-market-rate price. Then, if the State could establish other aspects of its case, such as (1) the law firm conspired with the title company and the posting company to set the high price; and (2) the law firm, the title company, and the posting company shared in the benefits of the high price, then the State could prove that the law firm's charges to its clients were a "false or misleading statement of fact concerning the prices of [its] service." § 6-1-105(1)(*l*). But, if the State could not establish that the title company and the posting company charged prices above the market rate, then the State's actual-and-reasonable theory could not succeed.

¶ 34 With this groundwork, we draw the following conclusions. First, the trial court did not err by rejecting the State's market rate evidence. Second, even if the trial court misinterpreted the supreme court's mandate when it concluded that the costs were "actual," we conclude that it did not commit reversible error. Third, the trial court did not err when it considered Fannie Mae's approval of the charges as evidence that the charges were reasonable. Fourth, the trial court did not improperly consider the State's "kickback theory."

¶ 35 Review of a trial court's judgment following a bench trial involves mixed questions of fact and law. *Deutsche Bank Tr. Co. Ams. v. Samora*, 2013 COA 81, ¶ 37. Generally, the court's findings of fact are reviewed for clear error, and the court's application of the legal standards to those facts is reviewed de novo. *Id.*

¶ 36 Specifically, we review de novo whether a trial court has complied with an appellate court's binding rulings. *See Hardesty*, 222 P.3d at 339-40. But we defer to the trial court's findings of fact if they were supported by the record. *See Jehly v. Brown*, 2014 COA 39, ¶ 8.

¶ 37 (The State makes the same or similar contentions in relation to both the posting company and the title company. The following discussion will focus only on the posting company, but our analysis applies with equal force to the title company's conduct. For purposes of brevity, we decline to address the same arguments twice.)

a. Evidence of Market Rate

¶ 38 We begin by discussing whether the trial court held an erroneous view of the relevance of the State's market rate evidence.

The State contends that the court incorrectly believed that the prices charged could only be misrepresentations if they were "unreasonably high." But, the State asserts, the supreme court's opinion required the trial court to consider the market rate evidence to determine whether the prices were artificially inflated. *Castle I*, ¶ 30.

¶ 39 The State submits the trial court determined that (1) even though the law firm's prices were higher; (2) they were not so high as to be unreasonable. This is not what happened.

¶ 40 Rather, the trial court decided that the State's "evidence was insufficient to provide the market price." For example, the court found that the prices from posting vendors that the State had presented were not viable comparisons to the posting company: they were relatively small, unsophisticated operations; they served smaller geographic areas; and they offered inferior services. The State also did not present a "market expert" or provide any other market analysis. The court ultimately concluded that the State had "cherry-picked a handful of competitors that were not at all

comparable" and that those vendors had been selected from a relatively small cross section of the marketplace.

¶ 41 The State also contends that the trial court violated the supreme court's mandate when it considered the prices charged by a posting vendor affiliated with the law firm's largest competitor. According to the State, the supreme court directed the trial court to only consider "[e]vidence of the market rates charged by unaffiliated vendors." *Id.* We disagree that the supreme court limited the trial court by allowing it to only consider vendors not affiliated with a law firm. And the trial court did not conclude that the price the competitor's vendor charged was evidence of the market rate. Rather, the trial court mentioned the competitor's vendor only to further illuminate its conclusion that the State had "cherry-picked" its evidence from a small cross section of the market. We therefore reject the State's argument that these findings contravened the law of the case.

b. Actual

¶ 42 Having concluded that the trial court did not err by rejecting the State's contention concerning the presumptive market rate, we

next address whether the trial court erred in its interpretation of "actual" cost.

¶ 43 The trial court made the following factual findings about the "actual" cost of the posting charges:

- Every charge to the law firm represented an actual posting.
- The law firm always paid the posting company.
- The law firm never "bill[ed] [its] clients more for posting than their posting companies actually billed [it]."

¶ 44 The State submits that the trial court's interpretation of the meaning of "actual" cost was erroneous. It maintains that the court's interpretation of the term "actual" cost was "whatever the vendor put on the invoice." The State asserts that this view violated the supreme court's holding that disclosed prices could still be deceptive if "the prices themselves [were] deceptive." *Id.* at ¶ 29.

¶ 45 We conclude that, even if we accepted the State's argument that the trial court's findings and conclusions did not align with the supreme court's holding, the court nonetheless did not commit reversible error. *See* C.R.C.P. 61 (errors that are harmless are not

reversible). This is so because the State did not prove that the price the posting company charged was above the market rate.

