No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.,

Plaintiffs-Appellees

v.

SUNCOR ENERGY (U.S.A.) INC., ET AL.,

Defendants-Appellants

On Appeal from the United States District Court for the District of Colorado, No. 1:18-CV-01672-WJM-SKC (Hon. William J. Martinez)

COLORADO COMMUNITIES FOR CLIMATE ACTION'S MOTION TO PARTICIPATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

W. Eric Pilsk
Sarah M. Keane
Sara V. Mogharabi
Samantha R. Caravello
KAPLAN KIRSCH & ROCKWELL LLP
1675 Broadway, Suite 2300
Denver, CO 80202
(303) 825-7000
epilsk@kaplankirsch.com
Counsel for Amicus Curiae *Colorado Communities for Climate Action*

Pursuant to Fed. R. App. P. 29(a)(3), Colorado Communities for Climate Action ("CC4CA") respectfully moves to participate as *amicus curiae* in support of Plaintiffs-Appellees in the above-captioned case.

Plaintiffs-Appellees consent to CC4CA's participation as *amicus curiae*. Defendant-Appellant Exxon Mobil Corporation also consents to CC4CA's participation. CC4CA has been unable to ascertain the position of Defendants-Appellants Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., and Suncor Energy Inc. despite attempts to contact counsel, necessitating the filing of this motion.

INTERESTS OF PROPOSED *AMICUS*

CC4CA is a coalition of local governments in Colorado, formed in Spring 2015 to advocate for state and federal policies to protect Colorado's climate for future generations. CC4CA currently has thirty-one member governments, including twenty-five cities and towns and six counties spanning Colorado. CC4CA's member jurisdictions currently represent nearly one-seventh of the state's population.

Many of CC4CA's members have adopted numerous climate and sustainability-oriented programs, including efforts to increase waste reduction, water conservation, and energy efficiency. CC4CA's

members, however, recognize that the effectiveness of local efforts to address climate change often hinges on actions and policies beyond their control, despite the fact that the impacts of climate change are often felt most immediately and intensely at the local level. These realities led to the creation of CC4CA and also inform its interest in this case. CC4CA and its members have grappled with and continue to grapple with serious, local impacts from climate change caused by greenhouse gas emissions from entities like Defendants.

CC4CA is alarmed by the Defendants' misconstruction of long-standing, limiting principles of removal jurisdiction, their advocacy for a sweeping, unfettered approach to federal common law, and their distorted view of federalism. If this Court were to overturn the district court's order, CC4CA would be deprived of important state law causes of action and remedies upon which CC4CA and its members depend to address the local impacts of climate change.

CC4CA's PROPOSED *AMICUS* BRIEF WILL ASSIST THE COURT AND PROVIDE RELEVANT INFORMATION

CC4CA's proposed *amicus* brief is desirable and asserts matters relevant to this Court's disposition of the case. CC4CA's proposed brief will illustrate how the kinds of injuries for which Plaintiffs seek

compensation are inherently local impacts of climate change. CC4CA will explain how Defendants' arguments for removal would disrupt the federal-state balance and deny local governments the opportunity to pursue state law claims to address local environmental harms. The proposed brief will detail how Plaintiffs' state law claims – both statutory and common law – are precisely the types of claims the Colorado legislature and Colorado courts saw fit to provide for plaintiffs in the state, and how Defendants should not be allowed to displace that reasoned judgment by asserting a vague federal interest in the case. Finally, the proposed brief will demonstrate how other courts have rejected removal attempts in analogous situations. In addition to being desirable and relevant to the Court's disposition of this matter, the proposed *amicus* brief will provide valuable additional perspective from Colorado local governments, whose interests and rights are at the core of this case.

CONCLUSION

For the foregoing reasons, CC4CA respectfully requests that this Court grant its motion to participate as *amicus curiae* in support of Appellees.

Dated: January 6, 2020

Respectfully submitted,

/s/ *W. Eric Pilsk*
W. Eric Pilsk
Sarah M. Keane
Sara V. Mogharabi
Samantha R. Caravello
KAPLAN KIRSCH & ROCKWELL LLP
1675 Broadway, Suite 2300
Denver, CO 80202
(303) 825-7000
epilsk@kaplankirsch.com
Counsel for Amicus Curiae
Colorado Communities for Climate Action

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font.

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 529 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ *W. Eric Pilsk*
W. ERIC PILSK

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, *amicus curiae* Colorado Communities for Climate Action ("CC4CA") discloses:

CC4CA is a Colorado non-profit corporation, organized as an association of political subdivisions across the state that advocates for stronger state and federal climate policy. CC4CA is not a publicly held corporation and has no any outstanding stock shares or other securities in the hands of the public. CC4CA does not have any parent corporation, and no publicly held corporation has a ten percent or greater ownership interest in CC4CA.

CERTIFICATE OF DIGITAL SUBMISSION, ANTIVIRUS SCAN, AND PRIVACY REDACTIONS

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual, that the attached Motion to Participate as *Amicus Curiae* of Colorado Communities for Climate Action in Support of Appellees and Affirmance, as submitted in digital form via the Court's electronic filing system, has been scanned for viruses using CB Defense System 64 bit, manufactured by Carbon Black Inc. (version 3.4.0.1091, last updated December 27, 2019), and, according to that program, is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically, and that all required privacy redactions have been made.

Dated: January 6, 2020

/s/ *W. Eric Pilsk*
W. ERIC PILSK

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2020, I electronically filed the foregoing brief, together with its addendum, with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *W. Eric Pilsk*
W. ERIC PILSK

No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.,

Plaintiffs-Appellees

v.

SUNCOR ENERGY (U.S.A.) INC., ET AL.,

Defendants-Appellants

On Appeal from the United States District Court for the District of Colorado, No. 1:18-CV-01672-WJM-SKC (Hon. William J. Martinez)

BRIEF OF *AMICUS CURIAE* COLORADO COMMUNITIES FOR CLIMATE ACTION IN SUPPORT OF APPELLEES AND AFFIRMANCE

W. Eric Pilsk
Sarah M. Keane
Sara V. Mogharabi
Samantha R. Caravello
KAPLAN KIRSCH & ROCKWELL LLP
1675 Broadway, Suite 2300
Denver, CO 80202
(303) 825-7000
epilsk@kaplankirsch.com
Counsel for Amicus Curiae *Colorado Communities for Climate Action*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, *amicus curiae* Colorado Communities for Climate Action ("CC4CA") discloses:

CC4CA is a Colorado non-profit corporation, organized as an association of political subdivisions across the state that advocates for stronger state and federal climate policy. CC4CA is not a publicly held corporation and has no outstanding stock shares or other securities in the hands of the public. CC4CA does not have any parent corporation, and no publicly held corporation has a ten percent or greater ownership interest in CC4CA.

RULE 29 STATEMENT

As required by Fed. R. App. P. 29(a)(4)(E), Colorado Communities for Climate Action ("CC4CA") states that no party's counsel authored this brief in whole or in part. No party or its counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amicus curiae*, including its members and counsel, contributed money that was intended to fund preparing or submitting this brief. CC4CA notes, however, that Boulder County, San Miguel County, and the City of Boulder are all members of CC4CA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

GLOSSARY ix

STATEMENT REGARDING ADDENDUM OF LEGAL AUTHORITIES x

INTRODUCTION 1

AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE 1

ARGUMENT 3

I. THE IMPACTS OF CLIMATE CHANGE ON LOCAL GOVERNMENTS 6

II. DEFENDANTS' APPROACH TO REMOVAL HAS NO BASIS IN CASE LAW AND WOULD INTERFERE WITH ESTABLISHED PRINCIPLES OF FEDERALISM 11

III. STATE LAW CLAIMS PROVIDE PLAINTIFFS WITH ESSENTIAL TOOLS TO REDRESS THE LOCAL HARM DEFENDANTS HAVE CAUSED 16

A. Colorado's Public Nuisance Statute 18

B. Colorado Common Law Tort Claims 21

C. The Colorado Consumer Protection Act 24

IV. STATE CAUSES OF ACTION ARE NOT DISPLACED MERELY BECAUSE OF FEDERAL REGULATION IN THAT AREA 26

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

American Electric Power Co. v. Connecticut,
564 U.S. 410 (2011) 13, 14

Antolovich v. Brown Group Retail, Inc.,
183 P.3d 582 (Colo. App. 2007) 23

Aztec Minerals Corp. v. Romer,
940 P.2d 1025 (Colo. App. 1996) 20

Burgess v. M/V Tamano,
370 F. Supp. 247 (D. Me. 1973) 21

Carpenter v. Wichita Falls Independent School District,
44 F.3d 362 (5th Cir. 1995) 12

Caterpillar Inc. v. Williams,
482 U.S. 386 (1987) 12, 16

Cipollone v. Liggett Group,
505 U.S. 504 (1992) 26

City of Denver v. Mullen,
3 P. 693 (Colo. 1884) 19

Colorado Division of Wildlife v. Cox,
843 P.2d 662 (Colo. App. 1992) 20

County of Kern v. Purdue Pharma, L.P.,
No. 1:19cv-00557-LJO-JLT,
2019 U.S. Dist. LEXIS 122709 (E.D. Cal. July 23, 2019) 28

County of Santa Clara v. Atlantic Richfield Co.,
40 Cal. Rptr. 3d 313 (2006) 17

Department of Health v. The Mill,
887 P.2d 993 (Colo. 1994) 20

Dinwiddie Cty. v. Purdue Pharma, L.P., No. 3:19-cv-242,
2019 U.S. Dist. LEXIS 102294 (E.D. Va. June 18, 2019) 28

Firstenberg v. City of Santa Fe,
696 F.3d 1018 (10th Cir. 2012) 12

Hoery v. United States,
64 P.3d 214 (Colo. 2003) 22

Ileto v. Glock Inc.,
349 F.3d 1191 (9th Cir. 2003) 26

Illinois v. Milwaukee,
406 U.S. 91 (1972) 13

*In re Methyl Tertiary Butyl Ether ("MTBE")
Products Liability Litigation*, 725 F.3d 65 (2d Cir. 2013) 27

