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UNFAIR TRADE PRACTICES, ANTITRUST AND CONSUMER WELFARE IN NORTH CAROLINA

JOHN F. GRAYBEAL*

North Carolina's unfair trade practices act, section 75-1.1 of the General Statutes of North Carolina, has the potential to operate contrary to the interests of consumers. Plaintiffs in section 75-1.1 cases who prove monetary injury automatically collect treble damages and they may obtain attorney fees as well. Federal and North Carolina antitrust law registers violations but only if market competition and consumers have been adversely affected. Both award treble damages to successful plaintiffs, and federal antitrust law also awards attorney fees. Because of its three vaguely stated offenses—"unfair methods of competition," "unfair acts" and "deceptive acts"—section 75-1.1 has a broad and uncertain scope. Lawyers and judges believe, and judicial decisions show, that conduct can violate section 75-1.1 even though it does not violate antitrust law or otherwise threaten competition or consumers. In this Article, the author argues that such outcomes imperil consumer welfare by threatening to punish with treble damage and attorney fee penalties conduct that may be procompetitive and in the best interests of consumers.

This Article asserts that judicial interpretation of section 75-1.1 lacks precision and clarity. Although the statute is a verbatim copy of section 5 of the Federal Trade Commission Act and North Carolina courts have stated an intention to look to section 5 authorities for guidance in interpreting section 75-1.1, the statute's terminology has challenged clear judicial interpretation. This Article points out that many section 75-1.1 decisions fail to identify the specific component of the statute found to be violated, that others identify the "wrong" part of the statute as the basis for the decision, and that these errors have adversely affected the analysis and even the outcome of some cases. More importantly, this Article notes certain cases in which a defendant was absolved of an antitrust violation but left exposed to section 75-1.1 liability. The author urges that the "unfair methods of competition" component of the statute should be viewed simply as an antitrust statute, reaching conduct that violates federal and state antitrust

law. The author also suggests methods for controlling the reach of the other components of section 75-1.1 so that the statute's potential to threaten procompetitive activity will be reduced.

INTRODUCTION.....	1929
I. THE BACKGROUND OF SECTION 75-1.1 IN SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT	1932
II. SECTION 75-1.1 INTERPRETATION PROBLEMS AND RELIANCE UPON FEDERAL PRECEDENT	1934
III. A SUMMARY OF THE SCOPE OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT	1939
A. <i>The "Unfair Methods of Competition" Prong</i>	1939
B. <i>The Necessity for an Adverse Effect on Market Competition</i>	1939
C. <i>Section 5's Coverage of Conduct not Reached by Antitrust Law</i>	1944
1. <i>Conduct Violating the "Spirit" of the Antitrust Laws</i>	1945
2. <i>Non-Antitrust Conduct as an Unfair Method of Competition</i>	1951
D. <i>The Unfair or Deceptive Acts or Practices Prong</i>	1954
IV. THE CONNECTION BETWEEN SECTION 75-1.1, ANTITRUST LAW, THE FTC ACT, AND BUSINESS TORTS.....	1954
V. FAILURES IN APPLICATION OF SECTION 75-1.1 BY STATE AND FEDERAL COURTS	1956
A. <i>Failure to Specify the Prong Forming the Basis of the Ruling</i>	1957
B. <i>Cases Applying the Wrong Section 75-1.1 Prong to the Conduct at Issue</i>	1960
1. <i>Cases with Antitrust "Character" Treated Under the Unfair/Deceptive Prong</i>	1960
2. <i>Cases Having no Antitrust "Character" Treated Under the Unfair Methods Prong</i>	1962
C. <i>Failure to Identify Prong or Erroneous Identification of Prong Producing Faulty Analysis or Improper Outcome</i>	1964
VI. ADVERSE IMPACT ON CONSUMER WELFARE THREATENED BY OVERBROAD APPLICATION OF SECTION 75-1.1	1970
A. <i>Application of Section 75-1.1 as a "Low-Test" Antitrust Statute</i>	1971

B. *Suggestions for Dealing with the Problem of Section 75-1.1 as a “Low Test” Antitrust Statute*1975

VII. FEDERAL PRECEDENT AND CONSUMER STANDING TO ASSERT UNFAIR METHODS CLAIMS1983

A. *Whether in a Non-Per Se Antitrust Case under Section 75-1.1 the Plaintiff Must Show an Adverse Effect on Competition in a Relevant Market*.....1984

B. *Van Dorn: The Wrong Way Not to Follow Federal Precedent*.....1989

C. *Whether Consumers Can Assert “Unfair Methods of Competition” Claims*1991

CONCLUSION1998

INTRODUCTION

North Carolina’s “unfair trade practices” statute, section 75-1.1 of the General Statutes, declares (1) “unfair methods of competition” and (2) “unfair or deceptive acts or practices” unlawful. These will be referred to in this Article as the “unfair methods” and “unfair/deceptive” prongs of the statute. Now a verbatim copy of section 5(a)(1) of the Federal Trade Commission Act,¹ section 75-1.1 is relied upon heavily by claimants in commercial litigation in the state.² A North Carolina federal judge has said that section 75-1.1 “constitutes a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina.”³ Such rich litigation opportunities are not presented by section 5 of the Federal Trade Commission Act since it affords no private cause of action. But the reasons for the heavy use of section 75-1.1 are clear. As with other provisions of Chapter 75 containing state antitrust law prohibitions, the winning plaintiff in a section 75-1.1 case

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1. 15 U.S.C. § 45(a)(1) (2000).
 2. One author has counted more than 700 state and federal decisions “involving” section 75-1.1. NOEL L. ALLEN, NORTH CAROLINA UNFAIR BUSINESS PRACTICE 6 (2d ed. 2000).
 3. *Allied Distribs., Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993).

automatically receives treble damages,⁴ and, perhaps more importantly, his "duly licensed attorney" may get attorney fees.⁵

Consumer welfare is the most important concern of antitrust law and policy.⁶ Generally, conduct does not violate antitrust standards unless it imposes an adverse effect on market competition, and, therefore, on consumers. The concern expressed here is that decisions under section 75-1.1 could threaten consumer welfare by imposing the penalties of treble damages and attorney fees on defendants whose conduct does not violate antitrust law. At the same time, this Article recognizes that section 75-1.1 reaches conduct condemned by business tort law and that, while some of that conduct may harm the competitive process, it may not threaten consumer welfare in the short run.

Despite its popularity and frequent appearance in the case reports, the judicial interpretation of section 75-1.1 lacks precision

4. N.C. GEN. STAT. § 75-16 (2001).

5. Section 75-16.1 of the North Carolina General Statutes provides that "the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party" if he finds that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matters which constitute the basis of such suit." Unlike federal antitrust actions where, pursuant to section 4(a) of the Clayton Act, 15 U.S.C. § 15(a) (2000), attorney fees are awarded to successful plaintiffs themselves, North Carolina section 75-16.1 "awards" the fees to the plaintiff's lawyer. N.C. GEN. STAT. § 75-16.1 (2001).

6. See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (The antitrust issue is whether "the arrangements in question would have an anticompetitive effect on customers and markets."). "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (holding that consumers are injured in their "property" when overcharged by price-fixing suppliers) (quoting ROBERT H. BORK, *THE ANITRUST PARADOX* 66 (1978)). The Sherman Act "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (quoting remarks of Sen. George, 21 CONG. REC. 1767-1768 (1890)). "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'" *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)). To be condemned, the conduct of a monopolist "must harm the competitive process and thereby harm consumers." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (per curiam). "Probably most (but certainly not all) scholars today accept the proposition that the antitrust laws either have, or should be treated as having, the sole goal of consumer welfare or efficiency." RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS* 154 (2d ed. 1981). To the extent that such a consumer welfare antitrust policy favors chain retailers, including "big box" outlets that may be viewed as threats to locally-owned albeit less efficient businesses and the cohesiveness or "downtown" vitality of smaller cities, towns, and communities, relief should be sought in other, non-antitrust laws and policies.

and clarity. This Article assesses section 75-1.1 decisions in light of the North Carolina Supreme Court's announced intention to look to Federal Trade Commission ("FTC") authorities for guidance in applying the statute and the FTC's application of section 5 of the FTC Act, the parent statute of section 75-1.1.⁷ Part I notes the direct linkage between section 75-1.1 and section 5(a)(1) of the FTC Act. Part II identifies cases in which courts applying section 75-1.1 follow federal authorities, and Part III contains a summary of application of section 5 by the FTC and by the courts that have reviewed its decisions. Part IV notes the body of business tort law that relates closely both to section 5 and to section 75-1.1. Since section 75-1.1 generally reaches conduct that amounts to a business tort, courts can usefully refer to business tort law to provide greater certainty for section 75-1.1 offenses.

The cases indicate that North Carolina practitioners and courts believe that even when the plaintiff fails to show the defendant violated federal or state antitrust law, the defendant may still be subjected to treble damages and attorney fee penalties under section 75-1.1.⁸ Since antitrust law and policy are primarily concerned about harm to consumers from adverse effects on market competition,⁹ such an outcome creates the problem that cases finding violations of section 75-1.1 where no consumer harm has been found will penalize and/or deter procompetitive, proconsumer conduct. Part VI(A) of this Article discusses cases in which such outcomes have occurred and points to other factual situations in which such outcomes could occur. Part VI(B) offers suggestions to avoid or minimize such results in the future.

On the way to these observations, Part V(A) of this Article observes that North Carolina courts (both state and federal) in many decisions have failed even to identify the prong of section 75-1.1 upon which the decision rests. Part V(B) points out that in other cases courts have identified the "wrong" prong. The standard of proper "prong identification" used here is derived from analysis of FTC authorities showing that cases having antitrust characteristics should be tested under the "unfair methods" prong while, generally, non-antitrust claims should be tested under the "unfair/deceptive" prong. This review not only finds cases in which failure to identify the prong or identification of the wrong prong is harmless, but it also finds

7. See *infra* notes 32–53 and accompanying text.

8. See *infra* notes 275–88 and accompanying text.

9. See *supra* note 6.

others, noted in Part V(C), in which prong identification errors adversely affected the analysis or the outcome or both. In applying the South Carolina statutory equivalent of section 75-1.1, the Fourth Circuit observed, "the . . . statute is aimed at two distinct kinds of conduct: unfair or deceptive practices and anticompetitive practices."¹⁰ While the parallel structure of the North Carolina statute was subsequently recognized in a federal district court opinion,¹¹ the Fourth Circuit's observation is a basic point deserving of more widespread appreciation by litigants and courts in section 75-1.1 cases.

Finally, Part VII(A) identifies cases that support those cited in Part II, which state that courts applying section 75-1.1 should look to federal authorities for guidance. Most of the cases discussed in Part VII(A) are authority for the proposition that plaintiffs must demonstrate an adverse effect on market competition in non-per se antitrust cases decided under section 75-1.1. In doing so, those cases follow federal antitrust authority. Part VII(B) of this Article, however, criticizes the analysis of the North Carolina Court of Appeals in a recent case¹² in which the court did not follow federal precedent. With its consumer welfare emphasis, this Article in Part VII(C) urges that courts applying section 75-1.1 should eliminate any uncertainty that consumers, as well as competitors, have standing to assert "unfair methods of competition" claims under the statute.

I. THE BACKGROUND OF SECTION 75-1.1 IN SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

As noted above, the roots of section 75-1.1 are in section 5 of the FTC Act.¹³ That federal statute, which created the FTC, proscribed only "unfair methods of competition" when first enacted in 1914.¹⁴ In

10. *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289, 1292 (4th Cir. 1987).

11. *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1196, 1220 (W.D.N.C. 1989), *aff'd per curiam*, 912 F.2d 463 (4th Cir. 1990) (unpublished table decision), *cert. denied*, 498 U.S. 1110 (1991).

12. *Van Dorn Retail Mgmt., Inc. v. Klaussner Furniture Indus., Inc.*, 132 N.C. App. 531, 512 S.E.2d 456 (1999).

13. 15 U.S.C. § 45(a) (2000).

14. Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)). Congress established the FTC as an administrative agency in part to assist in defining and applying the "rule of reason" that had been adopted for antitrust purposes in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). MILTON HANDLER ET AL., *TRADE REGULATION: CASES AND MATERIALS* 101 (4th ed. 1997); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 890 (2000). "One of the main reasons for

response to judicial interpretation, the Wheeler-Lea Amendments of 1938 added to the FTC's jurisdiction "unfair or deceptive acts or practices."¹⁵ As adopted by the North Carolina General Assembly in 1969, section 75-1.1(a) closely mirrored FTC Act section 5(a)(1) in its post-1938 form,¹⁶ and after a 1977 amendment, it became a verbatim copy of section 5(a)(1).¹⁷ Section 75-1.1(a) now reads: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."¹⁸

North Carolina's adoption of section 75-1.1 was part of a nationwide trend towards the enactment of uniform unfair trade practices law. In the 1960's, the FTC "began to collaborate in antitrust and consumer protection matters with various state officials and the Committee on Suggested State Legislation of the Council of State Governments."¹⁹ The result was the promulgation in 1967 of

creating the [FTC] . . . was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986).

15. Act of March 21, 1938, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a) (2000)).

16. Act of June 12, 1969, ch. 833, § 1(b), 1969 N.C. Sess. Laws 930, 930 (codified as amended at N.C. GEN. STAT. § 75-1.1 (2001)).

17. Act of June 27, 1977, ch. 747, § 1, 1977 N.C. Sess. Laws 984, 984 (codified at N.C. GEN. STAT. § 75-1.1 (2001)).

18. In its original form, section 75-1.1 prohibited unfair methods of competition and unfair or deceptive acts or practices "in the conduct of any *trade* or commerce." § 1(b), 1969 Sess. Laws at 930 (emphasis added). The supreme court in *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 316-17, 233 S.E.2d 895, 899 (1977) relied heavily on the word "trade" to decide that the statute covered only "bargain, sale, barter, exchange or traffic" in goods, but not abusive or harassing debt collection practices such as those at issue. The court noted that federal authorities had decided that FTC Act section 5 covered debt collection practices but observed that "federal court decisions . . . are not controlling in construing the North Carolina Act." *Id.* at 315, 233 S.E.2d at 898. The General Assembly acted promptly to overrule this decision legislatively. In the 1977 version of 75-1.1, subsection (b) defined "commerce" to exclude "professional services rendered by a member of a learned profession" but otherwise to "include[] all business activities, however denominated . . ." § 2, 1977 N.C. Sess. Laws at 984. Subsection (c) provided an exemption for newspapers, periodicals, radio or television stations, and other advertising media lacking knowledge that an advertisement was false, misleading, or deceptive and where the owner had no financial interest in the sale of the advertised product. N.C. GEN. STAT. § 75-1.1(c) (2001).

19. William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TULANE L. REV. 724, 730 (1972). See also Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 521-22 (1980) (noting that the FTC recognized that enforcement of its prohibition against unfair and deceptive practices could not be accomplished without assistance from the states).

model legislation entitled the "Unfair Trade Practices and Consumer Protection Act."²⁰ As adopted by the states, these statutes are referred to as "little FTC Acts" or "UDAP" statutes for "unfair or deceptive acts or practices." All fifty states and the District of Columbia eventually adopted some form of UDAP statute.²¹

II. SECTION 75-1.1 INTERPRETATION PROBLEMS AND RELIANCE UPON FEDERAL PRECEDENT

Courts applying section 75-1.1 have struggled with the interpretation problems created by the statute. For practitioners and judges applying section 75-1.1, its language is the beginning of the trouble. The inherently vague term "unfair" is used repetitively, immediately raising a question about the differences, if any, among (a) "unfair acts," (b) "unfair practices" and (c) "unfair methods of competition."²² Moreover, the common law tort of "unfair competition" is suggested but not specifically named.

North Carolina courts have manfully attempted to articulate definitions of the three offenses stated by the statute, although one early decision questioned whether such definitions were possible or even desirable. Speaking to the "unfair methods of competition" prong, the court of appeals lamented, "No precise definition of the term 'unfair methods of competition' as used in G.S. 75-1.1 is possible. Perhaps it is not even desirable that there be one."²³ The court has also said that "[u]nfair competition has been referred to in terms of conduct 'which a court of equity would consider unfair'. . . . Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic."²⁴

Regarding the two offenses included in the "unfair or deceptive acts or practices" prong of the statute, the North Carolina Supreme Court has said, "A practice is unfair if it is unethical or unscrupulous,

20. Leaffer & Lipson, *supra* note 19, at 521-22; Lovett, *supra* note 19, at 730.

21. JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (5th ed. 2001). The UDAP version adopted by North Carolina was "Alternative Form No. 1" of the model legislation. Lovett, *supra* note 19, at 732 (stating that Alternative Form No. 1 has the broadest impact because it reaches both antitrust and deceptive practices).

22. N.C. GEN. STAT. § 75-1.1(a) (2001).

23. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 404, 248 S.E.2d 739, 746 (1978).

24. *United Labs., Inc. v. Kuykendall*, 102 N.C. App. 484, 491, 403 S.E.2d 104, 109 (1991) (quoting *McDonald v. Scarboro*, 91 N.C. App. 13, 18, 370 S.E.2d 680, 683-84 (1988)).

and it is deceptive if it has a tendency to deceive.”²⁵ The oft-cited, more complete statement of unfairness is that “[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.”²⁶ Also, “[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.”²⁷ As for deception, “a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required.”²⁸ Therefore, statements that “are literally true . . . may still be deceptive.”²⁹ In addition, whether a trade practice is unfair or deceptive “usually depends upon the facts of each case and the impact the practice has in the marketplace.”³⁰

An important limitation on the scope of unfairness—and, perhaps, deception—lies in the language used by the Fourth Circuit in affirming the denial of a treble damage award under section 75-1.1 after the jury found breach of contract. The court observed that, because “unfairness inheres in every breach of contract, . . . [i]f such an award is to be trebled, the North Carolina legislature must have intended that substantial aggravating circumstances be present.”³¹

25. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). The court also repeated the long-standing proposition that “[t]he determination as to whether an act is unfair or deceptive is a question of law for the court.” *Id.* This principle is traceable to *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975), where, since the facts were stipulated, the court said that “[o]rdinarily it would be for the jury to determine the facts, and based on the jury’s finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce.” *Id.* at 310, 218 S.E.2d at 346–47. This displacement of the jury from “meaningful involvement in the application of section 75-1.1” was the subject of critical comment at the time. James McGee Phillips, Jr., Comment, *Consumer Protection—Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation—What Role for the Jury?*, 54 N.C. L. REV. 963, 970 (1976).

26. *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *overruled on other grounds by* *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). This formula originated in the FTC’s cigarette labeling rule published in 1964 stating the elements of an “unfair act or practice.” Trade Regulation Rule on Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8348–51 (June 22, 1964), *withdrawn*, 30 Fed. Reg. 9484, 9485 (July 28, 1965). The formula was apparently first stated in this form in *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 (7th Cir. 1976), which relied on *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–245 (1972), which had quoted the FTC rule.

27. *Johnson*, 300 N.C. at 264, 266 S.E.2d at 622.

28. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

29. *Johnson*, 300 N.C. at 265, 266 S.E.2d at 622.

30. *Id.* at 262–63, 266 S.E.2d at 621.

31. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 992 (4th Cir. 1981).

Faced with these new and uncertain legal phrases adopted from the federal statute, the North Carolina courts unsurprisingly have looked to federal authorities for assistance in their interpretation of section 75-1.1.³² In its first section 75-1.1 decision,³³ the North Carolina Supreme Court indicated that federal decisions on appeal from the FTC may provide guidance in interpretation.³⁴

Two years later, when the court in *State ex rel. Edmisten v. J.C. Penney Co.*³⁵ departed from federal authority, it was met with a prompt legislative rejoinder in the form of an amendment to the statute.³⁶ As a result, three years after *Penney*, the court in *Johnson v. Phoenix Mutual Life Insurance Company*³⁷ returned to the *Hardy* formula of looking "to the federal decisions interpreting the FTC Act for guidance in construing the meaning of section 75-1.1."³⁸

In some cases, courts apply federal authorities quite rigorously. For example, in cases involving securities transactions, the North Carolina courts have gone well beyond the recitation of formulae and, relying on federal precedent to the effect that FTC Act section 5 does not apply to securities transactions, have straightaway held that such transactions are not covered by section 75-1.1.³⁹ Some decisions have announced flatly that "proof of conduct violative of the

32. Indeed, twenty of the state UDAP statutes "specifically direct the state courts to employ the jurisprudence of the FTC, the federal courts, or both in construing the enumerated statutory proscriptions." Leaffer & Lipson, *supra* note 19, at 533.

33. William B. Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C. L. REV. 205, 210 (1982).

34. *Hardy v. Toler*, 288 N.C. 303, 308, 218 S.E.2d 342, 345 (1975). Although the court also indicated an interest in looking to the decisions of other state courts applying similar state statutes, it proceeded to its decision without examining the outcomes in either federal or state decisions. *Id.* at 308-10, 218 S.E.2d at 345-47.

35. 292 N.C. 311, 316-17, 233 S.E.2d 895, 899 (1977).

36. *See supra* note 18 (noting that the General Assembly provided a new definition for "commerce").

37. 300 N.C. 247, 266 S.E.2d 610 (1980), *overruled on other grounds by Meyer & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988).

38. *Id.* at 262, 266 S.E.2d at 620. Again though, as in *Hardy*, the court seemed to gain no benefit from the factual similarity of any federal precedent. It found one defendant's conduct not unfair because the defendant was "cooperative," and it found another defendant's statements not deceptive because they were truthful and otherwise had no "capacity or tendency to deceive." *Id.* at 265, 266, 266 S.E.2d at 622-23.

39. *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991). The court said: "In *Skinner [v. E.F. Hutton & Co.]*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985), we held that 'securities transactions are beyond the scope of N.C.G.S. sec. 75-1.1.'" *HAJMM*, 328 N.C. at 593, 403 S.E.2d at 492 (quoting *Skinner*, 314 N.C. at 275, 333 S.E.2d at 241). *Skinner* relied on *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162 (4th Cir. 1985), where the Fourth Circuit concluded that section 75-1.1 did not apply to securities transactions because no court had interpreted the FTC Act to apply to securities transactions. *HAJMM*, 328 N.C. at 593, 403 S.E.2d at 492.