¶ 46 We conclude that, because the trial court considered the State's market rate evidence and determined that the State's "evidence was *insufficient* to provide the market price" (emphasis added), the court's putative misinterpretation of the term "actual" was inconsequential. As noted above, proving the market rate was a prerequisite to showing that the posting company's charges were not actual.

¶ 47 The State also contends that the trial court's erroneous interpretation of the law of the case resulted in the court (1) ignoring evidence relating to benefits of the inflated price flowing from the vendors to the law firm; (2) disregarding evidence related to the law firm's control or influence over its vendors; and (3) excluding relevant evidence of "covert lobbying" on behalf of the law firm. We are not persuaded because the trial court determined that the prices for the services were not inflated and that the vendors set their prices independently of any influence from the law firm. The evidence supported these findings, and we will not

"substitute our judgment for the trial court's [judgment]." *State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 15 (Colo. App. 2009)(noting that the sufficiency, probative effect, and weight of the evidence are within the purview of the trial court and will not be overturned unless "clearly erroneous or unsupported by the record").

c. Reasonable

¶ 48 The trial court noted that Fannie Mae's approval of the posting charge was relevant to the question of whether the charge was reasonable. And the court commented that it found the State's argument lacking because it could not believe that a "sophisticated corporation[]" like Fannie Mae could be so easily "duped."

¶ 49 The State asserts that the trial court disregarded the supreme court's opinion when it considered Fannie Mae's approval of the posting company's price as evidence that the price was "reasonable." According to the State, doing so runs counter to the supreme court's statement that approval of a deceptive cost "does not automatically legitimize the price or cure the alleged deception." *Castle I*, ¶ 29. The State maintains that this was reversible error

because "it absolve[d] [the law firm] of any representations about the price by putting the onus on servicers . . . to determine the reasonableness of the cost."

¶ 50 We disagree with the State for the following reasons.

¶ 51 First, the trial court did not, as the State contends, conclude that Fannie Mae's approval and payment cured any deception. Rather, it merely noted that Fannie Mae's approval of the price provided some evidence that the price was "reasonable." The supreme court did not prohibit the trial court from considering Fannie Mae's approval of the price to determine whether it was reasonable.

¶ 52 Second, the trial court considered the market rate evidence presented by the State, as required by the supreme court, and it rejected the State's theory for the reasons discussed above. The court specifically noted that Fannie Mae's approval of the price was only "one more nail in the coffin" of the State's argument about the reasonableness of the price.

¶ 53 Third, the evidence supported the finding that Fannie Mae did not simply accept the price without inquiry into its reasonableness,

as the State suggests. Rather, Fannie Mae questioned the price because it seemed "high compared to other kinds of service." The law firm explained the reasons behind the price to Fannie Mae, contending that the price was reasonable because it applied statewide, the posting company was accurate and timely, the posting company had provided time-stamped proof of the postings, and it quickly responded to correct its mistakes.

¶ 54 Fourth, even if the trial court erred in considering Fannie Mae's approval of the price, we conclude that any error would be harmless. C.R.C.P. 61. The State's theory that the price was unreasonable relied on a showing that (1) the vendor's prices were artificially inflated above the market rate and (2) the prices resulted from a conspiracy between the law firm and its vendors. We have previously concluded that the trial court's findings in these areas were not clearly erroneous.

d. The Kickback Theory

¶ 55 The State also contends that the trial court disregarded the supreme court's mandate when it "focused only on whether [the law firm] received illegal monetary 'kickbacks'" instead of considering

whether "the [law firm's vendors] . . . also benefitted" from the conspiracy. *Castle I*, ¶ 30. We disagree.

¶ 56 Before the supreme court issued its opinion, the trial court stated that the only way for the State to prove its Consumer Act claim was through the kickback theory. Under this theory, the trial court assumed that the posting company could charge any amount it wanted and there could only be a violation of the Consumer Act if the State could prove that the posting company had "kicked back" some of the unjust benefits to the law firm. *Id.* at ¶ 18. As we discussed above, the supreme court focused on a different theory, which we have referred to in this opinion as the actual-and-reasonable theory.