Jackson v. Purdue Pharma Co.,
No. 6:02-cv-1428-Orl-19KRS, 2003 U.S. Dist. LEXIS 6998
(M.D. Fla. Apr. 10, 2003) 29

Jackson v. Unocal Corp.,
262 P.3d 874 (Colo. 2011) 23

Lawton v. Steele,
152 U.S. 133 (1894) 18

Lehman Bros. v. Schein, 416 U.S. 386 (1974) 12

May Department Stores Co. v. State ex rel. Woodard,
863 P.2d 967 (Colo. 1993) 25

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 30

Miller v. Carnation Co.,
516 P.2d 661 (Colo. App. 1973) 22

*Montana v. Purdue Pharma (In re National
Prescription Opiate Litigation)*, No. 1:18-OP-45604,
2018 U.S. Dist. LEXIS 143589 (N.D. Ohio Aug. 23, 2018) 28

Native Village of Kivalina v. ExxonMobil Corp.,
663 F. Supp. 2d 863 (N.D. Cal. 2009) 14

Native Village of Kivalina v. ExxonMobil Corp.,
696 F.3d 849 (9th Cir. 2012) 14

New Mexico ex rel. Balderas v. Purdue Pharma L.P.,
323 F. Supp. 3d 1242 (D.N.M. 2018) 28

Ohler v. Purdue Pharma, L.P., Civil Action
No. 01-3061 Section "N" (2), 2002 U.S. Dist. LEXIS 2368
(E.D. La. Jan. 22, 2002) 29

People v. Hupp,
123 P. 651 (1912) 18

People v. Truckee Lumber Co.,
48 P. 374 (Cal. 1897) 21

Pino v. United States,
507 F.3d 1233 (10th Cir. 2007) 12, 18

Platte & Denver Ditch Co. v. Anderson,
6 P. 515 (Colo. 1884) 19

Pritchett v. Office Depot, Inc.,
420 F.3d 1090 (10th Cir. 2005) 11

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 31

Seigle v. Bromley,
124 P. 191 (Colo. App. 1912) 19

Showpiece Homes Corp. v. Assurance Co. of America,
38 P.3d 47 (Colo. 2001) 24

Slide Mines, Inc. v. Left Hand Ditch Co.,
77 P.2d 125 (Colo. 1938) 20

Staley v. Sagel,
841 P.2d 379 (Colo. App. 1992) 19

Western Food Plan, Inc. v. District Court,
598 P.2d 1038 (Colo. 1979) 24

Wyeth v. Levine,
555 U.S. 555 (2009) 30

Statutes

Colo. Rev. Stat. §§ 6-1-101 to -1214 (2019) 24

Colo. Rev. Stat. § 6-1-105(1)(e) (2019) 24

Colo. Rev. Stat. § 6-1-105(1)(u) (2019) 24

Colo. Rev. Stat. §§ 16-13-301 to -316 (2019) 18

Colo. Rev. Stat. § 16-13-302(1) (2019) 19

Colo. Rev. Stat. § 16-13-305(1)(e) (2019) 20

Restatements of Law

Restatement (Second) of Torts § 158 (1965) 22

Other Authorities

2018 UPDATED COLORADO CLIMATE PLAN (2018) 9, 10

HEADWATERS ECONOMICS, THE FULL COMMUNITY COSTS OF WILDFIRE (2018) 8

JASON FUNK ET AL., UNION OF CONCERNED SCIENTISTS & ROCKY MOUNTAIN CLIMATE ORG., ROCKY MOUNTAIN FORESTS AT RISK (2014) 8

Leah Burrows, *The Complex Relationship Between Heat and Ozone*, THE HARVARD GAZETTE (Apr. 21, 2016) 9

NAT. RES. DEF. COUNCIL, IB: 18-06-B, CLIMATE CHANGE AND HEALTH IN COLORADO (2018) 10

U.S. EPA, EPA-430-R-15-001, CLIMATE CHANGE IN THE UNITED STATES: BENEFITS OF GLOBAL ACTION (2015) 9

U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES (2018)..... 7, 8, 10

GLOSSARY

CC4CA	Colorado Communities for Climate Action
CCPA	Colorado Consumer Protection Act
MTBE	Methyl Tertiary Butyl Ether
PCBs	Polychlorinated Biphenyls

STATEMENT REGARDING ADDENDUM OF LEGAL AUTHORITIES

Pertinent statutes and other authorities are set forth in an addendum attached to this brief.

INTRODUCTION

Plaintiffs filed this suit in state court seeking relief for local injuries based on state law causes of action. The district court correctly concluded, based on the face of Plaintiffs' well-pleaded complaint, that this case belongs in state court. Now, Defendants ask this Court to disregard the well-pleaded complaint rule and find some unidentified federal rule of decision based on Defendants' characterization of Plaintiffs' complaint.

As Colorado Communities for Climate Action ("CC4CA") explains in this brief, Defendants' request flies in the face of established principles of federal court jurisdiction. Finding cause for removal here would undermine settled principles of federalism and state authority to provide remedies for local harms. CC4CA agrees with Plaintiffs that this case belongs in state court and respectfully asks this Court to affirm the district court's remand order.

AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

CC4CA is a coalition of local governments in Colorado, formed in Spring 2015 to advocate for state and federal policies to protect Colorado's climate for future generations. CC4CA currently has 31

member governments, including 25 cities and towns and 6 counties spanning Colorado. CC4CA's member jurisdictions currently represent nearly one-seventh of the state's population.

Many of CC4CA's members have adopted their own climate and sustainability-oriented goals and programs. CC4CA's members facilitate investments in solar energy generation by their residents and businesses, and directly invest in renewable energy for local operations. CC4CA's members invest in bike lanes, mass transit, and other programs to reduce vehicle emissions. They support solid waste reduction, water conservation, and energy efficiency efforts, all of which can significantly reduce greenhouse gas emissions. And they invest in high-efficiency conventional vehicles as well as electric vehicles and related charging stations.

CC4CA's members, however, recognize that the effectiveness of local efforts to address climate change often hinges on actions and policies beyond their control. Meanwhile, the impacts of climate change are often felt most immediately and intensely at the local level. These realities led to the creation of CC4CA, and inform its interest in this case. Faced with the daunting challenge and costs of climate change,

CC4CA's member jurisdictions must remain empowered to use their traditional police powers and draw on state law remedies to prevent and mitigate actions that harm their communities.

Defendant ExxonMobil Corporation has consented to the filing of this brief, but the Suncor Defendants did not respond to CC4CA's request for consent, nor did the Suncor Defendants respond to CC4CA's Joint Unopposed Motion of Prospective *Amici Curiae* for an Extension of Time to File Briefs as *Amicus Curiae* in Support of Plaintiffs-Appellees. CC4CA has filed a motion for leave to file this *amicus* brief pursuant to Fed. R. App. P. 29(a)(2).

ARGUMENT

Defendants' arguments for removal rest on the notion that because Plaintiffs' claims relate to climate change, Plaintiffs' claims necessarily depend on unpled and inchoate federal common law to such a great extent that Plaintiffs' state law claims are transformed into federal law claims that can be removed to federal court. As Plaintiffs have explained in detail in their brief, Defendants' arguments misconstrue well-established principles of removal jurisdiction and the limited scope of federal common law.

More fundamentally, Defendants' arguments obliterate the critical divisions of responsibility our federal system establishes between state and federal government. Taken to their logical end, Defendants' arguments would render state law inoperative any time a state law claim in any way implicated an issue for which a defendant could articulate an important national interest, and further would inexplicably imbue federal courts with the authority to develop and apply federal common law to address state law claims about which Congress has not spoken. The result would not only deprive Plaintiffs and other local governments like CC4CA's member jurisdictions of traditional and critical tools to protect the health and welfare of their constituents, but also would strip state governments of the authority to develop and apply state law to address matters of local health, safety, and welfare. Our federal system has zealously and jealously preserved state authority to address local health, safety, and welfare issues, particularly in the absence of preemptive federal laws, and such authority cannot be brushed aside as Defendants claim.

To help the Court understand the context of this case, and the important role that state law claims play in addressing the local

impacts of Defendants' conduct, CC4CA will make four complementary points in this brief:

First, that the kinds of injuries for which Plaintiffs seek compensation are inherently local impacts of climate change.

Second, that Defendants' arguments for removal would interfere with the federal-state balance and allow judge-made law to displace state law without congressional authorization.

Third, that the state law claims Plaintiffs assert are intended to address precisely the injuries Plaintiffs are suffering as a result of Defendants' conduct.

Fourth, that federal courts in a wide range of analogous cases have recognized that state law claims seeking individual compensation for nationwide and even worldwide conduct are not removable to federal court, even when the conduct raises issues of national interest and is the subject of federal regulation.

This Court should reject Defendants' attempts to rewrite the law of removal, deprive Plaintiffs of their chosen forum, and eviscerate Plaintiffs' access to important state law causes of action by affirming

the district court's well-reasoned decision remanding this case to state court.

I. THE IMPACTS OF CLIMATE CHANGE ON LOCAL GOVERNMENTS

Colorado's communities are already experiencing consequential effects of climate change that threaten the health, lives, and livelihoods of their citizens, and may forever change both Colorado's economic vitality and its natural beauty. *See* Appellants' Appendix ("App.") 106–18. Local governments bear a substantial portion of the costs of this changing climate, as described in detail in Plaintiffs' complaint. App. 123–46.

CC4CA's members are among those entities experiencing these effects, which are far-reaching and touch on almost every aspect of daily activity. The effects of climate change are placing enormous strains on local governments as they must adapt, construct, and modify infrastructure, reallocate internal resources, and adopt new programs and initiatives in order to meet the challenges of climate change. Some of the more important and impactful changes CC4CA's members are already experiencing include:

Less Snow and Water, and More Drought. A warming climate will continue to decrease Colorado snowpack and its water content, causing earlier peak snow-fed streamflow, and increases in the proportion of rain to snow.[1] Climate change exacerbates hydrological drought and sharply increases the risk of megadroughts—dry periods lasting ten years or more.[2] Reduced snowpack and increased drought threaten communities' access to reliable, clean water supplies, hurt the local economy by harming the agriculture and ski industries, and threaten ecosystems.