Sherman Act is proof sufficient to establish a violation of the North Carolina Unfair Trade Practices Act.”⁴⁰ Furthermore, in accord with federal precedent, the weight of section 75-1.1 authority holds that plaintiffs in antitrust cases brought under the statute will be required to show that the defendant’s conduct had or threatened an adverse effect on market competition.⁴¹ Surprisingly, however, the North Carolina Court of Appeals recently held, in *Van Dorn Retail Management, Inc. v. Klaussner Furniture Industries, Inc.*,⁴² that section 75-1.1 does not reach secondary line price discrimination⁴³ notwithstanding well-established authority that it is reached by section 5 of the FTC Act.⁴⁴

North Carolina courts have also looked to federal antitrust precedent to interpret the “pure antitrust” provisions of Chapter 75. These include section 75-1, the now repealed section 75-5(b) and new section 75-2.1, adopted in 1996.⁴⁵ An early example is *Rose v. Vulcan Materials Co.*⁴⁶ In this case, the court declined to find that a contract providing for a discriminatorily low price to one customer violated section 75-1, barring contracts in restraint of trade, because no federal cases were cited showing such contracts to be in violation of section 1 of the Sherman Act, which also bars contracts in restraint of trade.⁴⁷ The court said that “the body of law applying the Sherman Act,

40. *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 48 (4th Cir. 1983). Citing *ITCO*, the court in *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477, 481 (M.D.N.C. 1985), said, “Section 75-1.1 is a comprehensive law designed to include within its reach the federal antitrust laws.” One voice in the wilderness, long since repudiated by later decisions, claimed in a section 75-1.1 context that “[t]he federal statutes and the judicial interpretations thereof, however, are not applicable to the North Carolina statutes under discussion.” *Am. Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*, 640 F. Supp. 1411, 1434 (E.D.N.C. 1986).

41. These cases are discussed in Part VII(A), *infra*.

42. 132 N.C. App. 531, 512 S.E.2d 456 (1999).

43. See *infra* note 402.

44. *Van Dorn*, 132 N.C. App. at 531–32, 512 S.E.2d at 457. For the federal precedent, see I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 455, 607 (5th ed. 2002) [hereinafter ANTITRUST L. DEV.], and cases cited. The court in *Van Dorn* departed from the federal precedent because it felt obliged to follow *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973), where the court said that section 75-5(b)(5), now repealed, prohibited only primary line discrimination. Section 75-1.1 was not involved in *Rose* since the cause of action there accrued before the effective date of the statute. *Van Dorn*, 132 N.C. App. at 531–32, 512 S.E.2d at 457. This case is discussed at greater length in Part VII(B), *infra*.

45. A summary of North Carolina antitrust law appears in II ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES, Chapter 35 (2d ed. 1999).

46. 282 N.C. 643, 194 S.E.2d 521 (1973).

47. *Id.* at 657, 194 S.E.2d at 531.

although not binding upon this Court in applying [section] 75-1, is nonetheless instructive in determining the full reach of that statute."⁴⁸ A more recent example is the North Carolina Supreme Court's adoption of the federal "filed rate doctrine"⁴⁹ to bar antitrust claims brought under sections 75-1 and 75-1.1.⁵⁰ The court approved the reasoning of the court of appeals,⁵¹ which stated that "[o]ur Supreme Court has held that federal precedent is instructive in interpreting Chapter 75 due to the similarity between provisions of Chapter 75 and the federal antitrust laws"⁵² and where it had expressed the "desire to insure uniformity with federal antitrust law in order to avoid forum shopping."⁵³ In summary, while the line is not completely straight because of *Penney, Van Dorn, American*

48. *Id.* at 655, 194 S.E.2d at 530.

49. Originating in *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), and sometimes referred to as the "Keogh" doctrine, the filed rate doctrine prevents claims for damages by antitrust plaintiffs where the rates charged by the defendants were filed for approval with a regulatory agency and became the "lawful" rates. Issues surrounding the doctrine include whether it may also be used by regulated defendants to bar injunctive relief and whether it is an obstacle for competitor suits as well as customer claims. See ANTITRUST L. DEV., *supra* note 44, at 1240-42.

50. *N.C. Steel, Inc. v. Nat'l Council on Comp. Ins.*, 347 N.C. 627, 632, 496 S.E.2d 369, 372 (1998).

51. *Id.*

52. *N.C. Steel, Inc. v. Nat'l Council on Comp. Ins.*, 123 N.C. App. 163, 171, 472 S.E.2d 578, 582 (1996).

53. *Id.* at 172, 472 S.E.2d at 583. The court said that "absent compelling reasons to the contrary, we are not inclined to permit a remedy under state law that is not allowed under federal law." *Id.* Interestingly, in another Court of Appeals decision issued approximately one month after its decision in *N.C. Steel* and authored by the same judge, the court in fact granted a major remedy under state law that is not allowed under federal law. *Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 582, 473 S.E.2d 680, 686 (1996). In *Hyde*, the court, not citing *N.C. Steel*, decided that "indirect purchasers" could recover under North Carolina General Statutes section 75-16, reasoning in part that a 1969 amendment of section 75-16, which broadened the class of persons given standing, occurred at a time when the federal courts allowed standing to indirect purchasers under section 4 of the Clayton Act. *Id.* at 579, 473 S.E.2d at 685. The court held that circumstance more critical than pure adherence to federal law, *id.*, which would have required adoption of the federal rule articulated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977), which held that indirect purchasers could not recover. Implicit in the material presented thus far is the proposition that state antitrust laws have not been found to be preempted by federal law. See ANTITRUST L. DEV., *supra* note 44, at 815-18. Indeed, the North Carolina Court of Appeals in *Hyde* noted that the Supreme Court's decision in *California v. ARC America Corp.*, 490 U.S. 93 (1989) had held that state "Illinois Brick repealer" statutes granting indirect purchasers the right to recover damages under state antitrust law were not preempted even though *Illinois Brick* denied them that right under federal law. *Hyde*, 123 N.C. App. at 576, 473 S.E.2d at 683. Similarly, although federal preemption occurs in some specific areas of regulation involving unfair and deceptive trade practices, "case law is heavily weighted against merchant defenses that a state [unfair trade practices] statute conflicts with and is preempted by federal law." SHELDON & CARTER, *supra* note 21, at 82.

Rockwool, Inc. v. Owens-Corning Fiberglas Corp.,⁵⁴ and *Hyde v. Abbott Laboratories, Inc.*,⁵⁵ courts applying section 75-1.1 and other provisions of Chapter 75 have demonstrated a strong tendency to rely on federal precedent.

III. A SUMMARY OF THE SCOPE OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Given North Carolina's clearly stated intention to rely on federal precedent interpreting section 5 of the FTC Act in applying section 75-1.1, and the broader policy of relying on federal antitrust authorities generally, evaluating the interpretation of section 75-1.1 made by state and federal courts requires examination of federal precedent.

A. *The "Unfair Methods of Competition" Prong*

The FTC and the reviewing federal courts apply the "unfair methods of competition" prong of FTC Act section 5 to conduct raising antitrust issues or concerns and the "unfair and deceptive acts and practices" component to practices not raising such issues.⁵⁶

At a minimum, the FTC may find conduct to be an "unfair method of competition" under section 5 if such conduct violates the Sherman, Clayton, or Robinson-Patman Acts.⁵⁷ Moreover, the FTC has authority to find antitrust-type conduct an unfair method of competition even though it would not violate an antitrust law.⁵⁸

B. *The Necessity for an Adverse Effect on Market Competition*

Aside from the FTC's authority to reach beyond the letter of the antitrust laws as it exercises its "unfair methods of competition" jurisdiction, it has become well established that, in deciding antitrust cases, the FTC and federal courts will apply either the "per se" rule of antitrust illegality or the so-called "rule of reason," which requires a finding that the conduct has produced or threatens to produce net

54. 640 F. Supp. 1411 (E.D.N.C. 1986).

55. 123 N.C. App. 572, 473 S.E.2d 680 (1996).

56. The FTC's Bureau of Competition focuses on the "unfair methods" prong while its Bureau of Consumer Protection applies the unfair/deceptive prong.

57. "[T]he scope of Section 5 is at least as broad as that of the combined Sherman, Clayton, and Robinson-Patman Acts." ANTITRUST L. DEV., *supra* note 44, at 607. The substantive provisions of the Sherman Act are 15 U.S.C. §§ 1, 2 (2000); the Clayton Act, 15 U.S.C. §§ 14, 18 (2000); and the Robinson-Patman Act, 15 U.S.C. § 13 (2000).

58. *See infra* Part III(C).

harm to market competition.⁵⁹ The per se rule remains in place to invalidate agreements among competitors regarding prices, output, geographical and customer allocations, and vertical minimum resale price maintenance (where the producer requires its customer to resell the product at or above a specified minimum price).⁶⁰ Certain other practices, such as boycotts and tying arrangements, once arguably condemned by the per se rule are now only uncertainly so.⁶¹ As a

59. Some antitrust practitioners believe that under the rule of reason, the defendant always wins. But now-deceased antitrust scholar Phillip Areeda was well known for his observation that "the rule of reason can sometimes be applied in the twinkling of an eye." P. AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 37-38 (Fed. Judicial Ctr. June 1981), *quoted in* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 763 (1999). The rule's application in many cases has not been arduous. *E.g.*, FTC v. Indiana Fed. of Dentists, 476 U.S. 447, 459 (1986) (stating that "[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty"). In other cases, courts have applied the rule of reason using "quick look," "abbreviated," or "truncated" analysis, although the Court in *California Dental* reversed the Ninth Circuit for doing so, and for allowing the FTC to do so, in that case. 526 U.S. at 763-65. On the other hand, application of the per se rule is not always so automatic. The Supreme Court acknowledged long ago that "there is often no bright line separating per se from Rule of Reason analysis" and that "[p]er se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 104 n.26 (1984).

60. The per se rule condemns certain practices promptly, denying the defendant even an opportunity to submit evidence of business justification. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Price and market allocation agreements among competitors—horizontal agreements—have long been condemned as per se illegal. As a result of the recent decision in *State Oil Co. v. Khan*, 522 U.S. 3, 18 (1997), vertical *maximum* resale price maintenance (where the producer requires its customer to resell the product below a specified maximum price) is no longer subject to the per se rule, but to the rule of reason.

61. *See* *Nynex v. Discon*, 525 U.S. 128, 130 (1998) (holding that the per se group boycott rule did not apply); *Indiana Dentists*, 476 U.S. at 458 (boycotts); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984) (tie-ins). The Court in *Nynex* noted that the Second Circuit had allowed "evidence of 'justification,'" and it quoted approvingly two antitrust scholars: "Boycotts are said to be unlawful per se but justifications are routinely considered in defining the forbidden category." 525 U.S. at 135, (quoting 7 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 1510, at 416 (1986)). In *Indiana Dentists*, the Court observed that the practice at issue "resembles practices that have been labeled 'group boycotts'" and that "this Court has in the past stated that group boycotts are unlawful *per se*." 476 U.S. at 458. However, the Court decided to "evaluate the restraint at issue in this case under the Rule of Reason rather than a rule of *per se* illegality." *Id.* at 458-59. The Court in the *NCAA* case said that while it had "spoken of a 'per se' rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis." 468 U.S. at 104 n.26. In *Microsoft*, the D.C. Circuit vacated the district court's finding of liability on the tying claim using the per se rule and remanded for evaluation of the claim under the rule of reason. *United States v. Microsoft Corp.*, 253

result, most antitrust claims are now analyzed under the rule of reason.

Application of this rule necessitates a determination of whether the conduct has had, is having, or threatens to have an adverse effect on market competition. As the Supreme Court said in *State Oil Co. v. Khan*:

[M]ost antitrust claims are analyzed under a “rule of reason,” according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature and effect.⁶²

Today, whether there has been or will be an adverse effect on market competition translates to whether there has been or will be a reduction in market output and/or an increase in market prices.⁶³

F.3d 34, 46 (D.C. Cir. 2001) (per curiam). By all past understanding, conduct is not subject to the per se rule if the defendant is allowed to offer evidence of “justification.” Such evidence has in fact been routinely admitted in boycott and tie-in cases.

62. 522 U.S. at 10. The Supreme Court long ago said, “As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.” *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 343 (1982). And the lower courts got the message. “Plaintiffs’ initial burden under the rule of reason analysis is to show that the alleged restraint had a ‘substantially adverse’ effect on competition in the relevant market. . . . If Plaintiffs cannot establish an anticompetitive effect, there is no cause of action under section 1 of the Sherman Act.” *Sea-Roy Corp. v. Parts R Parts, Inc.*, 1998-1 Trade Cases (CCH) ¶ 72,155, at 81,990-91 (M.D.N.C. 1997) (mem.), *aff’d per curiam*, Nos. 98-1028, 98-1546, 1999 U.S. App. LEXIS 3383 (4th Cir. Mar. 4, 1999 unpublished). The same is true in a monopolization context: “[T]o be condemned as exclusionary, a monopolist’s act must have an ‘anticompetitive effect.’ That is, it must harm the competitive *process* and thereby harm consumers.” *Microsoft*, 253 F.3d at 58.

63. Pointing to output as key, the Court in *Indiana Dentists*, after noting that the search was for any adverse effects on competition, said that “‘proof of actual detrimental effects, such as a reduction of output’ can obviate the need for an inquiry in market power.” 476 U.S. at 460-61, (quoting 7 P. AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)). Applying the rule of reason in the *NCAA* case, the Court said: “Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.” 468 U.S. at 107-08. In *California Dental*, the Court noted that the issue is “whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices,” and quoted the Seventh Circuit: “[R]aising price, reducing output, and dividing markets have the same anticompetitive effects.” 526 U.S. at 777 (quoting *Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n*, 744 F.2d 588, 594-95 (7th Cir. 1984)). The Antitrust Guidelines for Collaborations Among Competitors jointly issued by the FTC and the Department of Justice in April 2000 state: “The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”

Certain aspects of the defendant's conduct may enhance output and procompetitive effects, while other aspects may produce anticompetitive effects. In such cases, the court will need to balance the pro- and anticompetitive effects in order to determine the net effect on competition.⁶⁴ The key inquiry, however, pertains to *market* competition, not about an adverse effect on any particular competitor. The antitrust laws "were enacted 'for the protection of *competition* not *competitors*.'"⁶⁵ "[H]arm to one or more *competitors* will not suffice."⁶⁶ And, as the Supreme Court noted in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*,⁶⁷ "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."⁶⁸ For such offenses the laws pertaining to business torts and even criminal laws may apply.⁶⁹ Federal antitrust law today fully recognizes that the more efficient firm may—indeed, should—drive from business the less efficient one.⁷⁰

FTC & DEP'T OF JUSTICE, THE ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 10 (April 2000), available at <http://www.ftc.gov/os/2000/04/ftcdcojguidelines.pdf>. In *Sea-Roy*, the court found no adverse effect on market competition on the basis of evidence indicating price declines, no reduction in output, and no "evidence . . . [of] sufficient market power to potentially injure competition in the relevant market." 1998-1 Trade Cases (CCH) at 81,994 (mem.).

64. See, e.g., *Cal. Dental*, 526 U.S. at 759 (questioning whether the net effect of the Association's advertising requirements was to promote or hinder competition); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 257 (2d ed. 1999) (discussing the balancing process).

65. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *McDaniel v. Greensboro News Co.*, 1984-1 Trade Cases (CCH) ¶ 65,792 (M.D.N.C. 1983) ("The antitrust laws exist to protect competition, not competitors."); *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1196, 1218 (W.D.N.C. 1989) (stating that "[a]nticompetitive actions are not those 'that merely injure competitors, but [are] actions that harm the competitive process, a process that aims to bring consumers the benefits of lower prices, better products and more efficient production methods'") (quoting *Interface Group, Inc. v. Mass. Port Auth.*, 816 F.2d 9, 10 (1st Cir. 1987)), *aff'd per curiam*, 912 F.2d 463 (4th Cir. 1990) (unpublished table decision).

66. *Microsoft*, 253 F.3d at 58.

67. 509 U.S. 209 (1993).

68. *Id.* at 225. "As harsh as it may be, behavior that hurts or even destroys an individual competitor does not violate the Sherman Act unless it also has an adverse effect on competition as a whole." *Sea-Roy*, 1998-1 Trade Cases (CCH) at 81,993 (mem.).

69. "[O]ther laws, for example, 'unfair competition' laws, business tort laws, or regulatory laws provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality.'" *Nynex v. Discon*, 525 U.S. 128, 137 (1998) (quoting from 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651d, at 78 (1996)) (noting that several remedies are available to punish offensive and immoral business practices).

70. "Fundamental canons of antitrust law recognize the legitimacy of permitting the

Closely related to the requirement in antitrust cases that harm to the competitive process be shown is the necessity in private antitrust cases for the plaintiff to show “antitrust injury.”⁷¹ Although inapplicable to the FTC, the private antitrust complainant must show not only that the defendant’s actions harmed market competition but also that the specific injury it suffered was of “the type the antitrust laws were intended to prevent and that flow[ed] from that which ma[de] the defendants’ acts unlawful.”⁷² The doctrine has been applied where the antitrust plaintiff complained about mergers of competitors. In those cases, the mergers were found to violate the standards of section 7 of the Clayton Act since they increased market concentration sufficiently to threaten post-merger collusion, overt or tacit. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,⁷³ however, the Supreme Court rejected the damage claim where the plaintiff argued that, absent the merger, the acquired facilities would have failed altogether, thus enabling the plaintiff to achieve higher prices and profits.⁷⁴ The Court indicated that the plaintiff’s damages “did not occur ‘by reason of’ that which made the acquisitions unlawful.”⁷⁵ In *Cargill v. Monfort of Colorado, Inc.*,⁷⁶ the Court applied the doctrine to deny injunctive relief, observing that since an illegal merger should benefit an uninvolved industry competitor by producing higher prices and profits, the plaintiff must have feared that the merger would increase rather than reduce competition. The Court held that a “threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.”⁷⁷

Finally, in *Atlantic Richfield Co. v. USA Petroleum Co.*,⁷⁸ the plaintiffs were denied damages where they complained of an illegal agreement between Atlantic Richfield and its dealers whereby the dealers would charge no more than specified prices for gasoline.⁷⁹ Although, at that time, the agreement was a per se violation of

natural economic forces of free enterprise to drive inefficient producers of goods and services out of the market, and replace them with efficient producers.” *Re/Max Int’l, Inc. v. Realty One, Inc.*, 1999 FED. App. 012ap, 173 F.3d 995, 1000 (6th Cir. 1999), *cert. denied*, 122 S. Ct. 1539 (2002).

71. See PHILLIP AREEDA AND LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* 85–88 (5th ed. 1997).

72. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

73. 429 U.S. 477 (1977).

74. *Id.* at 488–89.

75. *Id.* at 488.

76. 479 U.S. 104 (1986).

77. *Id.* at 116–17.

78. 495 U.S. 328 (1990).

79. *Id.* at 331.

section 1 of the Sherman Act,⁸⁰ the plaintiffs were denied damages despite their argument that defendants' pricing agreement deprived them of the opportunity to charge higher prices and obtain bigger profits.⁸¹ The Court reasoned that "any injury to competitors of the retailers subject to ceiling prices resulted from competition and thus was not the type of loss that antitrust law was designed to prevent."⁸²

C. Section 5's Coverage of Conduct not Reached by Antitrust Law

As noted above, the FTC may find a section 5 violation if the conduct violates a federal antitrust law. The extent to which the FTC may exercise jurisdiction over conduct not condemned by the Sherman, Clayton or Robinson-Patman acts has been deferred to this point because it tightly intersects the question of how meticulously section 5 authorities should be incorporated into section 75-1.1 law. Since the FTC jurisdiction issue has been exhaustively researched and described by others,⁸³ a summary will suffice.

It seems clear from the legislative history that, even as originally enacted in 1914, covering only "unfair methods of competition," section 5 was nevertheless intended to extend to two categories of conduct not reached by the antitrust laws.⁸⁴ The first category

80. As explained in *supra* note 60 and accompanying text, both minimum and maximum resale price maintenance had been held to be per se violations of section 1 of the Sherman Act until the Supreme Court, in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), moved maximum resale price maintenance to the rule-of-reason category.

81. *Atl. Richfield Co.*, 495 U.S. at 335.

82. AREEDA & KAPLOW, *supra* note 71, at 87.

83. ANTITRUST L. DEV., *supra* note 44, at 608-15 (recognizing that the FTC has "authority similar to a court of equity to consider public values beyond those included in the antitrust laws"); 2 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 302h, at 21-27 (2d ed. 2000) (stating that FTC Act section 5 is not limited to the constraints of the Sherman and Clayton Acts); G. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 49-103 (1924) (discussing the FTC's jurisdiction and procedure for filing and pursuing antitrust complaints); EARL W. KINTNER AND WILLIAM P. KRATZKE, FEDERAL ANTITRUST LAW §§ 48.7-48.9, at 12-19 (1988) (discussing section 5, the incipency doctrine and the spirit and policies of antitrust laws); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 260 (1980) (noting that the FTC has jurisdiction over both the Sherman and Clayton Acts); Thomas C. Willcox, *Beyond the Pale of the Sherman and Clayton Acts: The Federal Trade Commission's "Invitation to Collude" Doctrine as a Deterrent to Violations of the Antitrust Laws*, 39 ANTITRUST BULL. 623, 623-27 (1994) (finding that courts have determined that the FTC was created to restrain unfair practices even though not covered by the Sherman or Clayton Acts).

84. By "antitrust laws" here is meant the Sherman and Clayton Acts. The Clayton Act was also enacted in 1914 within two weeks of passage of the FTC Act, and Congressmen apparently "had both bills in mind when they were debating the FTC Act." Averitt, *supra* note 83, at 260 n.141. The Robinson-Patman Act, technically an amendment to section 2 of the Clayton Act's provision relating to price discrimination,

consisted of antitrust-type conduct even though not technically covered by the antitrust laws—conduct at least lying within the “shadow” of the Sherman and Clayton Acts or violating their “spirit”—while the second category consisted of outright non-antitrust conduct, that is, conduct that not only failed to threaten market or competitive consequences but as to which such concepts were irrelevant.