¶ 57 The actual-and-reasonable theory is explained in detail above, so we will not retrace our steps, except to say that part of this theory involved an investigation of whether the posting company benefitted from the conspiracy. As we understand it, the supreme court envisioned one possible scenario that looked like this: (1) the law firm conspired with the posting company to set an artificially inflated price; (2) the law firm knew the price was artificially

inflated, but nevertheless presented the charges to its clients as the actual and reasonable costs of those services; (3) the posting company did not kick back any part of the inflated price to the law firm; and (4) so, only the posting company directly benefitted from the scheme. Under this theory, the law firm and the posting company could have still made "a false or misleading statement of fact concerning the price of [their] services," § 6-1-105(1)(*l*), even without the law firm directly benefiting from the scheme.

¶ 58 The State asserts that it never advanced the kickback theory, that the trial court came up with this theory independently, and that the trial court continued to maintain this "improper" view even after the supreme court had rejected the theory.

¶ 59 But, contrary to its assertion, the State relied on the kickback theory, at least in part. During opening statements, for example, the State referred to the kickback theory as the "cleanest part of the case." And, during the State's closing argument, the trial court explained its understanding that the State was proceeding under both the kickback theory and the actual-and-reasonable theory.

The State did not object to the court's characterization of its position.

¶ 60 Still, even if we assume, for purposes of argument, that the State only offered the actual-and-reasonable theory, the supreme court did not prohibit the trial court from considering the kickback theory in addition to the actual-and-reasonable theory. And, even if the trial court should have ignored the kickback theory as a stand-alone theory of the case, the evidence about kickbacks was still relevant to show the law firm's motivation in the scheme. If the State could not show that the law firm also benefitted from the inflated charge, then it would not make much sense that the law firm would involve itself in a scheme with no reward.

¶ 61 But, under the actual-and-reasonable theory, the State still had to show that the prices that the posting company charged were artificially inflated. We concluded above that the trial court did not err by rejecting the State's market rate evidence and, therefore, that the State had not established that the posting company had charged an inflated price.

¶ 62 So, even under the State's actual-and-reasonable theory, evidence or lack of evidence of kickbacks did not matter. *See* C.R.C.P. 61. Because the kickback evidence did not matter, we need not address the State's contention that the trial court applied the wrong legal standard (i.e., the "fair value" standard) in its kickback analysis.

B. Nonparty Witnesses' Invocation of Their Fifth Amendment Rights

¶ 63 The State maintains that the trial court erred when it did not require two nonparty witnesses to take the witness stand to invoke their Fifth Amendment rights. The State also contends that the court should have drawn an adverse inference against the law firm based on the witnesses' invocation of their Fifth Amendment rights. We disagree.

1. Standard of Review

¶ 64 The State raises two issues concerning the witnesses' invocation of their Fifth Amendment rights, both of which we review de novo. First, we review de novo the trial court's decision to permit a witness to invoke her Fifth Amendment right. *People v. Smith*, 275 P.3d 715, 719-20 (Colo. App. 2011)(applying a de novo

standard of review "[i]n light of . . . conflicting case law" regarding the appropriate standard of review). Second, we review de novo "the question whether a nonparty witness's invocation of the Fifth Amendment privilege constitutes admissible evidence" in a civil case. *McGillis Inv. Co., LLP v. First Interstate Fin. Utah LLC*, 2015 COA 116, ¶ 23.

2. Additional Background

¶ 65 The State contends that the trial court erred in accepting the Fifth Amendment invocations of two witnesses: (1) a lawyer from the law firm's competitor, whom we shall refer to as "the lawyer"; and (2) the manager of the competitor's posting company, whom we shall refer to as "the manager."

¶ 66 The State subpoenaed the lawyer and prepared to call her to testify. But the lawyer's attorney informed counsel for the parties that she intended to invoke her Fifth Amendment right to every question. The State told the trial court about this development.

¶ 67 The State objected to the court allowing the lawyer to make a "blanket invocation." The State stressed the importance of requiring the lawyer to invoke the privilege to specific questions, so

that the court could then draw adverse inferences from her nonresponses.

¶ 68 The trial court asked the State to make an offer of proof of the questions that it intended to ask the lawyer so that it could resolve the "threshold question of whether this area of questioning is likely to incriminate her." The State then provided a lengthy recitation of its proposed questions, which focused mainly on the method used to set the posting price and how the lawyer had allegedly conspired to horizontally fix the price.

¶ 69 The trial court determined that the proposed questioning "clearly implicate[d] her Fifth Amendment rights."

¶ 70 Later, the State told the court that the manager would also invoke her Fifth Amendment privilege to any questioning. The manager was not present in the courtroom, and there is nothing in the record to indicate that the State had subpoenaed her to appear.