More Frequent and Intense Forest Fires. Rising temperatures, intensified drought, and reduced snowpack have left forests dryer and more vulnerable to fire.[3] The area burned by wildfire in the western

---

[1] U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 1112 (2018) [hereinafter FOURTH NATIONAL CLIMATE ASSESSMENT], https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf.

[2] *Id.*

[3] *Id.* at 1115–16.

United States from 1984 to 2015 is estimated to be twice what would have burned absent climate change.[4] The burden of larger and more frequent fires[5] will largely be borne by local governments, who often foot the bill for long-term expenses after a forest fire.[6] For example, local governments may fund post-fire flooding and landslide mitigation, repairs to damaged infrastructure, and additional water treatment to deal with soil erosion and other contaminants in water supplies.[7]

Vulnerable Infrastructure. Higher temperatures and more intense storms will dramatically increase local governments' long-term infrastructure and operational costs. Stronger storms bringing greater rainfall may overload urban drainage systems and cause local flooding;

---

[4] *Id.* at 1115 fig.25.4.

[5] JASON FUNK ET AL., UNION OF CONCERNED SCIENTISTS & ROCKY MOUNTAIN CLIMATE ORG., ROCKY MOUNTAIN FORESTS AT RISK 17 (2014), https://www.ucsusa.org/sites/default/files/attach/2014/09/Rocky-Mountain-Forests-at-Risk-Full-Report.pdf.

[6] HEADWATERS ECONOMICS, THE FULL COMMUNITY COSTS OF WILDFIRE 28–29 (2018), https://headwaterseconomics.org/wp-content/uploads/full-wildfire-costs-report.pdf.

[7] *See id.*

higher temperatures will cause asphalt on roads to degrade more quickly, requiring more frequent maintenance and repairs; and bridges may suffer damage that requires adaptation and repair.[8] Buildings may also require adaptation to add cooling capacity, and energy costs will increase due to cooling needs.[9]

Public Health Threats. Higher temperatures will increase heat-related sicknesses and fatalities, and climate change will exacerbate air pollution, with severe health consequences. Higher temperatures lead to increased production of ozone, a respiratory irritant that is especially dangerous for sensitive populations including children, older adults, and those suffering from asthma.[10] Exposure to airborne particulate

---

[8] 2018 UPDATED COLORADO CLIMATE PLAN 49 (2018) [hereinafter COLORADO CLIMATE PLAN], https://dnrweblink.state.co.us/cwcb/0/doc/205387/Electronic.aspx?searchid=4fdc6e80-96ca-44b1-911c-57fe7793e3f6 (listing numerous impacts to infrastructure to be expected from climate change).

[9] U.S. EPA, EPA-430-R-15-001, CLIMATE CHANGE IN THE UNITED STATES: BENEFITS OF GLOBAL ACTION 46 (2015), https://www.epa.gov/sites/production/files/2015-06/documents/cirareport.pdf.

[10] Leah Burrows, *The Complex Relationship Between Heat and Ozone*, THE HARVARD GAZETTE (Apr. 21, 2016),

matter leads to similar respiratory and cardiovascular effects, and concentrations of such pollutants are likely to increase in a changing climate.[11] Health may also suffer due to more frequent incidences of extreme rainfall events, which may lead to the release of untreated sewage, contaminating local water bodies and drinking water supplies.[12] When rising temperatures, increased air pollution, and water quality issues lead to medical problems, communities are impacted by a loss of productivity and increased need for health care, which may be subsidized by local governments. Climate change is also likely to have both short- and long-term effects on vector-borne disease transmission and infection patterns, such as the potential for increased West Nile virus and other pathogens in Colorado communities.[13]

---

https://news.harvard.edu/gazette/story/2016/04/the-complex-relationship-between-heat-and-ozone/.

[11] COLORADO CLIMATE PLAN, *supra*, at 20–21.

[12] NAT. RES. DEF. COUNCIL, IB: 18-06-B, CLIMATE CHANGE AND HEALTH IN COLORADO 4 (2018), https://www.nrdc.org/sites/default/files/climate-change-health-impacts-colorado-ib.pdf.

[13] FOURTH NATIONAL CLIMATE ASSESSMENT, *supra*, at 13.

These impacts are just a small subset of those affecting local governments due to Defendants' production, promotion, and sale of fossil fuel products. In our federal system of government, it is presumed that redress for such local injuries is a matter of state law to be addressed in state court. CC4CA submits this brief to assure that its members and other local governments may continue to choose the law and forum to seek redress for local harms imposed by the conduct of Defendants and other similar entities.

II. DEFENDANTS' APPROACH TO REMOVAL HAS NO BASIS IN CASE LAW AND WOULD INTERFERE WITH ESTABLISHED PRINCIPLES OF FEDERALISM

Defendants' arguments are fundamentally inconsistent with the long-established principles of federalism that animate, and limit, removal jurisdiction. Removal of this case would undermine those principles and threaten the authority of states to provide remedies for harms suffered by their constituents.

Removal jurisdiction is to be "narrowly construed in light of [federal courts'] role as limited tribunals" and the carefully calibrated federalist balance. *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094–95 (10th Cir. 2005) (internal citations omitted). "[B]ecause the effect of

removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (internal citations omitted). Accordingly, the mere reference to a federal source of law is not "sufficient to bring the case into federal court" where the "pith of the complaint" is a state-law cause of action. *Firstenberg v. City of Santa Fe*, 696 F.3d 1018, 1025 (10th Cir. 2012). Fundamentally, the federal character of our judicial system means "that the judicial policy of a state should be decided when possible by state, not federal, courts." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

Nevertheless, Defendants attempt to justify removal by arguing that this case is a "transboundary pollution" suit that is governed by and arises under federal common law. This argument rests on a deeply flawed reading of Plaintiffs' complaint and of the case law, including the cases on which Defendants themselves rely.

Plaintiffs' complaint—the touchstone of the removal analysis under the well-pleaded complaint rule, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)—asserts *only* state law claims, none of which

present a federal question, as the district court correctly held, App. 213. The complaint seeks damages and related equitable relief, but does not seek to impose injunctive relief to control greenhouse gas emissions or limit fossil fuel production.

Thus, this case is not like *Illinois v. Milwaukee*, 406 U.S. 91 (1972), or *American Electric Power Co. v. Connecticut ("AEP")*, 564 U.S. 410 (2011), relied upon by Defendants. In those cases, states asserted federal common law claims in federal court seeking to reduce or eliminate pollution originating in other states. Plaintiffs in this case bring state law claims in state court seeking compensation for injuries; Plaintiffs do *not* seek to reduce or control *any* emissions, let alone out-of-state emissions.

Although Defendants cherry-pick language from *AEP* in an attempt to make their argument, they ignore that the Supreme Court in that case expressly preserved the viability of state law claims in state court, even as it dismissed federal common law claims. 564 U.S. at 429. They also ignore that the Supreme Court held that any federal common law nuisance action that may have existed to govern the control of

greenhouse gas emissions was displaced by the Clean Air Act. *Id.* at 424.

Defendants' reliance on *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), is also misplaced. In that case, the Ninth Circuit, applying *AEP*, held that the Clean Air Act has also displaced federal common law claims for damages. *Id.* at 857–58. Although the Ninth Circuit did not address state law claims, the district court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims after dismissing their federal claims, "without prejudice to their presentation in a state court action." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882–83 (N.D. Cal. 2009).

Thus, Defendants' arguments rest on the illogical and unsustainable assertion that Defendants can remove this case because it is a transboundary pollution case governed by federal common law *even though* this case does not seek to enjoin or limit interstate pollution and the Supreme Court has held that the Clean Air Act displaces federal common law in that area. Defendants' arguments also suggest that in the absence of any federal statute applying to

Defendants' conduct at issue here, courts somehow have the authority to fashion federal common law and preempt state law just because Defendants declare that there is a federal interest in addressing climate change. As Plaintiffs explain in their brief, the creation of federal common law is justified only in rare circumstances that are not present here. Br. of Appellees 31–34.

Thus, Defendants' arguments reduce to the preposterous proposition that the *absence* of a preemptive statute and the *absence* of federal common law somehow provide a sufficient expression of federal interest to convert Plaintiffs' state law claims into federal claims that can be removed. There is no precedent, or principled basis, to create removal jurisdiction *ex nihilo*. Such a result, moreover, would mean that removing defendants and federal judges alone would determine (1) what issues are of such strong federal interest that the creation of federal law is necessary, and (2) what the federal law to address that issue should be. That result is simply incompatible with our federal system in which states and Congress exercise legislative authority, not courts, as evidenced by the unbroken line of precedent limiting the

scope of federal common law and the scope of removal jurisdiction, *see supra* pp. 11–12.

As described below, *infra Part III*, Colorado has a long tradition of using state causes of action to address environmental and public health harms. Defendants essentially ask this Court to jettison well-established state law and replace it with yet-to-be-created federal common law in the absence of any congressional direction to do so. Such a rule would upend our federal system of government, would overrule the maxim that "the plaintiff [is] the master of the claim," *Caterpillar*, 482 U.S. at 392, and would deprive plaintiffs of their chosen forum and chosen law.

III. STATE LAW CLAIMS PROVIDE PLAINTIFFS WITH ESSENTIAL TOOLS TO REDRESS THE LOCAL HARM DEFENDANTS HAVE CAUSED

As Plaintiffs outline in their complaint, climate change and its impacts are the direct result of deliberate and intentional conduct by Defendants to increase fossil fuel production and use with the full knowledge that increased fossil fuel use would lead to global climate change and impose diverse and devastating impacts on localities. Although CC4CA and its members seek to prevent further climate

change through international cooperation, national and state legislation, and local efforts to reduce carbon emissions, CC4CA members must also take action to address the impacts of climate change that have already occurred within their respective jurisdictions.