1. Conduct Violating the “Spirit” of the Antitrust Laws

Using the standard terminology, the first category includes conduct violating not the letter but the “spirit” of the Sherman Act,⁸⁵ conduct consisting of an “incipient violation” of the antitrust laws,⁸⁶ and conduct violating “competition policy as framed by the Commission.”⁸⁷ In some sense, the 1972 Supreme Court decision in *FTC v. Sperry & Hutchinson*⁸⁸ is authority for the proposition that section 5 reaches all these categories. The Court there upheld the FTC, although it remanded the case, and emphasized that it had ample authority to “consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”⁸⁹

The conduct challenged by the FTC consisted of Sperry & Hutchinson’s aggressive litigation policies, which had closed down trading stamp exchanges.⁹⁰ Sperry & Hutchinson objected to the exchanges as threatening its position as the largest trading stamp seller in the country.⁹¹ All agreed that Sperry & Hutchinson’s conduct was not reached either by the letter or the “spirit” of the antitrust laws.⁹² As opposed to its argument in the Supreme Court,⁹³ the FTC’s decision itself denounced Sperry & Hutchinson’s conduct both as an unfair method of competition and as an “unfair act and practice.”⁹⁴

was not enacted until 1936. Act of June 19, 1936, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. § 13-13b, 21a (2000)).

85. Averitt, *supra* note 83, at 251.

86. *Id.* at 242.

87. *Id.* at 275. Averitt sets out an extensive and detailed review of the legislative history supporting the FTC’s jurisdiction in each of these areas.

88. 405 U.S. 233 (1972).

89. *Id.* at 244.

90. *Id.* at 234.

91. *Id.* at 236-37.

92. *Id.* at 239.

93. *Id.*

94. *Sperry & Hutchinson Co. v. FTC*, 432 F.2d 146, 147 (1970), *modified by FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

Although it is not totally clear, there is a strong suggestion that the Court thought the FTC's jurisdiction to reach "public values" beyond those protected by the letter and spirit of the antitrust laws was derived from the unfair/deceptive prong of the statute, rather than the unfair methods prong.⁹⁵ When it referred to these "public values," the Court cited the FTC's own attempt in 1964 in the "cigarette labeling rule" to define its "unfair acts or practices" jurisdiction.⁹⁶ In any event, even if trading stamps were still in vogue, undoubtedly the FTC today would not bring another *Sperry & Hutchinson* case challenging the practices as an "unfair method of competition."

Recent FTC history may be thought of as falling into three time periods: (1) the 1960's and early 1970's, when the courts granted wide authority to the FTC to bring cases either on the basis of its "incipiency" jurisdiction or on the ground that the conduct violated the spirit although not the letter of the antitrust laws, or both; (2) the 1980's, during which the Commission itself and the reviewing courts sharply curtailed FTC "unfair methods" jurisdiction and, in particular, demanded that it act only on the basis of showing an adverse effect on market competition; and (3) the more recent era of the 1990's, during which the Commission has brought some cases and obtained consent decrees where the conduct threatened competition but did not violate the letter of the antitrust laws.⁹⁷

In addition to *Sperry & Hutchinson*, the first time period includes the tires, batteries, and accessories ("TBA") cases, such as, *Atlantic Refining Co. v. FTC*,⁹⁸ where the Supreme Court upheld the Commission in issuing a cease and desist order against Atlantic for pressing Goodyear TBA upon its franchised dealers even though not formally "tying" them to its sales of gasoline.⁹⁹ Citing the FTC's

95. *Sperry & Hutchinson*, 405 U.S. at 244.

96. *Id.*

97. This course of events and the major cases are described in ANTITRUST L. DEV., *supra* note 44, at 608-15.

98. 381 U.S. 357 (1965).

99. *Id.* at 369. Tying occurs when the seller agrees to sell product A, the tying product, but only on the condition that the buyer take product B, the tied product, as well. One component of the offense is that the seller impose the requirement as a condition, not simply provide it as an option:

[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). See generally ANTITRUST L. DEV., *supra* note 44, at 175-212 (describing the components of the tie-in

ability “to arrest trade restraints in their incipency,” the Court also upheld the Commission in *FTC v. Brown Shoe Co.*¹⁰⁰ even though it had not found in the language of section 3 of the Clayton Act that there had been a substantial lessening of competition or tendency to produce a monopoly where the respondent rewarded dealers who agreed to purchase exclusively from Brown.¹⁰¹ The Second Circuit also affirmed the FTC in *Grand Union Co. v. FTC*,¹⁰² where the respondent induced discriminatory promotional allowances from its suppliers, a practice that technically did not violate the Robinson-Patman Act.¹⁰³

Undoubtedly related to the Chicago School renovation of antitrust doctrine,¹⁰⁴ the change of direction in the 1980’s found the FTC a willing participant in its own jurisdictional curtailment. Thus, in *General Foods Corp.*,¹⁰⁵ the FTC rejected the argument of its own complaint counsel that respondent’s predatory pricing practices violated section 5 even though they did not amount to an attempt to monopolize in violation of section 2 of the Sherman Act because its market share was insufficient to satisfy the “dangerous probability of success” prong of the attempt offense.¹⁰⁶ The Commission declined to rely on its “incipiency” authority recognized in *Brown Shoe* saying that conduct not in violation of the Sherman Act would not be condemned under the FTC Act.¹⁰⁷

offense).

100. 384 U.S. 316 (1966).

101. *Id.* at 322.

102. 300 F.2d 92 (2d Cir. 1962).

103. Section 2(f) of the Act prohibits purchasers from inducing or receiving price discriminations, but the Act does not prohibit inducing or receiving discriminatory promotional allowances. 15 U.S.C. § 13(a)–(f) (2000).

104. Many learned articles by academics and others discuss and analyze the origins, content, merits, limitations and future of the Chicago School model of antitrust law and policy. Four important ones, together with an extensive bibliography of many others, are collected in *AN ANTITRUST ANTHOLOGY* (Andrew I. Gavil ed., 1996).

105. *In re Gen. Foods Corp.*, 103 F.T.C. 204 (1984).

106. *Id.* at 366. “[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Proof of accomplished monopolization is more difficult, requiring “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

107. *Gen. Foods*, 103 F.T.C. at 365–66.

The Ninth Circuit established the new direction four years earlier in *Boise Cascade Corp. v. FTC*,¹⁰⁸ when it reversed the FTC's order against an industry-delivered pricing system where the Commission record contained no evidence of actual collusion or anticompetitive effect.¹⁰⁹ The Second Circuit issued a similar reversal in the *Ethyl* case, which also involved delivered pricing and a "price signaling" system, but where the FTC found a "significant adverse effect on competition," although no overt collusion.¹¹⁰ The Second Circuit had earlier reversed the FTC's order in *Official Airline Guides, Inc. v. FTC*,¹¹¹ where it had directed the monopolist publisher of flight schedule information to include in its publication scheduling information about commuter flights.¹¹² The problem faced by the Commission in that case was that the respondent was not a participant in the market in which adverse competitive effects appeared.¹¹³

More recently the FTC has filed section 5 cases where there was no violation of other antitrust laws. This change is consistent with post-Chicago school developments. Although courts have not yet approved these initiatives, the Commission has obtained consent decrees. The most prominent examples are five "invitation to collude" cases, where the Commission alleged in its complaints that one company either directly or implicitly invited another competitor to enter into a price fixing arrangement.¹¹⁴ Such conduct is not price fixing under section 1 of the Sherman Act because no accord or agreement can be shown. Another example is the Dell Computer complaint, which alleged unilateral conduct in violation of section 5 but did not allege a violation of section 2 of the Sherman Act.¹¹⁵

108. 637 F.2d 573 (9th Cir. 1980).

109. *Id.* at 582.

110. *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 130 n.2 (2d Cir. 1984).

111. 630 F.2d 920 (2d Cir. 1980).

112. *Id.* at 291.

113. *Id.* at 293.

114. *In re Stone Container Corp.*, 125 F.T.C. 853 (1998) (decision and order); *Precision Moulding Co.*, 122 F.T.C. 104 (1997) (decision and order); *YKK (U.S.A.) Inc.*, 58 Fed. Reg. 41, 790 (FTC 1993) (consent order), [1993-1997 Transfer Binder CCH] ¶ 23,355 (FTC July 1, 1993); *AE Clevite, Inc.*, [1993-1997 Transfer Binder CCH] ¶ 23,354 (FTC June 8, 1993); *Quality Trailer Products Prod. Corp.*, [1987-1993 Transfer Binder CCH] ¶ 23,247 (FTC Nov. 5, 1992); see ANTITRUST L. DEV., *supra* note 44, at 613-14. Willcox contends that the *Mead Johnson* case also fits within this category. Willcox, *supra* note 83, at 633, 636-41; see *Mead Johnson & Co.*, Federal Trade Commission Complaints and Orders, [1987-1993 Transfer Binder CCH] ¶ 23,209 (FTC June 11, 1992).

115. *Dell Computer Corp.*, No. C-3658; Statement of the Federal Trade Comm'n, *Dell Computer Corp.*, Dkt. No. C-3658 (May 20, 1996); see *In re Dell Computer Corp.*, 131 F.T.C. 616 (1996).

This summary of the exercise of FTC antitrust authority using the “unfair methods of competition” prong of section 5 indicates that the Commission’s authority after the 1972 *Sperry & Hutchinson* decision has been narrowed both by judicial review of FTC actions and by the Commission’s own evolving enforcement policies. Undoubtedly, the FTC today will proceed with great caution under section 5 to claim as an unfair method of competition any conduct that does not violate the Sherman or Clayton Acts. In taking any such action it will undoubtedly require that any such conduct either produce or threaten an adverse effect on market competition or be devoid of efficiency gains. “Invitations to collude” are a good example of justifiable FTC action challenging conduct outside the Sherman and Clayton Act domain, since they clearly threaten anticompetitive consequences and have no efficiency justifications.

Professors Areeda, Hovenkamp, and Blair urge that “the spirit and letter of the antitrust laws are identical” and that “sound policy requires the same results under the Federal Trade Commission Act” as are produced under the Sherman and Clayton Acts.¹¹⁶ They add:

[T]here is a fundamental difficulty in distinguishing an *antitrust* offense under FTC Act [section] 5 from that under the Sherman or Clayton Acts. . . . [T]he Sherman and Clayton Acts are broad enough to cover any anticompetitive agreement or monopolistic situation that ought to be attacked whether “completely full blown or not.”

The point is that sound Sherman Act analysis takes account of all relevant policies bearing on the issue before the enforcement agency. Accordingly, sound Sherman Act analysis must also govern the application of [section] 5 to antitrust-type offenses, except insofar as the FTC enforcement route differs in some relevant way from enforcement lawsuits initiated by the Justice Department or by private parties.¹¹⁷

These authors, however, concede that section 5 might be used to reach non-collusive “oligopoly behavior when the Sherman Act’s requirements are not met” or “unaccepted solicitation[s] to form an illegal conspiracy.”¹¹⁸ The key prerequisite to FTC jurisdiction that they would require in such cases “is a suspected injury to *competition*, albeit one that does not easily fit into the technical standards of the

116. II PHILLIP E. AREEDA ET AL., *ANTITRUST LAW*, § 302h at 21 (2d ed. 2000).

117. *Id.* at 22.

118. *Id.* at 24.

Sherman Act.”¹¹⁹ Further, they point to the unavailability of private damage actions based on section 5 as a factor justifying the use of “more aggressive substantive standards” under section 5 than under the Sherman and Clayton Acts.¹²⁰

Any venturing of the FTC beyond existing antitrust limits raises the question of the extent to which application of section 75-1.1 should follow; that is, the question is raised as to what extent North Carolina courts should interpret and apply section 75-1.1 in complete tandem with FTC (and judicial) action under section 5. The question is raised because section 75-1.1, unlike section 5 of the FTC Act, is available to private litigants pursuing non-public objectives combined with automatic treble damages and the possibility of attorney fees.¹²¹ As Areeda and Hovenkamp point out,¹²² it is one thing for the FTC with its public policy goals and a staff of attorneys and economists to carefully pursue conduct that falls outside antitrust limits where the available relief consists of an order to cease and desist. As Hovenkamp puts it, the “social cost of an error” by the FTC will not be very great.¹²³ It may be quite a different thing for North Carolina courts to authorize private litigants to pursue such claims where the motivations, rewards, and relief are quite different.

A factor qualifying this concern is that many such section 5 precedents may not lend themselves readily to private lawsuits under

119. *Id.*

120. *Id.* at 23.

121. See N.C. GEN. STAT. § 75-16 (2001) (awarding treble damages); § 75-16.1 (providing for discretionary attorney fees).

122. See *supra* note 120 and accompanying text.

[Section] 5 was conceived as a vehicle for evolving new administrative prohibitions of conduct not previously thought unlawful, which is presumably the reason that most of its sanctions are prospective only and invoked only by public officials. The short of it is that it would make no sense—and it certainly was not intended—to assimilate the entire body of unfair competition or business tort law into [section] 2 of the Sherman Act, which is concerned with monopoly, not with morality.

III A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 349, 349–50 (2000).

123. HOVENKAMP, *supra* note 64, at 588. The FTC is not limited entirely to prospective, cease-and-desist remedies. Pursuant to sections 5(l) and 5(m) of the FTC Act, it has authority to seek “civil penalties” (currently in the amount of \$11,000 per day) from persons or firms violating cease and desist orders and final rules. 15 U.S.C. §§ 45(l), (m) (2000); ANTITRUST L. DEV., *supra* note 44, at 662–65. It also has authority to obtain monetary restitution for consumers pursuant to sections 19(b) (codified at 15 U.S.C. § 57(b)) and 13(b) (15 U.S.C. § 53(b)) of the Act. See ANTITRUST L. DEV., *supra* note 44, at 666–70. And, *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp.2d 25, 37 (D.D.C. 1999) held that the FTC has the authority under section 13(b) to obtain disgorgement of profits or “illegally obtained funds.”

section 75-1.1. For example, since mere “invitations to collude” do not raise prices, they will not produce damage-suffering plaintiffs. Private cases resulting only in injunctive relief are comparable to FTC cases and can be accepted easily in North Carolina.¹²⁴

2. Non-Antitrust Conduct as an Unfair Method of Competition

Having considered the extent to which conduct not prohibited by the antitrust laws may be reached as an unfair method of competition under FTC Act section 5, the next question is the extent to which non-antitrust conduct is covered by the unfair methods prong of section 5. Non-antitrust conduct is the second category covered by section 5 as originally passed in 1914 when it referred only to “unfair methods of competition.” As noted above, this category consists of conduct having no connection to traditional antitrust concepts. The legislative history indicates that Congress intended some such conduct to be reached as “unfair methods of competition” even though it would be neater and cleaner if the “unfair methods” category reached only antitrust offenses, including those covered by FTC Act section 5 as stretched occasionally—and, hopefully, prudently—by the FTC.¹²⁵ With all antitrust, including antitrust stretched by section 5, covered by “unfair methods of competition” both under section 5 and under North Carolina’s section 75-1.1, the question is whether the unfair methods prong must also accommodate other matters.

The prime candidate for such coverage is common law “unfair competition.” The FTC brought some “unfair competition” cases during the period 1914–1938 relying on its “unfair methods of competition” jurisdiction.¹²⁶ The legislative history shows, however, that section 5 was not written merely to refer to “unfair competition” because that was a well-established tort at common law, and Congress

124. The availability of appropriate relief has impacted substantive antitrust policy. Whether price fixing actually occurred in a circumstantial evidence case is an issue sometimes assisted by asking whether any meaningful injunctive relief can be imposed upon the defendants. Oligopoly pricing that produces supracompetitive prices may be unblockable because competitors cannot, and should not, be ordered to ignore each other when setting prices. But the FTC or a court could order competitors to abandon a noncollusive delivered pricing system if it produced similar price effects. Such a system is enjoined even if pure interdependent oligopolistic pricing is not. The FTC attempted such an outcome in *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980), but the Ninth Circuit refused to cooperate.

125. Averitt, *supra* note 83, at 234–35, 271–75.

126. See ANTITRUST L. DEV., *supra* note 44, at 635, and cases cited.

did not want the FTC's jurisdiction to be confined to the common law tort.¹²⁷

In the context of section 75-1.1, Professor Aycock considered the problem of common law unfair competition thirty years ago and concluded that "practices heretofore deemed unfair competition under the common law of North Carolina should now be a violation of section 75-1.1 as an unfair *method* of competition."¹²⁸ In his next two paragraphs, however, Professor Aycock seemingly refined his position, saying that common law unfair competition could also be reached under the "unfair or deceptive acts or practices" prong of section 75-1.1, and that perhaps this approach is preferable since this prong "will protect competitors as well as consumers from such practices."¹²⁹ This suggestion, if implemented, would resolve the problem noted above, that "unfair methods of competition" must share its home base with non-antitrust matters.

The next question is, in addition to the common law tort of unfair competition, what other conduct did Congress intend to be covered by "unfair methods of competition?" Some amazingly broad statements were made in congressional debate.¹³⁰ In addition, in *FTC v. Gratz*,¹³¹ the United States Supreme Court, although declining to uphold the FTC's ruling, found that the words unfair methods of

127. Averitt describes the legislative process, saying that "[a]n amendment . . . was eventually adopted . . . confirming that the Senate intended Section 5 to have a general reach unconstrained by previous common law interpretations of 'unfair competition.'" Averitt, *supra* note 83, at 235. The Supreme Court in *FTC v. Raladam Co.*, 283 U.S. 643 (1931) also noted that "unfair methods of competition" was used by the drafters to include conduct not reached by common law unfair competition. *Id.* at 648.

128. William B. Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C. L. REV. 199, 250 (1972).

129. *Id.* at 251. Professor Aycock's reasoning is that the unfair/deceptive prong "is a broader prohibition" than the unfair methods prong and that "judicial development in North Carolina will probably be centered on it rather than on the more limited phrase." *Id.* He reached these observations after noting that FTC Act section 5 was amended by the Wheeler-Lea Act of 1938 to add the "unfair or deceptive acts or practices" phrase, and that this amendment was prompted by the United States Supreme Court decision in *Raladam*, which held "that proof of injury to competition was a jurisdictional prerequisite to a proceeding charging 'unfair methods of competition.'" *Id.* at 250. *Raladam* was actually a deceptive advertising case where respondent, producer of an "obesity cure" to be taken internally, was alleged to have deceived the public by advertising that the cure was safe and effective. The Supreme Court reversed the FTC not because it failed to show an adverse effect on market competition, but because it failed to show injury to any competitors or, indeed, that there were any competitors.

130. For example, Senator Newlands said: "The question is what unfair competition covers. It covers every practice and method between competitors upon the part of one against the other that is against public morals, . . . or is an offense for which a remedy lies either at law or in equity." 51 CONG. REC. 11,075, 11,112 (1914).

131. 253 U.S. 421 (1920).

competition were “clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.”¹³² The negative implication obviously gives “unfair methods” great, even unmanageable, breadth. Before 1938, the FTC also used its unfair methods jurisdiction to challenge deceptive practices where an adverse effect on a competitor could be shown.¹³³ And the Court upheld the FTC in *FTC v. R.F. Keppel & Brother, Inc.*,¹³⁴ agreeing that the respondent had engaged in an unfair method of competition¹³⁵ where Keppel’s sales of “penny candy” lured children into gambling.¹³⁶ “Penny candy” consisted of packages that sold for a penny with some of them containing both candy and a penny.¹³⁷ Averitt concludes that the 1914 version of section 5 authorized the FTC “to determine and enforce recognized standards of fair competitive behavior, whether these have been declared by statute or have emerged as the generally accepted ethical norms of the community. This is primarily true (and perhaps exclusively true) where violation of those standards confers a competitive advantage.”¹³⁸

However, the 1938 broadening of section 5 to reach “unfair or deceptive acts or practices” was a major change in the section 5 landscape. Generally, since that time, the FTC has not challenged such “acts or practices” as unfair methods of competition but instead has used its new authority.¹³⁹ As noted above, the *Sperry & Hutchinson* case was a significant exception, but the FTC suffered a defeat in the Supreme Court in that case.

In summary, the unfair methods prong of FTC Act section 5 today reaches conduct that violates the Sherman, Clayton, and Robinson-Patman Acts plus antitrust-type conduct challenged by the

132. *Id.* at 427.

133. ANTI-TRUST L. DEV., *supra* note 44, at 616 (citing as an example *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922)).

134. 291 U.S. 304 (1934).

135. *Id.* at 313.

136. *Id.* at 308.

137. The Supreme Court in *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 242–43 (1972) observed that since any competitor of Keppel’s could have responded by adopting Keppel’s practice, the case involved no injury to a competitor of the sort that had been required by the Court three years earlier in *FTC v. Raladam*, 283 U.S. 643 (1941).

138. Averitt, *supra* note 83, at 274.

139. Since 1938 the FTC “has prohibited a variety of marketing practices using variants of the Keppel scheme, applying its authority to prohibit unfair practices.” ANTI-TRUST L. DEV., *supra* note 44, at 647.

FTC on the basis of a showing of net anticompetitive effect. That the FTC could conceivably withstand judicial review should it, as in *Keppel*, challenge an unfair or deceptive practice as an unfair method of competition, does not change the reality that the unfair methods prong is applied by the FTC today as an antitrust statute.