¶ 71 The State asked the court if it could "make a very brief offer of proof regarding her testimony" and noted that the court had allowed that process previously. The State then made the offer, which described the manager's operation of her company, her lack of

experience in the industry, her practice of contracting with process servers to do postings for less than the amount charged by her company, and how much money she had made while managing the company.

¶ 72 After the State made this offer of proof, the trial court inquired into its purpose. The State explained that it had presented the offer of proof so the trial court could determine "whether it would apply an adverse inference." The State did not ask the trial court to rule on whether the manager was justified in declining to testify.

3. Law

¶ 73 The Fifth Amendment provides a witness with a privilege to decline to answer questions that might incriminate her. *Smith*, 275 P.3d at 720. The privilege applies in civil cases whenever the witness's answers could be used against her in a criminal proceeding. *McGillis Inv. Co.*, ¶ 26.

¶ 74 Generally speaking, "[t]he privilege against self-incrimination may not be asserted in advance of questions actually propounded; it is an option of refusal, not a prohibition of inquiry." *People in Interest of I.O.*, 713 P.2d 396, 397 (Colo. App. 1985). "The proper

procedure is to wait until a question which tends to be incriminating has been asked and then decline to answer." *People v. Austin*, 159 Colo. 445, 450, 412 P.2d 425, 427 (1966).

¶ 75 It is for the trial court, and not the witness, to determine whether the refusal to testify is justified under the Fifth Amendment. *Smith*, 275 P.3d at 720. When a witness invokes the Fifth Amendment, the court must "either accept the assertion of privilege or inquire further to determine if there is a real danger of self-incrimination." *People v. Razatos*, 699 P.2d 970, 976 (Colo. 1985).

¶ 76 The trial court should give the Fifth Amendment a "liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). So the witness should be allowed to invoke the Fifth Amendment not only when the answer would require an admission to a crime, but also when the answer would "furnish a link in the chain of evidence needed to prosecute" the witness. *Id.*

¶ 77 "A court may deny a witness'[s] claim of privilege only if it is absolutely clear that the witness is mistaken and the testimony

cannot possibly incriminate [her]." *People v. Villa*, 671 P.2d 971, 973 (Colo. App. 1983). When "the information known to the court" supports the conclusion that the witness's testimony might incriminate her, the court need not inquire further. *People v. Blackwell*, 251 P.3d 468, 474 (Colo. App. 2010).

¶ 78 Unlike in a criminal case, "a party in a civil proceeding may be called for testimony even if [s]he will be claiming the privilege," and the trial court may even require the witness to do so in the presence of the jury. *Asplin v. Mueller*, 687 P.2d 1329, 1332 (Colo. App. 1984). The fact finder may then consider the witness's invocation of the privilege and draw an adverse inference against her. *McGillis Inv. Co.*, ¶ 27.

¶ 79 Recently, a division of this court considered whether a trial court could admit a nonparty witness's invocation of the Fifth Amendment and allow the fact finder to draw an adverse inference against one of the parties. *Id.* at ¶ 35. To assess the admissibility of a nonparty's invocation of the privilege, the division adopted four non-exclusive factors from the Second Circuit's decision in *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997), which we shall

refer to as the *LiButti* factors: (1) the nature of the relevant relationships; (2) the degree of control; (3) the compatibility of interests in the litigation; and (4) the role of the nonparty witness in the litigation. *McGillis Inv. Co.*, ¶¶ 30-35.

¶ 80 If evidence of the nonparty witness's invocation is admitted, the fact finder may, but is not required to, draw "an inference adverse to a party." *Id.* at ¶ 36. The fact finder should not draw any inference if it concludes that the witness invoked the Fifth Amendment for reasons unrelated to the case on trial. *Id.*

4. Analysis

a. Blanket Invocation

¶ 81 The State contends that the trial court erred in allowing the lawyer and the manager to make a "blanket invocation" of their Fifth Amendment rights without having to take the witness stand to invoke their rights on a question-by-question basis. We disagree for the following reasons.

¶ 82 First, we agree with the law firm and the posting company that the State did not preserve its contention as to the manager. (Because this issue did not directly involve the title company, its brief does not address this issue.) The record does not show that

the manager appeared in court after being subpoenaed by the State. And, unlike the lawyer, the trial court made no determination of whether she had a justification to invoke the privilege. Rather, the State told the court that it wanted to make an offer of proof, so the trial court could determine "whether it would apply an adverse inference." We therefore conclude that the State's contention is unpreserved as to the manager, and we decline to review it further. *Scott R. Larson, P.C.*, ¶ 70.