Public nuisance and other state laws allow local governments to seek relief for community-wide harms that might otherwise not be capable of redress by individual plaintiffs. *See, e.g.*, *Cty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 328–29 (2006) (explaining that, unlike other tort law claims, public nuisance allows a public entity itself to act on behalf of the community that has been subjected to a widespread hazard). Moreover, local governments themselves face personal and unique harms as a result of Defendants' conduct, which are also redressable under state law. Further, Colorado courts have over time defined the contours of common law doctrines like private nuisance, trespass, unjust enrichment, and civil conspiracy as additional avenues for redress to which Colorado plaintiffs are entitled.

Although Defendants seek to portray this case as a broadbrush attack on climate change in general, the legal claims Plaintiffs actually assert focus on specific conduct by Defendants and specific harms

imposed on Plaintiffs, and are based on state laws—both statutory and common law—designed to remedy exactly those kinds of harms caused by that kind of conduct. As the Court considers its jurisdiction over this case, it is important to recognize that the state law claims that Plaintiffs invoke are intended to provide a remedy for pollution that imposes particular harms in localities and a remedy for the kind of deceitful commercial conduct at issue here. Under controlling principles of removal jurisdiction, the Court should allow state courts to employ state law to address those local impacts. *See Pino*, 507 F.3d at 1236.

A. Colorado's Public Nuisance Statute

Public nuisance law in Colorado, as in other jurisdictions, plays a critical role in redressing communal harm, including pollution and other harm to the environment, and represents an important exercise of the state's police power to safeguard the public health and safety. *See People v. Hupp*, 123 P. 651, 653 (1912) (quoting *Lawton v. Steele*, 152 U.S. 133 (1894)). The Colorado General Assembly has recognized the important role public nuisance doctrine plays and has codified the doctrine. *See* Colo. Rev. Stat. §§ 16-13-301 to -316 (2019). Colorado's

public nuisance statute states: "It is the policy of the general assembly that every public nuisance shall be restrained, prevented, abated, and perpetually enjoined." *Id.* § 16-13-302(1). Localities are authorized to sue to "restrain, prevent, abate, and perpetually enjoin any such public nuisance" in proceedings that are to be "remedial and equitable in nature." *Id.* Although the statute focuses on abatement, it has long been recognized that nuisance claims, both public and private, allow for the recovery of damages as well. *See Platte & Denver Ditch Co. v. Anderson*, 6 P. 515, 517 (Colo. 1884); *Seigle v. Bromley*, 124 P. 191, 193–94 (Colo. App. 1912) ("A nuisance may be at the same time both a public and a private nuisance, and . . . may be proceeded against either by indictment or by the individual specifically annoyed, by injunction or in an action for damage." (citing *City of Denver v. Mullen*, 3 P. 693 (Colo. 1884))); *Staley v. Sagel*, 841 P.2d 379, 381, 382 (Colo. App. 1992) (affirming monetary damages on a private nuisance claim for property impacts caused by the dust, smell, and waste disposal from a neighboring hog farm).

Colorado's public nuisance law sets forth categories of activities that the legislature has defined to be public nuisances, including the

"unlawful pollution or contamination of any surface or subsurface waters in this state, or of the air, or any water, substance, or material intended for human consumption." Colo. Rev. Stat. § 16-13-305(1)(e). Following these principles, a public nuisance may exist in Colorado where property owners have engaged in or threatened to engage in activities that would cause pollution that would harm the community. *See, e.g.*, *Dep't of Health v. The Mill*, 887 P.2d 993, 1001–02 (Colo. 1994) (explaining that release of uranium would constitute public nuisance under Colorado law); *Slide Mines, Inc. v. Left Hand Ditch Co.*, 77 P.2d 125, 126–27 (Colo. 1938) (affirming injunction prohibiting mine owner from using property in a manner that would pollute stream); *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032 (Colo. App. 1996) (stating that nuisance law would prohibit the use of property in a way that would degrade the environment and pose a hazard to public health).

More broadly, Colorado courts have held that a public nuisance exists where a defendant's actions cause damage to ecosystems. In *Colorado Division of Wildlife v. Cox*, the Colorado Court of Appeals affirmed a ruling that Cox's operation of an exotic wildlife ranch constituted a public nuisance because escaping exotic animals disrupted

native species, thereby degrading biodiversity. 843 P.2d 662, 664–65 (Colo. App. 1992). In other jurisdictions, too, courts have found a public nuisance where a defendant's conduct significantly interferes with conservation. For example, in the aquatic context, courts have found that a public right exists to preserve fish or other organisms. *See People v. Truckee Lumber Co.*, 48 P. 374, 374–75 (Cal. 1897) (holding that a lumber company's discharge of refuse into the Truckee River violated a public right to healthy fish stocks); *Burgess v. M/V Tamano*, 370 F. Supp. 247, 249–50 (D. Me. 1973) (allowing fisherman to pursue claims for monetary damages resulting from interference with public right to fish).

B. Colorado Common Law Tort Claims

The other common law claims asserted by Plaintiffs also provide remedies for environmental and similar harms imposed by others. Private nuisance is akin to public nuisance, though not codified in statute. While a public nuisance is based on an invasion of public rights —rights common to all members of the public—a private nuisance is based on the substantial and unreasonable interference with the plaintiff's use of his or her property. *Hoery v. United States*, 64 P.3d

214, 217 & n.5 (Colo. 2003). As discussed above, Colorado courts have routinely applied nuisance doctrine in cases involving environmental harms to property. The same is true for trespass. A trespass occurs "when an actor intentionally enters land possessed by someone else, or when an actor causes something else to enter the land." *Id.* at 217. "A landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property." *Miller v. Carnation Co.*, 516 P.2d 661, 664 (Colo. App. 1973); Restatement (Second) of Torts § 158 (1965). The Colorado Supreme Court has broadly held that "the ongoing presence and continued migration of toxic chemicals originally emanating from [a site] constitute[s] a continuing trespass." *Hoery*, 64 P.3d at 221. Additionally, the "failure of the [polluter] to remove the pollution from [the contaminated] property which it wrongfully placed there constitutes a continuing property invasion for the entire time the contamination remains." *Id.* at 222. These principles encompass Defendants' ongoing tortious conduct here, and provide Plaintiffs with state law causes of action for the harms Defendants have caused and

continue to cause to Plaintiffs' property—private nuisance and continuing trespass.

Colorado plaintiffs may also avail themselves of the state's common law claim of unjust enrichment for environmental harms or injuries. *See, e.g.*, *Jackson v. Unocal Corp.*, 262 P.3d 874, 877–78 (Colo. 2011) (plaintiff landowner brought a class action suit alleging defendant corporation caused asbestos contamination from removal of an oil pipeline and asserted related unjust enrichment claim); *Antolovich v. Brown Grp. Retail, Inc.*, 183 P.3d 582, 590 (Colo. App. 2007) (homeowners sued defendants alleging they had released chlorinated solvents and other toxic chemicals during operations at a nearby property and asserted a claim of unjust enrichment). Like the claims discussed above, unjust enrichment provides injured parties with a way to recoup monetary losses for harm caused by others' misconduct. A central tenet of Plaintiffs' claims is that Defendants have unfairly benefited from the manufacture, distribution, and/or sale of fossil fuels, causing harms that were borne by others, including the many injuries inflicted upon the communities that Plaintiffs represent. This is

precisely the type of scenario Colorado's unjust enrichment cause of action is designed to remedy.

C. The Colorado Consumer Protection Act

In addition to nuisance and common law remedies, Plaintiffs have asserted a claim under the Colorado Consumer Protection Act ("CCPA"), Colo. Rev. Stat. §§ 6-1-101 to -1214 (2019), which prohibits a person from engaging in deceptive trade practices, including making false representations as to the characteristics, ingredients, uses, or benefits of their products or failing to disclose material information regarding their products or services. *See* Colo. Rev. Stat. § 6-1-105(1)(e), (u) (2019). The law was enacted to provide "prompt, economical, and readily available remedies against consumer fraud." *W. Food Plan, Inc. v. Dist. Court*, 598 P.2d 1038, 1041 (Colo. 1979). The CCPA's reach is sweeping, and constantly evolving. *See Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 53 (Colo. 2001) ("[I]n determining whether conduct falls within the purview of the CCPA, it should ordinarily be assumed that the CCPA applies to the conduct . . . because of the strong and sweeping remedial purposes of the CCPA."); *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 973 n.10 (Colo.

1993) (noting the "broad remedial relief and deterrence purposes" of the CCPA while holding that no actual injury to a customer is required in order for a court to award a civil penalty under the act).

Here, Plaintiffs allege Defendants have made misrepresentations and false representations, and have failed to disclose significant information about the true costs and harms of their goods and services—precisely the type of claims covered by the CCPA. App. 165–72. While the other state causes of action alleged by Plaintiffs may provide adequate redress and remedies, only this statutory claim (and, to some extent, the related state common law claim of civil conspiracy) purposefully punish the deceitful and fraudulent aspects of Defendants' behavior. This is significant. If this Court were to find in favor of Defendants' preemption arguments, the Court would be in effect displacing the Colorado legislature's intent that its citizens have at their disposal specific statutory claims designed to root out dishonest business dealings that harm Colorado consumers. This Court should not allow Defendants to avoid the consequences of their unlawful and dishonest business practices under state law.