D. *The Unfair or Deceptive Acts or Practices Prong*

In addition to the application of FTC Act section 5 to “unfair methods of competition,” after the Wheeler-Lea Amendments of 1938, the statute also reaches “unfair or deceptive acts or practices.” It is beyond the scope of this article to survey the extensive FTC law on unfair and deceptive acts and practices, and useful surveys of this law exist elsewhere.¹⁴⁰ A point relevant to this discussion, though, is that with the publication in 1964 of its “cigarette labeling rule,” the FTC commenced the process of differentiating between unfair practices, on the one hand, and deceptive practices, on the other.¹⁴¹ The cigarette labeling rule articulated a three-pronged standard for unfair acts and practices. That standard was followed in 1980 with the issuance of a “policy statement” defining unfair practices, which in turn was codified by the FTC Act Amendments of 1994.¹⁴² The statute provides that an unfair act or practice is one that “causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹⁴³ In 1983, the Commission also issued a policy statement indicating that a deceptive practice would be found “if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer’s detriment.”¹⁴⁴

IV. THE CONNECTION BETWEEN SECTION 75-1.1, ANTITRUST LAW, THE FTC ACT, AND BUSINESS TORTS

Proper articulation of the concern of this paper—that competitive conduct that benefits consumers may be penalized by section 75-1.1 liability—requires brief reference to the relationship of

140. *E.g.*, ANTITRUST L. DEV., *supra* note 44, at 616–52 (surveying the application of section 5 of the Federal Trade Commission Act as consumer protection law).

141. *Id.* at 616.

142. *Id.* at 647–49.

143. 15 U.S.C. § 45(n) (2000).

144. Policy Statement on Deception, 4 Trade Reg. Rep. (CCH) ¶ 13,205 at 20,917 (F.T.C. Apr. 23, 1997).

business or commercial torts both to antitrust law and to section 75-1.1. Three points should be made.

First, state common law and statutory commercial or “business” torts are not themselves antitrust violations, but in some cases they may constitute components of antitrust violations.¹⁴⁵ As noted earlier, business torts do not alone achieve antitrust scope because proof of such claims generally requires no showing of an adverse effect on market competition. Conduct that is illegal as a matter of state common law or statutory tort law, however, may in some cases be used by antitrust plaintiffs to satisfy the requirement that predatory conduct be shown to establish the offenses of monopolization and attempt to monopolize.¹⁴⁶ Tort conduct, in some cases, may also be relevant to section 1 Sherman Act claims. For example, in *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*,¹⁴⁷ a 1932 First Circuit decision, the court held that a “conspiracy . . . the purpose or intent of which is by unfair means to eliminate a competitor” was a per se violation of section 1 of the Sherman Act. In many decisions over seventy years thereafter, the First Circuit and most other courts decided instead that such activity should be tested under the rule of reason.¹⁴⁸

Second, conduct that is a business tort can also be a violation of FTC Act section 5.¹⁴⁹ Moreover, and more importantly, it seems that virtually all North Carolina business torts are found also to violate section 75-1.1.¹⁵⁰ Successful business tort plaintiffs may frequently be able to collect not only compensatory damages but also punitive damages. Business tort plaintiffs who also show violations of section 75-1.1 can, as noted above, collect treble damages automatically and may be able to obtain attorney fees.

Third, during the period 1960–1990, tort claims nationally were more frequently asserted in antitrust cases than had been true before; damage recoveries on tort claims in some cases dwarfed antitrust

145. See AREEDA & HOVENKAMP, *supra* note 122, at 271–87, 344–59; Monty Gray & Robert Homchick, *The Evolving Role of Business Torts in Antitrust Litigation*, in BUSINESS TORTS & UNFAIR COMPETITION: A PRACTITIONER’S HANDBOOK 3, 3–14 (A. Michael Ferrill ed., 1996); ANTITRUST L. DEV., *supra* note 44, at 125–27.

146. AREEDA & HOVENKAMP, *supra* note 122, at 257–73, 327–41, deals with this analysis at great length.

147. 57 F.2d 96, 102 (1st Cir. 1932).

148. ANTITRUST L. DEV., *supra* note 44, at 125–27.

149. *Id.* at 635.

150. See ALLEN, *supra* note 2, at 410–11, 415–17, 535, 539–50, 555–62; Robert W. Spearman & Jill B. Hickey, *Unfair Trade Practice Litigation Under N.C. General Statute Section 75-1.1 12–17* (December 1995) (unpublished manuscript) (on file with the North Carolina Law Review).

damage recoveries; and in many cases the tort claims were successful while the antitrust claims failed.¹⁵¹ Most frequently cited in this context is *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,¹⁵² in which Kelco sued Browning-Ferris, a competitor in the waste disposal business, for conduct that drove it out of business.¹⁵³ The jury awarded Kelco \$51,146 in compensatory damages both on its antitrust and its tort claims.¹⁵⁴ The jury also awarded \$6 million in punitive damages on the tort claim,¹⁵⁵ while the antitrust claim was merely trebled. Predictably, the plaintiff elected to recover on the tort claim.¹⁵⁶

V. FAILURES IN APPLICATION OF SECTION 75-1.1 BY STATE AND FEDERAL COURTS

The focus now shifts to judicial interpretation of North Carolina's section 75-1.1, with the objective of determining the extent to which (1) the basis for section 75-1.1 recovery has been clearly identified and (2) section 75-1.1 recoveries have resulted from application of a reduced, watered down or "low test" antitrust standard. It is hard to avoid the observation that judicial application of section 75-1.1 has been inadequate, unclear, and confusing.¹⁵⁷ While some of the confusion is inconsequential in the sense that the outcome in the case was probably not affected, in other cases the analysis, and sometimes the outcome, was affected. Failure to identify the prong, or identifying the "wrong" prong, of section 75-1.1 forming the basis for the decision has affected both analysis and outcome in some cases. Such failures have contributed to inadequate

151. See Gray & Homchick, *supra* note 145, at 13-14; Harvey I. Saferestein, *The Ascendancy of Business Tort Claims in Antitrust Practice*, 59 ANTITRUST L.J. 379, 384-85 (1991).

152. 492 U.S. 257 (1989). Other cases involving greater plaintiff returns on the tort, as opposed to the antitrust, claim include: *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 44 F.3d 1465 (10th Cir. 1995); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683 (10th Cir. 1989); *First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033 (7th Cir. 1989); *Deauville Corp. v. Federated Department Stores, Inc.*, 756 F.2d 1183 (5th Cir. 1985); *Automotive Electric Service Corp. v. Ass'n of Automotive Aftermarket Distributors, Motor Age, Inc.*, 747 F. Supp. 1483 (E.D.N.Y. 1990).

153. Saferestein, *supra* note 151, at 379.

154. *Browning-Ferris*, 492 U.S. at 262.

155. *Id.*

156. Saferestein, *supra* note 151, at 380.

157. An important disclaimer is that this review is based on a sampling of section 75-1.1 cases. Although all section 75-1.1 decisions have not been scrutinized, it is believed that the bulk of the section 75-1.1 decisions involving antitrust issues have been reviewed.

antitrust analysis in some section 75-1.1 cases having antitrust character.¹⁵⁸

A. Failure to Specify the Prong Forming the Basis of the Ruling

The first observation that results from a review of the cases is that the courts have frequently failed to specify the prong or component of section 75-1.1 upon which the decision is based. In the cases discussed in this section, however, the prong identification failure was seemingly harmless in the sense that neither outcome nor analysis were affected.

In the first decision holding that the insurance code did not preclude private suits involving insurance practices pursuant to section 75-1.1, *Ray v. United Family Life Insurance Co.*,¹⁵⁹ the court dealt with claims by an insurance agent that its "burial insurance" agency was terminated because it refused to agree to an exclusive arrangement.¹⁶⁰ The court noted the plaintiff's evidence showing that the defendant insurer had acquired "a commanding share of the market for burial insurance in North Carolina,"¹⁶¹ and that it intended "to exclude competition completely in the burial insurance industry in North Carolina"¹⁶² by acquiring other insurers and their agents and insisting on exclusive agency arrangements.¹⁶³ The court denied the summary judgment motion directed at the section 75-1.1 claim and at the Sherman Act section 2 claim, but it granted the motion based on section 1 of the Sherman Act for failure of the plaintiff to produce evidence of a combination or conspiracy.¹⁶⁴ In short, the court dealt with antitrust claims that should have been treated under the "unfair methods of competition" prong of section 75-1.1. The court spoke of section 75-1.1, however, and all of its prongs together without specifying the applicable one.¹⁶⁵

Similarly, in *Ellis v. Smith-Broadhurst, Inc.*,¹⁶⁶ another case applying section 75-1.1 in an insurance context, the North Carolina Court of Appeals reversed a grant of summary judgment for the defendant,¹⁶⁷ where the plaintiff agent claimed the defendant, also an

158. See *infra* notes 229-56 and accompanying text.

159. 430 F. Supp. 1353 (W.D.N.C. 1977).

160. *Id.* at 1354.

161. *Id.* at 1356.

162. *Id.* at 1355.

163. *Id.* at 1355-56.

164. *Id.* at 1359.

165. *Id.* at 1356-57.

166. 48 N.C. App. 180, 268 S.E.2d 271 (1980).

167. *Id.* at 184, 268 S.E.2d at 274.

agent, misrepresented the terms and costs of the plaintiff's policy.¹⁶⁸ Without identifying the section 75-1.1 prong, the court stated simply that section 75-1.1 "provides a remedy for unfair trade practices in the insurance industry."¹⁶⁹

In *Stearns v. Genrad*,¹⁷⁰ a terminated distributor alleged violations of sections 1¹⁷¹ and 2¹⁷² of the Sherman Act, section 3 of the Clayton Act¹⁷³ and of sections 75-1, 75-5(b)(2) and (3), since repealed, and section 75-1.1.¹⁷⁴ Plaintiff claimed that it was terminated by the manufacturer for its failure to agree to an exclusive dealing arrangement,¹⁷⁵ to accept defendant's "full line forcing" of products,¹⁷⁶ to adhere to defendant's specified resale prices,¹⁷⁷ and to abide by territorial and customer allocations.¹⁷⁸ In granting the defendant's summary judgment motions,¹⁷⁹ the court assessed the Sherman Act and Clayton Act claims under the rule of reason¹⁸⁰ and disposed of most of them for plaintiff's failure to show an adverse effect on market competition.¹⁸¹ The court dismissed the North Carolina claims for the same reasons, referring simply to section 75-1.1 without specifying which prong of the statute was applicable.¹⁸²

In *Drouillard v. Keister Williams Newspaper Services, Inc.*,¹⁸³ defendant Lindsay Publishing counterclaimed that Drouillard violated the Trade Secrets Protection Act¹⁸⁴ by taking "customer lists and pricing and bidding formulas" when he left Lindsay's employ and using them to enable his new employer to best Lindsay in bidding for the Byrd Food Stores account.¹⁸⁵ Affirming a treble-damage verdict

168. *Id.* at 181, 268 S.E.2d at 272.

169. *Id.* at 183, 268 S.E.2d at 273. The court had made earlier reference to defendant's claim that "plaintiff cannot recover damages under 75-1.1 because unfair and deceptive acts and practices in the insurance industry are regulated exclusively by the insurance statutes." *Id.* at 182, 268 S.E.2d at 273.

170. 564 F. Supp. 1309 (M.D.N.C. 1983), *aff'd on other grounds*, 752 F.2d 942 (4th Cir. 1984).

171. *Id.* at 1312.

172. *Id.* at 1317-18.

173. *Id.* at 1316-17.

174. *Id.* at 1318.

175. *Id.* at 1313.

176. *Id.* at 1314.

177. *Id.* at 1315.

178. *Id.*

179. *Id.* at 1311.

180. *Id.* at 1312-13.

181. *Id.* at 1314-15.

182. *Id.* at 1318.

183. 108 N.C. App. 169, 423 S.E.2d 324 (1992).

184. N.C. GEN. STAT. § 66-152 to 66-162 (2001).

185. *Id.* at 172, 423 S.E.2d at 326.

on the counterclaim, the court, without further clarification, rejected the plaintiff's argument that violations of the Trade Secrets Protection Act were not "unfair or deceptive acts or practices under" section 75-1.1.¹⁸⁶ The court stated that section 75-1.1 "should not be so narrowly construed" and that it "declares '[u]nfair methods of competition' . . . to be unlawful."¹⁸⁷ One is left unsure whether the conduct was deemed an unfair or deceptive act or an unfair method of competition.

Likewise, in *Polo Fashions, Inc. v. Craftex, Inc.*,¹⁸⁸ plaintiff, the "well-known fashion house selling clothing for men and women" using "RALPH LAUREN" and other trademarks, sued defendant for selling sport shirts bearing the embroidered symbol of a "polo player mounted on a horse."¹⁸⁹ The court affirmed summary judgment for the plaintiff for Lanham Act, common law unfair competition, and section 75-1.1 claims. In dealing with section 75-1.1, the court said that unfair methods of competition "encompass any conduct that a court of equity would consider unfair" and that a "practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive."¹⁹⁰ The court failed to indicate which prong of section 75-1.1 it intended to invoke.

The court also kept us in the dark in *American Craft Hosiery Corp. v. Damascus Hosiery Mills, Inc.*¹⁹¹ Plaintiff American and defendant Damascus bid against each other on a government contract to supply "1,922,000 pairs of olive green cushion sole army socks." American had a deal with Setzer that it would "do the knitting of the griegge goods."¹⁹² The problem was that Damascus had been Setzer's only customer and owned one-half of Setzer's knitting machines. So, when American won the bid and Setzer's involvement became known, a vice president of Damascus announced that if Setzer stuck with the deal with American, Damascus would "put him out of business."¹⁹³ As a result of this announcement, Setzer backed out of the deal with American, and the jury returned a verdict for American on its tortious interference claim. Acknowledging that "a reading of all the cases" indicated that "tortious interference with a contract

186. *Drouillard*, 108 N.C. App. at 172-74, 423 S.E.2d at 326-27.

187. *Id.* at 172, 423 S.E.2d at 326.

188. 816 F.2d 145 (4th Cir. 1987).

189. *Id.* at 147.

190. *Id.* at 148.

191. 575 F. Supp. 816 (W.D.N.C. 1983).

192. *Id.* at 820.

193. *Id.*

could constitute an unfair method of competition or unfair acts within the meaning of the statute," the court, without explanation, held that "the facts of this case do not constitute such unfair competition, and the unfair acts and practices made unlawful by the Act."¹⁹⁴ The court declined to explain its decision and it declined to tell us upon which prong of the statute its nonreasoning was based.

B. Cases Applying the Wrong Section 75-1.1 Prong to the Conduct at Issue

The first category of cases, just discussed, involved those in which the court simply failed to identify the section 75-1.1 prong on which it relied. This second category, the "wrong prong" cases, involves those in which the court identified the prong, but chose the wrong one.

1. Cases with Antitrust "Character" Treated under the Unfair/Deceptive Prong

In a case involving a municipally-owned cable television service, the court stated that "monopolies" may "constitute . . . '[u]nfair methods of competition' or 'unfair or deceptive acts or practices.'" ¹⁹⁵ Passing by the fact that *monopolies*, as opposed to *monopolization*, are not illegal under any prong of any statute,¹⁹⁶ the court correctly noted that the unfair methods prong is pertinent to illegal monopolies but went astray in stating that they are reached by the unfair/deceptive prong.¹⁹⁷

Given that the dominant practitioner and judicial view of section 75-1.1 has it as an "unfair trade practices" statute, it is not surprising that most of the mischaracterizations involve mislabeling antitrust claims as "unfair trade practices" or as "unfair and deceptive acts/practices." *Dull v. Mutual of Omaha Insurance Co.*¹⁹⁸ is an example. In *Dull*, the plaintiffs, terminated insurance agents, forced antitrust analysis upon the court by relying on the *Brown Shoe* case,¹⁹⁹ where the FTC found that Brown Shoe's exclusive dealing arrangements with its dealers restricted its competitors' access to the

194. *Id.* at 821.

195. *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 655, 386 S.E.2d 200, 212 (1989).

196. "While merely possessing monopoly power is not itself an antitrust violation, . . . it is a necessary element of a monopolization charge." *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (per curiam).

197. That is not to say that a monopolist could never be found to have committed an unfair or a deceptive act or practice.

198. 85 N.C. App. 310, 354 S.E.2d 752 (1987).

199. *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

market.²⁰⁰ The Supreme Court's incipency analysis in *Brown Shoe* is out of fashion today, but it still qualifies as antitrust analysis. That should have caused the *Dull* court, in affirming summary judgment for defendant, to rely on the "unfair methods" prong of section 75-1.1 rather than the unfair/deceptive prong.

*McDaniel v. Greensboro News Co.*²⁰¹ was indisputably an antitrust case in which the plaintiff newspaper distributor claimed that it was terminated in part for refusing to adhere to maximum resale prices.²⁰² The court denied defendants' summary judgment motions addressed to the plaintiff's section 1 Sherman Act claims and its section 75-1, 75-2, and 75-1.1 claims. It treated the section 75-1 and 75-2 claims simultaneously with the Sherman section 1 claim²⁰³ but turned to separate analysis for the section 75-1.1 claim. For this separate analysis, it offered the definition of an "unfair practice" and announced that the "claim of unfair and deceptive trade practice also survives defendants' motion."²⁰⁴ The court should also have treated the section 75-1.1 claim simultaneously with the Sherman Act claim "just as it treated the section 75-1 and 75-2 claims." If the court wished to separate the claim out, it should have spoken of an unfair method of competition claim rather than an unfair or deceptive trade practice.

In *Owens v. Pepsi Cola Bottling Co.*,²⁰⁵ the North Carolina Supreme Court affirmed denial of defendant's summary judgment motion where the plaintiff, a convenience store operator, claimed that defendant "severely limited" his supply of two-liter containers of Pepsi to force him to raise his resale prices.²⁰⁶ Although the claim was grounded in facts potentially indicating a per se violation of section 1 of the Sherman Act, the court made no reference to the unfair methods prong of section 75-1.1. Indeed, it made no reference to the unfair/deceptive prong but instead referred to "coercive business

200. *Id.* at 317.

201. 1984-1 Trade Cases (CCH) ¶ 65,792, at 67,277 (M.D.N.C. 1983).

202. *Id.* at 67,278. This decision occurred before *State Oil v. Khan*, 522 U.S. 3 (1997), when maximum resale price maintenance was still illegal per se under Sherman Act section 1. See *supra* note 60.

203. "Summary judgment is not appropriate as to plaintiff's price fixing claims brought under section 1 of the Sherman Act and N.C. Gen. Stat. sections 75-1 & -2." *McDaniel*, 1984-1 Trade Cases (CCH) at 67,279.

204. *Id.*

205. 330 N.C. 666, 412 S.E.2d 636 (1992).

206. *Id.* at 676, 412 S.E.2d at 642.

tactics” and “inequitable assertions of power” as violating “our unfair practices law.”²⁰⁷

2. Cases Having No Antitrust “Character” Treated Under the Unfair Methods Prong

From cases “sounding in” antitrust or having some antitrust dimension with the court improperly invoking the unfair/deceptive prong rather than the unfair methods prong, attention now turns to cases having no antitrust character but where the court invoked the unfair methods prong.

But for the court’s final saving phrase, *United Laboratories, Inc. v. Kuykendall*²⁰⁸ involved an extreme case of the court’s inability to decide which prong of section 75-1.1 to apply. Kuykendall left his employment with United and went to work for Share, which competed with United in the sale of chemicals.²⁰⁹ The jury returned a verdict for United, finding that both Share and Kuykendall violated Kuykendall’s covenant not to compete, that Share induced Kuykendall to leave United and solicit his former customers, and Share offered to pay legal fees and costs associated with any lawsuit brought by United.²¹⁰ The court affirmed the section 75-1.1 treble-damage verdict in the amount of \$45,000.²¹¹ Its discussion consisted first of a mini-treatise about unfair and deceptive acts or practices, noting that the statute protects “business persons,” including competitors, as well as consumers. The court went on to explain that whether a practice is unfair or deceptive depends on the facts and the “impact the practice has on the marketplace” and that the court applies the law after the jury finds the facts.²¹² The court then turned to “unfair methods of competition,” saying that they, too, are to be judged by the facts and their “actual effects upon others.”²¹³ Then,

207. *Id.* at 676–77, 412 S.E.2d at 642–43. Unlike the common practice of the North Carolina courts to refer to section 75-1.1 as an “unfair trade practice” law, Chief Justice Exum, the author of this opinion, referred to section 75-1.1 as an “unfair practice” statute. This was also his style in *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 592, 403 S.E.2d 483, 492 (1991), and *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 190, 437 S.E.2d 374, 378 (1993). The practice has the merit of emphasizing that the statute specifies an offense of “unfair practices,” a specification that is not always clearly intended by those who use the term “unfair trade practices.”

208. 102 N.C. App. 484, 403 S.E.2d 104 (1991), *aff’d*, 335 N.C. 183, 437 S.E.2d 374 (1993).

209. *Id.* at 489–92, 403 S.E.2d at 107–09.

210. *Id.* at 491–92, 403 S.E.2d at 109.

211. *Id.* at 492, 403 S.E.2d at 109.

212. *Id.* at 490–91, 403 S.E.2d at 109.

213. *Id.* at 491, 403 S.E.2d at 109.

wiping away all of these distinctions, the court concluded, "We agree with the trial court's finding that Share's conduct violated G.S. Chapter 75."²¹⁴ Not wanting to leave us completely in the dark, however, the court then said that the "facts constituted unfair methods of competition,"²¹⁵ an inexplicable final comment given the non-antitrust character of the facts and claims.

In *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*,²¹⁶ the plaintiff, an agricultural co-op, claimed that defendant, Transcontinental, induced it to build a fertilizer plant promising that it would provide an adequate supply of natural gas to the plant when, in fact, it failed to do so.²¹⁷ The plaintiff claimed the defendant committed an "unfair practice."²¹⁸ The court dismissed the claim, noting that it "threaten[ed] to make every intentional breach of a commercial contract an unfair trade practice subjecting the breaching party to treble damages."²¹⁹ However, the court also said that the claim "carrie[d] no suggestion of deception, no allegation of any anti-competitive effect, no charge that Transco's purpose was to injure plaintiffs' business," and that "without any suggestion of deception or any claim of injury to competition, plaintiffs have not stated a claim under section 75-1.1."²²⁰ The court's references to deception are curious since the plaintiff had claimed only an "unfair practice," and its references to anticompetitive effect and injury to competition are inexplicable because the case contained no antitrust earmarks, and the plaintiff apparently had not invoked the unfair methods prong of section 75-1.1.