¶ 83 Second, we do not believe that the lawyer made the type of "blanket" invocation that case law prohibits. The case law does not prohibit a witness from invoking her privilege to all the questions that a lawyer asks; it only prevents a witness from invoking the privilege without knowing what she would be asked. *See Smith*, 275 P.3d at 720. And, in this case, the witness knew what she would be asked because her attorney had consulted with the State before she appeared in court. She determined that she could not "envision a question that would be relevant to the allegations in the case" that would not compel her to invoke the privilege.

¶ 84 We see no difference between what occurred in this case and what the division in *Smith* concluded was not a blanket invocation. *Id.* In *Smith*, the defendant called a witness who invoked her privilege after the first question: whether she was "acquainted" with the defendant. *Id.* at 718. The trial court did not require her to answer any further questions, and it then excused her from testifying. *Id.*

¶ 85 Third, we are not otherwise persuaded by *Feigin v. Zinn*, 789 P.2d 478, 480 (Colo. App. 1990), and similar cases on which the State relies. These cases are distinguishable because they do not involve a witness being called to the witness stand to testify in a trial. *See, e.g.*, *People v. Ruch*, 2016 CO 35, ¶ 32 (the defendant refused to attend treatment "based on his hypothetical concerns as to what might have been asked of him"); *Steiner v. Minn. Life Ins. Co.*, 85 P.3d 135, 139 (Colo. 2004)(involving a plaintiff who refused to be asked questions in a deposition).

¶ 86 Fourth, the trial court had some discretion under the rules of evidence in deciding how to proceed. *See* CRE 611(a). The rules allow a trial court to "exercise reasonable control over the mode and

order of interrogating witnesses" for several reasons, including to "avoid needless consumption of time." *Id.*

¶ 87 Fifth, even if the trial court erred in employing this procedure, we conclude that the error was harmless. *Leiting*, 58 P.3d at 1053-54. The trial court allowed the State to tell it the questions the State would ask, and there was no doubt that the lawyer would decline to answer them. So, even if the lawyer had taken the witness stand, the trial court would have made the same findings and conclusions.

¶ 88 Sixth, we decline to review whether the lawyer's invocation of the privilege was justified. The State did not challenge the justification itself at trial, and we do not consider unpreserved issues on appeal. *Scott R. Larson, P.C.*, ¶ 70.

b. Adverse Inference

¶ 89 The State next contends that the trial court erred when it did not require these witnesses to take the witness stand because "a court must know the questions that would be asked of the witness to consider whether to apply any adverse inference from the witness's silence." We disagree.

¶ 90 First, as we understand the State's argument, its success on this claim requires us to first conclude that the trial court erred in allowing the witnesses to invoke the Fifth Amendment without taking the witness stand. But, we have already determined that the trial court did not err by allowing the lawyer to invoke the Fifth Amendment without taking the witness stand. And we have also rejected the State's contention as to the manager because the State did not preserve its objection.

¶ 91 Second, even if we consider the State's argument, we are not persuaded because the court *knew* the questions that the State intended to ask. With the court's permission, the State made an offer of proof. The State cannot now claim that the trial court prevented it from presenting more questions. And it cannot claim that, given the opportunity to pose questions directly to the nonresponsive witness, the State would have posed more or different questions.

¶ 92 Third, whether the trial court properly addressed the *LiButti* factors is irrelevant. A trial court considers these factors when determining whether to admit the witness's decision to invoke the

privilege. *McGillis Inv. Co.*, ¶ 35. But admissibility is not the issue before us. The State asked the trial court to consider the evidence of the lawyer's silence and draw the adverse inference. (We do not consider evidence of the manager's silence because the State did not preserve its contention as to the manager, and it did not ask the trial court to draw the inference at the end of trial like it did with respect to the lawyer.) So (1) the trial court, as a matter of law, admitted the evidence; (2) it considered the evidence in its role as the fact finder in a bench trial; but (3) it declined to draw the inference as a matter of fact, as is permitted. *See id.* (noting that whether to draw an adverse inference is left to the fact finder).