IV. STATE CAUSES OF ACTION ARE NOT DISPLACED MERELY BECAUSE OF FEDERAL REGULATION IN THAT AREA

For further proof that Defendants' efforts to leverage a vague federal interest into the basis for removal are based on a fundamentally flawed theory, the Court need look no further than the numerous cases that have already reached this conclusion in analogous situations. Courts have routinely recognized that state common law causes of action provide important avenues of redress for injured individuals and communities even in cases involving interstate or nationwide conduct or cases that touch on areas of law that are regulated at the federal level. These decisions include cases involving the sale of guns, tobacco, pharmaceuticals, and environmental harms caused by products like asbestos, Methyl Tertiary Butyl Ether ("MTBE"), lead paint, and polychlorinated biphenyls ("PCBs"). *See Ileto v. Glock Inc.*, 349 F.3d 1191, 1214–15 (9th Cir. 2003) (concluding that plaintiffs could pursue state law public nuisance claim against gun manufacturers despite federal regulation of firearms); *see also Cipollone v. Liggett Grp.*, 505 U.S. 504, 526–27, 529, 530 (1992) (ruling that state law claims for fraudulent misrepresentation, conspiracy to misrepresent or conceal material facts, and breach of express warranty in connection with sale

of cigarettes were not preempted by federal law that dictated a specific warning be placed on cigarettes); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 95–96 (2d Cir. 2013) (rejecting gasoline company's argument that jury verdict finding liability for groundwater contamination based on state tort law was preempted by the Clean Air Act).

The recent wave of claims against opioid manufacturers provides yet another helpful analogy. As with air emissions, opioids are regulated in certain ways at the federal level—drug companies must obtain approval for the sale of their products from the Food and Drug Administration and must adhere to certain regulations governing labeling and marketing of the drugs pursuant to the Federal Food, Drug, and Cosmetic Act and the Controlled Substances Act. As the opioid epidemic in America has reached new heights, individuals seeking redress against pharmaceutical manufacturers for the devasting effects of opioid over-prescription, over-use, and addiction have pursued state claims because federal regulation of opioids does not prevent or provide redress for those harms. In response,

pharmaceutical companies have argued that federal regulation completely preempts such state law claims.

Courts have roundly rejected pharmaceutical companies' attempts at removal of opioid cases brought under state law. For instance, when Montana sued in state court to enjoin Purdue Pharma's promotion of its drugs in Montana based on five state law claims, Purdue Pharma sought removal, arguing that Montana's claims raised a federal issue, drug labeling. *Montana v. Purdue Pharma (In re Nat'l Prescription Opiate Litig.)*, No. 1:18-OP-45604, 2018 U.S. Dist. LEXIS 143589, at *1–4 (N.D. Ohio Aug. 23, 2018). The district court remanded to state court, finding there was no "federal issue," let alone a substantial issue, necessarily raised by Montana's complaint and request for relief, and therefore that the court lacked federal question jurisdiction. *Id.* at *7–8. Many other courts have reached similar decisions. *See, e.g.*, *Cty. of Kern v. Purdue Pharma, L.P.*, No. 1:19cv-00557-LJO-JLT, 2019 U.S. Dist. LEXIS 122709, at *7 (E.D. Cal. July 23, 2019); *Dinwiddie Cty. v. Purdue Pharma, L.P.*, No. 3:19-cv-242, 2019 U.S. Dist. LEXIS 102294, at *20–21 (E.D. Va. June 18, 2019); *N.M. ex rel. Balderas v. Purdue Pharma L.P.*, 323 F. Supp. 3d 1242, 1250–53 (D.N.M. 2018); *Jackson v.*

Purdue Pharma Co., No. 6:02-cv-1428-Orl-19KRS, 2003 U.S. Dist. LEXIS 6998, at *18–20 (M.D. Fla. Apr. 10, 2003).

In another case seeking to impose liability on drug manufacturers, plaintiff patients alleged under state law that a drug made by Purdue Pharma was an unreasonably dangerous product marketed without adequate warnings, and Purdue Pharma removed to federal court. *Ohler v. Purdue Pharma, L.P.*, Civil Action No. 01-3061 Section "N" (2), 2002 U.S. Dist. LEXIS 2368, at *7–8 (E.D. La. Jan. 22, 2002). The court remanded, rejecting Purdue Pharma's argument that plaintiffs' claims were a request for "labeling" that would be preempted by federal law, and explaining that even if Purdue Pharma could establish defensive preemption, it would be insufficient to establish *complete* preemption warranting removal. *Id.* at *35, *50–51, *53–54. The court noted that "[t]here is no question but that the pharmaceutical industry is highly-regulated, however that does not dictate a finding of implied preemption . . . courts should be reluctant to cavalierly imply 'clear evidence' of an intent to immunize an entire industry from liability, even a highly-regulated one." *Id.* at *53–54 (internal citations omitted).

As the opioid cases demonstrate, it makes practical sense that state law claims exist for activity that is also regulated in a targeted way at the federal level. Because the federal government's resources are limited and federal oversight of massive industries can never be complete, state tort and statutory claims serve as an important tool to fill in the gaps in federal regulation and provide alternative avenues to uncover wrongdoing or redress injuries. *See Wyeth v. Levine*, 555 U.S. 555, 574 (2009). The opposite conclusion—that the mere existence of federal regulation of an industry prohibits localities from bringing state law claims against actors within that regulated industry—would be untenable in our system of federalism. Such a sweeping reinterpretation of federal preemption would leave local governments unable to remedy harm to their communities, particularly where, as here, Congress has not provided the same remedies that state law supplies. As the Supreme Court explained, "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Simply put, just because a federal regulatory scheme touches on some of Defendants'

activities does not generally preclude state law claims or create a basis for removal. Rather, in all preemption cases, and particularly those involving a field in which Congress has passed legislation, courts must "start with the assumption that the historic police powers of the States were not to be superseded by the [federal legislation] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). No such clear and manifest purpose exists here, and thus this case presents just one more scenario where a federally regulated industry—the oil and gas industry—is properly the subject of a state court action in state court for local injuries it has caused.

CONCLUSION

Defendants' arguments for removal disregard Plaintiffs' well-pleaded complaint and the governing case law and are ultimately unpersuasive. Defendants would have this Court remove this case to federal court despite any congressional authorization to do so. Removal would deprive Plaintiffs of important state law claims and remedies to which they are entitled under Colorado law, claims and remedies which are sorely needed for Plaintiffs and similarly-situated localities across

the nation to grapple with the real and devastating local impacts of climate change resulting from Defendants' activities. This Court should affirm the district court's order remanding this case to state court.

Respectfully submitted,

Dated: January 6, 2020

/s/ *W. Eric Pilsk*
W. Eric Pilsk
Sarah M. Keane
Sara V. Mogharabi
Samantha R. Caravello
KAPLAN KIRSCH & ROCKWELL LLP
1675 Broadway, Suite 2300
Denver, CO 80202
(303) 825-7000
epilsk@kaplankirsch.com
Counsel for Amicus Curiae *Colorado Communities for Climate Action*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,704 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ *W. Eric Pilsk*
W. ERIC PILSK

ADDENDUM OF LEGAL AUTHORITIES

TABLE OF CONTENTS

Colo. Rev. Stat. § 6-1-105 ..... Add. 1

Colo. Rev. Stat. § 16-13-302 ..... Add. 7

Colo. Rev. Stat. § 16-13-305 ..... Add. 9

Restatement (Second) of Torts § 158 ..... Add. 11

C.R.S. 6-1-105

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 6. CONSUMER AND COMMERCIAL AFFAIRS > FAIR TRADE AND RESTRAINT OF TRADE > ARTICLE 1. COLORADO CONSUMER PROTECTION ACT > PART 1. CONSUMER PROTECTION - GENERAL

6-1-105. Unfair or deceptive trade practices

(1)A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person:

(a) Either knowingly or recklessly passes off goods, services, or property as those of another;

(b) Either knowingly or recklessly makes a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;

(c) Either knowingly or recklessly makes a false representation as to affiliation, connection, or association with or certification by another;

(d) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(e) Either knowingly or recklessly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;

(f) Represents that goods are original or new if he knows or should know that they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(g) Represents that goods, food, services, or property are of a particular standard, quality, or grade, or that goods are of a particular style or model, if he knows or should know that they are of another;

(h) Disparages the goods, services, property, or business of another by false or misleading representation of fact;

(i) Advertises goods, services, or property with intent not to sell them as advertised;

(j) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(k) Advertises under the guise of obtaining sales personnel when in fact the purpose is to first sell a product or service to the sales personnel applicant;

(l) Makes false or misleading statements of fact concerning the price of goods, services, or property or the reasons for, existence of, or amounts of price reductions;

(m) Fails to deliver to the customer at the time of an installment sale of goods or services a written order, contract, or receipt setting forth the name and address of the seller, the name and address of the organization which he represents, and all of the terms and conditions of the sale, including a description of the goods or services, stated in readable, clear, and unambiguous language;

(n) Employs "bait and switch" advertising, which is advertising accompanied by an effort to sell goods, services, or property other than those advertised or on terms other than those advertised and which is also accompanied by one or more of the following practices:

(I) Refusal to show the goods or property advertised or to offer the services advertised;

(II) Disparagement in any respect of the advertised goods, property, or services or the terms of sale;

(III) Requiring tie-in sales or other undisclosed conditions to be met prior to selling the advertised goods, property, or services;

(IV) Refusal to take orders for the goods, property, or services advertised for delivery within a reasonable time;

(V) Showing or demonstrating defective goods, property, or services which are unusable or impractical for the purposes set forth in the advertisement;

(VI) Accepting a deposit for the goods, property, or services and subsequently switching the purchase order to higher-priced goods, property, or services; or

(VII) Failure to make deliveries of the goods, property, or services within a reasonable time or to make a refund therefor;

(o) Either knowingly or recklessly fails to identify flood-damaged or water-damaged goods as to such damages;

(p) Solicits door-to-door as a seller, unless the seller, within thirty seconds after beginning the conversation, identifies himself or herself, whom he or she represents, and the purpose of the call;

(p.3) to (p.7) Repealed.