In a quarrel between two manufacturers of tobacco harvesting equipment, curing racks, and barns,²²¹ the court affirmed the grant of defendant Powell's motion for summary judgment finding its advertising claim that it had "the exclusive CutterBar" was not false or misleading.²²² In addition, the court found that its claim that "only the Powell Combine primes lugs through tips" was mere puffing.²²³ The court said the CutterBar ad was "not an unfair method of competition or unfair or deceptive act or practice" and the Powell

214. *Id.* at 492, 403 S.E.2d at 110.

215. *Id.*

216. 448 F. Supp. 475 (W.D.N.C. 1978).

217. *Id.* at 483.

218. *Id.* at 484.

219. *Id.* at 485.

220. *Id.*

221. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 248 S.E.2d 739 (1978).

222. *Id.* at 400, 248 S.E.2d at 743-44.

223. *Id.* at 400-401, 248 S.E.2d at 744.

Combine advertising claim "did not constitute unfair competition or an unfair or deceptive act."²²⁴ The court needlessly and confusingly ruled on the unfair methods prong in a non-antitrust case.²²⁵ Turning to Powell's complaint about Harrington's advertising, the court again found only puffing but confined its ruling to the statement that it was not an unfair act.²²⁶

The more relevant part of the case for this discussion is the court's ruling that Harrington's advertisement and demonstration of Powell's equipment as its own stated a claim for unfair methods of competition. The court reached this outcome by concluding (1) that although Harrington's conduct was not "passing off" as it "has traditionally been applied,"²²⁷ it was close enough and (2) that passing off is unfair competition.²²⁸ Its third, albeit unstated proposition, is that unfair competition is an unfair *method of* competition. The bottom line is that the court treated non-antitrust conduct as an unfair method of competition. The history of section 75-1.1 and FTC Act section 5 show, however, that indeed Congress in 1914 thought its "unfair method of competition" language would include "unfair competition." Professor Aycock's 1972 suggestion that, in effect, unfair competition be shifted from the unfair methods to the unfair/deceptive prong of section 75-1.1 was not considered by the *Harrington* court. It is understandable that the history of the statute may cause courts applying section 75-1.1 to treat "unfair competition" claims as "unfair methods of competition." But other cases discussed in this section show that courts treat non-antitrust claims as unfair methods of competition even when no such historical circumstances warrant.

C. *Failure to Identify Prong or Erroneous Identification of Prong Producing Faulty Analysis or Improper Outcome*

Unlike the cases (or parts of cases) discussed above, where the lack of clarity was harmless, in some decisions the failure of the court to identify the pertinent section 75-1.1 prong produced an improper

224. *Id.*

225. Presumably, although again confusingly, its reference to "unfair competition" was shorthand for "unfair method of competition." *Id.* at 401, 248 S.E.2d at 744.

226. *Id.* at 403, 248 S.E.2d at 745. Although there is confusion here, the court may not at this point refer to unfair methods because Powell apparently claimed only that the Harrington ads were "unfair and deceptive acts." Still, although the court referred only to "unfair acts," its reasoning—"buyers [would] not easily have been misled"—indicated the real issue was whether the ads were deceptive, not whether they were unfair. *See id.*

227. *Id.* at 405, 248 S.E.2d at 746.

228. *Id.* at 404, 248 S.E.2d at 746.

outcome or error. For example, in *Sea-Roy v. Parts R Parts, Inc.*,²²⁹ the plaintiff had been an exclusive agent for the distribution of Rammax trench compaction rollers and a purchaser of Farymann engine parts from Farymann's distributor, PRP.²³⁰ Among other things, the plaintiff complained that it was terminated by Rammax and that others conspired to prevent it from purchasing engines and engine parts directly from Farymann or PRP.²³¹ With inadequate evidence of conspiratorial action, the court found no violation of Sherman Act section 1 and held that even if the plaintiff had proved a conspiracy, it still had no Sherman Act claim because it had failed to prove an adverse effect on market competition, which rule of reason analysis requires.²³²

The court dealt with the state antitrust and section 75-1.1 claims in a footnote.²³³ It dismissed the section 75-1 claim "for the same reasons" it dismissed the Sherman Act claim.²³⁴ Turning to the section 75-1.1 claim, however, the court noted that the statute "forbids unfair methods of competition or unfair and deceptive trade practice[s]," and that these claims would be dismissed "due to Plaintiffs' failure to establish (1) an adverse effect on competition, or (2) actual injury or damage to themselves."²³⁵ The court concluded by stating that the evidence consisted only of "speculative theories of recovery," not facts which would show that defendants "engaged in unfair or deceptive trade practices."²³⁶

The court began by referring to "unfair methods of competition" but ended by saying there was no showing of "unfair or deceptive trade practices."²³⁷ That was only the beginning of the confusion. The court further failed to take note that any claim of an "unfair method of competition" would have been identical to the Sherman Act section 1 and the North Carolina 75-1 claims. The court should have dismissed both the 75-1 claim and the "unfair methods" claim for the same reasons it dismissed the Sherman Act claim. Finally, the court confusingly required proof of an adverse effect on market

229. 1998-1 Trade Cases (CCH) ¶ 72,155, at 81,980 (M.D.N.C. 1997), *aff'd per curiam*, No. 98-1028, 1999 U.S. App. LEXIS 3383 (4th Cir. Mar. 4, 1999).

230. *Id.* at 81,981-82.

231. *Id.* at 81,982-83.

232. *Id.* at 81,990-94.

233. *Id.* at 81,994 n.25.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

competition for an “unfair or deceptive acts or practices” claim.²³⁸ While such a showing should be required for an “unfair methods” claim, there is no basis for imposing such a requirement in an “unfair/deceptive” case. Clearer identification of the relevant prongs of section 75-1.1 would have materially assisted the court’s analysis.

The same can be said of *Cameron v. New Hanover Memorial Hospital*,²³⁹ where the court sustained directed verdicts for defendants against claims by two podiatrists that two orthopedic surgeons on staff conspired with the New Hanover Memorial Hospital to deny staff privileges to the plaintiffs.²⁴⁰ The court found insufficient evidence of conspiratorial action to support the plaintiffs’ claims of “civil conspiracy,” tortious interference with contract and prospective advantage, or their section 75-1 claim.²⁴¹ At the same time, the court’s recitation of the evidence indicated that defendants were generally well aware of the actions and statements of each other in opposing the plaintiffs’ petitions for staff privileges.²⁴² In dealing with the section 75-1.1 claim, instead of upholding the lower court for the same reason it applied to the other claims, the court held, pursuant to the 1977 *State ex rel. Edmisten v. J.C. Penney Co.* decision,²⁴³ that the defendants’ conduct did not involve the “bargain, sale, barter, exchange or traffic” in goods.²⁴⁴ Had the court isolated the unfair methods prong as the appropriate one, it might properly have treated the section 75-1.1 and 75-1 claims identically.

As noted earlier, in tracking section 5 of the FTC Act, the unfair methods prong of section 75-1.1 is merely an antitrust statute incorporating state analogs to Sherman Act sections 1 and 2.²⁴⁵ At the time of *Cameron*, this would only have been 75-1.²⁴⁶ While the FTC has stretched section 5 to cover certain conduct not covered by

238. *Id.*

239. 58 N.C. App. 414, 293 S.E.2d 901 (1982).

240. *Id.* at 453, 293 S.E.2d at 924.

241. *Id.* at 438–43, 293 S.E.2d at 916–18.

242. *Id.* at 422–30, 293 S.E.2d at 906–11.

243. 292 N.C. 311, 316–17, 233 S.E.2d 895, 899 (1977).

244. *Cameron*, 58 N.C. App. at 444–45, 293 S.E.2d at 919. The court also noted, in the alternative, that if it were to apply the revised version of section 75-1.1, which legislatively reversed *Penney*, it would hold that the “learned profession” exemption was applicable. *Id.* at 445–47, 293 S.E.2d at 920–21.

245. See *supra* notes 13–44, 56–124 and accompanying text.

246. The North Carolina analog to section 2 of the Sherman Act, section 75-2.1, was not enacted until 1996. Act of June 3, 1996, ch. 550, 1995 N.C. Sess. Laws 11 (codified at N.C. GEN. STAT. § 75-2.1 (2000)).

the Sherman or Clayton Acts, there was no valid argument that any such stretching of section 75-1.1 should have occurred in *Cameron*.²⁴⁷

The question that the court of appeals might have asked was whether, despite the lack of evidence of a conspiracy between the hospital and the two orthopedists, it might nevertheless have found an unfair method of competition arising from their nonconspiratorial, but knowing, actions. The court dutifully observed that given section 75-1.1's similarity to FTC Act section 5, cases under the latter are "instructive" to courts applying the former.²⁴⁸ Had the court taken full note of relevant section 5 cases, it might have rejected such a nonconspiratorial approach to section 75-1.1. It could have come to that position on the basis of the 1980 decision, just two years before *Cameron*, in *Boise Cascade Corp. v. FTC*,²⁴⁹ in which the Ninth Circuit reversed the FTC for ordering termination of an industry-delivered pricing system where there was no evidence of collusion.²⁵⁰ In short, the court in *Cameron*, although reaching the right result, erred in its application of section 75-1.1.

The decision in *Telephone Services, Inc. v. General Telephone Co. of the South*²⁵¹ consisted of a summary statement ("We hold that it is not unfair for defendant to refuse to employ its competitor."), rather than a reasoned conclusion.²⁵² Where defendant declined to use the plaintiff's installation and repair services because it was a competitor in the sale of "customer premise equipment," the case involved a unilateral refusal to deal—a federal antitrust category bulging with decisions.²⁵³ Although it invoked the *United States v. Colgate & Co.* rule²⁵⁴ for its decision, the court failed to take note of

247. The analysis here makes no attempt to assess the propriety of the court's application of the then-current *Penney* limitation of 75-1.1 to goods or of the learned profession exception, and it is not necessarily intended to suggest that the court erred in applying these principles.

248. *Cameron*, 58 N.C. App. at 443-44, 293 S.E.2d at 919.

249. 637 F.2d 573 (9th Cir. 1980).

250. *Id.* at 581-82. The FTC's "invitations to collude" consent decrees were not available as a model for section 75-1.1 since they were entered ten years after *Cameron*. See *supra* note 114 and accompanying text. Moreover, the "easy" stretching of section 5 to cover nonconspiratorial conduct represented by those proceedings is clearly inapplicable to the *Cameron* facts.

251. 92 N.C. App. 90, 373 S.E.2d 440 (1988).

252. *Id.* at 94, 373 S.E.2d at 443.

253. The cases are collected in ANTITRUST L. DEV., *supra* note 44, at 273-86.

254. In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the Court declared that one may deal, or not, with whomever one wishes absent "any purpose to create or maintain a monopoly." *Id.* at 307. The question was whether the indictment adequately alleged that Colgate, a manufacturer of soap and toilet articles, had entered into agreements with dealers that required them to resell the products at certain minimum prices. The case has

or distinguish two major United States Supreme Court decisions finding federal antitrust violations in the context of unilateral refusals to deal.²⁵⁵ Clear identification of the case as belonging under the unfair methods rather than the unfair/deceptive prong of section 75-1.1 might have led to fuller consideration of relevant antitrust authorities. Happily, the result seems not to have been affected since the plaintiff apparently offered no evidence that the defendant enjoyed monopoly power or that its refusal created the dangerous probability of its acquiring such power.²⁵⁶

In *Reichhold Chemicals, Inc. v. Goel*,²⁵⁷ the failure to distinguish between the antitrust component of section 75-1.1 and the other parts of the statute affected the court's analysis. The defendant, Goel, was moving his employment from Reichhold to a consulting arrangement with Imperial.²⁵⁸ Reichhold was a producer of reactive polyurethane adhesives, and Imperial hoped to enter some part of that business.²⁵⁹ Goel, while continuing to work for Reichhold, "met or exceeded his projected goals."²⁶⁰ At the same time, he commenced work for Imperial pursuant to a consulting agreement scheduled to become effective when he terminated employment at Reichhold.²⁶¹ A secretary at Imperial told Reichhold about Goel's appearances at Imperial.²⁶² Reichhold sued Imperial, Imperial abandoned the consulting agreement, and Goel counterclaimed that Reichhold's first lawsuit was tortious interference with the consulting agreement and an "unfair trade practice" under section 75-1.1.²⁶³ Reichhold defended against the counterclaims with the argument that the

become known, however, for the general rule that a firm is free to decide *unilaterally* with whom it will deal.

255. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (finding a violation where petitioner ski resort refused to participate with its competitor in a multi-mountain ski ticket venture where consumers were adversely affected); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (holding that the Journal violated section 2 of the Sherman Act by refusing to sell advertising space to persons who placed ads with a competing radio station).

256. For the components of the monopolization and attempted monopolization antitrust offenses, see *supra* note 106.

257. 146 N.C. App. 137, 555 S.E.2d 281 (2001).

258. *Id.* at 142, 555 S.E.2d at 284-85.

259. *Id.* at 142-43, 555 S.E.2d at 284-85.

260. *Id.* at 143, 555 S.E.2d at 285. The goods related to employment in plaintiff's automobile adhesives unit to which Goel had been transferred, a move which he and plaintiff considered to be a demotion. *Id.* at 142-43, 555 S.E.2d at 285.

261. *Id.*

262. *Id.* at 143, 555 S.E.2d at 285.

263. *Id.* at 144-45, 156, 555 S.E.2d at 286-87, 293.

“*Noerr-Pennington* doctrine,” adopted in a federal antitrust context, protected its right to bring the first suit.²⁶⁴

The court rejected Reichhold’s efforts to defend the tortious interference claim with the *Noerr-Pennington* doctrine but allowed Reichhold to use it to defeat Goel’s section 75-1.1 claim.²⁶⁵ Noting that “Chapter 75 of the North Carolina General Statutes was modeled after that federal antitrust law, and that federal decisions may ‘provide guidance in determining the scope and meaning of chapter 75,’”²⁶⁶ the court held “that the reasoning of *Noerr* and *PRE* apply to N.C.G.S. section 75-1.1”²⁶⁷ However, seeing “no relation between . . . tortious interference and the legislative intent behind federal antitrust law,” the court declined to allow the *Noerr-Pennington* defense in response to the tortious interference claim.²⁶⁸

The court failed to clearly identify the section 75-1.1 prong upon which Goel depended. It referred to “Chapter 75,” “unfair trade practices,” and “unfair and deceptive trade practices,” but not to “unfair methods of competition.”²⁶⁹ The court’s failure to identify the relevant prong of section 75-1.1 led it to apply the *Noerr-Pennington* doctrine, a federal antitrust doctrine, to the entirety of section 75-1.1, rather than limiting it—or to consider limiting it—to the antitrust part of section 75-1.1, that is, the “unfair methods” prong. Indeed, to the extent that Goel’s section 75-1.1 counterclaim was not an antitrust claim, by the court’s reasoning in rejecting *Noerr-Pennington* application to the tortious interference claim, it should also have rejected its application to the section 75-1.1 claim.²⁷⁰

264. *Id.* at 146–47, 156–57, 555 S.E.2d at 287, 293. The doctrine is named for the two decisions that created it, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). The doctrine stands for the proposition that “the federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government.” *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 379–80 (1991). It has been held to protect the filing of a lawsuit unless it is deemed to be “sham litigation,” which will not be true unless (1) “the lawsuit [is] . . . objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits;” (2) the litigant was “indifferent to the outcome on the merits” of the lawsuit; (3) any damages to be obtained would not justify the “investment in the suit;” and/or (4) the suit was brought “primarily for the benefit of collateral injuries inflicted through the use of legal process.” *Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–65 (1993).

265. 146 N.C. App. at 148, 156–57, 555 S.E.2d at 288, 293.

266. *Id.* at 156, 555 S.E.2d at 293.

267. *Id.*

268. *Id.* at 148, 555 S.E.2d at 288.

269. *Id.* at 156–57, 555 S.E.2d at 293.

270. Other courts have recognized and allowed the *Noerr-Pennington* defense in business tort cases. See generally Pamela Hobbs, *Application of Antitrust Principles to*

Failure to identify the pertinent prong also led to judicial error in *American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*,²⁷¹ a product disparagement case. The court rejected the defendant's claim that the plaintiff was required to show an adverse effect on competition.²⁷² Again, the court failed to identify the section 75-1.1 prong, simply referring to the statute as "section 75-1.1."²⁷³ It properly rejected defendant's argument since the case involved unfair/deceptive claims as opposed to antitrust/competition claims. But the court's failure to break the statute into its parts resulted in a broad and faulty announcement that a plaintiff in a section 75-1.1 case never needs to show an adverse effect on market competition.²⁷⁴

VI. ADVERSE IMPACT ON CONSUMER WELFARE THREATENED BY OVERBROAD APPLICATION OF SECTION 75-1.1

The review of cases in Part V produced three types of decisions: (1) where the court harmlessly failed to specify any prong or component of section 75-1.1 as the basis for its ruling; (2) where the court identified the wrong prong as the appropriate one; and (3) where improper prong identification affected the court's analysis or the outcome of the case. A fourth category of cases, now examined, consists of two subparts. Plaintiffs in the first group of cases urge, although unsuccessfully, that section 75-1.1 reaches conduct not invalidated by federal or state antitrust law. More importantly, Part VI(A) also identifies a second group of cases where the court rejected antitrust claims but upheld section 75-1.1 claims. The potential for section 75-1.1 to serve inappropriately as a method for unsuccessful antitrust claimants to obtain treble damages and attorney fees represents a serious problem for application of the statute. Part VI(B) suggests methods for applying section 75-1.1 to minimize its potential to harm consumer interests.

Business Tort Claims, in BUSINESS TORTS & UNFAIR COMPETITION: A PRACTITIONER'S HANDBOOK 15, 27-28 (A. Michael Ferrill ed., 1996) (examining how defendants in business tort cases have borrowed defenses from antitrust cases).

271. 640 F. Supp. 1411 (E.D.N.C. 1986).

272. *Id.* at 1434.

273. *Id.*

274. This case is discussed at greater length, *infra* notes 394-99 and accompanying text. If the court's decision is limited by its facts, its ruling that no showing of an adverse effect on competition is required in an antitrust/competition case is dictum. In any event, the decision has long since been displaced by subsequent judicial developments.

A. *Application of Section 75-1.1 as a "Low-Test" Antitrust Statute*

The plaintiffs in several cases having antitrust "character" have urged that full-fledged antitrust standards, whether federal or state, are inapplicable because section 75-1.1 reaches conduct not reached by antitrust law. Several courts have agreed with this claim. For example, the plaintiff in *Telephone Services, Inc. v. General Telephone Co.*²⁷⁵ claimed that section 75-1.1 "has been read broadly to prohibit unfair trade practices, including anticompetitive practices, not prohibited by Federal Law."²⁷⁶ Although it accepted the plaintiff's interpretation of the North Carolina statute, the court nevertheless held that refusing to employ a competitor was not an unfair trade practice.²⁷⁷

Similarly, in *L.C. Williams Oil, Inc. v. Exxon Corp.*,²⁷⁸ the plaintiff argued that the defendant's conduct "violate[d] the North Carolina statute even if the standards for violations of the federal antitrust laws are not met."²⁷⁹ Although it granted defendant's motion for summary judgment, the court did so stating "that no commercial unfairness or deception exists in this case to warrant expansion of [section] 75-1.1 beyond what is contained in the Clayton and Sherman Acts."²⁸⁰ The negative implication is that another case might warrant such "expansion."

The court also considered, although it did not rule on the issue, whether with section 75-1.1 the North Carolina General Assembly had in mind filling the antitrust "gap" that was noted in *Copperweld Corp. v. Independence Tube Corp.*²⁸¹ That "gap" arises from the fact that, as a matter of federal antitrust law, a single firm with substantial market power can achieve an adverse effect on market price and output that would be illegal if accomplished by two or more firms by combination. But, because it is a single firm, its conduct is not illegal unless the requirements for monopolization or attempt to monopolize are satisfied.²⁸² In short, the court, in *L.C. Williams Oil Co.*, demonstrated sympathy for the possible "stretching" of section 75-1.1

275. 92 N.C. App. 90, 373 S.E.2d 440 (1988).

276. *Id.* at 94, 373 S.E.2d at 442.

277. *Id.* at 94, 373 S.E.2d at 442-43.

278. 625 F. Supp. 477 (M.D.N.C. 1985).

279. *Id.* at 482.

280. *Id.*

281. *Id.* at 488 n.10 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) as producing the "gap" problem).

282. For the components of these offenses, see *supra* note 106.

to cover conduct not reached by federal or state antitrust laws, although it did not itself engage in such stretching.

In *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.*,²⁸³ “[t]he Discounters argue[d] that they have a stronger likelihood of success under their state law claim because [section] 75-1.1 prohibits unfair trade practices outside the orbit of the Sherman Act.”²⁸⁴ The plaintiffs, discount furniture retailers, sought a preliminary injunction to prevent the defendant, a furniture manufacturer, from implementing a policy that prevented the plaintiffs from selling furniture at discount prices out of state using the telephone or the mail.²⁸⁵ The federal antitrust claim was rejected for failure to prove a relevant market and an adverse effect on competition in that market.²⁸⁶ For their section 75-1.1 claim, however, the plaintiffs argued that the defendant engaged in unfairness and deception by changing its policies.²⁸⁷ While this claim was also rejected,²⁸⁸ the case demonstrates a challenge facing the courts in applying section 75-1.1, namely, how to apply the full statute fairly and responsibly while recognizing that advocates will seek creatively to utilize the unfair/deceptive prong in order to seek treble damages for conduct that does not violate the antitrust laws.

While the plaintiff in *McDaniel v. Greensboro News Co.*²⁸⁹ did not urge the broader sweep of section 75-1.1 relative to federal and state antitrust law, the court’s methodology demonstrated the potential benefit of such claims. Dealing with the resale price maintenance claims, the court simultaneously denied defendant’s summary judgment motion based on the Sherman Act section 1 claim and the section 75-1 and 75-2 claims.²⁹⁰ It then dealt separately with the section 75-1.1 claim, recited the definitions of unfair and deceptive practices and denied the motion.²⁹¹ While the outcome in *McDaniel* was proper, the court’s method of analysis creates the opportunity in an unmistakable antitrust context for a court to find no mainline antitrust violation but, by application of the unfair/deceptive prong of section 75-1.1, to allow the plaintiff access to treble damages

283. 889 F.2d 524 (4th Cir. 1989).