¶ 93 Fourth, the trial court's decision to decline to draw any adverse inference based on the lawyer's silence is supported by the record. For example, the court found that the lawyer had invoked the privilege because of alleged fraudulent billing activities that were unrelated to this case. *Id.* at ¶ 36 (noting that the fact finder should not draw an adverse inference if the witness invoked the privilege for a reason unrelated to the case at issue).

III. The Law Firm's Contentions

¶ 94 The law firm makes two arguments in its cross-appeal. First, it asserts that the trial court erred by applying the statute of limitations in the Consumer Act, section 6-1-115, C.R.S. 2018, instead of the statute of limitations for civil penalties, section 13-80-103(1)(d), C.R.S. 2018. Second, it contends that the trial court erred by finding in favor of the State on one of its claims under the Consumer Act.

A. Statute of Limitations

¶ 95 The law firm asserts that the trial court erred by applying the three-year statute of limitations in section 6-1-115, instead of the one-year statute of limitations for civil penalties in section 13-80-103(1)(d). We disagree.

1. Standard of Review

¶ 96 We review de novo a trial court's application of the statute of limitations. *Kovac v. Farmers Ins. Exch.*, 2017 COA 7M, ¶ 13.

2. Law and Analysis

¶ 97 A division of this court recently addressed this precise issue in *State ex rel. Coffman v. Robert J. Hopp & Associates, LLC*, 2018 COA 69M. The division applied the principle that, "[i]n the absence of a

clear expression of legislative intent to the contrary, a statute of limitations specifically addressing a particular class of cases will control over a more general or catch-all statute of limitations." *Id.* at ¶ 32 (quoting *Mortg. Invs. Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1185 (Colo. 2003)). The division therefore concluded that, "[b]ecause the [Consumer Act] contains a statute of limitations specifically addressing cases brought under its provisions, the three-year statute of limitations controls over the more general section 13-80-103(1)(d)." *Id.* at ¶ 33.

¶ 98 We agree with the division's reasoning, *see People v. Smoots*, 2013 COA 152, ¶ 20 (noting that a division of the court of appeals gives "considerable deference" to a decision of another division), *aff'd sub nom. Reyna-Abarca v. People*, 2017 CO 15, so we also conclude that the trial court did not err in this case by applying the three-year statute of limitations in section 6-1-115.

B. Disclosure of Relationship as a Deceptive Practice

¶ 99 We now turn to the law firm's contention that the State did not meet its burden under the Consumer Act. First, the law firm contends that the trial court erred by concluding that the law firm

committed a deceptive practice that "significantly impact[ed] the public as actual or potential consumers," *Hall v. Walter*, 969 P.2d 224, 234 (Colo. 1998), by not disclosing its relationship with the posting company. Second, the law firm asserts that, even if it made a misleading statement by not disclosing its relationship, the statement did not concern the "price" itself, so it did not violate section 6-1-105(1)(*l*).

¶ 100 Because we conclude below that the trial court erred as a matter of law in determining that the nondisclosure significantly impacted the public as actual or potential consumers, we do not need to address the law firm's second contention.

1. Additional Background

¶ 101 As part of its agreements with Fannie Mae and Freddie Mac, the law firm had to disclose whether it had any affiliation or ownership interest in either the title company or the posting company. The trial court found that the law firm had an interest in the posting company through the law firm's interest in the holding company.

¶ 102 The trial court determined that it had to find three elements for the State to prove a violation of the Consumer Act: (1) the law firm engaged in an unfair or deceptive trade practice; (2) within the course of its business; (3) that significantly impacted the public as actual or potential consumers. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Linings, Inc.*, 62 P.3d 142, 146 (Colo. 2003). The trial court found that the law firm had violated section 6-1-105(1)(*l*) ("Makes . . . misleading statements of fact concerning the price of . . . services . . . ."), by not disclosing this affiliation and that it did so within the course of its business. These two elements are not in dispute in this appeal.

¶ 103 The trial court determined that the State had satisfied the significant-public-impact element because the law firm "materially breached [its] retainer agreement with Fannie Mae and Freddie Mac tens of thousands of times, and as a result of those breaches these two [entities], and through them the taxpaying public, lost the opportunity to more closely scrutinize prices they surely would have scrutinized more closely."

2. Law and Analysis

¶ 104 The law firm contends that the trial court erred in assessing civil penalties under 6-1-112, C.R.S. 2018, because the trial court erred in determining that the deceptive act "significantly impact[ed] the public as actual or potential consumers." *Hall*, 969 P.2d at 234.

a. Elements of a Government Enforcement Action

¶ 105 We first address the State's contention that it did not need to prove a significant public impact in a civil enforcement action.