(q) Contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes any pyramid promotional scheme;

(r) Advertises or otherwise represents that goods or services are guaranteed without clearly and conspicuously disclosing the nature and extent of the guarantee, any material conditions or limitations in the guarantee which are imposed by the guarantor, the manner in which the guarantor will perform, and the identity of such guarantor. Any representation that goods or services are "guaranteed for life" or have a "lifetime guarantee" shall contain, in addition to the other requirements of this paragraph (r), a conspicuous disclosure of the meaning of "life" or "lifetime" as used in such representation (whether that of the purchaser, the goods or services, or otherwise). Guarantees shall not be used which under normal conditions could not be practically fulfilled or which are for such a period of time or are otherwise of such a nature as to have the capacity and tendency of misleading purchasers or prospective purchasers into believing that the goods or services so guaranteed have a greater degree of serviceability, durability, or performance capability in actual use than is true in fact. The provisions of this paragraph (r) apply not only to guarantees but also to warranties, to disclaimer of warranties, to purported guarantees and warranties, and to any promise or representation in the nature of a guarantee or warranty; however, such provisions do not apply to any reference to a guarantee in a slogan or advertisement so long as there is no guarantee or warranty of specific merchandise or other property.

(s) and (t) Repealed.

(u) Fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction;

(v) Disburses funds in connection with a real estate transaction in violation of section 38-35-125 (2), C.R.S.;

(w) Repealed.

(x) Violates sections 6-1-203 to 6-1-206 or part 7 of this article 1;

(y) Fails, in connection with any solicitation, oral or written, to clearly and prominently disclose immediately adjacent to or after the description of any item or prize to be received by any person the actual retail value of each item or prize to be awarded. For the purposes of this paragraph (y), the actual retail value is the price at which substantial sales of the item were made in the person's trade area or in the trade area in which the item or prize is to be received within the last ninety days or, if no substantial sales were made, the actual cost of the item or prize to the person on whose behalf any contest or promotion is conducted; except that, whenever the actual cost of the item to the provider is less than fifteen dollars per item, a disclosure that "actual cost to the provider is less than fifteen dollars" may be made in lieu of disclosure of actual cost. The provisions of this paragraph (y) shall not apply to a promotion which is soliciting the sale of a newspaper, magazine, or periodical of general circulation, or to a promotion soliciting the sale of books, records, audio tapes, compact discs, or videos when the promoter allows the purchaser to review the merchandise without obligation for at least seven days and provides a full refund within thirty days after the receipt of the returned merchandise or when a membership club operation is in conformity with rules and regulations of the federal trade commission contained in 16 CFR 425.

(z) Refuses or fails to obtain all governmental licenses or permits required to perform the services or to sell the goods, food, services, or property as agreed to or contracted for with a consumer;

(aa) Fails, in connection with the issuing, making, providing, selling, or offering to sell of a motor vehicle service contract, to comply with the provisions of article 11 of title 42, C.R.S.;

(bb) Repealed.

(cc) Engages in any commercial telephone solicitation which constitutes an unlawful telemarketing practice as defined in section 6-1-304;

(dd) Repealed.

(ee) Intentionally violates any provision of article 10 of title 5, C.R.S.;

(ee.5)to (ff) Repealed.

(gg) Fails to disclose or misrepresents to another person, a secured creditor, or an assignee by whom such person is retained to repossess personal property whether such person is bonded in accordance with section 4-9-629, C.R.S., or fails to file such bond with the attorney general;

(hh) Violates any provision of article 16 of this title;

(ii) Repealed.

(jj) Represents to any person that such person has won or is eligible to win any award, prize, or thing of value as the result of a contest, promotion, sweepstakes, or drawing, or that such person will receive or is eligible to receive free goods, services, or property, unless, at the time of the representation, the person has the present ability to supply such award, prize, or thing of value;

(kk) Violates any provision of article 6 of this title;

(ll) Either knowingly or recklessly makes a false representation as to the results of a radon test or the need for radon mitigation;

(mm) Violates section 35-27-113 (3)(e), (3)(f), or (3)(i), C.R.S.;

(nn) Repealed.

(oo) Fails to comply with the provisions of section 35-80-108 (1)(a), (1)(b), or (2)(f), C.R.S.;

(pp) Violates article 9 of title 42, C.R.S.;

(qq) Repealed.

(rr) Violates the provisions of part 8 of this article;

(ss) Violates any provision of part 33 of article 32 of title 24, C.R.S., that applies to the installation of manufactured homes;

(tt) Violates any provision of part 9 of this article;

(uu) Violates section 38-40-105, C.R.S.;

(vv) Violates section 24-21-523 (1)(f) or (1)(i) or 24-21-525 (3), (4), or (5);

(ww) Violates any provision of section 6-1-702;

(xx) Violates any provision of part 11 of this article;

(yy) Repealed.

(zz) Violates any provision of section 6-1-717;

(aaa) Violates any provision of section 12-10-710;

(bbb) Violates any provision of section 12-10-713;

(ccc) Violates the provisions of section 6-1-722;

(ddd) Violates section 6-1-724;

(eee) Violates section 6-1-701;

(fff) Violates section 6-1-723;

(ggg) Violates section 6-1-725;

(hhh)[Editor's note: This version of subsection (1)(hhh) is effective until January 1, 2020.] Either knowingly or recklessly represents that hemp, hemp oil, or any derivative of a hemp plant constitutes retail marijuana or medical marijuana unless it fully satisfies the definition of such products pursuant to section 44-12-103 (22) or section 44-11-104 (11);

(hhh)[Editor's note: This version of subsection (1)(hhh) is effective January 1, 2020.] Either knowingly or recklessly represents that hemp, hemp oil, or any derivative of a hemp plant constitutes retail marijuana or medical marijuana unless it fully satisfies the definition of such products pursuant to section 44-10-103 (34) or (57);

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

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

(II)[Editor's note: This version of subsection (1)(iii)(II) is effective until July 1, 2020.] The state treasurer and does not meet the requirements for such an agreement as specified in section 38-13-128.5;

(II)[Editor's note: This version of subsection (1)(iii)(II) is effective July 1, 2020.] The state treasurer and does not meet the requirements for such an agreement as specified in section 38-13-1304;

(jjj) Violates section 6-1-726;

(kkk) Either knowingly or recklessly engages in any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice;

(lll) Violates article 20 of title 5;

(mmm)[Editor's note: This subsection (1)(mmm) is effective January 1, 2020.] Violates section 24-34-114.

(2) Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

(3) The deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.

(4) For purposes of this section, "recklessly" means a reckless disregard for the truth or falsity of a statement or advertisement.

History

Source:

L. 69: p. 372, Section 2. C.R.S. 1963: Section 55-5-2.L. 71: p. 580, Section 1.L. 73: p. 619, Section 2.L. 75: (1)(r) added, p. 259, Section 1, effective July 1.L. 84: (1)(e) and (1)(g) amended and (1)(s) added, pp. 289, 290, Sections 2, 2, effective July 1.L. 85: (1)(t) added, p. 307, Section 2, effective June 1.L. 87: (1)(a), (1)(b), (1)(e), (1)(g) to (1)(i), and (1)(l) amended and (1)(s)(V) and (1)(u) added, p. 357, Sections 3, 4, effective July 1.L. 88: (1)(n) amended and (1)(v) and (1)(w) added, pp. 341, 1260, Sections 2, 2, effective July 1.L. 89: (1)(s)(V) repealed and (1)(y), (1)(z), and (1)(aa) added, pp. 360, 357, Sections 4, 1, effective July 7; (1)(x) added, p. 363, Section 2, effective January 1, 1990.L. 90: (1)(ee) added, p. 378, Section 2, effective April 20; (1)(t)(VI) amended and (1)(bb) to (1)(dd) added, p. 380, Section 2, effective July 1.L. 91: (1)(t)(VI) amended and (1)(t)(VII) added, p. 329, Section 1, effective May 16; (1)(dd)(I) amended and (1)(dd)(I.5) added, p. 331, Section 1, effective June 8.L. 92: IP(1) amended and (1)(ff) added, p. 1835, Section 2, effective April 29; IP(1) amended and (1)(gg) added, p. 247, Section 2, effective June 1.L. 93: (1)(t)(VI) and (1)(y) amended and (1)(hh) to (1)(ll) added, p. 1571, Section 1, effective July 1; (1)(cc) amended, p. 943, Section 2, effective July 1; (1)(mm) added, p. 1022, Section 3, effective July 1.L. 94: (1)(nn) added, p. 759, Section 1, effective April 20; (1)(ee.5) added, p. 94, Section 1, effective July 1; (1)(oo) added, p. 1311, Section 10, effective July 1; (1)(aa) and (1)(ii) amended, p. 2544, Section 14, effective January 1, 1995.L. 96: (1)(p) amended and (1)(p.3) and (1)(ee.7) added, pp. 787, 1787, Sections 1, 1, effective July 1.L. 97: (1)(pp) added, p. 865, Section 13, effective May 21; (1)(p.5) and (1)(p.7) added, p. 500, Section 1, effective July 1; (1)(ee.8) added, p. 406, Section 1, July 1.L. 98: (1)(qq) added, p. 746, Section 2, effective August 5.L. 99: (1)(p.3), (1)(p.5), (1)(p.7), (1)(s), (1)(t), (1)(w), (1)(bb), (1)(dd), (1)(ee.5), (1)(ee.7), (1)(ee.8), (1)(ff), (1)(ii), and (1)(qq) repealed and (1)(x) amended, pp. 655, 652, Sections 14, 3, effective May 18; (1)(qq) amended, p. 897, Section 2, effective October 1.L. 2000: (1)(rr) added, p. 867, Section 2, effective August 2; (1)(nn)(II) added by revision, pp. 2, 3, Sections 1, 6; (1)(ss) added, p. 1162, Section 3, effective July 1, 2001.L. 2001: (1)(gg) amended, p. 1445, Section 37, effective July 1; (1)(tt) added, p. 1461, Section 2, effective August 8.L. 2002: (1)(uu) added, p. 1602, Section 3, effective June 7.L. 2003: (1)(ss) amended, p. 550, Section 3, effective March 5.L. 2004: (1)(vv) added, p. 181, Section 2, effective July 1; (1)(ww) added, p. 407, Section 2, effective August 4.L. 2006: (1)(xx) added, p. 1344, Section 2, effective May 30.L. 2007: (1)(zz) added, p. 1728, Section 5, effective June 1; (1)(aaa) and (1)(bbb) added, p. 1723, Section 10, effective June 1; (1)(yy) added, p. 809, Section 1, effective July 1.L. 2010: (1)(ccc) added, (SB 10-155), ch. 180, p. 648, Section 2, effective August 11.L. 2013: (1)(eee) added, (SB 13-228), ch. 271, p. 1425, Section 2, effective May 24; (IP)(1) amended and (1)(ddd) added, (SB 13-215), ch. 399, p. 2335, Section 2, effective June 5.L. 2014: (1)(fff) and (1)(ggg) added, (HB 14-1037), ch. 358, p. 1681, Section 2, effective August 6.L. 2015: (1)(hhh) added, (SB 15-014), ch. 199, p. 688, Section 7, effective May 18; (1)(yy) repealed, (SB 15-264), ch. 259, p. 941, Section 7, effective August 5.L. 2016: (1)(jjj) added, (HB 16-1335), ch. 246, p. 1015, Section 2, effective July 1; (1)(bbb) amended, (HB 16-1306), ch. 117, p. 331, Section 1, effective August 10; (1)(iii) added, (HB 16-1090), ch. 97, p. 276, Section 2, effective August 10. L. 2017: (1)(vv) amended, (SB 17-132), ch. 207, p. 808, Section 4, effective July 1, 2018.L. 2018: (1)(x) amended, (SB 18-100), ch. 36, p. 392, Section 1, effective August 8; (1)(hhh) amended, (HB 18-1023), ch. 55, p. 584, Section 4, effective October 1.L. 2019: (1)(a), (1)(b), (1)(c), (1)(e), (1)(o), (1)(ll), (1)(hhh), and (1)(iii) amended and (1)(kkk) and (4) added, (HB 19-1289), ch. 268, p. 2515, Section 2, effective May 23; (1)(lll) added, (SB 19-002), ch. 157, p. 1872, Section 3, effective August 2; (1)(aaa) and (1)(bbb) amended, (HB 19-1172), ch. 136, p. 1643, Section 8, effective October 1; (1)(hhh) amended, (SB 19-224), ch. 315, p. 2935, Section 8, effective January 1, 2020; (1)(mmm) added, (HB