284. *Id.* at 529.

285. *Id.* at 526.

286. *Id.* at 526-27.

287. *Id.* at 529.

288. *Id.*

289. 1984-1 Trade Cases (CCH) ¶ 65,792 (M.D.N.C. 1983).

290. *Id.* at 67,277.

291. *Id.* at 67,279.

and attorney fees through application of a “low test” antitrust standard.²⁹²

These cases demonstrate that there is a substantial potential for section 75-1.1 to be used as a “low test” antitrust statute. This could happen either by way of application of the unfair methods prong that fails to incorporate antitrust standards, even “stretched” antitrust standards as applied by the FTC in section 5 cases, or by cases having predominantly antitrust characteristics treated nonrigorously under the unfair/deceptive prong of section 75-1.1. A generalized acceptance by practitioners and courts of the position that conduct not banned by antitrust standards “can still be reached as an unfair trade practice” can easily lead to either outcome, or both.

Indeed, in at least three cases such outcomes have occurred although two of them involved judicial recognition of an applicable business tort. In *Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*,²⁹³ the plaintiff auto dealer won a jury verdict complaining that Chrysler forced it not just to purchase the “full line” of cars required by its contract but also less desirable models as a condition of obtaining more desirable ones.²⁹⁴ The Fourth Circuit reversed the antitrust verdict because the plaintiff failed to show separate “tying” and “tied” products as required by antitrust cases,²⁹⁵ but remanded the section 75-1.1 unfairness claim to enable the district court to clarify whether it found unfairness as a matter of law.²⁹⁶

In two recent decisions, the plaintiffs lost their antitrust claims at the summary judgment stage, but preserved their section 75-1.1 claims. The plaintiff and defendant in *Edmondson v. American Motorcycle Ass’n*²⁹⁷ competed in staging motorcycle races.²⁹⁸ For

292. *Id.*

293. 826 F.2d 1360 (4th Cir. 1987).

294. *Id.* at 1361–62.

295. *Id.* at 1363. As noted earlier, *supra* note 99, the antitrust tying offense involves a seller requirement that the buyer purchase a “tied” product in order to obtain a separate “tying” product. The court in *Southern Pines Chrysler-Plymouth* quoted the U.S. Supreme Court in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 21 (1984), for the proposition: “[A] tying arrangement cannot exist unless two separate product markets have been linked.” *S. Pines*, 826 F.2d at 1363.

296. *Id.* at 1364–65. The court also noted that the “forcing by a manufacturer of a single type of product in excess of the agreed amount . . . is punishable under more common state remedies, including contract and tort remedies, and does not require the powerful prohibition of the antitrust laws.” *Id.* at 1363. In the first instance, such “common state remedies” would not present the same concern for a successful antitrust defendant since, unlike section 75-1.1, they would not involve automatic treble damages. Of course, some such cases could afford the possibility of punitive damages.

297. 243 F.3d 537, 2001 U.S. App. LEXIS 1506 (4th Cir. Feb. 2, 2001) (unpublished table decision).

several years they participated in a joint venture to organize such races.²⁹⁹ Defendant offered to purchase plaintiff's interest in the joint venture but then decided it could take over his interest without paying.³⁰⁰ Although it rejected the antitrust claims, the court found that the defendant's misrepresentations regarding its interest in purchasing the plaintiff's share, while simultaneously laying plans to take over his interest without paying, was an "unfair and deceptive practice,"³⁰¹ as well as "an unfair trade practice or method of competition."³⁰² It held that the defendant's promotion of races in 1995 and later, as though they were those of the joint venture, was "a form of passing off" and therefore an unfair method of competition.³⁰³ And it found that defendant's interference with certain of plaintiff's contractual interests, found otherwise to be tortious interference, was "unfair competitive practice."³⁰⁴

The plaintiff in *Bepco, Inc. v. Allied-Signal, Inc.*³⁰⁵ competed with the defendant in the aftermarket sale of remanufactured compressors and valves for truck airbrake systems.³⁰⁶ Allied-Signal had a strong position in the original equipment markets for systems, compressors, and valves, but the aftermarkets were less concentrated.³⁰⁷ The court granted summary judgment for Allied-Signal on the plaintiff's exclusive dealing claim based on section 1 of the Sherman Act and section 3 of the Clayton Act,³⁰⁸ and on the plaintiff's section 2 Sherman monopolization and attempted monopolization claims.³⁰⁹ It found that Allied-Signal's exclusive dealing arrangements with distributors reached only small percentages of the outlets, that they were of short duration, that other distribution outlets were available, and that the markets were vigorously competitive.³¹⁰ The section 2 claims failed both because the court believed Allied-Signal's market shares were insufficient to demonstrate monopoly power, for the monopolization claim, or dangerous probability of success, for the

298. *Id.* at *4.

299. *Id.*

300. *Id.* at *9.

301. *Id.* at *39.

302. *Id.* at *40.

303. *Id.* at *41.

304. *Id.*

305. 106 F. Supp. 2d 814 (M.D.N.C. 2000).

306. *Id.* at 816.

307. *Id.* at 817. The court used market shares for Allied-Signal of 43% and 37% for the compressor and valve aftermarkets, respectively. *Id.* at 818.

308. *Id.* at 826-29.

309. *Id.* at 830-33.

310. *Id.* at 827-29.

attempt claim, and because its conduct was not predatory.³¹¹ The court, nevertheless, denied the summary judgment motion on the unfair trade practices claims under section 75-1.1, stating that it “appear[ed] to encompass more than the federal antitrust claims which the court has rejected, and include[s] product disparagement and defamation.”³¹² The court emphasized, however, that the section 75-1.1 claim was allowed to remain only to the extent that it was “not dependent on [plaintiff’s] rejected federal antitrust claims.”³¹³

B. Suggestions for Dealing with the Problem of Section 75-1.1 as a “Low Test” Antitrust Statute

The three cases reported above are good examples of the “low test” problem since they show that an antitrust victor may nevertheless be penalized by section 75-1.1 treble damages. Although Southern Pines Chrysler-Plymouth lost its antitrust “tying” case, it was given the chance on remand to show that Chrysler’s demands were “unfair” and should be subjected to treble damages.³¹⁴ Similarly, Edmondson lost his antitrust claims on summary judgment but was given several opportunities to show a section 75-1.1 violation by proving tortious conduct. And, while the traditional antitrust claims of exclusive dealing in *Bepco v. Allied-Signal* did not survive summary judgment, the plaintiff retained the hope that under section 75-1.1 it could prove product disparagement or defamation. Even though both the section 75-1.1 and antitrust claims lost, *Murrow Furniture* also illustrates the potential problem. The defendant furniture manufacturer argued that its requirement of point-of-sale services promoted interbrand competition, while the telephone/mail discounters argued that their forced abandonment of these methods was unfair.³¹⁵

The facts of *In re General Foods Corp.*³¹⁶ provide another good example of the problem. In *General Foods*, the FTC held that predatory pricing activity did not violate section 2 of the Sherman Act because there was no “dangerous probability” that a monopoly would be achieved. It then rejected the argument of its own complaint

311. *Id.* at 830–33. See *supra* note 106 for monopolization and attempted monopolization components.

312. *Bepco*, 106 F. Supp. 2d at 834.

313. *Id.*

314. *S. Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 826 F.2d 1360, 1363–65 (4th Cir. 1987).

315. *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 529 (4th Cir. 1989).

316. 103 F.T.C. 204 (1984).

counsel that the conduct should be held, nevertheless, to be an unfair method of competition under section 5 of the FTC Act.³¹⁷ Similar facts in a North Carolina case could result in a firm arguing that its competitor's low prices were "unfair" even though they were not predatory by antitrust standards.³¹⁸

Consumer interests may have been well served by the antitrust outcomes in these cases. Interbrand competition and, therefore, consumers may have benefited from Chrysler's demands that its dealers stock all of its cars. Such a requirement may enable the manufacturer to achieve manufacturing efficiencies and economies of scale or scope in distribution. The requirement may increase output and the range of consumer choice, although dealers may object to carrying the full line.³¹⁹ Exclusive dealing arrangements of the sort involved in *Bepco* can also be procompetitive. Such agreements can encourage both suppliers and customers to make commitments to production and sales plans and facilities by reducing supplier uncertainty about sales volume and dealer uncertainty about sources of supply. Such risk reduction serves to increase output, which benefits consumers.³²⁰

While the case against the discounters in *Murrow Furniture* is more complicated since their activities undoubtedly benefited some consumers in the short run, a furniture manufacturer—and consumers, in the long run—need a distribution network, which might not survive for long against free-riding discounters. A furniture manufacturer must either open its own retail outlets or arrange for retail distribution with dealers willing to handle substantial inventories, display the furniture attractively, and deal with customer inquiries and complaints. Such dealers could not bear the cost of such services if they had to compete against other dealers enjoying lower costs by offering only a telephone number and/or a post office box

317. *Id.* at 364–66.

318. Predatory pricing as an antitrust matter is "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986). The most frequently-referenced "measure of cost" below which prices must lie in order to be considered predatory is average variable cost. Predatory pricing may be challenged as satisfying the predation component of the monopolization offense or as primary line price discrimination under the Robinson-Patman Act. See ANTITRUST L. DEV., *supra* note 44, at 256–69, 474–77.

319. HOVENKAMP, *supra* note 64, at 427.

320. *Id.* at 433–35.

address.³²¹ If they were forced to close, furniture distribution along with manufacturer and consumer welfare would be threatened.

Finally, as suggested by *General Foods*, for a firm to win a section 75-1.1 unfairness claim against the vigorous, but not antitrust/predatory, pricing of a competitor would be an obvious loss for consumers. A firm's price does not become predatory or illegal for antitrust purposes unless it falls "below an appropriate measure of its rival's costs."³²² Giving legal recognition to the complaint of an inefficient firm that a competitor's low but nonpredatory price is an "unfair act" or "practice" would "permit less efficient firms to stay in the market."³²³ Such an outcome would be harmful to the interests of consumers.³²⁴

The problem raised by these cases is that conduct deemed not in violation of the antitrust laws and, therefore, not anticompetitive—perhaps, even, efficient, procompetitive and proconsumer—runs the risk of incurring treble damages under section 75-1.1. It has been noted above (1) that section 5 of the FTC Act "was conceived as a vehicle for evolving new administrative prohibitions of conduct not previously thought unlawful, which is presumably the reason that most of its sanctions are prospective only and invoked only by public officials,"³²⁵ (2) but that section 75-1.1 is a verbatim reproduction of FTC Act section 5, (3) that, unlike FTC Act section 5 which provides no private right of action, section 75-1.1 affords the successful plaintiff treble damages automatically with the possibility of attorney fees as well, and (4) that section 75-1.1 not only has its own uncertain coverage of conduct deemed "unfair" or "deceptive" but that it incorporates, for the most part, the bulk of North Carolina business tort law. The "teeth" of section 75-1.1, as opposed to FTC Act section 5, combined with the uncertainty associated with its coverage creates substantial concern about its potential to penalize procompetitive conduct that has cleared antitrust review.

321. See, e.g., *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 55 (1977); HOVENKAMP, *supra* note 64, at 450–51.

322. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). "Competition drives prices to marginal costs." HOVENKAMP, *supra* note 64, at 337. Subjects well beyond the scope of this article include the debate about the proper cost standard for antitrust predatory pricing cases and whether there may be some cases where above-cost prices are predatory. See *id.* at 337–44.

323. HOVENKAMP, *supra* note 64, at 336.

324. "[A] legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in well-functioning competitive markets." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983).

325. AREEDA & HOVENKAMP, *supra* note 122, at 349.

Against these concerns there are some contrary and promising developments. For one, there are some cases in which the section 75-1.1 claim was dealt with on the same terms as the antitrust claim. In *Hester v. Martindale-Hubbell, Inc.*,³²⁶ the plaintiff attorney complained of a conspiracy involving Martindale-Hubbell, the American Bar Association, and the North Carolina State Bar that precluded him because of his rating from publishing his "professional card" in the "biographical section" of the Martindale directory.³²⁷ The court granted summary judgment on the section 1 Sherman Act claim and the section 75-1 claim for failure to show adequate evidence of a conspiracy and on the section 2 Sherman Act claim for failure to show willful acquisition or maintenance of monopoly power.³²⁸ It dismissed the section 75-1.1 claim for the same reasons and because Martindale "acted within its unilateral right to establish uniform publication policies."³²⁹

Another promising factor is judicial concern about the availability of section 75-1.1 treble damages where antitrust liability is not found. For example, in *General United Co. v. American Honda Motor Co.*,³³⁰ although the antitrust claim was without merit, the court applied a very helpful methodology in disposing of the section 75-1.1 claims. Sales to the plaintiff, a Honda motorcycle dealer in Gastonia, were terminated by the defendant when the plaintiff became delinquent in its payments.³³¹ However, defendant continued to sell on a cash basis to at least one other dealer that was also delinquent in its payments, although less so than the plaintiff.³³² The plaintiff "made a vague claim for some unspecified federal antitrust violation" and for violation of section 75-1.1. On summary judgment, the court carefully assessed and rejected all potential antitrust claims.³³³ In rejecting the section 75-1.1 unfair practice claim, the court identified three factors supporting its decision. First, it noted that since the conduct did not violate the antitrust laws, it did not "offend any established public policy."³³⁴ Second, it observed that the defendant's conduct was not "substantially injurious to consumers."³³⁵ Finally, it

326. 493 F. Supp. 335 (E.D.N.C. 1980), *aff'd*, 659 F.2d 433 (4th Cir. 1981).

327. *Id.* at 337.

328. *Id.* at 338-39.

329. *Id.* at 341.

330. 618 F. Supp. 1452 (W.D.N.C. 1985).

331. *Id.* at 1453.

332. *Id.* at 1454.

333. *Id.*

334. *Id.* at 1455.

335. *Id.*

found no “substantial aggravating circumstances’ . . . that would justify the punishment of treble damages.”³³⁶

Reflecting a similar approach, the court in *Bepco*, although allowing the section 75-1.1 claim to survive summary judgment, emphasized that the claim could not be based on any conduct cleared of antitrust concerns.³³⁷ The question is whether the *Bepco* rule can be applied universally, that is, whether conduct that has “antitrust character” or that involves “anticompetitive practices,” as opposed to unfair or deceptive practices, and that is found not to trigger either federal or state antitrust standards should, as a result, acquire immunity from being found unfair or deceptive.

The question, in turn, may be whether the case involves facts having “pure” antitrust character or whether it involves both antitrust facts and ancillary practices challengeable as product disparagement, passing off, tortious interference, or some other business tort.³³⁸ Cases in the first category, where no antitrust violation is found, should not be revisited by use of the unfair/deceptive prong of section 75-1.1.³³⁹ This suggestion applies to cases like *McDaniel*,³⁴⁰ *Southern Pines Chrysler-Plymouth*,³⁴¹ *Murrow Furniture*,³⁴² and *Hester*³⁴³ and to the hypothetical facts based on *General Foods*.³⁴⁴ Those cases involved facts having antitrust character with no ancillary practices otherwise challengeable. Although the court in *Southern Pines* remanded the section 75-1.1 unfairness claim, the antitrust rulings governed the outcomes in *McDaniel* and *Hester*. As for the *General Foods* situation and similar cases, the plaintiff who fails to prove its

336. *Id.* at 1455–56. For this factor, the court cited *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 992 (4th Cir. 1989), which used the proposition for the purpose of avoiding treble damages for a simple breach of contract. *Gen. United*, 618 F. Supp. at 1455. Applying a concept that has been widely used since, the court said that if a breach of contract award is to be trebled, “the North Carolina legislature must have intended that substantial aggravating circumstances be present.” *Id.*

337. *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 834 (M.D.N.C. 2000).

338. The national survey reported in Saferstein found that “some form of claim labelled [sic] ‘tortious interference’ [was] filed along with antitrust claims twice as frequently as the next most frequent [tort] claims.” Saferstein, *supra* note 151, at 385.

339. This is true whether the case is assessed under federal or state antitrust law or by using antitrust analysis under the unfair methods prong of section 75-1.1.

340. *McDaniel v. Greensboro News Co.*, 1984–1 Trade Cases (CCH) ¶ 65,792 (M.D.N.C. 1983).

341. *S. Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 826 F.2d 1360 (4th Cir. 1987).

342. *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524 (4th Cir. 1989).

343. *Hester v. Martindale-Hubbell, Inc.*, 493 F. Supp. 335 (E.D.N.C. 1980), *aff'd*, 659 F.2d 433 (4th Cir. 1981).

344. *In re Gen. Foods Corp.*, 103 F.T.C. 204 (1984).

competitor's prices are sufficiently low to satisfy the monopolization standard of predatory prices should not be allowed to argue, alternatively, that they are low enough to be an "unfair practice" under section 75-1.1.

Cases in the second category, however, may not lend themselves to the same treatment. Where there are both antitrust facts and ancillary unfairness or "tort" facts, rejection of the antitrust claim may necessarily leave the ancillary facts for separate treatment. This was the *Bepco* case itself, where the plaintiff had both exclusionary dealing antitrust claims but also claims of product disparagement and defamation.³⁴⁵ Although the defendant obtained summary judgment on the antitrust claims, the court remanded the ancillary claims but cautioned that the antitrust claims were not to be retried pursuant to a lower section 75-1.1 unfairness standard.³⁴⁶

Whether ancillary facts genuinely exist may itself be an issue. *Murrow Furniture*³⁴⁷ illustrates this problem. The plaintiffs, discount furniture dealers, lost their antitrust claims but creatively argued that the defendant's change in its policies gave the basis for an unfair/deceptive section 75-1.1 claim.³⁴⁸ The policy change, however, did not present real ancillary facts.

In short, the factors and analysis used by the *Bepco* and *General United* courts deserve attention in dealing with section 75-1.1 cases having antitrust character or involving anticompetitive practices. *Bepco* would not allow the antitrust conduct found not to violate antitrust standards to suffer a second look under section 75-1.1. *General United* would take into account whether the conduct involved "aggravating factors," whether it violated the antitrust law, and whether it was injurious to consumers.³⁴⁹

The latter factor also finds support in the recent Fourth Circuit decision in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*³⁵⁰ In a non-antitrust context, the court reversed Food Lion's favorable verdict on its claim that an ABC employee engaged in deceptive activity in violation of section 75-1.1. The alleged violation involved misrepresentations made when the ABC employee applied for a job at Food Lion for the purpose of exposing the improper handling of

345. *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814 (M.D.N.C. 2000).

346. See *supra* note 313 and accompanying text.

347. 889 F.2d 524, 529 (4th Cir. 1989).

348. See *supra* notes 283-88 and accompanying text.

349. See *supra* notes 334-36 and accompanying text.

350. 194 F.3d 505 (4th Cir. 1999).

meat by Food Lion employees.³⁵¹ The court held that in the past “businesses” have been allowed to press unfair/deceptive claims “against another business only when the businesses are competitors (or potential competitors) or are engaged in commercial dealings with each other.”³⁵² Believing that condition unsatisfied here, the court said that in such situations such claims will be allowed only when a victory for the plaintiff would be for the benefit of the consuming public.³⁵³

An expansion of the *Food Lion* principle would suggest that, in cases where the defendant is accused of engaging in unfair or deceptive acts or practices, plaintiffs, whether competitors “engaged in commercial dealings with each other” or not, should not be allowed section 75-1.1 victories if the defendant can show that its conduct promoted the best interests of consumers.

The problem with a generalized application of that principle is that there may be cases where the defendant in a business tort case, treated either as an independent tort or as a section 75-1.1 unfairness claim, could plausibly argue that its conduct was procompetitive. In such a case, allowing a “competition defense” would create a collision with established business tort law. One could imagine, for example, a small competitor, say Bepco, “tortiously interfering” with the supply contracts or distributor arrangements of a larger competitor, say Allied-Signal, that would have the effect of reducing the market share and market power of the larger competitor and, as a result, produce a procompetitive, proconsumer result. The larger competitor in this scenario would lose at least some of its ability to impose adverse price and output effects on consumers. The problem is that the tortious interference claim against the smaller competitor-defendant may be quite solid on the basis of existing law.

Three observations afford some comfort. First, such cases are likely to be rare. The more typical business tort case, or section 75-1.1 case rooted in a business tort, undoubtedly has the larger competitor as the defendant. That defendant will probably not have a defense that its conduct benefited competition and consumers. Second, “[b]usiness tort doctrine long has recognized a privilege for conduct that is legitimately competitive.”³⁵⁴ Citing the Restatement (Second) of Torts and other authorities, Hobbs notes that “courts

351. *Id.* at 510.

352. *Id.* at 520.

353. *Id.*

354. Hobbs, *supra* note 270, at 16.

generally have held that, while competition is not a defense to a claim of interference with an existing contract not terminable at will, it is a valid defense to a claim of interference with a contract that is terminable at will, or to a claim of interference with prospective advantage.³⁵⁵ To the extent that defendants in business tort cases can present “competition” defenses, plaintiffs’ claims may not be totally solid after all.³⁵⁶

Third, while a combination of the first two factors provides comfort—suggesting that only rarely will a defendant whose conduct benefited consumers be *properly* found liable in a business tort case—it would also seem (1) that where the defendant has a viable “competition defense,” the plaintiff’s case should be held to a very high standard and (2) that, in particular, the presumption should run in the defendant’s favor where its competition case is strong and the plaintiff relies not on a previously well-etched business tort claim but on an undifferentiated claim of “unfairness” or “deception” under section 75-1.1. In short, while the danger that an unsuccessful

355. *Id.* at 17.