¶ 106 In *Hall*, our supreme court held that a plaintiff must establish five elements to prove a violation of the Consumer Act under section 6-1-113, C.R.S. 2018: (1) an unfair or deceptive practice; (2) in the course of defendant's business; (3) that significantly impacted the public as actual or potential consumers; (4) where the plaintiff suffered an injury in fact; and (5) the defendant caused the injury. 969 P.2d at 235.

¶ 107 The trial court decided that the State had to prove the first three of these elements. On appeal, the State contends that the third element does not apply to a government enforcement action.

The State asserts that it must establish only the first two elements. We disagree for the following reasons.

¶ 108 First, in *Hall*, the supreme court noted that "[i]t is these final two elements, required under section 6-1-113, that distinguish a private . . . action from . . . an attorney general's action for civil penalties under section 6-1-112." *Id.* at 236. So, although the supreme court did not say so directly, it implied that the State, in the form of an attorney general's action, must prove the first three elements to assess civil penalties under section 6-1-112. And, to the extent that the above-quoted material is dicta, we find it persuasive. *See Winkler v. Shaffer*, 2015 COA 63, ¶ 18.

¶ 109 Second, the State's interpretation of the Consumer Act does not align with the legislative purpose of protecting the public interest. *See People ex rel. Dunbar v. Gym of Am., Inc.*, 177 Colo. 97, 112, 493 P.2d 660, 667 (1972)(stating that the purpose of the act is to regulate practices that, "because of their nature, may prove injurious, offensive, or dangerous to the public").

¶ 110 Third, our courts have heavily relied on Washington state law in interpreting our own consumer protection law, *see, e.g.*, *Crowe v.*

Tull, 126 P.3d 196, 203 (Colo. 2006), and that jurisdiction requires the attorney general to prove the first three elements in a government enforcement action. *See State v. Kaiser*, 254 P.3d 850, 858 (Wash. Ct. App. 2011)("Where, as here, the Attorney General brings a [consumer protection] enforcement action on behalf of the State, it must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact.").

¶ 111 We therefore conclude that the State had to prove that the law firm's nondisclosure of its relationship with the posting company had a significant public impact.

b. Significant Public Impact

¶ 112 Did the law firm's nondisclosure of its relationship with the posting company significantly impact the public based solely on the fact that the law firm's clients, Fannie Mae and Freddie Mac, are partially funded by taxpayers? We do not think so.

¶ 113 The State contends that we should review the trial court's finding for clear error; the law firm thinks we should review the matter de novo. We agree with the law firm because the facts necessary to resolve the issue are undisputed. *See One Creative*

Place, LLC v. Jet Ctr. Partners, LLC, 259 P.3d 1287, 1289 (Colo. App. 2011)("Where the controlling facts are undisputed, the existence or lack of public impact may be determined as a matter of law.").

¶ 114 To determine whether an allegedly deceptive practice significantly impacts the public, our supreme court has provided guidance in the form of three considerations: (1) number of consumers directly affected; (2) the consumers' relative sophistication and bargaining power; and (3) previous impact, or potential future impact, on consumers. *Martinez v. Lewis*, 969 P.2d 213, 222 (Colo. 1998).

¶ 115 We also note that a deceptive practice does not violate the Consumer Act simply because it impacts the public generally; rather, it must impact the public specifically as actual or potential consumers of the defendant's goods or services. *See Hall*, 969 P.2d at 234. In many Consumer Act cases involving misleading advertising, for example, "there is no dispute that [the] deceptive practices implicated the public as consumers because the misrepresentations were directed to the market generally." *Id.* at 235. This situation contrasts with cases, such as *Martinez*, in

which the alleged deceptive practices occurred only in the context of private agreements to provide services. 969 P.2d at 220-21.

¶ 116 There is no allegation that the deceptive practice in this case — not disclosing affiliations with vendors — was "directed to the market generally." *Hall*, 969 P.2d at 235. Rather, the deceptive practice impacted only two clients: Fannie Mae and Freddie Mac. We do not think, for the following reasons, that the public's interest in these entities as taxpayers suffices to constitute a significant public impact.

¶ 117 First, the taxpayers did not hire the law firm to perform foreclosure-related services, and they did not use those services. *See May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 973-74 (Colo. 1993)(recognizing a consumer as "a person who has been exposed to [the defendant's] violations and either purchases merchandise . . . or undertakes other activities in reliance on the advertisement"). Rather, we see two consumers: Fannie Mae and Freddie Mac.