19-1174), ch. 171, p. 1982, Section 1, effective January 1, 2020; (1)(iii)(II) amended, (SB 19-088), ch. 110, p. 462, Section 2, effective July 1, 2020.

COLORADO REVISED STATUTES

End of Document

C.R.S. 16-13-302

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 16. CRIMINAL PROCEEDINGS > CODE OF CRIMINAL PROCEDURE > ARTICLE 13. SPECIAL PROCEEDINGS > PART 3. ABATEMENT OF PUBLIC NUISANCE

16-13-302. Public nuisances - policy

(1) It is the policy of the general assembly that every public nuisance shall be restrained, prevented, abated, and perpetually enjoined. It is the duty of the district attorney in each judicial district of this state to bring and maintain an action, pursuant to the provisions of this part 3, to restrain, prevent, abate, and perpetually enjoin any such public nuisance and to seek the forfeiture of property as provided in this part 3. The general assembly intends that proceedings under this part 3 be remedial and equitable in nature. Nothing contained in this part 3 shall be construed as an amendment or repeal of any of the criminal laws of this state, but the provisions of this part 3, insofar as they relate to those laws, shall be considered a cumulative right of the people in the enforcement of such laws. The provisions of this part 3 shall not be construed to limit or preempt the powers of any court or political subdivision to abate or control nuisances.

(2) It is also the policy of the general assembly that asset forfeiture pursuant to this part 3 shall be carried out pursuant to the following:

(a) Generation of revenue shall not be the primary purpose of asset forfeiture.

(b) No prosecutor's or law enforcement officer's employment or level of salary shall depend upon the frequency of seizures or forfeitures which such person achieves.

(c) All seizures of real property pursuant to this part 3 shall be made pursuant to a temporary restraining order or injunction based upon a judicial finding of probable cause.

(d) Each seizing agency shall have policies and procedures for the expeditious release of seized property which is not subject to forfeiture pursuant to this part 3, when such release is appropriate.

(e) Each seizing agency retaining forfeited property for official law enforcement use shall ensure that the property is subject to controls consistent with controls which are applicable to property acquired through the normal appropriations process.

(f) Each seizing agency which receives forfeiture proceeds shall conform with reporting, audit, and disposition procedures enumerated in this article.

(g) Each seizing agency shall prohibit its employees from purchasing forfeited property.

History

Source:

L. 72: R&RE, p. 259, Section 1. C.R.S. 1963: Section 39-13-302.L. 87: Entire section amended, p. 630, Section 2, effective July 1.L. 92: Entire section amended, p. 446, Section 1, effective July 1.

C.R.S. 16-13-302

End of Document

C.R.S. 16-13-305

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 16. CRIMINAL PROCEEDINGS > CODE OF CRIMINAL PROCEDURE > ARTICLE 13. SPECIAL PROCEEDINGS > PART 3. ABATEMENT OF PUBLIC NUISANCE

16-13-305. Class 3 public nuisance

(1) The following are a class 3 public nuisance:

(a) The conducting or maintaining of any business, occupation, operation, or activity prohibited by a statute of this state; or

(b) The continuous or repeated conducting or maintaining of any business, occupation, operation, activity, building, land, or premises in violation of a statute of this state; or

(c) Any building, structure, or land open to or used by the general public, the condition of which presents a substantial danger or hazard to public health or safety; or

(d) Any dilapidated building of whatever kind which is unused by the owner, or uninhabited because of deterioration or decay, which condition constitutes a fire hazard, or subjects adjoining property to danger of damage by storm, soil erosion, or rodent infestation, or which becomes a place frequented by trespassers and transients seeking a temporary hideout or shelter; or

(e) Any unlawful pollution or contamination of any surface or subsurface waters in this state, or of the air, or any water, substance, or material intended for human consumption, but no action shall be brought under this paragraph (e) if the state department of public health and environment or any other agencies of state or local government charged by and acting pursuant to statute or duly adopted regulation have assumed jurisdiction by the institution of proceedings on that pollution or contamination. Nothing in this paragraph (e) shall abridge the right of any person to institute a private nuisance action or of any district attorney to institute a public nuisance action under the common law or other statutory law of this state.

(f) Any activity, operation, or condition which, after being ordered abated, corrected, or discontinued by a lawful order of an agency or officer of the state of Colorado, continues to be conducted or continues to exist in violation of:

(I) Any statute of this state;

(II) Any regulation enacted pursuant to the authority of a statute of this state; or

(g) Any condition declared by a statute of this state to be a class 3 public nuisance.

History

Source:

L. 72: R&RE, p. 261, Section 1. C.R.S. 1963: Section 39-13-305.L. 94: (1)(e) amended, p. 2732, Section 354, effective July 1.

COLORADO REVISED STATUTES

End of Document

Restat 2d of Torts, § 158

Restatement of the Law, Torts 2d - Official Text > Division 1- Intentional Harms to Persons, Land, and Chattels > Chapter 7- Invasions of the Interest in the Exclusive Possession of Land and Its Physical Condition (Trespass on Land) > Topic 1- Intentional Entries on Land

§ 158 Liability for Intentional Intrusions on Land

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in the possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

COMMENTS & ILLUSTRATIONS

Comment:

a. As to the distinction between trespass and nuisance, see the Scope and Introductory Note to Chapter 40.

b. Meaning of "enters land." Unless the context otherwise indicates, the phrase "enters land" is for convenience used throughout the Restatement of this Subject to include, not only coming upon land, but also remaining on it, and, in addition, to include the presence upon the land of a third person or thing which the actor has caused to be or to remain there.

c. Meaning of "intrusion." The word "intrusion" is used throughout the Restatement of this Subject to denote the fact that the possessor's interest in the exclusive possession of his land has been invaded by the presence of a person or thing upon it without the possessor's consent. It carries no implication that there is or is not some privilege derived otherwise than from the actor's consent which may prevent the intruder from becoming liable as a trespasser. The word "intrusion," therefore, describes a fact situation only. Whether the intruder is a trespasser and liable as such to the possessor depends upon the existence or non-existence of a law-given, as contrasted with a consensual, privilege. If the possessor of land gives a consent to the actor's presence upon only a particular part of his land, the actor's intentional entry upon any other part of the land is an intrusion, and, if unprivileged, is a trespass.

d. The word "harm" is used in the sense in which it is defined in § 7, Comment *a*, and therefore does not include a materially harmless invasion of the interest of the possessor in the exclusive possession of his land. (See § 163.)

e. Conduct which would otherwise constitute a trespass is not a trespass if it is privileged. Such a privilege may be derived from the consent of the possessor (see §§ 167-175), or may be given by law because of the purpose for which the actor acts or refrains from acting (see §§ 176-211).

f. Tort liability is never imposed upon one who has neither done an act nor failed to perform a duty. Therefore, one whose presence on the land is not caused by any act of his own or by a failure on his part to perform a duty is not a trespasser.

Illustrations:

1. A, against B's will, forcibly carries B upon the land of C. A is a trespasser; B is not.

2. A tornado lifts A's properly constructed house from A's land and deposits it on B's land. This is not a trespass.

g. A trespass on land may be committed by an intrusion upon the surface of the land or beneath or above the surface. (See § 159.)

Comment on Clause (a):

h. Personal entry by the actor. A trespass by way of an entry by the actor in person may be a mere momentary invasion, as where one walks across another's field or flies in an airplane over another's house close to the roof, or it may be an invasion which continues for a more or less protracted period, as where a camper pitches his tent on another's meadow, or where one occupies a building which is on another's land.

i. Causing entry of a thing. The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it. Thus, in the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap, or to fire projectiles or to fly an advertising kite or balloon through the air above it, even though no harm is done to the land or to the possessor's enjoyment of it. In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter. Thus one who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands, becomes a trespasser on the other's land.