356. Such competition defenses have received generous treatment in North Carolina courts. Tortious interference with contract in North Carolina requires that the defendant “without justification” intentionally induce the nonperformance of a known, valid contract. *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988); *Sea-Roy Corp. v. Parts R Parts, Inc.*, 1998-1 Trade Cases (CCH) ¶ 72,155, at 81,995 (M.D.N.C. 1997), *aff’d per curiam*, No. 98-1028, 1999 U.S. App. LEXIS 3383 (4th Cir. Mar. 4, 1999). Whether the conduct is “without justification” depends upon “the circumstances surrounding the interference, the actor’s motive or conduct, the interests sought to be advanced [and] the social interest in protecting the freedom of action of the actor.” *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 221, 367 S.E.2d 647, 650 (1988). Accepting a justification argument characterized as a “competition privilege,” the court in *Sea-Roy* rejected plaintiff’s tortious interference claim, holding that the defendant’s conduct in displacing *Sea-Roy* as a distributor was the kind of conduct “expected in a hearty competitive environment” and that its actions were “geared toward lawful competition.” *Sea-Roy*, 1998-1 Trade Cases (CCH) ¶ 72,155, at 81,995-96. Similarly, in *Hooks*, the court rejected a tortious interference claim where the defendant offered jobs to employees of its competitor who had terminable at will contracts, hired them, and, by locating them in their original sales territories, “induced them to breach the noncompetition clauses contained in their contracts with the plaintiff.” *Hooks*, 322 N.C. at 221, 367 S.E.2d at 650. The court spoke broadly of a competition privilege, noting that “[c]ompetition is the life of trade,” *Id.* at 223, 367 S.E.2d at 651, and stating that “we recognize and apply the general principle that interference may be justified when the plaintiff and the defendant are competitors.” *Id.* at 222, 367 S.E.2d at 650. Indeed, it appears that “[w]here the circumstances surrounding a tortious interference claim involve a business competitor, the party asserting the claim must show that the competitor acted with malice or a bad motive.” *Combs & Assocs., Inc. v. Kennedy*, 147 N.C. App. 362, 372, 555 S.E.2d 634, 641 (2001). On facts similar to those in *Hooks*, however, the court in *Kuykendall* remanded the case apparently believing that the jury might find evidence of malicious intent on the part of the defendant in hiring an employee of its competitor. *Kuykendall*, 322 N.C. at 660-64, 370 S.E.2d at 386-88.

antitrust plaintiff may nevertheless prevail on a section 75-1.1 claim clearly exists, there are ways to deal with the problem.

It would seem first that when the plaintiff loses a nontrivial antitrust claim but also has a section 75-1.1 unfair/deceptive claim, the court's attention should ratchet up substantially to guard against a section 75-1.1 outcome that might be contrary to consumer interests.

Second, where the conduct at issue clearly has antitrust character and where there are no significant ancillary facts supporting an unfairness, deception, or a business tort claim, the court should seriously consider applying the *Bepco* methodology and decline to give the conduct separate or different treatment in the application of section 75-1.1. In other words, in such cases the antitrust analysis and the section 75-1.1 analysis should be identical.

Third, even where ancillary facts or circumstances exist, the court should find a section 75-1.1 violation only (a) after careful analysis, (b) reliance on clearly applicable unfairness, deception or commercial tort precedent, (c) clear and specific assignment of the case to the proper section 75-1.1 prong and unfairness or deception subprong or to a specific tort, and (d) careful consideration of any meritorious "competition defense" presented by the defendant with a presumption that such a defense prevails over an undifferentiated unfairness claim, as opposed to a claim based on a previously well-defined business tort or unfairness standard.

VII. FEDERAL PRECEDENT AND CONSUMER STANDING TO ASSERT UNFAIR METHODS CLAIMS

Part A of this section shows that the weight of section 75-1.1 authority agrees with federal precedent that the plaintiff pursuing a section 75-1.1 antitrust case must show that the defendant's conduct had, or threatened, an adverse effect on market competition. In a case subject to the *per se* rule, the plaintiff can rely upon the operation of the rule and need not prove an adverse effect. The cases discussed here show support for the importance of consumer welfare in antitrust cases decided under section 75-1.1. Part B discusses *Van Dorn Retail Management, Inc. v. Klaussner Furniture Industries, Inc.*,³⁵⁷ in which the court inadequately analyzed the question whether secondary line price discrimination should be held to violate section 75-1.1. Finally, Part C discusses whether consumers can assert methods of competition claims under section 75-1.1, an issue that

357. 132 N.C. App. 531, 512 S.E.2d 456 (1999).

arises only because some decisions suggest they cannot. It is urged here that the weight of the authority supports the view that consumers may assert such claims.

A. *Whether in a Non-Per Se Antitrust Case under Section 75-1.1 the Plaintiff Must Show an Adverse Effect on Competition in a Relevant Market*

Unfortunately, the North Carolina Supreme Court has not had occasion to deal with the question whether, in order to prevail in a non-per se, rule of reason antitrust case presented under the unfair methods prong of section 75-1.1, the plaintiff would be required to show a net adverse effect on market competition. It has ruled, however, in a section 75-1 context, that an adverse effect on competition must be shown.³⁵⁸ Such a showing, as noted above, is clearly required in federal antitrust cases applying the rule of reason.³⁵⁹ Several federal court decisions have held, and/or strongly indicated that, in such a case arising under section 75-1.1, a showing of an adverse effect on market competition is required. It may be presumed that, consistent with their longstanding policy of finding federal antitrust authorities "instructive" although not binding, the North Carolina appellate courts will follow such holdings.

The principal state court opinion that applies the rule of reason in a manner relevant to this issue is the 1973 *Rose v. Vulcan Materials Co.*³⁶⁰ decision. In that case, the supreme court rejected the claim that a contract providing for a discriminatorily low price violated section 75-1.³⁶¹ The court found no section 1 Sherman Act cases finding such a violation.³⁶² Therefore, it held that the contract was not a per se violation of section 75-1 and that it was not "unreasonably in restraint of trade" because there was no showing regarding "the nature of the restraint and its effect, actual or probable."³⁶³ That the court was inquiring about anticompetitive effect is evident from its earlier statements that "the term 'restraint of trade' evolved in England to include unreasonable restrictions on competition" and that under the rule of reason only "combinations . . . which operate to the prejudice

358. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E.2d 521 (1973).

359. *See supra* Part III(B).

360. 282 N.C. 643, 194 S.E.2d 521 (1973).

361. *Id.* at 651-52, 194 S.E.2d at 527.

362. *Id.* at 655, 194 S.E.2d at 530.

363. *Id.* at 657, 194 S.E.2d at 531. The formula invoked by the court is a quote from *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), the federal antitrust case considered to have been one of the earliest applications of the rule of reason and setting out the analytical formula quoted ever after for applying the rule. *Id.*

of the public by unduly or unreasonably restricting competition or restraining trade are illegal.”³⁶⁴ Although *Rose* involved section 75-1, not 75-1.1, it appears that when the North Carolina appellate courts identify a section 75-1.1 antitrust claim that must be treated under the rule of reason, they will find compelling the *Rose* precedent of inquiring about the effect on market competition.

Two other state court decisions are relevant to this issue. In its 1987 decision in *Dull v. Mutual of Omaha Insurance Co.*,³⁶⁵ the court of appeals passed up a good opportunity to require plaintiffs in section 75-1.1 antitrust cases to demonstrate an adverse effect on competition. As noted above, the court was pressed into antitrust analysis by the plaintiffs’ reliance on the United States Supreme Court decision in *FTC v. Brown Shoe Co.*,³⁶⁶ in which the Court upheld the FTC’s finding of a violation involving an exclusive dealing arrangement.³⁶⁷ In *Brown Shoe*, the Court noted that the arrangements prevented Brown’s customers from buying shoes from its competitors and “foreclosed Brown’s competitors from selling to a substantial number of retail shoe dealers.”³⁶⁸ The Court, however, rejected respondent’s argument that the FTC was required to show an adverse effect on competition, stating that under section 5 the FTC was authorized to “arrest trade restraints in their incipiency.”³⁶⁹ Seeking to distinguish *Brown Shoe*, the court in *Dull* noted several factors, including that the plaintiffs had not shown “that defendants’ competitors were in any way foreclosed from marketing insurance products to the public.”³⁷⁰ The court might have distinguished *Brown Shoe* directly regarding anticompetitive effect by stating that unlike FTC Act section 5, as interpreted in *Brown Shoe*, plaintiffs in section 75-1.1 cases must show an adverse effect on competition. Instead, by simply reciting, although in broadened form, a factor (the preclusion of outlets to competitors of the supplier) the *Brown Shoe* Court found insufficient alone to demonstrate an adverse effect on competition, it cannot be read to have articulated an adverse effect requirement for section 75-1.1.

364. *Id.* at 656, 194 S.E.2d at 530. Moreover, it appears in context that the court’s reference to “restricting competition” was, indeed, a reference to market competition, not simply harm to particular competitors.

365. 85 N.C. App. 310, 354 S.E.2d 752 (1987).

366. 384 U.S. 316 (1966).

367. *Dull*, 85 N.C. App. at 316, 354 S.E.2d at 755.

368. *Brown Shoe*, 384 U.S. at 318–19.

369. *Id.* at 322.

370. *Dull*, 85 N.C. App. at 316–17, 354 S.E.2d at 756.

In the other relevant state court decision, the North Carolina Supreme Court, in *Owens v. Pepsi Cola Bottling Co.*,³⁷¹ rejected the defendant's argument that "plaintiff's claim makes no economic sense."³⁷² This rejection should not be read as an announcement by the court that in a non-per se antitrust case a showing of an adverse effect on competition will not be required. The argument was rejected in *Owens* because it was not supported by the facts, not because of its theoretical invalidity.³⁷³ More importantly, the argument arose in the context of a minimum resale price maintenance claim, for proof of which an antitrust plaintiff may rely upon the per se rule rather than demonstrating an adverse effect on competition under the rule of reason.

As for the federal cases, *Sea-Roy Corp. v. Parts R Parts, Inc.*³⁷⁴ is the most recent one. While the court's treatment of the section 75-1.1 issues is unsatisfactory because of its failure to clearly specify the prong involved, the decision can be read to grant summary judgment on the unfair methods claim because of the plaintiff's failure "to establish . . . an adverse effect on competition."³⁷⁵ The clarity of this ruling is enhanced by the fact that the court disposed of the Sherman Act section 1 claim for failure of the plaintiff to show anticompetitive effects;³⁷⁶ it also dismissed the section 75-1 claim "for the same reasons."³⁷⁷

Several other federal decisions came down in the 1983-89 timeframe, the earliest being *Stearns v. Genrad, Inc.*,³⁷⁸ where the court applied the rule of reason to dispose of Sherman and Clayton Act claims for the plaintiffs' failure to show an adverse effect on competition. The court dismissed North Carolina Chapter 75 claims for the same reason, but as to the section 75-1.1 claim specifically, the court noted that the plaintiff "has made absolutely no effort to

371. 330 N.C. 666, 412 S.E.2d 636 (1992). *Owens* is discussed *supra* at notes 205-07 and accompanying text.

372. *Id.* at 677, 412 S.E.2d at 642.

373. *Id.*

374. 1998-1 Trade Cases (CCH) ¶ 72,155, at 81,990-91 (M.D.N.C. 1997), *aff'd*, 1999 U.S. App. LEXIS 3383 (4th Cir. Mar. 4, 1999).

375. *Id.* at 81,994 n.25.

376. The heading of this section of the opinion was "anticompetitive effects". *Id.* at 81,993.

377. *Id.* at 81,993-94 & n.25.

378. 564 F. Supp. 1309 (M.D.N.C. 1983), *aff'd on other grounds*, 752 F.2d 942 (4th Cir. 1984). *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, 448 F. Supp. 475 (W.D.N.C. 1978), was decided five years before *Stearns*. Although it was not an antitrust case, the court in dismissing the claim said that there was "no allegation of any anti-competitive effect" and no "claim of injury to competition." *Id.* at 485.

demonstrate any effect upon overall competition in any relevant market.”³⁷⁹ Next was *L.C. Williams Oil*,³⁸⁰ another terminated dealer case. The plaintiff “misbranded” gasoline purchased elsewhere as Exxon gasoline.³⁸¹ The court granted Exxon’s motion for summary judgment, rejecting the plaintiff’s arguments that Exxon imposed upon it a “no growth” policy and price discriminated against it.³⁸² Viewing section 75-1.1 as “a comprehensive law designed to include within its reach the federal antitrust laws,”³⁸³ the court granted the motion noting that plaintiff had not sustained its burden “of showing an ability to prove at trial the ‘substantial’ effect on the market necessary for a violation of the antitrust laws incorporated into North Carolina’s Unfair Trade Practices Act.”³⁸⁴

Yet another terminated dealer case is pertinent because, even though it involved the South Carolina equivalent of section 75-1.1, it is subsequently cited by courts applying section 75-1.1. The plaintiff in *Chuck’s Feed & Seed Co. v. Ralston Purina Co.*³⁸⁵ had been for many years a Ralston Purina dealer exclusively, but it was terminated by the defendant in 1982, one year after it took on the ConAgra line.³⁸⁶ The termination was for its “failure to obtain market penetration.”³⁸⁷ The court, reversing a jury verdict for Chuck’s Feed, looked to federal exclusive dealing cases and concluded that the plaintiff failed “to show a negative impact on competition in the market as a whole.”³⁸⁸ Articulating a simple concept that would have been extremely helpful long ago to courts deciding cases under section 75-1.1, the court said: “Like the Federal Trade Commission Act, the South Carolina statute is aimed at two distinct kinds of

379. *Stearns*, 564 F. Supp. at 1318. The court in *American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*, 640 F. Supp. 1411 (E.D.N.C. 1986), stated that this language was “clearly dicta and not the predicate for the court’s decision.” *Id.* at 1434.

380. 625 F. Supp. 477 (M.D.N.C. 1985).

381. *See id.* at 480.

382. *Id.* at 482–86.

383. *Id.* at 481.

384. *Id.* at 484.

385. 810 F.2d 1289 (4th Cir. 1987).

386. *Id.* at 1291.

387. *Id.*

388. *Id.* at 1295. The court emphasized the broad scope of the competitive inquiry, stating that it must occur in the context of a relevant product and geographic market, it “must determine how much of that market has been closed off to the products of competing manufacturers,” the court must ask “whether or not competitors have found or are likely to find it difficult to enter or remain in the market,” and, finally, it should “consider any procompetitive effects of the exclusive dealing arrangements that would justify their use.” *Id.*

conduct: unfair or deceptive practices and anticompetitive practices. Only anticompetitive practices are at issue here."³⁸⁹

Relying on *Chuck's Feed & Seed*, the court in *Sewell Plastics, Inc., v. Coca-Cola Co.*³⁹⁰ disposed of federal antitrust claims on summary judgment for the plaintiff's failure to show an adverse effect on competition, and, with a few more words, disposed of the section 75-1.1 claim for the same reason.³⁹¹ The court noted that the Fourth Circuit in *Chuck's Feed & Seed* had interpreted the similar South Carolina statute "to require a showing of an adverse effect on competition when the claim is directed at anticompetitive (rather than unfair or deceptive) practices"³⁹² and that the Fourth Circuit had cited *Stearns v. Genrad* "with approval," which granted summary judgment "because plaintiff made no showing of an adverse effect on competition."³⁹³

The only authority to the contrary appears to be *American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*,³⁹⁴ in which plaintiff claimed defendant disparaged its product, rockwool loosefill insulation.³⁹⁵ In addition to claims of common law disparagement and unfair competition, the case was brought under the Lanham Act and sections 75-1.1 and 75-5(b)(3), now repealed.³⁹⁶ Although the court never identified the section 75-1.1 prong upon which it, or the plaintiff, proceeded, speaking simply of "section 75-1.1," it rejected defendant's argument on summary judgment that plaintiff must show an adverse effect on market competition.³⁹⁷ The ruling was correct since the plaintiff's claims necessarily were under the unfair/deceptive prong of section 75-1.1, where no claim of adverse effect on market competition could arise. Or, as the courts put it in *Chuck's Feed & Seed* and *Sewell Plastics*, the claims were directed at unfair or deceptive rather than anticompetitive practices.³⁹⁸

389. *Id.* at 1292.

390. 720 F. Supp. 1196 (W.D.N.C. 1989), *aff'd in part and remanded in part*, No. 89-3329, 1990 U.S. App. LEXIS 15526 (4th Cir. Sept. 4, 1990) (per curiam).

391. *Id.* at 1220.

392. *Id.*

393. *Id.* at 1220-21.

394. 640 F. Supp. 1411 (E.D.N.C. 1986).

395. Plaintiff's "claims are predicated upon Owens-Corning's advertising, technical bulletin, and promotional practices with respect to both plaintiff's products and Owens-Corning's products." *Id.* at 1418.

396. *Id.* at 1417 n.2.

397. *Id.* at 1434.

398. This statement is required in light of the earlier acknowledgement that common law "unfair competition" claims were originally encompassed within the "unfair methods of competition" prong of section 75-1.1, and may not yet have been shifted over to the

Although correct to this extent, the ruling erred by extending its reach to reject the concept of adverse effect on market competition as being relevant in any respect to section 75-1.1 claims. The error occurred because the court, unlike the courts in *Chuck's Feed & Seed* and *Sewell Plastics*, failed to note the bifurcated character of section 75-1.1. Only one part of the statute reaches unfair and deceptive practices. The other part covers antitrust/competitive practices where, absent application of the per se rule, adverse effect on market competition is a necessary inquiry.³⁹⁹

In summary, it appears that that when plaintiffs invoke section 75-1.1 for purposes of presenting an antitrust/competition case, as opposed to an unfair/deceptive case, they should be, and probably will be, required to demonstrate harm to market competition in addition to harm to themselves.⁴⁰⁰

B. Van Dorn: *The Wrong Way Not to Follow Federal Precedent*

An important issue in this Article is the extent to which courts dealing with antitrust cases under section 75-1.1 will follow federal antitrust precedent. The general rule of looking to federal precedent for guidance has been shown. Part A of this section demonstrates that the courts in section 75-1.1 cases utilize an essential ingredient of federal antitrust law—an adverse effect on market competition must be shown either by evidence or by reliance on the per se rule where

unfair/deceptive prong pursuant to Professor Aycock's suggestion. *See supra* notes 128–29 and accompanying text.

399. The court's failure to make this distinction is revealed by its citing of the *Johnson*, *Ellis*, and *Harrington* cases for its position that an adverse effect on competition need not be shown in 75-1.1 cases. *American Rockwool*, 640 F. Supp. at 1434. *Johnson* was a dispute between a shopping center developer and a mortgage broker. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 260, 266 S.E.2d 610, 619 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). *Ellis* alleged misrepresentations about insurance policy coverage. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 180, 268 S.E.2d 271, 272 (1980). *Harrington* involved false advertising and "passing off" claims. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 404, 248 S.E.2d 739, 746 (1978). Since none of these cases involved "antitrust" facts, no need to demonstrate an adverse effect on market competition arose.

400. This statement is subject to the ongoing caveat that it does not apply in per se cases and that the requisite showing in some cases is displaced by more specific statutory and/or judicial requirements. For example, the plaintiff in an attempted monopolization case must show a "dangerous probability of success," *see supra* note 106, and the plaintiff in a Clayton Act case must show that the effect of the defendant's conduct "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C.S. §§ 14, 18 (2000). Moreover, the "adverse effect on competition" inquiry includes the possibility that the defendant may make pro-efficiency or other arguments by way of justification, which may require a "balancing" of pro- and anticompetitive effects in order to determine the net effect on competition. *See supra* note 64.

appropriate. In this context, the recent court of appeals decision in *Van Dorn Retail Management, Inc. v. Klaussner Furniture Industries, Inc.*⁴⁰¹ requires attention because of its failure adequately to assess the policy aspects of the federal precedent it considered.

In *Van Dorn*, the court of appeals held that secondary line price discrimination⁴⁰² does not violate section 75-1.1.⁴⁰³ The court reasoned (1) that the supreme court in *Rose*,⁴⁰⁴ which considered the legality of secondary line price discrimination under sections 75-1 and 75-5(b)(5), now repealed, held that such discrimination is not "illegal under any law of the State of North Carolina"⁴⁰⁵ and (2) that this statement must be deemed to include reference to section 75-1.1 because "our Supreme Court was obviously aware that [section] 75-1.1 had been enacted at the time it rendered its decision in *Rose*."⁴⁰⁶

Even if as a policy matter the outcome of the case was proper, the court's reasoning was faulty. It read too broadly the *Rose* court's reference to "any law" as applying to a statute, section 75-1.1, which was never mentioned or assessed by the *Rose* court. It ignored (1) clear judicial precedent holding that section 5 of the FTC Act covers violations of the Robinson-Patman Act⁴⁰⁷ and (2) that "our Supreme Court" said as long ago as 1980 in the *Johnson* case⁴⁰⁸ that "it is appropriate for us to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of G.S. section 75-1.1."⁴⁰⁹ The court also discounted the federal court's statement in

401. 132 N.C. App. 531, 512 S.E.2d 456 (1999).

402. Secondary line price discrimination is to be distinguished from primary line discrimination discussed at *supra* note 318. As noted there, primary line discrimination is the Robinson-Patman Act nomenclature for predatory pricing, the term applied to the same practice in Sherman Act monopolization cases. With predatory pricing, also known primary line price discrimination, the seller seeks to use a low-price policy to harm a competitor, typically a small competitor in a local market. The seller may seek to subsidize its low prices against a local competitor with higher prices in other areas. However, the complainant in a secondary line discrimination case is a customer rather than a competitor of the seller, typically another local merchant who is put at a disadvantage by lower prices paid by one of its competitors, usually a large chain operation. See generally ANTITRUST L. DEV., *supra* note 44, at 474-81 (describing primary and secondary line price discrimination).

403. *Van Dorn*, 132 N.C. App. at 532, 512 S.E.2d at 457.

404. 282 N.C. 643, 194 S.E.2d 521 (1973).

405. *Id.* at 659, 194 S.E.2d at 532.

406. *Van Dorn*, 132 N.C. App. at 532, 512 S.E.2d at 457.

407. See *supra* notes 44 and 57 and accompanying text.

408. *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980), overruled on other grounds by *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988).