¶ 118 Second, the State cites no authority to support the trial court's conclusion that the public's ownership interest in a company is

enough to support a finding of significant public impact. To the contrary, our supreme court has observed that it has "never found that the public nature of a particular business satisfies per se the public impact element of a [Consumer Act] claim." *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 155 (Colo. 2007); *cf. Martinez*, 969 P.2d at 222 (requiring an investigation of the number of consumers "directly affected"). And the record leads us to conclude that Fannie Mae and Freddie Mac were the only consumers of the law firm's services that were "directly affected."

¶ 119 Third, we believe that this case is more akin to *Martinez*. In that case, a doctor examined Ms. Martinez at the request of her insurer. The doctor decided that she was malingering, and the insurer then denied coverage for future psychiatric or psychological treatment. As is pertinent to our analysis, Ms. Martinez sued the doctor. In her lawsuit, she alleged, among other things, that the doctor had violated the Consumer Act by making misrepresentations about her medical condition to the insurer. *Martinez*, 969 P.2d at 215. It was undisputed that the doctor did not make any misrepresentations *to her or to the public*; rather, the

doctor only made the alleged misrepresentations to the insurer. *Id.* at 216-17. The supreme court ultimately concluded that there was no significant public impact when the deceptive practice occurred only in the context of a private agreement between the doctor and the insurer. *Id.* at 221-22. As a result, the alleged deceptive practice "suggest[ed] 'a purely private wrong.'" *Id.* at 222 (quoting *U.S. Welding, Inc. v. Burroughs Corp.*, 615 F. Supp. 554, 556 (D. Colo. 1985)).

¶ 120 Similarly, the misrepresentation in this case was made to only two consumers — Fannie Mae and Freddie Mac — in the context of a private agreement between the law firm and those two consumers. *See id.*; *compare Full Draw Prods. v. Easton Sports, Inc.*, 85 F. Supp. 2d 1001, 1007 (D. Colo. 2000)(applying the Consumer Act; "The apparent business-to-business nature of [a person's] communications reduces the impact of the deceptive practice on the public as consumers."), *and Rhino Linings*, 62 P.3d at 150 ("Three affected dealers out of approximately 550 worldwide does not significantly affect the public . . . ."), *with Hall*, 969 P.2d at 235 ("[T]here is no dispute that [the] . . . deceptive practices implicated

the public as consumers because the misrepresentations were directed to the market generally, taking the form of widespread advertisement and deception of actual and prospective purchasers.").

¶ 121 Fourth, it is undisputed that Fannie Mae and Freddie Mac are not the type of consumers that the legislature intended to protect. *Martinez*, 969 P.2d at 222 (noting that the insurance company "is not the type of consumer that the [statute] generally contemplates requiring protection"). To the contrary, the trial court found that Fannie Mae and Freddie Mac were "sophisticated entities that enjoyed massive bargaining power" over the law firm, not the other way around.

¶ 122 Fifth, there was no allegation that any other consumers were previously impacted by a similar nondisclosure or that any consumers were likely to be affected in the future. *See id.*

¶ 123 Finally, the State encourages us to affirm the trial court's ruling on an alternative theory. *See People v. Chase*, 2013 COA 27, ¶17 ("[W]e may affirm a trial court's ruling on grounds different from those employed by th[e] court, as long as they are supported

by the record."). The State maintains that the "debtors curing, junior lienors redeeming, and the third-party buyers buying were the ultimate consumers of the law firm's services."

¶ 124 We decline to adopt the State's alternative theory because

- these various actors, plus any homeowners or the tax-paying public, were not consumers of the law firm's services for the purposes of the Consumer Act because they had not been "exposed to [the law firm's] violations and . . . [had not] undertake[n] other activities in reliance on the" violations, *May Dep't Stores Co.*, 863 P.2d at 973-74;
- the law firm did not make any false or misleading statements to these actors because they were not parties to the retainer agreement, *see Martinez*, 969 P.2d at 221-22; and
- the trial court found the State had not shown that (1) any of the law firm's statements to these actors, such as representations concerning the amount of costs, were

false or misleading; or (2) any of these actors "paid higher prices because of the [law firm's] failure to disclose."

¶ 125 The judgment is affirmed in part, reversed in part, and remanded to the trial court to vacate the judgment against the law firm.

JUDGE HAWTHORNE and JUDGE TOW concur.