Illustrations:

3. A intentionally throws a pail of water against a wall of B's house. A is a trespasser.

4. A intentionally drives a stray horse from his pasture into the pasture of his neighbor, B. A is a trespasser.

5. A erects a dam across a stream, thereby intentionally causing the water to back up and flood the land of B, an upper riparian proprietor. A is a trespasser.

6. A, on a public lake, intentionally discharges his shotgun over a point of land in B's possession, near the surface. The shot falls into the water on the other side. A is a trespasser.

j. Causing entry of a third person. If, by any act of his, the actor intentionally causes a third person to enter land, he is as fully liable as though he himself enters. Thus, if the actor has commanded or requested a third person to enter land in the possession of another, the actor is responsible for the third person's entry if it be a trespass. This is an application of the general principle that one who intentionally causes another to do an act is under the same liability as though he himself does the act in question. So too, one who by physical duress causes a third person to go upon the land of another or who carries the third person there against his will is liable as a trespasser, although the third person may not be liable. (See Comment *e* and Illustration 1.)

k. If the actor, entering in person, brings with him third persons or things, the presence of such third persons or things may be treated as an aggravation of the trespass committed by the actor's personal entry.

Comment on Clause (b):

l. Failure to leave land. A trespass on land may be by a failure of the actor to leave the land of which the other is in possession, or a part of such land. If the possessor of the land has consented to the actor's presence on the land, his failure to leave after the expiration of the license is a trespass (see §§ 171 and 176) unless his continued presence on the land is otherwise privileged, or unless it amounts to a disseisin (see § 162, Comment *c*). So too, if the actor has intruded in the exercise of a privilege conferred by law irrespective of the possessor's consent, he becomes a trespasser by remaining upon the land after the purpose for which the privilege has been given has been accomplished. Again, one who is forcibly carried onto the land by third persons becomes a trespasser if, after he regains his freedom, he fails to leave the land with reasonable expedition.

If the actor's entry was unprivileged, his remaining on the land may at the option of the possessor be treated as an aggravation of the original trespass of entering the land or, unless it amounts to a disseisin, as a continuing trespass which confers on the possessor a series of rights of action, unless and until the actor by his continued presence on the land disseises its possessor or acquires an easement in it.

m. Continuing trespass. An unprivileged remaining on land in another's possession is a continuing trespass for the entire time during which the actor wrongfully remains. Such a continuing trespass is to be distinguished from a series of separate trespasses on land, as where A habitually crosses B's field without a privilege to do so. Although the legal consequences of the two are much alike, there are certain differences, as where a license is terminated by the death of a licensor without the knowledge of his licensee. (Compare § 160, Comment *f*.)

As to the circumstances under which the rule of continuing trespass is of peculiar importance, see § 160, Comments *h* and *i*, which Comments so far as they are pertinent are applicable here. If one, without a privilege to do so, enters or remains on land and at that time or thereafter disseises the possessor, the actor's conduct in remaining on the land after such disseisin is not a continuing trespass. (See § 162, Comment *c*.)

Comment on Clause (c):

n. See §§ 160 and 161 and the Comments thereon.

REPORTER'S NOTES

This Section has been changed from the first Restatement by condensing it to conform to the shorter style of later Sections. No change in substance is intended.

Illustration 1 is taken from Smith v. Stone, Style 65, 82 Eng. Rep. 533 (1647). Compare Feiges v. Racine Dry Goods Co., 231 Wis. 270, 285 N.W. 799, 122 A.L.R. 272 (1939).

Illustration 2 is based on Livezey v. City of Philadelphia, 64 Pa. 106, 3 Am. Rep. 578 (1870), and Carter v. Thurston, 58 N.H. 104, 42 Am. Rep. 584 (1877). See also Hot Springs Lumber & Mfg. Co. v. Revercomb, 106 Va. 176, 55 S.E. 580, 9 L.R.A. N.S. 894 (1906).

Illustration 3 is taken from Prewitt v. Clayton, 5 T.B. Mon. (Ky.) 4 (1827). Cf. Wheeler v. Norton, 92 App. Div. 368, 86 N.Y.S. 1095 (1904).

Illustration 5 is based on Scheurich v. Empire Dist. Elec. Co., 188 S.W. 114 (Mo. 1916); Judd v. Blakeman, 175 Ky. 848, 195 S.W. 119 (1917); Walter v. Wagner, 225 Ky. 255, 8 S.W.2d 421 (1928); Suter v. Wenatchee Water Power Co., 35 Wash. 1, 76 P. 298, 102 Am. St. Rep. 881 (1904); Butala v. Union Elec. Co., 70 Mont. 580, 226 P. 899 (1924); Norwood v. Eastern Oregon Land Co., 139 Ore. 25, 5 P.2d 1057 (1931), modified, 7 P.2d 996 (1932); Fleming v. Lockwood, 36 Mont. 384, 92 P. 962, 14 L.R.A. N.S. 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263 (1907).

Illustration 6 is based on Whittaker v. Stangvick, 100 Minn. 386, 111 N.W. 295, 10 L.R.A. N.S. 921, 117 Am. St. Rep. 703, 10 Ann. Cas. 528 (1907).

See also the following cases of causing a thing to go upon the surface of another's land: Hendershott v. City of Ottumwa, 46 Iowa 658, 26 Am. Rep. 182 (1877); Harford County v. Wise, 71 Md. 43, 18 A. 31 (1889); Piedmont & C.R. Co. v. McKenzie, 75 Md. 458, 24 A. 157 (1892); Gray v. Tobin, 259 Mass. 113, 156 N.E. 30 (1927); Hennessy v. City of Boston, 265 Mass. 559, 164 N.E. 470, 62 A.L.R. 780 (1929); Clark v. Wiles, 54 Mich. 323, 20 N.W. 63 (1884); Curtis v. Fruin-Colnon Contracting Co., 363 Mo. 676, 253 S.W.2d 158 (1952); Ellis v. Blue Mountain Forest Ass'n., 69 N.H. 385, 41 A. 856, 42 L.R.A. 570 (1898); Hutchinson v. Schimmelfeder, 40 Pa. 396, 80 Am. Dec. 582 (1861); Williams v. Columbus Prod. Co., 80 W.Va. 683, 93 S.E. 809, L.R.A. 1918B, 179 (1917).

Comment j: The Comment is supported by Hendrix v. Black, 132 Ark. 473, 201 S.W. 283, L.R.A. 1918D, 217 (1918); Powell v. Harris, 39 Ga. App. 295, 147 S.E. 189 (1929); Murrell v. Goodwill, 159 La. 1057, 106 So. 564 (1925); Sperry v. Hurd, 267 Mo. 628, 185 S.W. 170 (1916); Vandenburgh v. Truax, 4 Denio (N.Y.) 464, 47 Am. Dec. 268 (1847); Wetzel v. Satterwhite, 59 Tex. Civ. App. 1, 125 S.W. 93 (1910).

Compare cases where the actor has induced another to enter by false representations, as for example by a grant of the land or of a right to enter: Donovan v. Consolidated Coal Co., 187 Ill. 28, 58 N.E. 290, 79 Am. St. Rep. 206 (1900); State v. Smith, 78 Me. 260, 4 A. 412, 57 Am. Rep. 802 (1886); Sanborn v. Sturtevant, 17 Minn. 200 (1871); Kirby Lumber Co. v. Karpel, 233 F.2d 373 (5 Cir 1956); Darden v. McMillian, 93 Ga. App. 892, 93 S.E.2d 169 (1956). See also Castleberry v. Mack, 167 S.W.2d 489 (Ark. 1943); State v. Lasiter, 352 S.W.2d 915 (Tex. Civ. App. 1961), error dismissed.

Comment l: Under strict common law pleading redress for a wrongful failure to leave land would probably have been by action on the case. Under modern systems of pleading, where the distinction between trespass and case is largely eliminated, there are a number of cases in which the liability for trespass has been found. See, for example, Snedecor v. Pope, 143 Ala. 275, 39 So. 318 (1904); New Morgan C.B. & L. Ass'n v. Plemmons, 210 Ala. 286, 98 So. 12 (1923); Mackenzie v. Minis, 132 Ga. 323, 63 S.E. 900, 23 L.R.A. N.S. 1003, 16 Ann. Cas. 723 (1909); Ragain v. Stout, 182 Ill. 645, 55 N.E. 529 (1899); Concanan v. Boynton, 76 Iowa 543, 41 N.W. 213 (1889); Davis v. Stone, 120 Mass. 228 (1876); Mitchell v. Mitchell, 54 Minn. 301, 55 N.W. 1134 (1893); Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953), motion denied, 305 N.Y. 924, 114 N.E.2d 476; Wolf

v. Buffalo House Wrecking Co., 10 Pa. D. & C. 350, 9 Erie Co. L.J. 127 (1928); Warner v. Hoisington, 42 Vt. 94 (1869); Case v. Knight, 129 Wash. 570, 225 P. 645 (1924); Brabazon v. Joannes Bros. Co., 231 Wis. 426, 286 N.W. 21 (1939).

Cross Reference

ALR Annotations:

Casting of light on another's premises as constituting actionable wrong. 5 A.L.R.2d 705.

Digest System Key Numbers:

Trespass 10 et seq.

End of Document

CERTIFICATE OF DIGITAL SUBMISSION, ANTIVIRUS SCAN, AND PRIVACY REDACTIONS

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual, that the attached Brief of *Amicus Curiae* Colorado Communities for Climate Action in Support of Appellees and Affirmance, as submitted in digital form via the Court's electronic filing system, has been scanned for viruses using CB Defense System 64 bit, manufactured by Carbon Black Inc. (version 3.4.0.1091, last updated December 27, 2019), and, according to that program, is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically, and that all required privacy redactions have been made.

Dated: January 6, 2020

/s/ *W. Eric Pilsk*
W. ERIC PILSK

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2020, I electronically filed the foregoing brief, together with its addendum, with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *W. Eric Pilsk*
W. ERIC PILSK