409. *Id.* at 262, 266 S.E.2d at 620.

*L.C. Williams Oil Co. v. Exxon Corp.*⁴¹⁰ that “[i]t is undisputed that price discrimination among those similarly situated constitutes a clear violation of North Carolina’s unfair trade practice laws.”⁴¹¹

Rather than ignoring the supreme court’s advice to be guided by “federal decisions interpreting the FTC Act,” the court of appeals might have reasoned that such “guidance” would lead section 75-1.1 interpretation astray. It might have held that for policy reasons section 75-1.1 should not be read as condemning secondary line price discrimination. The federal Robinson-Patman Act has long been criticized for being harmful to, rather than supportive of, consumer interests,⁴¹² and federal enforcement of the statute in recent times has been virtually nonexistent.⁴¹³ The concern is that aggressive price competition may be dampened by a company’s actions to avoid Robinson-Patman liability.⁴¹⁴ However, the opinion turns not on such analysis of the substantive or policy issues but on a questionable application, and nonapplication, of the authorities.

The court’s decision three years earlier in *Hyde*⁴¹⁵ might have served as a guide for its analysis. Holding, contrary to the federal rule, that indirect purchasers in North Carolina have standing under state antitrust law to assert antitrust claims, the court in *Hyde* considered the major substantive issue: whether granting standing both to direct and indirect purchasers would create so much warfare on the plaintiff side that such cases might be deterred altogether or that the efficiency of such litigation would be adversely affected.⁴¹⁶ While one may question the court’s conclusion, the substantive policy issues were at least discussed in *Hyde*, an observation that cannot be made for *Van Dorn*.

C. *Whether Consumers Can Assert “Unfair Methods of Competition” Claims*

Whether consumers can assert unfair methods of competition claims is an issue because of assertions, in some cases, that the purpose of the “unfair methods” prong of section 75-1.1 is the

410. 625 F. Supp. 477 (M.D.N.C. 1985).

411. *Van Dorn*, 132 N.C. App. at 532, 512 S.E.2d at 457 (quoting *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477, 482 (M.D.N.C. 1985)).

412. See, e.g., HOVENKAMP, *supra* note 64, at 570–72 (describing criticisms of the Robinson-Patman Act).

413. *Id.* at 572.

414. *Id.* at 570–72.

415. *Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 473 S.E.2d 680 (1996).

416. *Id.* at 583–84, 473 S.E.2d at 687–88.

protection of firms from the “unfair competition” of competitors, while the purpose of the unfair/deceptive prong is the protection of consumers. Such terminology could lead to rules that would preclude consumers from asserting antitrust claims under the unfair methods prong and would preclude firms from asserting claims under the unfair/deceptive prong against competitors and others. It could be argued this would not be a problem if for every conceivable antitrust violation there will always be an “aggrieved” competitor whose antitrust lawsuit would protect consumers. But that is not true. Indeed, with the classical antitrust violations—those that are still treated as per se illegal—price fixing and allocations of territories and/or customers, competitors are the beneficiaries of the activity while consumers suffer the damages. Accordingly, consumers should be allowed to bring antitrust cases claiming unfair methods of competition. Any contrary indications in the decided cases so far do not compel a different outcome.⁴¹⁷

The strongest judicial suggestion that consumers might be barred from asserting unfair methods claims comes in two recent insurance coverage cases. In *Henderson v. United States Fidelity & Guaranty Co.*,⁴¹⁸ the jury returned a verdict for the plaintiff-home buyers in the underlying action, finding that the builder-defendant had “engaged in unfair and deceptive practices” by representing that the lot and the house residing on it would have no water problems.⁴¹⁹ Plaintiffs then sued the builder’s insurers, and the question was whether the builder’s misrepresentations were “unfair competition” within the meaning of the builder’s commercial insurance policies.⁴²⁰ Seemingly, the court could have said that however one defines the term “unfair competition” as used in the policies, it did not cover these builders’ deceptions. Instead, the court held that there was no coverage, stating “that the term [unfair competition] refers exclusively to conduct between competitors.”⁴²¹ On the way to this conclusion, the

417. This discussion implicates the direct/indirect purchaser issue discussed *supra* note 53. As noted there, the federal rule bars suits by indirect purchasers (who may frequently be citizen consumers) while North Carolina law, as a result of the decision in *Hyde*, 123 N.C. App. at 577, 473 S.E.2d at 684, allows such suits. The concern expressed in the text would not materialize in North Carolina (1) if the direct purchasers were business firms, for example, wholesalers or retailers, as opposed to citizen consumers and (2) if they were not deemed “consumers” for purposes of bringing suits against price-fixing producers. However, both of these conditions may not always prevail.

418. 346 N.C. 741, 488 S.E.2d 234 (1997).

419. *Id.* at 743, 488 S.E.2d at 235–36.

420. *Id.* at 743–44, 488 S.E.2d at 236.

421. *Id.* at 747, 488 S.E.2d at 238.

court said that “unfair competition is an offense committed in the context of competition between business rivals.”⁴²² Noticing section 75-1.1’s reference to unfair methods of competition, the court stated that it is “patterned after” FTC Act section 5.⁴²³ The court then cited *FTC v. Sperry & Hutchinson*,⁴²⁴ which, according to the court, “clarified that the ‘unfair methods of competition’ language [in section 5 of the FTC Act] refers to acts against competitors, while the ‘unfair and deceptive practices’ language protects consumers.”⁴²⁵ The result, and seemingly an unnecessary one, is a strong suggestion, albeit not a holding, that consumers may not assert unfair methods of competition claims under section 75-1.1.⁴²⁶

The *Henderson* court, however, read *Sperry & Hutchinson* too broadly as stating that unfair methods is a competitor complaint, while unfair/deceptive acts are consumer complaints. It is true that the Supreme Court in *Sperry & Hutchinson* said that the 1938 Wheeler-Lea Amendment, which added the unfair/deceptive language to FTC Act section 5, “made it clear that Congress . . . charged the FTC with protecting consumers as well as competitors.”⁴²⁷ The court also quoted a House Report dealing with the amendment, noting that “[t]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.”⁴²⁸

Two serious qualifications of *Sperry & Hutchinson* apply, however, as it was invoked by the *Henderson* court. First, both because it was an FTC case and because section 5 of the FTC Act carries with it no private right of action, *Sperry & Hutchinson* necessarily stated no specific rule regarding whether a competitor or a consumer may assert an unfair methods cause of action. Second, *Sperry & Hutchinson* applauded the earlier *FTC v. Keppel*⁴²⁹ decision

422. *Id.* at 749, 488 S.E.2d at 239.

423. *Id.*

424. 405 U.S. 233 (1972).

425. *Henderson*, 346 N.C. at 749, 488 S.E.2d at 239.

426. Less than one year later, the court in *Wake Stone Corp. v. Aetna Casualty and Surety Co.*, 995 F. Supp. 612 (E.D.N.C. 1998), recited its understanding of the *Henderson* ruling, saying that the court there said section 75-1.1 was “divided into two concepts. First is unfair trade practices against consumers, and the other is unfair competition, which is self-evidently brought by competitors. The court then held that the insured could not shoehorn an unfair trade practices claim brought by a consumer into coverage for common law unfair competition.” *Id.* at 618 (citations omitted).

427. *Sperry & Hutchinson*, 405 U.S. at 244.

428. *Id.* (quoting H.R. REP. NO. 75-1613, at 3 (1937) (Su. Doc. No. Y1.1/8:75-1613)).

429. 291 U.S. 304 (1934).

affirming the FTC's finding that Keppel had engaged in an "unfair method of competition" by selling packs of candy to children for a penny and encouraging children to gamble by including a penny in some of the packages. Although the pre-1938 proceeding was of necessity an unfair methods case, the Court in *Sperry & Hutchinson* noted that Keppel's merchandising system was not particularly harmful to competitors since "any competitor could [have] maintain[ed] his position simply by adopting the challenged practice."⁴³⁰ Also, the Court in *Keppel* itself had characterized the practice as exploitation of an important consumer group, children.⁴³¹ In short, rather than indicating, as the *Henderson* court suggested, that "consumers" could not assert an unfair methods claim in private litigation, the *Sperry & Hutchinson* decision, while failing to point with total clarity, arguably suggested the contrary.

More importantly, surrounding the 1997 *Henderson* decision are the North Carolina Court of Appeals's 1996 *Hyde v. Abbott Laboratories, Inc.*⁴³² decision and the North Carolina Supreme Court's own 1998 *N.C. Steel, Inc. v. National Council on Compensation Insurance*⁴³³ decision upholding the right of consumers to assert *unfair methods* claims. Surprisingly, *Hyde* is not cited in *Henderson*, and *Henderson* is not cited in *N.C. Steel*. As noted above,⁴³⁴ in *Hyde* the court of appeals upheld the right of "indirect purchasers" to seek damages pursuant to section 75-16.⁴³⁵ This is contrary to the federal *Illinois Brick Co. v. Illinois*⁴³⁶ rule, which allows only direct purchasers to sue. The named plaintiffs, Suzanne Hyde and Lynn Meeks, represented a class of individual consumers alleging that the defendants "violated several of the antitrust laws of this state" by fixing the price of infant formula.⁴³⁷ Although the opinion does not specifically mention section 75-1.1, referring instead to the "antitrust laws of this state" and to "Chapter 75 violations," only two Chapter 75 statutes would be applicable, sections 75-1 and 75-1.1. Further, only the unfair methods prong of section 75-1.1 would be applicable since price fixing would not be considered an "unfair" or "deceptive" act.

430. *Sperry & Hutchinson*, 405 U.S. at 243.

431. *Keppel*, 291 U.S. at 313.

432. 123 N.C. App. 572, 473 S.E.2d 680 (1996).

433. 347 N.C. 627, 496 S.E.2d 369 (1998).

434. See *supra* note 53 and accompanying text.

435. *Hyde*, 123 N.C. App. at 579, 473 S.E.2d at 685.

436. 431 U.S. 720 (1977).

437. *Hyde*, 123 N.C. App. at 573, 473 S.E.2d at 681.

In *N.C. Steel*, eight corporate insureds complained that eleven workers' compensation insurers combined to fix the "servicing carrier fee", which either increased the premiums they paid for workers' compensation insurance or shifted them from the voluntary to the residual market where the premiums were higher.⁴³⁸ Although the opinion did not identify the prong of section 75-1.1 relied upon, referring simply to sections 75-1 and 75-1.1,⁴³⁹ and although the court adopted the federal filed rate doctrine which resulted in dismissal of the case,⁴⁴⁰ the claim was analogous to price fixing. Thus, absent the intervening filed rate defense, the claim would have been appropriately treated as an unfair method of competition. The opinion made no reference to the *Henderson* rule that assertion of unfair methods claims should be limited to competitors.

Also surrounding the *Henderson* decision are four cases—*Martin Marietta Corp. v. Wake Stone Corp.*⁴⁴¹ decided in 1995, *Sara Lee Corp v. Carter*⁴⁴² in 1999, *Bepco, Inc. v. Allied-Signal, Inc.*⁴⁴³ in 2000, and *Edmondson v. American Motorcycle Ass'n*⁴⁴⁴ in 2001—recognizing that *nonconsumers* may assert *unfair/deceptive* claims. *Martin Marietta* is not cited in *Henderson*, and *Henderson* is not cited in *Sara Lee*, *Bepco* or *Edmondson*. In *Martin Marietta*, the court upheld and remanded for trial Martin Marietta's claim for "unfair and deceptive trade practices"⁴⁴⁵ against its competitor, Wake Stone.⁴⁴⁶ Wake Stone, with an aggregates quarry in Wake County, engaged in a campaign directed at local officials and others to prevent Martin Marietta from acquiring variances and permits to open a quarry in Nash County.⁴⁴⁷ When Wake Stone's efforts succeeded, Martin Marietta sued, claiming libel, slander, and "unfair and deceptive trade practices."⁴⁴⁸ Wake Stone obtained summary judgment for libel and slander, but it eventually lost before the jury on the unfair and deceptive trade practices claim.⁴⁴⁹

438. See *N.C. Steel*, 347 N.C. at 630–31, 496 S.E.2d at 371–72.

439. *Id.* at 632, 496 S.E.2d at 372.

440. *Id.*

441. 339 N.C. 602, 453 S.E.2d 146 (1995) (per curiam).

442. 351 N.C. 27, 519 S.E.2d 308 (1999).

443. 106 F. Supp. 2d 814 (M.D.N.C. 2000).

444. No. 99-1299, 2001 U.S. App. LEXIS 1506 (4th Cir. Feb. 2, 2001) (per curiam), *aff'g in part and vacating in part* 54 F. Supp. 2d 544 (W.D.N.C. 1999).

445. This description of the claim appears in *Wake Stone Corp. v. Aetna Casualty and Surety Co.*, 995 F. Supp. 612, 613 (E.D.N.C. 1998).

446. *Martin Marietta*, 339 N.C. at 603, 453 S.E.2d at 146–47.

447. *Wake Stone*, 995 F. Supp. at 613.

448. *Id.*

449. *Id.*

The court in *Sara Lee* held that the plaintiff-employer was entitled to its section 75-1.1 trial court judgment for “unfair and deceptive practices” against its former employee, who, during his employment as a computer repairman, sold computer parts and services to his employer through companies he secretly owned.⁴⁵⁰ Although the court considered whether the claims were not cognizable under section 75-1.1 because of the employer/employee relationship and addressed whether the conduct was “in or affecting commerce,”⁴⁵¹ it apparently was not asked to reject the plaintiff’s claims because of the *Henderson* ruling that the “‘unfair and deceptive practices’ language protects consumers.”⁴⁵² However, the *Sara Lee* court did quote *United Laboratories, Inc. v. Kuykendall*⁴⁵³ as saying, “[w]e have not limited . . . 75-1.1 to cases involving consumers only. After all, unfair trade practices involving only businesses affect the consumer as well.”⁴⁵⁴

As noted above,⁴⁵⁵ the plaintiffs in *Bepco* and *Edmondson* were competitors of the defendants. The plaintiff’s antitrust claim in *Bepco* that Allied-Signal was tying up distributors with exclusive dealing arrangements was rejected, but certain product disparagement and defamation claims were allowed to proceed as “unfair trade practices.”⁴⁵⁶ Similarly, the plaintiff’s claim in *Edmondson* that defendant sought to take over its joint venture interest without compensation was allowed to proceed both as an unfair method of competition and as an unfair or deceptive practice.⁴⁵⁷

While *Martin Marietta*, *Sara Lee*, *Edmondson* and *Bepco* are of particular interest because of their proximity in time to *Henderson*, there are other decisions in which unfair/deceptive claims asserted by nonconsumers, including competitors, have not been subjected to a motion to dismiss based on *Henderson*-style reasoning but have been allowed to proceed, although not always successfully.⁴⁵⁸

450. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 28–29, 519 S.E.2d 308, 309 (1999).

451. *Id.* at 31–32, 519 S.E.2d at 311.

452. *Henderson v. United States Fid. & Guar. Co.*, 346 N.C. 741, 749, 488 S.E.2d 234, 239 (1997).

453. 322 N.C. 643, 370 S.E.2d 375 (1988).

454. *Sara Lee*, 351 N.C. at 32, 519 S.E.2d at 311 (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988)) (citations omitted).

455. *See supra* notes 297–313 and accompanying text.

456. *See Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 829–30, 833–34 (M.D.N.C. 2000).

457. *Edmondson v. Am. Motorcycle Ass’n*, No. 99-1299, 2001 U.S. App. LEXIS 1506, at *39–42 (4th Cir. Feb. 2, 2001).

458. These include: *McDaniel v. Greensboro News Co.*, 1984-1 Trade Cases (CCH)

Finally, the Fourth Circuit in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,⁴⁵⁹ a post-*Henderson* case, although stressing that section 75-1.1's "primary purpose is to protect the consuming public,"⁴⁶⁰ stated, without reference to *Henderson*, that "businesses" may assert unfair/deceptive claims but apparently only when consumers can be viewed as suffering at least some indirect injury from the defendant's conduct.⁴⁶¹ Food Lion's favorable judgment based on claims of deceptive activity under section 75-1.1 against an ABC employee was reversed. The court reasoned that the misrepresentations of the ABC employee on her Food Lion job application "did not harm the consuming public" because the point of the employment was to expose improper handling of meat by Food Lion employees.⁴⁶² The court said that "businesses" were allowed to pursue unfair/deceptive claims in the past "against another business only when the businesses are competitors (or potential competitors) or are engaged in commercial dealings with each other."⁴⁶³ Where these conditions do not hold—as apparently the court felt they did not in *Food Lion*—the court seems to say that businesses may press unfair/deceptive claims only when there is a "competitive or business relationship that can be policed for the benefit of the consuming public."⁴⁶⁴

The potential reach and significance of the language used by the court is quite uncertain. Even if the court is correct that there had been no prior "commercial dealings" between Food Lion and ABC, litigation between "businesses" would seem to be a rare event in the absence of prior "commercial dealings" between them. If so, the seeds of any amendments to unfair/deceptive law represented by *Food Lion* have little ground upon which to fall. In any event, *Food Lion* certainly serves to dispute *Henderson* to the extent that it recognizes that businesses have been allowed to press unfair/deceptive claims in the past and are likely to in the future.

In summary, the suggestion of *Henderson*—that consumers may not be allowed to assert unfair methods claims—should not be, and

¶ 65,792 (M.D.N.C. 1983); *Reichhold Chemicals, Inc. v. Goel*, 146 N.C. App. 137, 555 S.E.2d 281 (2001); and *Harrington Manufacturing Co. v. Powell Manufacturing Co.*, 38 N.C. App. 393, 248 S.E.2d 739 (1978).

459. 194 F.3d 505 (4th Cir. 1999).

460. *Id.* at 519.

461. *Id.* at 519–20.

462. *Id.* at 520.

463. *Id.*

464. *Id.*

seems unlikely to be, followed. Cases before and after *Henderson* strongly indicate that consumers will be allowed to assert such claims.

CONCLUSION

This Article produces the following recommendations for application of section 75-1.1. First, litigants invoking and courts applying this statute should take the advice of the Fourth Circuit in *Chuck's Feed & Seed* by noting early which of the "two distinct kinds of conduct" the case presents—"unfair or deceptive practices [or] anticompetitive practices."⁴⁶⁵ More specifically, they should carefully and specifically consider whether the conduct at issue is (1) an unfair method of competition, (2) an unfair practice, or (3) a deceptive practice. These are three separate offenses for which clear and separate elements should be articulated. Anyone who uses the phrase "unfair trade practice" should make clear which one of the three offenses is intended.

Second, conduct having antitrust character or involving actual or potential anticompetitive practices should be evaluated as an unfair method of competition. The methodology and decisions of the FTC section 5 authorities should be looked to closely for guidance in applying the unfair methods prong of section 75-1.1.⁴⁶⁶ This includes using the traditional *per se*/rule of reason analytical structures and the requirement that plaintiffs be prepared to show an actual or threatened adverse effect on market competition in a case proceeding under the rule of reason. Putting aside inter- and intrastate commerce differences, conduct that violates the federal Sherman, Clayton, and Robinson-Patman Acts, and the unfair methods prong of section 5 of the FTC Act, as well as the North Carolina General Statutes sections 75-1 and 75-2.1, also violates the unfair methods prong of section 75-1.1. The analysis required for application of the unfair methods prong of section 75-1.1 is, or should be, identical to the analysis required under these other federal and state statutes.

465. *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289, 1292 (4th Cir. 1987).

466. This advice applies only to conduct having antitrust character or involving anticompetitive practices under scrutiny as an unfair method of competition. It does not apply to other non-antitrust conduct, such as unfair competition, tortious interference with contract, or other business torts that may also qualify as an unfair method of competition. To avoid this muddle, it would be very useful to accept Professor Aycock's advice from thirty years ago to transfer all non-antitrust conduct to the unfair/deceptive prong of section 75-1.1. *See supra* notes 128–29 and accompanying text.

One caution is required. Courts applying section 75-1.1 should tread carefully before extending the unfair methods prong to cover conduct that has been found by the FTC, or by its reviewing courts, to violate the unfair methods prong of section 5 of the FTC Act, but which would not violate the Sherman, Clayton, or Robinson-Patman Acts. The reason for this caution is that the penalties that can be assigned to such conduct under section 75-1.1, that is, treble damages and attorney fees, are substantially more onerous than the injunctive and other relief the FTC can obtain in enforcing section 5 of the FTC Act. There should be no doubt, however, that consumers have standing to assert antitrust claims as unfair methods of competition under section 75-1.1.

Third, where conduct having antitrust character or involving anticompetitive practices is found not to offend mainline antitrust standards, courts in section 75-1.1 cases should be on guard to prevent the statute's application to produce treble damages and attorney fee awards under either prong of the statute. Such an outcome could occur either if the unfair methods prong incorporated a lower-than-antitrust burden of proof or if the "unfair" or "deceptive" practices categories too readily reached out to condemn such conduct. Misapplication of the unfair methods prong can be avoided if it is recognized as a plain antitrust statute. When dealing with conduct having antitrust character but which has been found not to be an unfair method of competition—that is, not an antitrust violation—a court should proceed cautiously before allowing the same conduct to be found "unfair" or "deceptive." Conduct having antitrust character but that does not violate antitrust standards will only infrequently deserve to be found "unfair" and even more rarely, if ever, deserve to be found deceptive. Application of the "substantial aggravating factors" criterion to conduct having antitrust character can also help prevent the "unfair" and "deceptive" offenses from becoming over-eager receptacles for practices passing the antitrust test.

Finally, in all section 75-1.1 cases, courts should keep consumer welfare in mind as a key test. Conduct not harming or threatening to harm consumer welfare does not violate the unfair methods prong applied as an antitrust statute. Even plaintiffs in non-antitrust unfair and deceptive practices cases should be unable to prevail if their victory would be contrary to the best long-run interests of consumers. Where the court faces either a free-standing business tort or a business tort presented as a case of unfairness or deception under section 75-1.1, it should also keep consumer welfare clearly in mind

and should give full scope to any “competition defense” presented by the defendant.